THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW

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This standard is not, of course, applied merely to Latin-American states. It was in support of this principle that Palmerston made his famous speech with regard to Don Pacifico;[25] and it is asserted, when occasion arises, against great states as well as small. Mr. Hyde declares that "the tribunals and processes found adequate for the exercise of jurisdiction with respect to the latter [the citizen] may notoriously fail when the complainant is an alien and local prejudice is aroused against him;"[26] and the failure of justice due to jury trial within the district where the injury to the alien was committed has on more than one occasion forced the United States to pay an indemnity. Certainly it would not be admitted

has been a denial of justice; and limits this term to "a refusal to grant foreigners free access to the courts" (pp. 10-11). "The affording of protection," he claims, "is an element of national law, a field in which the will of the State is the supreme arbiter" (p. 5). On the other hand, he admits (p. 6) that "*responsibility may* be incurred by failure to adopt methods which should have been adopted or by the inadequacy of the methods actually adopted."

To leave the state the supreme arbiter of the fate of aliens within its jurisdiction is contrary to all the tendencies of practice and to the dictates of humanity and the interests of his state. An international standard must be maintained, if international law is to serve any worthwhile function in international intercourse; and it is to be hoped that in the restatement of international law now in progress, more precise definition and circumscription will be given to this standard, to the end of preventing abuse, rather than that an attempt should be made to eliminate it. The present report takes an impossible position, and can not be taken to represent a sufficient agreement among nations to justify hope of being embodied in a convention. See criticism by Borchard in *A. J.*, XX, pp. 738-747, and in the debates at the 1927 session of the *Institut*.

[25] "I say, then, that our doctrine is, that, in the first instance, redress should be sought from the law courts of that country; but that in cases where redress can not be so had—and those cases are many—to confine a British subject to that remedy only would be to deprive him of the protection which he is entitled to receive. . . . We shall be told perhaps, that . . . foreigners have no right to be better treated than the native and have no business to complain if the same things are practiced upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man," Lord Palmerston, in the House of Commons, June 25, 1850, Moore, *Digest*, VI, p. 681.

[26] Hyde, *International Law*, I, pp. 469-470. He points out the need of further legislation by Congress enabling the Federal Government to protect aliens in Federal Courts. See U. S. *Comp. Stat.*, 1918, § 991, Sec. 17, by which Federal District Courts are given jurisdiction over suits brought by aliens "for a tort only, in violation of the laws of nations or of a treaty of the United States." Legislation extending this jurisdiction is badly needed and has been urged in various Presidential messages. Note the action of the French legislature in taking out of the hands of juries cases involving foreign ambassadors, note 77, p. 67, *supra;* and the cases quoted by Strupp (ohne Begründung!), of French and American juries which released the murderers of Germans because of the plea that it was no crime to kill a German, *Völkerrechtliche Delikt*, p. 76, note 3. In some foreign countries, and in some states of the United States, the locality is held responsible for injuries due to mob action, Hyde, *International Law*, I, § 292; Borchard, *Diplomatic Protection*, p. 141.

by foreign states that the "lynch law," which so blackly mars the administration of justice in the United States, attains the requisite standard of civilized justice; and the United States has not succeeded in maintaining, nor does it any longer attempt to maintain, that injured states may not intervene and demand pecuniary indemnity for this failure, on the ground that the alien must be satisfied with such justice as the state provides.

It must be admitted that the indefiniteness of the standard leaves small states at the mercy of larger ones in the matter of such claims. But while the possibility of abuse thus arises, this is, after all, the usual weakness of international law; and it has the corresponding advantage of achieving improvement in the administration of justice in all states, and of tending toward a uniform protection of the individual throughout the world.[27]

Consistent failure, on the part of a state, to administer internal justice in a satisfactory manner will produce an inclination on the part of injured states to disregard the rule of local redress, and to act more frequently through diplomatic channels. Backward states have only gradually been admitted to full rights in the community, the exterritorial jurisdiction to which they had long been subjected being removed as their ability to give proper protection to aliens was demonstrated.[28] Other states, though recognized as such, have been reduced, as in the case of some of the Caribbean states, to a position of dependence, as protectorates or otherwise, because of their proved inability to offer aliens the security which international law demands for them. It has apparently been asserted, finally, that the annexation and absorption of such a state is justified.[29]

[27] "It has, however, compensatory value in exerting an important influence in raising to the international standard the level of administration for everybody," Borchard, in *A. J.*, XX, p. 741; and see Lapradelle-Politis, *Recueil*, II, pp. 330-331.

[28] "Whenever," says Mr. Hyde, "the local judicial system serves to work injustice to the national of the territorial sovereign by failing to accord him that protection which enlightened States habitually place within the reach of their own citizens, and which therefore, it is believed that he should enjoy, it becomes apparent that the duty of jurisdiction is to be tested by a different standard," *International Law*, I, p. 468. See also Lapradelle-Politis, *Recueil*, II, pp. 32, 279; Hall, *International Law*, p. 60; Anzilotti, in *R. D. I. P.*, XIII, p. 22; and A. R. Higgins, *Proc. Am. Soc.*, 1927, p. 20.

[29] "And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the state itself. Annexation by Great Britain became an act of political necessity if those principles of justice and

That the community of nations has a standard for the administration of justice towards aliens, is not to be doubted;[30] and if the rule of local redress, which represents the independence of states, is to be respected, a strengthening of those agencies within states is needed. It is unfortunate that the determination, or application, of this standard should be left to individual states; for the temptation to abuse is great. Until the standard is more precisely stated, and until an international organization is effected capable of giving a fair and impartial interpretation to the principle, the right of a state to intervene in disregard of local remedies, where they are insufficient, must be justified by the importance of the principle of responsibility itself.

§ 34. Ordinarily, however, it may be assumed that a state's organization is such as to enable it adequately to meet the required international standard; and the usual question which arises is as to when, granted a satisfactory local system and the consequent necessity for an alien to exhaust local remedies, it may yet be proper for him to seek the diplomatic interposition of his own state. In other words, when, aside from other elements justifying diplomatic interposition, may the operation of local remedies in a particular case be regarded as so unsatisfactory as to render diplomatic action proper? The answer, it is believed, is: when there is a denial of justice.[31]

The confusion in the use of the term 'denial of justice' doubtless explains a great deal of the uncertainty attendant upon the effort to state the principle of responsibility in rules of practice.[32] While the matter may be regarded as chiefly one of terminology, it is

fair dealing which prevail in every country where property rights are respected were to be vindicated and applied in the future in this region," *R. E. Brown Claim*, Nielsen's *Report*, pp. 198-199, *A. J.*, XIX, p. 303.

[30] According to Article I of the Treaty between the United States and Germany of 1923, nationals of each state shall receive protection, "and shall enjoy in this respect that degree of protection that is required by international law," *Treaty Series*, No. 725. See the case of *Harry Roberts*, General Claims Commission, U. S. and Mexico, Docket No. 185, § 8; and Article 4, Cl. 1, of the Resolutions of the *Institut*, 1927, Appendix III, *infra*.

[31] *Contra*, Hyde, *International Law*, I, p. 492 and note 2: "the assertion is made that no denial of justice occurs until the aggrieved alien has exhausted his judicial remedies, and the territorial sovereign charged with fault has again been found wanting through the inadequacy of its judicial system. It is believed that this contention betrays confusion of thought." Mr. Hyde is not, in this statement, denying responsibility for illegalities outside the courts, but extending denial of justice to cover them.

[32] The uncertainty of the term is generally recognized. See Lapradelle-Politis, *Recueil*, II, pp. 31, 280; Decencière-Ferrandière, *Responsabilité*, pp. 87-88; Borchard, *Diplomatic Protection*, § 127; Hyde, *International Law*, I, p. 492 and note 3; Strupp, *Völkerrechtliche Delikt*, p. 79, note 1; Wambaugh, in *Proc. Am. Soc.*, IV, p. 128; Anzilotti, in *R. D. I. P.*, XIII, p. 22; Benjamin, *Haftung*, p. 46; Hatschek, *Völkerrecht*, p. 398.

important that the term should have a generally accepted signification, since, for every meaning given to it, a new statement of the rules of responsibility is required. Thus, it is correct to say that a state is responsible *only* for denial of justice, if that term is understood to include *every* violation of international law to the detriment of an alien. But if, as the Latin-American states uniformly interpret it, denial of justice is to mean only the failure of the *courts* to give to the alien the ordinary municipal justice, the state may be, and is in such cases, held responsible for more than the denial of justice.[33] These two statements do, in fact, represent the two extremes in interpretation of the phrase. On the one hand, it is broadly interpreted to mean any internationally illegal conduct toward an alien; on the other hand it is limited, in greater or less degree, to the failure of the judicial process invoked by the alien in the pursuit of relief.

The former position is strongly urged by Mr. Hyde.[34] M. de Lapradelle seems disposed to take the same attitude, though his position is admittedly uncertain;[35] and Mr. Nielsen, in arguments before the American and British Claims Arbitration Tribunal, has defined denial of justice as "obvious outrage."[36] Some cases apparently support this interpretation.[37]

[33] "There is a denial of justice only when the court shall refuse to make a formal decision on the principal matter in dispute, or on any incidents of the case," Law of Salvador, quoted by Penfield, *Proc. Am. Soc.*, IV, p. 139; and see Moore, *Digest*, VI, p. 269; Borchard, *Diplomatic Protection*, pp. 846, 842-843. M. Guerrero defines it as "a refusal to grant foreigners free access to the courts instituted in a State for the discharge of its judicial functions, or the failure to grant free access, in a particular case, to a foreigner who seeks to defend his rights, although in the circumstances, nationals of the State would be entitled to such access," Committee for Progressive Codification, *Responsibility*, p. 11. The difficulty with this report is that it rejects responsibility except for denial of justice as limited in this fashion.

[34] "A denial of justice, in a broad sense, occurs 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," Hyde, *International Law*, I, pp. 491, 492.

[35] Lapradelle-Politis, *Recueil*, doctrinal note to *Croft* and *Yuille*, *Shortridge and Co. Cases*, II, pp. 31, 33, 112. At p. 280 he speaks of "déni de justice, dont le caractère fuyant et complexe semble défier tout definition."

[36] Nielsen's *Report*, p. 250. He asserts also that there is no right to call a nation to account except for denial of justice, i.e., obvious outrage; but his citations refer only to judicial procedure, though perhaps as affected by legislative or executive acts.

Such a position assumes that responsibility and denial of justice are the same in content, so that only where a denial of justice is established can there be responsibility. Under such circumstances the term 'denial of justice' would appear to be superfluous and confusing, and proper to be eliminated. As a matter of fact, however, it has a useful meaning, since it describes a particular type of international illegality. In this sense, it serves a valuable purpose, and should be retained. It has been seen that responsibility may occur either before local remedies are sought, because of an international illegality; or afterwards, as the result of the failure of these remedies, thus constituting a separate delict. In the one case, the international illegality may perhaps be repaired by the local remedies offered; in the other, such reparation is impossible because it is the failure of the local remedies themselves which constitutes the delict. Here are two types of cases to be differentiated, the one a failure of due diligence, or other international illegality precedent to appeal to the courts, the latter a denial of justice.[38] Either

See also his separate opinion in the *Neer Case*, General Claims Commission, U. S. and Mexico, Docket No. 136. His position was rejected by the General Claims Commission, U. S. and Mexico, in the *Chattin Case*, § 11, and by the American British Claims Arbitration Tribunal, in the case of the *Cayuga Indians*, Nielsen, *Report*, pp. 249-266, especially at p. 258. On the other hand, some support is apparently to be found for it in the *Janes Case*, before the former commission, and in the *El Triunfo Case* (*Salvador Commercial Co.*), *For. Rel.*, 1902, 838.

[37] Mr. Hyde quotes the statement by Eugene Wambaugh, *Proc. Am. Soc.*, IV, 126; Mr. Bayard to Mr. McLane, June 23, 1886, Moore, *Digest*, VI, p. 266, Hyde, *International Law*, I, p. 491, note 2. The latter citation clearly refers to judicial process. Mr. Wambaugh's statement is quoted below. Mr. Nielsen cites the *Medina Case*, Moore, *Arbitrations*, p. 2317; Ralston, *International Arbitral Law and Procedure*, p. 51; the *R. E. Brown Case*, Nielsen's *Report*, p. 162; and the *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869, Nielsen's *Report*, pp. 250-253; the *El Triunfo Case*, *For. Rel.*, 1902, p. 870, in his separate opinion in the *Neer Case*, General Claims Commission, U. S. and Mexico, Docket No. 136. The *Brown* and *Poggioli Cases*, which apparently support this theory, will be taken up in the following pages of this Section.

[38] The statement is frequently found that responsibility exists for denial of justice or other violation of international law. "The offenses complained of now are double in nature, consisting of unjust imprisonment and denial of justice," *Tagliaferro Case*, Ralston, *Venezuelan Arbitrations*, p. 765. *Chattin Case*, General Claims Commission, U. S. and Mexico, Docket No. 41; *Mallén Case*, *ibid.*, No. 2935; *Kennedy Case*, *ibid.*, Docket No. 7; *Cotesworth and Powell*, Moore, *Arbitrations*, p. 2083; *Young Smith & Co.*, *ibid.*, p. 3147; *Prize Cases*, *ibid.*, p. 3153; *Fabiani Case*, *ibid.*, p. 4895. ". . . if it can be proved that there has been denial of justice by the said authorities, undue delay, or violation of the principles of international law," American Institute of International Law, Project No. 16, Article 3, *A. J.*, XX, Supplement, p. 329. See also Borchard, *Diplomatic Protection*, pp. 842-843; Wambaugh, in *Proc. Am. Soc.*, IV, p. 128; Nielsen's *Report*, p. 258, Mr. Pound; Calvo, § 1263, quoted in *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 867.

is an illegality; and either produces responsibility. But they differ: every denial of justice is a violation of international law; but not every violation of international law chargeable to the state is a denial of justice. The obligation which a state bears toward aliens includes other duties than mere regularity of action on the part of its local courts.

It must be observed that a denial of justice can only appear in those cases in which the rule of local redress applies. It is a generally accepted principle, said Secretary Blaine, that

> a denial of justice, which constitutes the true ground of formal diplomatic demands, does not exist until the remedies afforded by the laws of the country have been tried and found wanting.[39]

The two rules are interlocking and inseparable: local remedies must be sought until a denial of justice appears; a denial of justice is a failure in local remedies. The state has the duty of allowing to aliens the same judicial protection as it gives to its own citizens; if it fails in this duty, it is guilty of a denial of justice, which is a violation of international law. It has other duties to the alien as well, though it is doubtless true that most cases are those of denial of justice. The state has, for example, the duty of using due diligence for the prevention of injury to an alien, a duty entirely different from that of redress. Where a lack of diligence is established, it may not be necessary to resort to local remedies, and consequently no denial of justice would appear; but the state might nevertheless be responsible. The failure of the United States, for instance, to give proper protection in mob cases should not be regarded as a denial of justice, but as another violation of international law. It may subsequently become responsible, if its courts fail to give redress, on another count: that of denial of justice in the courts. The former duty is measured by international law; the latter by domestic law.

A very difficult problem, arising in this connection, is given thorough analysis in the recent *Chattin Case*, before the General Claims

[39] Mr. Blaine to Mr. Caamano, May 19, 1890, Moore, *Digest*, VI, p. 270. See also statement by Umpire Barge in *Orinoco S. S. Co. Case*, Ralston, *Venezuelan Arbitrations*, p. 90; *Burn Case*, Moore, *Arbitrations*, p. 3140, quoted in note 5, p. 97, *supra*; *Woodruff Case*, Ralston, *Venezuelan Arbitrations*, p. 161; Oppenheim, *International Law*, I, § 262; Penfield, in *Proc. Am. Soc.*, IV, p. 139; Mr. Bayard to Mr. Morgan, May 26, 1885, Moore, *Digest*, VI, p. 294.

Commission, U. S. and Mexico, in which a concurring and a dissenting opinion present the various viewpoints, and aid in clarifying the definition of denial of justice. The Presiding Commissioner, Mr. C. Van Vollenhoven, in making the award, distinguished between "indirect governmental liability" because of lack of proper action by the judiciary in case of injuries by individuals, and a "direct responsibility" for acts of government officials. He continues:

> The very name "denial of justice" (dénégation de justice, déni de justice) would seem inappropriate here, since the basis of claims in these cases does not lie in the fact that the courts refuse or deny redress for an injustice sustained by a foreigner because of an act of someone else, but lies in the fact that the courts themselves did injustice.

In an interesting dissenting opinion, the Mexican Commissioner points out that, if an analogy is to be made between the state's responsibility for positive acts of legislative and executive agents of the state and its responsibility for positive acts of the judicial agents of the state, it becomes equally necessary to hold the state responsible for all acts of its judges, whether in error or not, thus destroying the respect which has always been paid by arbitral tribunals to domestic courts, and reducing the respondent state to a régime of capitulations. It may be said that, upon the one hand, practice unquestionably demands that the domestic judicial system should measure up to an international standard, and that, as has also been seen, the state may still be held responsible for a "manifest injustice"; while, on the other hand, practice has consistently refused to assess responsibility for mere errors of the court, and has in general attempted to maintain the independence of domestic courts. Apparently, since denial of justice is limited to the failure of local remedies, but not necessarily, the positive or negligent injury done to the alien plaintiff (seeking redress) is denial of justice; while the same injury on the part of the judge to an alien defendant (accused himself of crime) would be manifest injustice. In the latter case, however, local remedies remain yet to be exhausted, so that no denial of justice is yet apparent, nor diplomatic interposition justifiable until such local remedies have failed. The distinction may seem meticulous, but is of value procedurally, even though it may be frequently true that no local remedies are

to be found against the judge, with the result that manifest injustice and denial of justice become practically coincident. Practice, however, does clearly make an exception for mere errors on the part of domestic courts, even though it may permit the state to be held responsible for the errors of its executive or legislative agents. — While the cases in which the term denial of justice is discussed are not always precise in meaning, in many of them the specific statement, and in almost all of them the evident implication, is that the term refers to a failure in judicial remedies.[40] Examples are rare in which the case can be interpreted as justifying a belief that any illegal act whatever toward an alien is to be called a denial of justice. The term is given a most thorough study in the *Fabiani Case,* with the following conclusion:

> One comes to believe that denial of justice comprehends not only refusal of a judicial authority to exercise its functions, and notably to pass upon the petition submitted to it, but also persistent delay on its

[40] "Nothing short of convincing evidence" that an American citizen "is the victim of intentional discrimination, partiality, or other injustice on the part of the court in which the prosecution is pending, could justify diplomatic intervention in his behalf," Mr. Gresham to Mr. Morse, May 31, 1893, Moore, *Digest,* VI, p. 282. See also Mr. McLane to Mr. Shain, May 28, 1834, *ibid.,* VI, p. 259; Mr. Marcy to Mr. Jackson, November 6, 1854, *ibid.,* VI, p. 283; Mr. Bayard to Mr. Scott, June 23, 1887, *ibid.,* VI, p. 294; Mr. Evarts to Mr. Langston, April 12, 1878, *ibid.,* VI, p. 656; Mr. Marcy to Mr. Clay, May 24, 1855, *ibid.,* VI, p. 659; Mr. Olney to the President, February 5, 1896, *ibid.,* VI, p. 670; *Waller's Case, ibid.,* VI, p. 670; Mr. Bayard to Mr. Jackson, September 7, 1886, *ibid.,* p. 680; Mr. Forsyth to Mr. Welsh, March 14, 1835, *ibid.,* VI, p. 696; Mr. Bayard to Mr. Copeland, February 23, 1886, *ibid.,* VI, p. 699. The definition of denial of justice adopted by the *Institut* at its 1927 session refers only to judicial action and distinguishes it from manifest injustice. See Appendix III, *infra.*

In some fifty cases examined in which the term "denial of justice" occurs, and in some twenty others listed in Moore's *Arbitrations* under the chapter heading "Denial of Justice," the reference is, with only two or three exceptions, always to judicial remedies. In these cases, the distinction between "denial of justice" and "manifest injustice" is not always clear. "In refusing the relief prayed for, the officers of the judicial department were guilty of a gross denial of justice, failing, as they did, to follow the excellent laws prescribed by Venezuela," *Tagliaferro Case,* Ralston, *Venezuelan Arbitrations,* p. 765; and see *Woodruff Case, ibid.,* p. 161; *La Guaira Light and Power Co. Case, ibid.,* p. 181; *Baldwin Case,* Moore, *Arbitrations,* p. 3126; *Bronner Case, ibid.,* p. 3134; *Ada Case, ibid.,* p. 3143; *Burn Case, ibid.,* p. 3140; *Danford, Knowlton Co. Case, ibid.,* p. 3148; *Medina Case, ibid.,* p. 2317; *Johnson Case, ibid.,* p. 1656; *Cotesworth and Powell, ibid.,* p. 2083; *Montano Case, ibid.,* p. 1637; *Chattin Case,* and *Turner Case,* General Claims Commission, U. S. and Mexico, Docket Nos. 41 and 1327 (in which denial of justice is distinguished from manifest injustice); *Canadian Claim for Refund of Duties,* Nielsen's *Report,* p. 368; *Cayuga Indians Case, ibid.,* p. 329; *Croft Case,* Lapradelle-Politis, *Recueil,* II, p. 31; *Yuille, Shortridge Co., ibid.,* II, p. 112; Negotiation of Convention, Mexican Claims Commission of 1839, *ibid.,* I, p. 446, Moore, *Arbitrations,* pp. 1216-1217.

part in pronouncing its decree. . . . In reality, the contracting parties seem to have wished to attribute to the words 'dénégations de justice' their most extended signification, and to include in them all the acts of judicial authorities implying a refusal, direct or disguised, to render justice.[41]

While one may not agree that this is the "most extended signification" of the phrase, it obviously excludes any but judicial action. Diplomatic statements usually connote judicial procedure; as for example, that of Secretary Olney:

This government can properly intervene where an American citizen has been actually denied justice in the courts of a foreign country.[42]

The opinion of writers appears also to limit denial of justice to the failure to secure judicial redress. Thus Mr. Wambaugh says:

In the narrower sense, the phrase is restricted to the instances where the wrong has been done through misconduct or inaction whose nature is judicial. This restricted meaning seems to be preferable to the wider one which has just now been explained; for denial of justice, at least when the expression is used by a lawyer, naturally connotes the instrumentalities whereby normally justice is secured, that is to say, courts and judicial procedure.[43]

On the other hand, the extreme interpretation given to denial of justice, particularly by South American writers, can not be admitted. Certainly it means more than mere refusal of access to the courts; for, as will be seen, these courts must give an honest and regular decision in the case.[44] Furthermore, it is clear that justice, as dealt out by the courts, may be defective because of con-

[41] Moore, *Arbitrations*, p. 4895, translation in Ralston, *Law and Procedure*, pp. 85-86.

[42] Mr. Olney to Mr. Hamlin, July 16, 1896, Moore, *Digest*, VI, p. 272.

[43] In *Proc. Am. Soc.*, IV, p. 128; and refer to note 37, p. 112, *supra*. "The State, to which the foreigner belongs, may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country;" and in the latter case he must have exhausted the means of redress afforded by the local tribunals, Phillimore, *Commentaries*, II, pp. 3-5. See Vattel, I, Ch. XVIII, 350; Twiss and others quoted in Mr. Bayard to Mr. McLane, June 23, 1886, Moore, *Digest*, VI, p. 266; Borchard, *Diplomatic Protection*, p. 330, who speaks of the "narrower and more customary sense."

[44] See quotations from the Law of Salvador, and from M. Guerrero, for the Committee for Progressive Codification, in note 33, p. 111, *supra*. "For this reason our law relating to foreigners declares that there is no denial of justice except when the

siderations extraneous to the judicial system. "Justice," says Mr. Ralston, "may as well be denied by administrative authority as by judicial"; and it often occurs that an arbitrary executive action renders the court powerless.[45] Or again, to quote the well-known words of Secretary Fish:

Justice may as much be denied when, as in this case, it would be absurd to seek it by judicial process, as if it were denied after having been so sought.[46]

It is obvious that, in the usual process of judicial protection for the alien, both the legislature and the executive must play an essential and inseparable part. A failure on the part of the legislature to give the necessary jurisdiction may render the court impotent to give redress; and the executive may arbitrarily prevent the court from giving justice, or fail to execute its decree. Or, as is well illustrated in the *R. E. Brown Case*, all three departments of government may combine to prevent judicial protection being given:

All three branches of the government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognised in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And, in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself.[47]

tribunals voluntarily retard the decision of matters submitted to their cognizance, or refuse absolutely to decide upon them," Argument of Señor Delgado, March 28, 1887, Moore, *Digest*, VI, p. 269.

[45] In the *Poggioli Case*, Ralston, *Venezuelan Arbitrations*, p. 869; and see his *Law and Procedure*, p. 86. Examples are: *Cheek Case*, Moore, *Arbitrations*, p. 1899, Moore, *Digest*, VI, p. 656; *Danford, Knowlton and Co., ibid.*, p. 3149; *Johnson Case, ibid.*, p. 1656; *Montano Case, ibid.*, p. 1634; *El Triunfo Case, For. Rel.*, 1902, p. 870; "the President acting in his judicial capacity," *Case of Teodoro Garcia and M. A. Garza*, General Claims Commission, U. S. and Mexico, Docket No. 292, December 3, 1926, § 8.

[46] Mr. Fish to Mr. Foster, December 16, 1873, Moore, *Digest*, VI, p. 265.

[47] Nielsen's *Report*, p. 198; and see also his citations on p. 250. Other cases are: *Cotesworth and Powell*, Moore, *Arbitrations*, p. 2081; *Ballistini*, Ralston, *Venezuelan*

In every case, however, denial of justice results from the inability of the courts to give to the alien the redress which, because of its exclusive territorial jurisdiction, the state is obligated to furnish him.

The expansion of the principle of responsibility probably accounts for the attempts to widen the definition of denial of justice. In many of the citations above given, the statement is encountered that the state may not interpose in behalf of its national abroad unless that national has suffered a denial of justice.[48] There are, however, exceptions to this general statement of the rule; and in order to account for these exceptions, it is necessary either to expand the definition of denial of justice to include them, or else to admit that diplomatic interposition is justifiable for international illegalities other than denial of justice. The latter solution is preferable, not only because it permits of a reasonable, rather than a strained, interpretation being given to the words 'denial of justice,' but also because it aids in distinguishing between various types of international delinquencies and allows room for the further expansion of responsibility in practice. It remains nevertheless true that diplomatic interposition upon other grounds than denial of justice should be exceptional. As states build up their machinery for the local redress of injuries suffered by aliens to the international standard, these exceptions should become fewer and fewer. It must be remembered, however, that responsibility exists from the moment an internationally illegal act is committed, whether or not local remedies are called upon, and whether or not diplomatic interposition is permissible.

A denial of justice, then, is a failure in the administration of domestic justice toward an alien—the failure to give to the alien the same redress as is available to the citizen, where such redress is in order for the alien. Such a failure may appear in any one of a great number of situations.

§ 35. If an alien desires to institute judicial proceedings for

Arbitrations, p. 503; *Danford, Knowlton Co.*, Moore, *Arbitrations*, p. 3148; and see note 45, *supra*.

[48] "A claimant must exhaust his remedy before the local tribunals, when there are such, and when he is admitted to equal privileges in them, before he can claim diplomatic intervention," Mr. Davis to Mr. Taylor, October 20, 1871, Moore, *Digest*, VI, p. 661. A number of other such instances will be found in *ibid.*, §§ 913, 987. Mr. Moore heads § 987 "Local Remedies Must, as a Rule, be Exhausted"; and in following Sections states exceptions.

the redress of damages done to him, he must be allowed access to the courts upon the same terms as are allowed to citizens. If obstructions are put in his path, or if there is undue delay, there is room for the claim that the state has failed in this duty.[49] If the alien has been criminally attacked, the state must pursue his assailants and must itself institute proceedings against them;[50] and it is important that, if an alien is accused of crime, he should be given every opportunity to defend himself in court.[51] His own state will usually watch with much interest to see that he has a fair trial.

Many opportunities for the perversion of justice appear during the actual course of the trial. If the court is under the arbitrary control of other agencies of the government, it will obviously be unable to render justice.[52] The judge may exceed his jurisdiction,

[49] "Obstruction by Spanish officials of a citizen of the United States in Spain in his attempts to obtain judicial redress for injuries there inflicted on him is the subject of international complaint," Mr. Evarts to Mr. Fairchild, January 17, 1881, Moore, *Digest*, VI, p. 656. See also Mr. Bayard to Mr. McLane, June 23, 1886, *ibid.*, VI, p. 266; Mr. Marcy to Mr. Clay, May 24, 1855, *ibid.*, VI, p. 659; Mr. Bayard to Mr. Jackson, September 7, 1886, *ibid.*, VI, p. 680; *Ballistini Case*, Ralston, *Venezuelan Arbitrations*, p. 504; *Tagliaferro Case*, *ibid.*, p. 765; *Bovallius and Hedlund Case*, *ibid.*, p. 953; *Garrison's Case*, Moore, *Arbitrations*, p. 3129; *Richards Case*, General Claims Commission, U. S. and Mexico, Docket No. 22; *Turner Case*, *ibid.*, No. 1327; *de Galvan*, *ibid.*, No. 752.

"Undue and needless delay in the trial of a citizen abroad is ground for international intervention," Mr. Frelinghuysen to Mr. Morgan, March 5, 1884, Moore, *Digest*, VI, p. 277. See Hyde, *International Law*, I, p. 497; Borchard, *Diplomatic Protection*, p. 337; *Case of the Bark Jones*, Moore, *Arbitrations*, p. 3051; Decencière-Ferrandière, *Responsabilité*, p. 108, who mentions treaty provisions in this regard.

[50] "Considering that if the opinion of the agent of Venezuela that the perpetrators of the violence were wrongdoers and sharpers be accepted, it would follow that the obligation of prosecuting and punishing the criminals rested on the competent local authorities, without its being necessary that any request be made by the injured parties for that purpose," *Bovallius and Hedlund Case*, Ralston, *Venezuelan Arbitrations*, p. 952; and see similarly Mr. Evarts to Mr. Fairchild, January 17, 1881, Moore, *Digest*, VI, p. 656; *Glenn's Case*, Moore, *Arbitrations*, p. 3138; *Mills Case*, *ibid.*, p. 3034; *de Brissot Case*, *ibid.*, p. 2968; *Piedras Negras Claims*, *ibid.*, p. 3036; *Davy Case*, Ralston, *Venezuelan Arbitrations*, p. 411; *Poggioli Case*, *ibid.*, p. 847; *Kennedy Case*, General Claims Commission, U. S. and Mexico, Docket No. 7; *Richards Case*, *ibid.*, No. 22; *Neer Case*, *ibid.*, No. 136; *Diaz Case*, *ibid.*, No. 293; *Massey Case*, *ibid.*, No. 352; Hyde, *International Law*, I, § 268.

[51] "The refusal of a Chilean court, in 1852, on the trial for crime of an American citizen, to hear testimony on behalf of the defendant, would, if sustained by the Chilean government, be considered by the United States as a 'gross outrage to an American citizen, for which it will assuredly hold Chile responsible,'" Mr. Conrad to Mr. Peyton, October 12, 1852, Moore, *Digest*, VI, pp. 274-275. Note also Mr. Frelinghuysen to Mr. Lowell, April 25, 1882, *ibid.*, VI, p. 276; Mr. Bayard to Mr. West, June 1, 1885, *ibid.*, VI, p. 279; *Sartori Case*, Moore, *Arbitrations*, p. 3123; *Driggs Case*, *ibid.*, p. 3125; *Moliere Case*, *ibid.*, p. 3252; Hyde, *International Law*, I, § 269; Borchard, *Diplomatic Protection*, pp. 99, 357.

[52] See the *Robert E. Brown Claim*, quoted on p. 117, *supra*; the *Idler Case*, Moore,

or be guilty of fraudulent or collusive practice.[53] The case must be conducted with regard to due process of law; but the process meant is that of the country in which the trial occurs.[54] The alien is entitled to the same measures for his own judicial protection as the national may claim, including such matters as the right to summon witnesses and to appeal; and he must not be discriminated against on the ground of his alienage.[55] The difficult problem of a manifestly unjust decision has been the subject of a previous discussion; but it may be repeated in this connection that mere error on the part of a court, unless it be attended by fraud, does not constitute denial of justice.[56] A flagrant miscarriage of justice is, as

Arbitrations, p. 3317; Mr. Cass to Mr. Dimitry, May 3, 1860, Wharton, *Digest*, II, p. 615; *Salvador Commercial Co. Case, For. Rel.*, 1902, p. 862.

[53] "A fraudulent decision by a foreign judge condemning an American ship is a ground for a demand for redress by this Government from the Government of such judge," Mr. Seward to Mr. Webb, December 7, 1867, Wharton, *Digest*, II, p. 615. See *Case of the Caroline*, Moore, *Digest*, VI, p. 748. "A collusive or irregular judgment by a foreign court is no bar to diplomatic proceedings by the sovereign of the plaintiff against the sovereign of the court rendering judgment," Mr. Evarts to Mr. Foster, April 19, 1879, *ibid.*, VI, p. 696.

The most famous example of a court exceeding its jurisdiction is the *Costa Rica Packet Case*. This, however, must be regarded as a violation of international law other than denial of justice. See *Jonan's Case*, Moore, *Arbitrations*, p. 3251; *Hall's Case, ibid.*, p. 3303; Mr. Marcy to Chevalier Bertinatti, December 1, 1856, Moore, *Digest*, VI, p. 748.

[54] "But we have claimed that by international law and by the customs and usages of civilized nations, a trial at law must be conducted without unseemly haste, with certain safeguards for the accused, and in deference to certain recognized rights, in order to mete out justice," Mr. Fish to Mr. Cushing, December 27, 1875, Wharton, *Digest*, II, p. 620. See Mr. Evarts to Mr. Langston, April 12, 1878, Moore, *Digest*, VI, p. 656; *Montano Case*, Moore, *Arbitrations*, p. 1634; *Garrison's Case, ibid.*, p. 3129; *van Bokkelen's Case, ibid.*, p. 1842; *Idler Case, ibid.*, p. 3508; *Neptune Case, ibid.*, p. 3076; *Bullis Case*, Ralston, *Venezuelan Arbitrations*, p. 170.

That the procedure of the state in question must be accepted (provided it measures up to the international standard), Hyde, *International Law*, I, § 219; Borchard, *Diplomatic Protection*, p. 198. Much variation in practice is thus permitted. As to what the United States considers due process, see Mr. Evarts to Aristarchi Bey, December 8, 1877, Wharton, *Digest*, II, p. 625, and elsewhere in § 230; and the *Bullis Case*, cited in this note.

[55] "Discrimination against an American citizen on the ground of alienage by which he is excluded from redress in courts of justice for injuries inflicted on him, is a ground for diplomatic interposition," Mr. Porter to Mr. Phelps, June 4, 1885, Moore, *Digest*, VI, p. 253; and see generally, *ibid.*, § 992. Also, Hyde, *International Law*, I, § 285; Borchard, *Diplomatic Protection*, pp. 333, 339, note 7; Resolutions of the *Institut*, 1927, Article 6, Appendix III, *infra*.

[56] "Where the judges are left free, and give evidence according to their conscience, though it should be erroneous, there is no ground for reprisals," *Zamora Case*, Grant, *Prize Cases*, III, p. 14. See the doctrinal notes in Lapradelle-Politis, *Recueil*, II, pp. 33, 112; Ralston, *Law and Procedure*, p. 91; Committee for Progressive Codification, *Responsibility*, p. 9; Decencière-Ferrandière, *Responsabilité*, pp. 111-112.

has been seen, itself productive of responsibility; but a diplomatic claim is not in order in such cases until local remedies prove lacking or unavailable.[57] It is a recognized and praiseworthy practice among states to give full credit to the judicial action of other states. It should be observed that it is the duty of the alien to carry his case to the highest court, and thus to allow to the state every opportunity to redress its own mistakes.[58]

Denial of justice is still possible after the decree of the court has been rendered. The duty of executing the decree lies with the administrative authorities; and a failure on their part to enforce the decision of the judge is as truly a denial of justice as miscarriage in the courtroom. If civil redress granted by the courts is not enforced by the proper authorities, or if criminal penalties are not levied against those who attack aliens, the responsibility of the state may still be called into play.[59]

§ 36. The protection of the alien represents a constant interplay between two forces: the exclusive control which the state exercises, as an incident of its independence, over all persons within its territories; and the desire of each state, equally recognized by international law, and backed by the need of intercourse between interdependent states, to assure fair treatment of its nationals wherever they go. An evident purpose exists, justified for reasons above given, to leave to the state within which the alien is located as great a degree of control over him as is consistent with universal ideas of justice; and the problem is one of finding a sliding rule which will cover all cases. It has been said that the function of the state is to prepare the way for its own demise, by so educating its members to respect the rights of others that state control over individuals

[57] See § 22, notes 94 and 95, *supra*, and the discussion of the *Chattin Case*, § 34, *supra*.

[58] *Driggs Case*, Moore, *Arbitrations*, p. 3160; *De Caro Case*, Ralston, *Venezuelan Arbitrations*, p. 819; Mr. Clay to Mr. Tacon, February 5, 1828, Moore, *Digest*, VI, p. 652.

[59] *Montano Case*, Moore, *Arbitrations*, p. 1634; *Renton Case*, Moore, *Digest*, VI, pp. 794-799. A pardon may have the same effect, Borchard, *Diplomatic Protection*, p. 218; *West Case*, General Claims Commission, U. S. and Mexico, Docket No. 241. "Punishment without execution of the penalty constitutes a basis for assuming a denial of justice," *Mallén Case*, General Claims Commission, U. S. and Mexico, Docket No. 2935, April 27, 1927, § 11; *Putnam Case, ibid.*, No. 354; *Youmans Case, ibid.*, No. 271. The Commission also considered the escape of a prisoner to establish a denial of justice, *Putnam Case, ibid.*, Docket No. 354, April 15, 1927, § 6; *Massey Case, ibid.*, Docket No. 352, April 15, 1927, § 25.

will no longer be necessary. Similarly, it may be said that the sole purpose of the supervision exercised by the community of nations over the treatment of aliens by one of its members is to maintain a certain standard of justice for individuals wherever they may be; and the more satisfactory the administration of justice within a state, the less opportunity will there be for intervention from the outside. But, just as no state has thus far attained so ideal a position as to justify abandoning its control over its members, so it can not be presumed that states have provided and will maintain such excellent systems of justice as to render international supervision unnecessary. While in all states local remedies must be respected so far as possible, and while in the better organized states there is rarely occasion for interference with the usual course of justice, it is still necessary that there should be an opportunity for diplomatic interposition in behalf of citizens abroad; and it will perhaps be helpful at this point to sum up the occasions upon which such action may be taken.

It must be repeated that diplomatic interposition and state responsibility are not coterminous nor necessarily coincident. Responsibility may appear before interposition is permissible; and, of course, it does not follow from the fact that matters have been taken up for diplomatic consideration, that responsibility is thereby established. Any act on the part of the state which is internationally illegal brings responsibility; but for some such acts the injured states may seek reparation through local channels while for others it is permitted to make a diplomatic claim. Responsibility is a matter of principle; interposition is a question of procedure. Responsibility exists from the moment the state violates international law to the detriment of another state or its member; and whether the latter state shall be satisfied with local redress or shall undertake diplomatic interposition is another problem, the answer to which has been attempted in this chapter. But the rule that local remedies must be exhausted before diplomatic interposition is permissible is of more than mere procedural value; for it is the legal recognition of the exclusive jurisdiction of states within their own territories.

The cases in which an aggrieved state is allowed to resort to diplomatic procedure have been developed in the preceding chapters, and require only summary restatement here. Usually where the

state itself, and occasionally where an individual within it, does injury to another state under international law, a complaint will be made directly by the injured state to the respondent state. For the violation of the territorial jurisdiction of a neighboring state, for example, no local redress would be available. Where an injury is done to an alien, whether by the state of his residence, or by an individual therein, local remedies are frequently provided. Such opportunities for redress must be employed and accepted unless (1) they do not measure up to the international standard; or (2) a denial of justice has been established. Finally, if the injury has been done by an individual, the state is responsible and local remedies need not necessarily be sought, if it is established that the state has not exercised due diligence in its duties of prevention.

It is a common mistake, oftentimes indicative merely of careless phraseology, but explicitly asserted by some writers, to speak of international responsibility as appearing only when diplomatic discussions are begun. Such a statement is true only in a procedural sense. Diplomatic interposition is not even the chief process employed in obtaining reparation for injurious acts; for many injuries to aliens are redressed by the ordinary domestic action of the state of the alien's residence, without either foreign office being aware of the existence of a potential source of a diplomatic claim. It should be regarded as an extraordinary remedy, and be correspondingly restricted in use.[60] Proper limitation upon its employment will result not only in increasing the respect due to the dignity and independence of states, and in relieving the burden upon international intercourse, but will diminish the complaints of small states, in which the right of interposition has often been abused by stronger powers. As a practical matter, however, the right of intervention will not, and can not, be surrendered by states so long as there is need for it in the protection of their interests abroad.

[60] "Diplomatic interposition may more properly be considered as an extraordinary legal remedy granted to the citizen, within the discretion of the state, under certain circumstances in harmony with the public interests of the state, its relations with other states, and the rights and equities of the citizen," Borchard, *Diplomatic Protection*, p. 353. "A foreigner, before he applies for extraordinary interposition should use his best endeavors to obtain the justice he claims from the ordinary tribunals of the country," Mr. Jefferson to the British Minister, April 18, 1793, Moore, *Digest*, VI, p. 259. "La voie diplomatique n'est, evidemment, qu'une ressource extreme, mais à laquelle on peut avoir a recourir," *R. D. I. P.*, II, p. 34; Lapradelle-Politis, *Recueil*, II, p. 710, note 3; Article 12, Resolutions of the *Institut*, 1927, Appendix III, *infra*.