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Mena Case

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him was of no value, the Spanish Commissioner is of the opinion that the declarations made before the consular agents of his nation ought to be admitted, since many times it is the only means of which Spanish subjects have been able to avail themselves to prove the facts upon which they base their claims. In an exposition of his belief said commissioner stated:

That the consuls of his country were authorized to receive the declarations of witnesses; that said faculty is in general inherent in all consuls, and that, at all events, it is to be borne in mind that this Mixed Commission is not a tribunal of justice, but that it ought to take into consideration all proofs that may be presented, giving to them the weight which they ought to have in accordance with equity, as prescribed in the protocol.

This point concerning the inadmissibility of the proof was submitted to the decision of the umpire, who, in rendering such opinion, believes that the express clause of said protocol, signed in Washington, April 2, of this year, by the representatives of Spain and Venezuela, are to be applied, in which, rules that must be observed are prescribed for this Commission, which can not assume powers which the protocol denies it, nor refrain from fulfilling the obligations which it imposes upon it.

The second article of the protocol cited, provides:

The Commissioners, or umpire, as the case may be, shall *investigate and decide* said claims upon such evidence or information only as shall be furnished by or on behalf of the respective governments. They shall be bound *to receive and consider all documents or written statements which may be presented by or on behalf of the respective governments in support of, or in answer to, any claim.*

And since the documents or statements, which tend to support the claim here considered, have been presented in writing and by the legation of Spain in the name of the Government, the Commission is bound to examine and consider them in order to take them into consideration in pronouncing the judgment which it may deem justified by the merits.

Nevertheless, the question of admissibility of the proof presented shall not prejudge its efficacy, which shall be appreciated by the commissioners or the umpire, as the case may be, as they may determine to proceed in accordance with absolute equity without regard to objections of a technical nature, or provisions of a local legislature, as prescribed as a binding rule.

Therefore the umpire decides that the proofs submitted with the claim made in the name of the Spanish subject, José Lozano, is admissible, and that the claim should be returned for the investigation of the commissioners, in order that they may decide it, examining and taking into consideration said proofs.

MENA CASE

It is an accepted principle of international law that states are not responsible for damages and injuries caused by persons in revolt against the constituted authorities; but this principle under the terms of the protocol can not be invoked by Venezuela.[1]

GUTIERREZ-OTERO, *Umpire.*

In record No. 5, presented in the claim of the Spanish subject Domingo Gonzalez Mena, in favor of whom the payment is claimed of 34,744 bolivars

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[1] See Aroa mines case, Vol. IX of these Reports, p. 402; see also *supra* cases of Kummerow, p. 370; Sambiaggio, p. 499; J. N. Henriquez, p. 713; Salas, p. 720; Guastini, p. 561; Padrón, p. 741.

as the value of 670 head of horses and mules situated upon the ranches belonging to him, the former having been destroyed by the belligerent forces in the war beginning in May, 1899, and the latter having been entirely lost during the same time, there arose a question concerning which the commissioners did not agree, and which, as a preliminary question, has been submitted to the umpire.

The Commissioner of Venezuela, referring to the circumstances, says that there is no exact statement concerning which force said troops belonged to, nor the name of the leader who commands them; and that there is question of the losses suffered because of war; he maintains that the State is only responsible for acts of its authorities, and also that strangers ought to suffer the consequences of wars which the country undergoes, and should not claim damages on this account, because they are produced by force majeure, which in no case can render said State responsible.

From this he deduces that Venezuela is not responsible for the damages which Gonzalez Mena says he suffered by reason of the war of 1899.

The Commissioner of Spain is of opinion that the interests of the claimant have not received the protection to which the treaties in force give them a right, and he maintains that said responsibility does exist.

The question set down in this way by the commissioners, it appears in the record that:

> Not being in accord upon this point, its resolution shall pass to the decision of the umpire.

In reality the two following principles are invoked by one of the commissioners, in order that they may be applied and govern the case:

Primarily, the State is responsible only for the acts done by its agents, and not for damages which insurgents cause to foreigners, and therefore Gonzalez Mena has no right, from this point of view, to claim damages which the revolutionary forces may have caused him:

In general, the State is not responsible for damages caused as a consequence of war because damages of this sort are considered as caused by force majeure, which exempts it from liability.

Do these principles in fact govern the case of Gonzalez Mena in such an absolute way, that, by reason of both, it is not permissible to take into account any other consideration in order to decide it and make it necessary to reject it summarily?

With respect to the first of these two rules which have been cited, the umpire has, upon another occasion,[1] already decided that although after a long discussion the theory has undoubtedly prevailed concerning the irresponsibility of states for damages which insurgents cause to the persons or property of foreigners living in their territory, and such a principle is now considered as a rule properly called one of international law, it does not govern a tribunal of the nature of this Mixed Commission, which, according to the protocol that created it, should, on the contrary, necessarily base its judgments upon absolute equity and not take into consideration objections of a technical nature which may be raised before it.

This character of a tribunal of equity, which is considered sufficient for the submission to arbitration of cases of protection, has been recognized as giving absolute liberty for a decision which is not against good conscience inspired by a true estimation of absolute justice, and which permits, finally, taking into consideration of all the circumstances of the case, conceding equitably what is

[1] *Supra*, p. 741.

not a matter of obligation and can not be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard to law.

The umpire has shown that the protocol of Washington, of April 2 of this year, by its own terms, and in accordance with the most reliable opinions which in this particular case can be produced, among them another protocol made in 1890 by the United States of Venezuela and the United States of America, places this Mixed Commission in that position.

Concerning the second principle — and even with more reason — substantially the same must be said, since if this doctrine to a certain degree did absolutely exist, that the acts of war do not give rise to the responsibility which obliges states to make arbitration, it would be modified by the theory that the distinction between these cases should be made as to those which, properly speaking, are defensible, and those which are not, therefore, of the nature of a fatal necessity.

Upon this point Fiore, cited by Tchernoff, says:

S'il est incontestable, dit un auteur, que la guerre a le caractère de nécessité fatale et de force majeure, tout ce qu'un gouvernement peut faire et entreprendre pour satisfaire aux justes exigences de la défense, en prévision d'une guerre, ou pendant la guerre, n'a pas en lui-même le caractère de nécessité fatale. La guerre imminente ou déclarée peut, sans doute, nécessiter certains faits contre la propriété privée, et autoriser les détériorations de cette propriété dans l'intérêt public de la défense militaire: mais ce que l'autorité publique peut faire dans un but stratégique revêt toujours le caractère de l'entreprise légitime dans un intérêt public, et non toujours celui de nécessité fatale, caractère qui devrait être réservé uniquement aux faits accomplis durant l'action et rendus nécessaires pour résister à l'ennemi qui s'avance pour commencer la lutte. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, p. 309, citing Fiore, France Judiciaire, X. 1, p. 193.)

Tchernoff contends, that the council of state in France established the distinction with respect to the demolition of real estate in the zone of the defense of Paris from between those which constituted a measure of this nature until the disaster of Sedan, and those after this event considering the latter as an act of war, which did not give, as the first did, a right to indemnity.

That the French court of cassation has decided that the damages caused to private property by the works completed, even in case of necessity for the defense of a stronghold in a state of war, give a right to indemnity in all cases where they do not constitute a case of force majeure;

And finally that an author, cited in La France Judiciaire, expresses himself as follows:

Si, au lieu de s'en tenir à la forme, on va au fond des choses, qu'il s'agisse des dommages résultant de travaux de défense antérieurs à l'action, ou des dommages résultant d'opérations militaires d'attaque ou de défense durant l'action, il y a toujours, dans un cas comme dans l'autre, des citoyens qui souffrent un dommage dans l'intérêt collectif de la patrie.

Dès lors, la collectivité des citoyens, ou le gouvernement qui la représente, doit indemniser intégralement les particuliers des pertes qu'ils ont subies dans l'intérêt commun, soit avant, soit après l'action. Du reste, le système contraire est tellement injuste, que ses partisans n'osent pas le pousser jusqu'à ses dernières conséquences logiques, mais le mitigent en disant que l'équité doit conseiller à l'Etat, même lorsqu'il s'agit des dommages causés durant l'action, à faire la charité aux victimes de la défense nationale. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, pp. 311, 312; citing a note of the translator of La France Judiciaire, X, 1, p. 192.)

Thus it is that although without taking into consideration that the case of Gonzalez Mena is submitted to a mixed commission, which is obliged to decide according to equity, the question of indemnity for acts of war appears, moreover, to be a question recommended in general for its decision to the same criterion

of equity, but these considerations which fix the necessity of deciding this claim upon its merits in no way prejudges the facts nor entail an opinion concerning the nature of those facts which have been the subject of the proof produced.

It is for this reason that the umpire in declaring that the rules invoked in an absolute sense with respect to damages caused by the revolution or by acts of war do not govern the case proposed, necessitating its disallowance decides expressly and exclusively:

That this record is to be returned to the commissioners in order that they may decide the claim presented on behalf of the Spanish subject Gonzalez Mena, bearing in mind that it is not subjected in this respect to any other criterion than that of absolute equity.

FRANQUI CASE

In the absence of an express provision to the contrary, the Commission has the right to adopt whatever means it determines upon to obtain evidence.

A witness can not discredit by subsequent retraction statements made by him as a governmental authority, especially where his statements have been corroborated at the time they were first made.

GUTIERREZ-OTERO, *Umpire:*

In record No. 70 relative to the claim made on behalf of the Spanish subject Alonzo Franqui a difference of opinion has arisen, and it is submitted to the umpire for his decision because upon the Venezuelan Commissioner's demand that Gen. Maurice Aguilar, whose testimony has been presented in support of said claim, should be heard by the whole Commission, the Spanish Commissioner was of opinion that the protocol, in its second article, expressly limits the persons whom said Commission ought to hear, and therefore the declaration of Gen. Maurice Aguilar is not to be admitted; and the undersigned takes into consideration and decides this point in the following manner:

First. That the protocol, signed in Washington on April 2 of this year by the representatives of Spain and Venezuela for the establishment of this Mixed Commission, does not limit the means of proof which may be made use of before it, and only demands in the first part of the second article that the proof shall be rendered by the respective Government or in their name; and in the second part of the same article that the Commission shall receive and consider all documents or written statements which may be presented by the Governments in support of or in answer to any claim.

Second. That in the absence of an express prohibition concerning the admissibility of determining means of proof, it is the unanimous conviction of the most conspicuous writers upon international law, which Mérignhac expresses in these terms:

* * * Alors le tribunal arbitral demeurera libre d'employer, pour s'éclairer, tous les genres de preuves qu'il croira nécessaires; et il ne sera lié, à cet égard, par aucune des restrictions qu'on rencontre dans les lois positives, spécialement quant à l'administration de la preuve testimoniale. (Mérignhac, Traité de l'Arbitrage International, No. 272, p. 269.)

The Institute of International Law, in article 15 of the Rules for Arbitration between Nations, proposes substantially the same thing.[1]

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[1] Revue de Droit International, 1875, vol. 7, p. 280. (See *supra*, p. 744.)