

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

---

**RECUEIL DES SENTENCES  
ARBITRALES**

**Louis B. Gordon (U.S.A.) v. United Mexican States**

8 October 1930

VOLUME IV pp. 586-593



NATIONS UNIES - UNITED NATIONS  
Copyright (c) 2006

*Decision*

The United Mexican States shall pay to the United States of America on behalf of Lillie S. Kling the sum of \$9,000.00 (nine thousand dollars) without interest.

---

LOUIS B. GORDON (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, dissenting opinion by American Commissioner, undated.  
Pages 50-60.)

---

RESPONSIBILITY FOR ACTS OF MILITARY OFFICERS.—DIRECT RESPONSIBILITY. RECKLESS USE OF ARMS.—ACTS OUTSIDE SCOPE OF DUTY. While engaged in target practice on grounds of Mexican fort two Mexican military officers, one a captain and the other a doctor, wounded claimant with one of their shots. Claimant was on board an American vessel anchored below the fort. Apparently no effort was made by the officers to ascertain whether any vessels were behind the target wall. Daily target practice was mandatory under Mexican Army Regulations. Pistol with which shots were fired was one privately owned. *Held*, (i) act resulting in injury was a private act and not one in line in duty for which respondent Government was responsible, and (ii) act was not an act of official resulting in injustice within the terms of the *compromis*, since such acts must involve acts unjust according to international law and in the instant case there was no responsibility at international law.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH. One of two military officers who shot American subject during target practice was not arrested therefor until six months after the event. No one was ever punished in connexion with such shooting, the accused being discharged on the ground that it could not be ascertained which of the two officers had fired the shot in question. *Held*, denial of justice below international standard not established. With respect to delay in arrest, it appeared that political disturbances then existed throughout the Mexican Republic.

*Cross-references*: Am. J. Int. Law., Vol. 25, 1931, p. 380; Annual Digest, 1929-1930, p. 170; British Yearbook, Vol. 12, 1931, p. 168.

*Comments*: Edwin M. Borchard, "Recent opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735.

*Commissioner Fernández MacGregor, for the Commission*:

Claim is made in this case against the United Mexican States by the United States of America on behalf of Louis B. Gordon, an American citizen, to obtain damages in the sum of \$5,000.00 United States currency, for physical injuries received at the hands of two Mexican military officers, upon whom absolutely no punishment was imposed.

On November 23, 1912, the steamship *San Juan*, owned by an American company, was anchored about one half mile from shore in the Port of Acapulco, Guerrero, Mexico. Louis B. Gordon, who was first assistant engineer of the vessel, noticed at about 5.45 P. M. that the ship was being fired upon by some person or persons stationed on the nearby Fort San Diego, and reported the matter to the Captain who ordered him to warn the passengers and the officers to remain on the opposite side of the ship. While carrying out this order the claimant was wounded in the left side being totally incapacitated as a result of the injury for twenty-six days and unable fully to perform his duties as engineer for three months.

At the request of the American Vice Consul at Acapulco, the Mexican military authorities investigated the case, reporting that Dr. Juan Ávalos had fired the shots and that he had been immediately placed under arrest. The matter was referred to the District Judge of Acapulco who personally boarded the vessel prior to its departure to make the necessary investigation which showed that not only had Dr. Ávalos fired but also Captain Felix Aguayo, while both were engaged in target practice.

The proceedings followed the usual course, and finally the Judge rendered a decision acquitting the two persons accused of wounding Gordon on the ground that as it did not clearly appear which of the two individuals engaged in target practice had fired the shot causing the injury, the provision of the Mexican law directing that in case of doubt the accused must be acquitted, was applied.

The American Agency alleges in the first place that in view of the fact that the two Mexican military officers in question inflicted upon Gordon the physical injury of which complaint is made while engaged in target practice which is prescribed by the Mexican Army Regulations, the Mexican Government is directly responsible for the resulting personal damages. Reference was made in this regard to a number of provisions of the Mexican Army Regulations to show that daily target practice was mandatory from which it is to be presumed that Captain Aguayo and Dr. Avalos were complying with a duty imposed upon them by law when they wounded the claimant. It was represented that soldiers are on duty 24 hours a day, and that as the target practice in question took place at five o'clock in the afternoon on the grounds of a Fort, the foregoing clearly demonstrated that Mexico is directly responsible according to the established principles of international law.

The foregoing reasoning tends to demonstrate a legal presumption that the Mexican officials were engaged in the performance of a military duty when they wounded Gordon. But the record of the proceedings does not sustain this presumption. Doctor Ávalos testified that he acquired a "Parabellum" pistol, and wishing to try it out, together with Captain Aguayo, set up a target and began firing. Aguayo confirms this version and even adds that the pistol was unfamiliar to him as he had never fired one of this make. It is also to be noted that the persons responsible for the crime were turned over to a civil Judge and not to the military authorities as would have been obligatory had they committed a crime while on duty. Colonel Gallardo, the Commandant of the Fort, told the Captain of the ship that the shots had not been fired by any of his men. In view of the preceding, it seems reasonable to assume that the target practice of the two officers was not that prescribed by Regulations, but of an absolutely different character instituted as the result of the private purchase of the "Parabellum"

pistol. It is not known on the other hand whether army doctors are required to perform target practice. Everything then leads to the belief that the act in question was outside the line of service and the performance of the duty of a military officer, and was a private act and under those conditions the Mexican Government is not directly responsible for the injury suffered by Gordon. (See Borchard, *Diplomatic Protection of Citizens Abroad*, par. 80, page 193, Ed. 1922; the case of *Youmans*, Docket No. 271; the case of *Stephens*, Docket No. 148, of this Commission).

The Commission likewise rejects the contention of the responsibility of Mexico founded upon the clause of the General Claims Convention under which the two contracting nations assume responsibility for claims arising from acts of officials or others acting for either Government and resulting in injustice. Not every act of an official is binding upon the Governments; it is necessary that it "result in injustice" and this phrase is merely another manner of saying that the act is unjust according to international law. The principle is that the personal acts of officials not within the scope of their authority do not entail responsibility upon a State. It has already been said that the Mexican officials in question acted outside the line of their duty. Therefore no responsibility attaches to the Mexican Government on this count.

The claimant also complains that the efforts made by the Mexican authorities to arrest and bring to trial the perpetrators of the crime, were lax and inadequate. The Commission finds that the preliminary proceedings were instituted immediately, since notwithstanding the fact that the Captain of the vessel and the American Vice Consul decided not to request the arrest of the guilty persons, so as not to delay the sailing of the said vessel, the case from the very day of the events was before the Judge who personally boarded the ship in order to make the preliminary investigation. Dr. Ávalos was arrested at once and his formal commitment to prison ordered on the second of December; the report of the expert on the wound suffered by Gordon was rendered on November 25, and although the Commission has not before it the whole judicial record, but only extracts thereof filed by the Mexican Agency, it is assumed that further investigation was made and other witnesses examined, as shown by the final decision of the case and the statement of the American Vice Consul, who on the 26th of November, addressed a letter to the Secretary of State reporting that the trial Judge had asked him that same day for the affidavits executed by the persons on the ship who had witnessed the events. Unfortunately, it seems that the arrest and examination of Captain Aguayo did not take place immediately. There is correspondence from the American Consulate addressed to the Judge and to the Military Commandant of Acapulco requesting information concerning the status of the proceedings and indicating the failure to arrest Captain Aguayo. The Mexican authorities replied (it appears with some delay because of the fact that the communications were written in English) that they had been unable to effect the arrest of Captain Aguayo for the reason that he had been assigned to field service, but that the proceedings were being followed and that letters rogatory had been sent to another Judge, (probably to examine or arrest Captain Aguayo). The fact is that he was not arrested until July 16, 1913, that is to say, six months after the events, and formally committed to prison on the 19th of the same month. The delay is evident and is not sufficiently explained; counsel for Mexico made reference to the then existing political

disturbances extending throughout the whole Mexican Republic, disturbances which are confirmed by history (the overthrow of President Madero by Victoriano Huerta in February of 1913) and corroborated to a certain extent by the correspondence of the American Consul addressed to the Secretary of State in Washington, which on April 24 states:

“Government is merely nominal and without adequate authority. The courts are paralyzed by fear ....”. “Anarchy prevails throughout this region.”

As to the remaining points, it does not appear so clearly that the Mexican authorities were disposed to treat Captain Aguayo with lenity, for although it is true that he was not arrested until July 16, 1913, he was not allowed his liberty on bail until the following 23rd of August, notwithstanding the fact, that under the provision of Mexican law, this could have been allowed much earlier. After the arrest of Captain Aguayo the proceedings continued their course until the rendering by the Judge of the final decision on October 2, 1913. It does not appear then that there has been in this case defective administration of justice so clear as to give rise to international liability.

The American Agency complains finally, that the decision rendered in the case constitutes a denial of justice, inasmuch as the two persons responsible for the physical injury suffered by Gordon were released without the imposition of any penalty. The facts proven before the Judge and upon which he based his decision, are the following: Doctor Ávalos and Captain Aguayo arranged to try out a small pistol belonging to the former on the covered way of Fort San Diego, setting up a target against a wall one meter in height which faced the sea; they did not take the precaution of ascertaining whether there were vessels of any kind behind the wall; they fired shots the number of which cannot be determined since the witnesses and the accused themselves do not agree on this point; the latter state that one shot only fired by Captain Aguayo passed beyond the wall into the sea; but the inspection of the said wall and of the *S.S. San Juan* shows that several shots passed beyond the wall, it not being possible to determine which one of the two accused fired the shots which struck the *S.S. San Juan*. The Judge drew the conclusion, based on the foregoing, that the act of the accused was not intentional, but that there existed carelessness, imprevision and lack of reflection or care on their part in firing the shots; that the *corpus quasi-delicti* is proven by the physical injury received by Gordon; but as the wound was caused by one shot only and being unable in any way to ascertain which one of the two accused fired it, neither of them could with certainty be declared to be the author of the physical injury in question, therefore, basing his action on a provision of the Mexican law which states that an accused cannot be convicted unless it is proven that he had incurred in the commission of the crime some of the penal responsibilities fixed by the law, and that in case of doubt he must be acquitted, he absolved the two accused in this case.

It is possible that the Judge could have imposed upon the accused a penalty based only on the carelessness of their act of discharging a firearm without taking the proper precautions. But it seems that the crime of which Ávalos and Aguayo were accused, that of physical injuries through negligence (*por culpa*) was a reasonable and adequate charge, when the events were recent, and the Judge was restricted to the complaint as presented. Apart from the injuries inflicted, the act of carelessness or imprevision on the part of the accused would have merited a very small penalty.

The decision was reviewed by the competent Superior Court and found to be in accordance with the law. The question then, is one of a decision of a court of last resort and in view of the circumstances, and of the opinions of this Commission in analogous cases, it cannot now be said that the said decision amounts to an outrage, or that it is rendered in bad faith, or shows a wilful neglect of duty or insufficiency of governmental action so far short of international standards as to constitute a denial of justice.

For the reasons stated, the claim of Louis B. Gordon must be disallowed.

#### *Decision*

The claim of the United States of America on behalf of Louis B. Gordon is disallowed.

#### *Commissioner Nielsen, dissenting.*

Contentions with respect to liability are predicated on two grounds: (1) direct responsibility for the action of Mexican military authorities in connection with the shooting of an engineer on an American vessel, and (2) non-punishment of the offenders.

I do not find myself in entire harmony with the conclusions of my associates nor with the arguments advanced by either Agency in its brief relative to the question of responsibility for the acts of soldiers, and specifically in this case, for the acts of officers. It seems to me that with respect to the majority of cases coming before international tribunals involving questions as to the responsibility for acts or omissions of agencies of functionaries of a government it is convenient and logical to make use of two general classifications.

On the one hand, a nation becomes responsible if there is a failure to live up to well defined obligations of international law. Thus for example, it is a requirement of international law with respect to injuries caused by private individuals to aliens that reasonable care must be taken to prevent such injuries in the first instance, and suitable steps must be taken properly to punish offenders. When conduct on the part of persons concerned with the discharge of governmental functions results in a failure to meet this obligation a nation must bear the responsibility.

On the other hand, there is what may conveniently be called a direct responsibility on the part of a nation for acts of representatives or agencies of government, such as liability under certain conditions, for acts of soldiers or damage caused by public vessels. A nation is not responsible for acts of soldiers committed in their private capacity, that is, when the soldiers are not under some form of authority. But it seems to me that it may be misleading to emphasize too much any idea as to reprehensible acts being within the competency or scope of duty of those guilty of misdeeds. There are of course private acts of malice that do not impose responsibility. But in connection with the question of direct responsibility it is assuredly important to take account of the nature of the agency or functionary that inflicts injury and of the element of control which the law presupposes in connection with this form of responsibility. Thus in the *Youmans* case, *Opinions of the Commissioners, Washington, 1927*, p. 150, the Commission expressed its views with respect to an argument made as to responsibility for acts of an official committed "outside the scope of his competency, that is to say, if he has exceeded his powers". It was observed in effect by the Commission that if there could be no responsibility for an act considered to be "outside

the scope of his competency" it would follow that generally speaking no wrongful acts committed by an official could be considered as acts for which his government could be held liable. Cases in which laws enjoin wrongful action on officials are undoubtedly exceptional. And it was further observed that soldiers inflicting personal injuries or committing wanton destruction or looting always or practically always act in disobedience of some rules laid down by superior authority, and that there could therefore broadly speaking be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts. Undoubtedly in the case of soldiers the distinction must be made between what have been called private acts and other acts. It is therefore proper to take account of conditions under which acts are performed. But it is equally important, if not more important, as I have suggested to take account of the principle of responsibility which has its justification in that control which a nation must exercise to prevent wrongful acts and which takes account specifically of the position of those committing such acts.

The element of control was interestingly emphasized in the case of the *Zafiro*, decided by the tribunal under the special Agreement concluded between the United States and Great Britain August 18, 1910, American Agent's *Report*, p. 478. In this case the United States was held responsible for looting committed by certain members of the crew of a vessel at a time when they were on shore leave and relieved from their duties. This decision may perhaps be considered to lose some of its force when account is taken of the fact that goods taken were returned by the Commander of the vessel, and that although the premises looted had been overrun prior to the arrival of the members of the crew, the tribunal held that, since the latter had participated in the wrongful act, the United States should be held liable for all losses sustained. However, the case has an interesting bearing on the element of control that it was considered the government was obliged to exercise.

In the instant case it would seem to be clear that if private soldiers had engaged in target practice from the fort or from environs belonging to the fort there would be responsibility on the part of the Government. And this would be so, even though the soldiers were engaged in target practice at some hour not specifically prescribed, or in some manner not precisely required by army regulations. The soldiers in this situation would be in the position in which it is considered responsibility would attach for their acts; they would be under some form of control or authority of officers. It therefore seems to me that if officers themselves engaged in some kind of target practice in the same circumstances there should be responsibility on the part of the Government for their acts. The instant case seems to me to present such a situation. The two accused men advanced the defense that they were engaged in target practice. The judge declared that this was in itself a licit act. But he found that the evidence established imprudence, improvisation, unskillfulness, negligence or lack of precaution and illicit consequence. Of course I do not mean that because of a man's official status a Government must be responsible for every wrongful act committed by an officer.

The element of uncertainty with respect to the question of direct responsibility does not appear, in my opinion, in connection with the phase of the case relating to non-prosecution. The record of course shows much delay.

It may seem a little strange that both officers should be found innocent. But for the purpose of rendering a decision it appears to be unnecessary to quarrel with the decision rendered by the judge. From the standpoint of the Commission it is not a vital point whether he properly weighed the evidence, or whether his decision was erroneous in the light of his conclusions, or whether he could reach no other decision with respect to the particular charge filed against the two defendants, an insufficient charge having been made by prosecuting authorities. The fact remains that the two men fired, as the judge states in his opinion, twelve to fifteen shots in the direction of the vessel. Several bullets struck the ship; the lives of passengers were endangered; the claimant was seriously wounded and incapacitated for virtually a month. The judge in his opinion stated that the evidence proved "the imprevision, the lack of judgment or care on the part of the authors who did not take any precaution, not even the precaution of looking beyond the wall which was only one meter high to ascertain that there were no vessels in sight, for if they had done so they could not have failed to notice that the *S.S. San Juan* provided such a large target", and he expressed the conclusion that the illicit consequences of the target practice was established by the evidence before him.

Such recklessness with such effect on a foreign vessel is assuredly not a matter of slight concern. The judge points out in his opinion how indifferent the defendants were to the possible consequences of their acts. Indeed if the officers had diverted themselves shooting at the ship, it would seem that they would not more greatly have endangered lives and property. From a communication written by the Commander of the vessel under date of November 25, 1912, it appears that he took it for granted at that time that the shots were aimed at the vessel.

There may be and probably is a distinction between the offense of such reckless action by itself and the offense of such action coupled with consequences such as the wounding of Gordon. For the latter the judge declared himself unable to inflict punishment, declaring that he could not determine from the evidence which of the defendants hit Gordon. But the utter recklessness which the judge describes undoubtedly is, and certainly should be, punishable under Mexican law, but through either the fault of the prosecuting authorities or through fault of the judicial authorities no punishment was inflicted.

I understand the reasoning of my associates, and I realize that in all countries there are errors and inadequacies at times in connection with the administration of criminal jurisprudence. However, it seems to me that, if the instant case is to be decided by strict application of law, it is not possible, in the light of the delayed and abortive proceedings against the defendants, to reject entirely the contentions of the United States with respect to non-prosecution. If there may appear to be some doubt on this point, it seems to me I have support in my view in a precedent furnished by the two Governments parties to this arbitration. The case interestingly illustrates the extent to which the Government of Mexico insisted on an indemnity for non-prosecution of an American who wounded a Mexican and the extent to which the Government of the United States acquiesced in the justness of the request for reparation.

A Mexican who had committed a theft in Brownsville in 1904 attempted to escape from arrest and was wounded by a Texas police official. It was explained that the latter ordered his prisoner to halt; that since the prisoner did not do so, the official, a so-called "ranger", being crippled in one leg,



knew that he could not make an arrest, and therefore fired first over the head of the fleeing man and later fired shots which took effect. The ranger surrendered himself to the authorities, and his case was investigated by a grand jury which, however, did not find an indictment against him. Mexico requested an indemnity because the ranger was not punished, and an indemnity was paid by the United States. *Foreign Relations of the United States*, 1904, p. 473 *et seq.*

Cases of shooting to prevent escape of wrongdoers almost invariably present difficult questions both from the standpoint of domestic law and from the standpoint of international law. Whatever may be the precise facts in connection with the case just mentioned, it would seem that the error of judgment or lack of discretion of the Texas ranger could certainly be no greater—and it appears to me to have been less—than that described by the judge with respect to the conduct of the two Mexican officers under consideration in the instant case.

---

GEORGE W. COOK (U.S.A.) *v.* UNITED MEXICAN STATES

(October 8, 1930, concurring opinion by American Commissioner, October 8, 1930.  
Pages 61-68.)

---

ILLEGAL COLLECTION OF TAXES.—STATUTORY EXEMPTION FROM TAXATION.

Claimant erected a certain building on real estate owned by him on the understanding with the Governor of the State that it would be exempt from the payment of the corresponding real estate tax. A State Statute granting such an exemption for a period of twenty years was thereafter enacted in 1909. In 1917 the local municipality, pursuant to authorization of the State Legislature, collected a certain tax on claimant's premises, payment thereof being made by claimant under protest. Claim for refund of tax *disallowed*. The tax in question was not a general real estate tax of the nature referred to in the Statute of 1909. Moreover, no person can have a vested interest in an exemption from taxation.

*Commissioner Fernández MacGregor, for the Commission:*

In this claim filed by the United States of America on behalf of George W. Cook, an American citizen, it is sought to recover from the United Mexican States the sum of \$137.70 Mexican currency and interest thereon from June 7, 1918, on the ground that this sum which represents a tax upon property of the claimant, which was exempt from such taxation, was collected illegally by the Municipal Authorities of Guadalajara.

The facts upon which both Agencies agree are as follows:

In 1905, Mr. Cook, the owner of a parcel of real estate in the city of Guadalajara, in the state of Jalisco, having the intention of erecting a building thereon, obtained from the Governor of the State an offer to the effect that if he, the claimant, would erect a modern building, he would recommend to the state legislature that the said property be exempted from the payment of the corresponding real estate tax (*Contribuciones prediales*). The claimant, in the years 1906 and 1907, constructed the edifice in question and on April 29, 1909, the State Congress enacted the following legislation: