Theoretical Aspects of the International Responsibility of States.

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The international responsibility of states for injuries to aliens, as a branch of positive international law, is a subject that has engaged the attention of scholars practically only within the last generation, although Foreign Offices and arbitral tribunals have settled cases and inductively developed rules of law and practice for some centuries. It is true Heffter made some reference to the subject; but any serious attempt to consider it as a special branch of the law probably dates from the notable works of Triepel and Anzilotti in the early part of the present century. Since then the development of the subject as a science is identified with the names of Ansaldi, Oppenheim, Moore, Marinoni, Strupp, Burckhardt, Décencière-Ferrandière, Schoen, De Visscher, Tchernoff, Jess, Eagleton and others. More recently the efforts of individuals and scientific groups to investigate and codify the subject have been stimulated by the project of the Committee of Experts for the Progressive Codification of International Law, acting under the auspices of the League of Nations. This project for codification has resulted not only in a proposed code drafted by Dr. Guerrero and submitted by the Committee of Experts in 1926 for the consideration of the various governments, but it has led to a definite proposal for the convocation of a conference of the governments at the Hague in 1930. At that conference an effort is to be made to procure the unanimous or at least the wide approval of governmental delegates representing both larger and smaller states, to a restatement or codification of the law. The task will not be one without difficulty. But it will be facilitated by the fact that within recent years, partial or complete codes, supplemented in some instances by supporting commentaries, have been published by the Geneva Committee of Experts, by the Institute of International Law, by the American Institute of International Law in connection with the work of the International Commission of Jurists at Rio Janeiro, by the International Commission itself with respect to the rights of aliens, by the International Law Association of Japan,

and by Professor Karl Strupp. A draft code and commentary prepared by an American committee called together by the Harvard Law School will also be before the conference.

These facts and events justify some discussion of the legal theories which appear to underlie the several drafts in question. The present article will be confined to an examination of the basis of responsibility, whether for risk or for fault, as advanced by the several drafts; of the question when a wrongful act is a "State act"; of the supposed distinction between superior and inferior officers; of the disputed issue as to when international responsibility begins; of the necessity of exhausting local remedies; of the place of denial of justice in the law of the subject; and of the possibility of a wider judicial instead of political solution of the issues raised by injuries to aliens.

Writers on the continent are more accustomed to indulge in theoretical speculations than are those of England or the United States. Considering that rules of responsibility have been inductively applied by international tribunals in literally hundreds of cases and that, in addition, the practical experience of Foreign Offices for many decades in dealing with claims cases is to a large extent available to the profession, it would seem more profitable to combine the acute analytical reasoning of continental jurists with the practical study of what arbitral tribunals and Foreign Offices have actually done, in order thus to arrive at a reasonable conclusion as to what we may expect an international conference to accept in the way of a code.

Risk or Fault as the Basis of Responsibility

On the continent a very considerable literature has developed on the issue whether risk or fault (*Erfolgs- oder Schuldhaftung*) underlies state responsibility in international law [1]). Three principal theories have attained a certain vogue. The prevailing theory seems to insist on the necessity of fault (*culpa* or *dolus*) on the part of the State or its agent — if that distinction is admitted. Anzilotti's theory merely demands a violation of international law with respect to an alien, *i. e.* a wrongful act attributable to the State, whether "fault" is present or not. Strupp's theory presupposes merely wrongful act in case of commission

[1]) Strupp, Das völkerrechtliche Delikt (1920) p. 45 ff.; *ibid.* Eléments du droit int. public (1927) 220 ff.; *ibid.*, Die völkerrechtliche Haftung des Staates, insbesondere bei Handlungen Privater (1927) 14 ff.; Jess, Politische Handlungen Privater gegen das Ausland und das Völkerrecht (1923) 116 ff.; Décencière-Ferrandière, La responsabilité internationale des Etats à raison des dommages subis par les étrangers (1925), 76 ff.; Held, Deliktsschuld und Erfolgshaftung im Völkerrecht (1927), 7 Ztschr. f. Öffentl. Recht, 1 ff.

(*delicta commissiva*) but requires proof of fault in the case of omissions.

While it is possible that any or all of these theories can be supported by abstract reasoning, they apparently play little or no part in the determinations of international tribunals or in the work of Foreign Offices, which are not concerned with the distinction between responsibility for risk or for fault. One conclusion that it seems possible to draw from the practice is that apart from "political crimes", some wrongful invasion of the rights of an alien by an agency of the State seems to be required, a conclusion which would seem to support Anzilotti's theory. But whether the complaining state must go further and prove "fault" seems doubtful and indeed academic — this for the reason that there is no internationally accepted definition or conception of "fault". International courts and Foreign Offices do not profess to make any fundamental distinction between wrongful, though perhaps innocent and unintentional, invasion of an alien's rights, and "fault"—the degree of wilfulness or negligence in the commission of the injury affecting mainly the measure of damages. In the case of most wrongful acts there would be culpability, so that there is no occasion for emphasizing the distinction in those cases. Whether we can go further still and support in practice the Strupp distinction between acts of commission, which require no fault, and acts of omission, which do require fault, is open to question. If the distinction is made by the courts, it is usually unconsciously or accidental, for the very reason that there is no agreement among international courts, particularly those on which Americans and Englishmen have sat, on what is meant by "fault". International tribunals indeed hardly use the concept "fault", though they continually apply the conception of "wrongful act" to cover any violation of international law to the injury of an alien. *Culpa* or *dolus* involve mental states often difficult to prove, and international tribunals, by virtue of the treaty or protocol under which they usually sit, are not obliged to indulge in the refinements of reasoning necessary to make the distinctions of the theorists.

Moreover, whose "fault" is meant? When a local law authorizes a revenue officer to make seizures outside the jurisdictional limits of the state, the administrative official in making the seizure is not at "fault" municipally because he is obeying the local law; it is the local law which violates the international duties of the state. Can it be said and is it necessary to say that the legislature has been guilty of *culpa* or *dolus* in enacting the law? Hardly. The legislature made a good faith mistake as to its rights under international law, and is responsible internationally because an officer, again in good faith, has carried out the law to the injury of an alien. The wrongful act of the state in enacting and enforcing the law suffices to impose responsibility. No different is the

case with omissions. If the state fails to establish adequate machinery to perform its international duties [2]), or if a police officer fails to enforce the law or to extend to aliens the protection which international law requires (e.g. the South Omaha riots of 1909), it seems like sophistry to insist on proof of *culpa* or *dolus* of the state legislature or of an administrative officer. It may be that in many cases it will be possible to make such proof, particularly in the application of the "due diligence" rule in respect of injuries committed by private individuals; but in practice it is not always possible to establish "fault", and its establishment ought not to be required. The failure to perform a duty should suffice, without a further attempt to prove a vague and uncertain "fault". If "fault" is used, as it occasionally is in international tribunals, to include innocent and unintentional omissions of duty, the requirement would be technically (even though erroneously) met, but it can hardly be said that a useful scientific purpose is thereby served. In view of the impracticability of using the criterion "fault" especially when applied to group omissions, and in view of the fact that it is either disregarded or used in a non-technical sense by international tribunals and Foreign Offices, it seems preferable to omit the term from any code and to confine the basis of state responsibility to "wrongful acts or omissions" by the State or its agents [3]). As we can reach effective decisions in practically every case, even under the "due diligence" rule, without invoking the term "fault", it seems unnecessary to encumber and confuse the subject with an additional concept which has no uniform interpretation or acceptance.

Responsibility for risk is again a conception of the theorists. In the broad sense, practically every assumption of responsibility by the group or principal, arising out of the act of an individual or employee, is responsibility for risk (*Erfolgshaftung*). To answer this by the Gierke theory that every officer is an "organ" of the State and that the State acts whenever an officer acts, would not meet the issue, because international law does not regard the State, it is submitted, as *immediately* responsible whenever an officer acts wrongfully. International law usually requires the exhaustion of local remedies and proof of a denial of justice or at least breach of international law or failure to cure the wrong locally, as a condition of an international claim. Mere damage is not enough; proof of the invasion of an alien's right by some act which can be imputed

[2]) See draft of the Institute of International Law, Rules V, X, XI; Project 15 of American Institute of International Law submitted at Rio de Janeiro, April 1927, Art. 1; Conclusion 6 of the Sub-committee of the Geneva Committee of Experts.

[3]) This would require a modification in paragraph 4 of Article 1 of the Institute draft, and would make unnecessary the second paragraph of Article 1 of the Strupp draft.

to the State is required. To say that when an officer acts within the scope of his legal authority, though that legal authority itself violates the international duties of the state, there is state responsibility for "fault"; but that when he exceeds his authority and acts *ultra vires*—a conception presently to be discussed—there is responsibility for "risk", seems an unnecessary and unconvincing distinction turning on the officer's obedience to his local authorization, a question with which international law is not concerned. In both cases there has been a wrongful act, one by the legislature and the other by the officer. In both cases international law imputes responsibility to the state, assuming that the injury is not cured locally. Whether "fault" is present in one or both cases, though immaterial, depends on one's definition of "fault". Because "fault" is immaterial, however, it seems inadvisable to conclude that all wrongful though perhaps unintentional acts of commission inflicting injury represent *"Erfolgshaftung"* (responsibility for risk). It would be better to confine the term *"Erfolgshaftung"* to injuries for which responsibility is imputed without evidence of any wrongful act on the part of the state. It is in this sense that the French use the term "responsibility for risk", as, for example, when a policeman in pursuit of a prisoner shoots and without any negligence strikes a bystander. This is responsibility or rather indemnity for accidents. That has happened in international practice, for example, when nations, voluntarily or under compulsion, have assumed responsibility for injuries to aliens occurring during civil war, as in the Mexican revolutions from 1910-1922, in cases of mob violence, and in cases of assault upon foreign ambassadors, consuls or other public officials—the so-called "political crimes". That is *"Erfolgshaftung"* in the sense of responsibility without subjective wrong, but it is doubtful whether this is international law. It is questionable whether one ought to speak of "responsibility" in such cases, for "responsibility" implies a duty not discharged. In most of these cases there is no duty which the state has violated, so that an indemnity is imposed on or assumed by the state in which the loss or injury has occurred, for political or social reasons. The subject of international claims is unfortunately strongly influenced by political considerations, because Foreign Offices often make settlements on political grounds which have little or no legal support. It would be a mistake to infer that indemnity which is imposed or assumed under these circumstances is an admission of legal responsibility or can be denominated as reparation for breach of an international duty. It is therefore best to consider such cases as not legal but political in character and to endeavor to mitigate their frequency and effect by strengthening the judicial forum for the adjudication of international claims of all kinds.

When is the Wrongful Act a "State Act".

A considerable difference of opinion is evident among the drafts with respect to the circumstances under which a wrongful act of an officer can be imputed to the State, *i. e.* as to when the wrongful act may be deemed a "State Act". The Guerrero Report provides:

> "If the act of the official is accomplished outside the scope of his competence, that is to say, if he has exceeded his powers, we are then confronted with an act which juridically speaking is not an act of the state. It may be illegal but from the point of view of international law, the offense cannot be imputed to the state."

This view finds expression in the Fourth Conclusion of the Sub-committee of Experts, reading as follows:

> "The state is not responsible for damage suffered by a foreigner, as a result of acts contrary to international law, if such damage is caused by an official acting outside his competence as defined by the national laws, except in the following cases:
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> (a) If the Government, having been informed that an official is preparing to commit an illegal act against a foreigner, does not take timely steps to prevent such act;
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> (b) If when the act has been committed, the Government does not with all due speed take such disciplinary measures and inflict such penalty on the said official as the laws of the country provide;
>
> (c) If there are no means of legal recourse available to the foreigner against the offending official, or if the municipal courts fail to proceed with the action brought by the injured foreigner under the national laws."

These rules would limit state responsibility for the wrongful acts of administrative officers—judges making erroneous decisions are here excluded—to cases in which the Government (1) knowing that the act is about to be committed fails to prevent it, or, if committed, fails to discipline or punish the officer; or (2) permits no legal recourse against him by the injured alien. The word "competence" is ambiguous. It may leave the officer a state agent only if he acts rightfully, for when he acts wrongfully, he "has exceeded his powers". On the other hand, it may be synonymous with "jurisdiction", *i.e.*, his general authority to undertake the act in question. In either case, it leaves a wide range for "personal" acts, for his wrongful act which is not "an act of the state" must be personal. If the term "competence" is limited to the first suggestion, an authority to act rightfully, it amounts almost to a rejection of international responsibility for the wrongful acts of officials and would approximate the Roman theory which maintained that a corporation being incapable of "will" was incapable of "fault", an attribute of individuals only; so that a wrongdoing officer of a corporation, acting

contrary to instructions, bound himself alone and not the corporation. If the term "competence" covers merely the act of an officer carrying out a state law which is itself contrary to international law, the resulting state responsibility would be comprehensible but would be so narrow that practically every wrongful act would be regarded as *ultra vires* and therefore personal. Yet, as will presently be observed, the Guerrero view cannot be so lightly dismissed because it reflects a practice prevailing internationally among some of the more advanced and well-organized states in their dealings with each other and applied by many international tribunals.

The draft of the Institute of International Law allows for a much wider range of state responsibility by making the officer a "state agent" when he acts within the "scope of his employment", though he may act wrongfully and in violation of instructions. Article I of the Institute's draft provides:

> "This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.
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> "It exists likewise when these organs act outside their competence under cover of their status as organs of the state and making use of means placed at their disposal as such organs."

The Japanese draft, Article I, uses the term "wilful act, default, or negligence of the official authorities in the discharge of their official functions".

Professor Strupp's draft, Article II provides: "Such responsibility is not relieved or avoided by the fact that the person or group has exceeded his or its authority, provided it had general jurisdiction to undertake the act or action in question".

Aside from the fact that the Guerrero draft uses the ambiguous term "competence", perhaps in as narrow a sense as the authority to act rightfully — a condition which prevails with respect to the officer's power to bind the state in the conclusion of contracts[4]) — whereas the Institute uses the term as the equivalent of "scope of his employment", there is a further fundamental difference between the two drafts which might easily escape notice, and which is not necessarily derogatory to the Guerrero draft. In the advanced municipal administrative systems of France and Germany, the State assumes responsibility for the wrongful acts of its officers, acting in their official capacity, either under the "organ" theory of Gierke or under the private law theory of Article 1384, C. C.,

4) Beales (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3548; Bernadou (U. S.) v. Brazil. Moore's Arb. 4620; Wallace (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3475 and other cases cited in Borchard, Diplomatic Protection of Citizens Abroad, p. 183, n. 5. The government may, of course, ratify the act of an officer originally unauthorized, Hooe v. U. S. 218 U. S. 332, 336; Zander (U. S.) v. Mexico, Act of March 3, 1849, Moore's Arb. 3433.

of the principal's responsibility for the torts of his employees (préposés) or on some public law ground[5]). Other systems, including that of the United States and of Great Britain and of most of the countries of Latin-America, are not yet so far advanced. For most wrongful acts of officers, an action against the officer is the only available remedy. When, then, the Guerrero draft declines in principle to admit state responsibility for the wrongful acts of state officers, which in practically every case would be contrary to their instructions or orders, it merely reflects a system of municipal law still prevailing in many countries.

The question arises whether international law demands any greater right of redress municipally than an action against a wrong-doing officer, in those countries where this is the only relief that nationals of the country possess. It is believed that it does not. When, however, the Guerrero draft limits state responsibility to cases in which the state fails, after opportunity, to prevent a wrongful act, or fails to punish the officer, or when it permits no legal recourse by the alien against the officer, the conditions of state responsibility are no different than they would be had a private individual committed the tort. Thus, the wrong-doing officer imputes no greater responsibility upon the state than a wrong-doing individual. The state only becomes responsible when local remedies are unavailable. Had Guerrero added to his exceptions the condition that the local remedy be not only unavailable but, at least in the case of higher officials, prove ineffective to secure redress—for the alien should perhaps have not only recourse but redress — and had he been willing to admit the general definition of denial of justice instead of limiting it as he has in subdivision (c), it might be difficult to quarrel with his position in the light of the best international practice[6]).

The Institute of International Law, on the other hand, proceeds on the "organ" theory of Gierke and assumes that when an officer acts the state acts, and that when the officer acts within the scope of his employment but wrongfully, the state has acted wrongfully and incurs responsibility. Whatever the municipal rule may be in France and Germany in this respect, the law has not as yet advanced to this point in most other countries, nor, it is believed, has international law. As will presently be explained, it is believed that international responsi-

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5) See Borchard, Theories of Governmental Responsibility in Tort, (1928) 28 Columbia Law Review, 734 ff.

6) That punishment of the officer will serve to prevent or discharge responsibility, see Kellett (U. S.) v. Siam, Award Sept. 20, 1897, Moore's Arb. 1862; Wright claim v. Guatemala, For. Rel. 1909, 354; Pierce (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3252; Maal (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 914. That the Guerrero rule has international support, see Moore's Dig. VI, secs. 999—1000 and Borchard, *op. cit.*, 189 ff.

bility is not incurred *immediately* when an official of the state wrongfully injures an alien, but only when it is evident that the local remedy is unavailable or ineffective. It is only then that *international* responsibility commences, for it is an indication that the state is unwilling or unable to make good the wrong of its officer (or individual) and hence must assume international responsibility. This theory, which is followed by international practice among the stronger states *inter se*, departs from the "organ" or identification theory and deems the officer a distinct individual against whom prosecution is necessary, if available, before international responsibility is incurred. The conflicting theories as to when international responsibility begins will be discussed presently. Here it need only be noted that the Institute's rule allows a narrower range for *personal* acts of an officer, *i. e.* outside the scope of his employment, when he acts solely as a private individual, than does the Guerrero draft, which would treat almost all wrongful acts, *i. e.* "outside the scope of his competence" in excess of "his powers", as personal acts of a private individual.

Is There a Distinction Between Superior and Inferior Officers?

The draft of the Institute proceeds from the theory that all officers of the state are "organs" for whose "fault" the state becomes responsible. This view is shared by many writers.[7] There is some authority for it, for on frequent occasions the state has been held directly responsible for a tort committed even by minor officials, on the theroy that the official in question was an agent of the state.[8] Yet there is much author-

7) Schoen, Die völkerrechtliche Haftung der Staaten (1917) 43: Calvo, Droit International, § 1284; Anzilotti in 13 R. G. D. I. P. 286; Strupp, Das völkerrechtliche Delikt, 39ff.; De Visscher, La responsabilité des Etats, 2 Bibliotheca Visseriana, 87—119; Décencière-Ferrandière, Responsabilité internationale des Etats (1925) 65; Strisower, Avant-projet de rapport, Institut de Droit Int. (1927) p. 3; Eagleton, Responsibility of States (1928) 45; Report of Sub-Committee of Experts on Responsibility, p. 6.

8) Deputy-sheriff of Maryland arrested attaché of Swiss Legation, For. Rel. 1892, p. 521, Moore's Dig., IV, 635. New York justice of the peace assumed jurisdiction over Spanish Minister, Moore's Dig. IV, 639. No damages were paid in these cases, though the United States conceded that a breach of international law had occurred. Customs officers: Brig *Cossack* (U. S.) v. Mexico, Apr. 11, 1839, Moore's Arb. 3043 and other cases in Moore's Arb. 3361 ff.; Naval officers: Confidence (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 3064; Jailers: Massey (U. S.) v. Mexico, Sept. 8, 1923, Opinions of Commission 228, 231. Policemen: Panamariot, July 4, 1912; Shipley (U.S.) v. Turkey, For. Rel. 1903, 733; Cesarino (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 770. The Agreement between the United States and Mexico, Sept. 8, 1923, confers upon the Claims Commission jurisdiction of "all claims for losses or damages originating from acts of officials

ity, particularly in the opinions of international tribunals, to the effect that only the higher officials of the state are its "organs" making the state responsible, whereas minor officials are merely employees against whom local remedies must be pursued and a denial of justice established before an international claim arises. That is, a very considerable number of cases proceed on the theory that the minor official is not a "state agent", and that the state cannot be held responsible for his wrongful acts until some state "organ", either a higher court or superior administrative authority, by some independent act or omission, has expressly or tacitly ratified the wrongful act, either by negligently failing to prevent the wrong and by refusing or neglecting to investigate an assault or other injurious act, by a failure to furnish access to the courts to the injured alien, by a failure to try to arrest and punish the offender, by a pardon depriving the injured party of all redress against the offender, and similar acts or omissions indicating indifference to or condonation of the injury [9]). Apparently under this view, the difference in state responsibility for wrong-doing by an official, on the one hand, and by an individual, on the other, in countries not sufficiently advanced to assume administrative responsibility for the torts of officers, is that the state would probably be expected more vigorously to disavow the act and punish and discipline the offender if he happened to be an officer than if he were an individual. So far as concerns the exhaustion of local remedies, there would seem to be little if any difference between the two cases. In practice, however, as will presently be noted, the rule requiring the exhaustion of local remedies is fairly flexible and in the case of official wrong-doing, it is often dispensed with by the complaining government or by international tribunals when effective relief seems doubtful.

It is not believed that either theory, (a) that all officials are state agents, or (b) that minor officials are not state agents, is entirely sustainable. Undoubtedly a large number of cases justify the conclusion that before the state can be held responsible it must be shown that the injured alien has exhausted his local remedies against the wrong-doing officer [10]). This would indicate that the officer is not in international law deemed an "organ" whose acts are the state's acts, at least in those states whose

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or others acting for either Government and resulting in injustice". For soldiers, Hague Convention IV, art. 3, makes the State responsible for all acts of its armed forces, thus dispensing with the former condition that officers had to be in command. See Borchard, *op. cit.*, 194 ff. and on Agents of the State in general, 180 ff.

9) See cases cited in Borchard, *op. cit.*, 191 ff.; Eagleton, *op. cit.* 48 ff. and cases before Mexican-U. S. Commission: Massey, p. 228; Venable, 331, 338; Faulkner, 86; Mallen, 254, 257; Putnam, 222, 226; Richards, 412, 414; Stephens, 397, 400. Such deficiencies in the administration of justice are plainly "denial of justice".

10) See infra, notes 15 and 16.

municipal law does not make this identification. The reason why the exhaustion of local remedies against higher officials is not usually required as a condition of state responsibility is because such remedies are either not available or are not in all probability effective; whereas against minor officials such remedies are usually available and effective. The utility of the distinction between major and minor officials has often appeared questionable, for the distinction is often impossible to make on any criterion commanding general support and when made has served no special purpose except to afford a basis for emphasizing the "local remedy" rule, for which actually it affords no sound test. Whether a particular official acted as a state agent in a given case should be determined not necessarily by his rank, but by the character of the duty imposed upon him under the circumstances of the particular case and by the nature and effect of his wrongful act [11]). There is no difference in principle between the two classes of officers. The difference lies in the facts, in the availability of and utility of exhausting local remedies.

And yet, in order that a code on the subject may aid in the solution of practical cases, it is believed that some useful purpose may be served by providing that in the case of higher officials, the State should be required — as in practice it usually is — to see that indemnity is provided, whereas in the case of minor officials — apart from the usual responsibility for denial of justice — responsibility be more remotely conditioned upon proof of failure by the State to disavow the wrongful act by disciplining the officer. More is expected of the local remedy in the case of higher than in the case of lower officials. In the former, effective *redress* ought to be provided, and the State should see that it is made, either by the officer or by the State itself. No guaranty of actual redress accompanies the wrongs of minor officials, but only the same *opportunity* to obtain redress that nationals possess. The State cannot guarantee that judgments against minor officers will be paid; but it should guarantee that it will discipline wrongdoing officers or else be deemed to have assumed the necessary consequence of itself providing indemnity.

When Does "International Responsibility" Commence?

This brings us to one of the most disputed matters in the theory of the subject, namely, as to the time when international responsibility commences — whether (a) from the moment of the commission of the

[11]) See Hyde, International Law (1922) 1, 510, and opinion of Nielsen, Commissioner, in Massey (U. S.) v. Mexico, Sept. 8, 1923, Opinions, 228, 231.

first injury upon an alien by an officer of the state, or (b) whether only after local remedies have failed. The two views have been expressed as follows:

First, that the state being incapable of acting otherwise than through officers or organs, is *immediately* responsible for the wrongful act of its agent, but that diplomatic interposition should be deferred until there has been an opportunity to exhaust whatever local remedies are available, thus enabling the state to discharge its responsibility itself;

Second, that the state is *not internationally* responsible until there has been a vain exhaustion of local remedies, and either a failure of redress or a denial of justice established.

1. The first view is derived in part from the continental theory that the agent is an organ of the state and that the state itself speaks through him—hence that his wrongful act is simultaneously the state's wrongful act. The theory has had strong support in France and Germany and the advanced state of administrative law in those countries is largely founded upon it. The doctrine has been incorporated in the Constitutions of Austria, Germany, Poland and Jugo-Slavia, and, based upon the theory of agency, is incorporated in the Federal Tort Claims Bill which passed the United States House of Representatives on February 20th, 1928 and the Senate on Feb. 9, 1929, and in the British Government Bill introduced in Parliament (Crown Proceedings Committee Report, April, 1927, Command 2842). As already observed, however, it is doubtful whether this principle of agency or identification is an established rule of international law.

Story, the American judge and jurist [12]), denied that an officer was an agent of the state, so that the doctrine of *respondeat superior* applied.[13]) The two views above mentioned doubtless are derived from this difference of theory as to the relation between the state and its officer, the former view considering the officer either as the "organ" or as the agent for whose acts the state assumes responsibility, the latter view considering him as an independent personality who alone assumes responsibility for his wrongful act. Both views deal with municipal or domestic responsibility.

The Institute of International Law *appears* to support the first view and to apply it directly to international law, a relation between State and State. Article I of the Lausanne draft provides that the state is responsible for injuries to foreigners... "whatever be the authority of the state whence (the wrongful act) proceeds: constitutional, legislative, governmental, administrative or judicial." Article XII adds:

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[12]) Story, Agency, 9th ed. (1882) sec. 319.

[13]) 28 Columbia Law Review 577, 606, 607.

"No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages."

From this it would appear that the Institute regards substantive responsibility as established when an agent of the State has wrongfully injured an alien, but that an international claim must be deferred so long as the individual has an effective local remedy. The presumption arises that if there is no effective local remedy, or when the local remedy fails, the right to diplomatic interposition then becomes unconditional. The recourse to local remedies is apparently not a limitation on responsibility, but a procedural condition precedent to diplomatic interposition. Mr. Hyde has given expression to this view as follows:

"As the preferring of a claim implies wrongfulness of action on the part of public authority, the State demanding redress must always be prepared to show that the territorial sovereign is responsible for the acts of those conduct is the source of grievance. The inquiry as to *national responsibility* is distinct from that respecting the propriety of interposition. The distinction has not, however, always been apparent. It has been asserted in substance, that the responsibility of the territorial sovereign for the acts of a particular official is dependent upon the steps taken by the aggrieved individual to exhaust his judicial remedies. This contention is reasonable when the act complained of is not in itself *internatianally illegal.* When, however, an agent of a State acting within the scope of his authority commits an *internationally illegal act* with respect to an alien, there is a denial of justice on the part of the State, and its responsibility is established. The establishment of responsibility imposes upon the territorial sovereign the duty either to afford the victim a means of obtaining redress by some reasonable process, or in lieu thereof, to make reparation upon the demand of the State of which the victim is a national. The propriety of interposition would, therefore, seem to depend upon which alternative the delinquent state has chosen. Thus, in the examination of claims, it becomes important to distinguish events which tend to show *internationally illegal conduct* on the part of a territorial sovereign, from those which tend to show a failure on its part to afford a means of redress in consequence of such conduct. The former serves to establish national responsibility; the latter to justify interposition" (italies ours) [14]).

14) Hyde, *op. cit.*, I, 492-3; Eagleton, *op. cit.*, 23, 122.

The draft of the Japanese International Law Association, Art. 1, reads as follows:

> "A State is responsible for injuries suffered by aliens within its territories, in life, person or property through wilful act, default or negligence of the official authorities in the discharge of their official functions, if such act, default or negligence constitutes a *violation of international duty* resting upon the State to which the said authorities belong." (italics ours).

Art. 1, paragraph 1 of Professor Strupp's draft reads as follows:

> "A State is responsible to other States for the acts of persons or groups whom it employs for the accomplishment of its purposes (its "organs"), in so far as these acts conflict with the *duties which arise out of the State's international legal relations* with the injured State." (italics ours).

Professor Strupp makes no reference to the requirement of exhausting local remedies.

The difficulty with these proposals is that they leave in doubt and uncertainty what is meant by the important term "national responsibility", "internationally illegal acts", "violation of international duty", "duties which arise out of the State's international legal relations". The very question to be determined is whether there is an *international wrong* whenever an officer of the State, however minor his office, injures an alien contrary to the officer's legal duty. There is undoubtedly by hypothesis a domestic wrong, but an examination of the decisions of arbitral tribunals on this point makes it very questionable whether the prevailing view regards the alien State as automatically injured whenever an officer of the State injures an alien. The alien is not regarded as the living embodiment of his State, by virtue of which the State is to be deemed simultaneously injured whenever the national is injured.

Unquestionably, there is a certain logical attractiveness about the theory that when the State appoints an officer and makes it possible for that officer to commit injury against an alien, it should assume public responsibility for the resulting damage, either on the "organ" theory or as a guarantor of its officer's good conduct, or as an employing principal for the acts of its agents, or for one or more of the reasons of public policy which have been advanced, notably in France and Germany. In that event, responsibility has attached the moment the initial injury has been committed, but respect for the state's sovereignty should prevent any diplomatic interposition until the state has been given every opportunity domestically to cure the wrong done by its ofificer. It would thus only be necessary to show that no adequate redress had been obtained, not necessarily that a denial of justice in the technical sense had occurred.

2. However logical this view may seem, it is apparently rejected

in international practice, doubtless because in the majority of countries the local law has not yet advanced to the stage of regarding the state as immediately responsible for the torts of its officers. But even apart from this fact, the view above set forth fails to perceive the vital distinction between *municipal* responsibility to the alien and *international* responsibility to his State. The majority view, to the effect that there is no *international injury* to the claimant state—and it seems proper to regard the international claim or injury as arising simultaneously with the right of diplomatic interposition and not before then—until the alien has exhausted his local remedies if available and effective, is strongly influenced by the fact that the alien must ordinarily accept the same treatment from the law that nationals enjoy, and that if nationals have recourse only against the wrong-doing officer, that is all that aliens can demand, and the state assumes no greater responsibility toward aliens than it does toward nationals. The view seems entirely sound. The United States has therefore declined on frequent occasions to prosecute claims against foreign governments until local remedies against the wrong-doing officers have been exhausted, and has on the same ground rejected the claims of foreign governments [15]). International tribunals have on numerous occasions disallowed claims on that ground [16]). It seems

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15) See extracts from diplomatic correspondence printed in Moore's Digest VI, sec. 987 and Wharton's Digest, II, sec. 241. For the position of the British Government see Orinoco Steamship Co. (Gt. Brit.) v. Venezuela, 1903, Ralston, p. 90. For that of the French Government, see Waller's case, Moore's Digest VI, 670. For claims against the United States, See Frank X. Dick (Germany) v. United States, Mr. Bacon, Acting Sec'y. to the German Ambassador, Sep. 26, 1907, For. Rel. 1908, p. 356, and especially Tunstall's case (Gt. Brit.) v. U. S. 1885, Moore's Dig. VI, 662-666, quoting authorities.

16) Baldwin (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 3126; Turner, ibid. 3126; Wilson (U. S.) v. Mexico, March 3, 1849, ibid. 3021; Medina (U. S.) v. Costa Rica, July 2, 1860, ibid. 2317; Pacific Mail (U. S.) v. Colombia, Feb. 10, 1864, ibid. 1412; People of Cinecue (Mexico) v. U. S., July 4, 1868, ibid. 3127; Selkirk (U. S.) v. Mexico, ibid. 3130; Tehuantepec Ship Canal, ibid. 3132; Leichardt, ibid. 3133, Jennings et al., ibid. 3135, Black et al., ibid. 3138, Green, ibid. 3139, Burn, ibid. 3140, Slocum, ibid. 3140, Pratt, ibid. 3141, Clavel, ibid 3141, Ada, ibid. 3143, Ana. ibid. 3144, Smith, ibid. 3146, Nolan, ibid. 3147, Cramer, ibid. 3250, McManus, ibid. 3411; Danford (U. S.) v. Spain, Feb. 12, 1871, ibid. 3148; Brig Napier (Gt. Brit.) v. U. S., May 6, 1871, ibid. 3152—3159 (prize case); Hubbell (U. S.) v. Great Britain, ibid. 3484; Driggs (U. S.) v. Venezuela, Dez. 5, 1885, ibid. 3160, Corwin, ibid. 3210; Oberlander and Messenger (U. S.) v. Mexico, March 2, 1897, For. Rel., 1897, 370 at 382 et seq., Sen. Doc. 73, 55th Cong., 3 rd .sess., 85, 125; French spoliation cases, Gray v. U. S., 21 Ct. Cl. 340; Ship Tom. 29 Ct. Cl. 68; Brig Freemason, 45 Ct. Cl. 555; La Guaira L. and P.Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 182; De Caro (Italy) v. Venezuela, Feb. 13 1903, ibid. 810; Comp. General of the Orinoco (France) v. Venezuela, Feb. 19, 1902 Sen. Doc. 533, 59 th Cong., lst sess. 244.

therefore safe to say that the majority view has not only the stronger support in practice, but is theoretically the only sound view, because responsibility to the alien under the local law, and responsibility to the alien's State under international law, involve fundamentally different legal relations.

The majority rule naturally presupposes the existence of local remedies, their effectiveness, an opportunity on the part of the alien to resort to them, and the practical utility of such recourse. In the event of a criminal offense, it assumes that the state itself will institute the necessary criminal proceedings. Otherwise the state's responsibility is engaged by reason of its failure to disavow its officer's act and to discipline or punish him. The nature of the local remedy to be available to the alien is not specifically prescribed by practice. A suit against the officer would be the American and English rule and doubtless that of many of the countries of Latin-America. A claim against the state would ordinarily be the French and the German rule. Either opportunity would satisfy the requirement of international law that the state must make available effective local remedies in order to escape international responsibility for the officer's tort. When the suit is brought against the officer, there is no guaranty by the state that the judgment, if obtained, will be paid. If the alien has at his disposal the same means of redress that the national has—assuming a certain reliable standard of administrative and judicial process to have been attained —that is all that international law requires.

The difference between the two views is perhaps more theoretical than practical, so far as concerns the procedure for the enforcement of the claim. The one view makes the exhaustion of local remedies merely a condition subsequent, not limiting international responsibility, but merely conditioning interposition; the other makes it a condition precedent to inception of international responsibility. Professor Strisower, in his report to the Institute, 1927, notwithstanding the rule above mentioned, states that exhaustion of local remedies, if available, is obviously required, for the state has not yet violated any obligation and has not yet incurred any international responsibility until such remedies have been tried [17]). The theoretical importance of the difference between the two views is considerable because it places in issue the time when the international claim has its inception—whether a) at the time of the original offense by the officer, or (b) when local remedies have either been proved unavailable or futile. Whether it is necessary to prove a technical denial of justice or a mere failure to obtain the relief the local law affords is a question which the cases and

[17]) Strisower, Avant-projet de rapport et questionnaire, Bruxelles, 1927, p. 38.

the practice do not clearly answer. It is believed that mere failure to obtain the relief that the local law affords should suffice to found international responsibility. Perhaps as a matter of new legislation, it might be advisable to require the state to guarantee any judgment against its officer.

The "Local Remedy" Rule.

We have already had occasion to observe the important part that the "local remedy" rule plays in the theory of international responsibility. Article XII of the Institute's draft reads:

> "No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.
>
> Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages."

Here there is a clear expression of opinion that no international "demand for reparation" is proper so long as local remedies are available. But it is the international "demand for reparation" which constitutes the evidence of an international claim and therefore of international responsibility. The Institute might better therefore have followed a consistent theory by providing that not merely the "demand for reparation" but also substantive "responsibility" depends on the exhaustion of local remedies as a condition precedent. Theory and practice would then have been in harmony. That the United States in principle will not "examine the claim" until there has been such effort to exhaust local remedies is evident from the Claims Circular of the Department of State (October 1st, 1924) reading as follows:

> "8. Responsibility of Foreign Government. Unless the responsibility for the loss or injury for which reparation is claimed is attributable to a foreign Government, efforts of the Government of the United States on behalf of the claimant will be futile. It is essential, therefore, for claimants to show that the responsibility for their losses or injuries is attributable to an official, branch, or agency of a foreign Government. If any legal remedies for obtaining satisfaction for, or settlement of, the losses or injuries sustained are afforded by a foreign Government before its judicial or administrative tribunals, boards, or officials, interested persons must ordinarily have recourse to and exhaust proceedings before such tribunals, boards, or officials as may be established or designated by the foreign Government and open to claimants for the adjustment of their claims and disputes. After such remedies have been exhausted with the result of a denial of justice attributable to an official,

branch, or agency of a foreign Government, *or have been found inapplicable or inadequate, or if no legal remedies are afforded,* the Department of State *will examine the claim* with a view to ascertaining whether, in all the circumstances of the case and considering the international relations of the United States, the claim may properly be presented for settlement through diplomatic channels, by arbitration or otherwise. Local remedies are provided generally in foreign countries for the settlement of *contract claims* founded upon *contracts* with the *Government or its agencies*, or of *private claims* for losses or injuries due to the acts of *private individuals*, and in some countries, *for the settlement of claims based on the tortious acts of the Government or for the malfeasance or misfeasance in office of its officers.*" (Italics ours.)

Recourse to the local remedy is not merely a condition of interposition as a procedural matter but a condition of substantive international responsibility, as Professor Strisower pointed out in his report[18]). The condition may, of course, be dispensed with by agreement between the two governments, as has occasionally happened [19]); and some claims commissions have assumed that by the submission of a case to arbitration the two governments must have intended to confer jurisdiction on the tribunal notwithstanding the fact that local remedies may not have been exhausted [20]).

There are good reasons for the rule requiring the exhaustion of local remedies, even when an officer has caused the injury: first, the national going abroad should normally be deemed to take the local law as he finds it, including the means afforded for the redress of wrong; second, the state's sovereignty and independence warrants it in demanding for its courts and remedial agencies freedom from interference by

[18]) See note 17.

[19]) See Art. 3 of the Agreement of Aug. 18, 1910 between the United States and Great Britain which provides that no claim "shall be disallowed or rejected by application of the *general principle of international law*, that the legal remedies must be exhausted as a *condition precedent to the validity* of the claim", though failure to exhaust was to be an equitable consideration. See also Art. 5 of the Mexican-United States Convention of Sept. 8, 1923.

[20]) See opinion of Day, Arbitrator, in Metzger (U. S.) v. Haiti, Oct. 18, 1899, For. Rel. 1901, 262, 275; Young, Smith and Co. (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3148; Trumbull (Chile) v. U. S., Aug. 7, 1892, ibid. 3569; Davy (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 410; Aroa Mines (Gt. Brit.) v. Venezuela, Feb. 13, 1903, ibid. 359 (dictum); Hoffman (U. S.) v. Mexico, March 3, 1849, Opin. 359 (not in Moore). in Moses (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3127 and Manasse (U. S.) v. Mexico, Ibid. 3463, two cases decided by Lieber, Umpire, the grounds of decision are not convincing. The British-American commission of 1871, assumed jurisdiction, notwithstanding failure to resort to local remedies, in Crutchett (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3734, Braithwaite, ibid. 3737, and Knowles, ibid. 3748. See also the Sally, Hays (U. S.) v. Great Britain, Nov. 19, 1794, ibid. 3101-3119.

other states, on the assumption that they are capable of doing justice and affording redress; third, the government of the complaining national should give the state in which the injury has occurred an opportunity of doing justice to the injured party and repairing the injury in its own regular way, and thus avoid, if possible, all occasion for international discussion involving two states and all the people thereof; fourth, if it is admitted that the officer initiating the injury is not identical with the state itself, but is only an agent acting contrary to orders, the exhaustion of local remedies is necessary in order to make certain that the wrongful act will not be corrected by higher authority and may thus be deemed the deliberate act of the state; and fifth, if it is the deliberate act of the state, that the state is willing to leave the wrong unrighted.

As already observed, the United States has acted on this principle in rejecting claims brought against it by aliens and claims for which its own interposition was asked by citizens [21]). But the rule that local remedies must be exhausted is not an absolute or doctrinaire condition, but a practical rule of reason, so that, when it has seemed impractical to demand its application, claimant governments and international tribunals have relieved aliens from compliance with it. It has been remarked that the local remedy must be "available and effective". Perhaps this is superfluous, for obviously if it is not available or if it is not effective it is not a remedy at all. Governments will not compel compliance with a futile and empty form. There must be some measure of confidence in the integrity of the local tribunals and in the possibility of obtaining justice from them, though naturally it is a serious and extraordinary charge to deny the existence of these conditions in the courts of foreign countries. In flagrant cases where the injury is particularly outrageous or where danger to life or personal safety is involved, claimaint governments, usually constituting themselves the judges of the necessity of exhausting local remedies and of the possibility of obtaining adequate relief, are prone to dispense with the requirement and to interpose immediately. This is particularly frequent in the case of false arrests and imprisonment by local authorities. These conditions of practical politics will indicate the difficulty of reducing to a rule the circumstances under which the exhaustion of local remedies is excused. Where the courts are not free to entertain jurisdiction or where they are under undue influence, either by the Executive or by hostile mobs, or where any of those other conditions of fairness and integrity of judicial determination indispensable to the administration of effective justice are lacking, or where the courts are unable to set aside municipal legislation out of which the injury arises, the exhaustion of local remedies would and perhaps should be dispensed with, because they could hardly afford that redress

[21]) Supra, note 15.

which it is the only purpose of the rule to secure [22]). The basis of the international claim in such circumstance is the wrongful act supported by evidence that there was no practical possibility of obtaining local relief. It is perhaps unfortunate that nations often make unilateral determinations on the complicated questions of fact involved in the possibility of obtaining local redress, a circumstance which keeps this branch of the law so largely in the political forum and proportionately weakens the controlling influence of law. The necessity of strengthening the control of judical institutions over the problems and issues created by injury to aliens and the international responsibility of the state will presently be discussed.

Denial of Justice.

Perhaps no concept and term in the law of state responsibility is more important than that of "denial of justice". This is due to the fact that so many writers and courts have undertaken to sum up the law by asserting that the only ground of state responsibility and of international claim is the establishment of a denial of justice. It becomes, therefore, extremely important to determine first, whether that assertion is true, and secondly, whether it is possible to accept any of the suggested definitions of denial of justice or to secure a concurrence of support for any other definition.

Many of the Latin-American states which have so often been the victims of diplomatic claims have undertaken to rely upon the supposed rule that denial of justice is the only basis of an international claim, by giving to the term, either by constitution or legislation, a narrow definition [23]). Dr. Guerrero for the Sub-Committee of Experts, defines the term as a refusal "to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a denial of justice." He adds:

> "(a) That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible;
>
> (b) That a judicial decision, whatever it may be, and even if

[22]) The cases in which the exhaustion of local remedies has been excused are discussed in Borchard, *op. cit.*, pp. 821 ff.; Eagleton; *op. cit.*, 103 ff.

[23]) Thus art. 40 of the law of Salvador of 1886: "there is a denial of justice only when the judicial authority refuses to make a formal declaration upon the . . . suit." Moore's Dig. VI, 267, For. Rel. 1887, p. 69; see also the Costa Rican law of 1886, Moore's Dig. VI. 269; Honduran law of 1895, 87 Brit. and For. St. Papers 707; Venezuelan law of 1903, 96 *ibid.*, 647; Fabiani (France) v. Venezuela, Feb. 24, 1891, Moore's Arb. 4878, 4893 ff.; 5 Ztschr. für Völkerrecht, 510; Borchard, *op. cit.*, 836 ff.

vitiated by error or injustice, does not involve the international responsibility of the state."

The rules proceed from the belief that a State has fully complied with its international duties, if it establishes independent courts for the administration of justice. No matter what the decision, even if intentionally erroneous and though it flagrantly misinterpret the law, and though it be "unjust" or "manifestly unjust", foreigners have, according to the proposals of the report, no ground to complain or seek an appeal to the diplomatic or international forum. To do so, is to infringe the "sovereignty" of the State. Only if the State provides no courts, or if it refuses foreigners access to the courts on the same terms with nationals (*cautio judicatum solvi* excepted?), or if the court refuses to proceed with the case or render a decision, is a "denial of justice" established, entailing international responsibility. The mere rendering of a decision, regardless of its character, refutes the possibility of a "denial of justice". Delay is not equivalent to a denial of justice.

This is the view occasionally advanced by a few of the Latin-American States which European countries and the United States have in principle heretofore refused to accept. As these latter countries, with minor qualifications, demand acceptance for approximately such a doctrine in respect of their own courts, perhaps it is not too much to ask that they concede its application to all the countries of the world, strong and weak alike. As a matter of fact, the principle is conceded in effect to those countries in which the administration of justice invites complete confidence, and no mere "error" or even "unjust" decision will invite interposition. As the weaker countries gradually strengthen the administration of justice, the application of the principle is not likely to be denied them. But it seems unlikely that a mere argument based on the "equality of states" and "sovereignty" will persuade the stronger states to bind themselves to such narrow definition of "denial of justice". The difficulty here again arises, not so much in a disagreement on the principle, as in its practical application to particular cases, for arbitrariness, discrimination and gross injustice cannot be brought within a definition or a formula. If states would agree to submit unsettled issues of this type to international adjudication and not seek to settle them by political measures, a striking advance will have been made.

The Institute of International Law defines the term "denial of justice" as follows:

"1. When the tribunals necessary to assure protection to foreigners do not exist or do not function.

2. When the tribunals are not accessible to foreigners.

3. When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice."

Of the last two conditions, 2 is embodied in the Experts' proposal and 3 may possibly be implied though it is not mentioned. The third condition is extremely general in terms and does not clearly indicate whether the "offer" of "guaranties" presupposes a general condition of defective justice or an ineffective administration of justice in a particular case.

Independently of a denial of justice, Article VI of the Institute's draft provides that "The State is likewise responsible if the procedure or the judgment is manifestly unjust, especially if they have been inspired by ill-will toward foreigners as such or as citizens of a particular state." Perhaps the inclusion of "manifestly unjust procedure" would cover the case of specific mal-administration of justice in a particular case.

Mr. Hyde uses the term "denial of justice" in a broad sense, to cover cases "whenever a state through any department or agency fails to observe with respect to an alien, any duty imposed by international law or by treaty with his country [24])."

Mr. Nielsen defines "denial of justice" as "briefly and roughly... an obvious outrage—a wrong of such a character that reasonable men cannot differ concerning it [25])."

If we were to proceed from the hypothesis that a denial of justice is the only basis of an international claim, we would reach the conclusion that under the Guerrero rule there is a very limited basis of responsibility for wrongful acts, whereas according to Mr. Hyde there is a very broad responsibility, for both Messrs. Hyde and Nielsen use the term "denial of justice" as covering every international delinquency regardless of its source.

These references disclose the fact that unless there is some agreement upon the meaning of the term, the rule that denial of justice is the condition of an international claim, if there is any such rule, would become meaningless. In the narrow sense of the term, it would include some failure or defect in the administration of justice, probably involving bad faith. In the broad sense of the term, it would constitute the equivalent of any wrongful conduct by any authority of the state. Obviously if it were used in the latter sense, it would merely be a synonym for "international wrong" and would therefore lose its value as a legal term.

We must therefore seek a more acceptable definition of the term. It is perhaps fair to say that the majority of the international tribunals that have dealt with the subject have used the term in the sense of a

[24]) Hyde, *op. cit.* I, 491.

[25]) This appeared in Mr. Nielsen's argument as American Agent in the Cayuga Indian claim, Nielsen's Report, 250. In his concurring opinion in the Neer case (U. S.) v. Mexico, Sept. 8, 1923, Opinions, 77, Commissioner Nielsen thought it proper to use the term "in a broader sense" than that of a "wrongful act" on the part of the judiciary.

failure of redress in the prosecution of local remedies, so that, as Mr. Pound expressed it as arbitrator in the Cayuga Indian case[26]), there must be some injustice antecedent to the denial, and then a denial of due process thereafter. But it may also be said that a considerable number of the courts assume that a denial of justice is confined to some defect in the judicial process. This again seems too narrow, for any defect not merely in the judicial process but in the remedial process as a whole, whether the delinquency be that of the police in failing to arrest an offender or that of the executive or administrative departments in pardoning an offender after conviction or in permitting him to escape, would seem equally to constitute a denial of justice in the remedial sense. Thus, the failure to apprehend a criminal, the denial of free access to the courts, the failure to render a decision or undue delay in rendering judgment, corruption in the judicial proceedings, discrimination or ill-will against the alien as such or as a citizen of a particular state, the bad faith refusal to apply the local law, executive or legislative interference with the freedom or impartiality of the judicial process, the failure to execute the judgment, the denial of an appeal where local law ordinarily permits it, negligently permitting a prisoner to escape, refusal to prosecute the guilty, or the pardon of a convicted person, have all been deemed instances of "denial of justice[27])".

This effort to confine the term to a defect in the secondary process of righting a primary wrong has been most effectively made in certain decisions of the Mexican-American Claims Commission under the Convention of 1923, particularly in the Chattin and Janes cases. The presiding commissioner, in an exhaustive opinion in the Chattin case, made a distinction between original injuries committed by any branch of the government, including the judiciary, and those secondary injuries inflicted in the exercise of the remedial process to correct some prior wrong. The presiding commissioner maintained that it is only the second use of "denial of justice" which is proper; and that an injury to an alien in the former sense, *i. e.*, an original injury proceeding from any department of the government[28]) would not properly be denominated a denial of justice but an international delinquency. A direct mistreatment of an alien by a court not connected with any resort to the court to remedy a prior wrong, such as a "notoriously unjust" judgment or "manifest in-

[26]) Nielsen's Report, 258.

[27]) For a discussion of the cases and the theory see Borchard, *op. cit.*, 330 ff.; Eagleton, *op. cit.*, 110 ff.; and 22 Amer. Journ. Int. L. (July, 1928), 538. See also the following cases before the Mexican-U. S. Commission of 1923: Neer, Opinions, 77; Chattin, 422, 426, 428; Janes, 112; Diaz, 143; Roper, 205, 209; Kennedy, 296; Mallen, 261; Venable, 368; Putnam, 227; West, 406; Massey, 228, 235.

[28]) See R. E. Brown claim (U.S.) v. Gt. Brit., Aug. 18, 1910, Nielsen's Report, 198.

justice", or false arrest ordered by a judge [29]), would illustrate this type of injury. The Institute, by making a separate paragraph of "manifestly unjust" judgments, may be deemed to recognize the validity of the distinction.

Whether it is technically possible or desirable to make the distinction where courts are involved, between primary and secondary injuries, for example, whether it is practical to say, where a mob or the Executive controls the courts in a case where the alien is a defendant, that a denial of justice has not occurred, but only an "unjust judgment", seems rather doubtful. Foreign Offices would probably not make the distinction, nor have international tribunals or writers generally. Possibly for scientific purposes, we would be justified in making a classification of judicial injuries into those (a) which do not involve the use of the court for the redress of a prior grievance, where the wrongful act would be denominated either as an international delinquency or as "notorious injustice"—in which cases the alien might be either plaintiff or defendant, even in a civil action — and those (b) in which the courts are invoked for the redress of a prior injury to the alien, where presumably the alien would be the plaintiff or the prosecuting witness.

But if the term "denial of justice" is used in the narrow sense of indicating a defect in the administration of justice, whether primary or secondary, it would serve two purposes. It would indicate the error of the supposed rule that a state is internationally responsible only for a denial of justice, and it would give meaning to the rule that ordinarily where administrative officers or individuals do injury, local remedies must be exhausted and a denial of justice established before an international claim arises or diplomatic interposition becomes proper. In the case of injuries by officers of the state — certainly higher officials — possibly a mere failure to assure redress without proof necessarily of such defects in the administration of justice as are associated with the term "denial of justice", should suffice. But the term "denial of justice" would not necessarily be confined to injuries judicial in character, nor perhaps would every injury by a judge or court constitute a denial of justice. The following definition is offered as one on which all states might be disposed to agree:

> "Denial of justice arises from the denial, undue delay or exceptional difficulty of access to the courts, from gross deficiencies in the judicial or remedial process, or from the absence of those guaranties which are indispensable to the proper administration of justice."

[29]) See the citation of cases by Presiding Commissioner Van Vollenhoven in the Chattin case, Opinions, 425-429, in which he undertakes to classify the cases in which the term "denial of justice" has been properly and improperly used.

It need hardly be added that a state is not responsible for injuries to aliens resulting from mere error of the courts in determining issues arising under municipal law, but that the state is responsible for such injuries resulting from errors in interpreting or applying international law or treaties.

The Judicial Determination of International Responsibility.

The Institute of International Law closes its draft with a *Voeu* to the effect that by conventions states shall agree in advance "to submit all disputes" involving international responsibility — presumably if not settled by diplomacy — to international commissions of inquiry, to a process of conciliation, or to judicial determination, and expresses the "hope" that states will abstain from every coercive measure "before having had recourse to the preceding measures."

The Guerrero draft provides that such disputes "*must*" be submitted to an international commission of inquiry "to examine the facts", and only in the event that the commission's report does not close the incident must the parties "submit the dispute to decision by arbitration or other pacific means of settlement." Again the draft concludes with a proposed rule that the state must formally undertake "not to resort... to any measure of coercion until all the above-mentioned means have been exhausted."

The striking feature of the Institute's draft is that so eminently sound a proposal as the pacific settlement of pecuniary claims should be expressed in a "*Voeu*" or "hope" and should not be included in the body of the treaty. The Guerrero draft, on the other hand, is limited to disputed questions of fact only, whereas often there is no difference on the facts but only a dispute as to the legal consequence flowing from admitted facts. The omission of arbitration as a recommended measure for all issues of law seems hard to explain. In both cases the suggestion that coercive measures should be postponed until pacific means of settlement are exhausted leaves force with a sanction which it should not have.

The fact is that the protection of citizens abroad represents one of the most primitive institutions of man — group or clan redress of injuries done by others to the individual member. So long as nations are deemed enlarged clans and so long as the enforcement of rights or claims depends on a qualified system of self-help, the weakness in the present institution of international responsibility, namely, the predominance of political factors, is likely to continue to prevail. It need not always be so. A change is likely to come, and the time seems now ripe for it, when nations will categorically admit that disputes involving international responsibility for injuries to aliens are purely legal in character

and should not be made the subject of political controversy and political settlement. With it should come the admission that such purely legal disputes should be submitted to obligatory arbitration, if diplomacy fails, and that force should not be even conditionally approved but should be outlawed. Article 36 of the Statute of the Permanent Court of International Justice already provides for such cases; the Pan-American Conventions of 1902 and 1910 on pecuniary claims contemplate arbitral settlement; and the arbitration treaties adopted by the Washington Conference of 1929 provide for the obligatory submission of legal disputes. The arbitral settlement of pecuniary claims should be made an inherent part of international due process of law. The renunciation of force should be unconditional. The arbitration treaties of the last twenty years by their exceptions of "national honor", "vital interests", "independence", "domestic questions", etc. can hardly be said to have made any serious contribution to the actual development of arbitration in practice. Indeed, it is questionable whether harm has not been done by thus giving a legal sanction to the refusal of nations to arbitrate important cases, any of which could usually be accommodated under the above-mentioned exceptions. So the Porter Proposition at the second Hague Conference was unfortunate in giving the sanction of force to the collection of contractual claims if arbitration is refused. If arbitration is offered and declined, because the debtor state may not deny liability, but perhaps admit it — merely claiming poverty — the use of force is by international convention sanctioned, where it had not been sanctioned theretofore. The same objection can probably be raised to the so-called Kellogg Pact. The reservations made by certain European Powers are so broad in scope that practically any war a nation might desire to wage would probably fall within the exceptions to the renunciation of war. The signature and ratification of the treaties would then give those excepted wars a solemn legal sanction which they did not have before. It is doubtful whether progress lies in that direction, although the incidental psychological and political effects of the Kellogg Pact, notwithstanding the European reservations, may possibly offset its legal deficiencies. Time will tell.

There is a special reason why a convention on state responsibility, more than almost any other convention, should include a clause for the obligatory submission to arbitration of disputes arising in its interpretation and application. The subject of state responsibility is intimately identified with standards of conduct, such as "due diligence", "due process", "standards of civilized justice", "denial of justice", and similar broad terms which have a meaning only in their application to a concrete case. Such terms must have impartial interpretation in

case of dispute. Probably the "due process of law" clause of the American Constitution would have proved either meaningless or dangerous without some provision for its judicial interpretation.

The greatest difficulty in the matter of State responsibility has been not the inability to agree on general substantive rules governing the subject, but the fact that claiming States are not bound to resort to the judicial process but often constitute themselves plaintiff, judge and sheriff in their own causes. This is one of the principal and justifiable grievances of certain of the weaker Latin-American States. The major objection to the present practice, notably from this Latin-American point of view, is the absence of any obligatory peaceful legal method of determining issues of law. The present system contemplates the frequent use of political coercion of all types to enforce claims essentially legal in character. The whole field of pecuniary claims, more strictly legal in its nature than many of the other departments of international law, should not only on its substantive, but on its procedural side, be divorced from politics and brought within a legal framework. No pecuniary claim, not involving an immediate threat to human life, should become the source of coercive political action. Every claim should, if not easily settled diplomatically, be submitted by convention, as automatically as possible, to an international court. If this were done, all parties would benefit and such tribunals as the Permanent Court of International Justice would probably never lack a full docket. International law would thus extend its beneficent regulatory power to a field in which political considerations now unfortunately often predominate. A claimant, having a perfect legal claim, is now dependent for relief largely upon the political strength or influence of his nation, on its political relations with the country complained against and on the disposition and willingness of the Foreign Office to exert diplomatic efforts in his behalf. His claim becomes the passive victim of politics and of their accidents. The Government of the injured citizen is subjected to political pressure to espouse what may be a poor claim, often acts on insufficient evidence, and in prosecuting a claim is led to invoke the support of a whole people on behalf of a single citizen or corporation — a primitive and medieval form of collective revenge which survives in practically no other branch of public law. A people should not be involved in political entanglements arising out of an alleged legal injury to a citizen, if it can possibly be avoided. The defendant nation should not be in the position of having to yield a legal case to political arguments or of availing itself of political strength to resist a legal claim. The cause of peace and normal international relations should not be impaired and hampered by the present easy conversion of a legal into a political issue. An agreement to submit legal pecuniary claims to a legal *i. e.*,

judicial method of settlement, — possibly permitting injured nationals to sue the defendant State directly in an international court — would be one of the greatest boons imaginable not only to the parties and peoples in interest but to a world still delicately balanced between the Scylla of law and the Charybdis of anarchy. Here, in the field of State responsibility for injuries to aliens, lies a practical opportunity to lift a most important field of international relations from the arena of politics to the realm of law.