

640

MEXICO/U.S.A. (GENERAL CLAIMS COMMISSION)

SARAH ANN GORHAM (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 132-139.)

Commissioner Nielsen, for the Commission:

Claim in the amount of \$25,000 with interest is made in this case by the United States of America against the United Mexican States on behalf of Sarah Ann Gorham, wife of Franklin Pierce Gorham, an American citizen, who was murdered in the State of Tamaulipas, Mexico, in 1919. The claim is predicated on allegations with respect to a denial of justice growing out of the failure of Mexican authorities to take suitable steps to apprehend and punish the slayers. The substance of assertions in the Memorial with respect to the occurrences on which the claim is based is, briefly stated, as follows:

From 1915 up to the time of his death, on April 29, 1929, Franklin Pierce Gorham was a peaceful and law-abiding resident of Mexico, conducting a farm and raising cattle on several acres of land, part of which he owned and part of which he rented, near Chamal, State of Tamaulipas. The claimant and her children lived with him on the farm, until conditions in and near Chamal became so turbulent and dangerous that she was obliged to leave for the United States.

On April 28, 1919, Franklin Pierce Gorham went to a neighbor's home to make a visit and to bring back to the farm, a hive of bees. He reached his destination, and left in time to have reached his home before dark. When he did not return by one o'clock of the next afternoon, a searching party started out to find him. His burro had previously wandered back alone, stripped of all but its halter. After a short search the dead body of Gorham was found by the side of the road, about one and a half miles south of Chamal, between the decedent's home and that of a neighbor.

From the condition in which the body was found it was evident that a brutal murder had been committed. Two or more persons had attacked Gorham, stabbing him with their knives, as was evidenced by eight gashes in his chest, and hacked open his skull with machetes. There were sixteen stab wounds in the body. The assailants, following the murder, then looted the decedent's clothing of everything they considered of value, turning the pockets inside out. The mutilated body was dragged to a point about thirty yards back from the road, and roughly covered with palms and foliage.

In accordance with Mexican law, the body was permitted to remain in the condition in which it was found until after the authorities, including the Municipal President at Ocampo, were notified. This was done imme-

diately and they were requested to make proper investigations. No official responded on the day when notice was given or up to a late hour the next day when the body was buried. Local Mexicans manifested no interest in the fact that Gorham had been brutally murdered. Appeals to the civil and military authorities evoked little, if any, assistance.

During the latter part of June, or the early part of July 1919, a group of nine Mexicans were arrested on the suspicion of being implicated in the murder, but were released or permitted to escape within a very few days. They were never reapprehended, although they had not been examined fully with reference to the murder.

Finally it is alleged in the Memorial that no sincere or conscientious efforts were ever made to afford proper protection to the residents of the vicinity or to punish violators for crimes which were committed from day to day.

In the Mexican Answer it is pointed out that in the Memorial and in certain accompanying annexes it appears that the crime was committed by two or more persons who in some instances are designated as "bandits". It is further pointed out that the crime occurred on April 29, 1919, that is, within the period referred to in Article III of the so-called Special Claims Convention concluded between Mexico and the United States on September 10, 1923. The opinion is expressed that these considerations would warrant the Commission to declare itself incompetent to take cognizance of the instant case. In the Mexican Brief it is argued that the case is similar to that of the *Blair* case, *Opinions of the Commissioners, Washington, 1929*, p. 107. It is pointed out that the *Blair* case involved a crime committed against an American citizen within the period between November 20, 1910, and May 1, 1920, and that some persons were apprehended and were subsequently released by revolutionary forces.

In behalf of the United States it is argued that, irrespective of the use of the term "bandit" in communications accompanying the Memorial, there is no information that the perpetrators were bandits, they being unknown. It is said that robbery was evidently the sole purpose of the crime. And it is contended that the evidence does not disclose that Gorham was murdered through the action of one of the forces enumerated in Article III of the so-called Special Claims Convention. Stress is laid on the point that the claim is predicated on allegations relative to the negligence of Mexican authorities with respect to the apprehension and punishment of the criminals.

In dealing with this difficult question of jurisdiction, it would seem to be desirable and indeed necessary to avoid any narrow construction taking too much account of terminology, in relation particularly to a point such as the definition or identification of a bandit. It can probably accurately be said that there is no technical, legal definition of a "bandit". In a despatch sent by the American Consul at Tampico to the Department of State at Washington reference is made to the slayers of Gorham as "bandits". However, the Consul also speaks of them as "bad men", and in another communication there is a mention of "renegades".

Of course it is proper to take account of the term bandit, since that is used in Article III of the so-called Special Claims Convention of September 10, 1923. Sub-paragraph (5) of that Article provides, among other things, that the Commission established by the Convention shall have cognizance of claims due to acts committed "by bandits, provided in any case it be established that the appropriate authorities omitted to take reasonable

measures to suppress insurrectionists, mobs or bandits, or treated them with lenity or were in fault in other particulars". It is stated in Article II of that Convention that Mexico desires that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore, that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in Article III of the Convention. The Convention contains this general stipulation with respect to the settlement of claims *ex gratia* and not according to principles of international law. However the language of sub-paragraph (5) of Article III would certainly appear to justify the construction that the Commission under that Convention, in dealing with this particular category of claims, must take account, at least to some extent, of general principles of evidence and of law that enter into the determination of such cases by a strict application of international law.

This Commission in previous cases has observed that, with respect to questions of jurisdiction, it is proper to consult the Convention of September 10, 1923. But the Commission must determine whether the cases presented to it come within the jurisdictional clauses of the Convention of September 8, 1923. Therefore, although Article III of the former contains detailed provisions of which it is important to take account, it is of course necessary that full effect be given to the jurisdictional provisions of the latter, and that none of them be ignored in the process of having recourse to another Convention for purposes of interpretation.

The Convention of September 8, 1923, confers on this Commission jurisdiction over claims by the nationals of each country against the other since July 4, 1868, with certain exceptions. The exceptions to be sure are specified in general terms. In the preamble they are described as "claims for losses or damages growing out of the revolutionary disturbances in Mexico". And in Article I they are described as those arising from "acts incident to the recent revolutions".

To attempt in the light of the record before us to ascribe the losses which it is alleged the claimant suffered as growing out of a revolutionary disturbance, or as incident to recent revolutions, would seem to be entering into a field of speculation and of strained reasoning which neither Convention requires or justifies. There appears to be some force in the argument of counsel for the United States to the effect that the acts of bandits referred to in the so-called Special Convention mean acts of groups of men operating, as it might be said, in the manner of organized banditry. With respect to this point, it may be noted that in the American Consul's despatch of July 2, 1919, it is stated that the men arrested are all "residents of the general vicinity of Chamal and Xicotencatl". The Consul also states that certain Americans "assisted in the arrest of the parties named through the medium of furnishing names and addresses". Moreover, irrespective of the exact meaning of the language of sub-paragraph (5) of Article III of the Convention of September 10, 1923, it is also proper to take account of the precise nature of the claims within our jurisdiction as distinct from claims in which Mexico has undertaken to make compensation *ex gratia* on the basis of a direct responsibility, so to speak. The instant case is based on contentions as to the failure of Mexico to live up to the obligations of the rule of international law with respect to punishment of persons who murdered the claimant's husband. Its merits must be determined by the application of the rule of international law pertaining to a complaint of that nature.

The argument on the part of Mexico with respect to the similarity of the instant case to the *Blair* case does not appear to involve any difficulties. That argument as presented involves a question of evidence. It is contended that, since certain persons were arrested for the murder of Gorham, and since they were released by revolutionists within the jurisdictional period fixed by the Convention of September 10, 1923, the claim made by the widow of Gorham is not within the jurisdiction of this Commission.

In passing on the question of jurisdiction in the instant case it is not necessary to consider the effect of any allegations with respect to the release of the prisoners by insurgents, because there is no evidence that the prisoners were released in that manner. Certainly when the decision on a plea to the jurisdiction is dependent upon a question of evidence, the party attacking the jurisdiction must produce evidence that is conclusive with respect to its contentions. Mexico has produced nothing. To be sure nothing might be necessary, if a sound conclusion could be based on evidence produced by the other party, but this is not the situation in the case before us.

The American Consul at Tampico reported in a despatch of July 2, 1919, to the Department of State at Washington that he had received information that certain persons were released or escaped from their cells when the revolutionists assaulted Ciudad Victoria. According to that information, which it appears reached the Consul just as he was writing his despatch, the men may have escaped and not have been released, and it is not stated that they were released by revolutionists.

The Judge of First Instance at Xicotencatl, Tamaulipas, refused to furnish the claimant a copy of the court record, and the Mexican Agency has produced no copy. It would seem that these records should throw light on the conditions under which the prisoners escaped or were released. When the allegations of the Memorial present a case within our jurisdiction, the Commission cannot properly refuse to take jurisdiction on the basis of some speculation as to things with reference to which there is no evidence.

On the merits of the case the following defense is made in the Mexican Answer:

“It is denied that the annexes submitted with the Memorial contain sufficient evidence to prove that the Mexican authorities were negligent in the persecution of the criminals and the attention of the Commissioners is called to the fact that in the said Memorial and in some of its annexes it is admitted that the authorities detained several suspects and it has not been proved that any or some of those detained were guilty and remained unpunished.”

No evidence accompanies the Answer, and no legal defense was made in the Brief or in oral argument. As has been observed, a copy of the court record was refused to the claimant, and no record has been produced before the commission. The sole source of information to the effect that certain persons were arrested in a consular despatch accompanying the Memorial. In the same despatch it is stated that the prisoners were released or escaped. However, with respect to the merits of the case no difficulties are presented. There is no conflict of testimony, since no evidence has been produced by the respondent Government on this phase of the case.

In the *Chase* case, *Opinions of the Commissioners, Washington, 1929*, p. 17, it was said by the Commission:

“International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's

guilt and assessing the proper penalty. It is possible that in certain cases the police or judicial authorities might declare the innocence of a defendant without bringing him to trial in the fullest sense of the word. But if the data which exists in a case indicate the possible guilt of a defendant, even in the slightest degree, it cannot be understood why he is not tried to the extent of determining his responsibility."

In the *Massey* case, *Opinions of the Commissioners, Washington, 1927*, p. 228, the Commission, after referring to the escape from prison of a person who killed an American citizen, said:

"With regard to the argument made with respect to the bearing on the question of Mexico's responsibility of the steps taken to apprehend Saenz, it may be concluded that there is no evidence in the record showing that any effective action has been taken by the appropriate authorities to apprehend the accused ... there is no specific evidence that police authorities took any steps to apprehend him and no evidence of any difficulties experienced by such authorities to locate this well-known fugitive."

In the *Richards* case, *ibid.*, p. 412, the Commission, after referring to certain judicial proceedings against a person charged with the killing of an American citizen, said: "the Court of Appeals revoked the decree of liberty and ordered the reapprehension of the accused on August 1, 1925, but Mexico has not presented any evidence of the continuation of the prosecution, or of their having been finally judged."

In the *Plehn* case, under the Convention of March 16, 1925, between Mexico and Germany, the President Commissioner, speaking in behalf of all three Commissioners in relation to a case growing out of the killing of a German subject by Mexican so-called bandits, said that the reasonable measures for punishing the bandits referred to in the Convention did not in his opinion "consist alone in the instituting of a prosecution, but it is necessary to become acquainted with the prosecution itself in order to state whether they have such a character". It was further said:

"The exhibition of the record would have made it possible to determine the steps employed by the authorities for the punishment of the guilty party, and the absence of this piece of evidence cannot damage the claimant, as it was not in her hands to present and appertain to the defendant Agency to show it in proof of its assertion that there was no lenity or lack of diligence on the part of the authorities.

"It does not appear in the proceedings that the competent authorities took reasonable measures to repress the act of banditry nor to punish those guilty. While there was instituted the appropriate prosecution, from the communication of the Agent of the Ministerio Público, submitted by the Mexican Agency, it appears that it was closed or withdrawn because no charge was made."

In the light of the record, the Commission is clearly constrained to hold that the complaint of the United States with respect to the failure of the Mexican authorities to take proper steps to investigate the murder of Gorham and to apprehend and punish the criminals is well founded.

Decision

The Government of the United Mexican States shall pay to the Government of the United States of America on behalf of Sarah Ann Gorham the sum of \$7,000.00, without interest.