DAMAGES
IN
INTERNATIONAL LAW

BY

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VOLUME I

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

KRAUS REPRINT CO.
Millwood, New York
1976

PUBLICATION NO. 960

Library of Congress Cataloging in Publication Data

Whiteman, Marjorie Millace.
Damages in international law.

Reprint of 2 v. of the 1937 ed. published by U. S. Govt. Print. Off., Washington, which was issued as no. 960-961 of U. S. Dept. of State, Publication series.
1. Damages. 2. Claims. I. Title. II. Series : United States. Dept. of State. Publication ; no. 960-961.
JX5483.W452 341.5'2 76-13520
ISBN 0-527-95970-7

Printed in U.S.A.

FOREWORD

In the past the subject of damages in international law has received in no instance that comprehensive study which a subject of its complexity and importance deserves, particularly when it is considered that international claims for damages amounting to many millions of dollars are passed upon each year by foreign offices and international tribunals.

At no time in the history of the United States, if not in all history, has there been brought together such a wealth of useful material as is presented in this treatise, wherein the primary emphasis is placed upon the measurement of damages in international claims as distinguished from the general responsibility giving rise to such claims. The subject-matter and the arrangement of the present work are both unique and practical.

The work is more than a compilation; it is a serious study, in step with present-day legal thought, of the so-called legal processes in a field where diverse and faulty methods abound. Without constant and wearying emphasis on this aspect of the cases—without undue criticism of the methods frequently revealed—the author has held the mirror up to the legal processes by which damages are measured and international claims are decided. Although the lack of science in our law is thus developed, the limitations of the methods are left, in the main, to be discerned by the reader who is interested in this phase of international jurisprudence. This has been done in order that the practical value of the work might not be impaired.

To the knowledge of the undersigned, the treatise falls far short of evidencing the amount of work involved in its preparation and the tireless energy with which the subject has been pursued. The author has made her work available to the Government with no thought of any remuneration. Perhaps she will be rewarded in some small measure by our assurance that the work is monumental and that it will be of inestimable value to lawyers, jurists, and claimants alike, who are concerned with the adjustment of international claims.

GREEN H. HACKWORTH

PREFACE

The extreme dearth of collated material on the subject of the methods and theories of measuring damages in international cases is well known to the international lawyer. In two of the foremost treatises on the general subject of international law, for instance, one footnote and three pages, respectively, are devoted to the subject of damages, as such. There have been correspondingly few articles in the legal periodicals relative to the decisions on damages. Compensation for damages formed the subject-matter of bases nos. 19 and 29 of the Bases of Discussion of the Committee on the Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners, at the Conference for the Codification of International Law held at The Hague in 1930. That committee decided that on the question of the measure of damages there had not been a sufficient crystallization of principles to warrant codification.[1]

In presenting this study of the methods and theories adopted at various times in measuring the amount of damage for which a state is liable in particular circumstances, the aim has been to present a useful treatise. The cases discussed or referred to in the text, while not all-inclusive, are representative of the cases settled diplomatically and of those settled by international arbitration. A certain amount of attention has been given to settlements arranged informally through good offices and to decisions of domestic commissions. The limitations of these settlements or decisions as precedents in international law should be borne in mind. It is thought, however, that the methods of estimating damages adopted in these cases may prove to be exceedingly interesting, if not of considerable assistance, to those solving similar problems. A large number of the cases presented have been settled since 1900. A considerable portion of the material is collected and published for the first time.

The study does not purport to be a handbook; it is not intended to present ready-made solutions for the highly complicated problems involved in the measurement of damages. Rather, the cases are indicative of how reasonable men have measured damages in a variety of circumstances. It is hoped that the material may present valuable suggestions for use in the determination of the amount of damages to

[1] *Acts of the Conference for the Codification of International Law held at The Hague from March 13th to April 12th, 1930*, vol. IV, Minutes of the Third Committee (League of Nations pub. no. C.351(c).M.145(c).1930.V), pp. 129, 234.

be asked or allowed in these and numerous other types of cases. Little more can be hoped for, as there has been, and necessarily will be, an infinite variety of questions arising in connection with the subject. Liberal quotation from the correspondence and decisions has been made. In some cases this has been done in order to make practically the whole of the decision in the case more easily available in printed form; and, in others, in order to present a more complete picture of the explanation of the amounts allowed, which is at times closely interwoven with the discussion of the responsibility of the state. Items of damage involved, together with the relative weight attached to such items, have been sought and, when discovered, presented to the reader. Arbitrators, foreign offices, and writers, alike, often fail to distinguish between reasons for an award and reasons for the amount of the award. The term "damage" is generally used herein in its broad sense and includes indemnity for loss, injury, costs, etc.

The author gratefully acknowledges the financial assistance—through a fellowship granted in 1927—of the Carnegie Endowment for International Peace. She also takes pleasure in acknowledging her indebtedness to Dr. Edwin M. Borchard, of the Yale School of Law, for having prompted the study of this subject and for his suggestions in the initial stages of the work, as well as her indebtedness to Mr. Green H. Hackworth, Legal Adviser of the Department of State, for his encouragement and invaluable assistance in reading the manuscript.

It should be added that the views expressed herein are not to be regarded as the official views of the Department of State, except as those views are expressed in quotations or are otherwise specifically attributed to the Department.

M. M. W.

WASHINGTON, D. C., *July 1, 1936.*

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CHAPTER I

BASES OF DAMAGES

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BASES OF DAMAGES

THE SETTLEMENT OF CLAIMS

A study of the methods adopted in the measurement of damages in international settlements and decisions is of considerable practical importance. The problems involved present themselves for solution (1) to foreign offices, or diplomatic officials who act under instructions or subject to the approval of the governments they represent, or special agents who are authorized to settle particular claims; (2) to arbitral tribunals; and (3) to attorneys and individual claimants faced with the problem of procuring a settlement of their claims.

Practical importance

The method of settling claims by arbitration or so-called mixed commissions, has been employed from early times. In modern times this method of settlement is frequently employed.[1] Under the terms of the treaty of peace of April 5, 1654 closing the Dutch war of 1652–54, Great Britain and the Netherlands appointed a mixed commission to assess the damages suffered by merchants arising out of that war.[2] At one time the French *Cour de Cassation* was consulted in an arbitral capacity, and this even when the Government of France was a party to the dispute. In 1879, for example, France and Nicaragua referred the dispute that arose between the two countries in 1874, when the French vessel *Phare* was searched for arms at Corinto, some weapons and ammunition seized, and the master of the vessel imprisoned, to that court, which held that the Government of Nicaragua should pay 40,320 francs of the total French claim for 75,000 francs, together with interest at twelve percent and costs.[3]

In earlier times

While usually those charged with the settlement of international claims are free to assess the damages to be paid without limitation as to the amount of the indemnity to be fixed, at times they have been expressly instructed to fix an indemnity within certain limits. Thus, in the case of the dispute between Great Britain and France in the *Sergent Malamine* incident, referred to arbitration under the convention signed at Paris, April 3, 1901, the following provision was made:

Amount of indemnity

ART. 1. The Arbitrator shall give a final decision:—

. . . . . .

[1] See appendix B for a list of international arbitrations and appendix A for suggestions for the preparation of claims (last volume).

[2] Phillipson, *Studies in International Law* (London, 1908) 19.

[3] Mérignhac, *Traité théorique et pratique de l'arbitrage international* (Paris, 1895) 111; Louis Renault, "Un Litige international devant la Cour de Cassation de France" in XIII *Revue de droit international et de législation comparée* (1881) 22–43.

(2) In regard to the amount of the indemnity for the loss of the "Sergent Malamine" to be paid by the British Government: this amount shall neither be less than 5,000 *l.* nor more than 8,000 *l.*[4]

The German-Mexican claims convention signed March 16, 1925 [5] contained a provision in article VII limiting the amount of damages that might be allowed in certain situations. That article read, in part, as follows:

For the purpose of determining the amount to be granted as compensation for material damage, the basis taken shall be the value given by the persons concerned to the fiscal authorities, except in very special cases deemed to be such by the Commission.

The amount of compensation for personal injuries shall not exceed the most ample indemnities granted by Germany in similar cases.[6]

Ordinarily indemnities are paid in terms of the money of one of the countries party to the dispute. Under early arbitrations and agreements of settlement the amount of the indemnity was at times ordered or agreed to be paid in kind. Thus, the agreement of friendship, commerce, etc., between Captain Bremer, R. N., of Her Majesty's ship *Tamar*, and the Sheik of the Habr Owul Tribe of Soomalees, of the East Coast of Africa, signed at Berbera, February 6, 1827, contained a provision in article IV that "15,000 Spanish dollars, or produce to the same amount" should be paid by the Sheiks of the Habr Owul tribe as the agreed equivalent for the value of the British brig *Marianne* and her cargo plundered in the port of Berbera.[7]

Payment in kind

After the rebellion in Syria in 1925–26 the Lebanese Government chose to reconstruct certain buildings destroyed in Rashaya, and other villages of the Lebanon, during the rebellion rather than make cash payment on the claims presented by aliens for such destruction.[8]

In more recent times arbitrators or governmental officials have also allowed indemnities supplemented by the granting of certain privileges on the part of the respondent state, or have awarded monetary indemnities or certain privileges in the alternative.

On October 21, 1888 the American schooner *William Jones*, with a perishable cargo bound for Gonaïves, Haiti, which had not been duly notified of a blockade of the port of Gonaïves, was seized, not allowed to go to a port of her choice, ordered to Port au Prince, and detained there for twenty days. At the time of the seizure, although the captain had immediately shaped his course for Port au Prince, the vessel was taken in tow, and soldiers, who remained in charge, were put on board

[4] XXIII Hertslet's *Commercial Treaties* (1905) 465, 466.

[5] 52 League of Nations Treaty Series (1926) 93, no. 1251.

[6] *Ibid.* 99, 101, translation.

[7] XIII Hertslet's *Commercial Treaties* (1877) 5.

[8] See ms. Department of State, file no. 451.11An82/3.

the vessel while it was still at sea.[9] On October 29, 1888 Secretary of State Bayard telegraphed the American Minister to protest immediately.[10] On November 16, 1888 Minister Thompson, in a despatch to the Secretary of State, reported that—

I have terminated the affair, having succeeded in proving to the authorities of this city that such ship was not legally notified of the blockade, because no notification was inscribed on her papers as law requires; that she was ordered to Port au Prince arbitrarily, for after the notification that a port is blockaded the ship should have been allowed to proceed to any other open port of her choice; that having been brought to this harbor notwithstanding my protests in the premises, a guard was kept on board and the captain and crew treated as prisoners for some twenty days. Being ordered by the Haytian gunboat *Toussaint L'Ouverture*, she proceeded to this harbor and accepted the treatment of a prisoner. I claimed damages to the amount of $10,000, and the ship is allowed to enter this port free of duties on her cargo and for her tonnage. In fact, in round numbers, the indemnity with these privileges amounts to about $20,000. I have paid over the sum of $10,000 to Captain Collins, who is the principal owner of the ship. I have his receipt in duplicate for the amount.[12]

Privileges granted [11]

Port privileges have frequently been secured in lieu of or supplemental to indemnities. In the convention of October 22, 1864 between Great Britain, France, the United States, the Netherlands, and the Tycoon of Japan, relative to the indemnity to be paid by Japan on account of the destruction of foreign vessels, beginning in June 1863, the stoppage of trade in the Straits of Simonoseki (frequently spelled Shimonoseki or Shimonasaki) by the Prince of Nagato, and the cost of sending the allied expedition to Simonoseki, the amount payable to the four powers was fixed at $3,000,000, this sum "to include all claims, of whatever nature, for past aggressions on the part of the Prince of Nagato, whether indemnities, ransom for Shimonasaki, or expenses entailed by the operations of the allied squadrons". By article III of the convention a provision was made that "if His Majesty the Tycoon wishes to offer in lieu of payment of the sum claimed, and as a material compensation for loss and injury sustained, the opening of Shimonasaki or some other eligible port in the Inland Sea, it shall be at the option of the said foreign Governments to accept the same, or insist on the payment of the indemnity in money under the conditions above stipulated." [13]

Settlement made in alternative

The Japanese Government chose to make the money payment, and, in fact, paid $785,000.87 to the United States. This sum was returned to Japan, however, pursuant to an act of Congress of February 22, 1883.[14]

[9] 1888 For. Rel. 932–960.

[10] *Ibid.* 936.

[11] All side notes appearing in this treatise are supplied by the author.

[12] 1888 For. Rel. 944.

[13] XII Hertslet's *Commercial Treaties* (1871) 597, 598.

[14] 22 Stat. 421.

In the recent case of the *Trail Smelter* (United States *v.* Canada) the matter of the drifting into the State of Washington of fumes from the smelter at Trail, British Columbia, Canada, with attendant injury to the property of nationals of the United States, was investigated and reported on by the International Joint Commission, United States and Canada, pursuant to article IX of the Boundary Waters Convention of January 11, 1909 between the United States and Great Britain.[15]

The Commission recommended in its report of February 28, 1931 that the payment by the smelter company to the United States of $350,000 should settle all damages prior to January 1, 1932.[16] It also made certain observations and recommendations with respect to means for abating the nuisance but left to the two Governments involved the determination of whether the company had taken the steps discussed and the efficacy of such steps. Finally, it suggested how future damages, if any, should be determined and settled.

Abatement of nuisance

The third paragraph of article IX of the Boundary Waters Convention of 1909, just referred to, contains the provision that the "reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award."[17] Accordingly, the findings and recommendations of the Commission are merely advisory in character and are not international awards in the sense that international arbitrations usually are. They do not purport to enunciate international law. However, as a type of procedure in international relations the reports and recommendations of the International Joint Commission are interesting. They signalize a new development in the methods of settling international problems, particularly where a continuing injury exists.

WRONG COMMITTED BY THE RESPONDENT STATE

POSITIVE ACTS OF AGENTS

The term "damages" in international law presupposes the existence of an international claim based upon the wrongful act or omission of one state toward another state. This liability may arise through

[15] III *Treaties, Conventions*, etc. (Redmond, 1923) 2607.

[16] Department of State, Press Releases, March 7, 1931 (Weekly Issue No. 75, Publication No. 167) 164. See also vol. II, pp. 1413–1417.

[17] III *Treaties, Conventions*, etc. (Redmond, 1923) 2612.

the violation of treaty obligations,[18] or of other obligations imposed by international law upon members of the family of nations. The wrongful acts of the respondent state, which may be in the nature of positive acts or consist in the failure of the state to prevent the injury, or to apprehend or punish the wrong-doer, under certain circumstances, may be committed through the executive or administrative agencies,[19] the military,[20] the police,[21] or the judicial authorities.[22] In general, a state is directly responsible for the acts of its higher officials coming within the scope of their authority; but if a local remedy is provided, resort to such remedy must ordinarily be had.

Executive, administrative, military, police, or judicial authorities

[18] In the following cases, for example, states were held liable for the violation of obligations arising from treaties:

Charles Adrian Van Bokkelen (United States *v.* Haiti), 1884 For. Rel. 306, 307, 320, 329, 330, 335; 1885 For. Rel. 474, 478, 481, 490, 492, 494, 497, 498, 499, 507, 512, 513, 517, 521, 522, 529, 531, 534, 537, 542, 547, 548; 1888 For. Rel. 984, 985, 987, 988, 1007 (a lower Haitian court, the Court of Cassation, and the Government of Haiti denied the claimant the benefit of a Haitian law permitting Haitians only to make an assignment for the benefit of creditors, contrary to articles 6 and 9 of the treaty of 1864 between the United States and Haiti; indemnity of $60,000 allowed by Mr. Morse, referee selected to settle the case under the terms of the protocol of May 24, 1888).

John D. Metzger & Co. (United States *v.* Haiti), 1901 For. Rel. 262, 272–276; arbitrated pursuant to the protocol of October 18, 1899 and the supplemental protocol of June 30, 1900 (sale of personal property for nonpayment of certain license taxes levied under the law of October 24, 1876 providing that foreigners should pay double the amount of tax imposed upon native workmen contrary to the treaty rights of Americans in Haiti; $5,000 allowed "in compensation for the goods" seized and sold, stated to be worth $1,200, and as "reparation for their seizure and sale in the manner herein found").

The *Manouba* (France *v.* Italy), Permanent Court of Arbitration, decided May 6, 1913, Scott, *The Hague Court Reports* (1916, Carnegie Endowment for International Peace) 342 (indemnity allowed for the illegal capture by Italy and convoy to Cagliari of the French vessel *Manouba*, in 1912, during the war between Italy and Turkey over Tripoli and Cyrenaica; capture and convoy alleged to have been contrary to article 2 of the Hague convention of October 18, 1907 relative to certain restrictions on captures in maritime warfare, and article 9 of the Geneva Convention of July 6, 1906 for the amelioration of the condition of the wounded and sick in armies in the field).

[19] By an exchange of notes dated February 1 and February 6, 1897, the Nicaraguan Government agreed to pay £2,400 to the British Government to be distributed by that Government to British subjects who had suffered injury to person or property during the disturbances in the Mosquito Reserve in 1894 owing to the action of the Nicaraguan authorities. (XXV Hertslet's *Commercial Treaties* (1910) 962–963.)

In the case of *Ricardo L. Trumbull* (Chile *v.* United States), a claim for $6,000 was made by Trumbull, a Chilean citizen, for his services as an attorney rendered, as he alleged, at the request of the American Minister, William R. Roberts, in connection with the extradition of an American citizen from Chile in the year 1889. When the bill was presented to the Department of State, the Department,

[Footnote continued on p. 8.]

[20] Footnote on pp. 8–11. [21] Footnote on pp. 12–13. [22] Footnote on pp. 13–14.

A state is not responsible, however, for acts of its subordinate officials, unless the wrongful act was directed or approved, [23] unless a denial of justice is suffered in the exhaustion of local remedies, or unless there was a failure to punish the criminal.

Footnote 19—Continued.

through the American Minister, informed Trumbull that the "Government of the United States assumed no responsibility in the premises." The Chilean Claims Commission established pursuant to the convention of May 24, 1897, to which the claim was presented, allowed $3,000 to the claimant without explanation of the grounds of the award. (Perry's Report (1901: unpaged), decision no. 7, docket 27.)

An automobile was requisitioned by the British Government from a British firm and not only used by the American Ambassador, David R. Francis, to whom gratuitous use was seemingly tendered by the British authorities, but also by the entire American staff of the American Military Mission at Archangel in 1918–19, after which the automobile was supposedly returned, but was, however, apparently lost. A claim for reimbursement for the use of the automobile was presented by the British Government. The sum of $500 was paid by the United States to that Government in settlement of the claim. (*Becos Traders, Limited* (Great Britain *v.* United States), ms. Department of State, file no. 311.415B77.)

A claim was presented to the Department of State on behalf of the *Société Nationale d'Affrêtements*, frequently referred to as the *Paris, Lyon & Mediterranean Railway Co.* case (France *v.* United States), March 12, 1919, for compensation for the requisition by the United States Shipping Board on August 23, 1917 of hull no. 169, then in the process of building in the United States, by the Oriental Navigation Company, for the Société Nationale d'Affrêtements, which was operating a fleet of colliers for the Paris, Lyon & Mediterranean Railway Company (*ibid.* no. 411.51P21). This claim and the claim of the *Algerian State Railway Company* for requisitioning by the United States of three hulls, were settled together by the United States Shipping Board Emergency Fleet Corporation, under the agreement of July 26, 1926, for the lump sum of $1,100,000 (Shipping Board letter of July 26, 1926, see *ibid.* 411.51P21/12, enclosure).

[20] (p. 7) In the case of *G. L. Solis* (United States *v.* Mexico), where claim was made for the value of cattle alleged to have been taken from the claimant's ranch by the "de la Huerta revolutionary forces", Mr. Nielsen, speaking for the Commission established pursuant to the convention of September 8, 1923, between the United States and Mexico, said:

> It will be seen that in dealing with the question of responsibility for acts of insurgents two pertinent points have been stressed, namely, the capacity to give protection, and the disposition of authorities to employ proper, available measures to do so. Irrespective of the facts of any given case, the character and extent of an insurrectionary movement must be an important factor in relation to the question of power to give protection.
>
> In the light of the general principles referred to above, the item of $535.00 in the instant claim must clearly be rejected, in the absence of convincing evidence of neglect on the part of Mexican authorities. [*Opinions of the Commissioners* (1929) 48, 53, docket 3245.]

An interesting instance of what constitutes an "act of Government" as distinguished from a "revolutionary act", is found in the case of *Félix Rohen* (Germany *v.* Mexico), decided by the commission established under the terms of the convention of March 16, 1925. (Docket 52, unprinted.) In that case it appeared that Félix Rohen lived in the city of Toluca in the year 1915. In the month of

[23] Footnote on pp. 14–17.

When a national of the claimant state is injured by a private individual of the respondent state no international injury or wrong

Footnote 20—Continued.

October of that year there met in Toluca the enemies of Venustiano Carranza, formed from the so-called "Conventionista Government", who put into circulation the bank notes known as "*Dos Caras*" or "*Revalidados*" of the Conventionista Government of the state of Mexico and others.

The Conventionistas having been defeated on October 15 of that same year, the Carranza general, Alejo G. González, entered Toluca, second to the general in chief, Pablo González; and on the following day (October 16, 1915) all the Conventionista money was declared null and void, and it was absolutely prohibited to make any transaction whatever in the money in circulation which up to that time had existed in the said city. M. Cruchaga, President of the Claims Commission, said, when the claim came before him, that—

> The Convention of March 16, 1925 has for its purpose the indemnifying pecuniarily for damages or losses which may have been suffered by German citizens by reason of revolutionary acts, as is stated in the Preamble, and in Article 4 it adds that "the losses or damages mentioned must have been caused during the revolutionary period from November 20, 1910 to May 31, 1920, inclusive," by the forces enumerated in the said Article. From this fact it is inferred that the act of General González in decreeing the nullity of the bills, after having taken the City of Toluca and defeated the revolutionary forces, is not either "a revolutionary act" nor "of the forces" provided for in the Convention, but merely an act of Government which had for its purpose the extending to the territory occupied the orders of the legitimate Government as to the monetary system established by the law, and it is unquestionable that acts of the Constitutional Government, in repressing the insurrection and re-establishing the legal regime in the territory of the Republic do not have the character of revolutionary acts, but are acts of Government and, consequently, excluded from the jurisdiction of this Commission. [Translation.]

Thus, the jurisdiction depended upon the revolutionary nature of the act. The imposition of one kind of currency and the prohibition of another kind was a governmental act committed by the forces in question.

The Claims Tribunal established by Great Britain and Chile under the terms of the convention of September 26, 1893, composed of M. Camille Janssen, appointed by the King of the Belgians, President, Mr. Alfred St. John, British Arbitrator, and Señor Luis Aldunate, Chilean Arbitrator, allowed indemnity for losses of property through pillage by Government troops of Chile at Miramar in August 1891. (1896 For. Rel. 35.) Indemnities were also apparently allowed by the same Commission for dead freight through vessels' being prevented from loading and for losses from the breach of a charter party by the Government through inability to furnish cargo, because military forces had blown up the loading apparatus at Lobos de Afuera. (*Ibid.* 36–37.)

In the case of *The American Electric and Manufacturing Co.* (United States *v.* Venezuela), the United States and Venezuelan Claims Commission, established under the protocol of February 17, 1903, held Venezuela responsible for the injury to and seizure of the claimant's (a neutral's) office and telephone apparatus during a revolution because of "previous and deliberate occupation by the Government for the public benefit or as being essential for the success of military operations", and not the mere "incidental and necessary consequences of a legitimate act of war", Doctor Paúl, Commissioner, writing the decision (Morris' Report (1904) 128, 131, docket 11).

[Footnote continued on p. 10.]