REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885

Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer v. Venezuela (the steamer *Apure* case), opinions of the Commissioners

Commission de réclamations constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Venezuela le 5 décembre 1885

Affaires concernant Amelia de Brissot, Ralph Rawdon, Joseph Stackpole et Narcisa de Hammer c. Venezuela (cas du vapeur *Apure*), opinions des Commissaires

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3. That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever.

4. That there is no evidence satisfactory to us that the petitioners' testator was interested to the extent of one-third of the claim for the damages alleged to have been suffered by the annulment of the said contracts, or that he ever expended any money or incurred any liability, or did anything in execution of the said contracts; and, treating the petitioners representing their testator as original claimants, we can discover no ground on which to base an award in their favor.

5. That the evidence seems to indicate very strongly that the petitioners' testator came into possession of a single certificate, which was found among his papers, by purchase, hypothecation, or some other channel than his interest in the original claim, and if the petitioners are to be regarded as claiming derivatively in the right of *bona fide* holders for value under the 9th section of the treaty, the claim must be rejected, because for the reasons stated the original claim itself is without merit, and falls therefore within the purview of the first article of the supplementary convention. The claim is accordingly disallowed, and the petition dismissed.

Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer *v.* Venezuela (the steamer *Apure* case), opinions of the Commissioners*

Affaires concernant Amelia de Brissot, Ralph Rawdon, Joseph Stackpole et Narcisa de Hammer c. Venezuela (cas du vapeur *Apure*), opinions des Commissaires**

First Commissioner

State responsibility—obligation of Venezuela to protect the life and property of the citizens of the United States—international responsibility of governments for the acts of their officers—extent of the responsibility varies according to whether acts emanated from agents appointed by the government or from officers who are not under its immediate direction and control—obligation to indemnify damages caused to another State or its citizens by persons under its dependence and for whom it is accountable.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2949.

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Imputability—imputability of acts to the State and its government—State responsible only for acts of its officers which occurred in circumstances that may morally be imputable to States.

Second Commissioner

State responsibility—ultimate responsibility not dependent upon the States' form of government or the domestic distribution of its powers—responsibility and liability are to be determined and measured by the State's conduct in ascertaining and bringing to justice the guilty parties.

Third Commissioner

State responsibility—no responsibility for not anticipating and preventing an outbreak of violence and surprise attack—responsibility for wrongs inflicted upon citizens of another State when the offender is permitted to go at large without honest endeavour made for his arrest and punishment—the relations *inter sese* between the constituent parts of a federal State cannot play part in determining the responsibility of the State for wrongs inflicted by any of these parts or within their jurisdiction.

State of war—no right superior to the doing and appropriating of whatever is necessary to success—attackers not considered to be belligerents recognized as *a de facto* government beyond the jurisdiction and control of the State—no evidence of a state of war that could be accepted as an excuse for the attack in the present case.

Premier Commissaire

Responsabilité de l'État—obligation du Venezuela de protéger la vie et les biens des citoyens des États-Unis—responsabilité internationale des gouvernements pour les actes de leurs organes—l'étendue de la responsabilité varie selon que les actes émanent d'agents nommés par le gouvernement ou d'individus qui n'étaient pas sous son contrôle et sa direction directs—obligation d'indemniser les dommages causés à un autre État ou à ses citoyens par les personnes sous le contrôle de l'État et pour lesquelles il est responsable.

Imputabilité—imputabilité des actes à l'État et son gouvernement—l'État est uniquement responsable des actes de ses organes qui ont été perpétrés dans des circonstances susceptibles d'être moralement imputables aux États.

Deuxième Commissaire

Responsabilité de l'État—la responsabilité ne dépend pas de la forme du gouvernement de l'État ou de la répartition interne des pouvoirs en son sein—la responsabilité doit être établie et mesurée à l'aune de la conduite de l'État dans la détermination et l'assignation en justice des parties coupables.

Troisième Commissaire

Responsabilité de l'État—absence de responsabilité pour ne pas avoir anticipé ou prévenu une éruption de violence et une attaque surprise—responsabilité pour les torts infligés aux citoyens d'un autre État lorsque le coupable est autorisé à rester en liberté sans qu'une tentative sérieuse de l'arrêter et de le punir ne soit entreprise—les relations *inter sese* entre les parties constituantes d'un État fédéral ne peuvent entrer en compte

dans la détermination de la responsabilité de l'État pour les torts infligés par l'une des ses parties constituantes ou sous la juridiction de celles-ci.

État de guerre—pas de droit supérieur à celui de faire et de s'approprier ce qui est nécessaire au succès—les attaquants ne sont pas considérés comme étant des belligérants reconnus comme gouvernement *de facto* placé hors de la compétence et du contrôle de l'État—pas de preuve de l'état de guerre qui aurait pu être acceptée dans le cas présent comme une excuse à l'attaque.

Opinion of the Commissioner, Mr. Andrade

The Government of Venezuela granted in May 1849 to E. A. Turpin and Frederick Anthony Beelen, citizens of the United States of America, and to their associates and successors, an exclusive privilege to navigate the rivers Orinoco and Apure, for eighteen years, running from the date of the aforesaid concession.

To work the said privilege, a corporation was legally organized in New York in October of the same year, 1849, under the name of "The Orinoco Steam Navigation Company of New York".

It appears that this company went so far as to put four steamers in actual service, three of which, the *Meta*, the *Apure*, and the *Barinas*, were still running in 1856 and 1857, and only two of them, the *Apure* and the *Guayana*, from 1858 to 1861; only one, the *Apure*, existed about 1865.

The *Apure* left Ciudad Bolivar on the 9th of October 1865 on one of her ordinary trips, carrying on board a very light cargo and a small number of passengers for Nutrias, the extreme point of her journey, and the intermediate ports. On her way through she touched at San Fernando, capital of the State of Apure, where, on the morning of the 17th, the passage fares agreed on having been paid, she took on board the president of the State, General Juan Bautista Garcia, and a small military force (about 9 officers and 50 men), to land them at a point on the upper Apure within his jurisdiction which General Garcia would opportunely designate. On the night of the 18th, the steamer being moored at the port of Apurito, one of her usual landing places, for which she carried some freight, she was suddenly attacked by a force of rebels against the government of General Garcia, who had been advised in advance of the presence of said general on board the steamer with an armed force.

The origin and cause of the above-mentioned four claims are to be found in this regrettable event, since during the seven hours' fight of that night the captain of the steamer, John W. Hammer, and chief engineer, Julius de Bnssot, whose wives' claims are for $50,000 and $30,000, respectively, were killed; Joseph Stackpole, another engineer, claiming $15,000 indemnity, was wounded; and in consequence thereof The Orinoco Steam Navigation Company suffered damages which its secretary, Ralph Rawdon, estimates at $100,000. . . .

Let the liability of Venezuela for these claims be now carefully examined from other points of view. Here is the reasoning of the claimants.

General Garcia caused the conflict that occurred at Apurito on the night of October 18, 1865, by placing his officers and troops on board the steamer and requiring Captain Hammer to undertake a service for Venezuela, the performance of which he knew would place their lives in peril, and which was under taken by Captain Hammer reluctantly, under protest, if not under military coercion; by requiring Captain Hammer to proceed to Apurito; by not leaving the steamer with his officers and men when informed by the spy that hostile forces were in the plaza; by sending a squad ashore from the steamer and when it was fired upon and routed, allowing it to take refuge in the steamer; by refusing to debark with his officers and men, and by making the steamer a shelter for himself and men. General Garcia was the president and chief executive of the State of Apure, one of the States of the Republic of Venezuela. The obligation rested upon Venezuela to protect the lives and property of the citizens of the United States. It was the duty of General Garcia, who was one of the civil as well as military officers of the republic, to see that this protection was afforded them. He not only failed to give them this protection, but required them under compulsion to perform a perilous service in behalf of Venezuela. Then Venezuela caused the conflict and is liable therefor. Though the cause could not be imputed to her directly she should always be held subject to responsibility according to the principle set down by Wharton, that—

> The sovereign is responsible to alien residents for injuries they receive on his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents.

General Garcia was in fact, as it appears, president of the State of Apure, of the Republic of Venezuela, and as such the natural chief of the military forces of that State; but it can not be concluded therefrom that he was a civil or military officer or agent of the government of the republic. Quite to the contrary. The federal constitution of 1864 provided:

> Art. 1. The provinces of Apure, Aragua, Barcelona, Barinas, Barquisimeto, Carabobo, Caracas, Cojedes, Cumaná, Guárico, Guayana, Maracaibo, Maturin, Mérida, Margarita, Portuguesa, Táchira, Trujillo, and Yaracuy, *are declared independent states,* and they unite themselves to form a free and sovereign nation under the name of the United States of Venezuela.

The State of Apure was, therefore, an autonomous state, and its government was independent of the Government of the United States of Venezuela. General Garcia was not an officer or agent of the republic, but of the public authority of the State of Apure, and hence, though he had really been the originator or efficient cause of the Apurito event, it would be contrary to sound logic to deduce therefrom the consequence that said event had been caused by Venezuela.

The same thing may be said of the so-called compulsory service required from Captain Hammer by General Garcia; that it was not a service for Venezuela, but for the State of Apure. This distinction does not lack importance, because the international responsibility of governments for the acts of their

officers, its extent and quantity and the rules by which it is to be determined, vary according as the act or acts out of which the liability may arise have emanated from agents appointed by the government, and dependent upon it for their functions, or from officers not appointed by the government, or who are not under its immediate direction and control. In the first case, the acts of the official representative are one with those of the government under the authority of which he has acted, and are imputable to it. In the second case, the question of the imputability is more complex.

The responsibility of governments, in general, for damages caused to foreigners, is founded on the ground that the state being a moral person endowed to a certain degree with the same capacity and liberty as are enjoyed by the citizens who compose it, is bound as such to account for its own acts when they cause some injury to another state, or to the citizens of another state. For the same reason it is held bound to indemnify the damages caused by the persons under its dependence, and for whom it is accountable.

But in the state a double juridical person is to be recognized—the civil person, inasmuch as it is the possessor of its patrimony and has the capacity to administer it, and the political person, so far as it is a political, independent, and sovereign entity charged with the preservation of the public order and the protection of the citizens. Considered in the first aspect, its responsibility toward the foreigners damnified or injured by the acts of its officers is purely moral, and only in the case of complicity or of manifest denial of justice, could it become international. In this aspect it is contemplated by Cushing, when, speaking of the two classes of officers employed in the administration of public affairs, he says:

> But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government.

And in the same aspect Calvo regards it when he writes:

> Within the circle of jurisdictional limits, all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each state. When they fail to fulfil their duties, exceed then-powers, or violate the law, they create according to circumstances, in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, natives or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice.

With regard to the political personality, the international responsibility of the state for the acts of its officers in the exercise of public authority is subject to clear and well-known rules. Such responsibility is admitted, but only in the case that upon an examination of the circumstances, the fact which has pro-

duced the damage to foreign interests may morally be imputable to the state. Fiore and Calvo concur in subordinating it to four conditions, to wit:

1. That the government may have known in due time to prevent it, the illegal act which its officer intended to commit, and did not prevent it.

2. That it, having been enabled to revoke in time the act of its officer, did not revoke it.

3. That the ignorance of the act intended by the officer may by its circumstances, be judged as malicious or criminal.

4. That having been advised of the facts, it had not pressed itself to blame the acts of its agent, nor to take the proper measures to prevent in future the repetition of the same faults.

Now, supposing for the sake of argument, that General Garcia had been an officer of the federal government, and his embarcation in the steamer *Apure* an illegal act, did the government know it in time to prevent him from committing it? Could the government know it? Could its ignorance be attributed to malice? Would it be just to impute it to the government? It seems sufficient to set down these questions in order to observe that they can not be solved otherwise than by the negative. The Apure arrived at San Fernando on the 16th of October, and on the 17th, at 6 o'clock a.m., left that port, having on board General Garcia with his officers and troops. Between San Fernando and Caracas there is a distance of over 200 miles by land (by water much greater), and at that epoch there was no other telegraphic line in Venezuela than the one from Caracas to La Guayra and Valencia. The same thing may be said regarding the event of Apurito. How could the Government of Caracas have known it before it was accomplished, if even after its consummation it took one month to come into possession of the first news about it, through the note of Mr. Wilson of November 13, 1865?

As to the inactivity which is attributed to the government after it was informed of the occurrence, it is well to recall the diligence shown by General Arismendi, president of the State of Guayana, in his engagement to have the truth duly ascertained through a judicial inquiry by the court of first instance of Ciudad Bolivar, since November 9, the date of the arrival there of the steamer Apure with the most recent account thereof. The meeting of the consuls and other foreigners, held at that town on the 12th of November, passed a vote of thanks to His Excellency General José L. Arismendi, "for his prompt and energetic measures toward a thorough examination into the details of this outrage;" and if the pretended blamable action of the president of Apure is placed as a debt to the account of Venezuela, justice requires that the praiseworthy action of the president of Guayana be equally placed to her account as a credit.

Besides that examination, among the documents are to be found, as evidence of what was done by the Government of Venezuela to speedily obtain official information about the occurrence at Apurito, several notes exchanged, from November 16 to a later date, between the minister of foreign relations at Caracas, and those of the interior and justice, and of war and navy; a report

from the military commander of the State of Apure to the minister of war and navy, of November 29; another from the national attorney at San Fernando to the minister of the interior and justice, dated January 9, 1866; another from the new president of the State of Apure, addressed also to the minister of the interior and justice, under date of January 10, 1866, and, finally an investigation instituted on the 13th of the same month of January before the circuit court of Lower Apure by the national attorney in the State. This suffices to demonstrate that Venezuela did not neglect on that occasion to adopt the means and measures proportionate to the gravity of the case, and is sufficient to withdraw from her the charge of voluntary omission of diligence, which is brought to-day against her. Governments are not bound in such cases to show an extraordinary activity.

> It would be an excessive and unreasonable pretension to demand that a government, occupied as it ought to be in the fulfillment of its multiple functions and duties, should work in all times and circumstances with mechanical precision. (Fiore.)

That was, furthermore, what the political institutions in force allowed her to do. The States of the Venezuelan Union were, as it has been said, independent and maintained in all its fullness the sovereignty not expressly delegated to the federal power. They possessed the exclusive right of civil and criminal legislation within their own territory and their courts of justice were independent. Their officers of every category were held responsible only before their own jurisdiction. The government of the Union could not maintain therein any other resident officers vested with jurisdiction and authority than those of the State itself, except those of the treasury and of the national fortresses, parks, navy-yard, etc., who had jurisdiction only over the affairs belonging to their respective offices, and within the precinct of the fortresses and barracks, being on all other matters subject to the general laws of the State in which they resided. Nor could it station in any State troops or military chiefs with command, even of the State itself, without the permission of the State. Nor could the federal executive interfere by force of arms in the domestic contentions of a State; the only thing permitted to it was the offer of its good offices with a view to bring about a peaceful solution. (Constitution of 1864.)

However imperfect or inefficacious to protect the rights of foreigners that constitution may be judged to be to-day it is not known of any foreign government having ever made the slightest remark to the Venezuelan Government in that regard, and it is presumed that those foreign citizens who, after its enactment, remained in Venezuela, carrying on their commercial business and navigation privileges, voluntarily submitted to it. All that could be demanded from the government of the republic was its loyal and faithful observance in relation to them.

> If a government had adopted, with perfect loyalty and good faith, all the measures at its disposal to obviate an inconvenience; if it had employed all the legal proceedings to prevent and punish him who had caused an injury

to a friendly state, *it would not be just or equitable to declare it responsible for not having employed means incompatible with the spirit of the political institutions, or for having been unable to modify the imperfect system of laws which it found established.* (Fiore.)

Mr. Dalton, the United States consul at Ciudad Bolivar, was no doubt mistaken when, in his protest of November 21, 1865, he holds the Republic of Venezuela liable *for the disasters and murders attendant upon the attack of Apurito, for its neglect of its relations with the State of Apure, one of its constituent portions, inasmueh as the president of the said State of Apure, Juan B. Garcia, a general in the army of the republic, was in actual revolt against its supreme authority. . . .*

General Arismendi was undoubtedly not less mistaken when, alluding to his position and that of General Garcia in his reply to the consuls at Ciudad Bolivar, he expressed his belief that according to the legal system of Venezuela the government of the Union alone could decide such cases, and that with regard to his public acts General Garcia had no other superior than the national executive.

And the learned counsel for the United States before this commission falls into the same error to-day in asserting that the offenders, so called by him, were all under the jurisdiction and authority of the federal government of Venezuela, all officers in the service of the Venezuelan Republic.

The truth is, that according to the constitutional law of Venezuela in 1865, General Garcia, the legal president of the State of Apure, was responsible only to the legislature of the said State, and that the federal government had not the legal power to punish him or even to treat him as a rebel, except by the law of war when it had subdued him by force. But it is not shown that he was in revolt at the time against the federal government. It may be that he did not want to recognize the national attorney appointed by that government for the State of Apure, on account, perhaps, of regarding it contrary to the right of independence of the State; but that was a question of law, not of war.

At all events, within the limits of the exercise of public power, Venezuela seems to have done all that she was bound to do in behalf of her international duties toward the United States. Yet it is important to add that the merit of the evidence affords no ground for imputing to General Garcia any fault whatever.

In view of the insurrection of Generals Sosa and Mendez, Garcia, in his capacity of president of the State, and in the interest of public order, had the right under the law of nations to detain the steamer Apure on her arrival at San Fernando, and to employ her for the transportation of troops and articles of war, without any other condition than previously to settle and pay the price for the service required, and without further responsibility than for the material damages suffered by the steamer on account of her detention, or of her departure from the regular and usual course of her voyage, or the loss of cargo, etc.

> In cases of civil troubles or foreign war, the interest of self-defense or security may impose upon a state the moral obligation of temporarily interfering with commercial transactions, of stopping the movement of merchant vessels, and even of seizing them for the transportation of troops and ammunition, or for any other military operation. State reason surpasses here private interest, whether national or foreign, and legitimates the adoption of these extreme means.
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> The exercise of these two rights, especially the latter (the requisition of a merchant vessel for any public service), is extremely delicate, and requires great regard for the private foreign interests that it sometimes affects. . . . On the other hand, by taking possession of her (the vessel) for a public use, by employing her in military operations, which necessarily are of a hostile nature, it destroys her neutrality, exposes her to risks and dangers of capture or detention, which equity demands that she be insured against, since she has not been able to avoid them. The rule universally recognized on this subject is, therefore, that any government which may be compelled by the circumstances to resort to such appropriation to public uses, is responsible not only for the material consequences to the vessel made the object thereof, but is also held bound before enforcing her requisition, to settle with the interested parties and pay the indemnity due for the service demanded. (Calvo.)

But General Garcia did not make use of that right, as it appears. The assertion that the service rendered by the steamer Apure was compulsory, has no foundation. The officers and crew say in their protest entered early in the morning of October 19, on the very spot of the combat:

> On the 17th instant at 6 o'clock a. m., after Captain Hammer *had agreed*, with the general-in-chief, Juan Bautista Garcia, president of the sovereign State of Apure, for the transportation of fifty soldiers and his officers, their passage and freight having been paid in advance, both more fair than the customary, as provided in the treaty with the national government, we started for the port of San Fernando.

And the foreign consuls residing at Ciudad Bolivar, in their manifesto of November 12, say:

> At this place General Juan B. Garcia, the president of the State of Apure, *demanded* transportation for himself, seven officers, and fifty-one soldiers, with the military material, to be taken at the usual rates of passage and freight, stipulated for in the charter. . . .

And Consul Dalton, in his letter to Ralph Rawdon, of November 25, writes:

> She (the steamer) arrived at San Fernando, midway on the route up the river, where *she was applied to by the legal authorities* to carry some military forces, about 60 soldiers.

And the secretary-general of the executive of the State of Apure, in his certificate of January 18, 1866:

> On the 16th of the same month (October 1865) the steamer arrived at San Fernando, and immediately General Garcia *contracted* with her captain, citizen John Hammer, for passage for himself, for myself, several officers, and fifty soldiers.

And the secretary of General Garcia, in his deposition before the circuit court of Lower Apure, January 1866:

> I know that President Juan B. Garcia, who acted as such about October 16 of last year, *contracted* on said date with the captain of the steamer *Apure*, Mr. John Hammer, for the passage of a force, with their officers.

And the president of the State of Apure, who succeeded General Garcia, in his note of January 10, 1866, addressed to the minister of the interior and justice:

> General Garcia, who was acting at the time as president of the State, *contracted* with the captain of the steamer, John Hammer, for passage for himself, several officers, and fifty soldiers.

No allusion is made in any of these references to the two protests which Mr. Wilson, minister resident of the United States, speaks of in his note of February 25, 1867 to Senor Seijas, nor to any other sign of opposition or reluctancy nor to the absence of Captain Hammer during the steamer's stay at San Fernando, and of which General Garcia is said to have taken advantage to place his troops on board. Probably such absence did not occur, as the steamer arrived there on the 16th and left again early on the 17th. Surely Captain Hammer was not two days refusing to grant the passage applied for by General Garcia, since the steamer did not remain even a whole day at San Fernando. All the probabilities are that such refusal did not exist. Were it not so, Salom, the secretary of the steamer, who received the money for the passage and ought to know all the circumstances of the affair, would have mentioned it in his protest of Apurito, expressly intended to protect the company against all responsibility, and to secure its right to be indemnified for the losses and damages suffered the preceding night. Were it not so, Mr. Dalton would have been careful enough to give prominence to that circumstance in his interrogatory to the witnesses before the court of first instance of Ciudad Bolivar, where he appeared so eager to find General Garcia guilty and to justify the conduct of the officers of the steamer. Were it not so, finally, the same Mr. Dalton would have no doubt called that fact to the attention of Ralph Rawdon, in his letter of November 25, 1865, in which he simply says that the legal authorities of San Fernando had applied to the steamer, etc.

The same thing may be said about the declaration, attributed to General Garcia, of not permitting the steamer to leave, unless she took him with his officers and troops on board. Mr. Wilson"s statement is, perhaps, the only foundation for such incident. Probably Captain Hammer had no motive to refuse transportation to General Garcia. He knew that the State was in revolt since some days before; he was cognizant of it before leaving Ciudad Bolivar, and, besides, that was public and notorious at San Fernando. But General Gar-

cia was the legal president of the State, and the boats of the Orinoco Steam Navigation Company were, by article 10 of their charter, to serve at anytime as transports to the government, and, in fact, they had been serving as such during the whole revolutionary period of Venezuela, from 1849 to 1863, the five years of the Federal war inclusive; not only without any prejudicial accident, but with large profits to the company; in the sole year 1860 the government of the republic had paid them for that service $86,487. General Garcia was not going to encounter the enemy; the scanty number of his force was the best proof of his inoffensive design. He did not take passage for a determined point, but for some place in Upper Apure, within his jurisdiction, which he would designate later on, he had not the intention, perhaps, to land at any place whatever, but to remain in the river on board the skiffs he took with him at San Fernando, together with the other force that went to meet him in the steamer the night of the fight. His passage and that of his small expeditionary force would leave to the company a benefit of over $300, without any danger. Why not accept it?

In the arrival at Apurito, which perhaps is to be considered as the real occasion of the peril which the steamer met with on the night of the I8th October 1865, General Garcia does not seem to have had any participation, he had nothing to attend to there. Apurito was, like San Fernando, one of the ordinary ports of the steamers of the company on their regular course from Ciudad Bolivar to Nutrias, and the *Apure* called there this time, as usual, to land a portion of her cargo. In regard to this particular there is no doubt or contradiction. Where is General Garcia's fault?

He is accused of not having permitted the steamer to be unfastened and held off, in order to prevent the attack, on learning that the enemy was in the town. This charge rests on no proof whatever; nor can the interest be perceived that General Garcia could have, in not taking advantage of that means to save himself, by saving the steamer, from the danger to which they had been unexpectedly exposed; he had not left San Fernando under an aggressive attitude, and probably he was not prepared to fight against an enemy whose force and situation were unknown to him. Such a charge, but with stronger reason, perhaps, could be made against Captain Hammer, did it not appear, as it does appear, that he gave the order to cast off, and that if it was not complied with, *it was because the enemy did not permit it.*

> At any rate, there can be no doubt that the losses of life and property which occurred at Apurito might have been avoided if General Garcia had chosen to prevent them; for all the facts show that if he and his officers and men had behaved with the ordinary courage and discipline of soldiers, and had left the vessel, *as they should have done when they found that she was in danger,* or if he had permitted the steamer to be cast loose from the shore, when the attack began, *nothing serious* would have happened.
>
> Whatever view may be accepted of his action in taking this passenger steamer for the hazardous service in which he proposed to use her, it is unques-

tionable that his conduct, after she reached Apurito, was in violation of every duty he owed to the property and persons under his protection. (Brief of the counsel for the United States.)

It has already been shown that General Garcia *did not take the steamer* by right of authority, as he could have done, *nor did he propose to use her in an extraordinary service*; but like any other passenger, took passage therein for a certain point in Upper Apure, near which she had to pass on her regular course to Nutrias. Transported on the way to Apurito, where the steamer had to call, he found himself, by accident, placed within the enemy's camp.

It is probable that if he had landed then with his guard, nothing serious would have happened to the steamer or her officers, for all the facts show that the attack was not directed against the vessel but against the president of the State and his military force that she had on board. Nevertheless, it would be contrary to the facts to contend that *nothing serious* would have also happened to General Garcia and his troop; the fate which the squad that he sent on shore met with, negatives such contention. Thus, what the claimants should have endeavored to prove was that, on such an occasion, the protection due by Venezuela to the citizens of the United States and their private property, imposed upon the president of the State of Apure the obligation to offer in sacrifice himself, his officers and men, and above all, the social interests represented by them. Will it be necessary to recall that in the conflict of rights, the one of more important concern and of more universal order and more evident title, or in other words, the stronger one, is to be by natural reason preferred to the less important, of less universal order and less evident title, or to the weaker one, and that the social or public right, in other terms, the right of the state, is stronger than the individual, private right, or right of the citizen? Where is, therefore, the fault of General Garcia?

At least it seems just to recognize that General Garcia's conduct at Apurito did not violate any duty of Venezuela's toward the United States. The right and duty of self-preservation and defense, as well as the laws of war, entitled him to continue occupying in that emergency the steamer, which a combination of casual circumstances had put under his martial law. His duties as the president of the State of Apure obliged him to act so, if he believed it necessary to protect the possession of his authority attacked and the welfare of the community confided to his care. The legal duties of persons in the position of General Garcia are strict and imperative; if they fail to do all that they are required by the circumstances to do, they incur solemn responsibility, legal and moral, and everybody can value the importance that the actual occupancy of the steamer ought to have had for him, were it only to prevent her from falling into the enemy's power. The defense of the party attacked is always just, because it is conformable to moral order, and gives a right to the adequate means for securing that end, and also to the spontaneous help of all those who are in a condition apt to furnish him assistance, because every man is bound to cooperate to the preservation of the others, and from this obligation springs the right to obtain

his help. These are rules of natural justice imposing obedience, especially with respect to heads of government, whose loss is supposed ordinarily to produce disorder and confusion in the societies governed by them.

It is true that the very right of defense, notwithstanding its perfect accordance with natural justice, is, however, limited to *necessity*. But General Garcia could not be justly charged with having exceeded that limit. On the contrary, by his moderation and prudence, he seems to have supplied a motive to be accused of want of courage and discipline. His action in sending to shore a squad as soon as he knew the impossibility of casting off from the port, does not prove that he had changed his condition of the party attacked for that of aggressor. Sometimes the true aggressor is not he who attacks the first, but he who has put his adversary in the necessity of attacking to defend himself. This is doctrine of natural justice.

Even admitting, then, the general rule of public law recognized in the message of the executive, General Falcon, presented to the Venezuelan Congress, February 26, 1867, that "it is the *central power* that represents the interests of the federation in the great society of nations, to which *it alone is amenable for all the acts violating the principles of international law, which are committed by any state whatever*"; even admitting that, according to that rule "the United States might have the right to look to the federal government of Venezuela for redress for wrongs done to their citizens by the authorities of any State of the Venezuelan federation"; yet in the case of Apurito, the United States seems to have not that right, for there was not any wrong act of the State of Apure for which Venezuela could be amenable.

As the losses of life and property which occurred at Apurito were the natural consequence of an act of war, in which the part of General Garcia was purely defensive, and the aggressors were not officers or troops either of the Government of Venezuela or of the State of Apure, but of a political party in a state of rebellion against the legal authority of the latter, it is evident that this case does not fall either in the division of acts of public officers, or in that of acts of private citizens, for which governments may, under certain circumstances, be held internationally responsible. According to the evidence submitted, this is clearly a case of losses and damages suffered by foreign citizens in times of internal troubles or civil wars. Is Venezuela amenable in such a case?

Relying upon her own laws, certainly not. Since 1854 (6th of March) her Congress had enacted a law to the effect of defining her responsibility in such cases:

> ART. No foreigner has any action to claim of the government of the republic, by way of indemnity or redress, the damages and losses that their interests may suffer in consequence of political commotions, or any other cause, *when such damages and losses shall not have been committed by lawful authority.*

Some passages of diplomatic correspondence have been alleged by counsel for the claimants, in proof of the opinion that the said law of Venezuela was

enacted without any due sense of the obligations of the government of that republic to other governments, pursuant to public law and to treaties.

With respect to treaties, it does not appear that Venezuela has ever recognized in her treaties with European or American nations any principle contrary to the one enforced in the law before quoted; at least in that of 1860 with the United States she did not. Far from it; in her treaty of recognition and amity of 1845 with Spain both parties accepted in principle the doctrine of the Venezuelan law of 1854, in reciprocally declaring that they would not make any claim for damages or losses caused by the war (Art. 11), and the same doctrine was afterward, in 1858, formally admitted in the treaties with Sardinia, and with the former Hanse towns.

Pursuant, now to public law are governments responsible, or are they not, for the losses and damages resulting from such cause?

> This question has been discussed at length, and at the end solved in a negative sense.
>
> To admit in such cases the responsibility of governments, that is to say the principle of indemnity would be to create an exorbitant and lamentable privilege, essentially favorable to powerful states, and injurious to weak nations, and to establish an unjustifiable inequality betwixt natives and aliens. On the other hand, by sanctioning the doctrine which we impugn, a strong though, not direct attempt would be made against one of the constitutive elements of the independence of nations, that of territorial jurisdiction, such is, in fact, the real scope, the true meaning of that so frequent resorting to the diplomatic course to solve questions which, by their nature and the circumstances in which they are produced, belong to the exclusive province of the ordinary tribunals.
>
> Summing up now our views on this subject, we feel compelled to conclude:
>
> > 1st. That the principle of indemnity and of diplomatic intervention in favor of foreigners, by reason of damages suffered in cases of civil war, *has not been, and is not, admitted by any nation of Europe or America*.
> >
> > 2d. That the governments of the powerful nations exercising or imposing this pretended right against states, relatively weak, *commit an abuse of power and force that nothing could justify, and as contrary to their own legislations* as to international usages and to political conveniences." (*Calvo*.)
>
> A nation which would not prevent its subjects from causing damages to foreigners would engage its responsibility because, the natives being under its authority, it must look after them in order that they may not cause damages to others. *But such negligence does not render a nation responsible for the acts of those among its subjects who have put themselves in a state of insurrection and have broken their bonds of loyalty, or who are no longer within the limits of its territory*. Under such circumstances, and whatever the character attributed to their acts and conduct may be, *those citizens cease to be in fact under the jurisdiction of their government*." (Rutherforth.)

> States are not bound to allow indemnities for losses and damages suffered by aliens or natives resulting from internal troubles or civil war. (Bluntschli.)
>
> As to damages suffered in case of war or revolution, foreigners have no right to be indemnified by the state where they reside; that would be to demand for the persons residing in another country advantages which the natives do not enjoy. When a person establishes himself in a foreign state, he is bound to bear the consequences. The claim of England against Naples and Tuscany, in 1848, was rejected, and not only that, but the Russian Government, having been invited by the two Italian states to act as umpire, refused the arbitration on the ground that the English demand seemed to it so groundless that to accept the part of umpire would have been to admit doubts which did not exist. Just so in 1851, the United States refused to indemnify the Spaniards murdered by the mob at New Orleans, and did not grant reparation for damages, except to the Spanish consul, who had been insulted, and who on account of his official character was especially placed under the protection of the government. (Heffter, Note G.)

The aforesaid opinions are entirely in accordance with the law and practice observed by the various nations of Europe and by the United States in their mutual relations, and also with the Venezuelan law of 1854. Certainly not with the rule that they have pretended to impose upon the other American states in general, that aliens are more entitled to protection and have right to greater and stronger privileges than the natives of the country where they reside. But can the general principles of international law be changed according as to the places where they are to be applied? Can they be deprived in South America of the virtual justice which they possess in Europe and North America? Is the principle of exception just? To these questions Calvo answers as follows:

> This principle is intrinsically contrary to the law of the equality of nations and most disastrous in its practical consequences. In its absolute claim against the American states, it is not only noxious to the maintenance of relations of good harmony, but it is, above all, highly unjust, inasmuch as the European governments do not adopt it as the invariable rule of conduct; among themselves. Every law, in order to become acceptable and respectable, ought to rest on the basis of equality, to protect the weak as well as the strong; to defend the rights and interests of each one without discrimination; in one word, to weigh equitably upon all. The moral bonds which unite the peoples are of the same order, and imply an absolute character of solidarity. A state, therefore, could not claim among the other states a privileged situation which it would not be ready to grant them at its turn, nor claim for its subjects advantages superior to that which constitutes the common law of the inhabitants of the country.

And Bluntschli:

> The maritime powers that have acted otherwise and forced the smaller states to allow indemnities have taken advantage of the superiority of their forces.

And Fiore:

> Protection is illicit and unjustifiable where it has for its purpose to secure in favor of the citizens residing abroad a privileged position.
>
> Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favor their citizens and exempt them from certain obligations, or grant them privileges of any nature whatever.

And Cushing:

> As to the exceptions to the general rule, they have grown up chiefly in Spanish America in consequence of the unsettled condition of the new American republics. Great Britain, France, and the United States have each occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference, which neither of us would tolerate at home; in some cases from necessity, in others with very questionable discretion or justification, so as greatly to aggravate the evils of misgovernment therein, as will plainly appear on a careful study of the internal condition of the Spanish American Republics.
>
> It seems to me that considerations of expediency concur with all sound ideas of public law to indicate the propriety of a return to more reserve in all this matter, as between the Spanish American republics and the United States; *that is, to abstain from applying to them any rule of public law which we do not admit to have applied to us; to do only as we would be done by and to consult their well-being and cultivate their friendship by adhering to the impartial assertion, whether in claim or in rejection of claim, of the established rules of the international jurisprudence of Christendom*.

In view of so numerous and creditable opinions, the conclusion *that the principle of the nonresponsibility of states for the losses and damages suffered by foreigners in times of internal trouble or civil wars*, is the true principle of international law, applicable to Venezuela in the case of the Apurito conflict, seems wholly warranted by truth and justice. International relations can not properly exist but between sovereign and sovereign; that is, between individuals of the same species, equal in independence. Before the law of nations all nations are equal, and if the wish of the powerful ones to cultivate relations of justice with the weak is sincere, and if the time and thought and labor which they devote to foster relations of friendship and commerce with them is with a view to valuable returns, they must behave toward them as they behave toward each other.

Summarizing, with regard to all the points of view from which this case has been considered, the claimants have failed to establish their right to be indemnified for the alleged losses and damages suffered by them in consequence of that regrettable conflict; and while this inference is true, in general, as to all of them, it seems to be so still more, in particular, with respect to Ralph Rawdon, as representative of "The Orinoco Steam Navigation Company."

Firstly, because the tarrying of the steamer at Apurito, on her way to Nutrias, which may be regarded as the proximate cause of the said conflict, was in the interest of the company.

Secondly, because according to the charter of the company "the officers and troops of the government and articles of cargo of whatever kind they may be, belonging to the government, shall likewise be transported in said steamers at reasonable prices for passage and freight, to be agreed upon with the competent authorities." Whatever the influence of the presence of General Garcia and his officers and troops on board may have been in bringing about the conflict, this was a peril to which the company had voluntarily subjected itself, as per article 10 of its charter. As to the doubt, whether such obligation was extendible or not to the transportation of officers and troops belonging to the governments of the States, the fact of Cap-tam Hammer having agreed with General Garcia upon his passage and that of his officers and men on terms conformable to said obligation, seems to have resolved it in favor of Venezuela. If it is not so, that question should have been determined by the authorities and according to the laws of Venezuela, in compliance with article 12 of the said charter, and should have never been the subject of an international claim.

Consequently, I am of the opinion that these four claims of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole, and Narcisa de Hammer, should be decided against the claimants.

In deference, however, to the judgment of my colleagues, I will sign an allowance for $5,000 each in cases No. 28 and No. 29, in addition to the amounts the claimants have already received therein.

Opinion of the Commissioner, Mr. Little

. . . The evidence does not show nor history chronicle that there was a state of war in Venezuela at the time of this disaster. The occurrence can not be viewed, therefore, from that standpoint. The ultimate responsibility of Venezuela for these wrongs is in nowise dependent upon her form of government; or the domestic distribution of her powers. For redress of injuries done her citizens, the United States must look to Venezuela, and not to any of her political subdivisions.

The question, then, is: Wherein and how was Venezuela derelict in duty if at all, in respect of this tragedy? The theory that General Garcia unlawfully or unwarrantably boarded the *Apure* with his troops, took military control of the boat, precipitated the attack at Apurito, and held the noncombatants on the vessel in the fight, is not only not supported by the evidence, but against its decided weight. If these claims depended upon the establishment of anything like such a state of fact they would have to be dismissed, for the facts and circumstances point quite to the contrary.

Garcia's embarkation was lawful and without coercion. The attack at Apurito was a surprise to him as much as to the master of the vessel. The

simple truth seems to be that he disembarked his little squad of militia in the dark in an ambuscade of conspirators to hunt down and suppress whom, not improbably, he had started, and got this far on his trip up the river, though he is spoken of as being on a tour of observation. They bided their time, waited till the vessel was fastened, to prevent his escape, and then, on the appearance of his force, opened fire. The confusion and demoralization of his troops under the circumstances is not strange, or attributable to any fault of his. The criminals were the conspirators upon the shore.

Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one.

But neither of these things appears to have occurred. It is true the evidence is not fall and clear on this point. There is consequently some doubt about it. On the whole, however, considering the heinous character of the offense, it may fairly be said that Venezuela here fell short of her entire duty. And such may perhaps be inferred to have been the view, from acts and declarations, of her executive and Congress. But her failure was not flagrant, and the allowance should be tempered with the doubt.

The damage to the vessel was not great. The consequential damages claimed by the company are not satisfactorily shown, if indeed they are not too remote. It is difficult to believe that this company, which had endured the storms of civil war for fifteen years after its formation and entrance on business, was driven from the Orinoco by this one calamity, tragic and appalling as it was. Stackpole's injury was not disabling or severe.

The allowances should not, however, in such a case, be confined to actual losses. The violated majesty of the law and regard for human life should have consideration. Remembering that the sum of $12,000 has already been paid the widows to whom we can grant no relief, and who, of course, were the greatest sufferers, we have concluded to allow $5,000 without interest in each of the two cases in addition to what has already been received. The entry may therefore be for $20,000 in case No. 28, and $7,250 in case No. 29, less what has been received under the former treaty.

Opinion of the Commissioner, Mr. Findlay

. . . After reading the record and carefully considering the arguments, which have been very full and exhaustive, on both sides, it does not seem to me that any case has been made out against Venezuela, except that she did not go as far as she ought in bringing the offenders to justice. She surely had no means of knowing or anticipating such a murderous outbreak as that which occurred at Apurito. As I understand the testimony, General Garcia and his detachment of troops on board the *Apure* were entirely unprepared to meet the assault; and whatever may have been their expectations as to trouble somewhere on the route, certainly do not appear to have apprehended any difficulty at this particular point. The attack was in the nature of an ambuscade and complete surprise. It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment.

I can not accept the theory of war as affording an excuse for Venezuela in this case. Of course, if war existed, it would not be worth while to inquire further, for in such a state there is but one law recognized, and that is the law of force, meliorated and modified somewhat in actual practice by the more refined and humaner instincts of modern times; but still, in its ugliest moods, the assertion of a power which recognizes no right superior to the doing and the appropriating of whatever is necessary to success. Had such a condition of belligerency existed, it could not be claimed that the attack upon the Apure, having on board a battalion of the enemy, was not justified by the laws of war, although civilian passengers happened to be on board at the same time, and the assault partook of the nature of an ambuscade, and was made under cover of the night; but where is the evidence that a state of war existed?

As I read the record, General Garcia, then president of Apure, started out from San Fernando with a small body of troops on a tour of observation. He only had fifty men in all, and with such a force it is apparent that the resistance which he expected to overcome, whatever it was, could not have been very formidable. It appears that he took small boats with him, and that would indicate an intention to explore some waters, tributaries to the Orinoco, which were not navigable by the steamer. The record is not clear, however, as to the object of his expedition, but as I understand it, fails entirely to disclose any evidence of a state of war, such as could be accepted as an excuse for the attack which ensued. It was urged in argument that the conditions were somewhat similar to those the United States was confronted with by the insurrection in the Southern States; but there is a wide difference between the cases. The South, as it was called, was a recognized belligerent *de facto* government, beyond the jurisdiction and control of the United States for the time being, and for this reason the

United States could not be held responsible to foreign powers for acts done by the Confederates; but in this case Zamora occupied no such status, and besides Apure, in my opinion, can not, with respect to Zamora, be placed in the same relation as the United States with the Southern Confederacy. The constitution of the United States of Venezuela, adopted in 1864, has been quoted by Commissioner Andrade for the purpose of showing that Venezuela was really composed at this time of a number of separate independent States, each autonomous and supreme as to all matters of internal jurisdiction, and only related to a common federal head, through the fiscal and war departments.

He says in the very learned and elaborate opinion which he has filed, that Apure was, in effect, a sovereign independent State, although an integral part of a body composed of several other States, equally sovereign and independent, called the United States of Venezuela, governed by a central administration, which was limited, however, to the power of making war and to the collection of revenues necessary for this purpose and the general welfare, and that under this decentralized system which was created in fact as the result of the long contention between the unionists and their antagonists for the express purpose of embodying and giving effect to the federal, as opposed to the national, idea of government, Apure was responsible for whatever was done by her authority and Venezuela must be exonerated. To this notion of Venezuela and her exterior responsibility I can not give an assent for a moment. Not only do I regard the question as closed by the principles laid down in the case of the *Caroline*, but if it was to be deemed as *res nova*, I should have no difficulty whatever in holding that whatever may be the relations inter sese between the constituent parts of a federative body, admitted as such into the family of nations, they can play no part in determining the liability of the body by its own distinctive name to other nations for wrongs inflicted by any of the parts or within the domestic jurisdiction of the same.

Apure has no flag recognized among the national flags of the world; she has no power to make war on other nations; she can make no treaties, and she can break none; and as far as her relations with foreign powers are concerned her existence is completely veiled in the sovereignty of the United States of Venezuela, which, by the necessity of the status, must be responsible in any proper case for whatever is done within the limits of its jurisdiction. Conceding, then, that Zamora was in revolt against Apure, and the insurrection had swollen to such a head as to relieve the parent state from responsibility, still, in my opinion, other things being equal, Venezuela could not be excused because Apure was not liable, but only because she was not responsible herself. There are nine States in Venezuela, and if the doctrine of the learned commissioner is accepted, instead of looking to one responsible head for redress for international wrongs, the state seeking a remedy would have to look to these different sovereignties, according to the particular jurisdiction within which the offense may happen to have been committed. As these matters are usually attended to by the diplomatic representatives accredited to the country in what capacity

would the minister of the United States to Venezuela address the government of Apure, for instance?

How would the State Department conduct the correspondence? And if redress were refused, against whom would reprisals be taken or war declared, in any case of sufficient magnitude to justify such extreme measures? Could the rest of Venezuela be at peace while Apure was engaged in war with a foreign power asserting the rights of its citizens? These questions answer themselves, and I can never assent, therefore, to the doctrine that as between the members of the family of nations any third party can be recognized and treated as responsible for an international offense, simply by reason of internal relations to some federal head.

Case of Amos B. Corwin *v.* Venezuela (the schooner *Mechanic* case), decision of the Commissioner, Mr. Little*

Affaire concernant Amos B. Corwin c. Venezuela (Affaire de la goélette *Mechanic*), décision du Commissaire, M. Little**

Prize law in the context of war—seizure of a neutral vessel and its cargo considered to amount to an act of piracy—in front of prize courts, the *onus probandi* of a neutral interest rests on the claimant—exclusive right of the State to which the captors belong to examine the conduct of its own members before becoming answerable for what they have done—in practice, prize courts judgments respected as much as judgments of municipal courts despite their summary proceedings.

State responsibility—denial of justice resulting from its prize courts' judgments—State's liability begins only when the court of last resort has acted on it—no right for subjects of a neutral State to apply to their own State for a remedy against an erroneous sentence until the final appeal.

Standing of an insurance company in front of the Claims Commission—standing in its own right—in case of abandonment of property and the subsequent payment of the entire loss, the insurer succeeds to all the rights of the insured respecting the property—competence of the Commission to assess whether the proceedings and judgment of the prize court were manifestly and certainly wrong.

Droit de prise dans un contexte de guerre—saisie d'un navire neutre et de son chargement réputée équivalente à un acte de piraterie—devant un tribunal des prises,

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3210.

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