TEODORO GARCÍA AND M. A. GARZA (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

(December 3, 1926, dissenting opinion by American Commissioner, undated. Pages 163-185.)

1. This claim is presented by the United Mexican States against the United States in behalf of Teodoro García and María Apolinar Garza, Mexican nationals, father and mother of Concepción García, a girl of Mexican nationality, who on April 8, 1919, between 9 and 10 a.m., was killed by a shot from the American side of the Río Bravo del Norte or Río Grande, while crossing from the American to the Mexican side on a raft propelled by two men in the water, in the company of her mother and her aunt, not far from Havana, Texas, the father, a laborer, looking on from the Mexican bank. An American officer, Second Lieutenant Robert L. Gulley, 4th United States Cavalry, was that morning on duty on the border with an armed patrol of four men, had discovered the raft in contravention of the laws, had fired in order to make them halt, and unfortunately had mortally wounded the young girl, who died immediately thereafter. Having been tried before a court-martial, he had been sentenced on April 28, 1919, to be dismissed from the military service, but the commanding officer at San

Antonio, Texas, in reviewing and approving the sentence, had used his right to reserve the case for the decision of the President of the United States, and the President, acting on the advice of the Board of Review, the Judge Advocate General, and the Secretary of War, had reversed the findings of the court-martial, released the lieutenant from arrest, and restored him to duty (September, 1919). It is alleged that the United States is liable both for a wrongful killing by one of its officials and for denial of justice; that the claimants sustained damages in the sum of 50,000 Mexican pesos; and that the United States ought to pay them the said amount, with interest thereon.

2. Nearly all of the facts in this case are undisputed. The raft left the Mexican side in the morning of the said day to take from the opposite side García's daughter who had been for about three years in the United States, but had fallen ill and was to be taken home, and García's wife with her sister, both of whom had been on the other side for a couple of days. All members of the party were unarmed. They crossed the river on a place where such crossing was strictly forbidden by the laws of both countries. It is not doubtful from the record that at least Teodoro García, the girl's father, knew perfectly well that this crossing was a delinquency and a risky act. Nor is it doubtful that the American officer had been especially instructed to enforce on the river border different sets of acts and/or regulations which forbade crossing, smuggling, and similar offenses. Less than two months before, however, on February 11, 1919, a military regulation had been promulgated, reading in its paragraph 7: "but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized." Less than three weeks before, troop commanders had been told they would be held responsible that the provisions of said Bulletin be "carefully explained to all men." The court-martial decided that this Bulletin had been violated by the officer. The President of the United States gave a contrary decision after submission of reports which held, among other things, that the Bulletin had not been violated. The only point of some importance on which the evidence differs relates to the question, whether the raft at the time of the shooting was in the Mexican or in the American part of the stream; but for the decision to be given by the Commission this question is not material.

3. The killing and its circumstances being established, the Commission has to decide, whether the firing as a consequence of which the girl was mortally wounded constituted a wrongful act under international law. It is not for this Commission to decide whether the author could or should be punished under American laws; therefore, it is not for the Commission to enter upon the field where the American court-martial, the reviewing general at San Antonio, Texas, and the President of the United States found themselves. The only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did.

4. The Commission makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life. The Commission not only holds that there exists one, but also that it is necessary to state and acknowledge its existence because of the fact that there are parts of the world and specific circumstances in which human practice apparently is inclined to fall below this standard. The Commission, in its opinion on the Swinney case (Docket No. 130), speaking of the Rio Grande, stated already: "Human life in these parts, on both sides, seems not

to be appraised so highly as international standards prescribe." Nobody, moreover, will deny that in time of active war the value of human life even outside of battlefields is underrated. Authoritative writers in the field of domestic penal law in different countries and authoritative awards have emphasized that human life may not be taken either for prevention or for repression, unless in cases of extreme necessity. To give just two quotations on the subject: the famous Italian jurist Carrera does not hesitate to qualify as an abuse of power excessive harshness employed by agents of the public force to realize an arrest, and adds that it is to such abuse that the sheriffs of Toscana owe their sad reputation (*Programma del corso di diritto criminale*, 8th edition, Vol. V, 1911, pp. 114-115; compare for an historic development Vol. I, 1906, pp. 56-60); and in State v. Cunningham 51 L. R. A. (N.S.) 1179, an American court said: "The highest degree of care is exacted of a person handling firearms. They are extraordinarily dangerous, and in using them extraordinary care should be exercised to prevent injury to others. * * *. We unqualifiedly condemn this practice of the reckless use of firearms. Officers should make all reasonable efforts to apprehend criminals; but this duty does not justify the use of firearms, except in the cases authorized by law. Officers, as well as other persons, should have a true appreciation of the value of a human life."

5. If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of firearms. On the part of American authorities this duty for the American-Mexican border was recognized in Bulletin No. 12, May 30, 1917 ("Particularly will be punished such offenses as unnecessary shooting across the border without authority"), by paragraph 7 of our Bulletin No. 4, February 11, 1919 ("but firing on unarmed persons supposed to be engaged in smuggling or crossing the river at unauthorized places, is not authorized"), and by paragraph 20 of General Order No. 3, March 21, 1919 ("Troop Commanders will be held responsible that the provisions of Bulletin No. 4 * * *, February 11, 1919, is carefully explained to all men"). In the field of international law the said principle has been recognized in the fourth Hague Convention of 1907, where article 46 of the "Regulations respecting the laws and customs of war on land" provides that in occupied territory "the lives of persons * * * must be respected," article 3 of the treaty itself adding that the belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. In order to consider shooting on the border by armed officials of either Government (soldiers, river guards, custom guards) justified, a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood: (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available? (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound, or kill. In no manner the Commission can endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive laws, that enforce-

ment of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms.

6. Bringing the facts of the present case to the test of these principles, the Commission holds that, in the first place, the delinquency of crossing the river (not that of anything else or more) was sufficiently established. In the second place, the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called "mezcal," all other suppositions as to atrocious acts they might have been perpetrating being mere inferences; a proportion between the supposed delinquency and the endangering of lives is therefore not established by the record. Remarks in the record relative to the "secrecy and speed with which the crime was committed," to the fact of its occurrence "at a hidden point on the border" ("a secluded and secret place") and to the status of war still existing at the time between the United States and Germany (April, 1919) can not either supply new facts, or outweigh the fact that the crossing occurred in broad daylight, between 9 and 10 a.m.; it is, moreover, stated in the record by a Mexican district judge that "the inhabitants or residents of both sides of the river * * * cross every day or very frequently to the other side" without looking "for the authorized shallow parts or passages, some of which are situated thirty or forty kilometers from their place of residence." In the third place, it appears from the record that the lieutenant did what he could to reach the place where the raft would probably land on the American bank of the river, so as to be able to arrest them without having resort to firing, but that the conditions of the bank did not allow him to be there in time and that hailing was impossible; the Commission has a full comprehension of the difficulties presenting themselves to an officer who in a case like this one has instantaneously to decide what to do. In the fourth place, however, the statement that the firing merely intended to give notice to the culprits of the officer's intention to investigate their business or to arrest them does not explain why the firing took place in so dangerous a way; the record showing that while persons were "swimming in the water and clinging thereto" (to the raft), he shot in the water quite near the raft, and that the child was wounded by "one of the first shots." the lieutenant himself recognizing that he "would not have fired in that direction if he had known women and children were on the raft." The allegation made by Lieutenant Gulley that "he knew nothing about Bulletin No. 4" can have no weight with the Commission, unless in so far as it might show that he considered himself as not having measured up to the requirements of said Bulletin.

7. The Judge Advocate's report of September 18, 1919, which apparently was the basis of the President's decision of said month would seem to interpret Bulletin No. 4, February 11, 1919, so as to read that firing on delinquents is not authorized in case the official knows or reasonably should assume that the delinquents are unarmed, but that such firing is authorized in case the official sees or is justified in assuming that they are armed, the presumption being in favor of their carrying firearms. In case this interpretation had been incorporated in the judicial decision emanating from the President of the United States, or if that interpretation were indispensable to explain the President's decision, the Commission would feel bound by this interpretation of a municipal enactment by the highest municipal decision of a judicial nature in this field. But assuming it to be a right interpretation as it stands, although not specifically endorsed by the President, it could not change in any way the facts in the present case, for in applying its principles to this

claim the Commission left aside the question whether the claimants were armed or not.

8. The allegation of a denial of justice committed by the United States has no foundation in the record. In order to assume such a denial there should be convincing evidence that, put to the test of international standards, the disapproval of the sentence of the court-martial by the President acting in his judicial capacity amounted to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency. None of these deficiencies appears from the record.

9. The record leaves no doubt but that the claimants, at least Teodoro García, realized their acting in contravention of laws and regulations which had been effective since about two years. Though this knowledge on their part can not influence the answer to the question, whether the shooting was justified or not, it ought to influence the amount of damage to which they are entitled. In fixing this amount the Commission does not consider reparation of pecuniary loss only, but also satisfaction for indignity suffered. An amount of $2,000, without interest, would seem to express best the personal damage caused the claimants by the killing of their daughter by an American officer.

Decision

10. The Commission accordingly decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States $2,000 (two thousand dollars), without interest, in behalf of Teodoro García and María Apolinar Garza.

Dissenting opinion

I regret that I feel constrained to dissent from the views of the other two Commissioners with respect to this claim. A very small award was rendered in the case. There are instances in which an arbitral tribunal, after reaching the conclusion that there was no liability in a given case, has recommended that compensation be made by the respondent government as an act of grace. In the present case, in which I believe there is no legal liability on the part of the respondent government, I should have been glad to join in a recommendation to the Government of the United States to make compensation to the claimants in an amount larger than that of the pecuniary award. I am stating my views with regard to the law applicable to the case, first because I deem it to be desirable to analyze the charges made with respect to the proceedings conducted in connection with the trial of the army officer who shot the girl whose death gave rise to this claim, and, second, because my views apparently differ from those of the other Commissioners not only with respect to the law applicable to this case, but also with respect to the functions of the Commission in acting on a case of this character.

The claim made by the Mexican Government is based on two grounds: (1) That there was a denial of justice, as that term is understood in international law, in the action of the President of the United States in improperly setting aside the sentence of the court-martial which found an officer of the American army guilty of charges preferred against him, and (2) that the United States is liable for a wrongful act committed by that officer.

In the Mexican Memorial it is stated that "from a constitutional standpoint the power which the Hon. President of the United States has to reverse the verdict of the Court-martial, by declaring Lieut. Gulley not responsible for the crime of homicide, contrary to all the evidence on record in the proceedings, is not open to discussion; but it is beyond doubt that this decision is not conformable to the universal principles of justice, but only to those questions of expediency of a political nature, which while they assuredly comply with constitutional requirements, yet none the less transgress the Law of Nations." And in the Mexican reply it is stated that "the decision given by the President of the United States of America to the effect that Lieutenant Gulley was not responsible for the death of the little girl named Concepción García, however it may be in accordance with the Constitutional and Military laws of the latter country, violates the principles of Universal Justice accepted by all Nations and which therefore are a part of International Law." These are very serious charges, and I am of the opinion that they are the result, in part at least, of a misconception of the military law governing the proceedings in the case of Lieutenant Gulley. In the oral argument of counsel for Mexico a somewhat different aspect was given to the President's action, which was spoken of as a pardon granted to the accused.

From the American Answer with its accompanying exhibits the facts in relation to the shooting of Concepción García and the trial of Lieutenant Gulley may be briefly summarized as follows:

On the morning of April 8, 1919, Lieutenant Gulley was in charge of an armed patrol consisting of himself and four men. He was under instructions to prevent smuggling and crossing of the Rio Grande at unauthorized points, to investigate all suspicious persons and vehicles, to allow no one with firearms south of a certain military road and to report any unusual happenings. While on duty he thought he saw a raft put out from the Mexican side of the river coming towards the American side at a distance of from 2,500 to 2,800 yards from where he was. As the undergrowth was thick at the point where the raft appeared to be and prevented a good view, Gulley proceeded with his patrol about 400 yards down the river from whence he saw the raft about four or five yards from the American side moving towards the Mexican side. The river at this point is about 75 to 100 yards in width. The distance was too great to permit Gulley to see persons on board. The distance between Gulley and the raft, estimated at from 1,500 to 2,400 yards being too great to enable him to hail persons upon it, he fired about twelve shots in the direction of the raft, stating at the time he did so, that he did not desire to hit any one but merely to frighten persons on the raft, so as to cause them to return to the American side in order that he might arrest them. The sights of the rifle were set first at 1,000 yards, one-half the estimated distance to the raft, then at 1,150 yards, and finally at 1,450 yards, about three-fourths of the estimated distance, and the shots were seen to strike the water between Gulley and the raft and around the raft.

At the time of the shooting there were on the raft the wife of Teodoro García, her sister and two children of García, and in the water propelling the raft or swimming with it were two men and two women, all Mexicans, returning from the United States. The business in the United States of the four women and the children or the reason for crossing the river was not disclosed by the evidence. The two men had been engaged by García in the morning to propel the raft from the Mexican to the American side and

return. One of the children, Concepción García, had been on the American side for three years and was ill when she was returning home. Those in control of the raft, although they heard the shots and saw the bullets striking, pursued their way towards the Mexican side. One of the bullets, either ricocheting from the water or coming directly from the gun fired by Gulley, struck the child, Concepción García, in the head inflicting a mortal wound from which she died in Mexico. The accused did not know any of the persons on the raft, and neither he nor any of his men suspected at the time of the shooting that some one on the raft had been killed.

Lieutenant Gulley was brought to trial before a general court-martial which convened at McAllen, Texas, April 28, 1919. Two charges were preferred against him: (1) that he "with malice afore-thought, wilfully, deliberately, feloniously, unlawfully, and with premediation" killed Concepción García, and (2) that he violated standing army orders by firing on unarmed persons crossing the Rio Grande at an unauthorized place. Under the first charge he was found guilty of manslaughter within the meaning of the 93rd Article of War, and he was also found guilty of the second charge, and he was sentenced to be dismissed from the Army. The reviewing authority (the Commanding General) approved the sentence, but conformably to an existing Army regulation and the 51st Article of War, he transmitted the record of the trial to the so-called "Board of Review" which rendered an opinion to the effect that Lieutenant Gulley was not under the law guilty of the charges preferred against him. This opinion, in which it is shown several high officers participated, was signed by the Judge Advocate General of the Army and approved by the Secretary of War, and was, together with the record of the trial before the court-martial, transmitted to the President of the United States pursuant to the provisions of the 51st Article of War. The President disapproved of findings of guilty and the sentence imposed on Lieutenant Gulley and ordered his release from arrest and his restoration to duty. Upon this action of the President the Mexican Agency bases the charge of a denial of justice.

By the 48th Article of War (39 Stat. L. 658) a sentence extending to the dismissal of an officer requires, in time of peace, confirmation by the President. In time of war such a sentence may, conformably to Article 51 of the Articles of War, be suspended by the competent authority pending action in the case by the President to whom, when this procedure is followed a copy of the record of the trial must be sent. If it can be imagined that in any civilized country a law could exist authorizing the setting aside of a sentence of dismissal or a sentence of death by the Chief Magistrate of the nation irrespective of the guilt of the accused person under the law, the records accompanying the Answer in the present case obviously show that no such action was taken by the President. While in time of war a commanding general may order the execution of a sentence of dismissal, he is authorized to suspend the sentence pending action by the President, and when such a course is adopted, it is clear that the President, under the system of military justice of the United States, acts in a judicial capacity. as a court of last resort, just as he so acts in time of peace, when sentences of this kind must be submitted to him before they are carried into execution. See on this point Runkle *v.* United States, 122 U. S., 543, 558. In the present case there were laid before the President as a court of last resort not only the record of the court-martial proceedings, but an opinion of the Board of Review signed by the Judge Advocate General of the army and approved by the Secretary of War. To my mind it must of course be

taken for granted that the President concurred in that opinion, in which the conclusions are submitted that Lieutenant Gulley did not commit manslaughter as defined by American law and did not violate an army regulation forbidding the firing on unarmed persons.

I am of the opinion that the Commission is bound by the President's interpretation of American law with respect to these two points. I take it that international law recognizes the right of the authorities of a sovereign nation, particularly a court of last resort, to put the final interpretation upon the nation's laws. Possibly there may be an exception to this general rule in a case where it can be shown that a decision of a court results in a denial of justice; that is, when a decision reveals an obviously fraudulent or erroneous interpretation or application of the local law. Domestic laws may contravene the law of nations, and judicial decisions may result in a denial of justice, but assuredly it is a well-recognized general principle that the construction of national laws rests with the nation's judiciary. In the opinion of the two other Commissioners some question seems to be raised whether it was necessary for the President, in order to reach the decision which he gave, to put an interpretation on Bulletin No. 4 of February 11, 1919, with respect to firing on unarmed persons. The opinion of the Board of Review deals in detail with the interpretation of this army regulation and reaches the conclusion by what appears to me to be sound reasoning that it was not violated by Lieutenant Gulley. Since, if in the opinion of the President the regulation had been violated the sentence of the court-martial could not have been disapproved, which it was, obviously the President put upon this regulation the construction that it was not violated by Lieutenant Gulley, however meagre may be the record of his specific action. The grave charge made in the oral and written arguments advanced in behalf of the Mexican Government that the action of the President was a denial of justice, in that a proper sentence of a lower court was deliberately set aside as a matter of expediency and contrary to all the evidence in the records of the proceedings, probably requires no more discussion than that given to it in the opinion of the two other Commissioners. I have, however, very briefly indicated the character of the careful proceedings that were taken in this case. A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made. This Commission has in the past broadly indicated its views as to what is required to establish such a charge. It is probably unnecessary, in view of what has already been said with regard to the proceedings in this case to say anything more for the purpose of showing that the decision of the court-martial imposing a sentence of dismissal on Lieutenant Gulley was not set aside merely as a matter of expediency, or that the construction and application of the law by the court of last resort was neither fraudulent, nor arbitrary, nor obviously erroneous, nor an act of expediency.

The second point raised in the case before the Commission is more difficult. The charge of a denial of justice being disposed of, there remains for consideration the issue whether the deed committed by Lieutenant Gulley for which he was tried is one for which his Government is, under international law, liable to respond in damages. There is no question with regard to the rule of international law that a nation is responsible for acts of soldiers which are not acts of malice committed in their private capacity.

See the opinion of the Commission in the claim of Thomas H. Youmans, Docket No. 271, and the cases therein cited. The Commission must therefore consider the question as to what are the kinds of acts of soldiers for which a nation is responsible. International law specifically defines certain acts of representatives or agencies for which a government must answer, such as looting or wanton or unnecessary destruction of property by soldiers, and malicious or wanton taking of human life. Acts of this kind are generally also condemned and punishable under domestic law. Well defined responsibility may also be illustrated by the liability for damages caused by public vessels. In cases of collisions between public and private vessels awards have been rendered against a nation because public vessels have been found guilty of faulty navigation under the applicable rules of admiralty law. In cases of collision in territorial waters it has been asserted that the law applicable to the determination of the question of fault was the *lex loci delicti commissi*. See *The Canadienne* claim and *The Sidra* claim, American and British Claims Arbitration under the Special Agreement of August 18, 1910, Agent's *Report*, pp. 427, 452. The precise question before the Commission is whether the act of Lieutenant Gulley, held by the court of last resort not to be in violation of the law of his country, is one for which his Government is liable under international law. Whether the United States is so liable must, in my opinion, be ascertained by a determination of the question whether American law sanctions an act that outrages ordinary standards of civilization. It is conceivable that domestic laws, just as they may contravene international law in their operation on property rights of aliens may, by their sanction of personal injuries under certain circumstances, offend broad standards of governmental action the failure of observance of which imposes on a nation, as arbitral tribunals have frequently held, the liability to respond in damages under international law. A fairly close analogy to the question presented for determination in this case may be found, I think, in cases that have frequently come before international tribunals involving gross mistreatment of aliens during imprisonment. The Commission has in other cases indicated a standard by which it considers it must be guided in making judicial pronouncements with respect to alleged wrongful acts of authorities against private persons. It has expressed the view that it can not render an award for pecuniary indemnity in any case in the absence of evidence of a pronounced degree of improper governmental administration. It has made awards dismissing cases in the absence of such evidence and has rendered pecuniary awards in cases in which it considered that such evidence was found in the record.

In the present case the opinion of the majority seems to me to be grounded on a different theory as to liability. It is said in the opinion that the "only problem before this Commission is whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did;" and that the Commission "makes its conception of international law in this respect dependent upon the answer to the question, whether there exists among civilized nations any international standard concerning the taking of human life." It is stated that, in order to consider shooting on the border by armed officials of either Government justified, "a combination of four requirements would seem to be necessary: (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well stated; (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives

of the culprits and other persons in their neighbourhood; (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available; (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill." It is further stated that "If this international standard of appraising human life exists, it is the duty not only of municipal authorities but of international tribunals as well to obviate any reckless use of fire-arms." To my mind it is not the duty of an international tribunal either to attempt in effect to formulate certain rules of criminal jurisprudence or to undertake to "obviate" acts which a tribunal may regard to be objectionable. In my opinion, it is the duty of an international-tribunal to determine whether a nation must respond in damages for acts alleged to be wrongful, and in discharging this duty a tribunal must take cognizance of and give effect to rules of law, and in cases in which unfortunately concrete rules are wanting, give proper application to principles. It must apply law to facts and pass upon acts of omission or commission in the light of rules or principles. And as I have heretofore observed, since the Commission cannot properly challenge the construction put upon penal laws of the United States by the Court of last resort in connection with the case of Gulley, it must determine whether laws under which his action was not punishable obviously fall below the standard of similar laws of members of the family of nations.

A very apposite case with respect to this point is the *Cadenhead* case decided May 1, 1914, by the Tribunal created by the Special Agreement concluded August 18, 1910, between the United States and Great Britain (Agent's *Report*, p. 506). I do not agree with the statement in the opinion rendered by the two other Commissioners as to the decision of the Tribunal. It is said that the claim was dismissed "because no personal pecuniary loss or damage resulting to relatives or representatives had been proven." That point is mentioned in the Tribunal's opinion. But the fundamental point in the case is concerned with the military law as construed by a military court under which a sentinel who accidentally shot a British subject while aiming at an escaping military prisoner was held not liable to punishment. Counsel for Great Britain severely criticized the army regulations under which shooting at an escaping prisoner in the manner disclosed by the record was permitted. With respect to what seems to me to have been the controlling point in the case, the Tribunal said (pp. 506-507):

"His Britannic Majesty's Government contend that this soldier was not justified in firing upon an unarmed man on a public highway, that he acted unnecessarily recklessly, and with gross negligence, and that compensation should be paid by the Government of the United States on the ground that under the circumstances it was responsible for the act of this soldier.

"The question whether or not a private soldier belonging to the United States Army and being on duty acted in violation of or in conformity with his military duty is a question of municipal law of the United States, and it has been established by the competent military court of the United States that he acted in entire conformity with the military orders and regulations, namely, section 365 of the Manual of Guard Duty, United States Army, approved June 14, 1902.

"*The only question for this Tribunal to decide is whether or not, under these circumstances,* the United States should be held liable to pay compensation for this act of its agent.

"It is established by the evidence that the aforesaid orders under which this soldier who fired at the escaping prisoner acted were issued pursuant to the

national law of the United States for the enforcement of military discipline and were within the competency and jurisdiction of that Government.

"It has not been shown that there was a denial of justice, or that there were any special circumstances or grounds of exception to the generally recognized rule of international law that a foreigner within the United States is subject to its public law, and has no greater rights than nationals of that country." (Italics mine.)

The last clause of the last paragraph above quoted may not be very happily worded, but I do not think that the learned Tribunal meant to give expression to the view that domestic laws can not contravene international law.

Domestic laws may by their operation on property rights of aliens contravene international law. And in any case in which an international reclamation is predicated upon such an infringement of the law of nations it is of course not a defense to say that a court of last resort has properly construed a law to authorize action against which complaint is made. But in reaching a conclusion whether an international delinquency has been committed in any such case, in which the decision of the court as to the meaning of the law is accepted as final, it is proper to determine whether the law has authorized or sanctioned a wrongful act. As I have observed, it is conceivable that domestic law by its sanction of personal injury may, under given circumstances, offend broad standards of governmental action which civilized nations may be expected to observe. And in a case involving an alleged personal injury permitted by domestic law of a nation, it is a proper test of the nature of the alleged wrongful act to compare the law of that nation with similar laws of other nations.

No attempt was made by counsel for the Mexican Government to make a comparison of the laws of the United States with the laws of other countries, not even with the laws of Mexico. Certain precedents were cited by counsel which it was argued furnish authority for a pecuniary award in the present case, among them the tribunal's decisions in the claims of Jesse Walter Swinney and Nancy Louisa Swinney, Docket No. 130, and Dolores Guerrero Vda. de Falcón, Docket No. 278, and the shooting in 1915 of two young Americans by Canadian soldiers in Canadian waters at Fort Erie. In my opinion none of these cases has any value in showing liability on the United States in the instant case.

In the Swinney case, a young man in a rowboat, not engaged in committing any offense, was shot by Mexican officials from the Mexican shore of the Rio Grande because, as was alleged, he did not respond to an order to come over to the Mexican side. On being hailed he explained that he was engaged in no wrongdoing. In the Falcón case the record disclosed that a soldier testified that he and a companion deliberately shot at unarmed naked persons swimming in the Rio Grande, one of whom was killed. The shooting which took place in Canadian waters was directed at two young men who were thought to be engaged in hunting ducks out of season. It seems reasonably clear that the men could have been apprehended without the use of firearms, and that, if they failed to respond to an order to come to the shore, they took but a few strokes in their boat before they were shot, one being killed and one seriously injured. In a note addressed by Secretary of State Bryan to the British Ambassador at Washington it was stated that the offense for which the arrest of the two men was sought was a minor one; that no resistance was offered or violence threatened by the injured men; that the killing and wounding were inflicted intentionally, or, if not,

through the gross and culpable negligence of the officers and soldiers in the most reckless manner in which they used their arms; and that the actions of the soldiers were without justification or excuse. It may be pertinent to note that even in these circumstances the British Government did not admit liability, but stated that "as an act of grace suitable compensation should be made to relatives of the deceased and to the injured man." And although the United States requested compensation, the British Government, instead of making such compensation to the United States, effected a private settlement with the injured persons. (*Foreign Relations of the United States*, 1915, pp. 415-423.)

In my opinion the very deplorable act committed by Lieutenant Gulley for which the United States is held responsible, has not been accurately described in the written or oral argument advanced by the Mexican Agency nor in the opinion of the two other Commissioners.

In discussing the available evidence with regard to the shooting of the little girl by Lieutenant Gulley, it is pertinent to bear in mind that we have evidence of two kinds: First, that accompanying the Answer consisting in the main of the lengthy opinion of the Board of Review analyzing the law applicable to the case, and the proceedings before the court-martial, including the evidence produced before the court, and second, the record of proceedings before Mexican judges in the State of Tamaulipas, which accompanies the Mexican Memorial.

In the opinion of the two other Commissioners brief quotations are made from the Mexican records to the effect that inhabitants on both sides of the river frequently crossed without looking for authorized shallow parts or passages. On this point, however, it seems to me that it is also pertinent to note that a judge states that "it is well known * * * that on account of the war between the United States of America and Germany there were taken by the former nation drastic measures in its frontiers to avoid the entrance of spies, among which measures was that of having patrols of American soldiers survey the length of the Bravo" and "*that in spite of such orders*" (italics mine) residents of Mexico "have defied the perils and dared to cross to the American side without a permit or passport." A Mexican judge before whom a number of Mexicans appeared conducted an investigation as a result of which it may be said that he in a sense found Lieutenant Gulley to be guilty of what he called the "crime of homicide", also describing the shooting as "wickedness or as an atrocity". Before the court-martial there appeared the defendant, of course, and also both American and Mexican witnesses.

It is stated in the Mexican Brief (p. 2) that Mexican witnesses all agreed that the soldiers on the American side "fired for no reason whatsoever and thus killed the child." And in the Mexican Reply it is stated that, although technically a state of war between Germany and the United States existed at the time of the shooting, it is evident that the persons who accompanied the little girl who was killed "could not have had the intention of crossing the Rio Bravo for the purpose of causing harm or injury to the United States, for, as it is proved by the testimony of the witnesses before the American authorities, found in Annex 1 of the Memorial, the sole purpose of the family of Concepción García was to return from the American side, where they were, to the Mexican side of the river, and it was only with this purpose that the temporary raft which served to take them across was made." Leaving aside discussion of the instructions which Lieutenant Gulley had with respect to the enforcement of laws and regulations incident

to a state of war, it is very pertinent to remark with regard to this statement in the Reply that of course the officer had no knowledge as to who were on the raft or what their purposes were. He was about a mile away when he first saw the raft. He rode hurriedly towards it. He was unable to challenge the persons on board by calling to them. While he clearly had no knowledge as to the mission of the persons propelling the raft, it is proper to bear in mind that he undoubtedly had information with regard to conditions on the border such as may be briefly indicated by quoting from a report of the Commissioner General of Immigration of the United States. In one portion of this report which was made at a time when vigilance on the border was not considered to be as imperative as it was when the shooting occurred, the Commissioner quotes the following from the report of an inspector on the border:

"There is little difficulty in smuggling an alien from Mexico across the line into this country, or in the alien entering unassisted, for that matter. The river is not wide at certain seasons of the year and in some places it becomes a mere trickle. This office estimates that there are at least 100 persons living on the Mexican side opposite points in this jurisdiction who earn their living chiefly by operating illegal ferries and bringing aliens to the United States. The work of the officers here in the past two years in apprehending and destroying boats used as ferries has largely forced them to abandon their large boats made of lumber and of galvanized sheet iron and to resort to 'patos', as they are known among the smuggling fraternity, made of a willow framework tied with willow withes and covered with a cheap canvas or wagon sheet. This canvas can be tied on or taken off the frame in a moment, and then carried under a man's arm. The frame can easily be hidden in the brush, and if it should be found and destroyed, 15 minutes' work with a machete (and no one ever saw a Mexican of this class without a machete) will construct another.

"These illegal ferrymen oftener than not own a small farm on the river. When an alien, Mexican or European, gentleman, criminal, or bolshevik—it makes no difference—wants to cross, this ferryman merely removes his boat cover from his wagon or haystack where it serves him between times, proceeds to the river and pulls his frame from the brush where it has been hidden, ties on the cover, places it in the water, and is ready to, and actually does take his passengers, and often a few cases of contraband liquor also, to this country. Before placing his boat in the water he carefully spies out this side, and probably calls to some 'paisano' on this side if one is in sight, and ascertains that no 'gringo' officers are in that vicinity. Any Mexican resident on this side will cheerfully abandon his work and spend a day if necessary watching for officers, to aid this boatman, with whom he is always in sympathy, and also for the reason that this kind of work does not call for much effort. In spite of the inhibitions of section 8, or of any other section, which the ferryman is probably ignorant of and which, in any event, he would cheerfully ignore, he more often than not successfully lands his passengers and returns to the other side and safety, and his passengers go their way." (*Annual Report*, 1924, pp. 16-17.)

In another portion of the report the Commissioner says:

"This work of the mounted or patrol inspectors is attended by considerable hardship and much danger, as it is often necessary for them to remain on duty long hours without opporunity for rest or sleep, in inclement weather, and the smugglers, who very frequently transport intoxicating liquor or narcotic drugs with the aliens are desperate characters. They go armed and shoot at the command to halt in the name of the law, preferring to commit murder rather than be apprehended and face the probability of serving a prison sentence. Previous annual reports have related the details of the killing and wounding of immigration officers by smugglers." (*Ibid.*, p. 19.)

In discussing acts of soldiers for which a government may be held liable, the Mexican Brief cites an extract from a note addressed by Secretary of State Frelinghuysen to the American Minister in Peru under date of December 5, 1884, with regard to the shooting of an American citizen in Peru by a Peruvian soldier. It is pertinent to note with regard to the character of acts of this kind for which a nation may be held responsible that Mr. Frelinghuysen describes the shooting as "as act of outrageous violation, by an agent of the Government while in the line of his duty, of a right which it was his business to protect." In my opinion, Lieutenant Gulley's act, however deplorable it is—and there may be reason to consider it indiscreet—does not come within the category of acts such as that described by Secretary of State Frelinghuysen. It is stated in the Brief (p. 15) that "even granting for purposes of argument that the soldier would not be guilty of the crime, and that really the orders prohibiting him from firing on unarmed persons would be unknown to him, still it could be held that the responsibility of the United States can be clearly established in international law." In support of this contention citation is made to an account in Moore's *Digest of International Law* of the killing by Chinese soldiers of Lewis L. Etzel, an American war correspondent, and the offer of the Chinese Government to pay an indemnity of $25,000 Mexican currency. The account of this case is very briefly given, and it is pertinent to note that the killing is described as an act of "criminal carelessness." Citation is further made in the Brief of a request made by the United States of the Honduran Government for the payment of an indemnity of $10,000 to the relatives of Frank Pears, an American citizen, who was shot in Honduras in 1899 by a sentinel. It is proper to note with respect to this case that the United States after investigation declared that the killing of Mr. Pears "could be regarded as nothing but the cruel murder of a defenseless man, innocently passing from his office to his house." Certainly the act committed by Lieutenant Gulley cannot be regarded as "cruel murder," and after a study of the elaborate opinion of the Board of Review in which evidence and law are considered to my mind with great care and accuracy, I do not believe that the shooting can properly be described as "criminal carelessness," although I am inclined to conclude from such evidence as is available that the officer might have acted with greater discretion and prudence.

It seems to me that the statement in the opinion of the two other Commissioners to the effect that "the record only shows that the officer expected the delinquents to be engaged in importing barrels of the native liquor called 'mescal', all other suppositions as to atrocious acts they might have been perpetrating being mere inferences," fails to take account of important matters in the record to which the Board of Review attached considerable weight in arriving at its conclusions. It may be that smuggling was the principal thing which Lieutenant Gulley had in mind in endeavoring to arrest persons on the raft. It is proper, however, to bear in mind that the Board of Review calls attention to at least three kinds of laws, the enforcement of which was enjoined on patrols, namely:

1. Legislation enacted in 1918 (40 Stat. L. 559) with respect to restrictions on the entry into or departure from the United States by aliens. It could not of course be expected that legislation of this kind would be repealed many months before the Treaty of Versailles had been signed. A portion of it relating to the entry of aliens into the United States is still in effect.

(41 Stat. L. 1217) and I assume that similar legislation is generally in force throughout the world to-day.

2. Legislation with respect to prohibition on the importation of arms and ammunition into Mexico (37 Stat. L. 630).

3. Legislation regarding matters relating to immigration and smuggling.

In discussing the position in which Lieutenant Gulley was placed, the Board of Review deemed it to be proper also to take cognizance of information which is stated in the Board's opinion as follows:

"It was a matter of common knowledge that propaganda in aid of war against the United States by the German Government, as well as organized efforts to procure information of military and other value, had been actively carried on by persons who, having their seat of operations in Mexico, had been crossing and re-crossing the border for this purpose. The safety of the whole people was involved in seeing that all such acts were suppressed and the offenders brought to justice."

To be sure hostilities between the United States and Germany were suspended in April, 1919, but the conclusion of peace was far distant, and it seems to me that the Board of Review acted properly in giving at least some consideration to the duties devolving upon a soldier during the existence of a state of war.

It was enjoined upon troops engaged in patrol duty to consider themselves always on duty, that patrolling was very important and must be performed in the most painstaking manner, and that perfunctory patrols are useless.

Lieutenant Gulley saw persons violating the law of the United States —and it is not disputed that this was knowingly done. He was not in a position to apprehend them; he could not hail them by calling to them; and they did not stop, although he repeatedly fired. Unless his testimony and that of soldiers with him are considered to be false, he did not aim at the raft. It may be pitiable that he shot at all, but it should be borne in mind, as I have endeavored to point out, that the question which must be considered in the instant case is whether the laws of the United States, under which shooting in those circumstances is not unlawful, are so at variance with the laws of other members of the family of nations as to fall below ordinary standards of civilization.

In my opinion the burden must devolve on anyone making such a charge to show convincingly by comparison with the laws of other countries the iniquitous character of the laws of the country against which complaint is made. To my mind that can not be shown by brief citations from domestic law such as are given in the opinion of the two other Commissioners. Nor do I perceive the relevancy of the citation of Article 46 of the regulations respecting the laws and customs of war on land in the Fourth Hague Convention. An injunction against murder in territory under military occupation stated in five words can have no bearing, to my mind, on the propriety of domestic law dealing with the difficult subject of the use of force in connection with the repression of crime. This is particularly true in a situation such as that under consideration in which patrol officers were called upon under unusual circumstances to execute both military and civil laws. The sacredness of human life and the principle that it shall not be unnecessarily taken or endangered are recognized in the jurisprudence of the United States and are emphasized in the opinion of the Board of Review whose conclusions with respect to Gulley's action, to my mind, are not at variance with that principle. I have already indicated the view,

in which I understand the other two Commissioners concurred, that obviously no denial of justice can be predicated upon the action of the President of the United States in disapproving of the sentence of the court-martial.

Fred K. NIELSEN,
Commissioner.
