ELVIRA ALMAGUER (U.S.A.) *v.* UNITED MEXICAN STATES

(May 13, 1929. Pages 291-299.)

Commissioner Fernández MacGregor, for the Commission:

A claim in the amount of $50,000.00, United States currency, is made by the United States of America, on behalf of Elvira Almaguer, against the United Mexican States, alleging that the claimant's husband, Toribio

Almaguer, an American citizen, was murdered in Mexico by a group of bandits, Mexican authorities having failed to extend adequate protection or to take steps to apprehend, prosecute and punish the persons responsible therefor.

It is alleged that prior to September 15, 1922, oil companies operating in the neighborhood of Tampico had sustained several losses incident to robberies of money which the said oil companies transported from the banks to the oil fields for the payment of the workmen; that due to the inactivity of the police in the prevention of these crimes, the companies had to resort to various means of safety, such as the employing of armed guards, automobiles, launches and aeroplanes; that shortly before eight o'clock, on the morning of September 15, of the same year, Frank L. Clark, Cashier of the Agwi Company, proceeded to a bank in Tampico, Tamaulipas, from which he withdrew 42,000.00 pesos, the said sum being placed in two leather bags for its transportation to the aviation field. Clark was carrying the said money in an automobile in charge of Toribio Almaguer and Macario Cano, and also having as passenger another employee of the Company named Rodolfo Saldaña Ruiz. Upon arrival at a certain place between the City of Tampico and the aviation field, this automobile was held up by another car containing bandits who assaulted Clark and his companions, shooting them with their firearms, as a result of which Toribio Almaguer was killed, Clark wounded in one arm, Cano bruised, and Saldaña alone remaining uninjured. The bandits seized the bags containing the money, boarded the automobile in which they had arrived to prepare their ambush, and departed towards the City of Tampico, following the direction of a point known as Cascajal. It appears that this group of bandits was composed of seven men. A few moments after the escape of the bandits, Saldaña, the only member of the Agwi party who had been left uninjured, hailed a passing automobile and immediately drove to the office of the Company, reporting the assault to the General Manager, and thereupon, both men went to the Police Headquarters to report the robbery and assault, and also the direction in which the bandits had escaped. The competent authorities began an investigation, and the following day they successfully apprehended not less than fifteen persons, who were questioned and detained on suspicion. Investigations were further continued, successfully resulting in the apprehension of a man by the name of Pedro Rojas who confessed to having been one of the assailants, and who furnished the names of the other participants to the crimes mentioned. Shortly thereafter, the said Pedro Rojas attempted to escape from jail and was shot by the police in an attempt to recapture him. This man died in the hospital as a result of his wounds. After the death of Rojas, the *Ministerio Público*, requested the release of all the other suspects, alleging that the clues which once existed as proof of their guilt, had vanished; consequently they were released on bond by the Judge with the exception of one named Nicolás Ramírez against whom there were also very strong suspicions. It appears that this man escaped from a hospital to which he had been confined during his imprisonment, and that he was not reapprehended until more than two years later, after having perpetrated other crimes. It also appears that a Military Judge, in order to perform certain judicial investigations in a certain trial which he was then conducting requested the civil judge who conducted the proceedings, to place Nicolás Ramírez under his charge, and that the said Ramírez in an attempt to escape while being taken from one court to the other, was shot and killed by the soldiers entrusted with his custody. Thereafter, no further steps were

taken in the proceedings started against the assailants of Almaguer, Clark and his companions, and therefore, as a result, no one was punished for the grave crimes herein set forth. The American Agency contends that this shows a serious negligence in the administration of justice by Mexico and thus renders its Government responsible for a denial of justice.

It is necessary first, to examine the alleged lack of protection in the region surrounding Tampico.

The American Agency has submitted the affidavits of several persons recording a list of robberies and assaults committed from 1918 until 1922, concluding therefrom that there were 28 cases of this nature in 1918, 20 in 1919, 8 in 1920, 9 in 1921, and 22 in the year 1922. There are statements in the aforesaid affidavits to the effect that the oil fields adjacent to Tampico were infested with outlaws, constituting a constant menace to life and property, and that the authorities did not take adequate steps to suppress this state of affairs; that while the Mexican Republic was practically at peace since 1921, the fields in the neighborhood of Tampico, however, were infested with marauders and bandits and that, although such facts could not have been unknown to the authorities in that region, the Federal Government did not take any practical steps to suppress this banditry. The respondent Government states that it was endeavoring to pacify the country after a revolt prolonged over a period of ten years, and that, in this connection it displayed unusual activity and diligence; that however, it was necessary to combat certain revolutionary groups as well as other small groups of outlaws and bandits; that the authorities, whenever the oil companies requested special armed guards in order to safeguard their money remittances, always were ready and willing to furnish, and did in a number of occasions furnish, said armed guards, and that particularly in the instant case, Rodolfo Saldaña, an employee of the Agwi Company, was, according to his own statement, warned by the police to give ample and timely notice concerning the day and hour in which the said transportation was to be effected, in order that full and adequate protection could be rendered.

In view of the meagerness of the evidence submitted regarding this point, the Commission is unable to conclude that Mexico is responsible for the failure to have rendered proper protection to the Tampico region in general, or to the deceased man in particular. The mere fact that in a certain nation or specific region thereof a high coefficient of criminality may exist, is no proof, by itself, that the government of such nation has failed in its duty of maintaining an adequate police force for the prosecution and punishment of criminals. In cases of this nature, it is necessary to consider the possibility of imparting protection, the extent to which protection is required, and the neglect to afford protection, and evidence as regards these elements is altogether lacking in the case under consideration.

In connection with the alleged negligence of the Mexican authorities in apprehending, prosecuting and punishing Almaguer's assailant the following facts mainly drawn from the evidence submitted by the Mexican Agency, are pertinent: the assault took place at about eight o'clock in the morning of September 15, 1922; the Police Headquarters at Tampico were notified shortly after the occurrences, and began to make the necessary investigations, in turn notifying the Second Court of First Instance of Tampico at 9.30 A. M. of the same day. The personnel of the said Police Headquarters proceeded to the scene of the crime, in order to obtain a view of the *locus*, and started to apprehend and examine several

suspicious persons and these by September 17 were sixteen in number. On September 19 the Court received from Police Headquarters the duly drawn preliminary declarations, and the persons who had been arrested. The Court also began an investigation on September 15, immediately taking the deposition of Clark and ordering the autopsy of Almaguer's body to be performed. From this moment, the Court diligently continued to act, and duly obtained the testimony of the persons arrested by the police and of others as well who appeared as suspicious to the said Court. On October 2, the detention of one of the guilty principals had already been effected, one Pedro Rojas, who confessed his guilt. From his statement it appeared that besides himself, Filiberto Lechuga, Eulalio Prieto, Pedro Díaz, Nicolás Ramírez, Pedro Rodríguez and Manuel Mora, were responsible for the assault, and that Julio Jeffries, Maurilio Rodríguez, Gerónimo Gutiérrez and Pío Gutiérrez were the concealers or the accessories. Three of these men named, Pedro Rojas, Julio Jeffries and Maurilio Rodríguez had already been arrested and declared to be formally imprisoned, the Judge hence issued a warrant for the apprehension of the others. Of these individuals, Eulalio Prieto, Nicolás Rodríguez, Manuel Mora, Gerónimo Gutiérrez and Pío Gutiérrez, were eventually apprehended, while Filiberto Lechuga, Pedro Díaz and Pedro Gutiérrez, the three principals, as well as Gabriel Martínez whose responsibility was secondary, were never apprehended.

It appears that after the death of Pedro Rojas resulting from his attempted escape, the *Ministerio Público*, representing the interests of society in the prosecution of crime, requested the release of all those held, alleging that the clues which existed as proof of their guilt had disappeared. It is shown that these requests were made before the Judge, the accused and their respective counsels being present. The Prosecuting Attorney vehemently expressed himself at the time of making these requests, in fact stating in one instance: "even though the public, once it has learned the facts through the exaggerated gossip of the court room loiterers, may accuse me as a faithless official, I shall face such criticism with a clear conscience, possessing as I do the certainty that the accused is innocent". Pedro Rojas apparently, died on December 23, 1922, and between January 12, and March 26, 1923 Gerónimo Gutiérrez, Martín Rodríguez, Pío Gutiérrez, Manuel Martín Mora, Vicente Rodríguez, Julio Jeffries, Marcial Godoy, Maurilio Rodríguez and Eulalio Prieto, were released on bond, Nicolás Ramírez, whose fate has been described, alone remaining on trial.

The American Agency has laid great stress on the release of the individuals above-mentioned, alleging that under every consideration such release was improper, inasmuch as sufficient circumstances existed to consider them guilty and inasmuch as they could not fall under the provisions of Article 20, sub-paragraph I of the Mexican Political Constitution of 1917, which in connection with the guarantees of the accused states the following:

"I.—He shall be set at liberty on demand and upon giving a bond up to ten thousand pesos, according to his personal resources and the seriousness of the offense charged, provided, that the said offense may not be punishable with penalty of more than five years, imprisonment; and without any further requisite than the placing of the stipulated sum at the disposal of the authorities or the giving of a mortgage bond or personal security sufficient to guarantee it."

The American Agency alleges that in accordance with the provisions of the Penal Code of Tamaulipas, the men who were accused of these criminal acts either as principals or as accessories, merited a penalty much

greater than five years, inasmuch as the case was one of highway robbery accompanied by violence, resulting in murder, with all of the aggravating circumstances, and that therefore, the Judge who granted liberty under bond, disobeyed the fundamental law of Mexico on this point. On the other hand, counsel for Mexico referred to Article 360 of the said Penal Code, which literally reads as follows:

"At whatever stage of the trial in which the grounds serving for decreeing detention of the preventive imprisonment, vanish, the accused or detained person shall be released, after he has been given a hearing, should he exist or be present; reserving the possibility to issue a new warrant of arrest, if there should later appear sufficient grounds therefor in the course of the trial. In this case the release shall be granted under a bond of not less than 20 and not over 100 pesos, except in the case of indigents who shall be released on parole."

It is not for this Commission to decide whether or not Article 20, Section I, of the Mexican Political Constitution of 1917 was or was not violated. Inasmuch as this article is concerned with a guarantee, it is conceivable that it fixes only the minimum guarantee which shall be granted the accused in connection with this release on bond. Therefore, a minimum guarantee alone being involved, it is doubtful whether or not a state statute of the Mexican Federal Union more extensively granting the accused a release on bond, that is to say, in those cases in which the penalty is greater than five years, is or is not unconstitutional. But aside from this it appears that this question need not be decided in the instant case inasmuch as in order to decide whether or not the Mexican Judge acted lawfully, it is sufficient to refer exclusively to the provisions of Article 360 mentioned above. Indeed, under this article, the accused may be released whenever the grounds for ordering the detention or the preventive imprisonment may have vanished, and therefore the pertinent thing is to ascertain whether or not, in the case of the persons accused of the assault which resulted in Almaguer's death, the grounds did or did not vanish. Maurilio Rodríguez was declared formally imprisoned inasmuch as from the statements of some of the witnesses it was established that he was possessed of information concerning the contemplated assault prior to its commission, and also that he had even entrusted his own brother with the delivery of certain suspicious messages; above all, because after the occurrences, although apparently knowing that "El Pericón" was one of the accused, he, even being a soldier, did not make the proper denunciation and thus constituted himself an accessory. According to the confession of Pedro Rojas, Maurilio Rodríguez was the person who invited him to be a participant in the assault, thus rendering him an intellectual perpetrator thereof. Maurilio Rodríguez in his confession admitted that he knew of the assault twenty days before it occurred, and that he had duly communicated this information to Comandante Benavides. The *Ministerio Público* in applying for the release of this person on bond, stated that the only reason that existed for the detention of Rodríguez was a number of contradictions occurring between his own declarations and his brother Vicente's, but that these however, were soon harmonized, and that therefore, except for the sole statement of the witness Gabriel Martínez, nothing had been left pending against this man. Inasmuch as the grounds existing against Maurilio Rodríguez have already been mentioned, the contention of the *Ministerio Público* appears wholly unwarranted by the facts, nor is there any evidence in the whole record submitted by the Mexican Agency to show that such grounds did in fact vanish. Therefore,

it is reasonably apparent that the release of Maurilio Rodríguez was unlawful.

The same may be said in regard to Eulalio Prieto, alias "El Tejano". There exists against this individual the confession of Rojas, pointing to him as the other principal in the assault. Rojas was living in the house of the mother-in-law and the wife of "El Pericón". It is true that "El Pericón" altered his first confession with respect to "El Tejano", by denying that his preliminary statement was true, but the Judge observed that this denial made in the presence of "El Tejano", was accompanied by visible signs of fear, and that obviously, he only tried to save the latter exactly as he had tried to do with the others who had been detained. A witness named Licona testified that "El Tejano" slept in the house in which the assault was planned on the night previous thereto, and that furthermore, "El Tejano" had been subsequently apprehended in that very same house. The *Ministerio Público*, in requesting "El Tejano's" release on bond, alleged that all these suspicious circumstances had been contradicted by the testimony of several other witnesses who declared that "El Tejano" had been ill for several days prior to the assault at another place which he had never left. There is no record of the testimony of these witnesses referred to by the *Ministerio Público* or of any confrontation of them with "El Tejano", or of any confrontation of the latter with the other defendants.

Manuel Martín Mora, another suspect, according to Rojas' confession, was formally imprisoned and upon confrontation with Rojas himself, the latter ratified his statement to the effect that the said Mora was in the automobile of the assailants. There is no record to show that these clues vanished, and the same conclusion may be reached as regards Julio Jeffries, Gerónimo Rodríguez, Pío Rodríguez and Gabriel Martínez who were released, as already stated, shortly after the death of Rojas in a certain hearing in which no record exists as to what other evidence could have destroyed the strong suspicions existing against the individuals mentioned. As already stated, the record submitted by Mexico discloses a number of deficiencies after the death of "El Pericón", occurring on December 23, 1922. The releases on bond, based upon the lack of evidence were granted beginning on January 12, but between these two dates, it seems that no proceedings were carried on to obtain further evidence. During this period there were a large number of persons detained against whom weighty suspicions existed, and there is no evidence to show that the Judge undertook to make among them the confrontations which under Mexican law are necessary for the investigation of the actual responsibility falling upon each of them.

Counsel for Mexico argued that the judicial record filed by his Government in this case is not complete being solely a digest of the outstanding steps of the trial. Such assertion is well founded, but the Commission should consider that since the allegation of the American Agency was to the effect that in certain important matters the proceedings revealed either negligence or a violation of Mexican law, the proper thing for the Mexican Government was to show by adequate evidence that such was not the case. As disclosed by the digest in question submitted as evidence, the judicial proceedings are in existence, and the Mexican Agency could have introduced evidence tending to show the disappearance of the suspicious grounds, existing in the said proceedings, against the suspected principals and accessories of the crimes. The Commission is constrained to conclude as to the questions of legality of the release of the prisoners on bond and the investiga-

tion of the delinquency itself that a culpable negligence has been shown to exist.

Under the conditions above stated, it may be said that there was no complete prosecution and punishment of Almaguer's assailants, but taking into account that the proceedings in their initial stage up until the date of Pedro Rojas' death do not disclose any deficiency; and that at least two of those appearing as principals responsible for the crimes were seriously prosecuted, as shown by the fact of their death as a result of an attempted escape, and also taking into account that the Commission has expressed in the case of *Laura M. B. Janes*, Docket No. 168, [1] its opinion to the effect that in cases of denial of justice it would take into account the different shades thereof, ["more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon")] it deems that the claimant may properly be awarded in this instance the sum of $7,000.00, inasmuch as there was a certain serious prosecution of some persons, while as regards others there was a negligent prosecution and no punishment.

Decision.

The United Mexican States shall pay to the United States of America on behalf of Elvira Almaguer, the amount of $7,000.00 (seven thousand dollars), United States currency, without interest.