

FRANCISCO MALLÉN (UNITED MEXICAN STATES) *v.* UNITED STATES OF AMERICA.

*(April 27, 1927, concurring opinion by American Commissioner, April 27, 1927, dissenting opinion (dissenting in part) by Mexican Commissioner, undated. Pages 254-280.)*

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*Van Vollenhoven, Presiding Commissioner:*

1. This claim is put forward by the United Mexican States on behalf of Francisco Mallén, a Mexican national. The claim is based on two assaults made on Mallén at El Paso, Texas, U.S.A., where he had been consul of Mexico since 1895, by one Juan Franco, an American deputy constable of Mexican origin; the first assault occurring on August 25, 1907, the second on October 13, 1907. Mexico alleges that the United States is responsible for illegal acts of an American official including an unwarranted arrest, for lack of protection, and for denial of justice in both trials relating to the

assaults, and claims on behalf of the claimant damages for compensation and satisfaction in the amount of \$200,000 with interest.

2. According to the respondent Government, the present claim shows a peculiar and delicate feature in that the claimant has intentionally misinformed on several occasions his own Government, the American Government and this Commission; especially in that he has submitted as evidence a garbled transcript of the proceedings in the second trial (November 7-9, 1907), allowing the text of the cross-examinations and other parts of the transcript to be destroyed though he knew the County Court at El Paso was not a court of record; in that he related the facts of the first assault in an exaggerated manner to his Government; in that he made conflicting statements about the second assault; and in that he misrepresented the purport of Dr. Bush's visits to him after October 13, 1907. The question has been raised as to whether a claimant behaving as is alleged deserves to see his claim espoused by his Government or, once it has been so, to see it maintained by said Government; or even, whether such a circumstance might induce the Commission to reject it.

3. The fact that Mallén's telegram of August 25, 1907, directed to the Mexican Foreign Office on the very evening of the first assault, was clothed in exaggerated words and that part of its contents is not supported by the evidence to which Mallén himself referred, can not be denied. Nor can it be denied that Mallén by submitting only a part of the transcript which he ordered made of the proceedings before the El Paso court on November 7-9, 1907, had removed from this Commission the best and most complete evidence it might have had regarding the second assault. Mallén, being at the time a man of fifty-three years, who had been a consul for twelve years, who was familiar with handling private affairs and who must have been somewhat familiar with criminal court practice in the United States, should not have acted in so uncautious a manner; he should have explained or at least established the several discrepancies between some of his earlier and later sworn and unsworn statements. But the mere fact that those parts of the transcript, which have been submitted to the Mexican Agency and by it have been rendered available for the respondent agency and the Commission, contain references to the omitted cross examinations, would seem to indicate that Mallén could not have intended to destroy all traces of that part of the proceedings. As to the visits of the physician Bush, between Mallén's statements on the one hand and Bush's statement in court on November 7, 1907, on the other hand, there is contradiction in words, not in essence; a divergence does not occur until Bush's affidavits of December 22, 1910, and January 26, 1927. The conclusion from all of this should be to the effect that Mallén, strange though it may seem, has not sufficiently realized that in a claim of this type and in the statement corroborating it the utmost accuracy is required and that there is no place for exaggerated, incomplete, or conflicting contentions. In paragraphs 8 and 9 of its opinion in the *Faulkner* case (Docket No. 47), rendered November 2, 1926, the Commission, however indicated that exaggeration and even misrepresentation of facts on the part of claimants are not so uncommon as to destroy the value of their contentions.

4. The evidence as to the first assault on Consul Mallén by Deputy Constable Franco, though unsatisfactory as to its details, clearly indicates a malevolent and unlawful act of a private individual who happened to be an official; not the act of an official. On Sunday night August 25, 1907, in a street of El Paso, the deputy constable saw Consul Mallén, for whom

evidently he had a profound aversion; pronounced to bystanders in uncouth language his intention to "get" and to "kill" that fellow; walked up to Mallén some five minutes later, and either slapped him in the face or knocked his hat off, possibly after having said some words in Spanish. Another policeman or a private citizen, Powers, was either called by telephone or happened to notice the event, and took Franco away. From Ciudad Juárez, Mallén wired to Mexico City that he had been the victim of an attempt to shoot him with a pistol; but the evidence does not support that contention. Franco was prosecuted before the County Court at El Paso and fined the next day \$5 on account of disturbing the peace; the fine apparently had been paid. Mallén had intentionally abstained from submitting any complaint and from being present at the arraignment.

5. Direct responsibility of the United States for this first assault has not been alleged. Denial of justice is alleged, on the ground that the court treated an attempt to kill Mallén as a mere disturbance of the peace. Since the occurrence was submitted to the police court without any testimony on the part of Mallén himself, it is difficult to see how the court could have deemed it a dangerous attack of importance. Mallén at this time had no reason to suspect Franco of lying in wait for him in order to revenge the fact (of which Mallén was innocent) of the nonextradition by Mexico of a man who had been suspected of being the murderer of Franco's brother-in-law. Lack of protection *during* this occurrence cannot be maintained; the second policemen, or the private citizen, did all that was necessary, and the incident was closed. On the other hand, it would seem quite unsatisfactory that a deputy constable, after disturbing the peace he was appointed to protect, was—as far as the record shows—neither punished in any disciplinary way, nor warned that he would be discharged as soon as a thing of this type happened again. The circumstance that within two months Franco, using the very same uncouth words to show his aversion for Mallén, availed himself of another opportunity to "get" Mallén, this second time misusing his official capacity, shows how imprudently and improperly the authorities acted in maintaining such a man, without any preventive measure, in a position in which he might easily cause great harm to peaceful residents. Mallén not long after August 25, 1907, applied to the county attorney at El Paso in order to inquire whether he was authorized to carry a pistol. The authorities of Texas therefore should have realized the risks they incurred by maintaining Franco in office and by not protecting Mallén from violence at the hands of Franco, and they must bear the full responsibility for their action.

6. The question has been raised whether consuls are entitled to a "special protection" for their persons. The answer depends upon the meaning given these two words. If they should indicate that, apart from prerogatives extended to consuls either by treaty or by unwritten law, the Government of their temporary residence is bound to grant them other prerogatives not enjoyed by common residents (be it citizens or aliens), the answer is in the negative. But if "special protection" means that in executing the laws of the country, especially those concerning police and penal law, the Government should realize that foreign Governments are sensitive regarding the treatment accorded their representatives, and that therefore the Government of the consul's residence should exercise greater vigilance in respect to their security and safety, the answer as evidently shall be in the affirmative. Many penal codes contain special provisions regarding special felonies committed as against foreign diplomats; nobody will contend that

such provisions exhaust the care which the Government of their residence is bound to observe regarding their security and welfare. In this sense one might even say that in countries where the treatment accorded citizens by their own authorities is somewhat lax, a "special protection" should be extended to foreigners on the ground that their Governments will not be satisfied with the excuse that they have been treated as nationals would have been (see paragraph 8 of the Commission's opinion in the *Roberts* case, Docket No. 185, rendered November 2, 1926, and paragraphs 13 and 16 of its opinion in the *Hopkins* case, Docket No. 39, rendered March 31, 1926). In this second sense President Fillmore of the United States, in his annual message of December 2, 1851, rightly said: "Ministers and consuls of foreign nations are the means and agents of communication between us and those nations, and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. \* \* \* Ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." (VI Moore, *Digest* 813.) In this second sense it was rightly stated by the Committee of Jurists appointed by the League of Nations on the Corfu difficulties, in a report adopted on March 13, 1924: "The recognized public character of a foreigner and the circumstances in which he is present in its territory, entail upon the State a corresponding duty of special vigilance on his behalf." (*American Journal of International Law* 18, 1924, p. 543.) In this second sense again it was rightly contended in 1925 by an American author that "if a consul is not a diplomatic agent, he is nevertheless entitled to a certain degree of protection because of his public character," similarly as commissioners employed for special international objects, such as the settlement of frontiers, supervision of the execution of a treaty, etc., "receive a special protection, even though it does not amount to diplomatic privilege." (Eagleton in *American Journal of International Law* 19, 1925, pp. 303, 308.)

7. The second assault, October 13, 1907, happened on a Sunday afternoon in a street car moving from Ciudad Juárez, Chihuahua, Mexico, across the river to the adjoining city of El Paso, Texas, U.S.A. Franco starting from a house at the Mexican side saw Mallén on the car, boarded the back platform, and told the conductor that as soon as they would be on the Texas side he would "get" this man. Once the car was in the United States, Franco walked up from behind Mallén who was seated in the front of the car, violently struck him with his fist on the right side of the head so that the left side was bumped against the door or the window (which rendered Mallén unconscious for a moment), went on striking him several more hard blows even while he was on the floor, drew his pistol, drove Mallén at the point of it to the rear of the car, made the car stop a little later, and then took Mallén, his face all covered with blood, to the El Paso county jail. It has been proven beyond doubt that during the following trial even the co-counsel for the prosecution had no knowledge of a blow on the right temple struck with Franco's revolver; he alleged only a heavy blow with the fist and a pointing at Mallén with the pistol; and a similar statement was made by Mallén himself the day following the occurrence to an El Paso paper. There is no evidence to support the allegation of a blow with a revolver, except Mallén's sworn statement dated October 13, 1907 (the night of the event), according to which Franco had struck him

“with his fists and by means and instrument to the affiant unknown.” It is essential to state that the whole act was of a most savage, brutal and humiliating character. It is also essential to note that both Governments consider Franco’s acts as the acts of an official on duty (though he came from the Mexican side), and that the evidence establishes his showing his badge to assert his official capacity. Franco could not have taken Mallén to jail if he had not been acting as a police officer. Though his act would seem to have been a private act of revenge which was disguised, once the first thirst of revenge had been satisfied, as an official act of arrest, the act as a whole can only be considered as the act of an official.

8. Franco contended that he arrested Mallén because of his illegally carrying a gun. This contention has no merit. Not only does the record sufficiently show that the law of Texas prohibiting the carrying of firearms was being executed so as to allow the officials of both Governments, who often had to pass the border, to carry them by way of mutual concession; but the county attorney at Al Paso, not long after August 25, 1907, had explicitly told Mallén that he might do so without fearing any consequences—a fact, established not only by Mallén’s statement, but also by co-counsel Beall’s letter of November 13, 1907, to the American Embassy at Mexico City—and the authorities after the second trial did not give any attention to Mallén’s alleged contravention of the Texas law. If Franco, being aware of the Mexican consul’s unlawfully carrying a pistol, had merely wished to prevent such action, he would, instead of submitting Mallén to the humiliation of an arrest in a street car, have applied to his superiors requesting them to inform Mallén he was not authorized to carry arms, particularly since the district attorney (Estes) had advised him to apply to the county attorney or even to the grand jury. The arrest made by Franco in this manner and at a time when Mallén’s pistol was not displayed was a mere pretext for taking private vengeance. Neither Government denies that, even supposing Franco’s intention to have been to execute the Texas law, he went incredibly much farther than might have been necessary to perform any official duty.

9. There can be no doubt as to liability on the part of American authorities for this second assault on Mallén by an American official. The American Agency, in the conclusion of its reply brief, states: “The Agent of the United States does not contend that this Government is without responsibility in this matter. An ‘official or other’ acting in a broad sense for the United States was by an American jury, in the language of the treaty, found to have perpetrated an ‘injustice’ upon Mr. Mallén. This circumstance is properly resented by Mexico.” A memorandum emanating from the American State Department, dated February 26, 1913, and filed among the evidence, concludes by stating that, if Mallén’s allegations are not refuted, “it would be incumbent either upon the State of Texas or on the National Government to accord him reparation for his injuries”. Franco was acting for the State of Texas as assistant of a *State* official, and whereas the State Department at Washington was active in respect to this claim it was the government of the State of Texas which was negligent and careless. However, as this Commission has had occasion to point out more than once, acts of authorities of Texas may, under the Convention of September 8, 1923, give rise to claims against the United States and claims may be predicated on such acts.

10. The second assault was tried before the County Court at El Paso on November 7-9, 1907, and Franco was fined \$100 for aggravated assault

and battery resulting in wounds which were not serious. The injuries sustained by Mallén were demonstrated before the court as not being at the time of a serious nature, though they might have been dangerous, and the court in its instruction to the jury included a statement that "the evidence of bodily injury, inflicted upon Francisco Mallén by the defendant Juan Franco, does not show the injury to be of that serious character to warrant a conviction of aggravated assault" on *that* ground. Under these circumstances a fine of \$100, being within the limits of the penal law, can not be said to represent a denial of justice merely because of its moderate amount.

11. Has that second fine plus the cost of the prosecution (\$51.75) been paid? Mexico denies it, and there is no evidence to the contrary, except Franco's own affidavit of December 22, 1910, that he paid \$95, which would mean a part only of the fine and costs. The county auditor at El Paso established on January 8, 1926, that Franco had given a bond for the sum of \$151.75, but that "no record appears of any payments ever having been made on said Convict Bond". It therefore should be assumed that the second fine has not been paid. The sentence moreover read that, if the sum was not fully paid, Franco should be committed to the county jail. It was for the United States to show that he has been committed to jail. Punishment without execution of the penalty constitutes a basis for assuming a denial of justice.

12. Lack of protection on the part of the Texas authorities lies in the fact that so dangerous an official as Franco, after having had his appointment as deputy constable cancelled on October 14, 1907, was reappointed shortly afterwards, at any rate before March 4, 1908, this time as deputy sheriff. This reappointment means lack of protection in so serious a form that it amounts to a challenge; it is exactly the reverse from that protection due to all peaceful residents, whether aliens or nationals. Instead of providing the Mexican consul with that security for his person which, according to the quotation from President Fillmore given in paragraph 6 of this opinion, is indispensable to permit a consul to perform his task, it would have exposed him to daily danger if he had stayed at El Paso.

13. There being established that the United States is liable (a) for illegal acts of the deputy constable Franco on October 13, 1907, (b) for denial of justice on the ground of nonexecution of the penalty imposed on November 9, 1907, and (c) for lack of protection, there remains to be established what material losses and damages resulted from Franco's second assault. The difficulty before the Commission lies in the problem, whether there is a link between, on the one hand, Mallén's ailments of 1908 and subsequent years up to the present time, together with their financial consequences, and, on the other hand, the events of October, 1907. It has been conclusively shown that in November, 1907, at the time of the second trial, both Mallén and co-counsel Beall only complained about a serious injury sustained by Mallén on the left side of his face as a result of contusion with the car, and that at that time the court did not esteem his injuries serious. It would seem from a receipt, produced among the evidence and relating to professional services by Dr. Anderson at El Paso "from October 13th to November 12, 1907. Surgery for wounded head and face \$35.00", that this first treatment ended before the middle of November, 1907. It is established, on the other hand, that on February 2, 1908, Mallén entered a hospital and on February 4, 1908, was operated upon in the right mastoid region by a Mexican physician at Mexico City for ailments which have since

disabled him. The only links between these two facts consist in (a) a certificate delivered on July 3, 1908, by Drs. Urrutia and Cañas, the physicians who operated upon Mallén and continued treating him from 1908 to 1912, relating that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to", and (b) a statement of March 9, 1927, by the same Dr. Urrutia and one of November 16, 1926, by Mallén, according to which the Chief Surgeon of the Mexican Army, General Caraza at Mexico City, treated Mallén for about a month, after he left El Paso and before he entered the sanitarium on February 2, 1908, for what Caraza, according to Urrutia, called a cerebral abscess of traumatic origin. It is true that there is no trace in the record of any new accident to Mallén between November 12, 1907, and February 2, 1908, which might have caused these subsequent troubles of traumatic origin, and that the physicians in Mexico City appear to have considered the connection between the injuries of October, 1907, and their operation on the right mastoid region a natural one. On the other hand, even when not applying to medical certificates the usual requirements of affidavits or legal statements, the present certificate, issued "on petition of the interested party", would seem too vague and incomprehensible to allow the Commission so far-reaching a conclusion as the claimant suggests. The certificate of July 3, 1908, mentions a medical treatment in October, 1907, not a later one; it does not even state who "the physicians" quoted are; Drs. Bush and Vilas seem to be out of the question, and there is no indication whatsoever either of any treatment by Dr. Anderson after November 12, 1907, or of any treatment by a fourth physician at El Paso. If Dr. Anderson had found after November 12, 1907, that the wounds of the left side had developed into a really dangerous ailment on the right side of the head, either the claimant or Dr. Urrutia would not have omitted to produce this surprising discovery of Dr. Anderson's in some way or other, and Dr. Anderson's careful and time-consuming examination of the patient leading to this discovery doubtless would have made its appearance in one of the numerous doctor's bills produced among the evidence. Nor is there any indication relating to General Caraza's views concerning the connection between the injuries of October 13, 1907, the abscess he treated, and the ear troubles and presumable bone fractures for which Mallén went to the hospital; the contention that Caraza treated Mallén for "an infection which resulted from the said wounds" appears in Mallén's affidavit only, not in the physician's statement. The claimant should have furnished some conclusive and pertinent medical testimony about the development of his illness between November 12, 1907, and February 2, 1908; or at least might have produced an expert statement by some high medical authority of the present day establishing the value of the two statements (a) and (b) referred to in the middle of this paragraph. The Commission under the Convention would seem not to be warranted in considering as sufficient proofs for a conclusion of this importance statements of so loose and inexplicable a character.

14. When accepting as the basis for an award, in so far as compensatory damages are concerned, the physical injuries inflicted upon Mallén on October 13, 1907, only those damages can be considered as losses or damages caused by Franco which are direct results of the occurrence. While recogniz-

ing that an amount should be added as satisfaction for indignity suffered, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honor was involved, or to consuls in backward countries where their position approaches that of the diplomat. The Permanent Court of Arbitration at The Hague in its award of May 22, 1909, in the case of the deserters at Casablanca twice mentioned "the prestige of the consular authority" or "the consular prestige", but especially with reference to conditions in Morocco as they were before France established its protectorate.

15. Taking all these considerations into account, it would seem that an award may properly be made in the amount of \$18,000 without interest.

*Nielsen, Commissioner:*

I agree with the conclusions of the Presiding Commissioner with respect to the legal responsibility of the United States in this claim, and I will merely indicate briefly my views touching certain aspects of the case.

A consular officer occupies a position of dignity and honor, and there are several recorded precedents revealing emphatic action taken by Governments to obtain redress for indignities or physical injuries inflicted upon consular officers in the countries of their residence. Diplomatic officers are accorded under international law certain privileges and immunities which do not extend to consular officers, and we find incorporated into domestic legislation provisions designed to carry out the obligations of international law with respect to matters of this kind. (See, for example, sections 4062 and 4064 of the Revised Statutes of the United States.) I think that international law undoubtedly secures to a consular officer the right to perform his functions without improper interference. And it would seem that, in a case in which his personal safety is threatened, authorities of the country of his residence may well be expected to take especial precaution to afford him protection. It is of course their duty to take proper steps for the protection of all aliens. But when indemnity is claimed before an international tribunal solely as personal compensation to a consular officer who has been injured, I do not believe that a sum so large that it must properly be regarded as punitive damages or as redress for indignity to a nation can properly be awarded on the ground that the injured person is such an official. Considerations that have prompted large demands of indemnity through diplomatic channels in connection with the adjustment of unfortunate incidents involving injuries to consular officers may clearly be of such a character that account may not be taken of them in connection with the determination of a claim such as that pending before the Commission. However, I do not intend to express the view that the fact that Mr. Mallén was a consul may not be taken into consideration in determining the amount of indemnity to which he is entitled for the injury inflicted on him.

Mr. Mallén might, of course, very properly bring to the attention of the Mexican Embassy the incident which occurred on August 25, 1907, and which is discussed in the Presiding Commissioner's opinion. But assuredly his status as a consular officer in no wise made it improper or inadvisable for him, in case he considered that a situation had arisen in which he was entitled to especial protection from local authorities in Texas, to bring that fact to the notice of those authorities. And if that situation was as serious as he has represented it to be, there would seem to be good



reason to suppose that direct communication with the authorities would have been useful in prompting them to take precautionary measures looking to his protection in the future which he states they failed to do.

I am of the opinion that no denial of justice can be predicated upon the proceedings in connection with the trial of Franco before the County Court at El Paso in November, 1907. When the law of Texas permitted the imposition of a fine in the amount fixed by the jury or a less amount, the members of the jury who tried Franco can not properly be charged with dishonorable conduct. Therefore, if the imposition of this fine was a penalty so inadequate that a violation of international law resulted therefrom, this wrong must be predicated on the character of the penal statute in which such a fine was authorized. I do not believe that the law was of such a nature as to do violence to ordinary standards of civilization.

But if the penalty imposed was not actually carried out, then a mockery was made of the trial—at least to some extent. Under the final order made by the court Franco could expiate his offense by the payment of \$100 and the costs of the prosecution, or by a term of imprisonment. I think it is certain that Franco was not compelled to serve a jail sentence, and though he may have paid part of the fine imposed upon him, he did not pay it all. The United States must, therefore, clearly be held liable for the acts of any official responsible for this remarkable state of affairs.

Franco was appointed a deputy sheriff after he committed the assault on the consul. It is not entirely clear when this appointment was made, but it was apparently within a few months after Franco's conviction. The appointment was doubtless made by the sheriff of the County of El Paso and in all probability without the knowledge of any of the higher officials of the State of Texas. Although this appointment did not contribute to the injuries which Mr. Mallén received on October 13, 1907, and although he had ceased to be consul at El Paso when it was made, it is clearly something of which the Commission may properly take cognizance in fixing the responsibility of the United States. It suggests a condonement of Franco's offense. (See on this point the opinion of the Umpire in the *Bovallins and Hedlund cases*, *Ralston's Report*, p. 952.) The United States appears to have admitted in its brief responsibility for the acts of Franco, and whatever might be said with regard to the liability of a nation for the acts of an official such as a deputy constable, I am of the opinion that there can be no question as to responsibility in this case, in view of the fact that either an inadequate penalty or no penalty at all was imposed on Franco.

The award of the Commission must be based on the character of the injuries inflicted upon the consul as a result of force and violence not necessary to effect his arrest.

I am unable to believe that the county attorney at El Paso in any way authorized Mr. Mallén to carry a pistol regardless of the law. In any event, there is a clear judicial pronouncement with respect to the illegality of Mr. Mallén's conduct in doing so. I consider untenable the argument of the Mexican Government to the effect that Mr. Mallén did not come within the operation of the law because he was traveling when carrying a pistol. Mr. Mallén according to his own testimony, took a street car from El Paso to Ciudad Juárez to visit a friend in the latter city, but changed his mind and did not leave the car but returned on it to El Paso. And on this point it may be noted that the theory advanced by counsel for Mexico is inconsistent with Mr. Mallén's explanation that he could properly carry a pistol

at any time in view of the construction put upon the law by the county attorney.

The judge at El Paso charged the jury that, if they believed that Franco knew the consul was carrying a pistol, then Franco had a right to arrest the consul, and it was Franco's duty to make the arrest. That charge was certainly not too favorable to the defendant, and, indeed, it seems to me that undoubtedly the judge might more accurately have stated the law to the effect that, if Franco had probable cause to suppose that the consul was carrying a pistol, the arrest could properly be made. I do not mean to suggest that other means might not have been employed in dealing with the offense for which the consul was arrested or that Franco was not merely seeking a pretext to arrest the consul, but it appears to be certain that the consul violated the law when he persisted in carrying a pistol. It seems to be equally certain that Franco knew that the consul had a pistol. That the consul violated the law of Texas was not a consideration which should have prevented the Mexican Government from putting before the Commission the claim which they have presented, but I am of the opinion that no charge of false arrest can be maintained. I am further of the opinion that there is no evidence of violent resistance to arrest on the part of the consul which could justify the treatment accorded him by Franco.

It is not necessary to be a medical expert to reach the conclusion that the best time to obtain the most satisfactory information with respect to the extent of the consul's injuries was immediately after those injuries were inflicted. Of course, there might be future developments. If there were, those are matters in relation to which the Commission should have competent proof, if it is to take account of them in formulating its decision.

The consul had full opportunity at Franco's trial to present evidence of his injuries through medical experts and by his own testimony. Special counsel was employed to assist the prosecution. Testimony was given at the trial to the effect that the injuries inflicted on the consul were not serious. In the light of all the testimony, including that given by Mr. Mallén, the trial judge directed the jury that the evidence of bodily injury inflicted on Mr. Mallén did not show the injury to be of such a serious character as to warrant a conviction for aggravated assault. In the absence of a clear showing of the impropriety of this finding and instruction, the Commission can not properly ignore it or regard it as improper.

The full record of the trial is not before the Commission. It is undoubtedly proper to assume that, if any testimony had been offered at the trial more favorable to the claim than that which Mr. Mallén laid before his government, he would have produced it. It is reasonable to suppose that the entire record would have been useful to the Commission.

With reference to the character of the injuries suffered by Mr. Mallén there remains to be considered the evidence by which it is attempted to link with the injuries inflicted upon the consul in 1907 the various ailments for which he alleges he has been treated over a long period of years. The Commission can not apply strict rules of evidence such as are prescribed by domestic law, but it can and must give application to well-recognized principles underlying rules of evidence and of course it must employ common-sense reasoning in considering the evidential value of the things which have been submitted to it as evidence. I think it can be briefly shown that to attempt, on the basis of certain statements in the record with regard to ailments suffered by the consul over a period of years, to ascribe such ailments to the action of Franco in 1907 would more nearly approach a

process of fatuous guesswork than an application of principles of law or any proper common-sense reasoning. It is not shown by evidence that Mr. Mallén was not suffering from such ailments prior to his difficulties with Franco. Ailments in the mastoid region which are frequently mentioned could, of course, have resulted from various causes.

In a certificate made on July 3, 1908, approximately nine months after the date on which Mallén received his injuries, Doctors Urrutia and Cañas made a statement in which they mention troubles in the mastoid region and assert that "the lesion originated in a wound over the temporal region, which, according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, was a contused wound with a purulent discharge from the ear and probable fracture of the bone, which was the direct and sole cause of the disorder referred to". The physicians mentioned as having attended Mr. Mallén are probably those who testified at the trial of Franco, and they said nothing about a purulent discharge from the ear or a probable fracture. If they said things at some other time upon which Doctors Urrutia and Cañas based their conclusion, it does not appear what was said. Clearly, no weight whatever can properly be given to a statement of this kind in formulating a conclusion with respect to the effect of the assault on Mr. Mallén.

It does not appear to be necessary to comment on a statement such as that given by Doctor Auerbach, who on December 28, 1908, more than a year after the date on which Mr. Mallén's injury was inflicted, declares, without personal knowledge of the injury, that he "can positively certify that Mr. Francisco Mallén's present condition is directly due to the original injury received over the temporal region on the right side".

In November, 1909, two years after the assault on Mr. Mallén, Doctor Andres Catalanotti, with no personal knowledge of the injury resulting from the assault, declared, without giving any information as to the basis of his conclusion, that deafness from which Mr. Mallén suffered in one ear was due "solely and exclusively to the injury aforementioned in the temporal region, of which he was the victim on the 13th of October, 1907." And he asserted that this injury produced a fracture of the mastoid process. Doctor Catalanotti does not explain how the injury, of which he knew nothing except what someone may have told him, could result in such a fracture. The doctor also furnishes other information about Mr. Mallén's afflictions, but no explanation is given how they might be considered to be related to the assault perpetrated upon Mr. Mallén.

On July 7, 1910, nearly three years after the assault, Doctors Sánchez and de la Vega made a statement containing some general information regarding Mr. Mallén's physical condition. There is nothing in this statement to indicate that the condition described had any relation whatever to the assault committed on Mr. Mallén. Without undertaking in any way to apply a technical rule of evidence with respect to the relevancy of testimony, the Commission must clearly regard a statement of this kind as entirely irrelevant to any issue in the instant case.

Under date of November 26, 1910, Doctor de la Vega made a brief statement with regard to an injury to Mr. Mallén's leg and an injury to his left wrist and declared that the injuries were caused by falls owing to Mr. Mallén's propensity to vertigo from which he had been suffering. Nothing is said concerning the assault on Mr. Mallén in 1907.

In 1910, about three years after the assault on Mallén, Doctor Urrutia issued a statement in Panama City describing the results of an examination

he made on Mr. Mallén. The doctor declares that he found a scar in the right temporal region which he says "indicates to have been the result of a serious injury". He does not undertake to say that this injury was inflicted by Franco in 1907. The doctor speaks of another scar in the mastoid region, which he says no doubt resulted "from some surgical intervention directed at reaching the mastoid cells". This is not relevant testimony with regard to the effects of the assault committed by Franco.

In 1912, about five years after the assault, Doctor Sánchez made a statement concerning his treatment of Mr. Mallén's right ear. In this statement it is said that the ailment "is a direct result from Mr. Mallén's delicate condition brought about by the bodily injuries testified to by Doctors W. H. Vilas, W. H. Anderson, and I. J. Bush in the County Court at El Paso, Texas, in November, 1907". This conclusion appears the more remarkable in the light of the fact that at least one of the doctors who testified in El Paso (Doctor Vilas) clearly expressed the view that Mallén's injuries were not serious or of such a nature that they would produce serious results.

In a statement made in 1912 Doctor Urrutia declares that he performed an operation in the right mastoid region on Mr. Mallén. Doctor Urrutia expresses the opinion that in the future Mr. Mallén may suffer from certain physical infirmities. There is nothing to show that such possible afflictions may in any way be linked with the assault committed on Mr. Mallén in 1907.

In the year 1923 Doctor Zelaya made some general statements about the physical ailments from which Mr. Mallén had suffered in the past and mentioned bodily injuries which rendered Mr. Mallén subject to a mastoid operation. This statement has no relevancy to the injury inflicted on Mallén in 1907.

On March 9, 1927, Doctor Urrutia made a brief statement, in which it is said that Doctor Rafael Caraza while Chief of the Medical Corps of the Army saw Mr. Mallén and attended him for one month and upon examining him as an ear and throat specialist indicated to him (Urrutia) the opinion that an ample trepanizing of the lateral cavity was indispensable. This statement contains no reference whatever to the injuries inflicted upon Mr. Mallén in 1907.

The physicians who furnish statements of this character had no personal information regarding the injuries inflicted on Mr. Mallén in 1907, and therefore evidently knew only what they were told by Mr. Mallén himself. It is natural, therefore, that these statements reveal on their face, as I am of the opinion they do, that they have no relevancy to the question of damages.

Statements made by physicians with regard to fees charged Mr. Mallén for medical treatment which do not show that the treatments were for the injuries which Mallén suffered at the hands of Franco in 1907, and statements of this character which are devoid of any trace of relevancy to issues in the instant case are not evidence of which account can properly be taken in fixing an indemnity. A considerable number of such statements accompany the Memorial.

In the view I take of the attempt to link with the assault committed by Franco in 1907 ailments for which Mr. Mallén has been treated over a long period of years and his nonemployment in an official capacity during a considerable portion of that period, it is unnecessary to discuss the application of legal principles to a claim for salary for \$80,000 from 1907 to 1926, a claim for a loss of \$20,000 from the failure to receive possible promo-

tions, and a claim for unproved losses in private affairs amounting to \$20,000 because of retirement from other activities.

Mention may be made of a few of the seemingly odd assertions advanced by Mr. Mallén upon which he predicates in part his claim for the large sum of money demanded as indemnity. He swears in an affidavit under date of November 16, 1926, that he can not produce certain evidence as proof of damages because he was told by the Mexican Foreign Office that it was the privilege of the Mexican Government to demand any sum that it desires as indemnity. I am of the opinion that he was badly mistaken as to the advice he received. He swears to the Memorial in which it is stated that he was struck by Franco with a pistol. It seems obvious from the record of the proceedings before the court at El Paso in 1907 that no blows were inflicted on Mr. Mallén with a pistol at the time of the assault in that year. He advances as an item of damage that he lost some jewelry because he failed to pay interest on a loan. It is attempted to fasten liability on the United States because foreign newspapers are said to have published libelous statements regarding Mr. Mallén.

In 1909 there was presented to the Government of the United States a claim which Mr. Mallén had submitted to his own Government for presentation through diplomatic channels. The amount of this claim was \$200,000. It is difficult to reconcile this estimate of damages with the amount now claimed in the Memorial which is also \$200,000, although this sum includes estimates for salaries totalling \$80,000 which Mr. Mallén states he might have earned up to 1926 ; also estimates with respect to possible promotions to the amount of \$20,000; also estimates of losses to the amount of \$50,000 because of retirement from all activities; also doctor's bills in considerable numbers ranging from \$5 up to \$10,000.

The Agent for the United States argued that the unreliable character of testimony furnished by Mr. Mallén should be taken account of in connection with the assessment of damages. The argument is undoubtedly sound. Obviously account must be taken of unreliable testimony with regard to the extent and character of injuries suffered by the claimant. But the Agent advanced the further contention that evidence of such a character had been presented by Mallén to his Government that the claim should be dismissed because the claimant had attempted to mislead his own Government and the Government of the United States. In my opinion the claim can not be dismissed on that ground.

Neither the fact that Mr. Mallén violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallén. If he violated the law of Texas a charge of false arrest and imprisonment can not be maintained. And clearly the extent of his injuries and losses has been exaggerated by the testimony which he has furnished.

The *Weil* claim cited by the American Agent is not apposite to the pending case. The United States, after having received an award honorably paid by the Government of Mexico in that case could return the award, either because it was considered that the Government of the United States should not pay over an award to a claimant who had practiced fraud, or

because it considered that the award could not have been rendered unless fraud had been practiced.

In the so-called *Rio Grande* claim presented against the United States under the Special Agreement concluded between the Government of Great Britain and the Government of the United States August 18, 1910, a motion was filed by the United States to dismiss the claim, in which motion it was alleged *inter alia*:

"That important official dispatches and court decisions, which purport to be quoted in the Memorial, are set forth in a grossly inaccurate and garbled form; for example sentences and parts of sentences are taken from different parts of a document and combined without asterisks; extracts from different documents, written by various persons to various persons at various times during a period of years are thrown together and attributed to one person in one document; sentences and parts of sentences, taken from judicial decisions and their headnotes, are jumbled and combined without regard to their order, context, or meaning. In one case a newspaper article, used to attack the character and conduct of an officer of the United States, has been materially misquoted. In another alleged 'propositions of compromise' \* \* \* 'offered on behalf of the Government of the United States', are produced in quotation marks. The references in support of this quotation give no clue to its real origin, which appears to be another newspaper clipping which can not be identified either as to the paper or date of publication. The quotations and citations of the Memorial generally are so consistently and well-nigh universally inaccurate and misleading as to render the document improper for presentation to any judicial tribunal. (American Agent's Report, p. 335.)

The importance attached by the tribunal to the facts above stated is not entirely clear in view of the fact that the arbitral tribunal found other grounds on which to dismiss the claim.

In the same arbitration objection was made in behalf of the United States in another case against the presentation of certain documents placed before the tribunal about 13 years after the filing of the final pleading. Among the things filed were numerous unpublished papers and parts of such papers. None of the things so filed was authenticated in the manner prescribed by the rules of the arbitration, which required the filing of originals or certified copies. *Cayuga Indians* claim, *Ibid.*, p. 300. All of these things were, however, received by the tribunal. In the same case objection was made in behalf of the United States to a discussion of certain cases in which the records revealing the true character of such cases were not produced, and an unsuccessful attempt was made to lay such records before the tribunal. *Ibid.*, pp. 303-304.

Clearly the question of the validity under international law of contentions such as are advanced by Mexico with respect to want of protection for Mr. Mallén, failure of the authorities of Texas to punish the person who assaulted him, and the appointment to office of the person who committed the assault, can in no way be affected by the use of unreliable testimony by the claimant.

The Commission has not been misled by any inaccurate evidence. Mr. Mallén suffered a grave injury. This occurred in a community in which he had served for a long period of time as a consul. There is considerable evidence in the record indicating that as a cultured and capable official he served with credit to his country and to himself. The record reveals not only an absence of prompt and effective processes of law to bring about the punishment of a wrongdoer but also evidence of a condonement by officers of the law of the injury inflicted upon Mr. Mallén.

*Decision*

The Commission decides that the Government of the United States of America is obligated to pay to the Government of the United Mexican States on behalf of Francisco Mallén \$18,000 (eighteen thousand dollars), without interest.

*Dissenting opinion*

1. I concur with the opinion of the Presiding Commissioner, which finds after a careful analysis of this case that the United States is responsible on three grounds: (a) for the wrongful acts which Deputy Constable Franco committed against claimant, Mallén, on October 13, 1907; (b) for denial of justice resulting from the non-fulfilment of the sentence imposed on aforesaid Franco on November 9, 1907; and (c) for failure to give protection to Mallén.

2. However, I entertain serious doubts about the point of view stated by the Presiding Commissioner in paragraph 13 of his opinion in endeavoring to establish and determine the material losses and damages which were caused to Mallén by the second assault committed against him by Franco. In fact, it seems to me that, considering the evidence presented, a link can reasonably be established between the serious blows received by Mallén at the hands of Franco and the subsequent illness which the victim suffered in the ear since almost immediately after the assault.

3. Of course, it is proven that said assault was brutal and dangerous. The physicians who testified in the proceedings which were instituted against Franco, agreed that the blows which Mallén received were very severe and struck at a highly delicate part of the head. Dr. Vilas testified that, when he saw Mallén, "he had the appearance of having recently passed through a threshing machine or something of that kind", that he had "several bruises and contusions, one particularly bad on one side of the temple, in front and above the ear \* \* \*"; and referring to the latter, he stated that it was "quite a serious wound", adding "I consider that a little bit more there would have been very dangerous to life. It is in a very dangerous locality; that portion of the skull is very thin and that wound was in a very dangerous place". Dr. Anderson testified that Mallén had "a long cut on the side of his head—on his temple, \* \* \*" and when he was asked if, in his opinion, a blow on that part of the head could produce serious injury, he answered "yes" without hesitation. Dr. Bush testified that the cut over the right ear was "evidently the result of a blow", and when he was asked if a blow over the ear, in that part of the head, could result in serious bodily injury, he answered that "it might", adding that the wound "might become infected and produce blood poisoning or a blow there might have fractured the skull". It is true that the aforementioned physicians testified that they did not believe the wounds could be serious; but this was at the time of rendering their testimony; that is, on the day when the trial of Franco was held, and, at any rate, it appears from the statements of the physicians and from those of the eyewitnesses of the assault which Mallén suffered, that the blows struck by Franco were of a brutal character. It is highly regrettable that the authorities of Texas should not have waited for a sufficient time, as is done in other countries, when it is a question of determining the importance of injuries caused a person, but that they should have satisfied themselves with the statements,

in the nature of ordinary testimony rather than expert testimony, of the three aforesaid physicians, which were rendered during the proceedings instituted against Franco on November 7-9, 1907, that is to say, twenty-six days, at most, after the date when Mallén had received the blows. At any rate, it is evident, by the statements of said physicians, that the lesions were grave and in a part of the head where they could cause not only serious but fatal consequences. It seems that the physicians satisfied themselves with simply giving their opinion on the external aspects of the injuries, and that they never considered the possible internal consequences thereof.

4. It seems that Dr. Anderson continued to treat Mallén until November 12, 1907, on which date he issued him a receipt covering fees for professional services. It is not known whether these services of Dr. Anderson terminated on that date or whether they continued to be rendered. The only thing which appears in connection with the illness which claimant considers a consequence of the blows, is his entrance in the hospital of Dr. Urrutia on February 2, 1908, and his operation—February 4th of the same year—on the right mastoid region, as evidenced by a certificate of Doctors Urrutia and Cañas issued on July 3, 1908. This certificate is very important, and to weigh it, is it necessary to analyze the different facts it certifies. Of course it is reasonable, and in accord with the rules of evidence accepted among civilized countries, that such certificate must constitute full evidence as regards everything which the certifier had before his eyes and examined, and that it has no evidential weight with respect to the other circumstances to which he refers. In said document, Doctor Cañas and Urrutia certify the following facts: (a) that Mallén entered the sanatorium managed by Cañas, on February 2, 1908; (b) that he entered to cure himself from a suppuration of the right ear; (c) that it was necessary to operate on him immediately on account of the appearance of symptoms of meningitis which placed his life in serious danger; (d) that the operation was carried out on the 4th of the same month and that the operating surgeons found a purulent focus in the mastoid region and in the temporal channel which communicated with the skull, rendering necessary the trepanization and complete drainage of the channel; (e) that the focus was under treatment two months; (f) that on July 3, 1908 (the certificate says "at present"), the patient suffered from slight perturbations in the ear and pains which radiated from the skull, for which reason he was recommended to follow a very moderate and methodical life for some time and to abstain from all hard work; (g) that the lesion originated in a wound over the temporal region; and (h) that according to the physicians who attended the patient in El Paso, Texas, during the month of October of last year, the direct and sole cause of the disorder referred to was a contused wound with a purulent discharge from the ear and probable fracture of the bone. The aforesaid certificate contains nothing further, and if given slight consideration, it is readily seen that all the facts specified under headings a, b, c, d, e, f and g, are facts which the two surgeons, who operated on the claimant, had before their eyes and in their hands, for which reason they have to be given full faith and credit as regards such facts. On the other hand, the certification under letter "h" is only an explanation of the manner in which the lesion with a traumatic origin was caused on the temporal region; this explanation is given by them, attributing it to the physicians who attended the patient in El Paso, and they probably received it from the lips of the claimant himself, who transcribed, in part at least, the opinion of said physicians of El Paso. Perhaps nothing further is necessary to connect with a relation of cause



to effect, the lesions which Mallén received in October and the ills which had developed in him during the first months of 1908. In fact, the testimony of the physicians of El Paso shows that the blows, as already stated, were very severe and in a dangerous region. Doctors Urrutia and Cañas certify that Mallén entered their sanatorium to be operated at once for a suppuration of the ear, and they also certify (letter "g") that the lesion originated in a wound over the temporal region. It is not venturesome to infer that blows of the kind received by Mallén, could produce, within the period of less than three months, an abscess in the contused region, which might place the patient's life in danger due to its communication with the skull. Cañas and Urrutia had Mallén under observation at a time when it was surely easy to discover the scars of the blows and, taking into consideration their medico-legal experience, they had all reason to attribute the abscess to the blows which caused the exterior wound that was visible to them. During the oral arguments, there were read opinions of distinguished medico-legal experts who affirm that strong blows inflicted on the head can produce abscesses, either on the side struck or on the opposite side; and it must be remembered that Mallén received blows on both sides of the head; on one by Franco's fist and, on the other, by rebound against the walls of the street car.

5. But there is still more evidence. The same Dr. Urrutia, in a letter of March 9, 1927, states that he received Mallén from the hands of Dr. Rafael Caraza and that the latter indicated to him that, in his opinion, "an ample trepanization on the lateral cavity was indispensable, because, in his opinion, the patient, Mr. Mallén, had a cerebral abscess of traumatic origin and flebitis of the lateral cavity, which endangered his life"; and Urrutia adds that, in passing the surgical case, Dr. Caraza "did so in request of urgent professional services which, if not rendered, would cause, to use his own phrase, the death of the patient". Here again we find the indication, that the illness was of a traumatic origin, expressed by a physician (Caraza) who treated Mallén, according to this second statement of Urrutia, a month more or less before his entering the hospital, which fixes this time within the month of January. In this way the two certificates of Urrutia complement each other, and as there is no evidence, as the Presiding Commissioner reasonably avers, that Mallén would have received another blow between October and February, it is logical to suppose, it is insisted, that the blows struck by Franco were the ones that produced the abscess which Caraza found and Urrutia had in sight when he operated on him. There is nothing in the record, furthermore, which may prove that claimant suffered ear trouble before the events of October, 1907, and even supposing that such illness existed, there would remain the possibility that it might have been aggravated by the brutal contusions suffered by Mallén.

6. There remains to be explained why Urrutia did not refer at all to Dr. Caraza in his observations, in the first certificate. It may be conjectured that Urrutia did not believe necessary to make reference to what he states in his second certificate, because it was sufficient to certify his own discoveries logically attributable to the traumatic origin revealed by a recent scar on the temple (either of the temples): perhaps he only referred to the physicians of El Paso in order to establish merely the form of the traumatism, and he did not take care to check up what Mallén probably attributed to them. Anderson or the other physicians certainly did not say that there was otorrhoea, although they did indicate that a blow of the kind received by Mallén could cause fracture of the bone. Dr. Anderson, who continued

to treat Mallén after Franco's trial, said nothing with respect to the abscess found by Caraza and Urrutia, but his silence can be explained by the fact that this class of diseases do not develop rapidly and do not have marked external symptoms at the beginning. Anderson, and even Mallén, thought, perhaps, that the effect of the blows had disappeared, but shortly after, at most one month, Mallén began to suffer again and he consulted Dr. Caraza, who made the first discovery of the traumatic abscess.

7. The physicians who subsequently treated Mallén certify to the delicate condition of his health as a result of his illness in the temporal region, and they equally certify that as consequence of such illness, the sense of hearing in the right ear has been almost completely lost. The other details of those certificates can be placed in doubt, but they are not essential.

8. For the above reasons, I believe that the United States must indemnify Mallén, in addition to the grounds set forth by my colleagues, for the material damage suffered by him in the loss of hearing in the right ear.

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