

Responsibility of State for International Delinquencies

by

Hua-Cheng Wang.

I. INTRODUCTION.

One of the notable results of increasing civilization has been the growth of rights and duties among members of the family of nations. In the past, sovereignty was considered as absolute, for a state was its own judge and no one could question its conduct. From this the doctrine of state irresponsibility was derived. But in recent times, the increasing contacts between nations, which are no longer wholly independent of each other, have necessitated a change. The rapid movements of population and the enormous expansion of business have penetrated and cross penetrated the national boundaries of states. Therefore it becomes necessary to have some sort of international law to regulate their intercourse, to confer upon them certain rights and to impose upon them certain corresponding duties for their mutual convenience and benefit.

From the point of view of individuals, the development of international law is closely associated with the growth of the rights of aliens.² To the Greeks

-
1. This article was written in 1927 as the first chapter of the author's dissertation on "Measures of Reparation for International Delinquencies". In the Spring of 1930, under the auspices of the League of Nations, the Hague Conference on the Codification of International Law took up the question of "Responsibility of states for Damages caused on their Territory to the Person or Property of Foreigners," along similar lines. Unfortunately, the question is so complicated that the Conference was unable to reach any agreement. This article is published in its original form with few slight modifications. For details of discussion and documents concerning the Codification Conference, see: League of Nations, Official Journal, 1930. American Journal of International Law, 1930.
 2. H. T. Kingsbury: "The act of state doctrine", American Journal of International Law, VI, 359.
See also Am. Soc. Proc. 1908, 60. "The rights of individuals in a foreign land are far more extensive and definite than they were fifty years ago; and international obligations and liabilities are more fully comprehended and more universally acknowledged than they were then. A nation can no longer live within itself. It can not ignore the generally accepted principles of international law, nor can it afford to defy the opinion of the civilized world by refusing to comply with them. Whatever political systems or institutions a nation may possess for the government of its domestic affairs,

and Romans, foreigners had no rights at all—in fact strangers and enemies were not distinguished in the eyes of law—and whatever rights they enjoyed in their person or property were not by right but by grace of the local sovereign.¹ However, at present, aliens enjoy practically the same amount of civil rights as nationals,² and often more in weak and disorderly states.³ Their rights are no longer grants by municipal legislation but derived directly from international law; and the protection of their rights is no more at the pleasure of the local tribunal but must measure up to an international standard.⁴ The more completely such rights are recognized and protected by the internal authorities, the

such system or institution must not interfere with its international duties. No state, however powerful or enlightened it may be, can claim a place among great nations which is not prepared to do as well as to demand natural justice, in the broad sense which this term has acquired at the present time. The policy of national selfishness has become antiquated and must give place to those altruistic ideas which are consistent with the modern conception of international morality."

1. In the Twelve Tables of Rome, alien and enemy were classed together under the common term 'hostis'. See Berheim: *The History of the Law of Aliens*, p. 7-17; and Austin: *Jurisprudence*, vol. 5, p. 241.
2. Tu: "Responsibility of state for injuries to foreigners" (thesis) p. 6. "At present the civil status of the alien is practicably the same as that of the nationals throughout the civilized world. Some disabilities of secondary importance still survive and differ from country to country."
3. "China indeed repardless of treaties has in innumerable cases been held to a degree of responsibility amounting actually to a guaranty of the security of persons and property of aliens". Borchard: *Diplomatic Protection of Citizens Abroad*, p. 222. Foreigners in China occupy a privileged position resented by the natives.
4. "An alien in entering a country submits tacitly to the local law, according to the rules of which his rights and duties are measured... However, unqualified this doctrine may be as a matter of principle, the practice of stronger nations in their relations with the exploited countries of the world has demonstrated that this axiom is conditioned upon the premise that the local civil and criminal law and its administration do not fall below the standard of civilized justice established by international law..." Borchard: *Diplomatic Protection of Citizens Abroad*, p. 179. "To sustain this denial of redress, Mr. Marsical has invoked the familiar rule that the measure of protection and privilege to which foreigners residing in a country are entitled is that which the government of the country accords to its own citizens. As a general proposition, this rule is undoubtedly acceptable. But where a government asserts that its citizens in a foreign country have not been duly protected, it is not competent for the government of that country to answer that it has not protected its own citizens, and thus to make the failure to perform one duty the excuse for the neglect of another." Moore: *Digest of International Law*, VI, 805 Mr. Blaine, Sec. of state to Mr. Dougherty, Jan. 5, 1891:"

less occasion there is for resort to external diplomatic pressure and the less danger there will be of international dispute.¹

International delinquency should be distinguished from such terms as "International Crime" and "Crime against the Law of Nations."² "International Crime" refers to such outrages against mankind as piracy and slave-trading which every state has a right to punish. They do not give rise to state responsibility at all, irrespective of the nationality of the offender. "Crimes against the Law of Nations" are such acts as are prohibited by the municipal law of the state in order to prevent incidents which would involve it in international responsibility. Both refer to acts by individuals, not acts by states.

International delinquency means every failure of the state itself to meet the requirements of international law. The obligations are imposed upon the state either by custom or by specific agreements. Non-fulfillment of any of these obligations constitutes an international delinquency which gives the injured state a right to diplomatic interposition and imposes on the delinquent state a duty to make reparation.

II. INTERNATIONAL DELINQUENCY FROM THE POINT OF VIEW OF ORIGIN OF OFFENSE.

The state as a subject of international law, is only accountable for its own conduct. It can not be held liable for any act except its own.³ However, a state can act only through its agents. Thus, any act of the agents of the state, acting within their authorization, is an act of state, is an international delinquency if contrary to the requirements of international law, and gives rise to international claim if the injured state chooses to exercise its right of diplomatic interposition.⁴ In such cases, the state responsibility is absolute.⁵

-
1. H. T. Kingsbury: *The Act of State Doctrine*. *American Journal of International Law* IV, 359.
 2. Hershey: *Essentials of Public International Law* p. 161. Oppenheim: *International law*, I. Sec. 151.
 3. Grotius Book II, XXI, II, 1, "A civil community, like any other community is not bound by the act of an individual member thereof, without some act of its own, or some omission. (Whewell's Translation.)"
 4. Hershey: *Essentials of Public International Law*, p. 161.
 5. *American Journal of International Law* VIII, 816.

The Legislature is an organ of the state for whose acts the state is internationally responsible, such as: the passage of legislation, ¹ violating treaty obligations in respect to immigration, ² or tariff, ³ etc., and the declaration of paper blockades, etc. contrary to customary or conventional international law.

Acts of Executive officials violating international law also constitute international delinquencies involving the responsibility of the state. ⁴ Under this group may be included the Chief Executive of the state, ⁵ its diplomatic, ⁶ naval, military, ⁷ and administrative officers.

1. Defects in law or even constitutional obstacles serve as no defense for the delinquent state. The arrest of the Russian Ambassador Mathwoef in London 1708, resulted in the passage of the famous act of Anne in the same year by parliament, and the Mcleod case led to the adoption of the revised statute section 753 amending Habeas Corpus Act, are notable incidents sufficient to show the principle of international law in this respect. For Act of Anne, see British Foreign list 1923, p. 467; for the revised statute sec. 753 see Moore: Digest of International Law II, 30. See also the article by Clyde Eagleton: "Responsibility of the state for protection of foreign officials." American Journal of International Law, XIX 297.
2. The United States Congress in passing the Chinese exclusion law contrary to treaty provision then existing between the two countries clearly violated international law. Regulation of immigrants is a domestic question. But if such regulation is contrary to treaty, it becomes an international offense. If China was strong enough to hold the United States responsible, the latter could not hope to escape its liability. Japan even resented the American regulation of immigration contrary to the Gentleman's Understanding which is merely an executive agreement.
3. The congressional act of 1912, regulating the tolls in the Panama canal and exempting from charges all vessels engaged in the coastwise or coast to coast trade of the United States, contrary to provisions of the Hay-Pouncefote Treaty of 1900 gave rise to protest by Great Britain. In 1914, upon the suggestion of President Wilson, the Tolls Bill was repealed. See Adam: "The Foreign Policy of the United States" p. 249-252.
4. The failure of an administrative officer to execute a judgment may appropriately be considered as a denial of justice. This is the opinion of Mr. Borchard. Diplomatic Protection of Citizens Abroad p. 131 ff.
5. The Chief of state represents the state in all its international affairs. Almost any act of his is considered as an act of the state. Where his conduct is clearly beyond his official capacity, the state is not responsible for such acts he may commit.
6. Diplomatic officers are considered as authorities of the state with respect to all acts within their scope of authority. In the case of Trumbull vs. United States (August 7, 1892) the rule was extended to include acts within the minister's ostensible authority. Borchard: Diplomatic Protection of Citizens Abroad. 187.
7. Bayard to Buck, Min. to Peru (U. S. Foreign Relations 1885, p. 625) "A government is responsible for the misconduct of its soldiers when in the field, or when acting either

The Judiciary is another part of the governing body of the state for whose acts the state is liable. The denial of justice by this branch of government has been one of the main grounds for diplomatic claims. However, the decision of lower courts would not involve immediate state responsibility if appeal to higher tribunals is still open to the injured alien. Only the decisions of the courts of the last resort are acts of the state. ¹

Although state responsibility is absolute when the officials act within their authority, yet if they act beyond their authorization, their acts are no more than acts of private individuals done in their private capacity, for which the state is not responsible unless through some competent agent it accepts the act or tacitly does it through negligence in prosecution. In spite of this theory of law, international commissions have often made awards on the proof of the mere fact that an officer has committed the injury in question. Certainly, if the injury is done by an officer the presumption of international responsibility lies with the state, because the officer is under the direct control and discipline of the state, and often his ability to do wrong is due to the power vested in him by the state, and therefore anything he has done is presumed to be either done or permitted by the state. But to say that the state is responsible for any act of its agents, irrespective of the capacity in which they acted is certainly inadmissible. ²

In regard to acts of private individuals, the state is not responsible at all unless the act can be attributed to the negligence of some agent of the state. This is true if its courts have denied justice to the alien, if its political officials have failed to exercise due diligence in the prevention of injury to aliens, or if its legislature has failed to provide proper laws and agencies for assuring justice and security. ³

actually or constructively under its authority, even though such misconduct has been forbidden by it...."

Art. III of the Hague Convention on Laws of War on Land, 1907, even provided that the state is liable for all acts committed by persons forming part of its armed forces.

1. "As a general rule the state is not liable for acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort." Borchard: *Diplomatic Protection of Citizens Abroad*. p. 196.
2. Borchard: *Diplomatic Protection of Citizens Abroad*, p. 196.
3. *ibid.* "Private individuals are in no sense authorities of the state. For this reason

State responsibility does not flow from the acts of individuals directly but from the state's exclusive territorial jurisdiction. It has been recognized by the principles of international law that states are sovereign within their territorial limits. This doctrine of territorial sovereignty implies a right of exclusive control over all individuals within the state, and consequently a duty to prevent internationally injurious acts from being committed on its territory. Thus Mr. Hall says: "A state must not only itself obey the law, but it must take reasonable care that illegal acts are not done within its dominions."¹

This is a duty of the state. Its responsibility, however, does not flow directly from the injurious acts, but from the non-fulfillment of its duty of prevention. The state owing to its right of exclusive control over its territory, has a corresponding duty to protect aliens and foreign states against injurious acts originating therein. But this is by no means a guaranty.² To say that international responsibility is involved the moment an internationally injurious act is committed within the state is merely using the term "Responsibility" in a loose way.

their acts do not involve the international responsibility of the state unless the latter by some independent delinquency of its own may be charged with a violation of its international obligations."

1. Hall: International Law 53.

2. "There is required to produce this liability, not only knowledge, but the (ability) power of prevention." Grotius, Bk. II, Ch. 17, p. 342. In this connection, statements made by Mr. Borchard are worthy of attention. "The first of these obligations in so far as it affects the present subject is to furnish legislative, administrative and judicial machinery which normally would protect the alien against injuries to his person or property by private individuals. This does not mean that the governmental machinery of the state must be so efficient as to prevent all injury to aliens...for..... This would make the state a guarantor of the security of aliens...but simply that its legislation, its police, and its courts, whatever the form of government, must be so organized that a violent act by one private individual upon another is only a fortuitous event and that the judicial channels for legal recourse against the wrong doer are freely open. A second and subsidiary duty, a default in which has often served to fasten responsibility upon the state, is the use of due diligence to prevent the injury, and in a criminal case the exertion of all reasonable efforts to bring the offenders to justice."

"...Nor is the state a guarantor of the safety of aliens. Even a treaty providing for special protection has been held not to be an insurance against all injury, but merely places aliens on an equality with citizens in this respect. As a general rule, the responsibility of the state for a failure to protect an alien is measured by its actual ability to protect".

Thus we may see that acts are of two kinds: Acts of state and acts of individuals. As to acts of officials, they are either under the one or the other dependent upon whether the officials have acted within their authority or not. If they are acting within their authority, they are acting for the state; but if they are acting outside their authorization, they are acting in their private capacity. Acts of state give rise to state responsibility immediately upon the commission of the offence while private acts do not; the latter only involve international responsibility in case they arise because of the negligence of the state. State responsibility for acts of state is direct and immediate; and for acts of individuals is indirect and conditional.

III. INTERNATIONAL DELINQUENCY FROM THE POINT OF VIEW OF THE INJURED.

When does this indirect and conditional responsibility arise? The degree of vigilance that a state is obliged to exercise for the prevention of unlawful and injurious acts within its jurisdiction seem to vary with the party affected. An international offense may be directed against the government of a foreign state or its territory or its people. In any event, the local state is responsible only if negligent, but in cases affecting foreign governments and territory, the presumption of negligence is much stronger than in cases only affecting alien individuals. State responsibility, to be sure, is not determined according to who has suffered from the injury. But owing to the special care that a state is bound to take for the protection of its neighbors, any injury done to them either in the person of their officials or in their territory is likely to involve international responsibility.¹

"In a number of cases occurring in the more poorly organized countries like China, Turkey, Morocco and formerly Greece and a few other states, the government has been held liable for the acts of private persons even in the absence of governmental complicity, apparently regardless of principle, but presumably on the ground that an insufficient police protection and enforcement of law invited disorder and constituted an international delinquency. In other words liability is predicted on the failure to prevent the injury, regardless of the ability to prevent it. This practice overlooks the principle that an alien visiting unstable countries assume a certain measure of risk, . . ." Borchard: *Diplomatic Protection of Citizens Abroad* p. 213 ff.

1. " . . . as in war, the bearers of flags of truce are sacred, or else wars would be interminable, so in peace, ambassadors, public ministers and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to

The question as to who is the suffering party has not only much to do with the determination of state responsibility, but also with fixing the reparation. When an alien is injured, usually his state is not seriously hurt, and may be satisfied with the operation of local redress. But when a public minister is attacked his state is hurt because of his public character as its representative. Thus he who insults a public minister affronts his state as well.¹ Therefore in the field of reparation, we find that international delinquencies affecting only alien indi-

the rights belonging to his rank and station . . . " Moore: Digest of International Law VI, 813.

"Where the offense is committed against the representative of a foreign state, either the head of the state, a public minister or even a consul, all of whom enjoy a certain special protection, the government has on occasion been held immediately liable for the wrongful acts of private persons." Borchard: Diplomatic Protection of Citizens Abroad. p. 216.

"ordinarily, the protection which a state must afford to foreigners within its jurisdiction is restricted to the provision and satisfactory operation of laws which protect the aliens as thoroughly as the national. But the foreign official may demand more in the way of protection than the private individuals may." League of Nations: Official Journal, November 1923, p. 309.

1. "The Book of Laws of Manon contains the following maxim: 'He who strikes an ambassador rushes on to his own loss and destruction'" American Journal of International Law VI, 23.

At a very early date, the Greeks recognized the sacred character of ambassadors. They were treated with great respect at the hands of the Romans. During medieval age, they were given special protection by the Canon Law of the church which provided excommunication for those who should throw obstacles in the paths of envoys. According to the civil law, then existing, the offender would be delivered to the enemy to be sold into slavery. "At the commencement of 17th century, John Hotman, the author of the treatise on the duty and dignity of ambassadors said: 'With regard to his person, it is common knowledge that by law both human and divine, even among barbarous nations and in the midst of enemies in arms, the person of the ambassador has been at all times held sacred and inviolable. The penalty inflicted upon those who injure them has been at all times most severe. This law has come to be proverbial, namely, that an ambassador is always exempt from any outrage and any harm . . . and when men have not inflicted punishment it has been seen from century to century that God has not allowed this crime to go unpunished; and in witness hereof, observe the destruction of Carthage of Tyre, of Thebes, of Corinth and of so many other states, and even entire provinces and kingdoms' ". Ibid.

"The special protection due to the representatives of foreign government explains the prompt payments of indemnities for attacks by mobs on foreign consuls and consular agents. The consul is considered injured not alone as an individual but in his character as the representative of a foreign government". Borchard: Diplomatic Protection of Citizens Abroad p. 223.

duals⁴ may be dropped without a protest while offenses affecting the state's territory or public officials may upset the whole world and alter the history of nations.¹

Although there are in reality no degrees of responsibility, for a state is either liable or not liable, yet there are degrees in the consequences resulting from injurious acts. If an alien individual is not properly protected, he alone suffers; but if an ambassador is not properly treated, the honor of empire or kingdom may be involved. Although the delinquent state is responsible for the offense in both cases, yet the damages done differ in magnitude as well as in kind, consequently measures of reparation vary accordingly.

The three important components of a state are the government, the territory and the people. All injurious and disrespectful acts against the national flag, the chief of state and other officials are direct offenses against the government itself. All persons and things forming part of the government are entitled to special protection at the hands of foreign states. Here international law demands a greater degree of diligence on the part of the local state for their protection; and therefore its responsibility can easily be involved if injury is done to them. What is due diligence in the protection of ordinary aliens may be considered as insufficient in the case of foreign officials. Consequently what is due diligence in one case may be negligence in another, thus involving the international responsibility of the state. As to measures of reparation for offenses against foreign governments, formal amends are needed to satisfy the honor of the injured state, all material damages must be fully repaired and offenders severely punished.

Violation of the territory of the state may either be in the form of armed invasion or mere extension of jurisdiction over the territory of that state by another. Cases of this sort are rare. If it involves only a mere extension of jurisdiction such as arresting a person across the international boundary line, it is not a very serious offense, and it would not ordinarily give rise to diplomatic crisis.

But if an armed group of citizens should attack a neighboring state, such acts would have grave international consequence, because such attacks cannot be momentary outbreaks but are results of long conceived plans which the local

1. Assassination of Arch-Duke of Austria in 1914 started the world war.

authorities are bound to repress, and because of the fact that arms are carried in open and the local authorities should take cognizance of the fact and should exercise a greater degree of diligence for the prevention of the crime. A state failing to do this, will be held liable. ¹

As to armed invasion under the orders of government, it is either a measure of self-defense, or a punitive expedition, or an act of war. ² In case the invasion is a matter of self-protection such as the landing of marines for the protection citizens and their property abroad, the invaded state is usually not in a position to demand reparation, and often its own conduct is such as to justify the measures taken by its neighbors. A more serious act would be a punitive expedition, such as, the Allied expedition to North China during the Boxer rebellion in 1900, ³ or the Pershing expedition into Mexico following the Villa raids on Mexican-American border. ⁴ Under this may also be included such cases as the

-
1. "From the supremacy and exclusiveness of the territorial jurisdiction, it follows that it is the duty of a state within the bounds of legal responsibility to prevent its territory from being used to the injury of another state . . ." Moore: Digest, II, 446. It is interesting to note that the United States rejected her responsibility for the Fenian invasion of Canada from the United States border in 1866, and later held Canada responsible for the Indian disturbance on the Montana border from Canadian side in 1879. Mr. Hall commented on the attitude of the United States by saying: "In other words, the country (U. S.) which had been guilty of direct complicity with raids on a friendly state from settled country close to the seat of government, did not hesitate when its own interests were involved to ask that state (Canada) to undertake a distant and difficult expedition into wild and almost uninhabited regions." Hall: International Law, p. 270.

Filibustering expeditions against weak neighbors started from the territory of the United States have been common in the history of U. S. foreign relations. The case of Cuba, Florida, Texas etc. Taking advantage of this rule, Great Britain made China responsible for the riot in Shanghai 1908 within the international settlement over which China exercised no police control. Foreign Relations of U. S. 1908, 140-151.

2. Invasion of foreign territory by individual soldiers sometimes happens. The recent dispute between Bulgaria and Greece serves as an example.
On September 28, 1887, a German soldier on sentry at the frontier near Vexian Court shot from the German side and killed an individual who was on French territory. As this act of the sentry violated French territorial sovereignty, Germany disowned the act and apologized for it, and paid a sum of 50,000 francs to the widow of the deceased as damages. The sentry, however, escaped punishment because he proved that he had acted in obedience to orders which he had misunderstood. See Oppenheim: International Law I. 255.
3. Moore: Digest of International Law V., 476-525.
4. Adams: History of the Foreign policy of the United States. 207. In this case, it is interesting to note that the armed invasion has the consent of the Mexican government.

occupation of Vera Cruz by the United States, bombardment of Corfu by Italy, etc.¹ In all these cases, the parties involved are not of relatively equal strength. Although the punitive measures taken may be far in excess of the offense, yet the question of responsibility and reparation is seldom raised, for the injured party is usually not an equal to the aggressor and their relationship resembles that of the conqueror to the vanquished. Finally there may be invasion of territory as a measure of war.² Theoretically speaking, the state is not responsible for such invasions, if it acts in accordance with the laws of war; but in practice, the defeated party is sometimes made liable for all damages and losses resulting from the war, irrespective of the legality of its acts, not by international law, but by peace treaty imposed on it by the victorious state.³

Of all international delinquencies, injuries to the aliens form the greatest bulk of cases. The state, having a right to demand protection for its citizens abroad, has a corresponding duty to protect aliens at home. Though the cases are numerous, each offense is not considered as serious an injury to the foreign state as if done to its territory or the person of its officials.

IV. INTERNATIONAL RESPONSIBILITY RESULTING FROM STATE-FAULT.

We have already seen that international responsibility results only from the fault of the state.⁴ Thus if the offence is an act of the state, the responsibility

-
1. For occupation of Vera Cruz see *Ibid* 206.
For bombardment of Corfu, see the case on the assassination of General Tellini of Italy in Greece.
Under this group may also be included the occupation of Kiaochow by Germany in 1889 as a result of the death of two German missionaries; the bombardment of Morocco by France in the Casablanca Incident 1907, etc., etc.
 2. By the Peace Treaty of Versailles June 28, 1919, Art. 232: "Germany pledges complete restoration of Belgium, and in addition to make reimbursements of all sums borrowed by Belgium of the Allied and Associated Governments up to Nov. 11, 1918, as a consequence of the violation of the Treaty of Neutralization of 1839." By Art 227, trial of William II was provided for "A supreme offense against international morality and sanctity of treaty". Here the responsibility of Germany is largely due to the violation of the Neutralization treaty rather than violation of territory.
 3. The Versailles Treaty also provided for trial and punishment of German officers guilty of violation of laws of war. But no such provisions for the punishment of Allied officers guilty of the same or similar offenses.
 4. American Journal of International Law, Special Supplement, Vol 20, 1926. Codification of International Law. "State responsibility for damages to foreigners," by League of Nations Committee of experts for the progressive codification of interna-

of the state is unquestioned; but where it is an act of a private individual the state is not responsible unless by some independent act or omission of its own, it becomes delinquent.¹ The Doctrine of state fault has always been the cardinal principle of state responsibility in international law. When Grotius first founded the Science of International Law, he definitely laid down the rule that a "Community is not bound by the act of an individual member thereof without some act of its own or some omission."² To him, "no one innocent of delict can be punished for the delict of another."³ Therefore in order to make the state responsible the claimant must show that the state itself is at fault.⁴ Fol-

tional law, p. 201, "Since International responsibility can only arise out of a wrongful act, contrary to international law, committed by one state against another state, damage caused to a foreigner can not involve international responsibility unless the state in which he resides has itself violated a duty contracted by treaty with the state of which the foreigner is a national, or a duty recognized by customary law in a clear and definite form."

1. "The act of the subject can never be the act of the sovereign; unless the subject has been commissioned by the sovereign to do it." Cases of the Resolution 2 Dallas 1.
"The government of the United States is not liable to foreign governments for misconduct of its private citizens within their jurisdiction, such citizens not being in any sense its representatives." Mr. Forsyth to Mr. Calderon de la Barca, Sept. 17, 1839 Moore: Digest of International Law VI, 787.
"Yet an examination of great many cases confirms the view that as a general principle, the state is not responsible for the wanton or unlawful acts or its minor officers, unless, it has directly authorized, or, after notice, failed to prevent the act, or by failure to arrest, try or punish the guilty offender, or to allow free access to its courts to the injured parties, it may be charged with actual or tacit complicity in the injury. One important reason for this rule is that the wrongful act of the minor official is not presumed to be the act of the state until some state organ, either a higher court or a superior administrative authority, by some independent act or omission, has tacitly ratified the act." Borchard: Diplomatic Protection of citizens abroad... 189.
"The essential feature of international law is not that it lays down rules of conduct for states, but that it holds state responsible for the conduct of persons..." Wright: Enforcement of International Law through Municipal Law preface 5.
2. Grotius, Whewell Trans. Bk. II, XXI, II, 1. (Ch. 17, p. 341)
3. Ibid 367.
4. Ibid 342. He laid the principle that liability is incurred when the injury to the alien could have been prevented. Thus he says: "Rulers come to share in the crime of others by their allowing and receiving. In regard to allowing, it is to be held that he who knows of the commission of the offense, is bound to prevent it and who does not, does himself offend." "The act of an individual citizen, or a small number of citizens is not to be imputed without special proof to the nation of which they are subjects. (A different rule would apply to the act of a large number of persons, esp. if they appear in the array and with the weapons of a military force.) Phillimore: International Law, 3rd. ed. Vol. I, p. 318.

lowing Grotius, Vattel supported the same theory of state responsibility by saying that: "A sovereign should not allow his subjects to do injury to subjects of other states, or the state itself. If he does not prevent the injury the sovereign is not less guilty than if he had committed the act himself. But as it is impossible even in the best governed state and for the most vigilant and absolute sovereign to restrain all acts of his subjects to keep them on any occasion in exact obedience, it would be unjust to impute to the state or sovereign all delicts committed by citizens thereof. Therefore we cannot generally say that any injury by individual members of a state should be regarded as an offense on the part of the state. But if the state approves or ratifies that act of its citizens, then the state should be regarded as the true author of the injury and the citizen only an instrument."¹ Ever since the days of Grotius and Vattel, the doctrine of state fault has been recognized as the only basis for state responsibility.

In matters of international claims, individual persons do not have any legal status. International law deals with the delinquency and responsibility of states—not individuals. An individual may commit an offense, but that offense itself does not immediately and automatically become an international delinquency, for no matter what the offense is or who the injured party may be, it is a domestic question. However, if the state, in its conduct before the offense or in handling the case, fails to meet the requirements of international law, then international delinquency arises out of the fault of the state. Although the act of the individual may be a contributory cause, it is the state fault that gives rise to international responsibility and not that of the individual who may have committed the crime in the first place. The lack of status for individuals in international law explains the fact that reparation, whatever the form, is made to and by the states concerned.² Finally the individual owing to his lack of international status can not make claims directly on foreign governments; and regardless of the kind and amount of injuries he may have suffered, he has to

1. Vattel, *Le droit de gens*, ed. Pradier-Fodere, Vol. II, Ch. 6. p. 47-55

2. "While awards are usually made in favor of the individual claimant, indemnities are paid to governments; and the claim which the individual may have in the indemnity is determined by municipal law entirely." Eagleton: *Responsibility of state* p. 89. "...International responsibility is a relation between states only." Borchard: *Diplomatic Protection of Citizens Abroad*. p. 383.

present his claims through his government which may or may not present his claim as it sees fit.

When will an offense, committed by an individual within the state, assume an international character? This is a rather difficult question. The important difference between an ordinary injurious act and an international delinquency is that in the former, the injured party must satisfy himself with whatever remedy he can get through local redress and the operation of local law, while in the latter case, diplomatic interposition may be invoked. Therefore the test of international delinquency is the justifiability of diplomatic interposition. Until state fault is definitely involved, no international delinquency exists, and consequently no diplomatic interposition is in order.

As to measures of reparation, the ideas of compensation and penalty are mixed together and it is often impossible to distinguish one from the other. However, it is safe to say that both of these elements have entered into consideration in a majority of cases. Compensation to those who have suffered loss and damage is a recognized practice supported by international law. Nine out of ten cases are of that sort. However, in some cases a penalty has been imposed to prevent further violation of the law of nations. This kind of case happens quite often though it may not be as numerous as the other type.

Having had a preliminary and general survey of the theory of state responsibility in international law, we may now proceed to the discussion on the various ways through which states become delinquent and responsible.

A. International responsibility resulting from injurious acts by the state: We have already noticed that acts by state-agents injurious to foreign states have often given rise to international responsibility. The main difficulty here is to determine whether or not the agent acts within his authority. More common are the cases where the injury is committed directly by an individual and the state is at fault only through negligence or complicity.¹

1. A state's complicity may be involved in acts of private individuals if it knows that certain acts injurious to foreigners and foreign states are about to happen, and yet purposely neglects to prevent them. Governmental complicity may also be involved if it actually directs the crime behind the stage, refuses to punish the offender, or fails to carry out the execution after the sentence is given. In short, acts involving governmental complicity are considered like any other act of the state involving its international responsibility.

B. International responsibility resulting from the lack of Due Diligence: One of the most common grounds for state responsibility is the failure of the state to exercise due diligence within its jurisdiction for the protection of the rights of aliens and foreign states. Every state in the family of nations enjoy a right of protection against injury from foreign jurisdiction. It is at the same time bound to do the same for others. "If a government neglected to do everything necessary to protect the property and goods of foreigners and if it did not endeavor to repress the violence and offenses of its citizens, it should be bound to answer for the consequence of its culpable negligence."¹ The state is responsible internationally for its negligence either in the prevention or prosecution of the crime. A state can not be said to have exercised its vigilance to prevent unlawful acts from being committed within its dominions, unless it has also exercised vigilance in punishing the offender and in repressing the wrong done.

The term "Due Diligence" and the term "Reasonable Care" are often used interchangeably. Both are incapable of concise definition. The words "Due", "Reasonable", or "Proper" all involve a sense of discretion varying from person to person and from case to case. What is due diligence in one instance may not be so in other instances. What seems to be proper to one party may not seem so to another. If we could draw a clear demarcation line between due diligence and lack of due diligence, we should be offering a great contribution to the science of international law, by solving one of its most controversial questions. Our inability to define due diligence satisfactorily is due to nature of things. The conditions of international delinquency are so varied and numerous that it is impossible to lay down hard and fast rules.²

Though "due diligence" is incapable of satisfactory definition it may be analyzed from several different angles.

"Due diligence" depends upon the emergency of the occasion, in other words, contingencies and circumstances at the time of commission of the offense.

-
1. Fiore, *Droit International Public*, Antaine's Trans. Vol. I, sec. 675, cited in Tu, *Responsibility of states for injuries to foreigners*. (Thesis)
"A government which has honestly and in good faith taken all possible measures to prevent injurious acts, may base upon that fact in an allegation of a presumption of non-liability on its part." Fiore: *International Law Codified*, (Borchard Trans). 282-90
 2. Furthermore, governments are run by human beings. Such a task necessarily involves discretion everywhere.

In case of sudden violence which the best organized government could not foresee, the general rule is that the government is not liable for acts of individuals which it could not prevent.¹ The reason for non-liability of states is that the acts that cause the damage are impossible of prevention. They are due to "Force Majeure" and therefore no liability can take place under the circumstances.²

"Due diligence" required of a local state varies with the kind of offense that it has to prevent. Injury against the person of the alien is more serious than damages to his property, therefore, the duty to exercise a greater degree of diligence for the protection of their lives is incumbent upon the local state. The use of insulting language against an ambassador by a private individual has very little chance of becoming an international delinquency for the local state has no control over such expressions made at heights of emotion. But if the individual should kill the ambassador, the state will probably be held liable for not giving him sufficient protection. The degree of due diligence that a state has to exercise varies with the gravity of the offense. The greater is the offense, the higher is the degree of diligence required. This is even more so in prosecution of crime, when the offense is known and the state should measure its diligence accordingly.³

1. Borchard: *Diplomatic Protection of Citizen Abroad* p. 223.

2. *American Journal of International Law*, VII, 740.

"It is notorious throughout the world that outrages of this kind on the western frontier of the United States are more of less frequent and that the whole military force of that country out of garrison has not been sufficient to prevent the occasional robbery or murder of innocent persons, whether aliens or citizens. Unless a government can be held to be an insurer of the lives and property of persons domiciled within its jurisdiction there is no principle of sound law which can fasten upon it the responsibility for indemnity in cases of sudden and unexpected deeds of violence which reasonable foresight and the use of ordinary caution cannot prevent. "The Wipperman Case, Moore, *Arbitration*, p. 3042.

3. In determining the liability of the state, the nature of the case is important. Thus if the moving cause of the injury is notorious, e. g., bandits in a certain locality, a greater degree of protection is incumbent upon the government. "A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed and which it fails to punish" Statement by Sec. Evarts. See Hershey: *Essentials of Public International Law* 164n Also Moore, VI, 791; *Foreign Relations*, 1885, 212. "The government of a foreign state is liable not only for any injury done by it, or with its permission, to citizens of the U. S. or their property but for any such injury which by reasonable care it could have averted."

"Due diligence" varies with the parties injured, because of the difference in the degree of protection which each of these parties is entitled to. An alien is usually not entitled to more protection than nationals, provided the laws, the courts, and the administration of justice conform to the international standard. Foreign governments and agents, however, may demand more in the way of protection.¹ Consequently the degree of due diligence that the local state has to exercise for their protection is also greater. Therefore, what is considered as diligence in the case of ordinary aliens may be insufficient in case of foreign officials and thus considered as a negligence invoking the international responsibility of the state. This is shown in the case of mob violence at New Orleans, 1851, against the Spaniards, in which the United States denied the responsibility for injuries sustained by Spanish subjects, but admitted its liability for attacks on the Spanish consulate which owing to its public character is entitled to a special protection.²

"Due diligence" should be commensurate with the damages which result. The greater is the damage, the higher is the degree of diligence required of the local state. In the Alabama arbitration case, the arbitrators declared that "due diligence" should be in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part."³ This decision has been criticised by many writers.⁴ Hall says, "the true nature of an emergency is often only discovered when it has passed, and no one can say what results may not follow from the most trivial acts of negligence. To fail in preventing the escape of an interned subaltern might involve the loss of an empire. To make responsibility at a given moment depend upon an intermediate something in the future is simply preposterous. The only measure of responsibility, arising out of a particular occurrence, which can be

1. League of Nations: Official Journal, Nov. 1923, p. 303.

2. Moore: Digest of International Law, VI, 811.

3. Moore: Digest of International Law, VII, sec. 1330.

4. Wilson & Tucker: International Law p. 322. "This definition is not satisfactory, and the measure of care required still depends upon the circumstances of each individual case, and therefore it is a matter of doubt."

"That the decision of the Tribunal has not become a precedent is quite generally accepted. Lawrence asserts that the award seems to have been dictated more by a regard for equitable considerations than by reference to principles hitherto accepted among nations."

obtained from the occurrence itself, is supplied by its apparent nature and importance at the moment. If a government honestly gives so much care as seem to an average intelligence to be proportioned to the state of things existing at the time, it does all it can be asked to do, and it can not be saddled with responsibility for consequences of unexpected gravity."¹ There is some justice in this statement. However, distinction should be made between direct damages and indirect damages. A slight negligence on the part of one state may result in the loss of an empire to another. That can only be remote consequence for which the state is not responsible under international law. The delinquent state is liable only for damages proximately caused by the incident and capable of prediction at the time of the commission of the offense. Furthermore, diligence is not only required in the prevention of the offense, but also in its prosecution. There is no principle more sound than this which requires the local state to measure up its diligence in prosecution with damages . . . done and known. To say that damage is the only measure of diligence may be going too far, but to deny this consideration altogether is undoubtedly indefensible.

Finally, "due diligence" depends upon the means at the disposal of the government for the prevention and prosecution of the crime.² If an alien is attacked in the open street while policemen and soldiers look on, the state will undoubtedly be responsible. This principle is recognized in cases of injury done

1. Hall: *International Law*, 217.

2. Grotius: II, 343. "There is required to produce this liability not only knowledge but the power of prevention."

"What is the degree of diligence required for the due performance of this duty? and the answer will be very obvious . . . that diligence must be such as to render impossible any other, better or more careful and attentive, so as not to omit anything, practical or possible which ought to have been done in this case . . . The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts." *Case of Salvador Prats, 1868, Moore, Arbitrations*, p. 2893-2894. Another statement from the same case, *Moore, Arbitration*, p. 2896-2897. "If in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she fulfills the whole of her duties, both toward her own citizens and the citizens of foreign countries."

"In normally well ordered states government liability is measured by the ability to protect the injured person in a given case." *Borchard, Diplomatic Protection of Citizens Abroad* p. 214.

to foreigners in wild and uninhabited region where the government can not be expected to have the same means to assure protection.¹

In cases of international delinquency, states have often put up constitutional obstacles or administrative defects as defense against its responsibility, to show that the state itself has done all that it can do under the circumstances. But "Whatever political institution or political system a nation may possess for the government of its domestic affairs, such institution or system must not interfere with its international duties . . ." ² "Insufficiency in municipal law is no excuse for failure of fulfillment of international obligations of the state."³ "The state must provide for itself with the means of fulfilling its international obligations is undisputable. If its laws are such that it is incapable of preventing armed bodies of men from collecting within it, and issuing from it, to invade a neighboring state, it must alter them. If its judiciary is so corrupt or prejudiced that serious and patent injustice done frequently to foreigners, it ought to reform the courts, and in isolated cases it is responsible for the injustice done and must compensate the sufferers . . ." ⁴ "A community has a right to choose between all forms of polity through which the ends of state existence can be attained, but it can not avoid its international responsibility on the plea of deliberate preference for anarchy."⁵

-
1. See the *Wipperman* case in Moore, *Arbitrations*, p. 3042.
 2. *Proc. Am. Soc. II*, 1908, 60.
 3. Borchard, *Diplomatic Protection of Citizens Abroad*
 4. Hall: *International Law* 218.
 5. *Ibid.*

see also the following statements:

"The king cannot compel the chambers, neither can he compel the courts; but the nation is not the less responsible for the breach of faith arising out of the discordant action of the internal machinery of its constitution. "Mr. Wheaton to Mr. Butler, Jan. 20, 1835, re French spoliation claims. Quoted in Wharton, *Digest of International Law*, I, 36.

"Constitutional arguments do not prevail to excuse the non-performance of international duties." Borchard, *Diplomatic Protection of Citizens Abroad*, 201.

"It is therefore no valid excuse for failure to perform an international duty to assert that the government's authority is limited by constitutional limitations, for the sovereign's responsibility is not lessened." Statement by Lansing, *Proc. Am. Soc. II*, 45. ". . . States are responsible as units and that this responsibility is unaffected by domestic law." Wright: *Control of American foreign relations*. P. 15-16

Another argument is often advanced for the defense of the delinquent state, that is, the same amount of protection has been given to aliens and nationals alike. Normally this would be sufficient to satisfy the requirements of international law. But in countries where protection granted to nationals is below that of the civilized standard, then the aliens may demand more in the way of protection than the nationals enjoy.¹ That is, no matter how a state may treat its own nationals, it must treat the aliens in accordance with the minimum standard required by international law.

The term "international standard", like the term "due diligence" is incapable of a clear and concise definition. It is termed as "civilized standard"; that is the standard used by civilized countries for their own administration of justice. But countries like China are civilized and yet the presence of extraterritoriality indicates that western countries consider their administration of law and protection of life and property below standard. Again, this term in order to avoid the above objection is defined as the "European standard" for international law, after all, was a creation of the European nations and therefore it follows that whatever standard they use is the "international standard". But this definition fails to recognize the fact that not all the European countries are using the same standard. This term, "international standard", has been one

1. "... If Mexico wished to maintain rank and fellowship among the civilized nations of the earth she must place her laws on a footing with the laws of other nations so far as related to intercourse with foreigners. What oppression they might practice upon their citizens was one thing; the practice of similar oppressions upon foreigners was another thing. The latter had the right to appeal to the protection of their government, if injured." Moore, *Arbitrations*, 3238.

"It can not be admitted that in every case the rights of a foreigner in that country (Peru) may be measured by the extent of protection to persons and property which a citizen might obtain." Mr. Bayard to Mr. Buck, Aug. 24, 1886, Moore, *Digest of International Law*, VI, 252.

"While, however, a government may construe according to its pleasure its obligations to protect its own citizens from injury, foreign governments have a right, and it is their duty, to judge whether their citizens have received the protection due them pursuant to public law and treaties. "Mr. Fish to Mr. Foster, Dec. 16, 1873, *ibid*, VI, 265.

"Each country is bound to give to the nationals of another country in its territories the benefit of the same law, the same administration, the same protection, and the same redress for injury, which it gives to its own citizens, and neither more nor less; provided the protection which the country gives to its own citizens conforms to the established standard of civilization." Mr. Root, *Proc. Am. Soc.* IV, 2)

of the sore spots in the relations between stronger and weaker states. Some think that this rule is a protection to the weaker states for they may not be compelled to do more than what this standard requires.¹ But the vagueness of the term has led to many abuses in its actual application. Very often, the question whether a state's standard is above or below the international one is not determined according to the merit of the case but according to the relative military strength that the nations possess.

In spite of all these defects, "international standard" has its own justification. The alternative to an international standard would be to allow each state to treat the aliens and nationals on strictly equal basis. But there are many countries in which the nationals themselves are not properly treated. There is no reason why aliens should suffer simply because the nationals have shared the same fate. The neglect of the state to perform one duty toward its nationals is no excuse for the non-performance of another duty toward the aliens. As in the case of individual conduct in private law, the test of due diligence by the degree of care one exercises in the management of his own affairs can not be accepted when rights of others are involved, for a man may be negligent in his own business and there is no reason why others should also suffer with him. However, the trouble with this international standard lies not in its justification but its application.²

C. International Responsibility resulting from Denial of Justice: Another great source of international responsibility is the "Denial of Justice". This includes not only cases in which the alien is denied the right of access to court to redress injury done to his person or property, but also cases in which the alien, himself, as a defendant, is not properly treated according to local law.

When justice is denied to an alien, it means that his rights in court accord-

1. See an article by Clyde Eagleton in the *American Journal of International Law*, Vol. 19.

2. Holland: *Jurisprudence*, p. 112 ff.

Rivier: *Principes du Droit des Gens*, Vol. II, 41-44.

"It is alleged to deny the existence of that obligation that aliens settled in the foreign territory should not have better treatment than nationals. It is true in principle. But if nationals suffer from the riot that reigns the country simply because they lack the means of seeking indemnity, why should they (aliens) equally suffer if their home state seizing the case in hand has the means to force the delinquent state to indemnity."

(Cited in Tu's work on *Responsibility of State for Injuries to Foreigners*, 17-18.)

ing to the standard of international law are denied to him. Municipal law may be below the international standard, but the alien is entitled to the latter.

Another important consideration is that the alien must be in court before there can be any denial of justice.¹ In other words, he must be a party to a case before he can have any rights in courts, which, if denied, will be the basis for international delinquency. When a criminal prosecution is started by the state against offenders who have injured the alien, the alien himself is not a party to the case before the court. This would be merely a case of state against the offenders. The alien has no right in it, nor are his interests directly involved. If the state fails to punish the offender according to law, it may indicate governmental complicity or lack of due diligence which will make the state internationally liable on another ground but not denial of justice.

But if the alien is in court or according to the international standard is entitled to be in court, his rights both procedural and substantive, either as plaintiff or defendant, must be strictly protected. Failing to do this, the state is responsible.

Ordinary miscarriage of justice does not entail state responsibility. But gross and flagrant injustice especially in decisions involving fraud will constitute an international delinquency.²

The term "denial of justice" is defined and used in many different ways. One of them is based upon the primitive conception of justice laid down in the rule: "Eye for eye, tooth for tooth". Thus if a national should murder an alien, and the state fails to give him a life sentence or death penalty, it is considered as denial of justice because justice requires that the murderer should be so punished. Or if such a penalty is made impossible by the system of government,³ or after such a penalty is imposed by the court and the executive

1. In criminal case :
Alien defendant.

In civil case :
Alien defendant.
Alien plaintiff.

2. Only decisions of the court of last resort can be considered as acts of state. Where the decisions are merely that of a lower court and appeal to higher tribunals is still open to injured alien, the state is not immediately responsible. . . . unless such injustice is approved or ratified by the higher court. See Borchard, *Diplomatic Protection of Citizens Abroad*, p. 196

3. International law requires that aliens must be protected. It prescribes results and not methods. The state may carry out this obligation in whatever way it likes. But no

officers fail to carry out the sentence, it is also considered as a denial of justice.¹ This term has been used by writers as well as statesmen in this sense. But according to its strict legal interpretation in international law, there is no denial of justice; and the state, if responsible at all, is responsible for something else.⁵

D. International Responsibility resulting from non-fulfillment of Specific Obligations: Finally, state responsibility is least questioned in cases of non-fulfillment of specific obligations which are imposed on the state either by customary international law or by specific international agreements. Here international delinquency arises the moment these obligations are broken, because these are obligations of the state and are violated by the state. There can be no question as to the author of the offense, and consequently state responsibility for the results of such breach of its international obligations is certain. Failure to pay claims liquidated by treaty or arbitration, to evacuate territory as required by treaty or to contribute to international organization are common forms of this delinquency.

It should be noted that when the obligations is imposed by customary international law, violation of that obligation is violation of international law itself. But where the obligation is imposed by treaty, its violation will also make the state responsible not so much because of the treaty itself, but because customary international law says that treaties must not be violated.

In conclusion it may be said, that international responsibility always in-

matter what method it uses, the alien must be protected. Difficulties have often arisen out of the governmental system of the local state. In the United States criminal prosecution usually requires jury trial. Very often in cases of mob riots before the court, the jury fails to find an indictment simply because of the fact that the juries are chosen from people of that particular locality, who were influenced by the same feeling as the rioters. Jury trial is a good system, but in this particular respect, it simply does not work. When the criminal is improperly set free, he cannot be tried again without violating the double jeopardy clause of the constitution. However, international law would not consider the soundness of constitutional principles, but hold the state responsible if its system fails to perform the international obligations. When the jury fails to find an indictment, or when the criminal can not be tried again, it is not so much a denial of justice as it is a lack of due diligence for the state, in view of these international obligations, should reform its systems and laws so that aliens will be properly protected as required by the international law.

1. Borchard, *Diplomatic Protection of Citizens Abroad*, p. 196

volves an injurious act, commission or omission, contrary to international law, committed by the state, which gives the injured state a right to resort to diplomatic interposition, and imposes on the delinquent state a duty to make reparation. International responsibility may either be the result of malice or negligence, no matter whether it is lack of due diligence, or denial of justice, or governmental complicity or non-performance of specific obligations.

