THE WALTER HINES PAGE SCHOOL OF INTERNATIONAL RELATIONS
THE JOHNS HOPKINS UNIVERSITY

THE PROTECTION OF NATIONALS

A Study in the Application of International Law

FREDERICK SHERWOOD DUNN

LONDON: HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

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BALTIMORE
THE JOHNS HOPKINS PRESS
1932

PRINTED IN THE UNITED STATES OF AMERICA
BY J. H. FURST COMPANY, BALTIMORE, MARYLAND

To

THE MEMORY OF

E. G. W. D.

INTRODUCTION

It is not perhaps unnatural that, in the long course of the development of the conception of law as among sovereign states, there should have come to prevail one of those easy simplifications of thinking by which ends are identified with means; and that it has come to be rather usually assumed that, for the attainment of the ideal of international legality, the customary legal process of induction and deduction from the data presented by decided cases is not only indispensable but of itself determinative. But those familiar at first-hand with the routine by which Foreign Offices reach their decisions as to the action to be taken, on one case and another of the multitude daily requiring to be dealt with, have quite generally, I think, felt that the traditional legal process does not by any means work to a definite and calculable result, but that often the logical mechanism reveals the working of some unacknowledged and perhaps variable factors modifying its operation. And those holding such a doubt as to the definitiveness of the mechanism cannot but feel that we lack a full and competent understanding of our own international conduct—of its motivating reasons and impulses, and hence of its tendencies and foreseeable consequences—unless we can satisfactorily explore and make evident these ignored and even unconscious modifying influences.

This is the problem to which Dr. Dunn has addressed himself in the present study of the institution of diplomatic protection of citizens abroad, with particular reference to Mexico. Having been for a number of years a member of the Solicitor's Office of the Department of State, or associated with international claims commissions, he approaches this subject not in the manner of the archaeologist seeking to reconstruct from the survivals the features of a ruined city, but rather as a citizen who has been at home in its streets and byways. From actual responsible experience, he is moved to inquire into the occasion and the nature of those variations of the compass which he had himself found dis-

concerting in the endeavor to chart the course of legality in such cases as fell to him to deal with. And he writes, therefore, not as one carping at the shortcomings of others, but in an effort to understand more fully the limitations of the customary legal technique and to offer something towards the development of a more adequate functioning of legal methods in matters of international relationship.

Dr. Dunn is no doubt right in his frank acknowledgment that the application to international questions of the conceptions now beginning to prevail in regard to domestic law must be the work of many hands. But the Page School welcomes the opportunity to present, as the first of its studies to be published, so suggestive and stimulating an initial inquiry into the bases upon which nations make their decisions on matters of law.

JOHN V. A. MACMURRAY

THE WALTER HINES PAGE SCHOOL
OF INTERNATIONAL RELATIONS
NOVEMBER 14, 1932

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THE PROTECTION OF NATIONALS

CHAPTER I

GENERAL CONSIDERATIONS

The following is not a juristic analysis of the rules and principles of international law governing the protection of citizens and their property interests abroad. It is not put forward as a competitor of the excellent works of Borchard, Eagleton and others on this subject. It is rather an experimental study of an intricate and continuing international problem that has heretofore defied solution by any of the conventional methods of approach. That problem is ultimately concerned with the possibility of maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige. In itself this problem is sufficiently difficult and pressing to warrant intensive and continuing study.

But beyond this problem lies the question of the effectiveness of international law in general as a means of adjusting conflicts of interest between nations. The protection of citizens abroad is a legal subject. It possesses a complex and well-developed jurisprudence and a large body of judicial precedents—larger, in fact, than any other branch of international relations. Because the interests involved in individual cases are not usually very extensive, governments are normally well disposed toward settling their differences on matters of protection by appeal to existing law. Hence the field of protection affords perhaps as good a test as can be found of the efficacy of the legal method as a means of adjusting international conflicts of interest. The difficulties inherent in that method are brought into sharp relief in its application to the everyday solution of questions of diplomatic protection.

The present study grew in large part out of an investigation of the diplomatic protection of American lives and property in Mexico, undertaken by the author in 1929-1930 under the auspices of the Council for Research in the Social Sciences of Columbia University.[1] An important result of that investigation was to bring into serious question some very common and fundamental ideas about what the legal process is and how it operates in the field of international relations. The conclusion seemed unavoidable that our traditional notions about these matters were built on some questionable basic assumptions that ran through the entire structure of international jurisprudence and vitiated or hampered much of the thinking that was being done on the subject. When regarded in the light of the facts revealed by that investigation, the conventional description of how nations act in disposing of questions falling within the scope of international law appeared in some notable respects both inaccurate and misleading; and the legal process itself, as traditionally conceived, seemed unduly ineffective and to certain extent logically unworkable.

It became evident that, in order to arrive at a clearer understanding of the difficulties surrounding the practice of diplomatic protection, some new method of approach to the subject would have to be devised. Existing studies have approached it almost exclusively from the standpoint of legal doctrine; that is to say, they have dealt with it solely in terms of legal rules and principles, setting forth the rights and duties of nations. It became quite clear on examination that, while these rules and principles were undoubtedly a factor in accounting for the actions of governments on the subject of protection, they were by no means the only factor involved. Many other things entered in as determining factors, even where the actions of governments were apparently capable of being fully explained in terms of legal rules and principles. In other words, it became evident that, by confining our attention exclusively to this one factor, we were obtaining a very incomplete and often inaccurate picture of

the process by which decisions were actually reached on questions of diplomatic protection.

In order to obtain a more accurate understanding of this process, it was necessary to shift the emphasis away from the juristic analysis of rules and principles of law, and to look at the practice of diplomatic protection as a man-made institution designed for particular social ends. That is not an easy shift to make. It requires the breaking down of habitual ways of thinking about legal problems and the revision of some basic assumptions that have heretofore not been open to question. It takes us into a new field of thinking in which most of our familiar guideposts are missing. It necessitates the building up of a new set of concepts and of new attitudes toward old problems.

Such efforts are not only immensely difficult; they are also, in the beginning at least, apt to be rather unpopular. The reluctance of human beings to alter their settled habits of thought is proverbial. This is particularly true in regard to our thinking about social institutions, since these often embody our inherited beliefs as to what is right or respectable in life. Criticism of such institutions often appears as an attack upon these underlying beliefs and hence is stoutly resisted. It is a trite observation that all human institutions tend in the course of time to acquire a protective coating of fixed ideas and unquestioned value judgments which blocks critical inquiry into the purpose and worth of such institutions or turns it off into side issues.

This resistance to new viewpoints is not merely a characteristic of the unthinking lay mind; it is found to an even greater degree among experts who have mastered the prevailing techniques of their respective fields. Lawyers, for example, are not noted for their receptivity to new ideas regarding the basic structure of their science or the methods by which they work. We have been assured on excellent authority that a lawyer who is not orthodox is no lawyer. Legal practitioners are immersed from the beginning of their training in the intricacies of a particular technique that seems to bring tolerably good results within certain limits, or

at least to have the approval of their professional brethren; and they tend to be impatient of any external considerations which might cast doubts upon the effectiveness of their method or upon the significance of the results which their acquired skills bring forth. In this they do not greatly differ from their fellow technicians in other fields. As Whitehead has pointed out:

> The man with a method good for purposes of his dominant interests, is a pathological case in respect to his wider judgment on the coordination of this method with a more complete experience. . . . We all start by being empiricists. But our empiricism is confined within our immediate interests. The more clearly we grasp the intellectual analysis of a way regulating procedure for the sake of those interests, the more decidedly we reject the inclusion of evidence which refuses to be immediately harmonized with the method before us. Some of the major disasters of mankind have been produced by the narrowness of men with a good methodology.[2]

Yet in recent years some exciting things have been happening in the field of legal science, at least as applied to domestic life. "The waters of the law," says Frankfurter, "are unwontedly alive." [3] New conceptions of the nature of the legal process, of the functions of courts and lawyers, of the place of law in human affairs, have been breaking out on every hand. New methods of approach are being developed and fields of inquiry opened up which seem to offer possibilities of immense interest for the future of legal science. Almost overnight, municipal jurisprudence has ceased to be the sterile and dreary science that it was at the opening of the present century, and now steps forward as a subject of immediate significance in the events of our daily lives.

Not so, however, the field of international jurisprudence. So far as one can find, the forces that are stirring into life the social sciences that deal with our domestic concerns have not yet made their presence felt to any noticeable extent in the minds of those who determine the trend of thought about international law and relations. One finds here no rigorous critical analysis of the framework of thinking employed in the solution of current problems. Disputes there are aplenty,

and new views are being constantly advanced, but these relate to particular phases of the content of the established system of thought, not to the system itself. About the general aims of the institution of international law and about the capacity of the accepted methods and techniques to achieve those aims, there seems to be little doubt. It is not even thought necessary to endeavor to state these aims in intelligible terms in the light of modern conditions. We still take such matters for granted.

It seems that all bodies of knowledge or systems of thought, regardless of subject matter, start with certain basic assumptions or postulates that are either implicit or else are accepted as self-evident or axiomatic. These assumptions provide the necessary conceptual framework within which subsequent thinking about the subject takes place. They not only enter into the formulation of theory, but also determine in large part what shall be regarded as "facts," since they mark out what is relevant or significant in the otherwise unassorted and random flow of events that makes up the field of observation.

In the beginning, these assumptions coincide more or less closely with the existing range of our experience, else they would not appear self-evident. So long as a particular system of thinking yields tolerably good results or provides an acceptable account of the observed phenomena, it usually does not occur to people to examine or doubt the validity of these underlying assumptions. They are so deeply ingrained in our thinking that to question them seems absurd.

The time comes, however, in all fields of knowledge when, as a result of changing conditions, an enlargement of experience, or an improvement in methods of inquiry, new ranges of phenomena appear which cannot be accounted for by any acceptable hypothesis drawn from the existing conceptual system or readily reconciled with current doctrines. When this happens, it eventually becomes necessary to bring into the light the underlying postulates or assumptions of the existing body of knowledge, to question their validity and to consider alternative hypotheses.

This is usually an extremely difficult task, and not infrequently arouses bitter opposition since it seems to threaten our established beliefs. However, in no other way is it possible to make the existing body of knowledge internally self-consistent and harmonious with the new ranges of experience. The new or modified basic assumptions that result from this procedure will usually seem at first quite contrary to "common sense," since common sense is itself conditioned by our existing assumptions. But if these new assumptions meet the tests of verification and provide a more useful account of observed events, they will eventually become the implicit or "self-evident" postulates of our enlarged body of knowledge, and will in their turn be accepted as the obvious dictates of common sense.

Illustrations of this morphology of our basic assumptions lie on every hand. The history of our ideas about the shape of the earth on which we live, about the relation of our world to the rest of the universe, about the composition of matter furnishes commonplace examples. Nearly everyone is now familiar with the illuminating example provided by the recent history of the physical sciences. For the nineteenth century world, a Newtonian physics based on the assumptions of absolute time and space and an irreducible atom was both adequate and "true" within the known world of experience. Toward the close of the century, however, improved methods and tools of inquiry opened up vast new realms of phenomena which did not readily fit into the existing scientific structure. The Michelson-Morley experiment, the discovery of X-rays, radium, electrons and protons, radioactivity, these and other discoveries which could not be readily reconciled with the doctrines of classical physics eventually forced the physical scientists to reconsider the underlying postulates of their science and to seek alternative hypotheses. As a result of this examination, most, if not all, of the implicit assumptions underlying our traditional notions about the physical world have had to be modified or abandoned.

What happened was more than a mere correction of particular doctrines or propositions; it was a fundamental change

in our ways of thinking about the physical world. In place of the old assumptions we now have such ideas as relativity, the quantum theory, the principle of indeterminancy, non-Newtonian mechanics, non-Euclidean geometries and even non-Pythagorean arithmetics. Most of these notions, when first proposed, seemed the very opposite of common sense, yet they have provided us with more acceptable explanations of the enlarged world of our experience, and have at the same time opened up new and immensely fruitful fields of exploration. By bringing its basic assumptions into the light and testing out alternative possibilities, our physical science has freed itself from the prepossessions remaining from a narrower world of experience and has made remarkable strides forward within the space of a few years.

It seems that our body of knowledge about international law and relations has now reached a similar stage in its development, where its underlying assumptions and the methods of inquiry used are no longer adequate to their task. Since the present ways of thinking about the subject became established, the range of our experience has widened in a spectacular manner and our knowledge of the world in which our international institutions operate has greatly increased. The practical problems we now face are radically different from those which forged the original postulates of our systematic thinking on the subject. There has likewise been a notable advance in our understanding of the logical methods relied upon in the operation of the legal process in general. Yet, up to the present time, no corresponding change has taken place in the conceptual structure of the science of international law or in our ways of approach to current problems in this field.

The evidence of this lies all about us. A sharp and growing chasm divides the fields of theory and practice. The account given by legal scholars of the operation of the institution of international law gives us no reliable basis of forecasting how particular issues will be decided in the future. Government officials, with all the good will in the world, experience the greatest difficulty in discovering what the

"law" is in particular cases. The results of extensive "factual" investigations of scholars are of little help in solving current problems. Confidence among governments in the efficacy of existing institutions for the peaceful settlement of disputes is at a low ebb. Jurists still find it necessary to devote considerable time to discussing such questions as whether or not international law "really" exists, or whether it is possible to have a legal order at all without a superior enforcing authority. The public at large remains cynical. In an era when the ideals of order and security in the world of international relations have a peculiarly powerful appeal, the instruments upon which we rely to achieve these ends seem surprisingly confused and ineffective.

One of the main things demanded of any systematic body of knowledge or science is that its established factual propositions shall be logically consistent with each other. In the present stage of our knowledge of international relations, it seems quite possible to establish, by objective research, any number of conflicting propositions on all vital questions. Which one of these rival propositions will be accepted as "true" seems to depend primarily upon one's predispositions and upon which part of the evidence one chooses to emphasize. Logical consistency in thinking can apparently be maintained only by ignoring or belittling inconvenient evidence.

In other words, the present range of our experience seems no longer capable of being satisfactorily explained within the framework of conventional ways of thinking about the subject. When this happens there is only one thing to do, and that is to push our inquiry back to the implicit assumptions underlying the established system of thought on the subject, to bring these out into the light, to question their validity however "self-evident" they may seem, and to see if we cannot find alternative hypotheses which more adequately account for the whole range of our present knowledge or experience.[4]

In the following chapters some of these fundamental assumptions will be set forth and their validity tested in the

light of our present knowledge. Where they seem to lead to inconsistent conclusions or fail to give a good account of the known facts, an effort will be made to find some alternative hypothesis that is more in accord with the extent of our present experience. The pursuit of these underlying assumptions will carry us at times far afield from the conventional discussion of the subject of diplomatic protection in terms of legal rules and principles. It will require us to approach the subject as a study of the practical operation of a human institution devised for a particular social purpose. It will lead us to ask such questions as the following: (1) what are the clashes of interest which the institution of diplomatic protection has been devised to adjust? (2) how is it supposed to accomplish this adjustment? (3) how does it in fact succeed in its purpose? (4) to what extent do legal rules and principles determine the actual course of decisions? (5) what other factors enter into decisions? and (6) how might the institution be made to operate more effectively as a means of adjusting conflicts of interest?

Approaching the subject from this angle throws considerable light on the difficulties that have heretofore accompanied the effort to settle questions of diplomatic protection by the process of law. It appears, for example, that the conflicts of interest at the basis of the subject are much more complex than has been commonly supposed. Likewise, the factors that influence decisions in particular cases are far greater in number than the traditional notion of the nature of the legal process would lead one to think. Further, one finds that, even with the best of intentions, this process does not and cannot eliminate the exercise of personal value judgments in deciding what the law is in contentious cases; this is not because of the frailties of human nature, but because of logical difficulties inherent in the nature of the material with which the legal process deals. It also appears that the reasons given by government officials or by international tribunals for their decisions in the average case cannot be accepted as a complete and accurate account of how the decision was in fact reached; they are for the most part merely explana-

tions of how the decision may be brought within the existing body of legal doctrine.

Again, the conventional idea of the legal process rests upon the assumption that it is possible to develop a body of rules and standards of conduct which will, if properly applied, normally yield one and only one answer to each new problem falling within its scope. It appears in fact that, in doubtful or novel cases, the existing body of rules and principles generously provides, not one, but two or more precepts logically applicable to the question at issue, each one leading to a different answer. How the selection is made between these competing precepts is the crucial point in every case, yet, under the prevailing view of the nature of the legal process, the method by which this selection is made remains a mystery. It appears further that a knowledge of the rules and principles of law as set forth in the law books does not enable one to predict with any degree of certainty how a novel case will be decided; it does little more than inform one what kind of language will probably be used in justifying the decision after it has been arrived at by some undisclosed method.

The present study seeks to cover these and other points, and to develop their implications in connection with the operation of the institution of diplomatic protection. The views here put forth are in no sense advanced as final or conclusive; they are often nothing more than tentative sallies into a hitherto largely unexplored field. They seek to do little more than to indicate the existence and scope of this field, which must be thought through if we can hope to achieve more effective methods of dealing with international problems.

Much of what is here said will not be new to those who are familiar with current trends of thought in the field of municipal law and its related social sciences. The author is fully sensible of the great debt he owes to the stimulating and adventurous thinkers who are remaking those fields, especially to such writers and jurists as Cook, Holmes, Stone, Cardozo, Pound, Oliphant, Yntema, Llwellyn, John Dickinson, Green, Underhill Moore, Michael, Arnold, Frankfurter

and Powell; and to such philosophers as Dewey, Morris Cohen, Felix Cohen, Cassius Keyser, C. I. Lewis, Whitehead and Adler. What is new, perhaps, is the effort to apply to international problems some of the ideas germinating in other fields. Such an enterprise obviously cannot be accomplished in one work or by one person; it requires the help of many minds and many viewpoints.

CHAPTER II

THE PROBLEM

Scope of the Subject

To the average layman, the subject of protection of citizens abroad is apt to suggest little more than the use of armed force by one country to safeguard the lives and property of its citizens in another country against some immediate and pressing danger, usually a revolution. The subject calls to his mind China, Nicaragua, Mexico and other troublesome places where, for some reason, foreigners seem to be in frequent danger from stray bullets of insurgents or from the depredations of bandits. If he thinks about the subject at all, he is very apt to look upon the act of protection, when undertaken in behalf of his own fellow-citizens in some turbulent foreign country, as an annoying but necessary duty of the navy; when undertaken by some foreign government, as an act of imperialism probably masking a move to acquire political or economic domination. In any event, the subject of protection is not commonly thought of as a major branch of the daily routine of foreign affairs, nor as an important part of high politics or world diplomacy.

As a matter of fact, if one examines with care the normal routine of foreign offices, he will find that the subject accounts for a very large proportion of their activities and is intertwined with most of the major questions that trouble the peace of the world. It represents an important part of the daily business of statesmen and diplomatists, however much they might prefer to devote their time to the more glamorous and mysterious subjects that tradition has associated with the high calling of diplomacy. Wars and alliances and balances of power have the appeal of grandeur, and are the traditional preoccupation of diplomatists and of students of international relations. But the average foreign office

official or diplomatist discovers, often to his surprise and pain, that there is given him little opportunity to exercise his mind and skill upon them. The subject-matter of his daily note-writing and his conferences is apt to be concerned primarily with the safeguarding of the interests of his fellow-citizens in their activities that extend beyond the borders of their own country.

This is, of course, especially true of the United States. Owing to its isolated geographical position and its relative size, its officials are relieved of the necessity of thinking continuously about maintaining its security from attack by its neighbors. Its contacts with other nations originate primarily in the commercial and social activities of its citizens abroad, and, to a lesser extent, in the activities of citizens of other nations within its own territories. Its paramount interests in the field of international relations seem to be grouped around the preservation and advancement of these foreign activities of its citizens. Most of its controversies with other nations center about this subject, and most of the incidents in which it has used its armed forces abroad have been concerned with the same thing. It has often been said that the primary justification which this country has for maintaining an army and a navy beyond the requirements of internal police is just for this purpose of protecting its citizens in their activities abroad.[1] In any event, an examination of the normal daily routine of the Department of State and of the Foreign Service reveals that this subject occupies more time and attention of the officials in charge of the foreign affairs of the United States and causes more controversies with other governments than any other general subject of international relations.

Some idea of the scope and complexity of the subject of the protection of citizens abroad may be gained from noting a few typical situations, chosen at random, in which the problem is involved:

(a) On the night of September 18, 1931, Japanese troops started a military movement in Manchuria which eventually resulted in the ousting of Chinese civil authorities and the

establishment of a separate government over that territory, independent of control by China and under the military protection of Japan. The initial justification for this action, as offered by Japan, was the alleged failure of the Chinese Government to provide adequate protection of the lives and property of Japanese subjects in Manchuria.

(b) The Soviet *régime,* which came into power in Russia in November 1917, summarily canceled all Russia's outstanding financial obligations (both those owing to foreign governments and to foreign nationals), and nationalized the property of foreigners without the payment of any compensation. Largely because of these actions, plus the alleged conduct of propaganda against capitalist governments, the United States has refused to extend recognition to the Soviet Government.

(c) José Madriz, who, in 1909, succeeded Zelaya as President of Nicaragua, was faced at the outset of his administration by an insurrection under the leadership of Juan J. Estrada. Madriz succeeded in defeating Estrada's forces and cooping them up in the town of Bluefields on the east coast of Nicaragua. The commander of the Nicaraguan gunboat *Maximo Jerez,* stationed off Bluefields, called upon the revolutionists to surrender, stating that, in case they refused, twenty-four hours would be allowed for the removal of noncombatants and then the town would be subjected to bombardment. The commander of an American naval vessel, then in the port, thereupon declared the town a neutral zone, notifying both factions that no military measures would be permitted which would in any way jeopardize the lives and property of Americans and other foreigners in the town. A detail of one hundred men was landed from the American vessel to enforce the proclamation. Thereafter the besieging forces were compelled to withdraw from the neighborhood. They were followed and eventually defeated by the insurgents, and President Madriz was forced to turn the government over to them.[2]

(d) Under the constitution and laws of Mexico as they existed prior to 1915, foreigners could, with certain very lim-

ited exceptions, acquire the ownership of real property in perpetuity in the same manner as natives, and many foreigners so acquired land for agricultural and other purposes. One of the chief aims of the revolutionary movement that started in Mexico in 1910 was to effect an agrarian reform, whereby the Mexican *peón* would be equipped with land to cultivate. The Constitution of 1917 contained various provisions looking to this end, one of which provided for the expropriation of land from existing owners for distribution among native communities. Payment for such expropriation was to be in non-negotiable government bonds on the basis of the assessed valuation of the property for fiscal purposes. In carrying out this programme, the property of many foreigners was expropriated along with that of natives. The provisions made for compensation were regarded by the owners and by foreign governments as wholly inadequate, and the methods of taking the property were likewise looked upon as improper. The Government of the United States protested against such seizures of vested property rights of American nationals unless accompanied by the payment of the just value of the property in cash at the time of the taking. After a long and heated diplomatic controversy, it was finally agreed that expropriations up to an extent of 1,750 hectares might be paid for in government bonds of a certain type, and that any American owner who felt himself aggrieved by the taking of his property could file a claim against the Mexican Government before the United States-Mexican General Claims Commission, to be established under the Claims Convention of September 8, 1923.[3]

(e) On September 2, 1885, a settlement of Chinese mine laborers was attacked by a mob at Rock Springs, in the then Territory of Wyoming. Twenty-eight Chinese were killed, fifteen severely wounded, and property to the value of $147,748.74 was destroyed or appropriated by the rioters. It appears that the attack was instigated by discontented mine laborers who had tried to induce the Chinese to join in the strike for higher wages, but without success. No one was convicted and punished for the crime. The Chinese Government

demanded that the guilty persons be brought to trial; that full indemnity be paid to the Chinese subjects for the injuries and losses they had sustained; and that suitable measures be adopted to protect Chinese residing in Wyoming and elsewhere in the United States from similar attacks in the future. The American Secretary of State denied any international responsibility on the part of his Government for the occurrence, and insisted that the injured Chinese should seek their remedies in the local courts. Eventually, however, the Congress of the United States passed an act on February 24, 1887, providing that the sum of $147,748.74 should be paid to the Chinese Government " in consideration of the losses unhappily sustained by certain Chinese subjects by mob violence at Rock Springs, in the Territory of Wyoming, September 2, 1885; the said sum being intended for distribution among the sufferers and their legal representatives, in the discretion of the Chinese Government." No reservation was made on the question of the legal liability of the Government of the United States in the premises.[4]

(f) On May 12, 1922, an American citizen named Harry Roberts, together with certain other persons, was arrested by Mexican federal troops in Tamaulipas, Mexico, charged with having taken part in an assault upon a house. It appears that the Mexican authorities had good grounds for believing that Roberts had taken part in the assault. Certain preliminary proceedings were started against him, but he was detained for nineteen months without being put on trial. At the end of that time he was released. American diplomatic and consular representatives in Mexico had sought repeatedly to have the trial of Roberts expedited, but without success. Under the Mexican Constitution it was provided that a person accused of a crime " must be judged within four months if he is accused of a crime the maximum penalty for which may not exceed two years' imprisonment, and within one year if the maximum penalty is greater." The Government of the United States brought an international claim against Mexico on the grounds of unreasonably long detention of Roberts without trial, and of mistreatment of him while in prison. This claim

came before the United States-Mexican General Claims Commission established under the Claims Convention of September 8, 1923, and that tribunal found that the Mexican Government was liable under international law on both charges, and should pay an indemnity to the United States on behalf of Roberts in the sum of $8,000.[5]

(g) In 1899, the Union Bridge Company, an American firm, contracted to supply to the Orange Free State the material for a wrought iron steel road bridge, for which the company was to receive 2,200 pounds sterling in payment. While the material was in transit, war broke out between Great Britain and the Orange Free State. The material was delivered at Port Elizabeth in accordance with the contract, but payment on the bills of lading was refused. Thereafter the Orange Free State was annexed to Great Britain. Subsequent efforts of the agents of the Union Bridge Company to sell the material to the local British authorities failed because of inability to agree upon a price. In 1901, the material was forwarded, without any authority from the Company or its agents, by the Storekeeper of the Cape Government Railways at Port Elizabeth (a government official) to the District Storekeeper at Bloemfontein, some 400 miles away. The authorities there did not want the material, but nevertheless stored it for several years. In 1907, letters were addressed to the Union Bridge Company offering to return the material on payment of storage and transportation charges. As nothing was heard from the Company, the material was finally sold at auction. The Company received nothing in payment for the material. Subsequently the Government of the United States filed an international claim against the British Government on behalf of the Company for the value of the material. This claim came before the American and British Claims Arbitration Tribunal established under the Treaty of 1910, and that Tribunal found that, by reason of the wrongful action of the British official in shipping the material to Bloemfontein, Great Britain had committed an "international tort," for which it was liable to pay damages to the United States in the sum of 750 pounds without interest.[6]

The above instances, selected at random, are typical examples of the operation of the institution of the protection of citizens abroad. While they differ widely in their details, in the nature and extent of the interests involved, in the methods of enforcement used, and in their appeal to the public imagination, they all fall, nevertheless, into the same general category of international action. That category, when looked at from one angle, is technically known as "the diplomatic protection of citizens abroad"; when viewed from another angle, it is called "the international responsibility of states for damage done in their territory to the person or property of foreigners." It embraces generally all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.

It is necessary to take note at the outset of one important source of confusion in current discussions of the subject, and that is the failure to distinguish carefully between the *existence* of international responsibility on the one hand, and the *enforcement* of international obligations on the other. The question whether a nation is or is not internationally responsible for injuries to foreigners within its borders is one thing; the question of what means of enforcement or sanction may be used to compel that nation to live up to its obligations in the matter is quite another. Unfortunately these two questions are often confused in current considerations of the subject. This confusion is signalized by the common use of the term "intervention" to describe all action taken by a government on behalf of its citizens abroad; using the term in effect as synonymous with protection. One finds this usage especially common among Latin-American writers and others who look with disapproval on the whole practice of protection, whether involving the use of coercive measures or not.[7]

There is, to be sure, in the broad dictionary definition of the word "intervention" some justification for this usage, since the purpose of all protective action is to bring about a

condition or course of action that would not have taken place if the nation to which representation was made had been left entirely free to follow its own inclination in the matter. But there is great danger of confusion in this usage because of the high emotional content that the term " intervention " has acquired in international relations. It signifies or suggests forceful coercion, generally of a weak state by a strong one, whereas the normal case of protection seldom gets beyond the stage of diplomatic negotiation.

What ordinarily happens in a case of protection is that the government of an injured alien calls the attention of the delinquent government to the facts of the complaint and requests that appropriate steps be taken to redress the grievance. The latter government may concede the allegations and make amends, or it may dispute its liability on legal grounds. If no agreement can be reached through diplomatic discussions, it is customary to allow such cases to accumulate until there are sufficient on hand to justify the resort to arbitration or some other form of judicial settlement. This normal protective action does not necessarily involve any idea of forceful coercion, and is in fact frequently resorted to by weak states against strong states.

It is only occasionally, where aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place. In such cases, the implication is that the delinquent state is either unable or unwilling to fulfill its obligations under international law, and hence becomes subject to whatever penalties flow from such a failure. In the present stage of organization of the international community, the enforcement of legal obligations is still left in large measure to the individual states, i. e., to what is called " self-help " (a situation that naturally favors the stronger as against the weaker states). Armed intervention is only one of various means of enforcement that have been developed. The question whether its use is justified in a particular case is, of course, different from the

question whether a violation of international law has taken place in the first instance.

In the present work we are concerned primarily with the practice or institution of protection itself, and not with any particular method by which the legal obligations thereunder may be enforced . To avoid confusion, the term " intervention " will be used to describe only those incidents in which armed force is actually used as a means of coercion. Representations or demands through diplomatic channels which do not involve the use of armed force will be spoken of as " interposition."

It should be noted further that, in accordance with current practice, the term " diplomatic protection " is here used as a generic term covering the general subject of protection of citizens and their property abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations. The adjective " diplomatic," in other words, is not necessarily descriptive of the course of action followed in particular cases, but is employed to distinguish this type of protection from the more common one that is concerned with the defence of home industries against foreign competition by the use of tariffs, embargoes, etc.

Again, it should be noted that we are here concerned only with representations or demands that are made (expressly or impliedly) under a *claim of right.* Governments often take action in behalf of their citizens abroad which is not based on any assertion of international obligation and does not fall within the category of protection in a technical sense. For example, they extend aid to their citizens in finding markets abroad for their products and in seeking to reduce local obstacles to trade, such as tariffs and embargoes. They frequently authorize their diplomatic representatives to use their good offices unofficially in behalf of a national who is seeking some action by a foreign government which his own government could not demand as a matter of right (or at least is not disposed to do so). These are matters of favor or courtesy which do not ordinarily give rise to controversy between governments. In a great many other cases, however, govern-

ments intercede in behalf of their citizens in foreign countries as a matter of right, and it is only these cases that concern us here, and that are properly classified under the general heading of the diplomatic protection of citizens abroad.

This means, of course, that the subject of protection is primarily a *legal* subject. Governments do not ordinarily claim or demand something of another government as a *matter of right* unless they mean that they are *legally* entitled to it. International law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others.[8] Hence we should expect to find, and do find, that the subject of protection of citizens abroad is commonly dealt with as a branch of international law. Questions arising thereunder are usually handled by the law officers of the foreign offices concerned, and are dealt with on the basis of legal rules and principles or treaty obligations. Cases not settled by diplomatic negotiations are frequently referred to international tribunals, which dispose of them as juridical questions. Scholars have been diligent in formulating legal rules and principles out of past practice, and in organizing them into a logical system, with the result that we possess at the present time an extensive and well-ordered jurisprudence on the subject of diplomatic protection.

Nature of the Problem

The existence of this body of law governing the protection of citizens abroad is proof of the presence, in the current life of the international community, of an extensive and continuing clash of interests that requires some established means of adjustment if the life of the international community is to be carried on peacefully and profitably. All systems of law find their origin in such clashes or conflicts of interests, and the legal institution of protection of citizens abroad is no exception to the rule. It is in the nature of this conflict that we will find an explanation of the institution itself, and perhaps a clue as to the causes of the serious difficulties encountered in its operation.

THE IMPERIALISTIC HYPOTHESIS

As here visualized, this conflict of interests is a far more complex thing than is commonly thought to lie at the base of governmental action in the realm of protection. According to the popular view, the conflict arises primarily out of the ambitions of strong nations to extend their economic and political influence at the expense of weaker nations. It is regarded as an effort, on the one hand, of the great powers to gain control of raw materials and markets in weaker countries, and, on the other hand, of the weaker countries to preserve their independence and integrity against encroachments by the great powers. This view of the matter is summed up in the word "imperialism," which is frequently advanced as the basic driving force in the activities of strong nations in behalf of their nationals and property interests abroad. As a check upon this force, international law, it is said, has developed a body of rules and principles safeguarding the independence and equality of all states, regardless of their size, against impairment by other states. The controversies that arise in the field are, according to this view, to be ascribed primarily to the failure of the great powers to observe scrupulously the precepts of international law in their dealings with small nations; and, in a lesser degree, to a lack of fullness and precision in the rules of law themselves.

It is not difficult to find in the past actions of governments a large amount of evidence which seems to give support to this view. Many books have been written on the subject. The imperialistic hypothesis, moreover, has the signal advantage of great simplicity, both in the intellectual realm and in the realm of the emotions. Unfortunately, however, if one studies the situation carefully enough, one finds a great many phenomena that cannot be satisfactorily explained, either by this hypothesis or by its opposite. One is forced to conclude that this popular view is over-simplified, and rests upon some underlying assumptions of doubtful validity.

In the first place, this view seems to be based on the assumption that the behavior of nations is something apart

from the behavior of individual human beings. For example, we speak of "Japan" desiring to obtain control of the economic life of Manchuria, or of the "United States" coveting the natural resources of Mexico. Yet, as every student of political science knows, "Japan" and the "United States" are not symbols for any physical reality. They stand, rather, for artificial abstract entities which cannot themselves have feelings and desires or take action except through the agency of human beings. There are, of course, such things as a Japanese people, a Japanese territory; a collection of officials plus a certain number of buildings and other property which, taken together, make up the physical part of the Japanese Government. The abstract conception of a "Japan" existing above and apart from these physical realities unquestionably has great utility in various realms of thought, particularly in analytical jurisprudence, but it remains an abstraction. To endow it with a will of its own, with the capacity of having feelings and desires, and even of entertaining nefarious designs against another abstract entity called "China" is to commit the serious logical fault of hypostatizing an abstraction. It is to turn an abstract concept, created for our convenience, into a concrete thing which thenceforth controls our thoughts and actions.

This hypostatization of the abstract state is a very common error that runs through and confuses much of our current thinking about international problems. Once we free ourselves from this notion, we see that, for any particular nation, the thing that acts and takes positions or attitudes in international relations is not the abstract entity, but the group of human beings who, for the moment, exercise the governmental power —in most cases a determinate group of government officials. These officials may or may not be acting in accordance with what they believe to be the general will of the community, but it is their actions which are the immediately visible phenomena of international relations. It is in their attitudes and behavior that we must find evidence of the pressures and conflicts of interest that lead to international controversies. For example, to say that "Great Britain" has designs upon con-

trolling the exploitation of oil in the Near East is to make an assertion about the thoughts and actions of the particular group of human beings who effectively control the relations between Great Britain and the countries of the Near East. To assert that "the United States" is prone to disregard the precepts of international law in its desires to dominate the economic life of the smaller nations to the south is to venture a description of the attitudes and actions of the officials who act for the United States in such matters.

When we come to examine the actual behavior and attitudes of these responsible officials in particular situations, however, we find that the popular imperialistic interpretation of the clash of interests behind the institution of diplomatic protection is a quite inadequate explanation of the matter. It offers entirely too simple an account of the complex motives, attitudes and pressures present in the minds of particular officials when they decide between competing courses of action in individual cases. It tends to ignore the diversity of factors that actually control decisions. It assumes a singleness of purpose and an unfailing ingenuity in working toward it, which, to anyone familiar with the hesitant and uncertain actions of foreign offices at first hand, must seem in most cases a fantastic illusion. It implies at the same time that otherwise apparently intelligent and high-minded individuals invariably lose a large proportion of these qualities when endowed with the responsibilities of public office in the handling of foreign affairs.

That there is, over a period of time, a striking degree of correspondence between the economic or political interests of certain large countries and the course of action followed by their governments on questions of protection can scarcely be denied. That this is the result of conscious and sustained planning on the part of the officials of those countries, and a deliberate ignoring of the legal rules and principles that might stand in the way of such action is simply not borne out by a careful consideration of all of the facts. In some respects this is unfortunate, because it makes the task of the investigator far more difficult than it otherwise would be.

The most serious defect of the imperialistic hypothesis seems to be that it rests upon certain basic assumptions as to the nature of international law and the legal process that are no longer tenable. It assumes, for example, that the legal system provides, or, if properly operated, should provide, one and only one rule or principle of law applicable to a particular situation or clash of interests. It suggests that, in most controversial issues between nations of unequal physical power, the choice that faces the responsible officials of the stronger government is whether to observe the law governing the situation or to ignore it in favor of the material interests of their country.

The fallacy of this view of the matter will be discussed at length in succeeding chapters. Suffice it to say at this point that the legal process, even in its ideal form, is unfortunately not so obliging. In most contentious cases it provides, not one, but two or more legal precepts, each logically applicable to the situation at hand, but each leading to a different answer. The choice of action that presents itself to the officials of a government engaged in a controversy is not whether to follow "the law" on the matter or to decide in favor of the material interests of their country, but which of two or more competing legal precepts to apply to the case. In other words, the question is not whether to observe the law or not, but what is the law? The process by which this question is answered is the heart of the problem.

As Professor Brierly has observed, the notion that strong governments habitually disregard known legal precepts because of the absence of a superior enforcing agency is the view of an amateur. One finds on investigating the matter that officials of foreign offices are quite as zealous as any other type of official, if not more so, in having their actions conform to the rules and principles of the prevailing legal system. One finds very few actual instances where it might be said with any degree of confidence that responsible officials had deliberately decided to follow a course of action which they knew or believed to be contrary to existing rules or principles of international law. On the contrary, if one

approaches the subject with open-mindedness, one can hardly fail to be impressed with the amount of effort that foreign offices make to decide questions of protection of citizens abroad in accordance with the prevailing principles of international law governing the subject.[10]

How, then, are we to account for the admitted fact that the decisions of governments on contentious legal issues correspond, with regularity, to the obvious dictates of their respective material interests? The answer seems to be that the legal process itself, as currently applied to the solution of international problems, does not in fact provide a means of eliminating the consideration of these interests in the decision of legal issues. Just why this is so will be developed at length in succeeding chapters. But first it will be necessary to give some consideration to the practical conditions and mental attitudes that have combined to bring forth the institution of diplomatic protection in its present form.

CHAPTER III

THE UNDERLYING CONFLICTS OF INTEREST

The Political Map of the World

Let us begin with a glance at the physical environment in which the institution of diplomatic protection operates. The world happens at the moment to be organized for purposes of political control into sixty-odd independent geographical units called states or nations. These nations are said to be "sovereign," by which is meant that they are presumably free to order their own affairs, both internally and externally, and are not subordinate to any other political authority. For our purposes, the most significant feature of this concept of sovereignty is the notion of territorial jurisdiction. This means that each nation exercises within its own geographical boundaries complete political control over everything that takes place within that territory; that it has the exclusive power to make and enforce the laws governing the relationships of all human beings in that territory. In the exercise of this power, each nation is presumably at liberty to adopt whatever form of government it chooses, and to develop its own social, legal and economic systems.

Another important feature of this political setting is the notion of citizenship or personal allegiance to a sovereign. This is older than the idea of territorial jurisdiction, and is in some respects in conflict with it. According to this notion, every human being belongs (or should belong) to some one of these sixty-odd sovereign political units and not at the same time to any other. From this relationship flow certain legal and political consequences. In the first place, the nation to which an individual belongs enjoys a personal control over him which it does not enjoy over non-members of its group. It may require him to perform certain duties in defence of the nation, even to the extent of bearing arms and risking

his life. It may compel him to fulfill civic duties in the interest of the group, such as jury service and the like. On the other hand, the individual enjoys certain privileges as a result of his membership in the group. He may participate in the political life of the nation and have a voice in the affairs of government, whereas non-members of the group, even though inhabitants of the territory, must ordinarily refrain from all such activity. He may also look to the nation to take some concern in his welfare, even when outside the national boundaries. This relationship, being a personal one, goes with the citizen wherever he goes, and is not limited by the extent of the territorial jurisdiction of the nation.

Practical Conditions Leading to Conflicts of Interest

Now this system of political jurisdiction would probably not have caused much difficulty in operation had the individual members of these independent political units habitually stayed within the borders of their own countries and engaged in no activities extending beyond those limits. As a matter of fact, the system grew up in a world of comparatively isolated communities. In the early days of the modern state system, economic and social life was largely localized, and the activities and transactions of men that were the subject of political regulation did not ordinarily extend beyond the scope of national political jurisdiction. Primarily owing to difficulties in transportation and communication, the interests of most men both began and ended within the territories of their respective states.

All this was changed by the coming of the machine age. It suddenly became easier to go from one nation to another than it had formerly been to go from one town to another within the nation. Technology widened out people's interests in an astonishing manner. Machine processes of manufacture developed new types of goods which required the gathering of raw materials from all parts of the earth. Machine production created a surplus over the requirements of domestic con-

sumption in many fields, and it became necessary to find foreign markets for the disposal of this surplus. The adequate employment of technological improvements for the enrichment of life at home demanded the widening of economic activities far beyond the limits of national jurisdiction, and led to the constant movement of people, capital and goods across national boundaries. In brief, the activities of human beings which form the subject matter of territorial jurisdiction soon ceased to correspond with the geographical distribution of that jurisdiction.

Even this extension of interests beyond national boundaries might not have been the source of much difficulty in international relations, had the various political units possessed similar legal and economic systems, and had they all been equally desirous of encouraging the development of international trade and intercourse. If, for example, a citizen of X could go to the country of Y or Z and there engage in commerce or industry in the same manner as he was accustomed to do at home, and have his normal expectations regarding the relations of government with his activities fulfilled as if he were in his own country, no particular clashes of interest might have arisen out of the extension of his economic interests beyond the borders of his own country.

But that was far from the case. The world of international trade and intercourse presented a kaleidoscopic picture of diverse legal systems, customs, *mores*, degrees and types of civilization, political control and stability, security of life and property, ideas of justice and fair dealing. These differences were often most noticeable between the highly industrialized countries needing raw materials for their manufactures and those countries which happened to possess an abundance of raw materials but no industry. In vast areas of the earth's surface where natural resources abounded, the native populations had little or no interest in the maintenance of political conditions favorable to commercial and industrial enterprise. In other areas where there might have been a willingness to participate in the new international life of trade and intercourse, the state of political development, the existence of

local racial or minorities problems, or the lack of national consciousness prevented effective action by the local government in establishing the necessary conditions of order and security.

Differences in legal systems and in methods of enforcement of the local laws offered a prime obstacle to the growth of international trade and intercourse. This represented something more than the juristic problems arising out of a diversity of jurisdictions, such as are dealt with under the heading of conflict of laws or private international law. While those problems are often difficult, they do not ordinarily give rise to international controversy; and, in any event, it has been shown that a wide diversity of local rules and practices is not wholly incompatible with an extensive and complex intercommunity life.

What is more important is the existence of fundamental differences of views as to what is just and fair in the ordinary dealings of men. As will be shown more fully later, legal systems reflect not merely differences in customary methods of adjusting the common conflicts of interest arising in the social life of mankind, but different views as to what is desirable in life. They embrace not merely procedures of administration and enforcement, but, what is far more important, scales of values, and these vary widely according to the time and the place. For example, in a community in which physical combat between the individual members is approved, or at least not disapproved, a man's " honor " and his reputation for valor in physical encounters is apt to be of far greater concern than the meticulous protection of his property rights, or even of his reputation for business integrity. In an industrialized, capitalistic society based on private profit, the protection of property rights and the sanctity of contract obligations become the essence of justice, since they are regarded as essential to the achievement of what that community has agreed upon as valid ends of life. Again, an industrialized society in which the means of production have been mechanized and labor specialized will hold quite different ideas of

justice and fair dealing from an agricultural community subsisting largely on a handicraft economy.

Notions of what is just and proper will be common to all communities only to the extent that they hold common ideas as to what is good in life. Historians and anthropologists have shown us how limited these common ideas are, if they exist at all. Even sacredness of human life itself is far from being a universally pervasive idea; in some communities a low value is placed on life as such, it being regarded as but a temporary and not necessarily pleasant prelude to a fuller life in the hereafter.

This is not to deny, of course, that such a thing as justice exists, or that it serves as an essential element in the development and operation of legal systems. It is merely to say that notions of what is just and fair as embodied in legal systems will invariably reflect the local scale of values as to the good life,[1] and that these scales of values are subjective and vary with the time and the place. In other words, the diversity of legal systems found in the present world of international intercourse represents not merely different methods of protecting human rights and meting out justice between individuals, but different notions of what *are* human rights and different ways of conceiving justice. Often, in fact, countries with substantially similar formal legal systems (as, for example, the United States and certain Latin-American countries) will apply them with quite different results.

This obstacle looms especially large because of the tendency of men to regard the notions of justice prevalent in their own communities as of universal validity, and all other notions as erroneous or unenlightened. Usually the system of values under which they have grown up becomes so deeply ingrained in their thinking that it does not occur to them to question its universality. We do not normally think to inquire about the sources of our ideas of fundamental justice or equity. We do not even inquire whether they are innate, i. e., determined in the germ plasm, or acquired by learning, i. e., socially determined. We are apt to regard them as self-evident or axiomatic, as necessarily persuasive to all right-

thinking men. Failure to accept or act upon these ideas is often attributed to backwardness or lack of education, or perhaps to deficient moral character, the assumption being that correct thinking could only lead to one set of concepts of justice and fairness. The trouble is that each community having a characteristic set of ideas on the subject looks upon them with the same reverence, and rejects as erroneous any competing set of notions based on a different conception of what is good in life.

Among these different ways of conceiving justice, there is none that can claim priority by reference to any absolute measure of universal values. However, to the extent that one set of ideas concerning fundamental justice happens at any one time to be prevalent among the nations exercising the most pervasive influence in the international community, that set will be reflected in the system of law adopted for the community as a whole. If, as happens to be the case at the moment, such nations are primarily industrialized units operating on a capitalistic economy, then the system of justice for the communuity as a whole will be conceived in terms of that ideology and will favor the promotion of industry and commerce. Should some other group of states of a different economy or type of civilization become dominant at a future date, then we might expect an alteration of the ideas of justice incorporated in the legal system for the international community as a whole.

Another condition making for controversy in this field is the lack of correspondence between political jurisdiction and economic needs and interests. The geographical boundaries of states have been drawn with no particular reference to the economic life of the people within them. The present layout of the inhabited portion of the earth's surface for purposes of political government is largely the result of historical accident. It was not planned with a view to assuring to the people within the various independent nations the means of adequately fulfilling their economic needs without going beyond their own borders. Primarily, political boundaries are determined by " political " motives and factors, by questions

of self-defence and self-determination, by ethnographical considerations and historical association. Yet economic activities are regarded as peculiarly the concern of political governments, and as subject to their direct control. Economic welfare is looked at from a national, rather than an international viewpoint; each political unit strives to control the exploitation of natural resources and the course of trade and industry for the benefit of its own population, without being concerned, legally or morally, with the economic welfare of the international community as a whole. In other words, although not laid out on the basis of economic interests, nations are looked upon as independent economic units with freedom to take such action as may be thought necessary to preserve and improve the economic welfare of their own nationals.

While the industrial revolution led to a vast increase in international trade and intercourse, it did not result in any very noticeable tendency toward the regulation of that trade and intercourse on an international, rather than a national basis. On the contrary, it seemed to stimulate economic nationalism. The industrial revolution did not make its appearance in all nations at the same time; it came first to one nation, then to another, and it was but natural that each one in turn should strive to control the new instruments of production and distribution for its own national advantage. There resulted a greatly intensified economic competition among nations that led to many controversies in international relations.

The neo-mercantilism that took root in the nineteenth century and has continued in force to the present day has led nations, on the one hand, to seek to expand the foreign commerce of their citizens in every way possible, and, on the other hand, to close their own markets against foreign competition, and to reserve the development of their natural resources and industry for their own citizens. This international competition has led nations to take a deeper interest in the enterprises of their citizens abroad, and to regard those enterprises

as being closely bound up with the economic welfare of the state itself.

This economic basis of conflicts of interest is closely tied up with political conditions. In many cases, the sources of raw materials and the markets for surplus manufactured products happen to be located in countries that have not yet reached a stage of political development that is favorable to commerce and industry. Economic intercourse, in order to be profitable, obviously requires a certain degree of political order and stability. As currently carried on, private business enterprise involves large investments of capital, and these cannot be safely undertaken unless there is freedom from constant political disturbances. Business enterprise under the capitalistic system requires, furthermore, some established and reliable means of protecting property rights and enforcing contracts. Otherwise it is not possible to make long-term commitments with any degree of confidence. To provide these minimum conditions for the successful conduct of commerce and industry requires a relatively high order of political development and stability of government. In a number of countries, such conditions have not in fact existed. Many of these countries were rich in natural resources, or offered markets for surplus products, and it was but natural that the industrialized states, which happened at the same time to be the most powerful states from a military standpoint, should have taken all available steps to draw these non-industrialized territories within the orbit of international trade and intercourse.

One obvious method of bringing "backward" territories within the sphere of international life was conquest and annexation by a stronger state, and this method was resorted to on frequent occasions in the course of the nineteenth century. The prime difficulty with it was, however, that it too often led to monopoly of the trade and industry of the conquered territory by the conquering state. Other industralized powers whose citizens were interested in the commerce of the conquered territory derived little or no benefit from the improvement of conditions following annexation; often they

were worse off than before. This led to heated rivalries among the great powers in the conquest of backward territories and in the establishment of spheres of influence; and this rivalry was in itself sufficient to discourage the resort to conquest as a method of bringing such territories within the scope of international trade and intercourse. As will be later suggested, a more satisfactory means of working toward the same end was found in the institution of diplomatic protection, which encouraged the maintenance of conditions favorable to commerce and industry without endangering the political sovereignty of weaker states and without setting up monopolistic control by a single power.

Closely akin to this pressure toward bringing all parts of the inhabited world within the scope of international trade and intercourse has been the effort of individual states to extend their influence over particular areas in which they have, or think they have, a special interest, economic or political. It may be that the territory in question is a source of supply of some essential raw materials in which the state claiming the special interest is deficient, as in the case of Japan and Manchuria. Or it may be that the territory is in some manner connected with the question of self-defence of the state claiming the interest, as in the case of the United States and the countries adjacent to the Panama Canal. Governments holding such claims in respect to the territory of another state show a tendency to take a special interest in the preservation of order and security in such areas, and to be more solicitous about the welfare of their citizens there than in other areas, even of the same nation. This has been well illustrated in the attitude of Japan toward the protection of Japanese citizens and their property interests in Manchuria. Since Japan has regarded the economic development of that territory as essential to her own welfare and advancement, she has shown a much greater concern about the maintenance of conditions favorable to industry and commerce there than in other parts of China.

This is true not merely of particular places, but also of particular occasions. The amount of special interest displayed

by one nation in the welfare of its nationals in the territory of another nation often shows a temporal variation corresponding to changes in its own economic situation. For example, when it was believed that the oil reserves of the United States were close to exhaustion, a deeper concern was shown by the Government of the United States in the welfare of American oil producers in Mexico and other places than when it later became evident that American reserves were more than adequate for all present needs. While this relation between real or assumed economic needs and the interest taken in the welfare of citizens abroad is often an unconscious one, it nevertheless appears with sufficient regularity to warrant its inclusion as a practical condition giving rise to conflicts of interest in this field.

Emotional Factors and Attitudes Influencing Action in this Field

Aside from these practical conditions stemming directly out of the existing distribution of political jurisdiction over the earth's surface, there are various fixed attitudes and habitual emotional responses that make for controversy in this field.

In the first place, it is still true that, in many parts of the world, the quality of being a foreigner is often a serious handicap in ordinary business and social relationships. However much the local law may place the foreigner on a footing of civil equality with the native, the simple fact that he is a foreigner may often be a determining factor in the kind of treatment he receives at the hands of private individuals or government officials. Prejudice against aliens as such is still a pervasive trait of human nature.[2] Anti-foreign movements, whether directed against foreigners in general or against those of a single nationality, still occur in various parts of the world and provide an important source of controversy in the field of diplomatic protection. Particularly in times of strained relations between two nations, the nationals of one within the territory of the other are apt to suffer harsh treatment at the hands of local interests, and this in turn only

accentuates the critical situation between the two countries. A vicious spiral is thus set up which may eventually result in war or intervention. An excited nationalism in a particular country not only increases the chances of injuries to foreigners in that country, but also tends to make other governments more zealous in watching for injuries to their nationals than they would be under ordinary conditions.

Again, the concept of nationality carries with it a definite emotional attitude of group consciousness which causes people of one nationality to show a concern for the welfare of others of the same nationality which is not felt for non-members of the group. This feeling is far more evident in external relations than in the internal life of the community; that is to say, the group solidarity which it represents seems to be a competitive attitude as against other groups, rather than a consciousness of common interests within the state. For example, if John Smith, to us unknown and perhaps of a different race, color and social stratum but of the same nationality (whether native or naturalized), should be the victim of mistreatment by the local police of a neighboring town, we are not apt to give the event more than passing notice, except as it indicates a possibility that the same thing might happen to ourselves. But if Smith should sustain the same injury at the hands of police officials of a foreign country, say Mexico or China, the mere fact that he is an American citizen is enough to arouse in us a definite interest in his case and a feeling that something ought to be done about it. The same emotion would not be aroused if the person injured, although of the same race, color and social stratum as ourselves, were of a different nationality.

This feeling is closely akin to the emotion that bound the members of the same tribe together, and is doubtless an outgrowth from it. Its psychological basis is obscure, yet it is one of the most pervasive and persistent of attitudes, even in these days of easy and frequent changes of allegiance. Often it is justified on the ground that an injury to a member of a group is an injury to the group itself, yet, if we look into the

matter at all, we find that the injury is more to the *amour propre* of the group than an injury in any material sense.

In early tribal days, when groups were small and based on kinship, it is quite conceivable that an injury to an able-bodied member of the tribe might have been looked upon as a weakening of the combative power of the group as a whole. But it is hard to take seriously the same line of thinking as applied to the huge national groupings of the present day. There is no longer any real connection between injuries to individual citizens abroad and the fighting force of the nation. The number of American sustaining personal injuries in foreign countries in any one year would certainly have no visible effect upon the material strength of the nation in comparison with that of other nations. If we were in fact primarily concerned with conserving the man power of the nation for military or other purposes, we should exhibit the same degree of concern over injuries to our fellow-citizens at home as over those inflicted in foreign countries. We should likewise feel less inclined to permit voluntary expatriation.[3]

The same thing is true to an even greater extent in regard to property losses sustained by our fellow-citizens at the hands of a foreign government. The concern which we feel in regard to such losses (and which we do not ordinarily feel in regard to similar losses sustained at home) is often traced to the idea that impairment of the property interests of a member of a community is a diminution of the total assets of the community itself and hence represents a loss sustained by all the members of the community. Thus President Coolidge stated, in justification of the American policy of protection of its citizens in foreign countries, that "the person and property of a citizen are a part of the general domain of the nation, even when abroad."[4] The same attitude is reflected in the common practice of referring to the private property interests of our fellow-citizens abroad as "our" interests, although we would scarcely think of using the possessive pronoun in respect of our neighbor's property at home.

As a matter of fact, "American" property interests abroad are not (except for embassies and legations and the like) the

property of the community but of private individuals. If this property represented a material part of the community assets, then it would seem that we should take an interest in how the owner managed and disposed of it. Actually we display no concern in the matter, except in the event of loss or damage that can in some way be attributed to a foreign government. If the owner dissipates his property through bad management or gives it away to foreigners, the total assets of the community are diminished just as much as if the property had been expropriated by a foreign government, yet it does not occur to us to show any concern in the affair. If the property is owned by an American corporation, the average layman does not stop to inquire whether the stockholders and others with a beneficial interest in the property are themselves Americans. Often we may suffer direct losses through expropriation of the property of a *foreign* corporation or individual with whom we have business relations, but we do not have the same feelings in this case as we do in the case of expropriation of the property of an American corporation or individual with whom we have no business relations whatever.

Hence it would seem that this concern which we feel whenever one of our fellow-citizens sustains injury at the hands of a foreign government is seldom in fact based on any conscious judgment that the material interests of the nation have thereby been damaged. It is more often a manifestation of the group consciousness that is represented in the concept of nationality, and is in some degree connected with the idea of relative prestige and importance of the group as compared with other competing groups.

Again, there is a widespread attitude that the exercise of diplomatic protection is necessary in order to engender in the minds of the inhabitants of other nations a wholesome respect for one's own government and one's fellow-citizens. According to this attitude, unless prompt and forceful action is taken by a government to avenge injuries to its citizens abroad, the impression will be spread about that citizens of that country may be mistreated with impunity. There is an assumption, in other words, that good treatment of foreigners

(at least in certain countries) only rests upon the fear of the unpleasant consequences that bad treatment would bring. This attitude also seems to be related in some manner to emotions of pride or self-esteem, such as would be engendered by the knowledge of belonging to a group that is looked upon with deference and respect by members of other groups.

An important stimulant to this group consciousness has been the emotional attitude known as modern "nationalism," which has been defined by Maurras as "the exclusive pursuit of national policies, the absolute maintenance of national integrity, and the steady increase of national power." [5] This attitude, which is playing such an important part in present international relations, is a development of the last one hundred and fifty years, whereas the notion of group consciousness and distrust of foreigners was a characteristic of political groupings long before the modern state system came into being.[6] At the same time, there can be little doubt that modern nationalism has often accentuated the dislike and suspicion of foreigners, and has at the same time increased the concern felt for members of the national group abroad. This attitude stresses the fact that nations are competitors for power, dominion and wealth, and is more or less hostile to any wider associations or groupings for whatever purpose. It holds that international trade and intercourse should be controlled for the benefit of the national interest. Foreigners are allowed to come within the territory of the nation and to live and engage in ordinary pursuits on the same basis as nationals only so long as this seems to contribute to the material advancement of the nation. If, for any reason, it should appear that the presence of extensive foreign interests or of large numbers of foreigners is not working to the advantage of the nation, the tendency is to eliminate them or restrict their activities within narrow bounds. The international complications resulting from an awakening nationalism have been exemplified in recent years in the cases of China and Mexico.

Among the inhabitants of strong and well-ordered states

the view is commonly held that governments which are unwilling or unable to maintain within their borders the degree of order and security for life and property prevalent among civilized states are bad governments, and countries which tolerate such governments are unworthy of the status of sovereign states. In such cases it is regarded as permissible and even necessary for some stronger nation to step in and maintain order. This attitude may be, and often is, quite disassociated from any conscious perception of economic or other benefits that might accrue from such intervention. It may be looked upon rather as the assumption of an unwelcome burden which humanity demands should be undertaken for the benefit of the inhabitants of the territory involved, as well as of the international community at large. This attitude is well exemplified in the term "white man's burden," and implies that the civilization and order of the intervening power is superior to that of the supplanted *régime,* even from the standpoint of the native population.

On the other side of the shield, there is the set of defensive emotional attitudes touched off by the exercise of diplomatic protection by a strong state in behalf of its citizens or their property interests in the territory of a relatively weaker state. To the extent that such interposition seeks to bring about a course of action that the state complained against would not follow if left to its own initiative, there are involved the fundamental notions of sovereignty, independence and equality of states, with all of their accompanying emotions. The vigor of these emotions often seems to vary inversely with the physical power and prestige of the nation concerned; that is to say, the weaker the nation, the greater the sensitiveness in regard to its sovereign status. The fact that diplomatic protection is resorted to far more often against the smaller powers than against the great powers is frequently taken as implying an inferior position in the nations against which it is invoked. Diplomatic interposition usually carries with it an indictment of particular local institutions, and this is resented especially in those states whose hold on full sovereign status is none too secure.

Again, diplomatic interposition is often interpreted as a demand for a privileged status for foreigners over natives. It is pointed out that, when natives suffer injuries at the hands of local officials, they can only have recourse to local institutions for redress, and it is argued that, to allow foreigners to appeal to their own governments for assistance in such cases, is to place them in an unjustifiably advantageous position. The emotional content of the word "privileged," when applied to the status of foreigners as against natives, is peculiarly high, especially in Latin-American countries. There is a strong feeling that the country belongs to the natives, and that, since foreigners are allowed in only on sufferance, they should not expect any better treatment than natives. If the local means of obtaining redress are open to foreigners on substantially the same terms as to natives, that, it is said, is all that foreigners have any right to demand. This attitude is not noticeably altered by the fact that, when native citizens find the local institutions unsatisfactory, they can take political action to bring about changes, whereas foreigners are ordinarily barred from such action.

A complex situation arises when a social revolution takes place in a particular country, resulting in the overthrow of the established order and the lodging of power in a different class of the population. Such upheavals are usually accompanied by a breakdown of central authority lasting for prolonged periods, in the course of which foreigners are subjected to losses and injuries along with natives. These events are different from the more usual political insurrection in which one faction tries to wrest control of the political machinery from another faction. Social revolutions are bound up with with the idea of social progress, and are normally aimed to improve the conditions of an oppressed portion of the population. They arouse different types of emotional responses in the people of other countries.

On the one hand, there is the feeling that any prolonged disturbance of the public order is wrong, no matter what the cause. This attitude draws no distinction between deep-rooted social upheavals and mere factional struggles for

political power. It recognizes no conditions which would justify any interference with vested rights or any protracted disturbance of the normal channels of trade and intercourse. It is not necessarily opposed to social changes, but these must be carried out without unduly upsetting the *status quo*, at least so far as foreigners are concerned.

This attitude was prevalent in the United States for many years in regard to the revolution that began in Mexico with the downfall of the Diaz *régime* in 1910. That revolution started as a political revolt, but soon developed into a social movement of profound significance, having as its aim the improvement of the conditions of the peasant class. An important part of the revolutionary programme was the endowment of native communities with land for cultivation. This could not be carried out without considerable hardship to the existing land-owning class, many of whom were foreigners. For many years the Government of the United States consistently took the attitude that, while a redistribution of agrarian lands in Mexico might be a necessary step for the advancement of the native *peón*, it should not be carried out in such a manner as to involve the confiscation of the vested property rights of foreigners. Actually there was no possibility of putting the programme into effect without causing some loss to existing foreign landholders.[7]

On the other hand, there is often found an attitude which holds that every nation should be permitted to seek its own political development in its own manner, and that the requirement of maintaining order and security for foreign interests should not be carried to the extreme of denying the right of social revolution to an oppressed people. This attitude recognizes that social progress is sometimes impossible without the overthrow of the established order and the slow and painful building up of a new order, in the course of which foreign interests inevitably suffer serious inconvenience and extensive losses. It holds that such periods of disorder are justified in the name of social experimentation and progress, and that the whole international community benefits in the end by improvements in the social and economic struc-

ture of a particular nation, even though purchased at the cost of extensive immediate losses to foreigners within the country.

Something of this attitude was reflected in the actions of the Great Powers at the Washington Conference of 1921-1922 in agreeing in the Nine Power Treaty not to take advantage of the disorder then existing in China as a result of the efforts of the Chinese people to establish a republican form of government. Secretary Stimson has recently described the attitudes behind that agreement as follows:

> At the time this treaty was signed, it was known that China was engaged in an attempt to develop the free institutions of a self-governing republic after her recent revolution from an autocratic form of government; that she would require many years of both economic and political effort to that end, and that her progress would necessarily be slow.
>
> The treaty was thus a covenant of self-denial among the signatory powers in deliberate renunciation of any policy of aggression which might tend to interfere with that development. It was believed—and the whole history of that development of the 'open door' policy reveals that faith—that only by such a process, under the protection of such an agreement, could the fullest interests not only of China but of all nations which have intercourse with her best be served.[8]

It was foreseen, in other words, that, during a prolonged period of reconstruction, China would not be able to maintain the conditions of order and security for foreign interests to which, as a sovereign nation, she might be held, and that her delinquencies in this respect might be made the occasion for attacks upon her territorial integrity by individual powers.

Finally there is a widespread attitude, closely related to some of those mentioned above, that individuals who go abroad do so at their own risk and should not expect their own government to involve itself in their behalf whenever they get into trouble with the government of another country. It is said that people who go abroad do so voluntarily, and must be presumed to foresee the chances of getting into difficulty and of having to rely on foreign institutions to obtain justice. If they are not content to do so, it is argued, then they should stay at home. They have no right to expect their

own nation to endanger its friendly relations with other countries by interposing in their behalf whenever they are subjected to what they may regard as mistreatment or injustice.

The above are the main physical conditions, habitual attitudes and emotional responses that are present in situations involving the exercise of diplomatic protection. The list does not pretend to be exhaustive, nor are the categories precisely drawn. All that is intended is to sketch in the kaleidoscopic background against which questions of protection arise. It is obvious that, if these considerations alone were the factors controlling judgment and action in the field of diplomatic protection, we would have a continuous conflict of irreconcilable interests and attitudes.

Constant controversy over the treatment of foreigners can only be avoided by the development of some effective method of adjustment of these irreconcilable claims and attitudes. That, in fact, is the primary reason for the development of all political institutions. Within national boundaries, disputes of this type are universally settled by the device of law. In the same manner, there has been developed in the field of protection a legal institution for the solution of the problems and conflicts of interest arising from international trade and intercourse. What this institution is, how it is conceived to work in theory, and how it actually works in daily practice will be examined in succeeding chapters.

CHAPTER IV

HISTORICAL DEVELOPMENT OF THE INSTITUTION OF DIPLOMATIC PROTECTION

Before the Nineteenth Century

The law of diplomatic protection is a comparative newcomer in the field of international jurisprudence. The practical conditions that were responsible for its development did not appear in full force until the nineteenth century. By that time the conceptual framework of international law had been fairly well crystallized. The fundamental doctrines of the juristic system had been worked out against the background of a more or less static world of localized and isolated communities ruled over by personal sovereigns. In the nineteenth century, that background changed radically, and along with it the practical needs to be served by a legal system. However, the basic conceptual structure of the system remained almost unchanged. Hence we find that the early history of the legal institution of diplomatic protection is very largely represented by attempts to deal with a new set of practical needs and conflicts of interests in terms of old doctrines and standards developed to fit the requirements of a different type of civilization.

Grotius and his immediate successors had little if anything to say in regard to the legal obligations of a state toward foreigners and foreign property interests within its borders, at least in time of peace. In the seventeenth century, travel and trade across national boundaries were comparatively limited in scope, and the new states that arose out of the disintegration of the Holy Roman Empire were very largely self-supporting economic units. Men's thoughts at that time were occupied with a different set of problems from those with which we are faced today. To the extent that the writings of the early authorities are applicable in terms to present-

day problems of protection, the applicability is largely an accidental one, due to the flexible meaning of words, since the problems themselves were quite unknown to the early writers and could scarcely have been forseen by them.

Grotius wrote of the legal relations of personal sovereigns in their dealings with each other; not of the relations of abstract states. He looked upon sovereigns as human beings subject to a moral order in their mutual relations in much the same manner that private individuals were then subject to an authoritative moral order. As Dean Pound has pointed out:

> The classical international law was a law governing men. It appealed to men and took account of men. It was not founded on a figure of speech. Its obligations were the obligations of personal sovereigns as individual men and its rules were imposed on those sovereigns in their capacity of individual men. It was a body of law for sovereigns who ruled personally; for sovereigns of which Louis XIV became the type. Its flowering time was the classical period of that type of political order and it begins to lose something of its real hold with the rise of a new type in the nineteenth century.[1]

Grotius's work had an immediate and striking success, primarily because it gave expression to the moral ideas of the time, and because the time was one in which there was fairly general agreement throughout the community upon a scale of moral values. The system of political order and authority represented in the Empire was disintegrating with the Empire itself, and threatened to be supplanted by anarchy and general disorder. The concept of absolute sovereignty of the monarch over his subjects, as preached by Bodin and his followers, was regarded as the best means of preventing endless strife and chaos in the internal life of the new states. It was believed essential to have some final resting place of authority within the independent state; someone who could make the final decision on all questions.

But it was feared that absolute freedom of the monarch in external relations with other states would lead to chaos and constant strife. Hence it was necessary to develop some system of restraints upon the external actions of absolute monarchs

in the interest of peace for the community at large. Grotius conceived that these monarchs were subject to a higher law based on natural reason, as well as to a customary law voluntarily accepted. This conception was in accord with the philosophical beliefs of the time, and filled the gap left by the gradual passing away of the system of universal authority embodied in the Holy Roman Empire. But Grotius had practically nothing to say in regard to the specific subject of the protection of the citizen abroad, primarily because the citizen for the most part stayed at home.

Vattel was the first of the classical writers on international law to give much attention to the subject of protection of aliens and their property interests. He was in a sense the spiritual father of the institution, since he first provided an acceptable doctrinal basis for it. When he wrote his celebrated work on *The Law of Nations, or the Principles of Natural Law,* more than a century after Grotius's work had appeared, international life had expanded in a notable manner. The new world had been successfully colonized and foreign trade had become an important element in the economic systems of a number of states. But nations were still relatively isolated and had not yet felt the impact of industrialization.

Vattel's most important contribution to the subject of the protection of citizens abroad was the thesis that an injury to an individual is an injury to his state. This thesis he stated as follows:

> Whoever wrongs the State, violates its rights, disturbs its peace, or injures it in any manner whatever becomes its declared enemy and is in a position to be justly punished. Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[2]

This celebrated passage is frequently cited as the real basis of the practice of diplomatic protection of citizens abroad. When taken by itself, its terms seem sufficiently broad to

cover all types of injuries to foreigners customarily included under this heading. If one examines the context, however, it seems clear that Vattel had in mind a narrower and somewhat different set of problems. Thus the passage appears in the chapter entitled " The Share a Nation May Have in the Acts of its Citizens," and refers only to injuries committed by private individuals, not by governments or government officials. Furthermore, it seems clear that he was thinking quite as much about injuries committed by a nation's citizens abroad as at home. Thus he stated as follows:

> If the injured State has hold of the offender it may without hesitation inflict just punishment upon him. If the offender has escaped and *returned to his own country,* justice should be demanded of his sovereign.[3]

In any event, it should be recalled that Vattel was writing for a fairly homogeneous international society of European Christian states possessing a common civilization and a common moral code. He did not find it necessary to establish the fact that certain kinds of treatment of foreigners should be regarded as wrongful or injurious. He did not have to trouble himself overmuch with the problem of deciding between conflicting standards or justice, or of right and wrong. He could assume that there would be fairly general agreement throughout the community on such matters. He was more concerned with setting forth the kind of wrongs that fell within the province of the law of nations.[4]

In another chapter Vattel sets forth the " Rules with respect to Foreigners," in which he purports to describe the relations existing between foreigners and the state of their sojourn, and the extent of the responsibility of the latter toward the former. Here again he was concerned " not so much to show what humanity and justice call for in our treatment of foreigners." He could take for granted that his readers needed no instruction on such questions. His purpose was merely " to lay down the rules of the Law of Nations on this subject, rules whose object is to secure the rights of both parties and to prevent the peace of Nations from being disturbed by the disputes of individuals." [5]

In this chapter, Vattel looks upon a sovereign's jurisdiction over his territory as analogous to ownership of a piece of land by a private individual. Thus he begins with the thesis that " since the lord of the territory may forbid entrance into it, whenever he thinks proper, he may undoubtedly fix the conditions on which admittance will be allowed." If he grants foreigners access to his dominions, it is presumed that he does so only on the implied condition that they will be subject to the local laws. Disputes between foreigners, or between a foreigner and a citizen, should be settled by the local courts and according to the national laws.

In the famous passage quoted above (to the effect that an injury to a citizen is an injury to his state), Vattel provided a useful thesis for those who sought to uphold and extend the practice of diplomatic protection. In his remarks regarding the exclusiveness of the sovereign's jurisdiction over his territory, Vattel provided ammunition for those who sought to restrict the resort to diplomatic protection in every possible way. Thus he stated as follows:

> Sovereignty following upon ownership gives a Nation *jurisdiction* over the territory which belongs to it. It is the part of the Nation, or of its sovereign, to enforce justice throughout the territory subject to it, to take cognizance of crimes committed therein, and of the differences arising between the citizens.
>
> Other Nations must respect this right; and as the administration of justice necessarily requires that every sentence, pronounced in due form and by the court of last resort, be regarded as just and executed as such, when once a case in which foreigners are involved has been decided in due form, the sovereign of the litigants may not review the decision. To undertake to inquire into the justice of a definitive sentence is an attack upon the jurisdiction of the court which passed it. Hence a sovereign should not interfere in the suits of his subjects in foreign countries nor grant them his protection, except in cases where justice has been denied or the decision is clearly and palpably unjust, or the proper procedure has not been observed, or finally, in cases where his subjects, or foreigners in general, have been discriminated against. . . . The principle may be accepted without any reference to the merits of the particular case which turned on the facts involved.[6]

This passage has been seized upon, especially in Latin-

American countries, as supporting the doctrine that the decisions of the local courts in all cases, except in those involving denial of justice in its narrowest sense, are final and binding, and are not subject to review or protest by a foreign government. The force of this projected doctrine as a general limitation upon the exercise of diplomatic protection becomes evident when it is taken in connection with the rule requiring the exhaustion of local remedies in the event of an injury to a foreigner by a government or its officials. Most governments make provision of some kind for suits in the local courts for redress in such cases, either against the government itself or against the offending official in his personal capacity. If an injured foreigner must first seek redress in the local courts, and if the decisions of the local courts (with the rare exception noted) are final and binding on him and his own government, then the delinquent government, through its own institutions, is in effect the final judge of its own responsibility in the matter. It is clear that these rules would, if applied in the manner insisted upon by Latin-American writers, sharply restrict the field in which diplomatic protection would be permissible.

While Vattel gave expression to the concept of exclusive territorial jurisdiction, he implied at the same time that a sovereign was under a certain degree of responsibility toward foreigners whom he allowed to come within the territory. Thus Vattel stated that a sovereign, in allowing foreigners the right of entry, " agrees to protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security." [7] Vattel did not, however, go into details in regard to this responsibility, beyond stating that a foreigner could not be subjected to " the public burdens which are directly connected with citizenship," such as military service and the payment of taxes destined for " the maintenance of national rights." Aside from these limitations, foreigners were expected to share the public burdens along with natives, including the payment of taxes.

In regard to the property interests of foreigners, Vattel reiterated the thesis that an injury to a citizen is an injury

to his State. He asserted that the property of an individual does not cease to belong to him because he happens to be in a foreign country; that " it still forms a part of the aggregate wealth of his Nation." [8] Apparently, in making this assertion, Vattel was thinking only of the movable property of foreigners, since he devotes a separate paragraph to the subject of real property. In regard to the latter, he stated that it was entirely within the discretion of each state " to grant or to refuse to foreigners the right to own land or other real property in its territory." If it grants the right, such property " remains subject to the jurisdiction and to the laws of the State and liable to taxation like other property." Moreover, since the sovereign may refuse to foreigners the right to own real property, he may grant the right subject to conditions.[9]

While the above statements of Vattel are frequently cited as authority for current decisions on questions of diplomatic protection, it seems clear that, in making them, he was thinking of a different set of problems from those which we face at the present time. He wrote of a world in which foreign property interests offered but few problems in national or international affairs. He viewed the state primarily in terms of personal sovereignty rather than of territorial jurisdiction. His personification of the state as an organic unity made up of the sovereign and his subjects (from which he derived his thesis that an injury to a citizen is an injury to the state) undoubtedly served a useful purpose in the juristic evolution of the modern state, but it is not easy to apply to the modern world of extensive international trade and intercourse, and easy and frequent changes of allegiance.

Just as the eighteenth century drew to a close, there occurred an event which was to have some significance in the development of diplomatic protection as a branch of international jurisprudence. That was the inclusion in the Jay Treaty of 1794, between the United States and Great Britain, of provisions for the establishment of three arbitration commissions to settle: (1) the St. Croix River boundary dispute;

(2) the claims of British subjects for confiscated debts; and (3) the reciprocal claims growing out of the alleged illegal seizure of American vessels by British cruisers, and the capture of British vessels by French ships armed in the ports of the United States.[10] This action inaugurated the modern era of international arbitration and introduced a means of adjustment which has been used with constantly increasing frequency in the settlement of disputes arising out of the protection of citizens abroad.

In the Nineteenth Century

It was not until the nineteenth century that the development of a body of law governing the treatment of aliens really got under way. The primary incentive, of course, came from the tremendous improvement in the means of communication achieved in that century, and the introduction of machine technology and industralization, which sent men to all parts of the earth to find raw materials and to sell manufactured products. The appearance of large numbers of foreigners and of extensive foreign property interests within the territorial jurisdiction of all nations inevitably gave rise to numerous conflicts of interest and controversies over the exercise of jurisdiction in relation to such foreigners.

The opening up of the new world to international trade was a contributing factor of special importance. Here was a vast new territory, rich in the minerals and other resources needed in the economic life of Europe, and offering huge potential markets for European goods. It was ruled over by newly formed governments which, for the most part, had not yet had time to consolidate their positions. The populations of these new countries were, in general, made up of ruling classes of emigrated whites of European extraction and large indigenous native groups of Indians quite unfamiliar with the customs and *mores* of European civilization; accustomed rather to a feudal type of community organization and to an agricultural and handicraft economy. The forms of government adopted in these new countries were borrowed from

European sources, and bore the imprint of the French and American revolutions, and the advanced political philosophy of individualism and representative government. In many ways these forms of government proved ill-adapted to the requirements of the new countries. The result was that, in large sections of the new world, political disorder and revolutions prevailed for many years. Foreigners suffered from these conditions relatively more than natives.

The international society of states of the eighteenth century had been wholly European in character. The body of legal relations and customary modes of acting which that society had built up were the reflections of European culture and civilization of the time. In the course of the nineteenth century, the society of nations expanded far beyond European horizons. At the same time, the European system that dominated the relations between the members of this society continued in that position. The ideas of justice and fair dealing incorporated in the accepted norms of conduct for European nations were carried over into the wider sphere of the international society of the nineteenth century. In the economic sphere, these ideas derived their content from the capitalistic individualism prevalent in Europe in the early part of the nineteenth century. They particularly embraced the notions of individual liberty, of the sacredness of private property even as against the actions of governments, and the sanctity of contracts.

The new nations in the western hemisphere embodied these concepts in their fundamental laws (which they had borrowed largely from outside sources), and hence there was, in theory at least, a common basis of ideas on which relations could be established. Where that was not the case, as in the Far East and certain countries of the Near East, relations were conducted on the special basis of extraterritoriality. But the conditions of order and stability that were required to make the European system work satisfactorily had not yet been established in many countries of the new world. Hence we find continual clashes of interest and charges of unjust treatment of foreigners.

In the beginning, the tendency was to place these complaints and demands for redress on the basis of international comity and the maintenance of friendly relations. Gradually, however, with the building up of a body of precedents, it became customary to make these demands as claims of legal right. This practice was encouraged by the inclusion in treaties of provisions stipulating for the protection of the lives and property of the nationals of each contracting party in the territory of the other. By the middle of the nineteenth century, governments habitually treated questions of protection as legal questions and justified interposition by appeal to principles of international law and the writings of authorities. In other words, the adjustment of disputes of this character was gradually becoming institutionalized.

At the same time, it can scarcely be said that there was any general agreement on the practical purposes to be served by the new institution of diplomatic protection. On the contrary, there soon developed a very sharp disagreement between the larger and smaller powers as to the justifiable scope of the practice. It happened that occasions for the exercise of diplomatic protection arose far more often in the newer and more unsettled countries of Latin America than in the old established countries of Europe. The continued state of political disorder in many South American countries gave rise to a steady stream of complaints of injuries to foreigners, and to occasional resort to armed intervention to enforce demands for redress. The repeated failure of local governmental institutions to function in the expected manner led to a general loss of confidence in those institutions among foreigners, and to an increasing readiness to resort to diplomatic protection. In any event, the demands and claims filed by other countries against the Latin-American states far exceeded the claims which these countries had against other countries.

The impression soon spread in Latin America that diplomatic protection was a practice which strong countries only resorted to against weaker countries, and never against each other. This seemed to infer an inferior position for the states against which demands were regularly made. Furthermore,

the nineteenth century was an era of expansionism among the great powers, and there was a constant fear among the smaller powers that complaints regarding the lack of protection of foreign interests would be used as excuses for territorial conquest. These things led to the growth of a school of thought in Latin America which was vigorously opposed to the extension of the practice of diplomatic protection and which sought to confine it to the narrowest possible limits.

This point of view early found authoritative expression in the works of Calvo, an Argentinian writer living in Paris, who published an extensive treatise on the law of nations in 1868.[11] Calvo expressed strong opposition to "intervention" on behalf of citizens or their property interests abroad. While he was obviously thinking primarily of armed intervention, he appeared to include diplomatic interposition in his strictures as well. From the independence and equality of nations he deduced the proposition that foreigners were entitled to the same kind of treatment as natives but no better, and that, so long as the local institutions of justice were open to them on the same basis as to natives, there could be no basis of an international complaint. He supported the view that the decisions of the local courts with regard to foreigners were final, and could not be called into question by the foreigners' own government. He sought to show that these principles were observed by European states as among themselves, but not with relation to Latin-American states. His views received wide approbation throughout Latin America and came to be known as the Calvo Doctrine, which has in large measure been the key-note of the attitudes of those governments on the general subject of diplomatic protection up to the present day.

Throughout the later nineteenth and early twentieth centuries the subject of diplomatic protection played a large and increasingly important part in the relations between nations, and especially between the larger powers on the one hand and the smaller and newer states on the other. Claims for pecuniary redress for injuries to foreigners were constantly accumulating against certain Latin-American states and pro-

vided a source of financial embarrassment to those states. These outstanding claims were unquestionably used on a number of occasions to bring pressure to bear on delinquent states for the attainment of other ends.[12] They likewise provided the immediate justification for armed intervention in various instances; notably the French interventions in Mexico in 1838 and 1861, the intervention of Germany, Great Britain and Italy in Venezuela in 1902-03, and American interventions in Santo Domingo in 1904 and in Haiti in 1915.[13]

While the Latin-American nations felt the burden of the practice of diplomatic protection relatively more than other states, it would be difficult to maintain that they would have been better off had the institution never been developed. There is no reason at all to believe that, in the absence of the institution, the stronger states would have been content to stand by and do nothing while their citizens in Latin-American countries were receiving treatment which appeared unjust or improper. It cannot be denied that, under the disturbed political conditions existing in South and Central America, the lot of the foreigner was often an unhappy one, and he was frequently subjected to treatment that fell far below European standards. In other parts of the world, territorial conquest was then taking place on much slighter provocation than was being offered in some Latin-American countries.

The existence of the Monroe Doctrine undoubtedly served to discourage the resort to territorial conquest by European states as a means of bringing order and security in the more disturbed regions of South America. However, that Doctrine was not interpreted, at least in the last century, to bar forceful intervention to compel the fulfillment of international obligations, so long as acquisition of territory was not contemplated. It was likewise no bar to conquest by the United States. It seems quite probable that, had the practice of diplomatic protection not developed as a legal institution, some Latin-American countries would have had to pay much higher penalties than they did for the injuries and losses sustained by

foreigners within their borders. While that institution did not always operate in the manner which Latin-American writers approved, it unquestionably served to delay or discourage the resort to forceful action by stronger states when their citizens sustained what was regarded as mistreatment in the territory of weaker states.

The appeal to general rules and principles of law often served to shift attention away from the circumstances of the immediate case, and to give time for passions to cool. In the realm of legal dialectics, the Latin-American statesmen won many more victories than they ever could have won in a trial of physical strength. Furthermore, so long as it was possible to place the discussion of responsibility on the ground of law, the defendant nation could always appeal to arbitration as a last resort. This could not easily be refused by the complainant state, and, if accepted, meant a delay in bringing pressure to bear, and often resulted in a final settlement far easier on the defendant state than the original demand.[14] The legal institution of diplomatic protection, in other words, served as a substitute for territorial conquest in bringing the Latin-American states within the orbit of international trade and intercourse, and, while the results obtained were not what these countries might have desired, the probable alternatives would have been far less desirable from their standpoint.

Considerable impetus was given to the development of the jurisprudence of the subject by the recourse to international arbitration for the settlement of outstanding claims for indemnity for injuries to foreigners. This practice, which began with the Jay Treaty in 1794, was resorted to with increasing frequency in the nineteenth century, and brought forth a large body of judicial precedents which eventually found their way into the legal treatises. Notable examples of this practice have been the arbitration of outstanding claims of the United States and Mexico under the conventions of 1839, 1848, 1868 and 1923; the Venezuelan arbitrations of 1903, in which the claims of ten countries against Venezuela were settled by arbitration; the arbitrations of the

United States with Great Britain under the conventions of 1853, 1871 and 1908, with Spain in 1871, with France in 1880, with Columbia in 1864 and 1874, with Chile in 1892, with Costa Rica in 1860, with Ecuador in 1862, with Peru in 1863 and 1868, and with Venezuela in 1888. In the great majority of cases, these arbitrations were conducted as judicial proceedings, the commissioners acting as judges and supporting their decisions by reference to rules and principles of international law. The publication in 1898 of John Bassett Moore's six-volume *History and Digest of the International Arbitrations to which the United States has been a Party* made many of these decisions and opinions available to government officials and writers on international law.

The writings of legal authorities also aided greatly in the development of the jurisprudence of the subject. By the close of the nineteenth century, scholars were beginning to interest themselves in the theoretical side of the international responsibility of states for injuries to foreigners within their borders. Among the works devoting particular attention to the subject were the following: Paul Heilborn, *Das System des Völkerrechts entwickelt aus der völkerrechtlichen Begriffen* (Berlin, 1896), Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), J. Tchernoff, *Le droit de protection exercé par un état à l'égard de ses nationaux résidant à l'étranger* (Paris, 1898), and Dionisio Anzilotti, *Teoria generale della responsabilita dello Stato nel diritto internazionale* (Florence, 1902). John Bassett Moore's monumental *International Law Digest*, which appeared in 1906, contained a large amount of material dealing with the subject of protection.

Writers of the natural law school and their successors of the historical school had occupied themselves chiefly with the logical development and extension of the fundamental doctrines and concepts of the classical writers. This occupation had not drawn their attention to the growing body of new problems arising out of the increased mobility of people and goods, and the implications of industrialization upon the normal relations of nations. The positivists, who

began to dominate the field toward the latter part of the nineteenth century, were concerned primarily with the study of actual cases and decisions rather than with logical analysis of fundamental concepts, and they could not overlook the fact that a large and growing number of available precedents dealt specifically with the subject of protection of citizens abroad. Nevertheless, most writers continued to think in terms of the inherited classical concepts and doctrines, and to use the traditional terminology and classification of legal materials. This framework of thinking had no adequate place in which to fit the materials dealing with protection. Hence the positivists tended to force it under concepts developed without any reference to the practice, or else to introduce it as separate material under some procedural category, such as "claims." [15]

With the publication of Professor Edwin M. Borchard's thorough treatise on *The Diplomatic Protection of Citizens Abroad* in 1916, the subject became definitely recognized as a separate and important branch of international jurisprudence. That work clearly showed the extent of the body of legal material that had been built up in the preceding century and its susceptibility of systematic treatment as a cohesive body of legal doctrine. The title of this work (in spite of its rather cumbersome length) promptly became adopted as the technical name for the subject in this country, and Professor Borchard's classification and terminology were likewise generally accepted by other writers.

Borchard approached the subject from the standpoint of the individual alien and his government, i. e., he was concerned primarily with the question of what a government could do under international law to protect and preserve the interests of its citizens in foreign jurisdictions. The same subject matter was susceptible of approach from the angle of the relations between a nation and the aliens within its borders. This approach was popular among continental jurists (notably Anzilotti), and was followed by Decenciere-Ferrandière in his *La responsabilité internationale des Etats à raison des dommages subis par des étrangers,* (Paris, 1925).

It was likewise adopted in the next important American work dealing with the subject, which was Professor Clyde Eagleton's *The Responsibility of States in International Law*, (New York, 1928). While the specific subject-matter covered in this treatment of the subject is less extensive than the field surveyed by Professor Borchard, the rules and principles enunciated are sufficiently broad to cover the whole field.

Attempts at Codification

The World War, in the minds of a great many people, represented the breakdown of international law as an effective instrument for regulating and controlling the relations between nations. The disregard of treaty obligations, and the deliberate ignoring of rules designed to mitigate the horrors of war, seemed to indicate to many minds that the existing legal system was wholly ineffective. At the same time, the necessity of some system of order and security in the international world was realized more keenly than ever. Hence the post-war period has been characterized by determined efforts to organize the existing body of law, to make its rules clear and certain, and to give definite expression to the obligation to observe these rules by codifying conventions, wherever possible. The belief has been widely held that much of the existing disorder was due to the lack of clear and fixed rules.

In the efforts recently made at codification of international law, the subject of diplomatic protection has played a prominent part. It has been assumed that, because of the extensive jurisprudence that has been developed in this field, it would be a comparatively easy one to codify. However, in spite of diligent and well-planned efforts of governments and of scholars, the plans for codification of the subject have ended in failure. This failure seems to be attributable less to a lack of established practice on the subject than to a lack of agreement on the ends to be achieved by the institution itself.

Thus, in giving expression to the rules of law on the subject, it was obvious that the great powers had in mind the

primary purpose of maintaining conditions favorable to international trade and intercourse. The states of Latin America, on the other hand, had little if any interest in the security and protection of foreigners, but were primarily concerned with drafting the rules in such a manner as to safeguard the independence of small states in their actions within their own territories. So long as this underlying disagreement existed, there was little chance of obtaining unanimous acceptance of any formulation of rules of law that had a definite meaning.

The most important effort to codify the law of the subject was made under the auspices of the League of Nations.[16] On September 22, 1924, the Assembly of the League adopted a resolution requesting the Council to convene a committee of experts with a view to the "progressive codification" of international law.[17] This committee was established in due course and drew up reports on seven subjects which it regarded as "sufficiently ripe" for codification. One of these subjects was the "Responsibility of States in respect of injury caused in their territory to the person or property of foreigners." The *Rapporteur* on this subject was Señor Guerrero of Salvador, and it is scarcely surprising to find that his report reflects very definitely the Latin-American viewpoint on the subject.[18]

In his report, Guerrero gave expression to the usual theoretical basis of the right of diplomatic protection, i. e., that every individual has certain fundamental rights, namely," the right to life, the right to liberty and the right to own property," and that states have recognized the existence of these rights, and have "mutually undertaken to ensure the possibility of enjoying them." [19] Before these rights, said Guerrero, "nationality sinks into the background, because they belong to man as a human being, and are not, accordingly, subordinate to the will of the State." This is in essence a description of the "minimum standard of justice" which, according to the usual theory, all states are obliged to observe in their treatment of aliens within their borders.

However, Guerrero sought to deprive this customary the-

ory of its force by adding the qualification, contended for by Latin-American authorities, that in no case is a state obliged to accord to foreigners any more favorable treatment than it accords to its own nationals. The force of this superficially plausible deduction from the doctrine of sovereignty is to leave to each state the power to fix the standard of treatment which it is bound to accord to foreigners, since it is of course free to fix the standard for its own nationals. Guerrero did not add the usual proviso made by authorities outside of Latin-American states that this national standard of treatment may be accepted as an appropriate discharge of state responsibility toward foreigners only when such treatment is in harmony with the minimum international standard as found in the practice of civilized states generally. This proviso leaves it open to foreign governments to pass upon the question whether the laws and institutions of a particular country are in keeping with the minimum international standard.

Guerrero sought further to limit the scope of the exercise of diplomatic protection in his definition of "denial of justice." While he recognized this ground as a basis of international responsibility, he did it in such a manner as to limit it to cases which virtually never happen in practice. In the first place, he advanced the usual thesis that a foreigner must seek his protection only in the laws and courts of the country of his sojourn (i. e., if he sustains an injury he must seek redress in the local courts). Guerrero then deduced from the principle of equality of states that the decisions of the local courts on any matter covered by local law must be regarded as final and in conformity with that law, even though the decision in a particular case represented a mistake in judgment, or could be looked upon as "unjust," or even "manifestly unjust." [20]

In brief, Guerrero concluded that no international recourse was admissible against a judgment of a local court, however mistaken or unjust it might seem. Even an abnormal delay in the administration of justice where a foreigner was involved could not, under his theory, provide a basis

for international responsibility. Only where a state refused to foreigners access to its courts on the same terms as to its own nationals, or where the courts refused to proceed with an action brought by a foreigner, could international responsibility arise.[21] Inasmuch as practically all states afford access to their courts to foreigners on the same terms as to nationals, and also provide judicial remedies for injuries sustained by individuals at the hands of the government or its officials, it can be readily seen that Guerrero's thesis, while logically deducible from accepted general principles, would have restricted the exercise of diplomatic protection to occasions which seldom if ever arise in practice.

In due course the Assembly of the League of Nations (by a resolution of September 27, 1927) decided to submit three subjects to a first international conference for the codification of international law. These subjects were (a) nationality, (b) responsibility of states for damage done in their territory to the person or property of foreigners, and (c) territorial waters. A preparatory committee was appointed, and this committee prepared and sent to the various governments for their consideration a "List of Points" on each of the three subjects, these lists being in the form of detailed questionnaires.

Some thirty governments replied to the questionnaire regarding Responsibility of States, including, however, only one Latin-American state, Chile. These replies were analyzed by the Preparatory Committee and "Bases of Discussion" were drawn up on the points covered, to serve as starting points of discussion by the proposed conference. The scope of international responsibility marked out in these bases of discussion was much broader than that admitted in Guerrero's report, and did not give recognition to the Calvo Doctrine as contended for by the Latin-American states.

Forty-seven states (including the United States and seven other states not members of the League of Nations) were represented at the First Conference for the Codification of International Law convened at the Hague on March 13, 1930.[22] After prolonged discussions, the Conference finally

adjourned without adopting any convention on the subject of state responsibility. The Third Committee, which was charged with the consideration of this subject, reached no agreement on the bases of discussion which could be referred to the general conference for action. That Committee merely adopted on first reading ten articles of a proposed convention, which in substance embodied twelve of the thirty bases of discussion drawn up by the Preparatory Committee. These ten articles were subsequently revised by the Drafting Committee, but did not receive the final approval of the Committee.

The main points on which the Committee divided were (1) on the proposed inclusion of a rule that foreigners were entitled to no more than equal treatment with native citizens; and (2) on the inclusion of a definite standard of "due diligence" in the prevention of injuries to foreigners. These points represent the main cleavage of interest between the powers which were concerned in preserving conditions favorable to international intercourse on the one hand, and those concerned with establishing their complete independence of action within their own borders on the other. The question, in substance, was whether there was to be an international standard for the treatment of foreigners, to which all nations would be required to conform, or whether each nation was to be left to fix its own standard.

This represented a fundamental difference of view as to the social ends to be achieved by having a body of law on the subject at all. So long as this fundamental difference existed, it was improbable, if not impossible, that unanimous agreement could be reached on any definite formulation of rules of law. Yet under the existing notions of the nature of law and of the process of codification, it was not possible to bring up the subject of social ends for discussion by the conference. Under the prevailing positivistic tradition, it was not admitted that these ends had anything to do with a statement of the existing law on the subject. Hence no consideration was given to the real difference of opinion that divided

the majority and the minority. Under the circumstances, it is not surprising that the conference ended in failure.

Thus the situation stands at the present time. The law governing diplomatic protection remains almost wholly in the field of customary law. This body of law contains a small number of fairly specific rules which can be readily applied to the types of questions that arise in normal relations, and which are habitually followed without discussion. It also contains a much larger body of usages and standards of conduct which are not so definite in content and which are customarily given different interpretations by different groups of states. These usages embody in large measure the capitalistic economy of the European civilization of the nineteenth century. Many of the states of the new world took over the forms of this system in their local laws, but not its underlying values or social aims. These states have been very little concerned with establishing locally the conditions which would make this system possible on an international scale. Hence it is perhaps not surprising that, in the application of these usages and standards to specific situations, there has been continual controversy. The sources of this controversy will be explored in the following chapters.

CHAPTER V

THE NATURE OF THE LEGAL PROCESS

The Classical Conception

It has been suggested above that the conventional diagnosis of the difficulties surrounding the subject of diplomatic protection does not seem to reach to the heart of the matter. It does not offer an adequate explanation of all of the facts which we now know. This conventional view holds in substance that the difficulties encountered are attributable to two things: (a) a regrettable indisposition on the part of governments or government officials to observe strictly the rules and principles of international law when the material interests of their respective nations are at stake; and (b) a lack of precision and clarity in the rules and principles themselves.[1] The first difficulty we have sought to cure through exhortations to governments to be more scrupulous in their respect for the legal rights of other nations, and through the development of sanctions for enforcing the law; the second, through the efforts of scholars and of governments to give a more careful formulation to existing law.

It appears on examination that this diagnosis is at best only partially true. It is doubtless correct that, in some instances, governments have deliberately ignored existing rules of international law that were inconvenient. However, this fact does not account for the far greater number of instances in which the same difficulties are present in spite of obviously sincere and intelligent efforts of both parties to follow existing law. It even seems that a tendency on the part of a government to decide legal questions in accordance with its obvious material interests is not necessarily inconsistent with a genuine disposition to abide by existing legal precepts. Often the decisions most severely criticized on this score are found to have been made under conditions indicating a com-

mendable and sustained effort to observe international law on the subject.

Again, it appears that there is little direct relation between the number and clarity of existing rules of law and the absence of controversy. One finds quite as many if not more conflicts in those parts of the subject where there is an abundance of authoritative and definite precedents as in those parts where the established rules are few in number and vague in content.

If these observations are correct, they seem to indicate that something is vitally wrong with our conventional notions about what the legal process is and how it operates in the international sphere. At any rate, it seems advisable not to rest content with the common assumption that our difficulties are due merely to the weakness of human nature, but to inquire whether they may not also be due to defects in the classical conception of the legal process itself.

It is the habit of those who write about international law to treat it as if it were a thing possessed of a single nature or essence, a discrete entity bearing the same essential character from whatever angle viewed, and capable of being defined or described apart from any particular purpose or frame of reference. Authors invariably begin their treatises with a description of "the" nature of international law, apparently assuming that there can be only one, and that this one is valid in all possible situations and for all purposes.

There is good reason to be suspicious of this assumption in the fact that, after several centuries of intensive descriptive effort, there is still a wide disagreement among the authorities as to the "real" nature of international law. Each new authority feels impelled to give his own individual account of the matter, and to ascribe the variations in views on the subject to the failure of his fellow authors to use precise terminology or to think clearly. Such consensus of opinion as exists on the subject is so general in character as to be of little help in concrete situations.

As a matter of fact, if one looks into the matter carefully enough, one finds that international law, like every general

concept, may have various different natures on different occasions, depending upon the frame of reference or realm of discourse in which the term is used, i. e., upon the particular purpose or set of problems one happens to be interested in at the moment. Clearly the private individual, the lawyer, the judge, the government official, the analytical jurist, the student of international relations, when thinking about international law, will each be concerned with a somewhat different set of problems, and hence will have different views as to the significant aspect or "nature" of international law. No one of these accounts of the matter can claim to be the "real nature" of international law in the abstract. Each one is "real" within its own particular set of problems or purposes. What may be true about the subject in one realm of discourse or frame of reference is not necessarily true in others.[2]

In the present connection we are concerned with international law, not from the standpoint of analytical jurisprudence, but as a going social institution devised to serve a particular set of human needs. From this standpoint, it may be regarded as a process for adjusting the conflicting interests of the members of the international community. It is in essence a method of dealing with individual disputes or clashes of interest in a generalized manner; i. e., treating them not as isolated events but in accordance with a system of general rules and principles. It purports to deal with individual conflicts as members of a class of similar cases, and to settle all instances of the same class in the same way, regardless of the respective material interests or the relative physical strength of the contending parties.

The ultimate aim of this process is to bring order and regularity into human relations, and to enable the members of the community to know, with a reasonable degree of certainty, how particular disputes or clashes of interest will be decided in the future; or, to put it in common language, to know what their "legal rights" are. Without such knowledge it is presumably not possible to make future plans or commitments with any degree of confidence, or to enjoy a

feeling of order and security in the ordinary affairs of life. By dealing with individual clashes of interest in accordance with general rules and principles, it is assumed that the prejudices and uncertainties of individual human judgments will be eliminated as determining factors in the disposition of such cases, and that, within the limits of human error, all members of the community will be treated substantially alike, regardless of their relative strength and importance.

Now if the common notion of what is involved in the process of finding answers to legal questions is valid, it is not easy to understand why there should be quite so much confusion and controversy in its application to concrete situations. International law, we are told, is a collection of rules and principles of conduct which the nations of the world have agreed to observe, and which they commonly do observe in their relations with one another. In order to find the answer to any particular question, it is presumably only necessary to discover among these preexisting rules and principles the one that governs situations of the type in question. and to deduce the answer by logical methods. If no applicable precept is found, then there is presumably no law on the subject and the question falls within the realm of political action. It is true, of course, that only a few of these rules and principles have been reduced to treaty form, the rest being in the nature of customary law, based on past practice. However, there are well-known methods or techniques for discovering the precepts of this customary law which presumably eliminate the necessity of recourse to individual subjective judgments.

In other words, the sole acknowledged factor which determines, or should determine, the course of decisions on legal questions is the existing body of legal rules and principles. The introduction of other factors in the deciding of questions is looked upon as improper. Most authorities admit that such factors sometimes creep in, but this is taken as an indication, either that the judges or officials deciding the issue have not properly applied the legal process, or else that the existing law on the subject happens to be deficient.[3]

In line with this conventional view, judges and other deciding agencies explain their decisions solely by reference to legal rules and principles or treaty provisions. Legal scholars confine their efforts exclusively to the study and elaboration of these rules and principles. The lawyer and the man on the street assume that, with a knowledge of this body of legal precepts, one can know with reasonable certainty how particular cases will be decided in the future.

The Acknowledged Factors that Determine Legal Decisions

Let us examine how far it is *logically possible* for this body of rules and principles of law to give us definite and precise answers to the problems falling within their scope. We are not here concerned with possible failures of the system that may be ascribed to the frailties of human nature. We are not considering the possibility that deciding agencies may at times be moved by other motives, worthy or unworthy, to depart from the solutions dictated by existing legal rules and principles in disposing of particular cases. We are here concerned only with the *ideal* situation, in which an intelligent and whole-hearted effort is made to apply the law. It is only by fixing the limits of the ideal that we can obtain any reliable information about the practical. To the extent that the existing body of rules and principles fails to provide us with definite answers to particular problems, the door is left open to the admission of other factors in the determination of legal issues.

According to the prevailing view, the solution of legal problems seems to consist; first, in the ascertainment of the "facts" of the case; second, in the classification of these facts under some preexisting legal category or categories (such as "confiscation," "revolutionary damages," "denial of justice," "false imprisonment," etc.); third, the identification of the rule, principle or standard which applies to this class of events; and finally, the deducing of the answer from this rule, principle or standard by logical processes. In other

words, finding the law which governs a particular issue is a process of discovery of preexisting things and of formal logic or syllogistic reasoning, in which the general rule or principle forms the major premise and the facts of the case at issue the minor premise. By this method the conclusion is presumed to be reached by formal laws of thought, from which all individual prejudices and predispositions are removed. This process is sometimes spoken of as "government of laws and not of men," meaning that, given a particular set of laws, the decisions reached thereunder are impersonal and inevitable. Everything necessary to the determination of the law controlling a question in issue is supposedly already in existence before the question itself arises, and all that is required is to discover and apply these preexisting realities to the facts of the case at issue.

For example, let us assume that Smith, an American citizen, goes to Mexico on business and while there acquires a piece of real property in accordance with the local laws (which presumably allow to aliens the private ownership of land in perpetuity), and that he pays the current market value therefor. Later the Mexican Government expropriates the property and transfers it to a group of Mexican citizens without the payment of compensation to Smith. Let us further assume that there is a well-established rule of international law which prohibits the confiscation of vested property interests of aliens in time of peace, and that "confiscation" is defined as the taking of property without the payment of compensation in the amount of the just value of the property taken.

Under existing notions of how the legal process operates, the answer to the question whether the Mexican Government has or has not committed an unlawful act is capable of being determined by discovery and formal logic, without taking future contingencies into consideration. The question whether or not the act of the Mexican Government falls within the category "confiscation," and hence within the rule of law, is a mere matter of identification with previous similar acts. The practical reasons which impelled the Mexi-

can Government to expropriate the property, or the fact that social conditions might have changed since the rule of international law was first formulated are presumably irrelevant to the decision. So is the question whether a decision one way or the other would lead to more desirable practical results from the standpoint of the parties to the issue or of the community at large. The syllogism in this case would be the following:

Major premise: A government that confiscates the property of an alien commits an internationally unlawful act.

Minor premise: The Mexican Government confiscated the property of Smith, an alien.

Conclusion: The Mexican Government committed an internationally unlawful act.

Most legal decisions are presumed to follow this general pattern, and hence to exclude, in the ideal form, all individual value judgments in arriving at answers to legal problems. The admission of such judgments would, it is said, deprive international law of its certainty and uniformity, which are the primary ends of all law. It would also give to legal decisions an *ex post facto* character, since one could never know what the law would be on a particular set of facts until a judgment had actually been rendered thereon.

Now it may be protested that this traditional view that law is discovered and never made by deciding agencies is no longer accepted as an unquestioned axiom by modern writers. It is true that, in the field of municipal law, the doctrine has been under attack for a number of years, and that it has been repudiated by many authorities. However, in the realm of international jurisprudence, it still seems to be implicit in most of the thinking that is being done on the subject.

It is, for example, implicit in the customary attitude that international law is nothing more than the collection of rules, principles and standards of conduct which nations have agreed to observe in their mutual relations. It is implicit in the belief that legal decisions on controverted issues can be explained solely by reference to the existing body of rules

and principles (as they are explained in judicial opinions and in legal textbooks). It is also implicit in the belief that a knowledge of these rules and principles will enable one to predict with certainty how particular issues will be decided in the future.

One likewise finds it expressed or implied in the most recent works on international law. Thus Sir John Fisher Williams, in describing the nature of international law, states as follows:

> * * * by 'rules' we mean statements which are general in character and which are at any given time fixed. A system of law is conceived as having a definite existence antecedent (we need not pause to inquire whether the antecedence is in time or in thought) to the fact or facts to which the rule has to be applied. Law, that is to say, does not consist of rules which are manufactured to suit particular cases, though it is true that the function of the judge is very often to discover and reveal to the public, developments of existing rules perhaps not previously fully appreciated or understood.[4]

And the same author, in discussing the decision of the World Court in the Lotus case, states:

> The majority reached their conclusion by a piece of purely deductive *a priori* reasoning from what they stated as being a first principle.[5]

Hudson describes the administration of justice according to law as follows:

> Now what are the characteristics of that administration? In the first place, justice administered according to law must be predicable; it must be possible for lawyers to know in advance what it is going to be. The predicability of law is one of its chief characteristics. It is a characteristic that does not apply to the Council of the League of Nations. Lawyers cannot predict what kind of political solution may be reached in any circumstances, but lawyers ought to be able to predict how a court is going to handle any difficulty.[6]

Baty holds that the "common consciousness, mainly inarticulate" of the people of the world regarding the rules which ought to regulate interstate relations constitutes international law. He adds that

Statesmen are guided by it. Jurists endeavor to discover it. But neither statesmen nor jurists make it. Statesmen can make treaties; but treaties do not make law: they depend on the law. Only a great statesman or a great jurist can make International Law: and that only by the indirect process of changing the mind of the people of the globe.[7]

Again, Mr. Frank B. Kellogg, Judge of the Permanent Court of International Justice, in his observations on the " Free Zones " case, made the following statement regarding the function of the Court:

The judges should be learned in the law, should be selected without regard to their nationality and should, in their administration of justice, *be governed solely by the special or general rules or principles of law* applicable to the case in hand.[8]

In support of this position, Judge Kellogg quoted with approval the following statement of Mr. James Brown Scott:

To decide as a judge, and according to law, it is evident that a Court should sit as a judicial, not as a diplomatic or political, tribunal. . . . Questions of a political nature should . . . be excluded, for a Court is neither a deliberative nor a legislative assembly. It neither makes laws nor determines a policy. Its supreme function is to interpret and apply the law to a concrete case.

In other words, the conventional view assumes that, for any specific situation within the scope of the legal system, the law must be fixed before the situation occurs. From a temporal viewpoint, finding the law governing a particular case seems to be a process of looking backward to something in existence prior to the happening of the event which gave rise to the question. To allow the determination of the law for a given situation to be affected by anything subsequent thereto would be, it is said, to make law retroactive. No one would know his legal rights until after these rights had been put in question. This view finds an echo in the customary admonition that judges and government officials, in disposing of legal questions, should be governed by what the law " is " and not by what it " ought to be."

This assumption is also implicit in the distinction which is commonly drawn between legal and political questions.

According to the usual understanding, "legal" questions are those which are to be decided by reference to certain existing rules and principles, without regard to possible future consequences of such action. "Political" questions, on the other hand, embrace all those which, not being regarded as covered by existing legal precepts, are left open to the empirical judgment of the persons responsible for disposing of them. In deciding such questions, the parties are presumably free to consider the foreseen consequences of their decisions, and to select that answer which seems under the circumstances to promise the most desirable results.

In other words, from the standpoint of the procedure of finding an answer to any question, it might be said that the essential difference between legal and political questions lies precisely in the temporal direction in which one is free to look for an answer, taking as the starting point the happening of the event giving rise to the question. If it is a legal question, one is supposed to look backward and be governed by something in existence anterior to the raising of the question. If it is a political question, one is presumably free to consider possible events posterior to the raising of the question. One's gaze is forward, toward the foreseen consequences of deciding the question one way or another.[9]

It may be readily conceded that the above notion of law as a something predetermined for each case would represent a highly desirable ideal. It would contribute toward that certainty and predictability in future relations which it is a primary aim of all legal systems to attain. If nations are to be bound by a body of legal rules and principles, it is a reasonable demand that they should be able to know in advance just what it is that the law prescribes in particular situations. The only question that here concerns us is how far such an ideal is *logically attainable* in dealing with the different kinds of questions that are included within the scope of international law.

It is obvious that the whole case for the traditional conception of the operation of the legal process rests upon certain assumptions as to what formal logic can do in the

manipulation of conventional legal materials. We do not and cannot have a separate rule of law for every individual dispute or clash of interests that arises. We rely instead upon the indispensable logical processes of generalization and deduction—upon our ability to formulate abstractions and to apply these abstractions to concrete situations that arise in the future. Formal logic, in other words, is the main instrument relied upon by the legal scientist, and performs much the same function for him that mathematics does for the physical scientist.

It would be foolish to deny the efficacy of the deductive application of generalizations to particular situations in the realm of international affairs when most of our normal activities are made possible by this very thing. Without it we could not successfully organize our social and economic relations, or make future plans or commitments with any confidence whatever. The normal trade and intercourse between nations is carried out on the assumption that certain general ways of acting will be followed with regularity in the future. We assume, for example, that, under normal circumstances, our ships on the high seas or in foreign ports will not be attacked, our goods will not be seized, our citizens abroad will not be physically maltreated or deprived of their liberty to move about freely and engage in normal activities, our territorial jurisdiction will be respected, our treaty engagements will be observed. If these and a hundred other similar things could not be counted on with a certain amount of confidence, the present enormously complex network of international relations could not possibly have been developed.

However, while freely admitting all this, it still remains true that there are certain definite and inescapable limitations upon what formal logic can do with the *kind of material* which we customarily supply to it in the solution of problems of international law. Logic is an indispensable aid to thinking, but it is not a magical device which can automatically solve all our difficulties regardless of their nature. It is rather like a machine whose ability to turn out useful products depends entirely upon the sort of materials we put

into it in the first place. A physical scientist does not expect the mathematical machine to provide him with quantitative information about the physical world unless he puts quantitative material into his formulae in the beginning. He knows, furthermore, that if he starts with nothing but variable terms he will end up with variable results. The lawyer, on the other hand, has heretofore paid little attention to the conditions which are essential for the successful operation of his logical machine. He has taken logic more or less for granted, without realizing its capacities and limitations. By expecting too much from it, he has not infrequently deprived it of its essential utility.

The Requirements of Logic

In order to make the customary picture of the legal process valid, three things would seem to be necessary: (1) the facts of a case should admit of being determined objectively, quite apart from any potential solution of the legal issues involved; (2) the general rules and principles making up the body of law should be sufficiently precise in their terms to make useful deduction from them possible; and (3) every case that arises within their scope should fit into one precept and not at the same time into any other precept leading to a contrary conclusion.

First, as to the facts of a case. The notion that we can, by an objective process of observation and weighing of evidence, determine the " true " facts of a case quite apart from any relation to its possible outcome seems highly questionable, at least in those cases in which there is a dispute between the parties as to what the " facts " are. Every fact-situation is a complex pattern. We do not report, or even notice, *all* of the facts connected in some manner with a particular case. We do not, for example, report the color of a ship captain's eyes in recounting the facts of a ship collision. We select only the " pertinent " or " relevant " facts. But why are some facts considered as pertinent and others not? Obviously this can only be answered by having some idea of

what we are trying to do at the moment. What is relevant for one purpose will be quite irrelevant for another. This means that we must have some notion or hypothesis in mind as to the possible outcome of the case before we can know what facts are relevant. And where different people have different hypotheses in mind they are very apt to give different accounts of the "true" facts of the case. This is not due merely to defective powers of human observation, but to the nature of facts. These different accounts may be equally "true," but each for its own purpose.

Again, it appears that "facts" have for all of us a dual character. There is, first, the impression which our external experience makes upon our sense perception—what Whitehead calls the "presentational immediacy." It appears that this perception is and must forever remain "private" for each of us, i. e., it is incommunicable to the rest of the world. The moment we begin to differentiate this flow of experience for the purpose of communicating it to others, or of acting upon it, we are bound to interpret and select, and to make predictions and exercise value judgments.[10] We do not and cannot report a situation as it "really happened" (if that statement has any meaning at all). We sift it through our personalities, our past experiences and inherited categories, our forecast of future events.[11]

The second requirement mentioned above (that the general rules and principles making up the body of law should be sufficiently precise in their terms to make useful deduction from them possible) is fairly obvious. It scarcely needs to be demonstrated that one cannot get a precise answer by deduction from generalizations containing terms of vague or ambiguous meaning. If, for example, one should take as a premise that the jurisdiction of a state extends the distance of a cannon shot from the shore, one could not by any amount of purely logical manipulation determine whether a particular state had jurisdiction at a point that was within the range of some cannon but not of others. One's answer in such a case would necessarily turn upon other factors not stated in the premise or the logical deduction therefrom.[12]

The question whether a particular rule, principle or treaty provision applies to a situation in issue normally presents itself as a problem of definition or classification. That is to say, in placing a set of facts under a particular legal term or category, we are in effect deciding what rule or principle applies to the case, and hence determining the outcome of it. Where a particular fact-situation or event is recognized by everybody concerned as identical with previously classified events, no difficulty is ordinarily presented and no dispute occurs. But most fact-situations have novel features which differentiate them in some manner from events previously classified. It must be obvious that the act of classifying such facts in existing categories is not an automatic process of recognition of identity, but calls for an act of reflective judgment.

For example, in the hypothetical land case previously given, let us assume that the act of expropriation of Smith's property by the Mexican Government presents certain novel features not previously encountered in past cases of expropriation in international practice. In inspecting these past cases we find various different categories in which this set of facts might be placed, such as " confiscation," " not-confiscation," " public utility," " vested rights," " denial of justice," " domestic question," etc. The outcome of the case will depend very largely on which one of these categories we select as applicable, yet this selection cannot be made on the basis of mere identity with past situations alone, since, by hypothesis, the present situation is not completely identical with those previously classified under any one of them. Unless we make the choice blindly or intuitively, we are forced to consider the consequences of classifying the act in one category or another, and to choose that set of consequences which we think most desirable.

Thus we may decide to call the act " confiscation " because the foreseen results of so defining it in the particular case appear to correspond with the general purposes which the legal rule regarding confiscation was originally designed to serve. But such an act of classification involves a *pre-*

diction of future events, and not merely the recognition of an existing identity, although it is customary to dress it up in the latter form (i. e., what we say is "this act is confiscation, therefore it should be prohibited," when what we mean is "this act seems to lead to results that society has agreed should be prohibited, therefore we will classify it as confiscation"). In placing this new situation under the term "confiscation," we have in effect projected our minds into the future and made an affirmative choice between the foreseen consequences of rival courses of action. To the extent that this choice is made unconsciously or intuitively, there is no way of knowing what the facts of a particular case will turn out to have been until after the case has been decided.

The above applies, of course, not merely to rules of customary law but also to express treaty provisions. No matter how carefully drawn, such provisions inevitably contain terms of variable meaning. Obviously the person drafting a treaty provision dealing with a particular situation or clash of interests does not know, nor can he foresee, all of the different variations that this situation will take on in the future. When an unforseen variation occurs, it is impossible to say whether it "really" belongs within the meaning of the provision as intended by the drafters. They obviously had no intention in the matter one way or another, since for them the situation simply did not exist. It is equally difficult to say whether the situation belongs within the "real" or "common" meaning of the words used, apart from any intention of the drafters. The real or common meaning of the terms used is very likely to be even more variable and equivocal than the conception in the minds of the drafters, since they at least had a particular set of situations in mind, and a definite purpose which they desired to achieve, whereas the common meaning often represents a bewildering variety of possible variations and of different purposes. One can, of course, endeavor to see what the specific aim of the treaty provision is, and then classify the new situation within or without the terms of the provision according as the practical

results would seem to work toward or against this aim. Such action, however, would involve a forecasting of future events and the exercise of personal judgment, rather than the automatic application of an existing precept.

It appears that no rule or principle of international law ever is or can be absolutely clear and precise, i. e., without some borderland of doubtful meaning. This is due to the fact that rules of law are expressed in language of common use, and such language does not provide us with sharply cut symbols which can be precisely defined for all occasions.[13] Of course some rules are clearer and more precise than others, but they all without exception contain zones of hazy or ambiguous meaning from which it is impossible to derive the answer to a new question by simple deduction. The cases falling within these zones are the ones which cause controversies, yet the customary description of the legal process leaves us more or less in the dark as to how these cases are to be decided.

Consider, for example, the rule that a nation can only extend diplomatic protection to its own nationals—one of the clearest and simplest rules that can be found. Obviously enough, under ordinary circumstances the rule works without question for the vast majority of people. But it is well known that there are certain classes of people about whom it has not been easy to say whether or not they are " nationals " within the meaning of this rule. Note, for example, artificial persons or corporations with a large percentage of foreign stock-ownership. One cannot solve these cases merely by deductively applying the above rule as it stands. One must consider other factors, but what these factors are is not revealed in the conventional description of the process of finding the law.[14]

In the field of municipal law, we find many rules whose application depends primarily on counting relatively simple things or on quantitative measurement. Dickinson gives as examples the two or three signatures of witnesses required for the validity of a will, the three or five years required to bar an action under a statute of limitations, or the twenty

years necessary to establish a title based on adverse possession.[15] Such rules as these obviously serve to dispose more or less automatically of many possible controversies, and, under ordinary circumstances, cases falling within them would never even reach the courts. The answer is obvious to everyone.

In the field of the law of diplomatic protection, we find very few rules of this definite type which can be applied to specific situations without the exercise of reflective judgment. The makers of the Harvard draft code on the subject of international responsibility set out to put down in writing all of the definite rules and principles of law which they could find, or which they thought would have a chance of being accepted by the majority of governments. Out of the eighteen articles of that code, perhaps eight could be applied to the types of situations that arise in the normal course of events, without considering the consequences of such application or without exercising individual judgment.

For example, Article 2 definitely states that " the responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding." One would perhaps not need to consider the social consequences of his act or the conflicting interests involved in holding that, under this rule, the United States, for example, could not defend itself against a charge of international responsibility by merely citing one of its own laws or a decision of its own Supreme Court. Again, Article 3 provides that a state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, " regardless of the extent to which the national government, according to its constitution, has control of the subdivision." The test adopted in this instance is whether or not the delinquent political unit conducts its own foreign relations. That is in most cases a simple fact which can be readily determined by observation. Under this article it is plain that the United States, for example, could not avoid international responsi-

bility for an injury attributable to one of its component states merely by citing the peculiar constitutional relationship that exists between them (although it has on occasion attempted to do so in the past). Conversely, one could not hold Great Britain internationally responsible for the delinquencies of Canada or the other dominions that have established their own independent foreign relations. Article 8 (b) is of similar import and holds that " a state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice." If everyone concerned were in agreement as to the facts of a particular case falling within this rule, the application of the rule could probably take place in many cases without considering other factors. The same thing is true with regard to Articles 13 (a), 15 (b), 16 and 17.[18]

However, a *caveat* is necessary. All that has been said above is that it is possible in many instances to apply these rules more or less automatically, without exercising individual choice between competing sets of consequences; which means that in such cases almost everyone of normal mind will be in agreement as to the application of the rule. This does not mean, however, that there will not be borderline cases, even for these comparatively clear-cut rules. One can, without much difficulty, think up such borderline cases for each one of them, in which a sharp disagreement would exist on the applicability of the rule. In such cases other considerations are bound to enter into any final decision on the question.

Furthermore, conditions in international life are constantly changing, and it is quite possible that a rule which formerly gave good results no longer does so. Where it becomes apparent that this is so, the chances are good that the rule will no longer be followed, however clear and simple it may seem. There is, of course, a definite social advantage in having settled rules which are followed without question, even though the results obtained, owing to changed conditions, are no longer as desirable as when the rule was first established. If, however, this advantage is clearly outweighed by the

undesirability of the results (when generalized for all cases of the same type), then the rule will probably no longer be followed. This is merely to say that, even in the case of simple and definite rules that can be more or less automatically applied, one is not released in every case from considering the consequences of applying them.

All of the other rules in the Harvard draft code contain terms of variable or ambiguous meaning whose application to particular situations would inevitably involve some exercise of individual judgment. Thus Article 4 speaks of the duty of a state to maintain a governmental organization " adequate, under normal conditions " for the performance of its obligations under international law and treaties. Other articles use such variable terms as " ordinarily," " within the scope of the office or function," " due diligence," " adequate redress," etc. The effort to give the important but vague term " denial of justice " some concrete meaning results in the following collection of variable terms:

> Denial of justice exists when there is a *denial, unwarranted delay* or *obstruction* of access to courts, *gross deficiency* in the administration of judicial or remedial process, *failure* to provide those guarantees which are *generally considered indispensable* to the *proper administration* of justice, or a *manifestly unjust* judgment.[17]

It is obvious that none of the terms italicized could be automatically applied to the types of questions that normally arise without the exercise of some measure of personal judgment by those responsible for the decision. These terms express standards or norms of human conduct, and can only be given definite meaning in a particular case by assigning a value to them. But the traditional view of the legal process gives no indication as to how this is to be done. The matter is left almost entirely to the intuitive action of the person making the decision. This too often means that it is left to be settled by personal prejudice, by deduction from outworn postulates, by reference to local ideas with which the person making the decision happens to be familiar, by doctrinaire methods or hidden ethical concepts. This is bad enough in the field of municipal law where one ordinarily finds a certain

amount of general agreement throughout the community on standards of conduct. It is much worse in the international field where there is such a wide diversity of standards and of ideas of justice. The result is an excessive amount of uncertainty and unpredictability in the application of standards or norms of conduct to new situations, and a general reluctance of nations to resort whole-heartedly to such a vague and unreliable method of protecting their interests.

In this application of standards of conduct to specific situations, the traditional view assumes that one can, by examining a long line of past similar fact-situations, find an element of identity that is common to all of them and that will give definite content to the standard in a new situation in which this element is present. If the common element were one that had physical properties (such, for example, as the physical act of allowing a foreigner access to the local courts in the same manner as natives) then it would be possible, perhaps, wherever such a common physical element were found, to devise an objective test for applying the standard in question. Examination will reveal, however, that in the great majority of cases (and possibly in all), no such common physical element can be identified.

Professor Dickinson, who has gone into the matter with some care in the field of municipal law, finds that most of the relatively broad terms which form components of legal rules rest on the type of identity which consists of " an identical reaction of approval or disapproval." He further finds this to be true, not merely for such terms as " negligence," " cruelty," etc., but even for such terms with an apparently physical content as " consideration " in the law of contracts.[18] Now it may be conceded that, in constantly recurring situations, one may be able to discover and be guided by an established public " reaction of approval or disapproval," regardless of one's individual views on the matter. But in situations containing some element of novelty, no such established value judgment exists, and here deciding agencies must have recourse to their individual judgment in reaching their decisions.

We come now to the third requirement mentioned above

as a condition for the successful operation of the classical conception of the legal process, i. e., that every case arising within the existing body of law should fit into one precept and not be contained in any other precept leading to a contrary conclusion. Up to the present time we have been assuming that the question normally raised in a legal case is whether or not a particular rule, principle, standard, or treaty provision can be said to apply to the issue. As a matter of fact, in the great majority of contentious cases, this is not the form in which the question is raised. The question is rather *which one of two or more competing rules or principles of law can properly be said to apply to the case.* It appears in fact that the rules and principles of international law are not mutually exclusive propositions, but that every novel case may be contained (so far as the meaning of words is concerned) within two or more different principles, each one leading to a different answer.[19] In every legal controversy, *both* sides are able to produce legal rules or principles which appear to contain the point at issue and which lead to the result they desire to see come about. The question is, which one of these rival precepts is to be selected as the major premise? On this crucial question, the traditional description of the legal process as a deductive science gives us little help.

As an illustration of this difficulty, let us take the land case previously given and make it a little more complicated. Let us assume that the Mexican Government is faced with a situation in which the arable land of the nation has been concentrated in the hands of a comparatively few large landowners, many of whom are foreigners. Let us further assume that the mass of the native population is compelled to exist in a state of extreme poverty and backwardness because of the lack of available land for agriculture, and that, as a result of this condition, a serious threat of revolt faces the government in power. In order to relieve the situation, the government adopts an immediate program of land distribution, under which the major portion of the large estates is distributed among the natives. The government is financially unable to assume responsibility for the payment of the mar-

ket value of the land, but makes a gesture toward compensation by offering the owners non-negotiable bonds in an amount equal to a small fraction of that value.

It becomes obvious that the case as now given can be said to be contained in a variety of general principles that are found to be lying about, and that lead to different conclusions when logically applied. So far as the ordinary meaning of words is concerned, it can still be said to come under the assumed rule against the confiscation of property already given, and hence by logical deduction to be an *unlawful* act. It may also come under the principle that a state is sovereign within its own borders, and property rights are determined by the local laws; from which it would follow that the act of expropriation is *lawful.* Again, in the absence of a local remedy against the government, the situation might be classified as a "denial of justice," and hence be *unlawful.* Furthermore, the case might be placed under the principle that private rights must yield in the face of a pressing public emergency, or that foreigners voluntarily entering a country accept the conditions they find there and cannot complain if they are treated in the same manner as natives; from either of which it would follow that the act of the Mexican Government was *lawful.* On the question which one of these rival general principles "really" contains the question at issue, formal logic is, by itself, powerless to give an answer. It will reveal the implications of these and other propositions we might tentatively consider in connection with the case, but it will not, wholly by itself, tell us which one to choose. In other words, the factors which determine the selection of the general rule or principle to be applied, and hence determine how the case shall be decided, are not fully revealed in the conventional description of the legal process.

Consider for a moment the method by which we arrive at the rules and principles we apply to litigated cases. Under the prevailing positivistic doctrine, these rules (aside from conventional law) are supposed to be derived from past practice by simple induction; that is to say, when faced with a legal issue we look back to all the previous similar cases

we can find and draw from them by induction a rule or principle which we then apply deductively to the case at issue. In this process we are presumably guided, not by what we would like to see come about in the case at issue or similar cases, but by what has actually been the practice in previous cases.

Now it may be conceded that, in respect to cases "on all fours" with a line of previously decided cases (i. e., those in which everybody concerned agrees as to the identity with past cases), the above method is capable of providing us with a major premise that yields but one answer to the case in hand. However, as previously observed, these cases do not ordinarily cause any difficulty. The great majority of litigated cases contain some novel feature which raises doubts about their exact identity with a single line of past cases. In such cases, pure induction by itself will not provide us with an answer. As Professor Oliphant has pointed out:

> If the principle thus 'induced' is no broader than the sum of the previous cases which it summarizes, it obviously does not and cannot include the case to be decided, which, by hypothesis, is a new and undecided case, and, hence, can form no part of the generalization made from previous cases only. If it does not include the case to be decided, it is powerless to produce and determine a decision of it. If is it taken to include the case to be decided, it assumes the very thing that is supposed to be up for decision.[20]

We can, by a process that looks like induction, usually derive from past cases some general rule or principle that is broad enough in its terms to include the question at issue, but we can also, by selecting a different set of past cases, derive one or more rival principles leading to contrary results. The inductive method does not by itself tell us which one of these competing principles should be selected. This choice must be made by reference to some other factors not revealed in the positivist's description of the legal process.

Most positivists admit that cases do arise which are not identical with any previously decided cases. The method which they commonly resort to in deciding these cases is that of "analogy." Analogous cases are those which are

similar in some respects to the case at issue but different in other respects. However, from a logical viewpoint, this method of analogy is no more successful in providing an impersonal method of solving new cases than is the inductive method. It does not tell us *why* the similarities in the selected analogous cases should be regarded as significant rather than the dissimilarities. On this question we need some basis of judgment other than that of mere resemblance of particular elements. As in the case of the inductive method, for every principle drawn from one set of "analogous" cases it is always possible to select another set of cases leading to a contrary principle. In the solution of new cases, this method of analogy is of great assistance in bringing to bear the results of past experience on the question at issue, but it cannot wholly by itself provide us with the proper solution. Other factors must enter into the choice between competing analogies and hence into the determination of the "law" on the question.

When other means fail to provide a single definite answer to a novel question, officials and judges often base their decisions on "reason." One looks in vain, however, for any clear description of the intellectual process intended to be indicated by this word "reason." Presumably everyone is supposed to know what is meant by it without further elucidation. The word itself carries a certain air of sanctity which shuts off critical examination. If a thing is in accord with "reason," no one in his right mind would think of questioning it.

Actually, if one examines closely the cases in which "reason" is advanced as an acknowledged factor in reaching the decision, one does not find any common element running through them which can be identified as a distinct intellectual process. Presumably, under the accepted notion of law as something antedating every decision made under it, reason is a process which works backward from the time the events in question took place, and produces an answer out of the past. But just how this is done remains in most

cases a mystery, which is not to be solved by taking refuge behind the sacred symbol " reason."

Now among the many possible uses of the term reason in this connection, we need mention only three: (1) as synonymous with formal logic; (2) as expressing a value judgment deemed to meet with the approval of intelligent men; and (3) as a combination of the two. But only the first of these, formal logic, could be concerned exclusively with the discovery of a preexisting fact or proposition of law. The other two obviously involve a glance into the future and a choice between competing values.

As has already been pointed out, formal logic is an immensely valuable tool in organizing and directing our thinking about intellectual problems. Without it we would lose all coherence and consistency in our mental processes. But it has also been indicated that formal logic by itself is not capable of providing us, from general rules drawn from old problems with single concrete answers to new problems. Rather it provides us with an indeterminate number of possible answers, among which we must choose either intuitively or by the exercise of some form of personal value judgment. But this involves consideration of ends and ways of attaining them, and not the mere discovery of preexisting facts or propositions.

Hence the introduction of this acknowledged factor of " reason " in the process of finding answers to legal problems seems inevitably to involve a departure from the traditional notion that law is a preexisting thing and that deciding agencies do not legislate on the basis of their individual value judgments. One finds in fact that the terms " reason " and " reasonable " are commonly used to describe propositions that are believed to lead to results which have the approval of intelligent men. This is, of course, not objectionable since it cannot be avoided. The difficulty is that most people assume that, merely by using the term " reason," they are released from the necessity of consciously examining the bases of their value judgments or the ethical postulates on which these judgments rest.

A value judgment means a choice between possible competing courses of action. Such a choice may be made intuitively, i. e., without reflective weighing of alternatives, or it may be the result of conscious intellectual processes. But to think about competing alternatives means to consider the foreseeable results of applying one or the other, to compare these probable results and to select the one that seems to lead to the most desirable outcome. This means inevitably a forward look into the future (as compared with the time of the happening of the event which gave rise to the issue) and a selection on the basis of things that have not yet happened. The parties' " rights," in other words, would be determined by something not yet known at the time the clash of interests occurred, i. e., by the personal judgment of the deciding agency as to the relative desirability of two or more possible series of events in the future.

This idea is strongly disapproved of by existing legal theory on the ground that it would make the law an uncertain thing; that if this were permitted it could not be said that the law was in existence at the time the dispute arose. In other words, the person making the decision would be " legislating," instead of finding and applying the law as it existed. Furthermore, this would be " retroactive " legislation since it would be made after the dispute had arisen. For these reasons the traditional notion of the legal method condemns the use of conscious intellectual processes in the selection between competing courses of action.

The answer to this heretofore persuasive argument must by now be obvious. It is that, by barring these conscious intellectual processes, we do not and cannot prevent the choice between possible future alternatives from being made; we merely require that it be made unconsciously or intuitively, and hence often unintelligently. Does this lead to any greater certainty and predictability? Most decidedly it does not, as the present uncertainty and unpredictability of the outcome of contested cases amply testify. Our only certainty seems to lie in knowing the type of arguments that will

be used in support of these decisions, not in knowing what the decisions themselves will be.

By leaving the matter to blind, instinctive reactions of approval or disapproval, we are acting upon the absurd assumption that most people will have the same blind reaction to the same novel fact-situation, an assumption that is particularly absurd in the international field. Furthermore, we do not prevent the deciding agency from legislating or making law for the particular case (for no one can be sure, until after the case has been decided, what the "law" will turn out to be for that particular case); we merely require that this legislating be done surreptitiously or unconsciously, and without intelligent perception of the consequences.

Suppose, for example, the question is whether a particular fact-situation falls within or without the term "due diligence" in the rule requiring the state to exercise due diligence to prevent crimes against aliens. The particular fact-situation is admittedly not like any other previously decided. If the matter is left to the instinctive or intuitive reaction of approval or disapproval of a judicial officer (or to his guess as to the reaction of the community at large), the answer will depend upon many unknown and unforeseeable factors; e. g., the official's past experience and background, what he is accustomed to in the matter of prevention of crimes, the particular class of society to which he happens to belong, his national and personal prejudices and fixed ideas, perhaps even the state of his digestion. All of these factors are unaccountable elements, and make the notion of certainty and predictability of decisions on the basis of rules and principles of law alone an absurd illusion.

The fact that we get as much consistency and predictability as we do in contested cases is doubtless attributable to the circumstance that deciding agencies do exercise some intelligent processes in making their choices, although tradition prevents them from revealing the fact, often even to themselves. The persons we select to decide our legal questions normally come from the more intelligent sections of

the population, and they are apt to reflect in their personal judgments the views of the respectable elements in the community. Lawyers, by reason of long experience with courts and government officials, become familiar with their ways of thinking, and can often predict the outcome of contested cases, even though the decision is not directly determined by existing rules and principles of law. But since tradition dictates that only the factor of legal rules and principles shall be discussed in connection with decisions, the illusion is created that this factor alone is responsible for such certainty and consistency as exist in the disposition of legal questions.

A judge's opinion is not a literal account of the mental process by which he arrives at his decision; often he is not consciously aware of that process himself. It is rather his explanation of how the decision may be fitted into the existing body of legal doctrine. A knowledge of existing legal doctrine will usually enable us to predict how he will do this, i. e., what language he will use, and what type of argument he will rely upon, but it will not necessarily enable us to predict the decision itself. Often, as far as logic is concerned, the judge could make out an equally good case for the opposite conclusion. Only a knowledge of all of the factors, legal and non-legal, which might influence the judge to select one outcome rather than another would enable us to predict the decision itself with any degree of certainty.

Nevertheless, it would be absurd to say that, because other factors enter into decisions, legal rules and principles play no part therein, other than to serve as convenient rationalizations. If that were so, how could we explain the innumerable instances in which government officials have decided cases against the immediate material interests of their own country, citing (with obvious reluctance) some legal rule as a reason for their action? Actually law officers and judges do try to decide cases before them in accordance with existing rules and principles of law. Being lawyers, they can hardly prevent themselves from thinking in terms of legal doctrine. Where the legal method provides them (or seems

to provide them) with a reasonably clear-cut answer to an issue before them, they can usually be counted upon to adopt that answer, even though it is against their inclination to do so. Law officers, like most other people, try to do what is expected of them. If that were not the case, the small countries would be far less successful in their legal controversies with larger powers than they now are.

But where, as is so often the case, the legal method provides two or more possible answers to an issue, each of which can be supported by an acceptable legal argument, it is undoubtedly true that law officers will tend to select that answer which is most in accord with the interests of their own country. In such cases it is also true that the legal reasons advanced in support of the decision do not explain why one answer was chosen rather than another. That choice, which is the crucial matter in determining the outcome of the case, was necessarily made on some other basis. The point is, however, that a law officer will not ordinarily select an answer that cannot be supported by some existing rule or principle of law, however desirable the answer may seem on other grounds.

In saying that judges and law officers are often influenced by other factors than legal rules and principles in reaching their decisions, it is not meant to infer that there is anything deceptive or hypocritical in such conduct. People who believe so are assuming that the legal system provides one and only one answer to every question falling within its scope, which is not the case. Where the system provides two or more solutions, each equally good so far as logic is concerned, the official charged with making the decision has no choice but to consider the consequences of selecting one answer rather than another, and to choose the one that seems to him most advantageous. The trouble is, not that he does this at all, but that, under traditional notions of the nature of the legal process, he is led to do it blindly, without adequate information and without due consideration of social needs and the interests of the community as a whole.

Summary

In summary, then, it may be said that the classical conception of the operation of the legal process in the settlement of international conflicts of interest is at fault primarily in its assumption of what formal logic can do with the type of material supplied to it. That it is possible, under certain conditions, to derive single concrete answers to specific problems or clashes of interest from general rules and principles of law by the impersonal processes of logic is undoubtedly true. That this is possible under all conditions and for all types of disputes is just as certainly not true.

The conditions under which the classical conception may be said to work satisfactorily are briefly as follows: (a) where the case in hand is recognized by everyone concerned to be " on all fours " with a line of previously decided cases; (b) where the rule or principle concerned is composed of simple, unambiguous terms, about the meaning of which there is no real dispute between the parties (for example, rules whose applicability can be determined by impersonal mental processes such as the measuring or counting of physical objects, etc.); and (c) where the case is contained within one rule or principle and not at the same time within another precept leading to a different answer. Under these conditions, the traditional notion of the legal process as the impersonal logical application of preexisting rules to specific situations may be accepted as adequate for all practical purposes. However, cases falling within this category usually do not give rise to controversies, since the answer is obvious to all concerned or else can be very quickly determined.

In the great majority of contested cases the above conditions are not found, and it is these cases which cause most of our difficulties. In general, these cases contain some novel feature or combination of circumstances which prevents them from being automatically classified under familiar headings or identified with previously decided cases. Under such conditions, the legal process normally yields, not one, but two or more applicable legal precepts, each leading to a

different conclusion. It is impossible to choose between these competing solutions on the basis of formal logic alone. Other factors *must* enter into the choice, consciously or unconsciously.

Conventional theory has stoutly resisted the recognition of other factors in the reaching of legal decisions, on the ground that this would deprive the legal process of its certainty and predictability. Yet the centering of attention on the single factor of the logical application of rules and principles of law does not exclude these other factors in the reaching of decisions. It merely means that they must, for the most part, operate surreptitiously. By requiring that the choice between rival premises be made intuitively or blindly, we do not achieve certainty and predictability in fact, but only an illusion of them.

By frankly recognizing the fact that other factors must enter into the solution of novel cases, it then becomes possible to deal with them openly and intelligently, and to devise means of regularizing their influence in a manner that is in harmony with the general aims of the legal institution. But before considering this subject, let us look briefly at the unacknowledged factors that now enter into the determination of legal issues under the conventional theory.

CHAPTER VI

UNACKNOWLEDGED FACTORS THAT INFLUENCE LEGAL DECISIONS

Factors Associated with Public Office

In the last chapter we discussed the acknowledged factors that enter into and presumably determine legal decisions. As has been indicated, these factors by themselves do not and cannot give a complete account of the reasons which lead to the selection of one answer rather than another in doubtful or contested cases. They leave the door wide open to a host of other influences which operate upon foreign office officials and other deciding agencies to turn the scales in favor of one side or the other. It is probable, furthermore, that, in many cases, these extra-legal factors play a far more important rôle in determining the actual course of decisions than do the acknowledged factors. Hence, whether one's purpose is to find means of making the legal process more certain and predictable in its results, or merely to understand the operation of that process in current affairs, one cannot ignore these other factors.

An inquiry into the things that affect the outcome of legal issues is, of course, an inquiry into the springs of human behavior. Furthermore, it deals with human behavior in highly complex situations. One is met at the threshold with the realization that our knowledge of human conduct in social situations has not yet advanced to the point where it is possible to give a full and accurate account of the influences that result in a particular form of action in a complex situation. At best one can merely pick out some of the more obvious elements that seem to have had some effect upon decisional behavior in particular cases in the past, without implying that these elements are present in every contested case, or that they always have the same effect.

Furthermore, we are here concerned with factors which are not acknowledged among the reasons given for legal decisions, and which for the most part operate subconsciously. Hence it is seldom possible to obtain direct evidence of their influence. One can merely draw inferences from the surrounding circumstances. Some of these factors are associated with or flow from the circumstances of holding public office; others represent attitudes that are common to official and layman alike. A number of the latter have already been suggested in Chapter III above.

NECESSITY OF DECIDING

A factor that exerts a much larger influence on the course of decisions than is commonly supposed is the necessity of taking some definite stand. Officials charged with the disposition of legal questions have to make some decision on the questions put up to them, no matter how difficult. Unlike writers of textbooks, they cannot content themselves with saying that the law on the point in issue is unsettled or is not clear. They cannot discharge their function by setting forth the various conflicting views expressed by other writers on the subject and letting it go at that. They have to choose between the alternatives offered them, even though they may, and often do, see little or no ground on which to make such a choice. Once the decision is finally made, then of course the "law" becomes clear and definite for the point in issue, although before that moment no one could have foretold, not even the deciding official himself, what the law would turn out to have been.

In other words, this necessity for making a decision often transmutes the vague and doubtful into the certain and obvious. For after the official has selected his answer, then he is naturally at great pains to justify it as a good answer; i. e., to show that it was the "law" after all, although before the decision was made some contrary answer had an equally good chance of being selected. In close cases, deciding officials very often are not wholly con-

scious of just what it is that finally inclines them toward one side rather than the other, but once they have made the choice they are able to give good reasons for it, just as they could have done for the contrary view had they chosen that instead. If deciding agencies only had to pass upon those cases in which they were certain of the law, they would have very little to do, since the parties to those cases would doubtless also know in advance the way the case would be decided and would not make an issue of it. Hence we find that this mere necessity to reach some decision in a doubtful issue is responsible for the "discovery" of much law which had no prior existence except as one of several possible conflicting attitudes that a deciding agency might take if the question were put up to it.

Again, this necessity of reaching some decision explains in large measure the hold that precedent has on legal administration. In a doubtful situation it is almost always easier to follow, as nearly as one can, what someone has done before than to think out a new decision or to assume the responsibility of embarking upon a new course of action. When government officials are in doubt as to what to do in a novel situation, they invariably turn to past practice, and, if they can find any prior situation with similar elements, they are apt to follow the course of action there adopted, without bothering much whether the points of similarity are significant for their immediate purpose or not. Past practice, in other words, is often followed, not because it is evidence of the acceptance of a rule of law by the family of nations, but simply because of intellectual inertia, or because of reluctance to undertake the responsibility of adopting a new and untried course of action.

THE ADMINISTRATIVE FACTOR

This brings us to the consideration of a closely allied factor, which Leon Green has named the "administrative factor" in the workings of our municipal court system. Every court, according to Dean Green, invariably develops

its own " scheme of things " for dealing with the important types of problems that come before it, and it also develops a reluctance toward altering this scheme, even when parts of it become antiquated.

> If [says Green] a court is asked to extend its protection to a new interest or against an unusual hazard which threatens a well established interest, it will not do so if its attempt would appear to be unduly burdensome, expensive or vain. A court will not knowingly enter upon a course of dealing which it cannot finish, or that may bring down upon it an increase in business or a mass of problems which it is not prepared to handle. On the other hand, even though a rule or practice has become antiquated and no longer meets the requirements of business, ethics, or justice, if it works easily and judges understand its operation, they will hesitate to discard it for some improved practice not yet accepted generally, even though the latter promises much greater utility.[1]

This factor is, of course, much more influential in highly developed judicial systems administering municipal law than in the international field where most courts are temporary *ad hoc* tribunals and most legal decisions are made by the clash of opinions of the two governments involved, without reference to an impartial agency. Nevertheless, it is undoubtedly true that foreign offices and general claims commissions, to say nothing of the Permanent Court of International Justice, develop their own particular scheme of habitual reactions to recurrent problems, and are reluctant to consider new and improved methods of dealing with these problems if such methods threaten to upset existing habits of thinking.

THE FACTOR OF PROFESSIONAL STANDING

Then there is the factor of professional standing. Deciding officials unconsciously desire to win the approval and respect of their professional brethren for the decisions they make, and this desire undoubtedly influences them to select answers which they think will be acceptable to the most respectable elements in the profession. As Felix Cohen has pointed out: " the question to which the judge's critical faculties are regularly restricted is: ' What decision would an

intelligent lawyer familiar with statutes and past decisions expect in this situation?' or, more politely, 'What *is* the law?'"[2] Furthermore, a deciding official will seek to make the reasons he gives for his decision as convincing as possible to his professional brethren, and hence will not often include therein the doubts and hesitations which may at first have assailed him.

Again, since the audience uppermost in the mind of a judge or other deciding official is the body of the profession rather than the community at large, his decisions will be more apt to reflect the conventional habits of thinking and ethical judgments of his fellow practitioners than the opinions of the man on the street. In other words, there is a strong pull on officials and judges in deciding legal issues to follow the accepted views of a restricted and notably conservative class of the community.

THE INSTITUTIONAL FACTOR

Closely allied to this factor of professional approval is what might be called the institutional factor. Officials connected with any institution (whether formally organized or not) tend to act in a manner to keep that institution alive and to enlarge rather than diminish its importance in the life of the community. If one's livelihood or social status has come to depend upon the continuance of a particular institution or practice, one's mind is not apt to be very receptive to any proposals which, if put into force, would diminish the scope and importance of that institution or practice. The institution of diplomatic protection has come to be an activity of some importance in the daily routine of many foreign offices, and has created professional work for a number of people. As between two possible interpretations of legal doctrine, one of which would restrict the practice of protection and the other would maintain or enlarge it, one might well imagine that, other things being equal, the latter would have a stronger subconscious appeal to those professionally engaged in the practice than the former. Just as disarmament proposals do not find their strongest advo-

cates among military and naval officers, so doctrines or ideas looking toward the restriction or abolition of the institution of diplomatic protection do not seem to find enthusiastic support among foreign office officials and others whose livelihood or position has come to depend in some manner upon the continuance of this institution.

THE PROPHYLACTIC FACTOR

Another common influence on decisional behavior is what Dean Green has called the "prophylactic factor." Judges, according to Green, are "inveterate prophets and legislators."

> They scale their penalties, they impose damages, both punitive and compensatory, not merely for the individual offender's lesson, but as a preventive of future harms. They spend much time fashioning prophylactic rules both of substantive and procedural design in their efforts to purify the social stream through the judicial process.[3]

The same thing is true in the international realm. In spite of the supposed *a priori* nature of legal rules and principles, it is often clear that the primary consideration in the mind of a deciding official is the possible effect of his decision, one way or another, on the course of future events. As a matter of fact, if what was said in the last chapter is correct, he can hardly avoid such considerations in doubtful or contested cases, although under the traditional view of the legal process he is not supposed to take them into account.

For example, in the case of a country suffering from prolonged political disorder, it is observable that decisions of other governments on complaints of injuries to their nationals are influenced primarily, not by the circumstances of the individual cases, but by the general condition, and by the desire to use the legal process to improve that condition so far as possible. Where complaints are received in great number (indicating a general condition of lack of order and protection), the tendency is to view such complaints much more seriously than if they arose as isolated and fortuitous events, and to decide with much greater readiness that inter-

national responsibility exists. The decisive factor here is often the desire to correct a general condition, rather than to obtain redress for particular injuries or to dispose of individual cases in accordance with the approved legal technique. Members of international tribunals likewise seem to base their decisions in many cases less on what they find to be the preexisting law of the subject than on their desire to correct some existing condition or practice that meets with their disapproval.[4]

THE REVENGE FACTOR

Closely allied with this prophylactic factor is one which we might call the "revenge factor." Legal behavior in certain fields still seems to be motivated by a survival of the primitive notion of pure revenge upon a wrongdoer, quite apart from the question of whether the exacting of retribution serves to improve social conditions in any way. The fixing of penalties is still very largely the unthinking application of the Mosaic law of an eye for an eye and a tooth for a tooth, without any consideration of whether such action is in fact beneficial or detrimental to the community as a whole. Even where the notion of prevention of future crimes may be present in the fixing of a penalty, little or no effort is made to find out how and to what extent penalties do in fact operate to discourage crimes. As will be noted later, the failure to subject to conscious intellectual processes the reasons for inflicting penalties has led to extraordinary confusion on the subject of measure of damages in the field of diplomatic protection.

General Human Factors

In addition to the above factors that are associated with or flow from the circumstance of holding public office, decisions in doubtful or novel cases are subject to the influence of innumerable other motives and attitudes that are common to official and layman alike. To disentangle and measure the effect of these other factors in particular cases is usually an impossible task, at least in the present stage of our knowledge of human behavior. One can merely note some of the more obvious of them.

CARRY-OVER OF LOCAL IDEAS

First is the tendency to carry over into the realm of international law the laws, customs, ethical ideas, and habits of thinking of the deciding official's own community. One does not, by endowing an individual American or Frenchman or Englishman with an office, necessarily make him any less provincially-minded than he was as a private citizen. He carries with him the whole collection of habitual ways of acting, of fixed ideas and value judgments of his own community, which he is prone to expand into ideas of universal validity. Education and experience may and often do lead to some modification of these ideas, but the most flexibly minded apparently do not escape a residue of such notions. For example, an official who has been brought up in a highly industralized community, where special values are placed on the security of property and the sanctity of contracts, is fairly certain to react in a different manner on property cases from one who has spent his life in a frontier community or in a country where community ownership of property is common. In like manner, the particular social stratum in which an official has been brought up is likely to have an important effect upon his reactions of approval or disapproval to particular situations involving social values.

NATIONALITY

The nationality of a deciding official is unquestionably a factor in determining his decisions, but it is perhaps of less importance than most laymen suppose. Here we have to make some distinction between officials acting as representatives of their respective governments when making legal decisions and those acting as neutral judges. Although both types of officials are presumably engaged in the same operation of " finding the law," the former's intellectual processes are complicated by the fact that, in addition to his judicial duties, he is charged with protecting the interest of his own country, i. e., he is often in the position of an advocate as well as a judge. Obviously a neutral judge is in a better

position to see both sides of a dispute than is a judge who is at the same time a trustee of the interests of one of the parties. As already indicated, this is not because of partisan blindness or bad faith, but because the "law" is frequently on both sides of the case.

Naturally enough an advocate is most impressed with that reading of the law which is favorable to the interests of his client. He normally becomes quite convinced that this is "the" law governing the case, just as counsel for the other side is equally convinced that the opposite view is "the" law. So far as concerns the logical application of existing rules and principles to the case in hand, they are often both right. Hence it is perfectly natural to expect that, where an issue is dealt with by negotiation between the parties rather than by impartial adjudication, the law officers of each side will tend to accept and insist upon that view of the law which favors their own country's interests. As already suggested, there is nothing improper in such conduct, especially since "the" law in such cases is still to be made.

International tribunals are customarily composed not only of neutral judges but also of members who are nationals of the contending parties. These national members are usually not looked upon as representatives of their own country's interests but as impartial judges whose decisions are guided only by the law. Nevertheless, it might be expected that their nationality would generally lead them to decide cases in favor of the contentions of their own government, and undoubtedly the factor of nationality does so operate in a number of cases. However, it is a very common occurrence for a national member of an international tribunal to decide cases against the contentions of his own government. For example, the great majority of decisions by mixed claims commissions are rendered unanimously, which means that one or the other of the national judges has ruled against his own country.

Still, it is true that national judges tend to decide contested cases more often in favor of the contentions of their own country than judges of other nationality acting in the same

cases. One finds, for example, that, in mixed tribunals, dissenting opinions are invariably written by the national judge of the country *against* which the majority have decided. One looks in vain for a dissenting vote by a judge against a decision of the majority *in favor of* his own country. In other words, national judges are often willing to join the other members of the tribunal in deciding against the contentions of their own country, but never go so far as to stand out against the majority when it favors their own country.

It may be said in general that, while the nationality of judges does influence decisional behavior to a certain extent, it does not do so with sufficient regularity to make it a reliable factor in forecasting the decisions of particular judges. There is, of course, a feeling that national judges should decide impartially in the same manner as neutral judges, and this feeling may operate subconsciously to prevent them from deciding always in favor of their own government, if only to show that they are impartial. Nationality is most apt to operate as a factor when the issue before the court involves an idea deeply imbedded in the national culture of the country of one of the judges. If a judge has been trained throughout his life to hold a certain value judgment or to react in a certain way to a recurrent fact-situation, he will doubtless continue to do so when acting as an impartial judge, especially since, under the traditional conception of the judicial process, his decisions are often left to his intuition.

POLITICAL AND ECONOMIC FACTORS

We have already discussed in Chapter III the effect of political and economic interests upon attitudes toward questions of diplomatic protection. It goes without saying that these considerations will enter in as factors influencing decisions on legal questions so long as such decisions are left to the intuitive or instinctive responses of officials.

The importance of these factors varies at different times and places. When the major interests in the international field are centered about the political relations of states,

political considerations will loom large in the unconscious or unacknowledged factors affecting decisions on legal issues. That was true everywhere in the nineteenth century, and it is still true today among those countries whose political status is not entirely secure. For example, when a Latin-American jurist invariably decides that " denial of justice " means only a refusal to foreigners of access to the local courts, he is unconsciously concerned with the political status of his country in comparison with that of the great powers. An official of a power whose political status is assured does not have to think about this question, and is very apt to interpret denial of justice in a more liberal manner.

In recent years, economic interests have come to play an increasingly large part in international relations, and we accordingly observe that they enter more frequently as factors influencing legal decisions. Consider, for example, the recent oil dispute between the United States and Mexico. There existed in that case excellent legal grounds for deciding the issue either way; in other words, it was a novel case which could be placed under several different legal precepts, each one leading to a different answer. In the beginning of the dispute, the production of Mexican oil for export was generally regarded as of vital economic importance for the United States, especially as it was believed that her own supply would be exhausted in a few years. The law officers of the American Government found that the Mexican oil legislation was confiscatory, and hence was in violation of international law. On the other hand, the Mexican revolutionary government was pledged to improving the economic status of the native population, and one promising way of doing so was to make available to Mexicans the exploitation of their natural resources. We accordingly find that the Mexican officials were most strongly impressed with those principles of law which seemed to uphold the oil legislation as within the rights of the Mexican Government.

In the course of the long-drawn out legal dispute that followed, the economic situation changed radically. Vast new oil fields were discovered in the United States and other

countries; the oil industry began to suffer seriously from overproduction; salt water began to appear in the fields of Mexico, causing production to be sharply curtailed and profits to disappear. Mexican oil ceased to be of vital interest to the United States and the right to exploit that oil lost most of its attractions for Mexicans. Simultaneously we find both governments gradually modifying their views as to the "law" governing the situation, and eventually accepting a solution that was quite different in practical effect from the positions assumed by either of them in the beginning of the dispute. One seems justified in assuming that the changed economic situation had some influence, at least unconsciously, upon the intuitive selection of the legal principles that applied to the case.

It is not meant to imply that the officials of either country acted improperly or in bad faith in the matter. Such a charge might have been made if there had been one and only one legal rule applicable to the situation which one party or the other ignored in favor of its own economic interests. But the legal process, as traditionally conceived, did not in fact produce a sole correct answer to the problem; it produced several competing answers and left it to the intuitive judgment of the parties to choose among them. Naturally enough, in the exercise of such judgment, economic considerations were bound to enter in, at least subconsciously, since these represented the dominant interests of both sides in the issue.

Suppose, on the other hand, that the dominant interests of the American people at the time had been artistic rather than economic, and that the development and importation of Mexican oil, instead of favoring these interests, had been a hindrance to them. Is it possible to suppose that the intuitive action of the American officials who decided what the "law" was in the case would have been the same? On the contrary, one might have predicted with fair confidence that, as between the two competing sets of applicable principles, they would have been most impressed with that one which removed this blight upon American artistic production and enjoyment.

THE WORD FACTOR

Finally there should be noted what we may call the word factor. All thinking and discussion about legal problems is conducted in word symbols. As has already been noted, these symbols are not exact, objective signs or equivalents for particular things or relations. On the contrary, most of them can signify a number of different things at the same time, and hence are not satisfactory terms for use in strict logical discourse, at least until a more definite value or meaning has been assigned to them.

Furthermore, these symbols, as used in popular discourse, carry with them a load of emotional content and subjective meaning that is peculiar to each person using them, and is in large part not even communicable to other persons. When such symbols are used in thinking about a particular problem, this subjective aura of meaning which surrounds them may often lead to one intuitive judgment rather than another. Consider, for example, the high emotive power of such words of common use in legal discourse as the following: justice, sovereignty, independence, honor, dignity, vital interests, equality, liberty, right, wrong, duty, responsibility, fault. Every one of these is apt to represent for each person using it a pattern of emotional responses that is personal to that individual, and is the peculiar product of the totality of his past experience and environment. It would be too much to expect that intuitive or instinctive judgments, such as are constantly called for under the legal process as traditionally conceived, would not be affected in a large degree by these subjective responses to particular symbols. "When language is once grown familiar," said Berkeley, "the hearing of the sounds or sight of the characters is often immediately attended with those passions which at first were wont to be produced by the intervention of ideas that are now quite omitted." [5] The effect of words upon thought is, of course, too complex a subject to be dealt with in detail here. All that it is desired to suggest is that, when judgments between competing premises in logical discourse are left to intuition

or common sense, the emotional baggage carried by many words of common use will unconsciously enter into and affect such judgments.

Very often the flexible meaning of words is highly useful in enabling us to give a convincing legal justification for something we desire to do for very practical reasons. If a suitable word presents itself for marking off a particular case from similar past cases, it is then possible to justify a different course of action in regard to it. For example, when the Council of the League of Nations, early in October, 1931, wanted to invite the United States to participate in the deliberations regarding the Manchurian situation, it was able to do so on the theory that the Kellogg Pact, to which the United States was a signatory, was involved in the situation along with the League Covenant. But Soviet Russia was also a signatory to the Kellogg Pact, and it was not desired to invite that country to participate in the deliberations. Some "formula" had to be devised to support a distinction in the course of action followed in relation to the two countries. Finally someone devised the magic word formula that the United States was a "proponent" of the Kellogg Pact and was also the "depositary of ratifications" neither of which terms could be applied to Soviet Russia. Hence it was felt quite regular and proper to invite the former and not the latter.[6] The point is, of course, that the fact of the United States having been a proponent and a depositary of ratifications had nothing to do with the original decision to invite it and not Soviet Russia; it merely served to give to that decision an air of regularity. Had the desire been to invite both countries to participate in the deliberations, the fact that one was a proponent and depositary and the other not would certainly not have made any difference.

Of course, if no one had been able to think up a suitable formula, it is quite possible that a different course of action would have been pursued. But it appears that, whenever there is a clear desire among the interested parties to follow a particular course of action, legal language is sufficiently flexible to afford the necessary formula for bringing that

course of action within approved codes of conduct. It is only where there is a difference of opinion as to the desirability of a particular course of action, or where the interested parties are not sure just what they want to do, that the finding of a convincing formula presents difficulties, and may enter in as a factor in the choice between competing courses of action.

We see, therefore, that the traditional logical method for the finding of solutions to problems in the legal field is at the very best and in the simplest case a very rough approximation of an exact method; that, instead of leading everyone who applies the same thought process to the same situation to arrive inevitably at the same conclusion, it creates only a relatively low degree of probability that they will do so; a degree somewhat greater, perhaps, than mere random chance, but far from that degree of certainty which has generally been claimed for the legal process. It leaves open the door to the admission of a variety of factors bearing on particular decisions that are not accounted for in existing descriptions of the legal process and have no official place in that system, yet are certainly as important in explaining the course of legal decisions as are the traditional factors of legal rules and principles.

CHAPTER VII

THE SEARCH FOR WORKABLE RULES AND STANDARDS OF CONDUCT

We have outlined above the logical difficulties encountered in the attempt to apply the legal process, as traditionally conceived, to the types of conflicts and clashes of interest that arise in the field of international relations. Let us now turn our attention more specifically to a consideration of the existing body of laws governing diplomatic protection, as revealed and systematized by legal scientists for the use of those who are concerned with knowing what "the law" is in particular situations. Our purpose here is to observe how far this accepted system of laws actually does succeed in providing us with a set of workable rules and standards of conduct in the field of diplomatic protection, and how it might be made to fulfill its function more satisfactorily in the light of what has been said above.

Under the prevailing positivistic tradition, current systematized studies of the subject purport on the whole to be mere discoveries of a logical system of laws which is revealed in the common practice of nations. In other words, one presumably can find, by inspection of past practice, certain first principles, axioms or doctrines, from which may be deduced more specific rules and principles which in turn are supported by common practice. As a matter of fact, the usual procedure of legal scientists seems to be to start with certain particular rules and work back logically to first principles, and then to weave back and forth by induction and deduction until a logically consistent system of laws has been achieved that is justifiable at as many points as possible by reference to actual events or precedents. From this system one is presumably in a position to deduce answers to any particular questions that fall within the scope of the legal process.

The Theoretical Basis of International Responsibility

Let us consider first the theoretical basis of the international responsibility of states for injuries to aliens within their borders, as conceived by the most recent authoritative writers on the subject. For this purpose let us examine the views expressed by Professor Eagleton in his recent treatise on *The Responsibility of States in International Law*, and also the views contained in the draft convention and comment prepared by the Research in International Law of the Harvard Law School.

In casting about for some clear, certain and precise basis of first principles on which to erect his system of international responsibility, Eagleton at once encounters the difficulty that no such basis can be found which does not in turn have to be justified and explained in terms of some other system of ideas. But the positivistic tradition stands in the way of approaching the subject in terms of current social needs and desires, or of bringing into conscious perception the ethical value judgments by which the stream of legal materials and practices is intuitively evaluated and criticised. Hence Eagleton, like other writers who attempt to establish a system without reference to any conscious conception of social ends, starts off with a circularity, a definition of his first principles in terms of themselves. Thus he states that "Obligation, simply put, is the owing of a duty; and, behind it, claiming the performance of that duty, is responsibility." [1] Responsibility, on the other hand, "derives its authority from the same moral sense of obligation which influences mankind everywhere." [2] Now either this is pure tautology or else the terms "responsibility," "duty," and "obligation" must themselves be defined in terms of social ends (as Eagleton in fact elsewhere attempts to do, although in a sketchy and apologetic manner [3]).

Eagleton experiences great difficulty in finding an *a priori* basis of reconciling the notion of obligation with that of independence. At first he seems to take as his starting point

the old natural law theory that man comes into society with a collection of fundamental, inherent, or natural rights. Thus he says as follows:

> It is manifest that at some point one must cease asking why, and accept a principle, if not as an axiom, at least as an hypothesis upon which to build. Human society has long recognized certain rights as accruing to its members—rights which prescribe correlative duties on the part of others.[4]

And again:

> From the moment that the right of separate and equal existence of states was admitted, it became necessary to set up rules to guard these rights; for states, no more than individuals, can exist to themselves.[5]

But Eagleton does not attempt to explain how it is possible to have "rights" before a legal system exists to give them validity. If he means merely moral rights, then an explanation is necessary of how they suddenly become transformed into legal rights, and why some are so transformed and others not. If, on the other hand, he means legal rights, then he is assuming the very thing he is trying to establish. As Professor Brierly has remarked, "a legal right is a meaningless phrase unless we first assume an objective legal system from which it gets its validity."[6]

It is upon some such shaky and unsatisfactory basis as this that must rest all systems of legal obligation which seek to find their first principles in themselves, or assume them *a priori*. Yet even the most avowed positivist cannot get along without a starting point of reasoning. He may and usually does insist that he is not concerned with speculation about the theoretical basis of legal obligation, that he is only concerned with observing practice as it is. Yet practice is undifferentiated, diverse and inconsistent. Some basis must exist for selecting one view on a given point rather than another. No positivist escapes the constant exercise of such judgment, however unconscious he may be of the reasons for his particular choices. Furthermore, by leaving these choices to intuition rather than to conscious intellectual processes,

will find that it is under a duty to make reparation. This directs attention to the fact that the real question at issue is not merely a problem of formal logical deduction from fixed premises, but of the behavior of a certain group of officials when acted upon by a certain set of influences or pressures. This being the case, it obviously becomes important to know as much as possible about the factors, influences and pressures that operate upon deciding agencies in determining their decisions as to whether or not there is a duty to make reparation.

Article 2 of the Harvard draft convention specifies where one is to look to find out whether or not a state should be held liable to make reparation, and is worded as follows:

> The responsibilty of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.[13]

Although advanced as a description of existing habitual practice of governments, this rule in effect embodies a judgment of what is practically desirable from the standpoint of maintaining satisfactory conditions of international life. One can find without difficulty many statements of governments and of arbitral tribunals which support this rule. On the other hand, one can find a good many actions of states which could be cited in support of contrary views. This rule, like the others in the draft convention, is not arrived at merely by counting past precedents for and against, but by selecting from two or more possible but conflicting rules derived from past cases that one which would seem to give the best results in practice, and which, for this reason, would probably be applied by the majority of arbitral tribunals and deciding agencies who thought intelligently about the problem.

The main conflicts of interest which this rule seeks to meet are three: (1) the efforts of certain states, which have found the exercise of diplomatic protection by other states irksome, to restrict such operation by local legislation; (2) the tendency of some deciding agencies to regard expression of their local courts or legislative bodies and administrative

officials on international questions of responsibility as authoritative precedents and internationally binding; and (3) the effort of some states to establish the principle (as a means of limiting the exercise of diplomatic protection) that, on all questions falling within the jurisdiction of the local courts (whether or not they also fall within the scope of international law), the decisions of those courts are final and binding, and cannot be called into question by any international tribunal or foreign government.

Now it is obvious that if the purpose of having an international legal system at all is to obtain some measure of common standards of action for the international community as a whole, such a purpose would be defeated if each individual state were free to fix the standard in accordance with its own convenience or desires. Hence the above rule is, in effect, merely a statement of the practical conditions which are necessary, in a world of diverse cultures, interests and ideas of justice, if the advantages foreseen from having a set of common standards are to be realized. One does not have to theorize about whether international law is superior to municipal law in the abstract in order to be impressed with the value of this rule. Its practical necessity would be apparent to most normal minds who were convinced that the advantages of having common standards of conduct for the international community outweighed the inconvenience or hardship resulting from applying those standards in individual cases.

Furthermore, this practical reason for the rule gives a workable clue to the criteria to be applied in doubtful cases (something which the theoretical deduction of the rule from some larger generalization does not give). The rule itself, as has already been remarked above, is sufficiently definite so that in most cases it could be applied without any difficulty. However, suppose a case arose in which there was a question as to whether a particular municipal enactment was or was not in contravention with some international rule imposing responsibility. One could only answer this question intelligently by considering whether the act of adopting enact-

ments of this type, if generalized, would defeat the purpose of having a body of rules of international responsibility at all. To be sure, this is not an exact and certain test that everyone could apply automatically in all cases and be sure of getting the same answer, but it is far more certain and exact than intuitive judgments resulting from an unguided wondering about whether the doubtful enactment in a particular case did or did not fall within the vague borderland of the rule.

Of course if this rule is to be included within a logically consistent system which also contains a rule that a state is sovereign within its own territory (a rule also based on practical reasons), it is necessary to devise some logical means of reconciling the two concepts. The Comment on Article 2 in the draft convention indicates how this may be done.[14] One argues that, since international law is binding upon states, it must therefore prevail over any contrary rule of municipal law. To the extent that this acts as a limitation upon territorial sovereignty, one resorts to the consent theory of international law, and argues that " states are bound by international law because they are members of the family of nations." One has to imply this consent because express consent cannot ordinarily be shown. As stated in the Comment, " a professed necessity for proving express consent of a particular state to a particular rule of customary or established law would materially weaken international law as a legal system." By this partly fictional method, one is enabled to bring the two principles within one logical system. It is obvious, however, that this line of argument does not explain why the rule contained in Article 2 was chosen rather than some other version equally justifiable on logical grounds; it merely indicates how this rule may be reconciled with the existing legal system containing, among other things, the concept of territorial sovereignty.

The Comment on Article 2 likewise indicates how one may get around the problem raised by the notion of the finality of decisions of local courts in matters committed to their jurisdiction by the municipal law. To permit an inter-

national tribunal or other deciding agency to over-rule the decision of a municipal court is, in effect, to constitute the international agency a court of appeal from decisions of national courts—an idea that is difficult to reconcile with the notion of sovereignty and is particularly unpalatable to some states which are especially sensitive in regard to their sovereign status. One gets around this difficulty by the theory that "the decision of the highest municipal court is not reversed by the international tribunal, but the whole question of the international responsibility of the state is submitted."[15] In other words, what the international tribunal considers is not the decision of the national court but the alleged violation by the state of its international obligations (whether by reason of an improper decision of its highest municipal court or otherwise). Having thus arrived at a theory which is logically reconcilable with the remainder of the legal system, one is no longer disturbed (or should not be) by the fact that the practical results are precisely as if the international tribunal *had* acted as a court of appeal from the decision of the local tribunal, unless one persists in believing (as apparently some Latin-American governments do) that the disadvantages of this procedure outweigh any possible advantages that may accrue to the community as a whole from having such a rule as is embodied in Article 2.

Who May Engage the Responsibility of the State?

Having established that a state may be internationally responsible under certain circumstances for injuries to foreigners committed within its territory, the next question customarily asked by legal authorities is, for whose acts may the state be held responsible? Usually this question is approached as a matter of analytical deduction from the abstract nature of the state and the concept of responsibility. The state, being a legal abstraction, must act through human beings; hence the question is thought to be a proper one, what particular group of human beings may engage the international responsibility of the state?

As a practical matter, the question may be raised in regard to the acts of three types of persons: (1) acts of political subdivisions of a state or the officials thereof; (2) acts of higher and subordinate authorities and employees of the state; and (3) acts of private individuals. Usually the question is raised as a matter of defence or denial of responsibility; i. e., it is argued that, even though an injury has taken place for which reparation would normally be due, the person who committed the act resulting in the injury is not one who can legally engage the responsibility of the state. The efforts to solve this question by abstract analysis of the nature of the state and of international responsibility fill many pages in the treatises on the subject, but it can hardly be said that this analysis has yielded very useful guides to future action.

ACTS OF POLITICAL SUBDIVISIONS

In regard to (1) above, the primary difficulty arises out of the fact that states are divided up for political purposes in a great variety of ways, with a corresponding variety in the nature and degree of control exercised by the central government over the subdivisions. States are presumed to be free to select any form of internal organization they like. In some cases it is difficult to say just where the seat of final authority resides, i. e., just who has the final word in any question involving the exercise of governmental power.[16] Furthermore, there are various different forms of subordination, such as protectorates, mandated territories, suzerainties, dominions, colonies, and the like. In many cases a considerable degree of local autonomy is given, especially in the matter of maintenance of law and order, and the central government may be legally powerless to prevent the exercise of this local autonomy in a manner detrimental to the interests of foreigners.

Here the ancient doctrine of no responsibility without fault enters in to obscure the practical problems involved. If the central government is powerless to prevent the authorities of a local political unit from taking action injurious to foreigners, or to compel the local subdivision to make redress, why

should the central government be held internationally responsible for the injury? It has itself committed no fault. Why should it be held liable to make reparation for something which it could not possibly have prevented? In the United States, for example, the matter of prevention and punishment of crimes is left very largely to the various component states, and the Federal Government is given no authority to take action within the jurisdiction of a state to prevent crimes against foreigners, or to prosecute the perpetrators of such crimes. Why should it be held to answer internationally for such crimes, especially as foreigners are presumed to know the location of jurisdiction to punish for crimes before they enter the country. This argument has been advanced many times in the past by the United States in defence against claims for redress presented by other governments.[17]

There is nothing *logically* wrong with this deduction from the above premises. It is not, however, the view that is generally accepted at the present time, even by the Government of the United States. The obvious reason is that the foreseen results of such a rule would be incompatible with the very purpose of having the institution of diplomatic protection. If nations could escape responsibility for the actions of political subdivisions merely by pleading their own lack of control under their own laws, then the institution itself would be greatly restricted in operation. Any nation could, through its own action in adopting a particular form of internal organization, avoid international responsibility altogether.

Eagleton and other modern writers express the view that international responsibility is a corollary of "control" over territory. Thus Eagleton says:

> Responsibility must be located in each separate case by ascertaining the actual amount of freedom from external control, or conversely, the actual amount of control left, to the respondent state.[18]

The concept of "control" here given is somewhat vague and unsatisfactory, as Eagleton himself admits when he says that it is necessary "to judge each case upon its own

merits." [19] Apparently it does not mean control from the standpoint of internal constitutional law, since that would allow each state to fix the incidence of its own responsibility. What is obviously intended is control from the standpoint of international relations. This would, however, be difficult to determine in some cases, unless one kept in mind the necessity of having some member of the family of nations answerable for what takes place in any part of the territory over which the international system holds sway.

The draft rule adopted by the Harvard Research proposes a far more definite and practical criterion by tying up responsibility with the conduct of foreign relations. Thus Article 3 is as follows:

> A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.[20]

In other words, whichever member of the family of nations purports to conduct the foreign relations of a particular territory, that nation is internationally responsible for what happens in the territory, regardless of the amount of local autonomy the territory may possess, and regardless of the degree of control specified in the internal constitutional law of the country or the actual physical control exercised by the parent state over the subdivision. In the great majority of cases there would be no difficulty in applying this test. It is clear, however, that the reason for adopting this rule rather than some other one is not merely because it is logically deducible from fundamental principles, or even because it has the greatest number of past precedents in its favor, but because, out of several possible logical deductions, this one seems to offer the most desirable results in practice.

The logical basis for the rule as offered in the Comment is the theory that " each member of the family of nations is a unit " and must therefore assume responsibility for every

violation of international law attributable to any part of it. However, the Comment limits the scope of this deduction by making it apply only to delicts, and not to contracts concluded by aliens with political subdivisions of a state. In the latter case, other practical considerations enter in which make another rule more desirable. Hence in this case one ignores the principle that each member of the family of nations is a "unit," and one has recourse to some other premise which leads to the desired answer.

ACTS OF HIGHER AND SUBORDINATE AUTHORITIES

The next question which it is customary to ask is whether all authorities and employees of the state can engage its responsibility, or only some of them. In other words, what is the extent of the responsibility of the state for the acts of its agents? So long as one attempts to answer this question exclusively by deduction from the nature of the state and of international responsibility, or by induction from past precedents, one experiences great difficulty in arriving at a satisfactory solution.

One might, of course, take as a premise the principle used by the Harvard Research in justifying Article 3 discussed above, i. e., that a state is a unity, and deduce from this that it is responsible for the wrongful actions of any of its agents, down to the lowest employee. Such a rule as this, however, runs afoul of many practical difficulties, and hence is not often advanced as an acceptable rule of law, regardless of its high qualifications as a logical deduction from general principles. For example, the activities of the modern state are extremely complex, and require for their execution a host of officials and employees. Governmental power must be entrusted to all sorts of individuals of every degree of intelligence and honesty. It is asserted that, as a practical matter, if the state should be held internationally responsible for every injury to an alien committed by every one of these agents, however low in rank, the burden would be too great for any state. It is impossible to find people to serve as government agents who can be relied upon to be intelligent and

honest in all actions affecting foreigners. A certain number of wrongs will take place, regardless of the degree of care exercised in appointments, and it is argued that a state ought not to be held as an absolute insurer against the possible misuse of governmental power by every one of its host of agents and employees. Many states are in fact reluctant to accept responsibility under their municipal laws for the wrongful acts of their officials.

If one examines the past cases, one will find a great many instances in which governments have been held not responsible for injuries to foreigners committed by petty officials or employees, the lack of responsibility being charged directly to the minor rank of the official committing the act. However, if one seeks to find some common element running through these cases which will provide an objective test for deciding when an official is to be regarded as a higher authority, capable of engaging the responsibility of the state, and when he is to be looked upon as a subordinate or minor official, not capable of involving the state in his acts, one will experience great difficulty in finding it. The cases themselves present the greatest confusion.

There is also a great diversity of opinion among textbook writers as to whether any rule exists which makes the responsibility of the state turn upon the rank of the agent committing the injury. Borchard holds that there is such a rule, writing as follows:

> . . . an examination of a great many cases confirms the view that as a general principle the state is not responsible for the wanton or unlawful acts of its minor officials, 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.[21]

Eagleton, on the other hand, while recognizing that a state operates through many agents and employees, takes note of the principle that, in the international field, each state must be regarded as an individual unity, and he deduces from this principle that " a state may be forced to accept responsibility

for the act of any of its agents." [22] He seeks to explain past practice, not on the ground of the relative rank of the delinquent official (although that may be the reason given for the decision), but on the question of the exhaustion of local remedies against the official. Thus he states as follows:

> Such differentiation as apparently exists between subordinate officials and those higher in rank is not one as to responsibility, but as to procedure. Practice does not justify the conclusion that no responsibility exists for injurious acts by inferior officials of the state: it merely reveals the fact that, due to domestic legislation, local remedies may more often be found against the acts of minor officials, and less frequently against those of superior officials.[23]

Eagleton observes that most states provide local remedies against the wrongful acts of minor officials, either against the official himself or against the government, and he believes that it is this fact, more than the mere question of rank, that influences deciding agencies to make some distinction in the matter of responsibility. Some of the decisions do in fact mention the failure to exhaust local remedies as a factor, along with the minor rank of the official, in justifying the decision of no responsibility, but a great many others do not. In these latter cases Eagleton is conjecturing as to the real factor which led to the decision. He is undoubtedly correct that, in many cases, the possibility that an injured foreigner might obtain redress in the local courts would lead a deciding official to conclude that the international remedy should not come into play, although he might put his decision on some other ground. However, as has been pointed out above, a great many other unacknowledged factors may also enter into decisions, and it is very doubtful whether one is justified in explaining a whole group of cases on this one unacknowledged reason, even though it may be an appealing one.

One finds in fact a great many cases of injuries committed by minor officials in which responsibility has been established, even though the local law allows proceedings in the courts against the wrongdoing official and no such proceedings have been taken. If the rule advocated by Eagleton were literally applied, it would be comparatively easy for a state

to avoid all international responsibility for the acts of its agents. It would merely need to provide (as most states do) that any official could be sued in the local courts for any wrong committed by him. Then the state itself would only be responsible in the event of some improper action in the courts. But obviously, where an injury is at all extensive, one stands little chance of obtaining redress from a minor official, even though one succeeds in getting a judgment against him, simply because he ordinarily does not have sufficient property to meet the judgment. Yet such inability to satisfy a judgment properly rendered does not transfer the burden to the government under the rule of exhaustion of local remedies. If the court system has functioned fairly, that is enough. Hence, under this rule, the more extensive the injury to an alien, the less chance he would stand of obtaining redress.

In the rule which it adopted on this question, the Harvard Research sought to combine the question of the relative rank of a wrongdoing official with the matter of denial of justice and exhaustion of local remedies, as follows:

ARTICLE 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

It is admitted in the Comment that the above rules are in the nature of *lex ferendi;* that they do not pretend to be accurate descriptions of past practice, but seek to provide a workable solution of the specific problem involved. That problem is the practical one of just how far a state ought to be held to liability for all of the acts of the immense number of officials and employees of high and low rank that are necessary to carry out the ordinary business of the state. On

the one hand, when a political body endows an individual with a degree of governmental power, it places him in a position to do injuries to foreigners much more easily than if he were a private citizen. On the other hand, it is practically impossible for a state to control every act of its army of officials and employees, and make certain that they exercise their governmental power in a particular manner. How do the above rules meet this problem?

In the first place, the rules recognize the distinction between acts of higher and subordinate officials, and seek to place on the state a greater degree of responsibility for the former than for the latter. But when it comes to stating an objective test for measuring the degree of responsibility for these two types of agents, great difficulty is encountered. What is a higher and what a subordinate official? On this point the Harvard draft struggles hard but does not get very far.

It is suggested in the beginning of the Comment on this Article that, regardless of the question of rank, any action of an authority which is complained of must be *unreviewable* by any other authority if it is to involve the responsibility of the state. Thus the Comment states as follows:

> In every case covered by this paragraph it must be the action of higher officials or authorities who in this sense bind the State itself and whose action is, therefore, the unreviewable action of the highest authorities of the state. . . . If the action by the official or authority is unreviewable by any other official or authority of the state, there are no local remedies the exhaustion of which is a condition precedent to state responsibility; but if the action is thus reviewable, the local remedies available must ordinarily have been exhausted without adequate redress to the injured alien before the state will become responsible.[24]

But it appears later on that higher authorities are not necessarily those whose acts are not reviewable by other officials. Such a test would in fact restrict state responsibility to very narrow limits. Under the organization of some modern states, it would result in making the state responsible, under the first paragraph of Article 7, only for the actions of the members of the supreme court, the actions of

all other officials being reviewable by that body. This is not in accord with existing practice, nor would it serve the purposes of the institution of diplomatic protection. The Comment recognizes this but fails to provide any other specific test. It confesses its inability to do so in the following words:

> No hard and fast line can be drawn between the higher authorities of the state and subordinate officers or employees. The higher authorities are usually those, such as legislatures, the highest executive officials and highest courts, whose acts are not reviewable by other officials or authorities. Yet the term is not absolutely so restricted, nor are all officials whose acts are reviewable necessarily to be deemed subordinate. In general, the position of the official in the government is to be considered, the nature of his function, the degree to which he exercises discretion and the extent to which he is in fact controlled by the judgment or direction of other officials. But no arbitrary classification can be made for the purposes of international law, just as in various systems of national law, experience has shown that it is impracticable to draw a clear distinction between higher officials acting as direct organs of the state and minor employees.[25]

This is another one of those cases in which "each case must be considered on its merits," which is only a confession that no test apart from the exercise of individual, intuitive judgment can be devised, and that the criteria to be applied in the exercise of this individual judgment have not been clearly visualized. Of what help is it to say that "the position of the official," "the nature of his function," etc., are "to be considered," without telling how they are to be considered?

The Comment then goes on to cite numerous cases in support of its contention that there is a distinction in the matter of responsibility that is directly traceable to the rank of the offending official, but all that these cases seem to amount to is that, taken as a whole, the officials for whose acts states have been held directly responsible have more often been of high than of low rank. But to conclude from this that responsibility turns upon the question of the relative rank of the official committing the act is a very dubious proceeding. Many of the cases cited do not bear out this

conclusion at all, as the Comment itself admits. Thus it is said as follows:

> It must be admitted that there have been some cases, where under the particular circumstances, or under the terms of a particular protocol of arbitration, the distinction between superior and inferior officials or employees, and even the possibility of judicial recourse has been predicated on the mere malfeasance or non-feasance of officers or employees upon whom a distinct governmental duty was incumbent, irrespective of their rank.[26]

After citing a number of such cases the Comment goes on to remark:

> These cases may be deemed exceptional. With them may be cited numerous cases of wrongful seizures of property or money by customs officials, where the act either resulted in benefit to the Government or the seizure has been in flagrant violation of official duty and adequate redress seemed unobtainable locally [citing more cases].

And one might also cite the fact that states have uniformly been held responsible for the wrongful acts of diplomatic, naval and military officers regardless of their rank, as well as for the acts of private soldiers under command of an officer, however low in rank the officer might be and quite regardless of the question of disavowal of the act by the state, or whether an appeal might have been taken to some higher officer.

One does not really explain anything by saying that these cases are "exceptional." Apparently they are exceptional only in the fact that they unfortunately do not support the rule as formulated. But this only dodges the issue. Why regard these cases as "exceptional" rather than those in which the decision is sought to be justified directly on the ground of the relative rank of the official perpetrating the injury?

It seems in fact that none of the various rules advanced which seek to determine international responsibility by reference to the relative rank of the official or employee commiting the injury is of much value, (1) as a summary of past cases, (2) as a basis of forecasting future decisions, or

(3) as a workable method of solving the particular problem of international responsibility that is involved.

In regard to (1), the fact that many cases can be cited which expressly advance the rank of the wrongdoing official as the deciding factor in determining responsibility does not mean that the decision in these cases really turned upon that factor, entirely or even partially. It may be that that factor merely served as a convenient means of justifying the decision and fitting it into the existing body of legal doctrine. It may have happened in some cases, of course, that, had this convenient justification for the decision not been lying around, the decision itself might have been different. Deciding agencies usually do not adopt decisions, however desirable they may seem, unless it is possible to bring them under some rule or principle which is thought to have the approval of the legal profession. But that does not mean that the rule advanced is an accurate account of the reasons which led to the selection of one of several alternative decisions. This is shown by the fact that, when the rule regarding rank would operate to defeat the purpose of the institution of diplomatic protection, it is often simply ignored and the decision placed on other grounds.

In regard to (2), none of the formulations of the rule that have been advanced provide a reliable basis of forecasting future decisions, first, because the rule itself does not reveal all of the factors on which such decisions turn, and second, because none of these versions provide an objective test for determining what is a higher and what a subordinate rank. This is left for the most part to the individual, intuitive judgment of the deciding official, which usually means that reliable forecasting is out of the question.

In regard to (3), the various versions of the rule that have been advanced do not provide workable guides to the solution of the problem involved, because the makers of these versions have not visualized what that problem is in terms of social needs and desires. The rule has not been framed in answer to the question why should the relative rank of the wrongdoing official make any difference in the matter

of determining the international responsibility of the state for the wrong.

A THEORY OF RISK ALLOCATION

It seems that a workable test can only be arrived at by giving consideration to the general purpose of the notion of international responsibility in connection with the injuries to foreigners. As already suggested, that purpose seems to be to preserve the minimum conditions which are regarded as necessary for the continuance of international trade and intercourse on its present basis. That purpose does not require that a state be made to answer for every injurious act of every one of its many officials and employees. At the same time, it does require that the state be held responsible for certain types of misuse of governmental power.

Here one can have recourse to the notion of risk allocation (as developed in Anglo-Saxon law in recent years) in place of the old notion of fault as the determinant of responsibility. It is obvious that normal business and social relations can still be carried on although there is a certain percentage of abuses of governmental power by individual officials and employees. The existing system takes account of the fact that a certain proportion of these is inevitable, and makes allowances for them without expecting compensation from the state. Normal business and social relationships, in other words, are capable of taking a certain degree of risk in this matter. There is a point, however, where derelictions and errors on the part of government officials (regardless of rank) might become so numerous as to make the usual course of social and economic life difficult, if not impossible, to carry on. In other words, these relationships are not able to absorb the entire risk of such derelictions. From this point on, the state should take over the risk of injuries from misuses of the governmental power. Failures beyond this point are occasionally bound to occur, regardless of the care exercised in the selection of personnel or the amount of supervision used, but the state can and should assume the risk of these failures; otherwise it would not be

fulfilling the primary purpose of political organization, which is to maintain conditions under which social life is possible.

Hence the question to be asked would be, does the delinquency of a particular official indicate a failure on the part of the state to establish governmental organs capable of maintaining the minimum conditions necessary for the carrying on of normal social and business relations? If it does, then the state assumes the risk, otherwise not. Or the question might be put in another way. Is the delinquency of a type which, if permitted to occur generally, would make the conduct of customary social and business relations impossible? One might express this in familiar language by saying that a state is " under a duty " to provide conditions of this character, and that if it fails in this duty, then it becomes liable to make reparation.

Placing the risk on the state in this instance serves two purposes: (1) that of providing reparation for injuries to individuals, the risk of which they should not be required to take if society is to keep up its customary ways of living; and (2) that of an inducement to governments to exercise some care in the selection of individuals who are to have the exercise of governmental power. This test requires, to be sure, some forecasting of future possibilities, and is not an exact and certain test in operation, but it is far less vague and uncertain than any test which rests upon the nebulous distinction between " higher " and " subordinate " authorities.

As a matter of fact, this test appears to be not only more easily applied than the one contained in the Harvard draft convention, but it also offers a much better explanation of past cases. Some officials or employees, although relatively low in the scale, are nevertheless possessed of a type of governmental power that can more easily be used to cause difficulties in the normal course of international trade and intercourse than that of other officials of relatively higher rank. For example, local police officials and minor customs officers and soldiers are more directly concerned with the preservation of conditions favorable to trade and intercourse than are, say, commissioners of education and even some cabinet

members; and are in a better position to obstruct such trade and intercourse through the misuse of their special powers. Likewise a naval commander of minor rank who is entrusted with a naval vessel can, by mismanagement or misconduct, cause more direct damage to international commerce than can the Secretary of the Navy himself. If one examines a large number of cases one will find that (disregarding the reasons given in justification for the decisions) a far larger percentage can be explained on this ground than on the basis of any of the projected distinctions between higher and subordinate authorities.

This being the case, one has reasonable grounds for suggesting that some such consideration as that outlined above was a determining factor in the minds of the deciding agencies, whether consciously considered or only semi-consciously perceived; and that the mere rank of the wrongdoing official was not in itself the determining factor, although it may have been a convenient peg on which to hang the decision after it had been reached on other grounds. In other words, there seems to have been an unconscious allocation of risk by deciding agencies in accordance with the capacity of different types of governmental power to cause disruption of the conditions which are favorable to international trade and intercourse. The greater the power to disrupt these conditions, the greater the degree of risk assumed by the state, regardless of the relative rank of the official exercising the power.

This test likewise removes much of the difficulty surrounding the question of whether a state is responsible for the wrongful acts of an official committed outside the "scope of his authority." It has often been maintained that a state should not be so responsible, any more than it is responsible for wrongful acts of private individuals. But great difficulty arises in determining what is the scope of an official's authority. Seldom if ever are officials given authority to commit wrongs. As the Comment on the Harvard draft remarks, "it is probable that officers are instructed to act rightfully only." [27] Hence it might be argued that any wrongful act

fulfilling the primary purpose of political organization, which is to maintain conditions under which social life is possible.

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members; and are in a better position to obstruct such trade and intercourse through the misuse of their special powers. Likewise a naval commander of minor rank who is entrusted with a naval vessel can, by mismanagement or misconduct, cause more direct damage to international commerce than can the Secretary of the Navy himself. If one examines a large number of cases one will find that (disregarding the reasons given in justification for the decisions) a far larger percentage can be explained on this ground than on the basis of any of the projected distinctions between higher and subordinate authorities.

This being the case, one has reasonable grounds for suggesting that some such consideration as that outlined above was a determining factor in the minds of the deciding agencies, whether consciously considered or only semi-consciously perceived; and that the mere rank of the wrongdoing official was not in itself the determining factor, although it may have been a convenient peg on which to hang the decision after it had been reached on other grounds. In other words, there seems to have been an unconscious allocation of risk by deciding agencies in accordance with the capacity of different types of governmental power to cause disruption of the conditions which are favorable to international trade and intercourse. The greater the power to disrupt these conditions, the greater the degree of risk assumed by the state, regardless of the relative rank of the official exercising the power.

This test likewise removes much of the difficulty surrounding the question of whether a state is responsible for the wrongful acts of an official committed outside the "scope of his authority." It has often been maintained that a state should not be so responsible, any more than it is responsible for wrongful acts of private individuals. But great difficulty arises in determining what is the scope of an official's authority. Seldom if ever are officials given authority to commit wrongs. As the Comment on the Harvard draft remarks, "it is probable that officers are instructed to act rightfully only." [27] Hence it might be argued that any wrongful act

was outside the scope of an officer's authority, and could not directly involve the responsibility of the state. But this would in large measure defeat the purpose of the institution of diplomatic protection.

It does not do much good to substitute the phrase "within the scope of the office or function" of the official, as is done in the Harvard draft convention, since that has an almost equally wide borderland of doubtful meaning. Is participation in a mob uprising by a police official "within the scope of his office or function"? Yet states have often been held responsible for such acts. According to the test suggested above, if an official uses his governmental power to commit an injury (however limited that power may be), then the question is to be dealt with as one involving the responsibility of the state for the acts of its officials, and the rule applied accordingly. All other cases are to be dealt with as if the wrongful act had been committed by a private individual.

ACTS OF PRIVATE INDIVIDUALS

This brings us to a consideration of the international responsibility of the state for injuries to foreigners within its territory committed by private individuals. Here the legal authorities are in fairly general agreement that a state is not responsible for wrongs committed by individuals unless there is connected with such wrongs some independent delinquency on the part of the state itself, or its officials. However, upon the reasons for this rule and also upon the question of what kind of independent delinquencies are necessary to create responsibility, there is a wide difference of opinion.

For many years authorities have, following Grotius, derived the rule of non-responsibility for acts of private individuals from the ancient principle of no liability without fault. Private individuals do not act on behalf of the state; therefore the state cannot be regarded as responsible for their acts unless it has itself committed some independent delinquency in connection therewith, such as failure to exercise due diligence to prevent a wrong, or condoning or ratifying

it after it has been committed. In this latter case it is the independent delinquency of the state that forms the basis of international responsibility, not the original injury committed by the private citizen.

In the nineteenth century this *culpa* theory was very popular with writers and jurists, and was accepted as providing a satisfactory rule for determining responsibility in the case of acts of private individuals. In recent years, however, it has become increasingly difficult to explain actual practice on the basis of this theory, and there has been a definite trend away from it, especially among Continental authorities. The primary difficulty, as we shall later see, arises out of the fact that, however satisfactory it may be as a logical deduction from fundamental principles, it does not provide us with an objective test that can be impersonally applied to particular situations. It assumes the very thing which in most cases needs to be established, i. e., whether a "wrong" has occurred in contemplation of international law. It is not a workable rule for determining international responsibility because it takes no account of the practical needs which the notion of responsibility is designed to fulfill.

Grotius sought to define "fault" in this connection as complicity, condonement or ratification by the state of the wrongful act of the individual. This definition limited the state's responsibility for acts of individuals to those cases in which the act might have and should have been foreseen and prevented, or in which it was ratified or condoned by the state after commission. It has been found in practice, however, that this definition (so far as it has a definite meaning) is entirely too narrow in scope, and that it does not account for many types of cases in which international responsibility has been found to exist, even though "fault" on the part of the state could not be directly shown.

As a matter of fact, "condonement" of an injury to a foreigner by the state is in most cases an extremely difficult if not impossible thing to prove. Usually the higher officials of a government (especially those who have to bear the brunt of diplomatic representations), far from condoning or

approving crimes against foreigners in their territory, are genuinely sorry to have such incidents occur, although they may, for one reason or another, be unable to prevent them or to cause the perpetrators to be punished. In the average case it is necessary to *imply* condonement or ratification from the failure to prevent the crime or to punish the criminals. But obviously this implied condonement is not in itself the reason for deciding that international responsibility exists. One does not ordinarily *imply* the existence of a condition or fact to justify a particular decision unless one is already favorably inclined toward the decision itself. In the average case it would be equally possible to imply that there had not been condonement, if there were any reason for doing so.

In other words, the implication of condonement in a particular case does not ordinarily explain *why* the deciding agency thought that the state should be held responsible for the injury caused by a private individual; it is merely a useful method of reconciling the decision with the ancient doctrine of no liability without fault. But unless we can throw some light on the question of why the particular decision was reached in the first place, we are quite in the dark, both in accounting for past practice and in providing useful guides for future decisions or reliable means of forecasting what such future decisions will be. In brief, the condonement theory does not give us any method of achieving either certainty or predictability in future decisions; it merely helps us to construct a logically consistent system of general principles.

Eagleton rejects the notion of *culpa* as the basis of international responsibility for acts of private individuals, primarily because of its failure to offer a satisfactory explanation of existing practice. He admits that the acts of a private individual cannot be regarded as the acts of the state, and that, before the state's responsibility can be engaged, it is necessary to show an "illegality" of its own. But this, he says, "involves simply the question of what duties are laid upon the state with regard to individuals within it boundaries by positive international law."[28] He seeks to derive these

duties from the fact of control exercised by the state over its territory. Thus he states:

> It is one of the foundation stones of the international system, that a state should have exclusive control within its territorial limits. Since, therefore, the alien's state may not normally enter to protect him, the state of his residence is under the obligation of safeguarding him against violations of international law committed to his injury by public authorities or by private individuals.

But this argument is a circularity, since it assumes in advance that " violations of international law " may be committed by private individuals, which is the very thing under discussion. Of course a state is internationally responsible for violations of international law resulting in injuries to foreigners, regardless of the status of the persons committing the acts. It is not necessary to derive this responsibility from a state's control over its territory. As has been pointed out above, there is no such thing as a violation of international law without international responsibility. These two terms are merely different ways of saying the same thing. What we want to know is, when is an injury to a foreigner by a private individual to be regarded as a violation of international law? This cannot be solved merely by deduction from the principle of exclusive territorial control. One obvious deduction from that principle would be that a state is responsible for *all* acts of private individuals resulting in injury of any kind to foreigners, but Eagleton admits that this is not in accord with practice and would be a wholly unworkable rule. It would be impossible, he holds, for states to prevent all injurious acts to foreigners. Furthermore, every state has its own laws for defining and punishing injuries by private individuals. All that international law is concerned with in the matter is to maintain " a general standard for the administration of justice." [29] In other words, the fundamental question is, not whether a state is generally responsible for injuries to foreigners by private individuals, but how far a state must go in preventing or redressing such injuries if it wishes to escape being called to account by other nations.

This brings us fairly close to the heart of the whole

problem of the protection of citizens abroad. For an injury or loss sustained by a foreigner at the hands of a private individual (or, for that matter, at the hands of an official) is only a wrong in contemplation of international law if it involves the international responsibility of the state, and, if it does so, then the question of whether it was committed by an official or a private individual is of no significance. Not all injuries sustained by foreigners are to be regarded as such wrongs; only some of them. But when it comes to specifying which injuries fall within this class and which do not, we find the utmost confusion.

What are the standards that have been proposed for determining whether an injury or loss sustained by a foreigner is a wrong for which the state is internationally responsible? This is, in effect, only another way of asking, how much protection against injuries or property losses is a state bound to accord to foreigners within its territory if it desires to escape international responsibility?

One possible answer to this question, which is very popular among Latin-American writers, is that "the state must assure to the alien the same amount of protection which it gives to its own citizens, no more, no less." [30] As already pointed out, this rule has many advantages. It would be fairly easy to apply; it is logically compatible with the fundamental principles of sovereignty and equality of states; it has a strong emotional appeal for many people. The chief difficulty with it is that it would, in practice, largely defeat the whole purpose of the institution of diplomatic protection. That, of course, explains its popularity with the smaller and less orderly states which would gladly see the institution abolished, and also explains why it is not acceptable to the states that are concerned with the preservation of international trade and intercourse. Such a rule as this would allow each state to fix its own standards of treatment of aliens, and certain states could be depended upon to fix that standard so low as to make ordinary business and social intercourse, as carried on in states of European civilization, difficult if not impossible. Hence this rule, although a perfectly

sound logical deduction from accepted principles, is rejected by the majority of writers outside of Latin America.

The more widely accepted view is that the standard must be an international one. The most frequently quoted expression of this view is the following statement of Elihu Root:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard.[31]

One finds, however, that the efforts of the authorities to give specific content to this " very simple, very fundamental " standard have resulted in the utmost confusion and vagueness. One finds in fact a wide divergence among the members of the family of nations in systems of protection and methods of administering justice, as well as in ideas of human values and social ends.

It is not true that the same ideas of the protection of person and property are to be found in all states claiming sovereign status. That may perhaps have been the case to some extent in the eighteenth and early nineteenth centuries when the family of nations was restricted to the Christian nations of European civilization, but it is hardly true for the present world-wide international society, comprising a variety of different civilizations, cultures, social and economic systems. When one seeks to find in the present heterogeneous community of states some common ideas in regard to the protection of the individual and his property, one ends up with only the vaguest sort of generalities that are of little or no value in the solution of particular problems.

Can one find, for example, a single conception running through the laws and practices of all the independent states of the world in regard to the protection of private property as against government action? Even the views of some of the European states have changed radically on this subject in recent years. Is there a common view as to the protection of human life, say, in Great Britain and in the Near East?

Clearly not. Is one to take as the standard the views common to a majority of states although not to all? But majority rule is not accepted in the international world, or at least not yet. Are we to prefer one civilization to another, and, if so, on what ground is the preference to be based? What *a priori* justification have we, for example, to give preference to the industralized civilization of the United States over the spiritual culture of India? If, on the other hand, strict universality is to be the ultimate test, then the international standard of protection can be no higher than the lowest found in any state that is recognized by some other states (not necessarily by all) as a member of the family of nations. But this would obviously defeat the purpose of having the institution of diplomatic protection at all.

Let us see how the Harvard draft convention seeks to express this standard. The rule concerning responsibility for injuries to aliens committed by private individuals is found in Article 11, which is as follows:

> A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed to exercise due diligence to prevent such injury and if the local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

It is to be observed in the first place, that, although a special article is devoted to the subject, the fact that an injury is committed by a private individual or a mob, rather than by a government official, really seems to make no difference in the matter of responsibility, since the extent of such responsibility, as here set forth, differs in no perceptible degree from that found in the two preceding articles dealing with the state's responsibility toward aliens in general (i. e., without regard to the character of the person or persons committing the offence). Thus Article 10 deals with responsibility for failure to exercise due diligence, and is as follows:

> A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such

failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

Article 9 deals with responsibility arising from denial of justice, and is worded as follows:

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

The Harvard draft recognizes, in other words, that the real problem is not to determine whether a state is or is not internationally responsible for injuries committed by private individuals in general, but under what conditions is a state responsible for injuries to foreigners within its territory, regardless of the character of the person committing the injury; or, to put it in another way, what is the kind or degree of protection that a state must give to foreigners against injuries if it desires to avoid being held internationally responsible to other states? According to the Harvard draft, a state's duties in this respect consist of two things: (1) a duty to use due diligence to prevent injuries, and (2) where there is no failure of due diligence, a duty to provide justice to an alien who has sustained an injury and seeks redress under the local laws. To what extent is it possible to find objective tests for the performance of these duties?

Due Diligence

Nearly everyone will concede that "due diligence" in the prevention of injuries is one of the vaguest of standards. This is admitted in the wording of Article 10 itself, which states that the diligence required "may vary with the private or public character of the alien and the circumstances of the case." The Comment on this article adds that "What is 'due diligence' in a given case is often difficult to deter-

mine." [32] Eagleton also finds that it is impossible to state a rule regarding due diligence with precision. "No clear and definite formula," he says, "has ever been promulgated: it is necessary to study other cases, and to judge according to the circumstances in any particular situation." [33] But to "judge according to the circumstances" of each case means merely that there is no preexisting objective test; that the matter is left to the personal judgment of whatever deciding agency has jurisdiction over a particular case. Can it possibly be said that for such cases the "law" is fixed and certain in advance of the exercise of this judgment by the deciding agency in question?

As already indicated, this judgment may be merely a blind, intuitive choice (in which case it is apt merely to reflect the past experience or personal prejudices of the deciding agency), or it may be a conscious intellectual process in which the alternative consequences of deciding the issue one way or the other are foreseen and evaluated, and a choice made consciously in accordance with some approved scheme of values. The traditional notion of the way the legal process works strongly favors the former of these two methods. But it must be clear that, if we are to get intelligent judgments, and if we are to have any basis of forecasting what they will be in particular cases, it is necessary that this process should be a conscious one and that we should have some agreement upon the scheme of values to be applied.

If one examines a large number of past cases, one will find that, setting aside those in which personal prejudice or material interest was obviously the deciding factor, there is a common, although largely unconscious, basis of judgment in deciding whether or not a particular act should be classified as "due diligence." This seems to turn upon the question of whether or not, in the view of the person making the decision, the particular situation, if generalized, would interfere with the normal course of economic and social relations; and whether the duty of prevention of such situations can practically be borne by the usual governmental institutions. This again comes down to a question, not of determining

whether a state is " at fault " in failing to prevent a particular injury, but of risk allocation.

No state, no matter how well organized, can prevent all injuries to foreigners within its borders, nor is it expected to do so. As in the case of wrongs by public officials, normal social and economic life is able to absorb a certain percentage of injuries by private individuals and infractions of the public order without faltering, and in fact it is geared to do so. International trade and intercourse are able to function normally in spite of occasional, isolated crimes and disturbances of the peace in which foreigners sustain injuries, even though such injuries are not subsequently redressed. On the other hand, there is a point at which the prevalence of crimes and civil disturbances so interferes with the usual course of community life that it becomes unprofitable and perhaps impossible to carry it on; in other words, there is a degree of disorder and insecurity which the economic and social system as currently devised cannot absorb. A political organization that allows such conditions to exist for extended periods is failing in the primary purpose for which it exists.

In the international field, states desiring to maintain their position as independent entities (that is, recognition by other states of their exclusive territorial sovereignty) are presumed to be able to keep the extent and rate of crimes and other civil disturbances affecting foreigners below the point at which normal intercourse is threatened with interruption, but not to prevent such crimes and disturbances altogether. The system of international responsibility is, in effect, both a method of inducing states to maintain such conditions by penalizing them when they fail to do so, and also a method of providing redress for individuals who have sustained injuries beyond that which they should be called upon to absorb as an incident of normal community life.

The determination of due diligence is not merely a question of whether the state uses the means at its disposal to prevent a particular act.[34] The means existing at a particular time may be quite inadequate to maintain the required conditions, in which case one usually finds that the state is not

relieved from responsibility. Nor is it a question of collusion or connivance on the part of the officials of the state. They may be quite innocent of any wrong intentions, yet this does not mean that the state will thereby escape responsibility. The question is largely one of the manner of fulfillment of essential governmental funtions.

Whether a particular incident is an isolated and fortuitous case, or whether it is one of a series of similar events happening about the same time, has an important bearing on the determination of whether or not the actions of the state will be found to fall within the category of due diligence. Where the event is isolated and unusual, it does not indicate a general condition that is unfavorable to the continuance of normal relations, and hence is not apt to be regarded as showing a lack of due diligence, even though some officials involved may have been guilty of censurable conduct. Where there is a series of similar incidents, however, there is an indication of a breakdown of police administration, and in such cases there is a much greater tendency to find a lack of due diligence on the part of the government. The Comment on Article 11 of the Harvard draft convention recognizes this in the statement that " in well-ordered states evidence of due diligence will be more readily received as a bar to a claim for indemnity than in states subject to frequent disturbances." This explains in part the seeming difference of standards applied to stronger and weaker states.

Denial of Justice

This brings us to a consideration of the second " duty " of the state in respect of protecting foreigners against injuries, as specified in the Harvard draft convention, and that is the duty to provide for the injured alien a means of obtaining " justice " in the local courts. Here we touch upon a field of thought that is at once perhaps the most important and the most confused of the whole subject of diplomatic protection; that concerned with the subjects of " denial of justice " and the " exhaustion of local remedies."

A book could be written on the various meanings that have been given to the term "denial of justice." It is perhaps the most frequently used term in the whole vocabulary of the law of diplomatic protection, and the one that is the least understood. The high emotional content that the word "justice" carries with it seems to shut off all conscious intellectual processes in dealing with the term. One is impressed with the mental paralysis that seems to follow upon the mere pronouncement of the term "denial of justice" in connection with a particular situation.

Writers on the subject of diplomatic protection have labored long and hard to give some precise connotation to the term, and have at least succeeded in disentangling from current practice two main classes of common meanings. The first, called the "broad" meaning of the term, signifies, according to Borchard, "any arbitrary or wrongful conduct on the part of any one of the three departments of government—executive, legislative or judicial." He adds that the term includes "every positive or negative act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled." [85] The second or so-called "narrow" meaning of the term, which is favored by Borchard, Eagleton and the drafters of the Harvard convention, signifies, according to Borchard, "some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law." This second meaning involves "some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process." Let us inquire whether either of these main uses of the term has any utility as an objective standard for determining whether a state should be held internationally responsible for a particular injury suffered by a foreigner.

Not much need be said about the "broad" meaning of the term. It must be clear on the face of things that a concept of such loose meaning can have no particular utility, either as a premise to decide a specific dispute, or as an

explanation of why a particular past case was decided in one way rather than another. The term as here used seems to be merely the equivalent of saying that international responsibility exists. To say that a state is internationally responsible for a denial of justice, and that a denial of justice is any unlawful conduct on the part of any branch of the government resulting in an injury to a foreigner is to tell us nothing we did not already know. It merely substitutes one set of symbols for another. We still must have some means of finding out what is unlawful conduct. This broad meaning of the term seems to be devoid of any utility for legal science, and might well be abolished.

The "narrow" and at present more popular meaning of the term is concerned with improper action on the part of the local judicial system. To what extent does the term in this sense have any concrete meaning that can serve as an objective standard for determining whether or not international responsibility exists in a particular case? Let us consider the various types of situations to which the term as here used is commonly applied.

First there is the large class of cases in which a foreigner is a party to a civil suit in the local courts, either as plaintiff or defendant, and believes that, in the course of the proceedings, the courts have treated him or his cause in some improper manner, i. e., that he has been "denied justice." Here there is no question of the state or its officials being involved in the incident that led to the litigation; the only basis of international responsibility would be the improper action of the courts, which are governmental agencies.

The question that has to be decided in these cases is not whether an improper action or wrong by the judicial officials involves the international responsibility of the state. The answer to that question is implicit in the designation of the conduct of the courts as improper or wrongful (speaking, of course, in terms of international law). The question is, rather, what kinds of action of the local courts are to be regarded as improper or wrongful?

A closely related type of case is that in which an in-

dividual foreigner is accused of some offence against the criminal laws of the state of his sojourn and is subjected to arrest, imprisonment and trial in the local courts; and, in the course of the proceedings against him, he meets with some kind of treatment at the hands of the judicial or police officials which he regards as a "denial of justice" (e. g., false imprisonment, delay in trial, failure to receive a hearing, unjust sentence, etc.). Here again the question is not whether improper or unjust action of the local courts can lead to international responsibility, but what kinds of action of those courts are to be regarded as improper. This in turn leads to the question, by what standards is the action of the local judicial system to be judged?

Legal authorities outside of Latin America insist that this standard must be an international one; that individual states cannot be allowed to fix this standard for themselves by their own laws and methods of administering those laws, else the purpose of having any international law on the subject would be defeated. But where is one to find this international standard? Not every instance of alleged irregularity or mistreatment is to be regarded as a "denial of justice" entailing international responsibility. On the other hand, not every action of a court official can be accepted as proper merely because it is the action of a court official.

The ways in which this question comes up are legion. How much bias does a judge in a civil suit involving an alien have to show in order to perpetrate a "denial of justice"? How adequate must the grounds of suspicion be in order to justify an arrest? How long a delay before trial is justifiable? Is the accused entitled to know in all cases the charges against him, and, if so, with what degree of particularity? What kind of treatment must be given to him while in custody? Questions of this character daily harrass the officials of foreign offices. Unfortunately the existing concept of denial of justice in its narrow sense offers no objective measuring rods for answering them.

Perhaps the description set forth in the Harvard draft convention represents the most careful and intelligent at-

tempt yet made to give some specific content to the concept of denial of justice as used in this sense. Yet, as we have seen above, every one of the tests formulated is couched in variable or ambiguous terms which cannot be applied to specific situations without recourse to personal judgment (e. g., " unwarranted delay," " obstruction of access," " gross deficiency," etc.). Here, as elsewhere, a deciding official, when faced with a new case, is left to fall back on his own intuitive judgment, which means that in most cases he will decide as nearly as possible in accordance with the practice of the judicial system with which he happens to be familiar.

It is customary to include under the narrow meaning of the term denial of justice those cases which arise out of the failure to prosecute persons who commit crimes against foreigners. In these cases there is no allegation that the state was at fault in failing to prevent the original crime, but merely that, by reason of some improper action of the police or judicial officials, the perpetrator of the crime was not adequately punished. This is regarded as a " denial of justice " to the foreigner who was the victim of the crime; as a failure of the " remedial function " (the function of providing means of obtaining redress for injuries) rather than of the " preventive function " (the function of preventing injuries in the first place). Thus the Comment on Article 10 of the Harvard draft convention states as follows:

> The responsibility of a state for failure to use diligence to prevent injuries to aliens, must be distinguished from its responsibility for failure to use diligence to bring offenders to justice. The latter is a responsibility for denial of justice. It grows out of a state's exercise of the remedial function, while the former grows out of a state's duty to exercise the preventive function.[36]

Just why this class of cases should be classified as " denial of justice " is difficult to understand. Is the purpose of criminal prosecution to provide a remedy for the injured individual? Or is it to prevent or discourage crimes? If it is the former, then this function of the state is merely that of providing vicarious revenge to the victim of the crime. The punishment of the criminal does not repair the injury of the

victim nor provide reparation for his losses. If the punishment takes the form of imprisonment or the death penalty, how is the victim's injury remedied? He is materially no better off than he was before. His primitive desire for revenge on the person who wronged him may be satisfied, but the damage he has sustained is not made good to him. If the punishment takes the form of a fine, the proceeds do not go to the injured individual as compensation for his loss; they go to the state. The proceedings against the criminal are not brought in the name of the victim of the crime, but of the sovereign or the community at large. By what reasoning, then, are these proceedings to be regarded as an exercise of the "remedial function" of the state rather than of the "preventive function"? According to modern theories of criminal jurisprudence, the function of criminal laws and criminal prosecution is prevention of crimes, not vengeance for the victim.

The persistence of the notion that failure to prosecute crimes against foreigners is a "denial of justice" to those foreigners is perhaps due in large part to the fact that the courts are usually involved in the proceedings, and it is customary to think of courts as agencies of administering justice. Hence any failure in prosecution is instantly translated into a "denial of justice." But it should be noted that such failures to prosecute are quite as often the result of a failure of the police to apprehend the criminal or to retain him in custody as they are of misconduct on the part of judicial officers. It should also be noted that judges perform two main functions: (1) the settlement of civil disputes between individuals; and (2) the enforcement of the criminal laws on behalf of the community at large. In this second function they are acting as an arm of the police force of the state. What they do in this respect is not to be called "remedial" merely because they happen to be judges; nor is it to be presumed that their function here is to render "justice" to individuals who are the victims of crimes. They are primarily concerned at the moment with the more pressing duty of aiding in the suppression of crimes and the enforcement of

public order and security for the benefit of the community at large.

The only way in which the victim of a crime might be said to be deprived of a remedy through failure of the state to apprehend and prosecute the criminal is that the victim might thereby lose an opportunity to bring a civil suit against the criminal for pecuniary damages. But it is not this possible loss that is commonly thought of when classifying failure to prosecute as a denial of justice to the victim. Furthermore, in the average case, civil suits against criminals are not productive of any real remedy, and are seldom prosecuted, even where the criminal is apprehended and is available for suit.

This habit of classifying cases of failure to prosecute under the heading of denial of justice obscures the reason for having a rule of international responsibility in such cases, and hence obstructs the efforts to formulate a workable standard. As suggested above, all current formulations of the rule of responsibility for denial of justice call for the exercise of personal judgment in their application to new cases, and this judgment, under the traditional notion of the legal process, is commonly exercised intuitively. By setting up an erroneous notion of the function of the local courts in criminal prosecution (i. e., that it is remedial rather than preventive), one can be fairly certain that this intuitive judgment will be exercised in an unsatisfactory manner and will lead to confusing results in practice. One need only examine the series of cases involving failure to prosecute as decided by the General Claims Commission under the Convention of September 8, 1923, between the United States and Mexico, to be convinced of the high state of confusion and uncertainty that reigns at present in this branch of the law of diplomatic protection.[37]

It is also customary to include under the heading of denial of justice those cases in which the original injury to an alien in itself involves the international responsibility of the state, but in which there has also been an unsuccessful attempt to obtain redress in the local courts. Here we touch upon the closely allied subject of exhaustion of local remedies, which

will be considered later. By classifying as denial of justice these failures to grant an adequate local remedy for wrongs which are themselves violations of international law, we are apt to create confusion as to just what injury it is for which the state should be held responsible, and also as to what standard of conduct should be applied. The rule that, where a local remedy exists, it should be resorted to, applies to all cases, regardless of the nature of the original injury, and is a practical rule of procedure. But in the case of an injury that in itself involves international responsibility, if the local remedy is tried and found inadequate, the basis of international responsibility (and hence the duty to make reparation) remains the original injury and not the inadequacy of the judicial remedy or " denial of justice " in the courts. To call such cases " denial of justice " is to direct attention away from the basis of responsibility, and hence to obscure the test to be applied.

In summary, it would appear that the category of denial of justice, even in the so-called narrow sense of the term, is still too broad and vague to serve as a very useful classification of injuries entailing international responsibility. It further appears that the tests so far formulated for determining whether or not a particular situation falls within this category are quite lacking in precision and objectivity. Hence it is not surprising to find that, in practice, the rule regarding denial of justice either confuses the issues involved or else merely serves as an acceptable label to apply to decisions already reached (for the most part intuitively) on other grounds.

In order to give the concept of denial of justice some useful meaning as a guide to the decision of new cases, it would be necessary, in the first place, to reduce to intelligible terms the purpose of having a rule on the subject at all. This would require a critical examination of the notion of " justice " as meted out in national courts, in place of the present reverential acceptance of it as a something that everybody knows about, and that needs no analysis.

What is the practical problem that gives rise to the need for a rule of international law on the subject? Fundamen-

tally, it seems to arise out of the fact that, in all communities of human beings, disputes and clashes of interest arise between members of the community which require some impartial agency to decree a settlement if peace is to be maintained. For this purpose, all political communities have developed judicial systems, or methods for the administration of "justice." The justice which these agencies apply is the collection of written laws, practices, *mores*, accepted notions of what is respectable or what leads to a desirable social life, and traditional ways of doing things, that make it possible to maintain the usual course of business and social relationships in the community. While the maintenance of such a judicial system is a vital function for all political governments, it is in no case expected that the system will work perfectly (i. e., that it will settle all clashes of interest in a manner that makes for the most desirable conditions of community life), nor is such perfection necessary for the maintenance of normal relations. Here, as in the case of the governmental functions previously discussed, there is an allowance for a certain amount of error which does not interrupt the established course of community life, and the risk of which the members of the community take upon themselves. On the other hand, there is a point at which these errors and misapplications of the system can become so numerous as to threaten an interruption of the body of social and economic relations that makes up the pattern of community life. Where this happens, one may say that the state has failed in its function of providing an effective judicial system. The risk of such happenings is then properly placed upon the state.

In the international field, this risk is expressed by saying that the state assumes responsibility for all such misconduct of its courts as indicates a failure to provide a judicial system that is adequate to maintain the normal course of social and business relationships. Isolated or fortuitous instances of improper functioning of the courts do not involve such responsibility; only those in which the circumstances indicate a general condition of inadequacy, or those which, if per-

mitted to happen generally and without restraint, would threaten to upset the pattern of community life.

Under this view it might happen, of course, that the test of the adequacy of the judicial system would be different for natives and for foreigners. In a particular country the natives might be content with a system of economic and social relations quite different from that prevailing among the majority of the members of the international society, and hence require for their own relationships a local system of justice that would not satisfy the requirements of the *régime* under which international trade and intercourse are conducted. A particular nation might, for example, rate spiritual values higher than property values and devise a local system of justice accordingly. But to the extent that that nation participated in the life of the international community, it would be under the necessity of supplementing its system of justice to enable it to operate in such a manner as to make the carrying on of international trade and intercourse possible.

Hence, in so far as foreigners are concerned, the test to be applied would be, not whether the local system of justice is adequate to the native economic system and cultural development, but whether it shows a condition that is compatible with the continuance of international economic and social relations. As a matter of fact, we find that, in spite of the vigorous protests of the Latin-American states, it is commonly recognized that the system of justice required for foreigners may be different in certain respects from that which satisfies the native population, and that a state does not discharge its full duty in this respect merely by opening to foreigners the judicial system available for its own citizens. As the Comment on Article 5 of the Harvard draft convention states:

> The subjection of the alien to the local law and remedies is necessarily based upon the assumption that the local law and remedies measure up to the standard required by international law.[38]

By thus formulating a test in the light of the practical purpose which the rule is apparently designed to achieve, one

stands a chance that individual decisions will be so made as to serve that purpose. Under the present method, one is forced to gamble on the unpredictable, intuitive responses of unknown future deciding agencies.

Exhaustion of Local Remedies

This brings us to a consideration of the closely allied question of the exhaustion of local remedies. It is commonly said by legal authorities that, regardless of the nature of the original injury to a foreigner (whether or not directly involving the international responsibility of the state), if there is a remedy offered under the local laws, the foreigner must first exhaust that remedy before international reclamation is in order. Whether, as argued by some authorities, no international responsibility can arise until this is done, or whether, as argued by others, responsibility may arise but is suspended until the local government has been given a chance to repair the injury, would seem to make little practical difference to the injured foreigner or to his government. Under either theory his government can do nothing for him until he has had recourse to the local courts. The agreement on this requirement is so general that one might expect to find a clear and precise rule of law on the subject which could be more or less automatically applied to the vast majority of cases without difficulty.

As a matter of fact, the draftsmen of the Harvard convention, in endeavoring to give the most precise formulation possible to this rule, were forced to use terms of such equivocal meaning as to leave the door wide open to personal judgment in every new case. The rule as formulated in Article 6 is as follows:

> A state is not ordinarily responsible (under a duty to make reparation to another state) until the local remedies available to the injured alien have been exhausted.

The question that most frequently arises is whether or not the local remedy offered is "adequate." As is often said, it is not necessary to exhaust local remedies when there are

no local remedies to exhaust. But what standard is to be used in deciding whether or not the remedy offered in a particular case is a remedy?

Let us assume that the injury sustained by a foreigner is one which would directly involve the international responsibility of the state if no local redress were given. Most states provide some kind of recourse under local law in the event of injuries by officials or employees, either against the state itself or against the wrongdoing official personally. Does this release the state from all further responsibility in the matter? Many Latin-American authorities have contended that it does, but this has been denied by the majority of writers, since it would make it very easy for a state to avoid all responsibility for acts of its officials, and would largely defeat the purpose of having the institution of diplomatic protection.

On the other hand, does the rule mean that the injury or loss sustained by the foreigner must actually be redressed to the satisfaction of himself or his government? This position is equally unacceptable as a test of the applicability of the rule. Full and adequate reparation satisfactory to the injured party is not often obtained through litigation, even in states with the most highly developed judicial systems. Suppose a judgment is obtained against an official but he has no property with which to satisfy it. In such a case it is not customary to say that there has been a failure of remedy. Furthermore, the remedies provided for specific injuries differ widely in different states. How are we to tell whether or not the remedy granted by the laws of a particular state is "adequate"? Most contentious cases turn upon this question, yet current legal doctrine leaves us more or less in the dark as to how we are to go about solving it.

Suppose, again, that the local judge who has to pass upon a suit for redress by an injured alien happens to be an appointee of the official against whom the suit is directed; or that there is a strong anti-foreign feeling in the community at the moment. Of course if a judge openly allows it to be known that such factors as these have influenced his judg-

ment, it might not be difficult to conclude that there had been a failure of remedy, but judges ordinarily do not do such things openly. In the great majority of cases, such factors would operate subconsciously in influencing a judge's opinion, and there would be no way of proving their effect upon the outcome of the case.

If one desires a workable test of adequacy of local remedies, one is again driven to consider the purpose of the institution of diplomatic protection and of the rule of local redress. Quite apart from any theoretical consideration of territorial sovereignty, the rule is readily justified on the ground of practical convenience. It likewise takes account of the fact that most states do offer some kind of redress in their local courts to foreigners who have sustained injuries. The real question is whether the system of remedies offered is sufficient to make up for the original failure of the government to fulfill its functions in the expected manner. Where, for example, the original injury is such as to indicate a breakdown in the local police administration sufficient to threaten the continuance of normal social and economic relations, is the remedy granted in the local courts, when generalized to cover all similar cases, sufficient to counteract this condition? Where the injury is of such a character that private individuals should not be expected to take the risk of it as a part of normal community life, does the remedy offered shift the burden to the state, or at least remove it from the shoulders of the private citizen sufficiently to allow customary relations to be carried on with mutual profit? Such a test does not require specific pecuniary redress in each case, nor is it satisfied by mere paper remedies, e. g., statutory means of redress that yield nothing tangible.

As a matter of fact, although officials and tribunals have not heretofore claimed to apply any such test in interpreting the rule of local redress, it nevertheless seems to offer a fairly good description of the basis of judgment unconsciously used in many past cases. Where, for example, there is no reason to suppose that the local system of remedies

(although open to foreigners on the same basis as to natives) will serve to correct or compensate for the breakdown in governmental function that led to the original injury, one usually finds that, either the subject of exhaustion of local remedies is not mentioned at all in the decision, or else it is assumed that such remedies will be inadequate.[39] This does not change the fact, of course, that, where a state has a normally functioning judicial system which offers the possibility of a remedy in a particular case, the injured foreigner must resort to such a remedy before appealing to his own government. The practical value of such a requirement can scarcely be questioned. The test suggested above merely has to do with the question whether the remedy offered is to be regarded as adequate.

Revolutionary Damages

Another subject customarily dealt with by writers on the law of diplomatic protection is that of injuries to foreigners resulting from revolutions or civil wars. To what extent is a state internationally responsible for such injuries? Is it possible to answer this question by logical deduction from fundamental principles of international law? A vast literature exists on the subject, demonstrating pretty clearly that it is quite possible to make out a perfectly good logical case both for and against such responsibility.[40] It is likewise possible to support either position by an imposing number of past precedents. This is another illuminating example in which the conventional analysis of fundamental principles and past practice has proved sterile in providing us, either with an acceptable account of why deciding agencies have acted the way they have in past cases, or with a trustworthy guide to decisions in future cases.

We are assured by Borchard, Eagleton and others that the present tendency is toward the view that a state is not responsible for revolutionary damages to foreigners, as such; that there must be some additional element of fault or improper action on the part of the government in order to create such

responsibility. This view is shared by the makers of the Harvard draft convention, which deals with the subject in the following manner:

ARTICLE 12

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

ARTICLE 13

(a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under Article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

The basis of responsibility set forth in Article 12 is no different from that already set forth in previous articles for injuries other than those committed directly by government officials. In substance, it requires the showing of an independent delinquency on the part of the state or its agents, beyond the mere fact that an insurrection has broken out. This independent delinquency normally takes the form of a lack of due diligence on the part of the state or its officials in preventing the injury. But the same difficulty is encountered here as in previous cases—that of finding a workable test for determining what is " due diligence." It is not necessary to repeat what has already been said on this subject above.

What is the practical basis for the rule as stated? In the ordinary course of events, revolutions or insurrections are rare and fortuitous events, against which every government seeks to protect itself. Since they are attacks upon the life of the existing government, one can safely assume in most cases that the government will do everything possible to prevent them from occurring, or to suppress them when they arise. Hence there is not, as a rule, any need for providing an addi-

tional inducement to governments, in the form of a penalty, to prevent the outbreak of insurrections against them. Such outbreaks do, of course, upset the normal life of the community in the area concerned, but the effect is temporary, and the social and economic order is able to survive occasional outbreaks of this sort. Hence there is no obvious practical reason why the risk of occasional injuries from such outbreaks should be transferred from the individual to the state.

Furthermore, one very practical reason against such a transfer is that personal and property losses in the course of a revolution are apt to be fairly extensive, and a government which has had to undergo the cost of putting down such an uprising is probably in no position financially to meet the additional burden of compensating private individuals for the damage caused to them by the hostilities. If there were a legal obligation on the government to recompense foreigners for their losses, native citizens would doubtless demand similar treatment, and the strain on the public treasury might very often be too great.

However, the above practical considerations assume that such outbreaks are isolated and fortuitous events, and that they do not happen with sufficient frequency to constitute a definite menace to the normal conduct of human affairs. In some countries of Latin America, revolutionary outbreaks have occurred with such frequency as to make it almost impossible to conduct trade and intercourse within their borders on a profitable basis. Losses or threatened losses from such insurrections have been more than private business and social life could easily absorb. In such cases we find that other governments have not in fact applied the rule of no responsibility as advanced by modern writers, but have consistently sought to hold the state internationally responsible for injuries to foreigners arising out of such incidents.

This does not necessarily mean, as is often inferred, that the stronger states have consciously adopted one rule regarding responsibility for revolutionary damages as among them-

selves, and another rule for weaker states. There have been a great many instances of outbreaks in small and weak states, in which the larger powers have made no effort to impose responsibility for the injuries suffered by their nationals. One finds that, in these cases, revolutionary outbreaks are of comparatively rare occurrence, and that they do not offer a constant threat to the business and social life of the region affected.

It is only in the case of prolonged political disorder (as has been the case in Mexico in certain periods in the past), or where insurrections become so frequent as to make normal social and economic relations impossible, that other states have sought to impose liability for revolutionary damages as such. It is true that they have not sought to justify responsibility on this ground, but have followed the traditional technique of deriving it by deduction from general principles. However, it is clear that the acknowledged reasons do not explain why the decision of responsibility was reached rather than the opposite one, which would have been equally defensible by logical deduction from general principles. They merely explain how the decision might be brought within the framework of existing legal principles. One cannot, of course, be certain that the explanation here offered has been a decisive although unconscious factor in the cases mentioned. One can only point out that it offers a far more consistent account of past decisions on both sides of the question than does existing legal doctrine.

Furthermore, this explanation suggests a useful test for determining whether or not responsibility exists in future cases. It takes account of the fact that occasional insurrections or revolutions are to be expected even in the most orderly states, and does not seek to place the risk of these on the surviving *régime*. On the other hand, it places a condition on states desiring to avoid international responsibility in the matter that they shall achieve sufficient governmental order and stability to make possible the conduct of business and social relations. Incessant revolutions and prolonged states of political disorder indicate a failure to do so and

hence transfer the risk of injuries arising therefrom to the community itself. This test is not difficult to apply, and it gives a much better account of the past actions of governments on the subject than does either a rule that there is no responsibility for revolutionary damages *per se*, or a rule that there is.

This test is furthermore borne out by the events of recent years, in spite of the present tendency of authorities to favor the rule of no responsibility in theory. Thus we observe that the Mexican Government agreed to assume responsibility of reparation for damages sustained by foreigners in Mexico during the prolonged revolutionary period of 1910-1920, when normal business and social activities became well-nigh impossible to carry on. It is true that the Mexican Government avoided any discussion of its legal liability on the subject, but it is doubtful if that government could have escaped the payment of compensation for these claims in any case, since the general feeling was strong that responsibility rested on the Government in this instance. On the other hand, there have been since that time several revolutionary outbreaks against the existing administration in Mexico, but the Government has not been required to assume liability for damages to aliens during these outbreaks since they seemed to be fortuitous and occasional, and not to represent any general threat to the usual course of economic and social relationships.

Disputes Arising out of Contracts

This brings us to the question of international responsibility for losses arising out of contractual relations between private individuals and foreign governments. This subject presents a diversity of views among legal authorities and a confusion of precedents quite as great if not greater than any subject previously considered.[41]

It is not necessary to go into the various efforts that have been made to arrive by deduction from fundamental principles at a general rule of law governing responsibility in contract cases. As in other cases, it seems quite possible here

to make out a good logical case both for and against responsibility, and to support each of them by an imposing array of precedents. It seems impossible to choose between the alternatives offered on the ground of formal logic alone, or even on the basis of a numerical count of past precedents on one side or the other. Any selection involves the conscious or unconscious operation of some value judgment, some social or juristic philosophy.

Let us consider the practical problems involved. Defaults by governments on their contractual obligations with foreigners may be of several different kinds: (1) where the contract involves a payment of money by the government for goods delivered or services rendered and there is a simple failure to pay on the part of the government, but no direct repudiation of the contract; (2) where the debt is a bonded obligation or other negotiable credit purchased in the open market; and (3) where there is a cancellation or repudiation by the government of the contract or of its obligations thereunder.

In regard to the first case, it is a fairly consistent practice of governments not to interpose diplomatically in behalf of their citizens, except through the use of unofficial good offices. Here the event that has happened is one that might have been foreseen in any contract, whether public or private. Failure to pay is a risk that is associated with all contractual obligations, and is one that is presumably taken into account in the terms of the contract. Normal business relations can still be carried on in spite of failures by individual contractors to observe the obligations of their contracts to the full, and in spite of the fact that the judicial remedies available to the other party may not result in an actual recovery. Business men are quite accustomed to taking a certain percentage of losses on their contracts, and no judicial system has yet been devised that will provide effective remedies in all cases. Most states permit themselves to be sued on contracts in their own courts, but even where no local redress is given for a simple breach of contract by the state, it does not follow that the government of the other party to the con-

tract will invoke the question of international responsibility. Normal business and social relations can still go on in spite of occasional breaches of this kind by governments.

On the other hand, it is not safe to conclude, as some authorities do, that international responsibility can never be based on breach of contract by a government. There have been many decisions which hold that it can. It should be noted that, in its actions on its contracts with private individuals, a government may act in two different ways: (1) as a private individual or corporate contractor would act; and (2) as a sovereign and supreme power. In the first case the government commonly subjects itself to the local laws governing the fulfillment of contracts, and to judicial process in the local courts in the same manner as other contractors; and, while it may not always meet its obligations or be compelled to meet them, it does not have recourse to its sovereign power in order to escape them. The risks of loss which the private contractor takes in this case are similar to those which he would take in contracting with private individuals. The practical problems involved in the maintenance of contract obligations are no different.

On the other hand, if a government is free to have recourse to its sovereign power to escape its obligations under a contract with a private individual, then doing business with governments on a contractual basis becomes a wholly uncertain thing, so far as the private contractor is concerned. No matter how he should seek to safeguard himself in the terms of the contract against possible loss, the state might, through the exercise of its supreme governmental power, overturn all his calculations. Private contractors could not safely do business with governments on any such terms.

It appears to be the consensus of opinion that private contractors should not be expected to take the risk of such action on the part of the other contracting party. So long as the state remains within its character as a contracting party and does not take advantage of its superior governmental power to escape its obligations, then the private contractor is usually left to sustain whatever losses may accrue from the contract.

But when it steps out of that character and takes action that a private contractor could not take, in order to escape its obligations under the contract, then it upsets the contractual basis and pursues a course of action that is quite incompatible with normal business relations; for example, if it declares the contract void by its own decision, or seizes property belonging to the other party to the contract, or declines to submit to suit thereunder, or seeks to alter the terms of the contract without the consent of the other party.

The Harvard draft convention deals with the subject of responsibility arising out of contract obligations in the following manner:

ARTICLE 8

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

The first paragraph of this article seems to imply that (with the usual exception in regard to exhaustion of local remedies) all questions of non-performance of contractual obligations by a state directly involve the international responsibility of the state. No exception is made in regard to the character of non-performance. However, this broad rule is severely qualified in the Comment by the statement that " the article implies, of course, an unlawful or wrongful non-performance." [42] Presumably this means " unlawful " or " wrongful " in the eyes of international law. But, if this is the case, then the rule becomes mere tautology, saying in effect that an unlawful non-performance of a contract by a state is unlawful; i. e., it involves the international responsibility of the state.

All that we learn from the above rule is that there are certain kinds of breaches of contract which may be unlawful under international law, but the rule itself does not specify what they are. It suggests no test whereby we may know

an unlawful or wrongful non-performance when we see one. The Comment takes note of the fact that governments do not ordinarily interpose in cases of "mere breach of contract" beyond the use of unofficial good offices, but does not seek to formulate a specific test for deciding when a non-performance is a "mere breach" and when it is "unlawful." It merely sets forth examples of different kinds of cases which governments have treated as exceptions to the general practice of non-interposition.

If one examines these cases carefully, one finds that, so far as they can be said to contain any common ground at all, it is the feature of the use of governmental power to defeat the obligations of the contract. The types of cases set forth are as follows: (1) failure to provide adequate remedies in the local courts against breaches by the state; (2) arbitrary annullment by the contracting government without recourse to a judicial determination of the terms of the contract or of the legality of the government's act; and (3) various other "arbitrary" acts by the contracting government resulting in loss to the private contractor. In all of these cases the distinguishing feature is an interjection of governmental power to alter the situation envisaged in the contract. To the extent that one party to a contract is able to do this without the consent of the other party, the expectations created by the contractual relation are defeated. Hence it would seem that the test suggested has in fact played an important part, consciously or unconsciously, in controlling the course of decisions in past cases.

Somewhat the same situation exists in relation to defaults on bonded indebtedness. On the one hand, we find that governments regularly refrain from interposing on behalf of their citizens who hold bonds of a foreign government on which a simple default has taken place. A great many such defaults have occurred, especially on the part of small and weak states, in which no diplomatic interposition has taken place on behalf of the aliens who have lost their money. On the other hand, this does not seem to mean that states enjoy complete freedom to default on their external loans

whenever they wish and under any conditions, without incurring international responsibility. Cases of default which have aroused foreign governments to interpose appear to involve, as a rule, some exercise of governmental power, or failure to exercise such power, in a manner that definitely alters the status of the government as a credit risk.

Most prominent in this class of cases are those in which a government has diverted revenues or other assets pledged to the security of a loan. Less often interposition has taken place where flagrant and long-continued mismanagement of the public finances has rendered a state unable to meet its external obligations. In both of these situations, the state has stepped out of its character as one of two equal parties to a contract, and has used or misused its governmental power to alter the situation created by the contract. Private lenders have no means of foreseeing and protecting themselves against such action in the terms of the contract. To the extent that a state is at liberty to use its governmental powers in this manner, the normal expectations created by a loan contract are defeated. A conscious or unconscious realization of this fact seems to be reflected in the attitudes of governments on the question of interposition on behalf of their citizens who hold defaulted bonds of foreign governments. The deliberate intrusion of governmental power to alter the situation between debtor and creditor is not compatible with the maintenance of the existing international economic system.

Paragraph (b) of the above-quoted article of the Harvard draft calls for little comment. Private individuals loaning money to political subdivisions do not expect that they are at the same time engaging the credit of the central government, and it is not regarded as a function of the central government to see that subdivisions pay their loans. Ordinarily such subdivisions are suable in the national courts on their contracts, and hence are subject to legal process which is not directly under their control. Nevertheless, if a default of a subdivision were traceable to the use or misuse of governmental power by the central government, it can safely be

predicted that the international responsibility of that government would be invoked, although it was not a party to the original loan contract.

THE CALVO CLAUSE

The test suggested above has a direct bearing on the difficult problem raised by the so-called Calvo clause in contracts. That question has given rise to an extraordinary amount of confusion and controversy, and, although it has been the subject of many decisions of arbitral tribunals, it is still far from settled. No attempt will be made here to analyze the legal arguments that have been built up both for and against the validity of the Calvo clause in international law. Suffice it to say that it is quite possible to erect a logically sound argument on either side of the case, so far as abstract theory is concerned, and to support it by an impressive number of precedents. Here again it becomes necessary to find some intelligent basis of selection between competing premises.

The Calvo clause, as everyone knows, is a voluntary renunciation by a private contractor of recourse to the diplomatic protection of his government in anything connected with his contract. He in substance agrees that, for any loss or injury sustained by him in connection with the contract, he will have recourse only to whatever local remedies may exist, and will not take up his troubles with his own government, with a view to obtaining its assistance. Sometimes cases of "denial of justice" (using the term in its narrow sense) are excepted, but in recent years the tendency has been to make absolute the prohibition against the recourse to diplomatic protection.

Intuitive judgments on the binding force of these clauses are apt to be affected by various conflicting notions that are lying about. In the first place, there is the notion that an individual who makes a contract ought to be bound by it. This notion is intimately associated with the maintenance of the existing economic system, and, as a practical matter,

there is, of course, much to be said in its favor. On the other hand, there is the notion that diplomatic protection is a governmental function, and that private individuals should not be permitted to embarrass their governments by attempting to sign away this right by their own contract. Again, there is the notion that contracts not to have recourse to a particular legal remedy in the event of future injuries are void as against "public policy"; public policy in this sense being merely an expression of opinion that contracts of this type lead to socially undesirable results. Each of these notions has a certain practical appeal that commends it to particular officials in particular instances. Under present circumstances, however, there is no way of telling which of these and other similar notions will be chosen as the guiding principle in particular cases.

What are the practical problems involved in the question? In the first place, there is the fact that private individuals or corporations, possessing the nationality of a strong country, who make contracts with weaker countries, have been prone in the past to seek avoidance of all risks of non-performance by the contracting government by immediate recourse to the diplomatic assistance of their own government whenever anything goes wrong under the contract. In other words, they have sought to escape from the risks of loss normally associated with the contract relationship. Local remedies, even where they meet the requirements of the prevailing economic system, do not always result in actual redress or reparation. As already stated, this margin of failure is ordinarily capable of being absorbed by contractors without harm to the economic system itself, and, under the existing judicial system, this risk is taken by the individual contractor.

In many cases of contracts between individuals and foreign governments in the past, the private contractor has sought to avoid even this risk (which may presumably be taken care of in the terms of the contract) by recourse to the diplomatic protection of his own government. To the extent that the Calvo clause serves to discourage this practice, there would seem to be no practical objection to it. But, as a matter of

fact, this situation is already covered by the rule regarding the exhaustion of local remedies as a preliminary condition for the exercise of diplomatic protection, and, to the extent that this rule is observed, the Calvo clause would seem to be superfluous. This has already been pointed out by many authorities outside of Latin America.[43]

Some Latin-American nations, however, have sought to go beyond this, and to make the prohibition against recourse to diplomatic protection absolute, regardless of the nature of the injury arising under the contract. This would mean, of course, a transfer to the private individual of the risk of injuries or losses under the contract now customarily placed on the government, either because it uses its governmental power to escape its obligations under the contract, or because it fails to provide a local judicial system that apportions the risk in a manner compatible with the existing economic system. Such a situation would, as previously pointed out, seriously interfere with the existing system of contractual relations between governments and private individuals, since it would destroy whatever basis of expectancy now exists as to the outcome of the contract, so far as the private contractor is concerned. Hence we find a strong tendency among authorities outside of Latin America to condemn the Calvo clause in its absolute form as a bar to diplomatic protection, although the reasons they give in support of this view are varied and often unconvincing.[44]

Private individuals making contracts with foreign governments do not ordinarily foresee that the government will in the future resort to its governmental power to defeat its obligations under the contract. If they did, they would make no such contracts at all, since the scope of governmental power is such as to be able to defeat any normal basis of expectation of the outcome of the contractual relationship. Hence we find that private contractors are usually not unwilling to include clauses binding them to have recourse to local remedies in the event of non-performance by the government. But it is hardly to be supposed that this is a conscious, voluntary acceptance by the individual contractor of

all the risks of losses arising under the contractual relation, including those which may be brought about by action of the government outside of its rôle as a contracting party. The chances are that the private contractor, in signing a contract containing a Calvo clause, foresees only those types of possible loss that are commonly associated with the contractual relation in general.

The Measure of Damages

We come finally to a consideration of the subject of the measure of damages for injuries to aliens involving the international responsibility of the state. This subject is often looked upon as of little importance from the standpoint of legal theory, being concerned only with the determination of the amount of reparation to be paid for an injury already decided to be in violation of international law. But, if one looks closely at what deciding agencies do in this respect, one finds that considerable light is thrown upon the factors which influence the decision itself.

There seems to be fairly general agreement that the assessment of damages for a violation of international law (except in rare cases involving the "honor" or "dignity" of the complainant nation) is in no sense a penalty for the violation, but is merely for the purpose of making good the loss or injury sustained as a result of the violation. As Judge Edwin B. Parker said in the *Lusitania* claims:

> In our opinion, the words exemplary, vindictive, or punitive as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered; a judicially ascertained compensation for wrong. . . . Putting the inquiry only serves to illustrate how repugnant to the fundamental principles of international law is the idea that this Commission should treat as justicable the question as to what penalty should be assessed against Germany as punishment for its alleged wrongdoing.[45]

In other words, imposing a liability on a state to pay a sum of money or do some other act as a consequence of a violation of international law is merely to make good the

loss sustained, so far as that may be possible. As Eagleton expresses it:

> When an internationally illegal act has been committed, it is incumbent upon the injuring state chargeable therewith to restore the situation exactly to its former state; or, if this is impossible, to substitute in some manner, and to such an extent, as will be considered to have repaired the injury.[46]

There is not in this traditional notion of the nature of damages any idea that the purpose of fixing damages in a particular case may be to induce the delinquent state or other states to act in a different manner in the future. It seems to be wholly a question of making good the loss sustained by the injured individuals.

As a matter of fact (as has been repeatedly pointed out above), it is very difficult, if not impossible, to think intelligently about whether an award in damages should be decreed against a state without at the same time thinking of the effect of the decision upon the future conduct, both of that state and of states in general. To decide that an award should be decreed is the same thing as deciding that the respondent state is internationally responsible in the premises, and one cannot do this intelligently without some consideration of the purpose which the notion of international responsibility is designed to achieve. As already indicated, this purpose seems to be directly concerned with the idea of inducing nations to maintain within their borders the minimum conditions necessary for the continuance of international economic and social intercourse in the accustomed manner and under the system approved by the leading elements of the international community. To cause nations to pay pecuniary damages for failure to do so is one of the principal means of accomplishing this purpose. Such payment is a disagreeable consequence which nations are ordinarily very anxious to avoid.

One might, of course, do this openly by instituting a system of fines, the amount in each case to be determined by the nature of the delinquency, without particular reference to the amount of pecuniary loss or injury sustained by the

individual alien involved in the act. However, while this would doubtless serve to accomplish the same purpose, it would be repugnant to the traditional notion that sovereign states should not be punished by other sovereign states for their acts.

Along with this more or less hidden purpose of inducing nations to mend their ways, there is also undoubtedly present the purpose of reparation to an individual who has sustained a loss or injury, the risk of which he should not have been called upon to undergo as a member of the community. By repairing such losses, so far as possible, through pecuniary awards, the existing system of economic and social relationships is enabled to go on, in spite of the happening of injuries of this kind. This is merely a practical application of the notion of risk allocation in a community where acts incompatible with the continuance of normal community life are bound to take place.

These two purposes seem to be combined in the determination of the measure of damages for internationally illegal acts; that is to say, the delinquent nation is made to pay pecuniary damages as a method of discouraging the repetition of the act: the damages are measured by the pecuniary loss sustained by the foreigners concerned, and are paid over to them as compensation for their losses. Of course it is not meant to say that these purposes are always consciously perceived by deciding agencies. Usually they act intuitively in the matter, and very often they get into difficulties because of failure to visualize with any great precision what they are trying to do. This is clearly brought out in a series of recent decisions by the United States-Mexican General Claims Commission that reveal the existing confusion on the subject.

The question of measure of damages came up for lengthy consideration by that Commission in connection with a series of cases dealing with the alleged failure of Mexican authorities to punish the perpetrators of certain crimes against Americans in Mexico. As stated above, it has always been the custom to deal with these cases under the heading of "denial of justice" (in the narrow meaning of the term),

and to assume that such failure to prosecute criminals was a failure to render justice to the victims of the crimes. It has, furthermore, always been assumed, apparently without much conscious thought on the subject, that the proper measure of damages for such denial of justice was the injury or loss arising out of the *original crime,* even though there was no allegation that the state had been in any way at fault in failing to prevent the crime in the first place.

In the case of *Laura M. B. Janes,* the majority of the Commission became greatly troubled by the traditional view of the matter. This claim grew out of the killing of one Byron Everett Janes, an American mining superintendent in Mexico, by a Mexican employee of the mine, whom Janes had discharged. There was no allegation that the Mexican Government or its police officials were at fault in failing to prevent the crime. The sole basis of the claim was the alleged failure of the Mexican officials to be diligent in apprehending and prosecuting the criminal. The Government of the United States, in accordance with the usual practice in such cases, filed a claim for damages arising out of the *original crime,* i. e., the pecuniary losses alleged to have been sustained by the heirs and assigns of Janes as a result of his death.

In its decision on this case, the Commission found that there had been a lack of due diligence on the part of the Mexican officials in apprehending the murderer of Janes, and hence that the Mexican Government was liable under international law to pay damages to the Government of the United States. But when it came to decide upon the measure of these damages, the majority of the Commission found themselves unable to accept the traditional theory that this measure should be the losses arising from the original crime. The difficulty was that the wrong committed by the Mexican Government, for which it was internationally responsible, was not the original crime itself, but the subsequent failure to apprehend and punish the criminal. Why, then, asked the majority, should the Mexican Government be held liable to make good losses flowing from an act for which it was in no sense to blame?

Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State, so far from having transgressed its own penal code (which perhaps not even is applicable to it), has transgressed a provision of international law as to State duties.[47]

From this premise the majority of the Commission argued that the damage resulting from the Government's violation of its international duties was not the damage caused to Jane's relatives by his death, but " the damage resulting from the non-punishment of the murderer."

When it came to measuring these damages, however, the majority experienced considerable difficulty. They assumed in the traditional manner that the purpose of the proceedings was merely to make good the material loss sustained by American citizens as a result of the delinquency of the Mexican Government, but it was not easy to say just what, if any, material losses the relatives of Janes had sustained as a result of the failure to prosecute the murderer of Janes. At first the majority suggested that these were of two kinds: (1) " indignant neglect," and (2) the loss of the opportunity of subjecting the murderer to a civil suit in the Mexican courts for the pecuniary damages he had caused. This second ground was not pressed, however, since it was realized that the murderer was a poor man, and the relatives could not have obtained any reparation from him in a civil suit, even though he had been apprehended. In fixing the damages, the majority confined itself to the " individual grief " of the relatives (not as a result of Jane's death, but of the failure of the state to prosecute the culprit), as well as their feeling of " mistrust and lack of safety " resulting from the Government's attitude. For this damage, the majority of the Commission held that the Mexican Government should pay the amount of $12,000, without interest, " as

satisfaction for the personal damage caused the claimants [i. e., Janes's surviving relatives] by the nonapprehension and nonpunishment of the murderer of Janes." [48]

Now it must be obvious that the real explanation for the award is not to be found simply in this reputed desire of the majority to make good the material injury sustained by Janes's relatives as a result of the failure to punish the murderer of Janes. No such injury was either alleged or proved to have been sustained by the claimants. No one knows whether they felt any particular " grief " at the failure of the Government to prosecute the culprit, or any " mistrust and lack of safety " because of the Government's attitude, especially since it appears that they were residing in the United States at the time and had no intention of going to Mexico themselves. Certainly it would be difficult, if not impossible, to measure such feelings in terms of money. Clearly they suffered no pecuniary loss because of the Government's conduct in the matter of the prosecution, and the assumption of mental distress on their part is quite too unsubstantial to support an award of $12,000, purely as compensation for losses sustained. Suppose Janes had left no relatives who would be apt to have any feelings in the matter. Would the Mexican Government have been relieved from any responsibility for its failure to prosecute the murderer of an American citizen? [49]

Obviously this assumed mental distress was not the thing that led the majority of the Commission to the conclusion that the Mexican Government should pay a money award in this case. It served merely as a convenient peg on which to hang the award after the decision to make it had been reached on other grounds. The majority did not like the customary peg provided for this purpose, i. e., the damages flowing from the original crime, and so they substituted the only other one they could think of at the time, an assumed mental distress on the part of Janes's relatives, which they valued at the high price of $12,000, and for which no claim had been made at all.

The underlying purpose of the award was clearly not to

make good some fancied loss sustained by the relatives as a result of the failure to prosecute. In spite of the usual assumption to the contrary, such prosecution of crimes is not undertaken on behalf of the relatives of the deceased, but on behalf of the community at large; it is not primarily for the purpose of rendering "justice" to the victim, but to aid in the prevention of future crimes. The purpose of the award in this case was to express disapproval of the actions of the Mexican Government in failing to fulfill this function of prevention of crimes by diligent prosecution of those who commit them. It was in the nature of a penalty imposed on the Government for being derelict in its duties, not an effort merely to repair a material loss sustained by private individuals.

Even the amount of the award was clearly measured, not by the extent of the loss, if any, but by the extent of the delinquency of the Government. The majority admits this in their argument that the proposed measure of damages would allow the taking into account of the extent of the Government's delinquency, which would not have been possible under the old rule measuring the liability by the losses arising from the original crime. Thus the opinion of the majority states as follows:

> One among the advantages of severing the Government's dereliction of duty from the individual's crime is in that it grants an opportunity to take into account several shades of denial of justice, more serious ones and lighter ones (no prosecution at all; prosecution and release; prosecution and light punishment; prosecution, punishment, and pardon), whereas the old system operates automatically and allows for the numerous forms of such a denial one amount only, that of full and total reparation.[50]

This is a frank admission that the chief matter of interest in fixing the amount of damages to be paid in such cases is the extent of the delinquency of the government, rather than the extent of the material loss sustained by the individuals. This being the case, it seems pointless to insist, as most authorities do, that the underlying purpose of establishing international responsibility is merely to make reparation to

private individuals suffering losses, and not to impose a penalty on the state as an inducement to it and to other states to avoid a similar situation in the future.

The American Commissioner, Mr. Fred K. Nielsen, while concurring in the decision of the majority, was unable to accept the rather naïve measure of damages proposed by the majority. Mr. Nielsen preferred instead the old theory that the measure of damages was the extent of the losses flowing from the original crime of the individual. He approved of the argument made by the Government of the United States that responsibility rested upon the state for these losses "because by its failure to act it condones and ratifies the wrongful act, thereby making the act its own." [51] He argued that "there is no violence to logic and no distortion of the proper meaning of the word 'condone' in saying that a nation condones a wrong committed by individuals when it fails to take action to punish the wrongdoing." [52] In this he is perfectly right. At the same time, had it been desired to reach a different decision in the case, it would likewise have done no violence to logic to say that the state could only be held responsible for its own misdeeds, and that it could not be held liable to make good losses which took place through no fault of its own. Condonation, although often advanced as an assertion of fact, is in most cases merely a useful assumption or fiction for the purpose of tying up the responsibility of the state with the losses flowing out of the original crime. Thus according to the majority opinion:

> A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one of nonrepression.[53]

Mr. Nielsen likewise seems to admit that the purpose of assessing damages in these cases is not entirely that of repairing the losses sustained by individuals. Thus he states as follows:

> The degree of fault attributable to a nation will, of course, depend upon the facts of each given case. A community protects itself

against crime by police measures to prevent offenses against the law and by appropriate measures to punish wrongdoing. The prevalence of crime has often been ascribed to lax police measures and to a dilatory and ineffective administration of criminal jurisprudence resulting in the failure to apprehend criminals, in inadequate punishment, or in no punishment at all.[54]

This statement recognizes that punishment of criminals is not primarily for the purpose of doing "justice" to the injured individual, but is to discourage crime in general. In other words, the reason why a state is found liable to pay damages is because it has failed in this function of preventing crimes, not merely because a private individual may have suffered injury or mental distress by reason of a failure to punish a criminal in a particular case.[55]

The same Commission had to pass on the question of measure of damages for failure to prosecute in cases involving property losses. The Mecham case, for example, involved a robbery of a store in Mexico owned and operated by an American, and a subsequent failure of the Mexican authorities to apprehend and punish the robbers. As in the Janes case, there was here no allegation that there had been any failure of due diligence on the part of the Mexican Government in preventing the robbery. The whole question of international responsibility turned upon the alleged failure to use diligence in apprehending and punishing the criminals.

In fixing the measure of damages in this case, the majority of the Commission appeared to follow the lead of the majority in the Janes case and to look to the losses arising out of the delinquency of the Mexican Government, rather than to those flowing from the original crime. It appears that, in the course of the robbery, some property was destroyed and other property carried off by the robbers. Although claim was made for the full property loss sustained, the Commission ruled that the Mexican Government was only liable for that part of the property which might have been recovered if the robbers had been apprehended, but not for the property that had been destroyed and hence could not have been recovered, even though the authorities had used due diligence.

But the Commission did not deem it necessary in this case to assume the existence of any mental distress on the part of the injured foreigners; any "distrust and lack of safety" resulting from the failure of the Government to prosecute the criminals, even though there was perhaps a better ground here for assuming such feelings, since the injured foreigner was an established storekeeper who intended to go on with his business in the same location.[56] It was not necessary, however, to resort to any such basis of measuring damages in this case, as there was a definite property loss to which an award against the Mexican Government could be tied.[57]

The rule adopted in the Mecham case in regard to the measure of damages for property losses leads to some interesting questions. Suppose the bandits had destroyed *all* of the property and had carried none of it off? Would there have been no liability on the part of the Mexican Government for the subsequent failure of prosecution of the robbers, merely because full and adequate prosecution could not have resulted in the recovery of any of the property? Suppose it had been a case of arson? From the rule laid down in the Mecham case, one might assume that there could be no international responsibility in such cases, since there could not have been any recovery of the property, no matter how diligent the prosecution had been. However, it is safe to predict that, in such cases, the deciding agency would find some measure of damages by which to inflict a pecuniary penalty on the delinquent government, even though it had to fall back on mental distress, as in the Janes case.

The next case in which the question of measure of damages for failure of prosecution arose was in connection with the robbery of the pay-roll of an American oil company at Tampico, Mexico. Three separate claims were brought by the United States before the Commission, arising out of this event: (1) that on behalf of Elvira Almaguer for the death of her husband, Toribio Almaguer, an employee of the oil company who was killed in the course of the robbery,[58] (2) that on behalf of Frank L. Clark, also an employee of the

company, for personal injuries received during the robbery; [59] and (3) that on behalf of the Atlantic Gulf Oil Company for the loss of the pay-roll.[60] The Commission found in the first case that there had been no lack of due diligence on the part of the Mexican Government in failing to prevent the robbery, but that there had been a certain (although not a complete) lack of diligence in apprehending and punishing the robbers. The question then arose as to the measure of damages to be applied in these three situations.

In fixing damages in the Almaguer case (where claim was made for damages resulting from the death of Almaguer) the Commission, in a unanimous decision, expressly referred to the majority opinion in the Janes case as authority for the view that damages should be fixed in accordance with the degree of delinquency of the Government. The Commission said nothing whatever about the losses flowing from Almaguer's death, nor even about any assumed losses resulting from mental distress or lack of safety following upon the Government's failure to prosecute. It found that there had been culpable negligence in the course of the criminal proceedings, but it held that, since there had been some prosecution, an award of $7,000 was sufficient.

In other words, the award in this case was frankly based directly upon the degree of delinquency shown by the Government authorities in failing to prosecute, and not upon any real or assumed losses sustained by the heirs of the deceased. Since some steps had been taken toward prosecution of the criminals in this case, the amount of the award was less by $5,000 than that rendered in the Janes case. This clearly indicates the unconscious penal nature of the awards in these cases, since the Commission here does not even pretend that it is making good the losses sustained by an alien; rather it is assessing an indemnity against the delinquent government in direct proportion to the seriousness of the delinquency.

In the Clark claim, on the other hand, the claimant was able to show a definite material loss resulting from the original crime, through impairment of his earning capacity

by reason of an injury to his arm. In fixing the amount of damages in this case, the Commission apparently took into account, not only the extent of the delinquency of the Mexican Government in the failure to prosecute, but also the extent of the injury sustained by Clark in the course of the robbery itself, for only $5,000 was allowed in this case, although the Government delinquency had been the same as in the Almaguer case. After referring to the nature of the wound suffered by Clark, the Commission stated that "taking into account the nature of the international delinquency imputable to Mexico in the instant case, the claimant should be awarded the amount of $5,000." As in the Almaguer claim, there was no mention of any possible mental suffering by the claimant as a result of the failure of the Government to prosecute the criminals. The only specific injury to the claimant mentioned was that flowing out of the original crime itself, for which the Government was not responsible, and to this extent the Commission seemed to depart from the rule of the measure of damages laid down by it in the Janes case. Possibly this was because the Commission was here faced with a definite, measurable loss resulting from the original crime, and reverted to the old practice without thinking.

At the time of writing, no decision has been rendered on the claim of the Atlantic Gulf Oil Company for the loss of the pay-roll. On the basis of its previous decisions, one may imagine that the Commission will experience considerable difficulty in arriving at a suitable measure of damages in this case. It has already held the Mexican Government responsible in the premises by reason of the inadequate prosecution of the persons responsible for the crime. Yet, under the prior cases, if a recovery is to be had in behalf of the oil company, it will be necessary to show, either (1) that all or part of the pay-roll would have been recoverable had the prosecution of the criminals been more diligent, or (2) that the company suffered mental distress or feelings of "distrust and lack of safety" as a result of the inadequate prosecution. The first of these seems impossible to prove

as a matter of fact, and the second is out of the question since the corporation, being an artificial person, could not undergo mental suffering. Hence if the Commission should seek to follow the rule set forth in the Janes and Mecham cases, it would apparently have to release the Mexican Government from responsibility in this case, although that Government was held responsible for the same set of facts in the Almaguer and Clark cases. However, as the company suffered a definite measurable loss from the original crime, it is quite possible that the Commission might do what it did in the Clark claim and revert to the former practice of measuring damages for a failure to prosecute by the losses arising out of the original crime.

This series of cases illustrates as well as anything could the logical difficulties involved in an attempt to develop a system of fixed rules of liability based on the *culpa* doctrine. In the first place, the notion of fault assumes a preexisting standard of right and wrong conduct which is generally accepted throughout the community, and which can be more or less automatically applied to individual cases. In the second place, basing damages on the ground of fault is logically incompatible with the notion that such damages are compensatory, i. e., that they are merely for the purpose of making good losses sustained by private individuals as a result of the wrongful action of a government. One cannot, at one and the same time, measure losses by the degree of fault shown by the state and by the extent of the losses sustained by private individuals. One has to choose between these two measures, and an intelligent choice is not possible without some idea of the underlying purposes that are sought to be achieved by the legal device of international responsibility.

The conventional theory that the establishment of liability is for the purpose of making good losses sustained by individual foreigners through the wrongful acts of governments would, in practice, give little or no room for a finding of liability in a case of failure to prosecute. Since, in the average case, no material losses can be shown to have been

sustained by private individuals as a result of such failure, a strict application of the compensatory theory would seem to eliminate the notion of international responsibility in these cases, no matter how flagrant the misconduct of the delinquent government may have been.

The feeling of distrust and lack of safety advanced as a basis of material loss in the Janes case is patently a fiction, and is not in itself the reason for holding that responsibility exists. Likewise, the old " condonement " theory is, in most cases, a fiction and does not reveal the real reasons for establishing responsibility; it merely provides a useful means of reconciling such responsibility with existing legal doctrine. If the purpose of the device of responsibility were merely that of repairing actual losses and nothing more, one would not resort to fictions in order to find a measure of damages; one would simply conclude that, since there were no pecuniary losses to be repaired, no international responsibility existed. The fact that this is not done, and that various fictions are resorted to in an effort to show material loss as a measure of liability indicates clearly that some purpose exists for the establishment of responsibility in these cases other than mere reparation. This is also shown by the tendency to measure damages in accordance with the degree of governmental delinquency shown in the failure to prosecute, for, if the purpose were merely that of compensation for actual losses, the degree of delinquency would seem to have no particular bearing on the matter.

What is the underlying purpose of the practice of holding a state internationally responsible in cases of failure to prosecute persons who commit crimes against aliens? Obviously it is to express disapproval of the conduct of the delinquent government and to discourage similar action in the future; not merely to do " justice " to individual foreigners. As already pointed out, criminal prosecution is not (at least according to modern ideas) undertaken for the purpose of providing the victim of the crime with a kind of vicarious revenge, but of preventing other crimes and maintaining order and security so that normal community life may go

on undisturbed. Failure to prosecute is a failure to fulfill this necessary police function, and, if permitted to happen generally without disapproval of the community at large, might very well lead to conditions of disorder and insecurity that would render impossible the carrying on of normal international social and economic relationships. Hence the finding of responsibility and the fixing of damages in such cases seems at bottom to be largely prophylactic in nature.

This has in fact been admitted by two eminent authorities, Borchard and Brierly, in commenting upon the decision in the Janes case. Thus Borchard has stated as follows:

> The Commission's theory is useful, however, because it is analytically correct and because it recognizes various degrees of governmental delinquency, from a continuous and notorious failure to punish any crime, the assumed equivalent of failure, after opportunity, to prevent, down to occasional and slight lapses, such as slowness of prosecution, inadequacy of punishment, etc. The difficulty will always remain of measuring or computing such degrees of delinquency or the 'individual grief' which they cause. That must, in any event, be arbitrary. But the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will, if possible, be prevented in the future.[61]

And Professor Brierly has remarked that:

> As the law is now administered, what Professsor Borchard calls the 'inarticulate purpose' of the damages in such cases is often in fact penal, and while it may not be expedient in present circumstances to make this purpose 'articulate' in the theory of the law, it would be neither just nor expedient to try to exclude it. Such an attempt would either be instinctively defeated by the action of arbitral tribunals, and in that case would only introduce an unreality into the theory of the law; or it would defeat its own purpose by denying a legitimate satisfaction to complainant states, and thus discouraging the submission of claims to arbitral settlement.[62]

If this purpose is frankly admitted, then it becomes possible to devise an intelligible test for deciding when international responsibility exists for failure to prosecute, and

also a suitable measure of damages for such responsibility. Again one may look upon the problem as a matter of risk-allocation, rather than of penalizing wrongful conduct. Where a failure to prosecute is such that, if generalized, it would lead to conditions unfavorable to the customary course of intercommunity relationships, then international responsibility would be engaged. This does not call for full prosecution in every case of a crime against an alien, nor, on the other hand, does it leave the standard of due diligence in prosecution to be determined by each state for itself. Furthermore, it allows the measure of damages to be graded in accordance with the delinquency, which means in effect that they would be fixed in accordance with the purpose to be achieved, and would not depend upon some real or fancied material loss to a private individual as a result of the failure to prosecute.

CHAPTER VIII

LAW AND INTERNATIONAL RELATIONS

Let us now summarize briefly the results of the foregoing analysis of the institution of diplomatic protection, and see what implications these results have for our customary ways of thinking, not only about the specific subject of protection, but also about the larger subject of law as a means of settling international disputes. Our findings may be conveniently dealt with from the standpoint of their bearing, (a) upon our knowledge of the practical operation of the legal process in international affairs, and (b) upon the development of a rational science of international law.

The Practical Operation of the Legal Process

We have seen that the conventional diagnosis of the difficulties that have heretofore beset us in the field of protection of nationals in foreign countries is both superficial and inadequate. To the extent that it attributes these difficulties to the reluctance of governments to observe international law when their material interests are at stake, it appears to be based in large measure upon a false conception of the nature of the legal process. To the extent that it looks to the enlargement and clarification of the existing body of legal rules and principles as the way out of our difficulties, it seems to overestimate the part that such rules play in the reaching of decisions on contentious issues.

According to the conventional view, the legal process, in its ideal form, provides us with an impersonal, logical method of arriving at answers to the types of questions that arise within the scope of the legal system. The resort to considerations other than existing rules and principles of law is regarded as unnecessary and improper. Personal value judgments and the consideration of future consequences in individual cases can presumably be eliminated. Everything

necessary to the decision of a particular issue is supposed to be in existence before the issue itself arises, and all that is necessary is to apply these preexisting realities by logical processes.

But if our foregoing analysis is in any degree correct, it appears that this conventional view of the nature of the legal process must be in large part abandoned. It is perfectly true that, under certain restricted conditions, it is possible, by the impersonal processes of logic, to derive concrete answers to specific problems from general rules and principles of law. But these conditions are seldom found to exist in the types of situations that lead to controversies. In these cases we are invariably faced with a choice between competing courses of action, each one of which is capable of being logically reconciled with existing legal doctrine. Into the making of this choice, some factors other than the logical application of existing rules and principles of law must enter.

In like manner, the notion that, by enlarging and clarifying the existing body of legal rules and principles, we can correspondingly reduce the occasions for controversy in this field seems to be open to serious question. Present efforts toward codification undoubtedly have utility in improving the formulation of that part of existing practice that is capable of being expressed in clear and simple rules, but these efforts do not and cannot reach the source of our difficulties, which lies in the constant stream of new situations that are not identical with previously decided cases. It is these cases that cause most of our controversies, and no amount of codification along the present lines will eliminate them.

In Chapter VII we considered more specifically the most recent formulations of the existing legal rules and principles governing diplomatic protection, with a view to discovering to what extent this body of laws did in fact provide us with workable rules and standards of conduct for regulating future action in this field. We saw that this body of laws contains but a handful of clear-cut rules that might be

applied to particular situations without the consideration of future consequences and the exercise of personal judgment, based on some scheme of social values.

The conflicts of interest that arise in this field are of such a nature that, for the most part, it is not possible to formulate rules and standards of precise and unambiguous meaning that can be automatically applied to their solution. The effort to do so merely results in diverting attention away from the factors that actually determine the outcome of particular issues, and in driving into the realm of intuition, or of uninformed speculation, the choice between rival legal precepts that must be made in every new case. The fact that it is almost always possible to express the outcome in terms of some existing rule or principle creates the illusion that this rule or principle is the real determining factor, whereas it may in fact have had little or no controlling influence upon the choice of alternative courses of action.

Once these facts are realized, it becomes possible to take stock of the situation, and to direct attention to the crucial problem involved in the application of the legal process to new cases. That problem is, in essence, to devise useful guides to the making of intelligent choices between the rival courses of action that are presented by the existing body of legal rules and principles.

This involves, first of all, a consideration of the underlying purpose of having a body of laws on the subject at all. For one cannot make an intelligent choice between alternative ways of acting without knowing what goal one is trying to reach. Furthermore, one must have some basis of knowledge on which to select that course of action which is most likely to lead to the desired goal. In other words, the question inevitably reduces itself to one of means and ends. Questions of means are answered by empirical knowledge, not merely by formal deduction from general principles.

As suggested above, the underlying purpose of the institution of diplomatic protection seems to be to aid in the maintenance of the conditions of order and security that are essential for the carrying on of normal social and economic

relations across national boundaries. It appears to be the general opinion that such intercourse enriches human life and is a desirable thing from the standpoint of the welfare of the community at large, and that it should be fostered and safeguarded through the device of legal control, even though this may at times restrict the complete independence of action of individual members of the international community. With this purpose in mind, it is possible to devise a system of standards or criteria of judgment that can be effectively applied to new situations.

By looking at the problem in this manner, one is released from the futile effort of trying to find some fixed *a priori* basis of judgment of right and wrong in the conduct of nations. One avoids the unworkable concept of *culpa* as a basis of international responsibility, as well as the unpalatable notion of fixing penalties on sovereign nations for wrongdoing. Instead, one may look upon the institution of diplomatic protection as a device for allocating the risks of injuries and losses that are necessarily associated with the normal conduct of international trade and intercourse. Furthermore, instead of looking for some absolute and universal conception of "justice" as a basis of this legal institution, one may look upon justice in this sense as being whatever the institution can do to aid in maintaining and improving conditions that make for a desirable intercommunity life.

This assumes, of course, that the members of the international community have, in some degree, a common interest in the carrying on of international trade and intercourse in the customary manner. Without such a common interest, a system of laws on the subject would be superfluous and futile, since the function of legal institutions in any community is to foster the conditions necessary for the preservation and advancement of the common interests of its members. This does not mean, of course, that all members of the international community must have an equal interest in trade and industry, or any other specific manifestation

of international life. Their common interest may lie merely in the preservation of peaceful relations among nations.

This view takes account of the fact that, regardless of the attitudes and actions of individual governments, there is necessarily associated with the existing set of mutual relationships some risk of injuries and losses to individual foreigners. A certain amount of these can occur without unduly disturbing normal trade and intercourse; and the risk of these can be absorbed by the individuals participating in such activities. But there are others which, if permitted to occur without restriction, would disrupt the established pattern of social and economic relationships; and the risk of these should be borne by the state. The law, in other words, would seek to distribute the risks where they can best be borne, with a view to creating and maintaining the minimum conditions necessary for the continuance of mutually profitable intercommunity relationships.

The standards of conduct thus arrived at are not, to be sure, fixed and certain tests which can be automatically applied to new cases by everybody with assurance of achieving the same results. They call in many instances for a forecasting of future events and a perception of social needs and desires. But, if what has been said above is correct, such forecasting and exercise of value judgments are unavoidable in any intelligent solution of novel legal issues. What the present view makes abundantly clear is the necessity of carrying out this process in an open, conscious and informed manner, instead of intuitively and surreptitiously, as has been necessary under the traditional view. By so doing, we would vastly improve the chances of obtaining intelligent decisions in line with the underlying purposes of the institution of diplomatic protection. We would likewise greatly increase the certainty and predictability of the operation of the legal process, since we would reduce the part now played in that process by unknown, subconscious and unforeseeable factors, and would substitute therefor conscious and informed judgments.

In place of the customary diagnosis, then, the foregoing

analysis indicates certain definite methods of procedure that contain fruitful possibilities for improving the application of law to the realm of international affairs.

In the first place, we need more accurate knowledge of how the conventional process works in actual operation, and of the practical results which it brings. We need to know more about its capacities and limitations in dealing with the types of disputes that arise in international life. In this respect there has prevailed a tendency to proceed on assumptions that turn out on inspection to be unsound. As indicated in Chapters V and VI, there is a whole field of phenomena which calls for careful investigation before we can begin to deal wisely with existing problems of legal administration. This is largely a task for the empirical branch of legal science, although empirical investigations in this field must go hand in hand with a more precise analysis than we now possess of the nature and functions of the legal process as a social institution.

It is true that such inquiry brings us to some extent within the difficult realm of human behavior, and we are here faced with the fact that our knowledge of human motives is rudimentary. However, while more adequate methods of obtaining reliable scientific data in this field are being developed, we can do much through additions to our common-sense knowledge of human conduct. It would be absurd to take the position that, because we do not now possess exact scientific knowledge of human behavior in complex situations, we must continue to deal with our problems on the basis of a demonstrably unsound conception of the operation of the legal process.

Again, it is essential that those actually responsible for the making of decisions on contentious issues should have a clearer conception of what they are trying to do, and of the rôle that legal rules and principles can play in aiding them to reach their decisions. They must become conscious of the part that other factors now play in the disposition of contentious issues. They must be induced to consider these other factors openly and on the basis of the best information

obtainable. They must be more concerned with the considerations that lead to the decisions themselves, and less with the logical arguments by which those decisions may be reconciled with existing legal doctrine. They must, in other words, have a better knowledge than they now have of where to look for their answers, and of the conditions that make for the reaching of intelligent decisions.

By some people this will be looked upon with considerable misgiving. They will insist upon the necessity of preserving the conception, at least in the minds of the people at large, that the legal process is a wholly impersonal and inevitable one, that the law itself is fixed and definite for every situation arising within its scope, and that judges and other deciding agencies do not make the law but merely discover and interpret it. They fear that, to deny this conception in new cases and to reveal the necessity of individual choices between competing legal precepts, will destroy the respect for law among the people at large.

As a matter of fact, the opposite effect may be predicted with some confidence, at least in the long run. Certainly it would be difficult to maintain that the traditional conception of the impersonal nature of law has in fact gained among the people at large that respect for, and confidence in, the legal process in international affairs which we are told we must preserve. On the contrary, public confidence in the regulative power of international law is at a low ebb. Even if that were not the case, it is extremely doubtful whether a respect based on a misconception is a strong foundation on which to build a social institution. Discovery of the fallacy is bound to come, and to be followed by disillusionment and skepticism.

Again, some people will argue that the admission of human judgment in the deciding of legal issues would open the door to personal prejudice, selfish motives, bias and ignorance. They will fear that, if this were permitted, cases would be decided individually as isolated events rather than as members of a class; there would be no security in legal rights; people would never know how particular issues would

be settled; all members of the community would not be treated alike; judges would be under pressure to decide cases in favor of the strong rather than the weak.

The answer to this objection must by now be clear. It is that, by disguising the fact that individual judgment enters into decisions in contentious cases, we do not eliminate the evils associated with unrestricted human judgment; we encourage them. These evils do not flow from individual judgment *per se,* but from such judgment that is not directed toward desirable ends. So long as such judgment operates unconsciously or surreptitiously, we have no means of controlling it or directing it into channels that intelligently favor the public interest. So long as it is unrecognized, it must remain haphazard and unpredictable. By recognizing its inevitability and making it a conscious process, we make possible the development of useful guides to intelligent action.

What has been said above is not a proposal for unrestrained freedom of choice for deciding agencies, or for the decision of individual cases on their merits as isolated events. Quite the contrary, it is an assertion that, too often, that is precisely what happens under the conventional conception of the legal process. Our point here is that, since individual choices must inevitably be made, they should be conscious choices, directed toward approved social ends, and guided by the best available knowledge. Respect among the people at large for the work of courts of justice and other deciding agencies will ultimately be based on the wisdom and social utility of the work of these institutions, not on a carefully fostered illusion that these deciding agencies really exercise no choice. One can improve the chances of obtaining wise decisions, and hence of gaining and holding respect for the legal process, by making the procedure of selection a conscious and informed one, rather than by ignoring it or denying that it takes place.

In the third place, a new and important field of study is opened up for legal and political scientists. Heretofore, the attention of scholars has been almost exclusively centered on the single factor of legal doctrine. It may be readily con-

ceded that this work is vital and must be continued. But, if our analysis is correct, there is an equally important place for the development of a body of empirical knowledge about the subject. The crucial problems involved in the disposition of novel cases are not those of formal logical deduction but of means to the attainment of practical ends. The question in these cases, in other words, can be stated in the form: Which of two or more possible courses of action (each of which can be justified under existing legal doctrine) will be most likely to lead to the particular end which the community seems to have agreed upon as a desirable one? Such problems of means-end relationships can be wisely solved only on the basis of reliable empirical knowledge. Deciding agencies must, of course, first have some conception of the particular ends to be achieved. They must also have some basis on which to forecast the probable results of deciding issues one way or another. Those who legislate must have similar knowledge, unless they proceed wholly on the basis of trial and error.

At the present time we leave the answering of such questions very largely to individual intuition or common-sense experience. This puts a heavy premium upon the wisdom and experience of individual judges and legislators. There is no reason at all why legal scientists could not aid enormously in the reaching of sound decisions by building up a body of knowledge of means-end relationships in the field of phenomena in which the legal process operates. They could direct their studies toward determining the probable social results of following different courses of action in particular situations. In this manner they could be of the greatest assistance to judges and other government officials who must now make decisions too often on the basis of pure guesswork, if they are conscious about the matter at all.

International Law as a Rational Science

The foregoing analysis likewise indicates the source of many of the difficulties which now harrass the analytical jurist in seeking to develop a rational science of interna-

tional law. The need for such a science can scarcely be denied. It is fully as important for the successful operation of the legal institution as is the development of a body of empirical knowledge as outlined above. Yet, in spite of the sustained and able efforts of scholars in this direction over a long period of years, it can be said with some confidence that we do not today possess a rational science of international law in any very useful meaning of the term. What we have is, at most, compilations of rules and principles of law drawn from past practice and arranged in some order according to subject matter.

Now a rational science of international law cannot be built up out of the rules and principles of law alone. As these are found in practice, they are unrelated, inconsistent and ambiguous. A rational science, on the other hand, must consist of propositions which are logically related to each other, and which form a systematic body of thought. Moreover, rules and principles, being generalizations, are made up of variable terms to which some definite values must be assigned in applying them to particular situations. Hence a rational system of law must have a logical base in something other than the rules and principles themselves.[1]

As indicated in Chapter VII, the present effort to define the underlying concepts of international law in terms of the rules and principles of law themselves results merely in circularity and confusion. Such a method provides us with no solid foundation on which a logically consistent system of propositions can be built. Before an intelligent sorting and ordering of existing heterogenous legal materials can take place, we need some wider basis upon which we can interpret the significance of these materials and determine their logical order.

Up to the present time, international jurisprudence has not developed any such logical base, and hence can scarcely be described as a rational science. It has sought its rational base within itself, in certain fundamental principles such as those dealing with the sovereignty and equality of nations. But these are themselves principles of international law and

hence cannot serve as a basis of their own interpretation. The effort to make them do so has merely led the jurists into a wearisome and futile debate about the origin of international obligations.

Furthermore, the rules and principles now making up the body of international law seem to be based less on actual judicial behavior than on statements made by deciding agencies in justification of their decisions. Hence, although these rules purport to be descriptive statements of past practice, they are not propositions about the manner in which deciding agencies have acted in particular situations but about the kind of arguments they have used in explanation of their actions. In addition, such systematic arrangement of these rules and principles as has taken place is largely on the basis of their particular subject matter, rather than in accordance with any wider generalizations in terms of which they could be interpreted. We find many inconsistencies and ambiguities among the existing rules and principles, but our thinking is not directed toward any possible solution of these difficulties.

Consider the conventional arrangement of the rules and principles of law governing diplomatic protection, as indicated in Chapter VII. The groupings adopted have grown up in a more or less haphazard way, determined sometimes by superficial logical analysis and sometimes by specific subject matter. Note, for example, the main headings: responsibility for acts of officials, responsibility for acts of private individuals, denial of justice, exhaustion of local remedies, mob violence, revolutionary damages, claims arising out of contract, etc. There is little or no logical relationship among these various subject matters; there is not even a common element running through them. One cannot proceed by logical analysis from one to the other. Rules in one group are often inconsistent with rules in another.

There is no single rational scheme which contains all of the existing propositions, nor is it possible to devise one simply in terms of these rules and principles themselves. Having no such underlying scheme, we are quite at a loss

how to resolve the inconsistencies now existing, or to clear up the ambiguity and vagueness of particular rules. Where the body of rules is incomplete, we have no rational guide toward filling the gap. The same thing is true of each of the other branches of international legal science, as well as of the subject taken as a whole.

Now international law is not an amorphous something, existing in space. It is a man-made instrument devised to achieve certain definite social ends. Hence the place to look for a suitable logical base for a rational science of international law is in the purposes or functions which the legal institution is designed to fulfill in present day international life. These functions can be revealed by systematic analysis of existing legal materials in their political, social and economic environment. Once we have arrived by this means at a rational foundation for a legal system, it then becomes possible to restate and rearrange in some logical order the body of rules and principles drawn from past practice. The base selected would give meaning and significance to the general precepts within our system, and would provide an intelligible guide for their interpretation in specific situations. It would likewise provide a means for resolving the inconsistencies and ambiguities that appear among the rules themselves.

The first step, then, is in making articulate the ends of the legal institution, instead of taking them more or less for granted as we now do. The second is in restating and rearranging the rules and principles drawn from past practice in line with these ends. The legal system would then be seen in its proper rôle as a practical device for fostering and safeguarding the common interests of the international community.

Making the ends of the law articulate is not, of course, the same thing as establishing their validity as useful or desirable ends. Criticism and evaluation of ends is primarily a matter for ethics to undertake. But we do not need to wait upon the outcome of such discussion. What we need is a suitable foundation upon which can be erected a logical

system of legal propositions expressing current practice and revealing current social needs and desires.

The positivist may object that, in consciously selecting a rational base for our logical system of legal propositions, we are concerning ourselves with what the law ought to be, rather than with what it is. He might readily concede the propriety of consideration of ends in the making of new law through general treaties, but would deny that it had a place in the recording and systematizing of existing customary law. However, in the light of what has been said above, the answer to this objection should be clear.

In the first place, the notion that it is possible to record the law as it "really exists," without the introduction of personal value judgments or selective processes, is no longer tenable. The mass of legal phenomena which the analytical jurist observes is undifferentiated, confused and inconsistent. In recording past practice, he is bound to select and interpret in the light of some scheme of values, however unconscious he may be of his acts. Furthermore, in stating his version of an existing rule of customary law, he implies that it *ought* to be observed. He cannot escape from this *ought* implication in formulating for future use his account of past practice. As between two possible interpretations of that practice, one leading to results which he would consider desirable and the other to results which he would not approve, he will invariably, albeit unconsciously, choose the former. But, under the present positivistic conception of the process of finding the law, our schemes of values remain largely inarticulate and unexamined. They serve us only unconsciously as a basis of choice between competing interpretations, and not at all as a rational base for erecting a logically coherent and consistent system of legal propositions.

Furthermore, under the traditional procedure, the formulation of rules from past practice is based more often upon the reasoning advanced in support of decisions than upon the decisions themselves. Hence the positivist can hardly maintain that his propositions are in fact accurate descriptions of past decisional behavior. Rather they may be merely

descriptions of the prevailing linguistic fashions for making decisions seem impersonal and inevitable.

We have briefly indicated in Chapter VII how a rational system may be developed for one particular branch of international law. By making articulate the purpose for which the institution of diplomatic protection seems to exist, we arrive at a workable basis for a logically consistent and coherent system of rules and principles on the subject. Furthermore, the subordinate propositions of law arrived at by logical deduction from this base are found in fact to be more in accord with past practice than is the existing set of formulations. This is because the former are more in harmony with the practical aims which deciding agencies seem to have been trying, consciously or unconsciously, to fulfill. Any formulation of past practice not in accord with those aims really has no place in the legal system anyway, no matter how many times it may have been advanced in justification of a particular way of deciding.

Thus, if we take as our starting point the premise that the aim of the institution of diplomatic protection is to preserve the minimum conditions necessary for the maintenance of international trade and intercourse, we find that these conditions are intimately related to the customary functions of political governments in the realm of national affairs. In other words, the conditions necessary for the carrying on of a mutually profitable international intercourse are nothing more than the minimum conditions required for a profitable domestic intercourse, if conducted in accordance with the prevailing economic system. These conditions are briefly: (1) the provision of police protection of life and property sufficient for the maintenance of normal community life; (2) the provision of a judicial system, adequate to the same purpose, for the settlement of disputes between individuals within the state, or between individuals and the government; (3) the maintenance of a system of laws for the safeguarding of personal and property rights; and (4) the administration of these laws in a manner compatible with the carrying on of established economic and social relationships.

Under these major headings can be subsumed all of the rules and principles drawn from past practice, as well as all of the additional precepts which might be found necessary to fulfill the aims of the institution.

For example, under (1) we would classify rules dealing with such subjects as the prevention of crimes against aliens and the apprehension and punishment of criminals, false arrest or imprisonment of aliens, mob violence, banditry, and revolutionary damages. Under (2) we would include the subjects now covered by the terms denial of justice, delay in judicial proceedings, exhaustion of local remedies, and related subjects. Under (3) we would place confiscatory legislation, burdensome fiscal measures, expropriations for public utility, etc. Under (4) we would group customs cases, ship seizures, forfeiture of concessions, contract and bond cases, etc.

It will be observed that these groupings are logically related to each other and to the system as a whole. Since the suggested system starts from a base that is outside the rules and principles themselves, we are provided with criteria for interpreting and applying individual rules in specific situations.[2] We likewise have an intelligible guide for the elimination of the logical ambiguities and inconsistencies that now infest the body of rules and principles as traditionally stated. None of these things is, or can be, achieved under the present method for developing a rational system of international law.

The purpose selected as the basis of this system is not chosen at random, but is the one that seems to have had the most pervasive influence upon the course of past decisions. Once this purpose is made articulate, it is quite possible, of course, that many people might disapprove of it as a valid aim of the legal institution. They might hold, for example, that the general good of the international community would best be served by allowing each individual nation to develop in its own way, regardless of whether or not this makes for conditions favorable to intercommunity intercourse. But this again involves a question of means-

end relationship, and can only be solved on the basis of empirical knowledge. For the purpose indicated is not an ultimate end, but only an intermediate one, and is, in its turn, a means to the further end of the general welfare of the international community.

In any case, the value of the method of procedure outlined above for the development of an international legal order in no sense depends upon the validity of any particular end that may be agreed upon for attaining the ultimate good of society. Without some immediate end in view, it is impossible to devise an effective legal order. For law and justice are not ends in themselves, but are merely instruments for working toward a larger end, which is the welfare of the community as a whole. What we require as a basis for a rational system of international law is an end that is at once broad enough to give unity to the diverse aspects of current practice, yet definite enough to give clear direction to our thinking.

It seems, then, that the development of an effective legal system in the international realm does not necessarily depend, as many people have supposed, upon the introduction of a new and higher moral order among nations in their dealings with each other. Neither must it await the establishment of a superior central force to compel recalcitrant nations to observe its precepts.

To the extent that common interests exist among the members of the international community, the stage is set for the development of a legal order. What is necessary is to make these common interests articulate, and to look upon international law simply as an instrument for fostering and safeguarding them. If the legal process is so operated that it regularly yields answers to current controversies which are seen to be intelligent and in keeping with the common interests of the members of the international community, no further sanction will be required in the average case.

What we need most at the moment is, first, clarification of the practical ends or common interests which the legal institution is designed to secure, and second, better knowledge of how the legal process can be made to serve these ends.

APPENDIX

RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

(Draft convention prepared by the Research in International Law of the Harvard Law School in anticipation of the First Conference on the Codification of International Law, The Hague, 1930.)

ARTICLE 1

A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its nationals.

ARTICLE 2

The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

ARTICLE 3

A state is not relieved of responsibility because an injury to an alien is attributable to one of its political subdivisions, regardless of the extent to which the national government, according to its constitution, has control of the subdivision. For the purposes of this article, a dominion, a colony, a dependency, a protectorate, or a community under mandate, which does not independently conduct its foreign relations, is to be assimilated to a political subdivision.

ARTICLE 4

A state has a duty to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law and treaties. In the event of emergencies temporarily disarranging its governmental organization, a state has a duty to use the means at its disposal for the performance of these obligations.

ARTICLE 5

A state has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals.

ARTICLE 6

A state is not ordinarily responsible (under a duty to make

reparation to another state) until the local remedies available to the injured alien have been exhausted.

ARTICLE 7

(a) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its higher authorities within the scope of the office or function of such authority, if the local remedies have been exhausted without adequate redress.

(b) A state is responsible if an injury to an alien results from the wrongful act or omission of one of its subordinate officers or employees within the scope of his office or function, if justice is denied to the injured alien, or if, without having given adequate redress to the injured alien, the state has failed to discipline the officer or employee.

ARTICLE 8

(a) A state is responsible if an injury to an alien results from its non-performance of a contractual obligation which it owes to the alien, if local remedies have been exhausted without adequate redress.

(b) A state is not responsible if an injury to an alien results from the non-performance of a contractual obligation which its political subdivision owes to an alien, apart from responsibility because of a denial of justice.

ARTICLE 9

A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.

ARTICLE 10

A state is responsible if an injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

ARTICLE 11

A state is responsible if an injury to an alien results from an act of an individual or from mob violence, if the state has failed

to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice.

ARTICLE 12

A state is responsible if an injury to an alien results from an act of insurgents, if the state has failed to use due diligence to prevent the injury and if local remedies have been exhausted without adequate redress for such failure.

ARTICLE 13

(a) In the event of an unsuccessful revolution, a state is not responsible when an injury to an alien results from an act of the revolutionists committed after their recognition as belligerents either by itself or by the state of which the alien is a national.

(b) In the event of a successful revolution, the state whose government is established thereby is responsible under Article 7, if an injury to an alien has resulted from a wrongful act or omission of the revolutionists committed at any time after the inception of the revolution.

ARTICLE 14

A state is responsible if an injury to an alien results from an act, committed within its territory, which is attributable to another state, only if it has failed to use due diligence to prevent such injury.

ARTICLE 15

(a) A state is responsible to another state which claims in behalf of one of its nationals only insofar as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another state which claims in behalf of one who is not its national only if

(1) the beneficiary has lost its nationality by operation of law, or

(2) the interest in the claim has passed from a national to the beneficiary by operation of law.

ARTICLE 16

(a) A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.

(b) A state is not relieved of responsibility if injury is sustained by a foreign corporation, or if a claim is made on behalf

of a foreign corporation, because one or more of the shareholders of such corporation possessed or possesses its nationality.

(c) A state is not relieved of responsibility as a consequence of any provision in its own law that an alien should be considered its national for a particular purpose.

ARTICLE 17

A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national.

ARTICLE 18

Any dispute between states parties to this convention, with respect to the interpretation or application of the provisions of this convention, which is not settled by negotiation and which is not referred to arbitration under a general or special arbitration treaty, shall be referred to the Permanent Court of International Justice, and may be brought before the Permanent Court of International Justice by either party to the dispute.

NOTES

NOTES TO CHAPTER ONE

[1] See F. S. Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia University Press, in press, hereafter cited as Dunn, *Dip. Prot.*), In order to avoid undue length and the tedious piling up of evidence, it has been found necessary to restrict somewhat the citation of cases and other materials in support of the views expressed in the present text. Readers are referred to the other volume for additional illustrative material bearing on these views.

[2] A. N. Whitehead, *The Function of Reason* (1929), p. 8. Henri Rolin has noted this tendency among legal scholars, but offers a somewhat different explanation: "Chose curieuse, la prétendue 'science du droit', celle qu'on enseigne aux futurs juristes dans les Facultés universitaires, est encore, au début du xx[e] siècle, tout imbue de l'esprit de la scolastique. La plupart des jurisconsultes sont des disciples, s'ignorant eux-mêmes, de Scot Erigène ou d'Albert le Grand. . . . Comment expliquer qu'à une époque où la critique philosophique s'attaque à tout, en un temps de démolitions universelles, les vieilles méthodes et les antiques conceptions du Droit soient encore si respectées? Sans doute, par la raison qui maintient les religions: nous voulons dire leur utilité. Cependent, c'est aussi, croyons-nous, par le fait que les juristes, comme les prêtres, forment une caste à peu près fermée. Les sociologues non-juristes ne sont pas armés comme il le faudrait pour donner l'assaut aux murs derrière lesquels les juristes sont retranchés; et les juristes ne sont en général pas assez pénétrés de l'esprit scientifique pour renverser eux-mêmes les remparts entre lesquels ils étouffent." Henri Rolin, *Prolégomènes a la science du droit* (1911), pp. 1-3.

[3] "Our times may well come to be named, by future dealers in half-truths, the Tired Age. Disillusionment is a mood of fashion as much as a form of *ennui* after the war's great effort. Whatever the cause, our politics are devoid of ardor and social reform has lost its romance. Such being the mental climate, one would expect jurisprudence to be in the doldrums and to earn its title as the dreary science. Alas for these generalizations about the main currents of thought! The waters of the law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clearer that decisions are functions of some juristic philosophy." Felix Frankfurter, "The Early Writings of O. W. Holmes, Jr.," 44 *Harvard Law Review* (1931), 717.

[4] "By making our assumptions explicit we are able to question them and to enrich our vision by thus revealing other possibilities. Our ordinary impressions as to what is true involve all sorts of unavowed assumptions which being habitual are felt with a certainty that blinds us to all other

possibilities. The explicit statement of any proposition makes it relatively easy to consider its negative, or to analyze its components and to determine abstractly the various other possible combinations of these components. New forms of algebra, non-Euclidean geometry, or non-Newtonian physics are logically suggested by the explicit formulation of the axioms of ordinary algebra, Euclidean geometry, or Newtonian physics. Similarly it helps us to understand the nature of our economic system if we make its axioms explicit and then formulate possible alternatives. . . . By making our assumptions explicit we not only facilitate the consideration of logically alternative hypotheses (and thus save ourselves from narrowness and fanaticism) but we make them more fruitful by reducing them to a form from which their consequences can be clearly traced." Morris R. Cohen, *Reason and Nature,* pp. 110-111. "In proportion as one is well bred in the ways of postulational thinking one becomes vividly aware of the fact that within or under every species of discourse, except such as has been thoroughgoingly postulationalized, there lurk obscure or even completely hidden assumptions or postulates; that these, being employed quite unconsciously, are often more effective than conscious reasoning itself in determining attitudes, theses, and conclusions; that, on every account, such hidden determinants of life, conduct, and thought ought to be dragged forth from their hiding places into the light; and that, therefore, the disciplining of men, women, and children in the art of 'postulate detection', . . ., is an unsurpassed obligation of education in all of its subjects and at every stage." Cassius J. Keyser, "The Nature of the Doctrinal Function and its Rôle in Rational Thought," 41 *Yale Law Journal* (March, 1932), 713, at 744.

Notes to Chapter Two

[1] In an official publication of the Navy Department of the United States recently issued through the Government Printing Office under the title of *The United States Navy in Peace Time,* considerable stress is laid upon this protective function of the Navy. Note, for example, the following statements:

"Oftentimes the layman is apt to consider the Navy solely as a means of aggression and overlook its potential value to peaceful commerce. That there is a close relationship existing between navies and commerce is no newly discovered principle. . . . We know that our Navy, like those of foreign powers, had its inception in the need for trade protection. And our Navy to-day is coming more and more to be recognized as a potential force in American commercial security. Moreover, in less settled portions of the world it is accepted as a potent, and at times an extremely active, trade stabilizer. . . .

Even more important, however, is the policy of our Government in protecting American citizens abroad and on the high seas who are engaged in lawful commercial enterprises. On account of this policy, as old as the Nation itself, America built her first fleet following the Revolutionary

War, fought the French in 1798, the Barbary pirates on various occasions from 1801 to 1816, the British from 1812 to 1815, and the Germans in 1917. In support of this policy to-day the United States still maintains an effective force along the coast of and in the interior of China.

"Trade protection, then, forms the basic commercial consideration for a Navy. The appreciation of this fact leads to the inevitable conclusion that the Navy of the United States is no mere agency for the protection of the American seaboard, but its missions, conditions, and readiness are of equal interest to the Detroit automobile manufacturer, the Kansas wheat grower, and the cash-register exporter of Dayton.

"American foreign trade, which is near the ten-billion mark, compares favorably with that of any other nation. Economists agree that one of the major factors in the restoration of American prosperity will be the uninterrupted flow abroad of our surplus from farm and factory. History has repeatedly shown that this flow is subject to periodic interruptions (the most recent occasion being in 1917), and that the normal outlet is resumed only after the Navy has been called into action. . . .

"Practical diplomatists have long appreciated the protective value to peaceful commerce of a mere demonstration of naval force. Oftentimes simply the movement of a fleet a few hundred miles up or down a foreign coast proves effective without any sinister implication of aggression. Repeatedly since the war in regions of turbulence and unrest the appearance of the American flag flying from the masthead of a cruiser has given cause for reflection, with a consequent cessation of hostilities and restoration of order. . . .

"Largely on account of our well-recognized commercial rights we are entitled to and will have a Navy second to none other in the world." United States Office of Naval Intelligence, *The United States Navy in Peace Time*, Washington, Government Printing Office, 1931, pp. 1-4.

[2] See Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Johns Hopkins University Studies in Historical and Political Science, 1928), pp. 104-107.

[3] See Dunn, *Dip. Prot.*, chap. xii.

[4] John Bassett Moore, *International Law Digest*, VI, p. 835.

[5] *Opinions of Commissioners*, I, p. 100.

[6] *Award, Union Bridge Company case, Report of Fred K. Nielsen*, pp. 371-381.

[7] For example: "Intervention—diplomatic or armed, permanent or temporary—is an attempt against the independence of nations, and cannot be justified on the plea of protecting the interests of citizens." Statement by the Argentine representative at the Havana Conference of 1928, *Foreign Policy Association Information Service*, iv, April 27, 1928, p. 68.

[8] It will be recalled that the most satisfactory definition yet found of a "justiciable issue" is any situation "with regard to which the parties are in conflict as to their respective rights." See Article 3 of the Locarno Treaty of

Mutual Guarantee between Germany, France, Belgium, Great Britain and Italy.

[9] At least so far as the foreign office of his own country is concerned. He may and often does still treasure the illusion about the foreign offices of other countries. Witness the widespread conviction among informed people in every country that the officials in charge of the foreign affairs of other countries are far more adroit and clever, and act with a greater singleness of purpose, than the officials of their own country.

[10] Those who assume that governments habitually disregard precepts of international law whenever these are inconvenient overlook an important point that should appeal especially to cynical minds. Questions of this kind are normally handled by lawyers, whose professional careers depend upon having law play an important and respectable part in human affairs. They know that if law should be observed only when convenient, it would soon lose all utility in the life of the community, and lawyers would likewise eventually lose their present important position in the community. Naturally they would be the last to act in such a way as to deprive themselves of the power and position they now enjoy.

Notes to Chapter Three

[1] See Felix Cohen, "The Ethical Basis of Legal Criticism," 41 *Yale Law Journal* (December, 1931) 202.

[2] Note that the drafters of the Constitution of the United States felt it necessary to give to the federal courts concurrent jurisdiction over suits between citizens of different states as a means of avoiding local prejudice that might exist in state courts against litigants from other states.

[3] In the *Brief of the United States of America* in the Santa Ysabel cases before the United States-Mexican Special Claims Commission of 1923, the Agent for the United States argued that a personal injury to a citizen at the hands of a foreign government represented a material loss to the nation itself; a loss, moreover, that could be measured in pecuniary damages. He admitted that under modern conditions the present or prospective value of the citizen for military service was of minor importance, but he insisted that any injury which impaired "the productive, intellectual or social value of a citizen constitutes a material injury to the nation to which he belongs." Thus he stated in part as follows: "In the primitive stages of society the value of the citizen to the nation was largely measured in terms of his present or prospective value for military service. This is no longer true. From the standpoint of modern civilization and indeed of national existence under the present complex economic and social conditions of the world, military service is one of the less important elements in the value of a citizen to the nation. His productive power, his ability to contribute to the intellectual and social progress of the community, and other elements which are obvious, are under present conditions matters of primary importance in the national life and development, and any act of a foreign nation which destroys or impairs the

productive, intellectual or social value of a citizen constitutes a material injury to the nation to which he belongs, entirely aside from any question of offense to the national honor or injury to the person himself or to those dependent upon or attached to him. It follows that the nation which thus sustains injury or damage through injury or damage to one of its citizens is entitled to indemnification commensurate with the economic and social value of such citizen, aside from any element of loss to his family, . ." (pp. 6-7.) But if this rather vague and nebulous material value of the citizen to the nation is the basis of our concern for his welfare while abroad, we should feel the same concern about him to an even greater degree when he is at home, since he is then in a far better position to contribute to the "intellectual and social progress of the community."

[4] *The New York Times*, April 26, 1927. The Agent for the United States in the Brief in the Santa Ysabel cases mentioned above (note 3) argued in the same manner in respect to property losses of citizens abroad. Thus he stated as follows: "The same principles are applicable to cases of loss of or damage to property of a citizen either natural or artificial. The loss or damage is to property under the control and jurisdiction of the nation constituting a part of the national assets and resources, for which the nation is entitled to indemnification in justice to all its citizens, aside from any right of the individual property owner. The very existence of any modern nation depends upon (1) the life and productive capacity of its citizens; and (2) the property or resources subject to its jurisdiction and control. All property of its citizens, wherever located, is subject to taxation and to expropriation in event of need. It may be reached directly when within the territorial jurisdiction of the government, or indirectly through governmental control of the person of the citizen or national if the property be outside the territorial jurisdiction. But this aspect only looks to governmental use of property for the purpose of taxation or emergency. The private use of property by the owners thereof is the chief basis of industrial and social progress. It is obvious, therefore, that any act of a foreign government by which the property of a citizen of another is injured or destroyed or in any wise depleted, constitutes an injury to the nation through the diminution of the national assets and the impairment of the essential elements of national life, entirely aside from the direct or private injury or damage. For this damage to all the citizens of the nation there should always be full compensation or indemnification." *Op. cit.*, pp. 7-8.

[5] Quoted in C. J. H. Hayes, *Historical Evolution of Modern Nationalism*, p. 165.

[6] Thus Cicero wrote: "How many wars did our ancestors . . . wage, because it was said that Roman citizens had been wronged, sailors detained, and traders robbed!" Quoted in Grotius, *De Jure Belli ac Pacis*, Bk. II, chap. xxv, I, "Classics of International Law" ed., p. 578.

[7] See Dunn, *Dip. Prot.*, chap. xii.

[8] Letter to Senator Borah, February 24, 1932, as printed in *The New York Times*, February 25, 1932.

Notes to Chapter Four

[1] Roscoe Pound, "Philosophical Theory and International Law," *Bibliotheca Visseriana*, I (1923), p. 76.

[2] Bk. II, chap. vi, Text of 1758, "Classics of International Law" ed., III, p. 136.

[3] *Ibid.*, p. 136. Italics added.

[4] That concepts of justice are relative to the time and the place is well illustrated by noting at random some of the ideas that Vattel, writing only a century and a half ago, could take as obvious to right-thinking men. Note for example the following:

"A Nation can not maintain its continuous existence except by the procreation of children. A Nation of men is therefore justified in procuring women, who are absolutely necessary to its preservation; and if its neighbors have more than are needed and refuse to give up any, the Nation may use force to obtain them. We have a famous instance of this in the rape of the Sabine women. . . .

"Let us add, however, that if, as many assert, the Romans were in the beginning no more than a band of robbers united under Romulus, they did not form a real Nation, a true State. Neighboring States were perfectly justified in refusing to give them women, and there was nothing in the natural law, which only approves of civil societies for a just purpose, to require that a society of vagabonds and robbers be given the means of perpetuating itself; and much less did the natural law authorize them to procure those means by force. And in like manner no Nation was obliged to furnish the Amazons with men. That nation of women, if it ever really existed, put itself, by its own fault, in a position where it could not maintain itself without foreign help." *Ibid.*, p. 150.

"The earth is intended to supply its inhabitants with food; hence a man who is without resources is not called upon to starve because all the means of supplying his wants are controlled by others. When, therefore, a Nation is in absolute need of supplies of food, it can force its neighbors, who have an over-supply, to furnish it food at a just price, and it can even take what it needs by force if its neighbors are unwilling to sell. Its urgent necessity restores the original state of common ownership, the abolition of which could not deprive anyone of the necessities of life." *Ibid.*, p. 149.

"The right of *traite foraine* is more in accord with justice and with the mutual duties of Nations. This is the right by virtue of which the sovereign keeps a moderate part of the property, whether of citizens or of foreigners, which passes out of the State into foreign hands. As such property is thus lost to the State, it is reasonable that the State should receive fair compensation for it." *Ibid.*, p. 148.

[5] *Ibid.*, p. 144.

[6] *Ibid.*, p. 139.

[7] *Ibid.*, p. 145.

[8] *Ibid.*, p. 146.

[9] *Ibid.*, p. 148.

[10] See Moore, *International Adjudications*, I-IV.

[11] This edition was in Spanish. An enlarged edition in French appeared in 1870, followed by three subsequent editions in French, the last appearing in six volumes in 1896.

[12] For the use of outstanding claims against Mexico by the Government of the United States to induce the sale of further Mexican territory to the United States, see Dunn, *Dip. Prot.*, chaps. ii-iv.

[13] It will be recalled that President Polk and his cabinet were prepared to use the outstanding claims of American citizens against Mexico as the excuse for making war on that country in 1846, but that this was rendered unnecessary by the action of Mexican soldiers in firing on American troops who had been sent to the Rio Grande. See J. Fred Rippy, *The United States and Mexico*, pp. 11-12.

[14] For example, it seems clear that the appeal by Mexico to arbitration in 1838 alone prevented the resort to force by the United States to collect its outstanding claims against Mexico, and incidentally to achieve certain other objectives. See Dunn, *Dip. Prot.*, chap. ii.

[15] It is so classified in Moore's *Digest of International Law*.

[16] Note also the projects drawn up in 1927 by the International Commission of Jurists appointed in conformity with a resolution of the Third Pan American Conference in 1906, and the efforts made under the auspices of the League of Nations to draw up a general convention regarding the treatment of foreigners. Among the efforts of private organizations in this direction should be noted the projects of the Institute of International Law, adopted at Lausanne in 1927, and of the American Institute of International Law, submitted to the International Commission of Jurists at Rio de Janeiro in 1927. These latter are printed as Appendices 3 and 5 to the Report of the Harvard Research in International Law on *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*. This report is discussed in detail below.

[17] According to the classical view, codification is the systematic expression in written form of unwritten rules and principles already established by custom; it is distinguished from legislation, which is the conscious formulation of new laws. From the wording of the resolution of the Assembly, however, it appears that, although the word "codification" was used, something more in the nature of legislation was intended. Thus the resolution begins as follows: "Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to communications and transit, . . ." Printed in Supplement to *American Journal of International Law* (hereafter cited as *Suppl. A. J. I. L.*), vol. 20, special no., July, 1926, p. 2.

[18] The subcommittee for this subject consisted of M. Guerrero and Mr. Wang Chung-hui of China. The latter was unable to attend the meeting of

the Committee and the report was signed only by Guerrero, who appears to have been responsible for its drafting.

[19] *Suppl. A. J. I. L.*, vol. 20, spec. no., p. 182.

[20] *Ibid.*, p. 190.

[21] *Ibid.*, pp. 192-3.

[22] On the subject of Responsibility of States, the Conference had before it not only the Bases of Discussion prepared by the Preparatory Committee but also several other draft codes. The most important of these was the draft convention prepared by the Harvard Research in International Law, under the direction of Professor Manley O. Hudson. This Research was organized in November, 1927, for the express purpose of preparing draft conventions on each of the three subjects to be dealt with by the codification conference. While composed entirely of American experts in international law, its purpose was not merely to present the American viewpoint (or that of the American Government) but to set forth a code based on current practice that might be acceptable to the governments represented at the conference. The reporter on the subject of Responsibility was Professor Edwin M. Borchard, and he was assisted by ten advisers (including Professor Eagleton). This code will be discussed in detail below, and its provisions are set forth in an appendix to this volume, at page 205. While it took more account of the views of Latin-American nations than did the Bases of Discussion prepared by the Preparatory Committee, it did not recognize the Calvo Doctrine as a limitation upon the responsibility of states.

Notes to Chapter Five

[1] Note, for example, the following statement in a recently published treatise on international law: "If each of these governments had a perfectly accurate understanding of the true principles of international law and a no less sincere desire to fulfil every obligation, national aspirations to the contrary notwithstanding, this sovereign method of enforcement would suffice. The cooperative action of each sovereign enforcing international law within its own jurisdiction would then supply the most perfect fulfilment of the law. In practice, however, the failure properly to understand the correct principles and the disturbing influence of competitive ideals and egoistical national aspirations lead to inaccurate interpretations of the law." Ellery Stowell, *International Law*, p. 69.

[2] The same thing is of course true in regard to the nature of law itself. Dean Pound has remarked that "Most of the discussion as to the nature of law which has been the staple of Anglo-American writing on jurisprudence has suffered from an initial false assumption that 'law' is a single conception; that the one short word has one simple analytically ascertainable meaning. As one reads the voluminous literature upon this subject he soon feels that the disputants are speaking of different things, although calling them by one name." Roscoe Pound, "The Theory of Judicial Decision," 36 *Harvard Law Review* (1923), 643.

[3] Note, for example, the public reaction to the recent decision of the Permanent Court of International Justice in the German-Austrian Customs Union case. The suggestion that some members of the Court might have allowed their decisions to be influenced by "non-legal" or "political" factors was taken as a matter of course to mean that they had not properly applied the legal process in reaching their decision. The entire public discussion has turned upon the question of whether the majority did or did not take political factors into consideration. There has been little or no suggestion that perhaps they could not have helped themselves. On this point see the following comment by Professor Thurman Arnold of the Yale Law School: "A short time ago the World Court decided against the German-Austrian Customs Union. Newspapers generally regarded this as a political decision and used it to prove that the World Court was not a court at all. Of course the decision was no more political than most court decisions on economic or social problems, but the fact that the court lacked a complicated and generally respected logical science for the interpretation of international affairs made it impossible for it to make the result seem impersonal and inevitable. Hence the criticism was directed at the court, instead of at the unfortunate state of international law." "The Rôle of Substantive Law and Procedure in the Legal Process," 45 *Harvard Law Review* (1932), 634.

[4] *Current International Law and the League of Nations*, p. 4.

[5] *Ibid.*, p. 216.

[6] *The Administration of International Justice, Problems of Peace*, 5th Series, p. 186. In fairness to Professor Hudson it should be added that the above passage, taken by itself, does not appear to give an accurate picture of his general views on the subject. Thus, in a more recent publication, he has made the following statement:

"No court, whether national or international, can apply 'the law' automatically. Indeed, no system of law exists, in either sphere, to furnish clear-cut and ready-made solutions for all the problems which arise. Principles are guides not masters, and their application calls for a delicate appreciation of factors which do not range themselves into hard and fast categories. The wise judge will face this task frankly, even at the risk of incurring criticism that his judgment is 'political.' This was done by Judge Anzilotti in the case relating to the proposed Austro-German customs régime, but not by the minority of the Court which purported to proceed on a 'purely legal' basis, without regard to 'political considerations.' As Judge Kellogg has insisted, an international court should not be open for the submission of 'political' questions; but only the trained person can be expected to discover the shadowy line between 'political' and 'legal' questions, and what is 'political' today may become 'legal' romorrow. Moreover, as the experience of the Supreme Court of the United States has demonstrated, the process of seeking a solution of admittedly 'legal' questions cannot be pursued without attention to matters of policy. If these considerations had been more widely appreciated, it seems probable that some of the criticism of the Court's opinions, particularly the opinion on the Austro-German customs

régime, would have been less severe." Manley O. Hudson, "Ten Years of the World Court," *Foreign Affairs*, October, 1932, pp. 91-92.

[7] *The Canons of International Law*, p. 24.

[8] Observations by Mr. Kellogg, Case of the Free Zones of Upper Savoy and the District of Gex (second phase), *Collection of Judgments*, Series A, No. 24 (1930), pp. 34, 35, italics added.

[9] Thus, according to Bulmerincq: "Law leaves no choice; policy keeps open various means to an end and permits a free choice in respect to these." Marquardsen's *Handbuch*, I, § 3, quoted in Hershey, *Essentials of International Public Law and Organizations*, p. 5, n. 12. Of course, in political questions a government may also look backward and be guided by some existing policy, doctrine, ethical principle or whatnot, but it is presumably at liberty to do so or not as it chooses. There is no prescribed penalty attached to the failure to do so. In legal questions, on the other hand, a government supposedly must follow preexisting rules whether it likes the foreseen consequences or not, unless it deliberately chooses the penalty provided for failure to do so.

[10] See Walter Wheeler Cook, "The Possibilities of Social Study as a Science," in *Essays on Research in the Social Sciences* (Brookings Institution, 1931), pp. 31-37; also C. I. Lewis, *Mind and the World Order* (1929), *passim*.

[11] "At the moment, I have a fountain pen in my hand. When I so describe this item of my present experience, I make use of terms whose meaning I have learned. Correlatively I abstract this item and relate it to what is not just now present in ways which I have learned and which reflect modes of action which I have acquired. It might happen that I remember my first experience of such a thing. If so, I should find that this sort of presentation did not then mean 'fountain pen' to me. I bring to the present moment something which I did not then bring; a relation of this to other actual and possible experiences, and a classification of what is here presented with things which I did not then include in the same group. This present classification depends on that learned relation of this experience to other possible experience and to my action, which the shape, size, etc., of this object was not then a sign of. A savage in New Guinea, lacking certain interests and habits of action which are mine, would not so classify it. . . .

"Again, suppose my present interest to be slightly altered. I might then describe this object which is in my hand as 'a cylinder' or 'hard rubber' or 'a poor buy.' In each case the thing is somewhat differently related in my mind, and the connoted modes of my possible behavior toward it, and my further experience of it, are different. Something called 'given' remains constant, but its character as sign, its classification, and its relation to other things and to action are differently taken.

"In whatever terms I describe this item of my experience, I shall not convey it *merely* as given, but shall supplement this by a meaning which has to do with relations, and particularly with relation to other experiences which I regard as possible but which are not just now actual. The manner of this

supplementation reflects my habitual interests and modes of activity, the nature of my mind. The infant may see it much as I do, but still it will mean to him none of these things I have described it as being, but merely 'plaything' or 'smooth biteable.' But for any mind whatever, it will be more than what is merely given if it be noted at all. Some meaning of it also will be contained in the experience. All that comes under this broad term 'meaning' (unless immediate value or the specificity of sense-quality should be included) is brought to this experience by the mind, as is evidenced by the fact that in this respect the experience is alterable to my interest and my will." C. I. Lewis, *op. cit.*, pp. 49-51.

[13] Of course the premise as stated (if it were a rule of law) would not be wholly meaningless, since one could deduce from it that a point outside the range of *any* existing cannon would not be within the jurisdiction of the state, but ordinarily no controversy would arise in regard to such a point since the answer would be obvious.

[14] "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used." Justice O. W. Holmes, Jr., in *Towne* v. *Eisner*, 245 U. S. 418, at 425. Of course, absolute clarity (such as may be attained through the use of mathematical symbols under certain conditions) is not an essential condition of utility for propositions of law. So long as legal rules and principles are unambiguous for at least some kinds of recurrent situations that arise in practice, they are useful generalizations, even though one can readily conceive of other situations in which they would be vague or equivocal. Ambiguity, in other words, is relative to the use to which a generalization is put. But it still remains true that, because propositions of law are stated in words of common use, their capacity to serve as premises in logical deduction is strictly limited.

[15] Professor John Dickinson, suggests that the problem in these doubtful cases is not one of discovering the "absolute" or "real" meaning of the generalization, but of fixing its "focus" by determining "by what other generalizations, tacit or express, its content and scope are to be taken as limited." This is "interpretation" of the rule and means the bringing to bear on it of some other generalization or generalizations which fix its focus so as to include or exclude the particular type of situation in question. See his article on "Legal Rules: Their Application and Elaboration," 79, *Univ. of Pennsylvania Law Review* (June, 1931), 1052. The question still remains, however, how one is to select one's "focusing generalizations."

[16] *Ibid.*, p. 1079.

[17] The draft conventions and comments of the Harvard Research in International Law were printed as a Supplement to the *American Journal of International Law*, vol. 23, special no., April, 1929. The convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners is reprinted in the Appendix to this volume, pp. 205-208.

[18] Article 9.

[15] *Op. cit.* (note 13), p. 1086.

[19] ". . . legal principles—and rules as well—are in the habit of hunting in pairs." W. W. Cook, 38 *Yale Law Journal* (January 1929), 406.

[20] Introduction to Jacques Rueff, *From the Physical to the Social Sciences* (Baltimore, 1929), p. xix.

Notes to Chapter Six

[1] Leon Green, "The Duty Problem in Negligence Cases," 28 *Columbia Law Review* (December, 1928), 1014, at 1035.

[2] Felix Cohen, "The Ethical Basis of Legal Criticism," 41 *Yale Law Journal* (December, 1931), 201, at 214.

[3] *Op. cit.* (note 1), Part II, vol. 29, no. 3 (March, 1929), pp. 255-56.

[4] Note, for example, the decisions of Commissioner Wadsworth on forced loans in the United States-Mexican claims arbitration of 1868, Dunn, *Dip. Prot.*, pp. 131, 135; also the decision of Umpire VanVollenhoven in the North American Dredging Company case, *ibid.*, pp. 410-411.

[5] *Treatise*, Introduction, sec. 20, quoted in Ogden and Richards, *The Meaning of Meaning*, p. 42.

[6] See Walter Lippmann, *The United States in World Affairs*, 1931, p. 256.

Notes to Chapter Seven

[1] *Op. cit.*, p. 3.

[2] *Ibid.*, p. 5.

[3] *Ibid.*, p. 4.

[4] *Ibid.*, p. 3.

[5] *Ibid.*, p. 5.

[6] J. L. Brierly, *The Law of Nations* (1928), p. 35.

[7] *Op. cit.*, p. 22.

[8] *Ibid.*, p. 23.

[9] Note the comment to Article 6 of the draft convention of the Harvard Research (p. 151): "The subject can be dealt with either in terms of a right to reparation or in terms of international responsibility. They involve identical conceptions, except that the one, international claim for reparation, looks to the claimant state, the other, international responsibility, to the state claimed against."

[10] *Op. cit.*, p. 5.

[11] *Op. cit.*, p. 37.

[12] *Op. cit.*, p. 142. Article 1 of the draft convention is as follows: "A state is responsible, as the term is used in this convention, when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national." (p. 140.)

[13] *Ibid.*, p. 142.

[14] *Ibid.*, p. 143.

[15] *Ibid.*, p. 144.

[16] For example, in the case of the United States before the Civil War and

of the British Empire during its transitional stage toward an association of free nations.

[17] See cases cited in Eagleton, *op. cit.*, p. 33, n. 23.

[18] *Ibid.*, p. 43.

[19] *Ibid.*, p. 36.

[20] *Op. cit.*, p. 145.

[21] E. M. Borchard, *Diplomatic Protection of Citizens Abroad*, p. 189.

[22] *Op. cit.*, p. 45.

[23] *Ibid.*, p. 49.

[24] *Op. cit.*, p. 157.

[25] *Ibid.*, pp. 158-9.

[26] *Ibid.*, p. 164.

[27] *Ibid.*, p. 163.

[28] *Op. cit.*, p. 77.

[29] *Ibid.*, p. 79.

[30] *Ibid.*, p. 83, and cases there cited.

[31] *Proceedings, American Society of International Law*, IV, p. 21.

[32] *Op. cit.*, p. 188.

[33] *Op. cit.*, p. 88.

[34] As maintained, for example, by Commissioner Palaccio in the Pratz case before the United States–Mexican Claims Commission of 1868. See Eagleton, *op. cit.*, p. 88.

[35] *Op. cit.*, p. 330.

[36] *Op. cit.*, p. 188.

[37] These cases are considered below under the subject of Measure of Damages.

[38] *Op. cit.*, p. 148. See also p. 180.

[39] See Dunn, *Dip. Prot.*, chap. viii.

[40] For citations, see Eagleton, *op. cit.*, pp. 138 ff., and Borchard, *op. cit.*, pp. 228 ff.

[41] Thus a recent arbitral tribunal, after an extensive examination of the authorities, held that it was impossible to say, either that there was a rule of international law entailing responsibility for breaches of contract, or that there was not. See the decision of the United States–Mexican General Claims Commission of 1923 in the Illinois Central Railroad Company case, *Opinions of Commissioners*, I, p. 15, at 16. Fortunately the Commission was able to decide the case on the basis of an interpretation of the claims convention itself, and hence to dodge the legal question. Had this not been possible; had the Commission been forced to answer the question on the basis of existing international law, it is safe to say that the majority would have found that international law really did provide an answer one way or the other, however uncertain the question might have been before their answer was reached. It is not recorded that any tribunal has refused to decide any case submitted to it on the ground that there was no international law on the question, or that the existing law was not clear. As suggested above, only textbook writers and teachers are at liberty to conclude that the law on a

given question is unsettled. Deciding agencies have to give an answer one way or the other, and it is astonishing how clear and certain the law becomes in the opinions with which they support their decisions, regardless of how much mental travail they may have gone through in choosing between different alternatives.

[42] *Op. cit.*, p. 168.

[43] Thus Eagleton states that " in so far as the Calvo Clause demands resort to local remedies for breach of contract, it is legitimate, but superfluous; for that rule is clearly stated and thoroughly established in international law." *Op. cit.*, p. 175. See also the Comment on Article 17 in the Harvard draft convention, *op. cit.*, p. 203.

[44] Note especially the extraordinarily involved logic of the opinion of the majority in the North American Dredging Company case, United States–Mexican Claims Commission of 1923, *Opinions of Commissioners*, I, p. 21.

[45] Mixed Claims Commission, United States and Germany, *Decisions and Opinions*, pp. 25, 31; also quoted in Eagleton, *op. cit.*, pp. 189-190.

[46] *Op. cit.*, p. 182.

[47] *Opinions of Commissioners*, I, pp. 108, 115.

[48] *Ibid.*, p. 119.

[49] As a matter of fact, the Agent for the Mexican Government actually advanced this argument against holding his Government liable in another case before the Commission, basing his position on the opinion of the majority in the Janes case. This was in the claim of the United States on behalf of William T. Way for damages in the sum of $25,000 for the death of one Clarence Way in Mexico. (*Opinions of Commissioners*, II, p. 94.) The claim that Mexico was internationally responsible in this case was based on two grounds: (1) that a Mexican police official had been implicated in the original crime; and (2) that there had been inadequate prosecution of Way's assailants in the Mexican courts. In regard to the latter ground of complaint, the Mexican Agent argued that, even admitting failure of prosecution, the Mexican Government could not be held liable because, at the time of the proceedings against Way's assailants, there was no relative of Way living who could have felt any mental distress or " mistrust and lack of safety " as a result of the failure to prosecute Way's assailants. The only relative was a half-brother living in the United States. Way was killed in July, 1904. On the following September 1, 1904, his half-brother was adjudged insane and placed in an asylum. The alleged " denial of justice " arising out of the failure to prosecute Way did not take place until September 22, 1904, when the decision of the first court was rendered. It was argued that, since Way's half-brother was insane at that time, he could not possibly have had any feeling of distrust or lack of safety resulting from the inadequate sentence imposed by the Mexican court on Way's assailants. Fortunately the Commission was able to dodge the issue in this case, since it found that the Mexican Government was responsible for the original crime, owing to the participation of a Mexican official in it. Had this not been the case, it is interesting to speculate upon what measure of damages the Com-

mission would have resorted to, in view of its opinion in the Janes case.

[50] *Ibid.*, p. 119.

[51] *Ibid.*, p. 120.

[52] *Ibid.*, p. 123.

[53] *Ibid.*, pp. 114-115.

[54] *Ibid.*, p. 123.

[55] Whereas the majority of the Commission purported to use one measure of damages (the mental distress of the relatives at the failure to prosecute) and the American Commissioner another (the loss sustained by the relatives from the death of Janes), it is interesting to note that they both arrived at the same amount of damages, i. e., $12,000.

[56] As a matter of fact, Mecham was killed by bandits a year later at the same place where he had sustained the robbery.

[57] It should be noted that the basis of this measure of damages was not the fact that the failure of the Mexican authorities to apprehend the robbers had deprived Mecham of an opportunity of recovery in a civil suit, for in such a suit he would, theoretically at least, have been able to recover for the property destroyed as well as stolen.

[58] *Op. cit.*, II, p. 291.

[59] *Ibid.*, p. 300.

[60] Decision not yet rendered.

[61] *A. J. I. L.*, vol. 21 (1927), p. 518.

[62] *British Yearbook of International Law*, 1928, p. 49.

Notes to Chapter Eight

[1] See Jerome Michael and Mortimer J. Adler, *An Institute of Criminology and of Criminal Justice* (1932), pp. 384-387.

[2] The nature of these criteria has been indicated in Chapter VII.

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