

MEASURE OF DAMAGES IN INTERNATIONAL LAW

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Writers have devoted but little attention to the measure of damages in international law; and the paucity of doctrine and precedent has embarrassed recent attempts to codify the law relating to the responsibility of states to such an extent that it is now a question as to whether this subject should be included in the code. Such a statement would be of great value to judges and arbitral tribunals because of the divergencies of theory which underlie the measuring of damages—which, indeed, lie at the foundation of international responsibility. It is contended, however, that, because of contrariety of opinion, and the difficulties of statement, no effort should be made to state rules as to the measure of damages. It is hoped that presentation of some of the problems may be helpful, by leading to discussion which would pave the way for agreement.

It would seem to be a universally recognized principle of law that an illegal act arouses an obligation to make reparation. Such is the definition given to responsibility in international law:

“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.”¹

And the Permanent Court of International Justice in the *Chorzow Factory Case* said:

“As regards the first point, the Court observes that it is a principle of international law, and even a general conception of

¹ DRAFT CONVENTION ON THE LAW OF RESPONSIBILITY OF STATES FOR DAMAGE DONE IN THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS, RESEARCH IN INTERNATIONAL LAW (1929) 133 (also published, with same pagination, (1929) 23 AM. J. INT. LAW (Spec. Supp.) 133. See GROTIUS, DE JURE BELLI ET PACIS II, XVII, 1; Umpire Parker, in the Lusitania Cases, Mixed Claims Commission, U. S. and Germany, DECISIONS AND OPINIONS (1925) 19, 25; 2 DE LAPRADELLE ET POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX (1924) 980 (doctrinal note to the Alabama Case); DEVISSCHER, RESPONSABILITÉ DES ETATS, 2 BIBLIOTECA VISSERIANA (1923) 118; ANZILOTTI, COURS DE DROIT INTERNATIONAL (1929) 467. See also 1 STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) XXXII; SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (1909) 11, 15.

law, that any breach of an engagement involves an obligation to make reparation."²

The ideal form of reparation, doubtless, is the restoration of the situation exactly as it was before the injury.

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."³

Such a solution, however, is rarely possible in international law. One may conceive of the restoration of a confiscated ship, or the reversal of an unjust judgment by a court; but even in such cases it is probable that damages for loss of services during the interim would be necessary to make reparation whole and complete. Where *restitutio in integrum* is impossible, reparation may be made in other forms.⁴

The usual, and almost exclusive, method of reparation for an injury done to an alien is pecuniary payment. As Judge Parker phrased it:

"It is variously expressed as 'compensation,' 'reparation,' 'indemnity,' 'recompense,' and is measured by pecuniary standards, because, says Grotius, 'money is the common measure of valuable things.'"⁵

The purpose of such pecuniary payment is to make reparation for losses suffered.

² Chorzow Factory Case, Permanent Court of International Justice, Series A, No. 17, Judgment No. 13, p. 29, September 13, 1928.

³ *Ibid.* 47.

⁴ See, for examples, EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928) 183-189. Also, the distinction made between moral and material damages by DE VISSCHER, *op. cit. supra* note 1, at 118-119; between *Réparation* and *Satisfaction* in 1 FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (1922) 535; and between *Genugthuung* and *Réparation* by TRIEFEL, VÖLKERRECHT UND LANDESRECHT (1899) 334-335.

As to *restitutio in integrum*, STRUPP, DAS VÖLKERRECHTLICHE DELIKT (1920) Handbuch des Völkerrechts, Erste Abteilung, 209 *et seq.*; Schoen, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen* (1917) 10 ZEITSCHRIFT FÜR VÖLKERRECHT, Ergänzungsheft 2, p. 123.

⁵ DECISIONS AND OPINIONS, *supra* note 1, at 19.

"The fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."⁶

When, however, an attempt is made to ascertain what compensation is proper in order to make the injured party whole, various difficulties, both as to the theoretical source of the injury, and the method of compensation, are encountered. Some of these will be considered in the following pages.

I

It is usually said by writers that the state is responsible only for its own acts. This position is consistently derived from the doctrine that states only are persons at international law. Individuals, not being such persons, can commit no illegality under international law; and since their acts are not the acts of the state, they can not engage the responsibility of the state. To a lesser degree, it is contended that most agents of the state are not able to speak in its name, and cannot, therefore, contract a responsibility on the part of the state through their acts. According to this theory, the state's responsibility can be engaged only through its own act or omission; that is to say, when it has failed in its international duties of prevention or repair of the damage caused by the act of the individual or of the minor agent of the state. The illegal act which produces a duty on the part of the state to make reparation is thus ordinarily reduced to a denial of justice, that is, a failure of the local remedies, usually domestic courts, to give due process of law to the alien. The duty to make reparation is thus due to some act of negligence, discrimination, corruption, etc. on the part of the highest judicial authorities of the state.⁷

From the above theory it would logically follow that the damage caused to the alien should be measured by the act or omission of the state itself—which would mean, in most cases, a denial of justice. Aside from the difficulty of computing damages according to such a measure, it would appear to reduce the damages awarded to the injured alien to a negligible quantity. But, as a matter of fact, practice consistently measures the damage by the loss suffered by the alien from the original act (of individual or state agent) which the state failed to repair. In other words, responsibility is, according to this theory, determined by the act or omission of the state; while reparation, or

⁶ *Ibid.* 25.

⁷ As to the above paragraph, see EAGLETON, *op. cit. supra* note 4, c. 3 (Acts of Agents), c. 4 (Acts of Individuals); and *Denial of Justice* (1928) 22 AM. J. INT. LAW, 538-559.

damages, is, according to practice, measured by the loss sustained through the act of an individual for whom the state is not responsible. There is thus a striking inconsistency between theory and practice.

The difficulty is clearly presented in the recent *Janes Case*.⁸ Janes was an American citizen who was murdered in Mexico by an employee whom he had discharged. The Mexican authorities were negligent in pursuing the murderer; and the Commission agreed that "there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer as to warrant an award of indemnity." But when it came to measuring the indemnity, the Commission, having rejected the theory of complicity (as to which see below), found themselves with this problem:

"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. . . . The damage caused by the culprit is the damage caused to Janes' relatives by Janes' death; the damage caused by the Government's negligence is the damage resulting from the non-punishment of the murderer."

Then, having thrown off the older theory, the Commission pointed out that "claimants have always been given substantial satisfaction for serious dereliction of duty on the part of a Government," and proceeded to base damages upon denial of justice. It was admitted that computation according to this measure was more difficult than that of the damage caused by the killing itself; but it was argued that it was no more difficult than in other cases of denial of justice. An award of \$12,000 was made.

While the *Janes Case* was the first in which this problem was seriously discussed,⁹ the difficulties of the situation have produced various theories. Not one of them may be regarded as generally acceptable; but all of them lead generally to the same conclusion.

(1) The theory of complicity may be traced back to Vattel, who said:

⁸ General Claims Commission, United States and Mexico, DECISIONS AND OPINIONS (1927) 108.

⁹ Though Dr. Hyde had earlier raised the question in his discussion of the Lentz case, 1 HYDE, INTERNATIONAL LAW (1922) 515 and note.

"The sovereign who refuses to cause reparation to be made for the damage done by his subject, or to punish the offender, or, finally, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it."¹⁰

This theory was explicitly rejected in the *Janes Case*. It might be accepted, said the majority opinion,

"... where a Government knows of an *intended* injurious crime, might have averted it, but for some reason constituting its liability did not do so. 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."

While writers for some time followed the lead of Vattel, later authors seem to have rejected the theory.¹¹ Where there is actual complicity on the part of the government, *e.g.*, participation of police in a riot, there would, of course, be responsibility; but to assume that, simply because a state failed to prevent or punish the act of an individual, it was, therefore, an accomplice in the original crime, and that its damages should be measured accordingly, is stretching logic rather too far.

(2) Mr. Nielsen apparently intends a slightly different theory when he says:

"Assuredly the theory repeatedly advanced that a nation must be held liable for failure to take appropriate steps to punish persons who inflict wrongs upon aliens, because by such failure the nation condones the wrong and becomes responsible for it, is not illogical or arbitrary. Certainly 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."¹²

The theory of condonation would seem to be slightly more plausible; and where the government does formally condone the individual's offense, it is reasonable enough. Amnesty affords an example. But the two theories are objectionable in the same respect: both project a later negligence on the part of the government back into the past to produce an *assumption* of responsibility on the part of the state. It seems severe to say that, because a state negligently failed to prevent an act, or to punish

¹⁰ 2 VATTEL, LAW OF NATIONS (1758) § 77.

¹¹ That the theory of complicity is abandoned, see EAGLETON, *op. cit. supra* note 4, at 195 and references therein. *Contra*: see the evidence collected by Commissioner Nielsen in his dissenting opinion in the *Janes Case*, *supra* note 8, at 123 *et seq.*; and BRIERLY, *The Theory of Implied State Complicity in International Claims*, BRITISH YEARBOOK OF INTERNATIONAL LAW (1928) 42.

¹² *Janes Case*, *supra* note 8, at 123.

it, that therefore the state approves the act. As Dr. Hyde says: "A state may by its neglect condone conduct without becoming an accomplice of the author."¹³

(3) Dr. Hyde suggests, in connection with the *Janes Case*, that if a state betrays unconcern as to whether penalties shall be visited upon the one who injures an alien, the state is deprived of the defenses which it might normally set up.

"A state which has failed in the performance of its international obligation in the matter of prosecution is not permitted to deny responsibility for damages caused by the criminal acts of individuals or mobs as measured by the pecuniary losses which they themselves have produced."¹⁴

But if the state is not permitted to deny responsibility for individual acts, it would seem thereby to be loaded with responsibility for such an act. Or, if it be stated in negative fashion, that a state is barred from pleading its usual irresponsibility, by what reasoning is the measure of damages fixed as the particular loss caused by the individual's act? Behind such a theory there would appear to be an assumption of an original responsibility on the part of the state for the act of the individual, though, for one reason or other, the state is ordinarily, and except in case of negligence, permitted to plead irresponsibility.

(4) The situation may be satisfactorily explained if, rejecting the above theories, it is admitted that the state is responsible for injuries to aliens, by whomsoever committed, and from the moment that the injury occurs. This explanation is not acceptable at present, since it must mean that a state is responsible not only for the acts of its agents—which position is widely accepted—but also for the acts of individuals, which would be generally denied. To accept the latter view would do no harm to existing law for, as will shortly be seen, it would not affect the decision of any case. It is probably true, however, that, for purposes of codification, neither states nor writers are prepared to say, even in theory and with no change in the rules of law, that states are responsible for the acts of individuals.

(5) Finally, it may be said that, since theory and practice do not agree, it has become necessary to lay down an arbitrary rule, more in keeping with the universal sense of justice, to the effect that damages are to be measured by the loss actually suffered by

¹³ Dr. Hyde thinks that the condonation theory is more satisfactory than that of complicity. Hyde, *Concerning Damages Arising from Neglect to Prosecute* (1928) 22 AM. J. INT. LAW 142. Mr. Borchard does not seem to distinguish between the two. Borchard, *Important Decisions of the Mixed Claims Commission, United States and Mexico* (1927) 21 AM. J. INT. LAW 517.

¹⁴ Hyde, *loc. cit. supra* note 13.

the alien, through the act which the state negligently failed to prevent or punish. Apparently, this was the attitude taken by the majority in the *Janes Case*; and also in the *Chorzow Factory Case*, where the court held:

"It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law. This is even the most usual form of reparation. . . . The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing the relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."¹⁵

Such a solution is simple and unanswerable; but it leaves in the mind a persistent undertone of question. Why is it necessary to be arbitrary? If damages are to be assessed against the state for the act of an individual, why should it not be admitted that the state is responsible for that act from the beginning?

The above discussion leads necessarily into the theory behind state responsibility. It is an extremely difficult question, for the reason that it is purely theoretical. States do not concern themselves so much with the theory behind the law, as with the actual rules of law; and it is almost impossible, from a study of cases or diplomatic documents, to say that a state adopts one theory or the other. Yet, as a matter of consistent codification, and particularly as to the measure of damages, it is vitally important that the theory behind the code be accepted and understood.

Such a theory may be stated in three different forms; and it is important to observe that the decision of any case, because of the operation of the rule of local redress, remains unaffected by

¹⁵ *Chorzow Factory Case*, *supra* note 2, at 29. But see, at 95, the dissenting observations of M. Nyholm: "Germany may suffer, as the result of Poland's action, moral damage represented by the demand for an imaginary sum, and also, maybe, material damage; but the latter is always based on a fact affecting the State itself. To measure such damage by the actual amount of damage caused to its subjects is to make a claim that finds no support save as regards the special cases where the wrong done to subjects directly affects the State as being privately interested in the enterprise."

the theory. It is a question of the moment at which responsibility arises, and, therefore, of the acts for which the state may be held responsible. One may say either: (1) at the moment the alien receives the injury, from whatever source, or (2) at the moment of injury by a state agent, but not by an individual, or (3) only after local remedies have failed, which is to say, ordinarily only for denial of justice. The first theory would mean responsibility for the acts of individuals, and would find little support. The second limits responsibility to the acts of state agents, and is widely accepted. The third theory applies the rule of local remedies to the acts of most agents, on the ground that they are not authorized to speak for the state. Since this is the situation of individuals also, there does not seem to be sufficient logical basis for accepting responsibility in one case, and not in the other. The real differentiation is to be found, not in classifications of individuals, minor agents, etc., but in the operation of the rule that local remedies must be exhausted before a diplomatic claim is in order.

Thus one may say that the state is responsible for the injurious act of any person whatever which does harm to an alien, but that the proper operation of local remedies discharges that responsibility; or one may say that no responsibility appears at all until these local remedies have failed, and that the only form of reparation possible is that made by state to state, usually a pecuniary payment.¹⁶ The latter theory is more in harmony with present doctrine, which asserts that only the state has rights or duties under international law; consequently, only an act of the state (which is, it may be interpolated, difficult to define) can produce responsibility, and only a state may make reparation, and only to another state. Omitting, as irrelevant to this discussion, any other arguments as to the position of the individual in international law,¹⁷ it must be observed here that it is difficult to reconcile the theory that a state is responsible for its own acts only with the practice of states, which actually measures damages according to the amount of injury occasioned by the act of the individual or state agent. It would appear much more logical to say that the state, which has a certain duty of preventing individual acts harmful to aliens, should be responsible for the individual's act from the moment of its occurrence. Since local remedies serve as a means of discharging this responsibility, no duty of pecuniary reparation would exist until such remedies have failed. Such a theory, which would produce

¹⁶ As to the latter theory, see Articles 1 and 6 of the Draft Convention of RESEARCH IN INTERNATIONAL LAW, *op. cit. supra* note 1, together with the comment upon those articles.

¹⁷ EAGLETON, *op. cit. supra* note 4, at 221 and note 22.

no change in the procedure of settlement, would consistently permit the damage suffered by an alien to be measured by the act which caused the damage.

As to the precise method of calculating damages in each particular type of case, it is doubtless true that precedents in the field of international law are not always sufficient to provide an answer. Nevertheless, for some types of injury, the judge would find numerous decided cases to aid him, and a fair amount of agreement upon which to proceed. There have been numerous cases with regard to the confiscation or detention of ships, and the losses resulting therefrom.¹⁸ There is sufficient agreement as to damages caused by death, for which Umpire Parker in the *Lusitania* opinion laid down a definite formula, based upon the losses resulting to the claimants.¹⁹ For false imprisonment, Mr. Ralston has calculated damages at \$100 per day, a figure which was accepted by the Mexican Claims Commission, with 50% added because of the changed value of money.²⁰ As to contractual claims, the chief difficulty appears to be the question of indirect damages, which will be considered in a moment. There are many kinds of injury for which the calculation of damages is not so clear, since international law has not had the experience of domestic law in such matters. Even in domestic law, the measure of damages is a difficult enough problem; and international law will meet its situations as cases arise.

In addition to, or where there are no material damages, moral damages may be allowed. Umpire Ralston, in the *Di Caro Case*, took into consideration:

“. . . the extent of comforts and amenities of which the wife has been the loser . . . the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or a wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations.”²¹

¹⁸ See ADMINISTRATIVE DECISIONS No. VII and VIIa, Mixed Claims Commission, United States and Germany; RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (1926) 250 *et seq.*; BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915) 175; EAGLETON, *op. cit. supra* note 4, at 191.

¹⁹ DECISIONS AND OPINIONS, *supra* note 1, at 19-20, 363. See also RALSTON, *op. cit. supra* note 18, at 259 *et seq.*; BORCHARD, *op. cit. supra* note 18, at 425; EAGLETON, *op. cit. supra* note 4, at 193.

²⁰ RALSTON, *op. cit. supra* note 18, at 262 *et seq.*; Faulkner Case, DECISIONS AND OPINIONS, *supra* note 8, at 92; BORCHARD, *op. cit. supra* note 18, at 262 *et seq.*

²¹ RALSTON, *VENEZUELAN ARBITRATIONS OF 1903* (1904) 770. Judge Parker, in the *Lusitania* opinion, allowed “reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death.” DECISIONS AND OPINIONS, *supra* note 1, at 19-20.

In the *Janes Case*, above mentioned,

"The Commission holds that the wording of Article I of the Convention, concluded September 8, 1923, mentioning claims for losses or damages suffered *by persons or* by their properties, is sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages of the stamp of indignity, grief, and other similar wrongs."²²

II

While, as has been seen, damages are measured according to the harm done by the original act of injury to the alien, this should not exclude the possibility of assessing damages supplementary to those produced by the original act, if the denial of justice on the part of the state added to the loss suffered by the alien. This situation, as Dr. Hyde observes, resembles that in private law

"... where, by virtue of a penal statute, an individual is enabled to obtain from one who violates the statute damages which, however remedial, serve to do more than compensate the plaintiff for any loss which he has sustained from the acts of the defendant."²³

Whether such supplementary damages should be extended to permit of penal damages in international law is highly debatable. It is usually held that the purpose of pecuniary reparation is to make compensation for losses suffered; and the assertion is frequently met with that punitive damages are illegal. Mr. Borchard sums it up as follows:

"Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages."²⁴

While it is true that few arbitral tribunals have avowedly awarded punitive damages, it is to be observed that, on the other hand, none of them go so far as to deny the right, under inter-

²² DECISIONS AND OPINIONS, *supra* note 8, at 118. Writers seem to approve the granting of moral damages. See, for example, STRUPP, *op. cit. supra* note 4, at 213; SCHOEN, *op. cit. supra* note 4, at 130; DEVISSCHER, *op. cit. supra* note 1, at 119.

²³ I HYDE, *op. cit. supra* note 9, at 515, n. 3. He suggests, as added harm, depriving victims of means for ascertaining the identity of their assailants.

²⁴ BORCHARD, *op. cit. supra* note 18, § 174. See also RALSTON, *op. cit. supra* note 18, at 267; and the emphatic condemnation of punitive damages by Umpire Parker in the *Lusitania* Opinion, DECISIONS AND OPINIONS, *supra* note 1, at 25, 27.

national law, to award such damages. Where they have explicitly rejected damages of this type it has been for reasons other than their illegality, as, for example, that the commission was limited by the treaty under which it operated. Thus it was observed, in the *Wielemans Case*, that penal damages could not be awarded under Article 297e of the Treaty of Versailles.²⁵

In several cases there is a clear implication that, under other circumstances, the tribunal might have been willing to award punitive damages; and in at least one case the tribunal supported such an award. This was *Moke's Case*, in which it was said:

"The forced loans were illegal; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property; but we wish to condemn the practice of forcing loans by the military, and think an award of \$500 for 24 hours' imprisonment will be sufficient. . . . If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."²⁶

It seems fair to conclude that arbitral tribunals have not objected to punitive damages, as being a principle not allowable in international law; and that the principle has frequently been admitted, though not applied because of the limitations of the treaty, or other circumstances in the case.²⁷

If arbitral tribunals have considered themselves as limited in this respect, states have felt no such limitations. Punitive or exemplary damages have often been demanded by the United States and Great Britain, as well as by other states.²⁸ It may be argued that this represents political, rather than legal or judicial, action; but, while it may sometimes be difficult to determine whether, in a particular case, the demand represents a reasonable punishment, or whether it is the overbearing atti-

²⁵ 2 TRIBUNAUX ARBITRAUX MIXTES 230. See the case of Aaron Brooks, 4 MOORE, ARBITRATIONS (1898) 4311, and the Torrey and Metzger cases, RALSTON, *op. cit. supra* note 21, at 162-164, 580.

²⁶ MOORE, *op. cit. supra* note 25, at 3411. This case was rejected by Judge Parker as a precedent in the Lusitania case on the ground that an award of \$500 "has in it none of the elements of punishment" and "can hardly be said to be adequate compensation." DECISIONS AND OPINIONS, *supra* note 1, at 28. However, as has been seen, the average award for such cases was \$100 for a day's imprisonment.

²⁷ "In some cases the umpires have refused in terms the granting of punitive awards, indicating by suggestion at least that they would, the circumstances permitting, entertain the idea, although, as we have said, the power to inflict such damages has never been expressly claimed." RALSTON, *op. cit. supra* note 18, at 267. See also BORCHARD, *op. cit. supra* note 18, § 174.

²⁸ HYDE, *op. cit. supra* note 9, at 515; BORCHARD, *op. cit. supra* note 18, § 174.

tude of a strong state toward a weaker one, there can be no doubt that the attitude of states is often the result of a serious intention to exact a just penalty. The action taken after the Boxer uprising would seem to be clearly of this nature; as also in the case of the Lienchou Riots, or the murder of the consuls at Salonica.²⁹ In the *Labaree Case* the Persian Government proposed to substitute a fine in place of the punishment of the murderers, to which the United States replied that this would lack the essential element of punitive and exemplary justice.

"In this matter of the murder of Labaree, the Government of the United States has acted in fulfillment of its duty to protect the interests of American citizens, as well as in the exercise of its international right to redress the wrong done to the United States in the person of one of its citizens. This has required the treatment of the question under two aspects—the remedial reparation due to the widow of the murdered man, which has been effected by the payment of a money indemnity for the benefit of the dependent relatives of Labaree, and the exemplary redress due to the Government of the United States to effect which the due operation of Persian justice has been invoked against the guilty parties and their accessories."²⁹

The indemnity exorted from Greece by Italy on the occasion of the Corfu episode, if it was not an overbearing act, can only be explained as punitive, or perhaps, vindictive, in character. In the *Mannheim Case*, France demanded and received one million francs as *amende*, in addition to 100,000 francs for the victim's family.³¹

There are other evidences of that assent, on the part of nations, through which a rule of international law is gradually built up. If the signatories of the Treaty of Versailles were willing to impose penalties upon Germany, they would seem thereby to have recognized penalties as admissible between states. Article XVI of the Covenant of the League of Nations provides for penalties against states. The Committee of Jurists which studied the creation of the Permanent Court of International Justice recommended that there should be also a High Court of International Justice which

²⁹ The demands made after the Boxer uprising may be found in 5 MOORE, DIGEST (1906) §§ 808-810. For the Lienchou Riots, FOREIGN RELATIONS (1906) 308-319; for the Salonica affair, 65 BRITISH AND FOREIGN STATE PAPERS (1881) 949.

³⁰ 2 FOREIGN RELATIONS (1907) 942-943. See also the Lentz Case, in which \$19,000 was collected, of which \$7,500 was paid to the parents of Lentz. 6 MOORE, *op. cit. supra* note 29, at 794. Dr. Hyde, speaking of these cases, says that the United States has "in reality exacted a penalty on account of denial of justice." 1 HYDE, *loc. cit. supra* note 9.

³¹ FAUCHILLE, *op. cit. supra* note 4, at 528; 49 CLUNET (1922) 1243.

“ . . . should have power to define the nature of the crime, to fix the penalty, and to decide the appropriate means of carrying out the sentence.”³²

The recommendation was rejected by the Assembly of the League, not so much, apparently, because of opposition to the proposal in principle, as to the belief that it was not feasible at the moment and to the belief that such matters could be handled by the Permanent Court itself. This Court, as finally established, has the power to assess penal damages.³³

Of those writers who discuss the matter at all, a large number—a majority so far as my investigations have shown—are inclined to accept the idea of penalty in international law. Thus Hall says:

“When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrong-doer.”³⁴

Dr. Hyde speaks of the “value of exemplary reparation as a deterrent of misconduct otherwise to be anticipated”;³⁵ and Mr. Borchard appears to regard it as implicit in the theory of damages.³⁶ Strupp says that it is not impossible to conceive of punishing a state.³⁷ The International Law Association has issued a report favoring the establishment of an international criminal court, with penal jurisdiction;³⁸ and the Interparliamentary

³² RECORDS OF THE FIRST ASSEMBLY, 1 COMMITTEES 494.

³³ “The nature or extent of the reparation to be made for the breach of an international obligation.” STAT. OF THE COURT, art. 36.

³⁴ HALL, INTERNATIONAL LAW (1924) 65.

³⁵ 1 HYDE, *op. cit. supra* note 9, at 516; and see his comment in (1928) 22 AM. J. INT. LAW 141, n. 6.

³⁶ (1927) 21 AM. J. INT. LAW 518: “As the law is now administered, what Professor Borchard calls the ‘inarticulate purpose’ of the damages in such cases is often in fact penal, and while it may not be expedient 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.” Brierly, *op. cit. supra* note 11, at 49.

³⁷ STRUPP, *op. cit. supra* note 4, at 218. See also BLUNTSCHLI, DAS MODERNE VÖLKERRECHT (1878) par. 462; DESPAGNET, COURS 363; 5 TRAVERS, DROIT PÉNAL INTERNATIONAL (1922) 538; POLITIS, THE NEW ASPECTS OF INTERNATIONAL LAW (1927) c. III.

³⁸ (1927) 5 R. DE DR. INT. DE SC. DIP. ET POL. 274; (1905) 1 REVUE INT. DE DROIT PÉNAL 7; 2 *ibid.* 492.

Union has studied it with favor.³⁹ As far back as Vattel, it is approved:

“Finally, the offended party have a right to provide for their future security and to chastise the offender, by inflicting upon him a punishment capable of deterring him thenceforward from similar aggressions, and of intimidating those who might be tempted to imitate him.”

The objection most often raised against the imposition of punitive damages is the doctrine of sovereignty. It is clearly stated by Oppenheim:

“The nature of the Law of Nations as a law between, not above, sovereign States, excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime. . . . The only legal consequences of an international delinquency that are possible under existing circumstances are such as create reparation of the moral and material wrong done.”⁴⁰

Aside from the damaging attacks now being made upon the doctrine of an irresponsible sovereignty in international society, it is obvious that the above objection is inconsistent with the whole theory of international law and international society. If it were admitted, no damages of any sort could be assessed against so-called sovereign states. There could, indeed, be no such thing as a responsibility of states. The test is not sovereignty, but whether states have approved, or will approve, the establishment of such a rule. States have certainly consented to a duty of reparation; if they consent to a duty of paying punitive damages as well, such damages will be internationally legal, regardless of any fiction of irresponsible sovereignty.⁴¹

It is also objected that a court would be called upon to apply penalties in unknown situations, there being no international law provided to cover such cases. The same objection was urged against the establishment of the Permanent Court of International Justice, which is nevertheless functioning successfully. In further answer to this objection, it should be said that states through their political departments do, in uncontrolled fashion, assess penalties against other states. It would seem beyond dispute that it would be better to have such penalties measured by an impartial court, in accordance with judicial precedents, than to leave a weak state at the mercy of a stronger one.

That international law is badly in need of sanctions to en-

³⁹ PELLA, *LA CRIMINALITÉ COLLECTIVE DES ÉTATS ET LE DROIT PÉNAL DE L'AVENIR* (1925).

⁴⁰ 1 OPPENHEIM, *INTERNATIONAL LAW* (1928) § 156.

⁴¹ See STRUPP, *op. cit. supra* note 4, at 217.

courage obedience to it is well known. One method of providing such sanctions is to permit international tribunals to assess punitive damages against a state which has flagrantly violated international law, or has been flagrantly negligent in observing it. Such a measure need not be regarded as unusual, or as derogatory to the dignity of a state. The proudest states have been called upon to apologize, and have done so in forms which represent a far greater sacrifice of national pride than the payment of an indemnity. It is human to err; it should not be so hard to admit error. Nor is the absence of any superior authority a reason for objecting to punitive damages; for the same reason, objection would have to be made to compensatory damages. The same forces which impel a state to apologize, or salute the flag of another state, or to pay compensatory damages, would impel it to accept the award of an international tribunal fixing punitive damages.

It is doubtless true that in many international awards in which compensatory damages alone were supposed to have been awarded a punitive element was present. Possibly the modern trend in private law is to expand the concept of damages so as to include within it elements which are punitive in character.⁴² Such a development might afford a solution to this question; but it would seem to omit the advantages of a deterrent or exemplary character to be found in avowedly punitive awards.

III

A further problem remains to be considered. The terms used with regard to the measure of damages, whether in private or international law, do not seem, for the most part, to bear a precise and generally understood meaning. It is for this reason that so much difficulty is found with regard to indirect damages in international law. The term "indirect damages" is so vague in its meaning that it is impossible to say either that indirect damages are, or are not, permitted.⁴³ There seems no reason,

⁴² This seems to have been in Judge Parker's mind when he said: "That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate with the injury. Such damages are very real, and the mere fact that they are difficult to measure or to estimate by money standards makes them none the less real, and afford no reason why the injured party should not be compensated therefor as compensatory damages, but not as a penalty." *Lusitania Case*, DECISIONS AND OPINIONS, *supra* note 1, at 27.

⁴³ See the doctrinal note to the Alabama case in 2 LAPRADELLE ET POLITIS, *op. cit. supra* note 1, at 977; and an article by Hauriou, *Les dommages*

however, why a rule should not be stated without the use of the term.

Arbitral tribunals, in asserting that indirect damages are not legal, have followed the precedent set down in the famous Alabama Claims arbitration.⁴⁴ Severe and justifiable attacks upon that decision have in recent years so weakened it that it no longer has value as a binding precedent. In the first place, it is to be noted that the order excluding indirect damages was dictated by political considerations, and is, therefore, of little judicial value.⁴⁵ Furthermore, there was no agreement as to the meaning of the term. Judge Parker points out that the term is nowhere justified by the historical record of the negotiations leading to the arbitration, nor by the treaty itself, nor by the award.

"The use of the term to describe a particular class of claims is inapt, inaccurate, and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful, and should have no place in international law."⁴⁶

The tribunal did, as a matter of fact, award some damages which might be classified as indirect, as is shown by the fact that certain claims were classified by the United States as indirect, while England was willing to regard them as direct.⁴⁷ Professor Yntema sums up concisely the reasons for rejecting the Alabama Award as a precedent:

indirects dans les arbitrages internationaux (1924) 31 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 212; also, 1 ANZILOTTI, *op. cit. supra* note 1, at 533.

⁴⁴ RALSTON, *op. cit. supra* note 18, at 241 *et seq.*; BORCHARD, *op. cit. supra* note 18, at 414; 1 LAPRADELLE ET POLITIS, *op. cit. supra* note 1, at 596; Yntema, *Treaties with Germany and Compensation for War Damages* (1924) 24 COL. L. REV. 150.

⁴⁵ The order was necessitated by the danger that England would withdraw in the face of the enormous demands for indirect damages made by the United States. 2 LAPRADELLE ET POLITIS, *op. cit. supra* note 43, at 839, 911; Hauriou, *op. cit. supra* note 43, at 211. "While this ruling was in the nature of an interlocutory order or judgment, it was, when considered in the light of the record, nothing more than an extra judicial declaration made necessary by political expediency and entirely justified on that ground." Opinion in the War-Risk Insurance Premium Claims, DECISIONS AND OPINIONS, *supra* note 1, at 54.

⁴⁶ *Ibid.* 58.

⁴⁷ MOORE, *op. cit. supra* note 25, at 589, 646; SCHOEN, HAFTUNG (1917) 127, note 11; Yntema, *op. cit. supra* note 44, at 140. Hauriou asserts that the expense of pursuing the Confederate cruisers, the prolongation of the war, and the increased insurance rates, are classic examples of *damnum emergens*, and yet were classified as indirect damages. Hauriou, *op. cit. supra* note 43, at 213.

"The effect of the award cannot properly be extended so far as to deduce therefrom a rule that all claims for indirect or consequential damages are without legal foundation. . . . In the first place, it is in general improper to deduce from the rejection of specific indirect claims on the grounds of remoteness . . . of a particular case, the principle that all indirect claims under all circumstances are to be rejected, since, as in the Geneva Arbitration, the general principle is not in question, but only the more special consideration whether it can be appealed to under the circumstances. The Geneva Tribunal did not decide that indirect claims are generally to be disallowed, and, if it had so decided, its dictum would have been incompetent. It was empowered to adjudicate only certain specific claims. Furthermore, as Bluntschli has somewhat acutely observed, all the so-called Alabama Claims were indirect, as respects Great Britain, since the liability of the British Government resulted only from the non-enforcement of the neutrality laws by British officials and the evasions thereof by persons for whom the British Government was not directly responsible. . . . The Alabama Award, therefore, far from serving as a precedent to the contrary, may be cited as authority for the allowance of claims for indirect damage in international law."⁴⁸

A study of the cases which have disallowed indirect damages reveals the fact that in most of these the principle of indirect damages has not been denied, but that they were refused in that particular instance because they were too remote, or for other reasons connected with the circumstances of the case. Cases are rare in which indirect damages are rejected *au fond*. Umpire Thornton refused them in two cases, in both of which he spoke of lack of certainty.⁴⁹ The Commission held in the *El Triunfo Case* that

"... by the accepted rules of international courts in such cases, nothing can be allowed as damages which has for its basis the probable future profits of the undertaking. . . ."⁵⁰

Profits were also rejected in the cases of *Jethro Mitchell* and *Lacaze*. In neither of the latter cases does the opinion state reasons; and it is impossible to know whether the particular circumstances, or objection in principle, caused the refusal.⁵¹

⁴⁸ Yntema, *op. cit. supra* note 44, at 151.

⁴⁹ Hammaken's Case. MOORE, *op. cit. supra* note 25, at 3471; Canada Case, *ibid.* 1746. Perhaps he would have been willing to allow more certain losses. In any case, many other decisions have allowed profits for either broken contracts (Hammaken) or ships (Canada).

⁵⁰ FOREIGN RELATIONS (1902) 872.

⁵¹ 1 LAPRADELLE ET POLITIS, *op. cit. supra* note 1, at 471; 2 *ibid.* 290. Of the latter case the editor says that it conforms with practice and should be approved. *Ibid.* 304. The cases which he cites (which will be discussed hereafter) can not be taken to prove that all indirect damages should be rejected. For that matter, the editors themselves, in discussing the Alabama Claims, admit the possibility of such damages. 2 *ibid.* 977.

In some cases which apparently deny indirect damages, it will be found that they have actually been awarded. This, as has been seen, may be said of the *Alabama Case*; and in the *Canada Case*, just mentioned, allowance was made for the wages of the crew for a year, and for their transportation. The words of Commissioner Frazer, in the *Boyne Case*, are often quoted:

"The allowance of prospective earnings by vessels was denied by the tribunal at Geneva unanimously. It is not, so far as I am aware, allowed by the municipal laws of any civilized nation anywhere. The reason is obvious and universally recognized among jurists. It is not possible to ascertain such earnings with any approximation of certainty. There are a thousand unknown contingencies, the happening of any one of which will render incorrect any estimate of them, and hence result in injustice."⁵²

Yet, after complaining as to the lack of evidence, he estimated "the value of the vessel for the return cargo" at so much per pound upon cotton freight. In the *Bronner Case*, Umpire Thornton—who, as we have seen, had elsewhere rejected consequential damages or prospective profits—again refused them, but

"... because he thinks that the loss of this is sufficiently compensated by the assured interest of 6 per cent per annum at the end of a number of years."⁵³

It is clear that a large number of cases ordinarily cited as denying indirect damages do not do so in principle: the tribunal is simply unable to award them because of the particular circumstances before them. The reasons for such action vary. It may be that the commission is not satisfied with the evidence before them that the losses sustained could be calculated as reasonably certain. Thus, in the *Alsop* claim, it was said, "there is really nothing to indicate that such profits would have arisen."⁵⁴ Similarly, in the *Rudloff Case*:

"Under these circumstances any estimate of the pecuniary advantages derivable from the contract is necessarily conjectural. Damages to be recoverable must be shown with a reasonable degree of certainty, and can not be recovered for an uncertain loss. . . . The case presented here is not that of the loss of the prospective profits of an established business, nor is it that of the loss of the ascertained profits derivable from a contract unperformed. . . . The damages claimed in this item are speculative and contingent and cannot form the basis of an award."⁵⁵

⁵² MOORE, *op. cit. supra* note 25, at 3926.

⁵³ *Ibid.* 3135.

⁵⁴ RALSTON, *op. cit. supra* note 18, at 249, citing (1911) 5 AM. J. INT. LAW 1097, 1098.

⁵⁵ RALSTON, *op. cit. supra* note 21, at 198. In the *Oliva Case*, Umpire Ralston cited the *Alabama Award*, and the opinion of Commissioner Frazer;

Again, the tribunal may feel that the injury for which compensation is claimed is too far removed from the original illegal act for which the state has been held responsible to justify indemnification. This was the position taken by the Mixed Claims Commission, United States and Germany, in the *War-Risk Insurance Premium Claims*:

"Although the act of Germany was the immediate cause of maturing the contracts of insurance by which the insurers were bound, *this effect* so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence. . . . In striking down the natural man, Germany is not in legal contemplation held to have struck every artificial contract obligation, of which she had no notice, directly or remotely connected with that man. The accelerated maturity of the insurance contracts was not a natural and normal consequence of Germany's act in taking the lives, and hence not attributable to that act as a proximate cause."⁶⁶

In the *Pelletier Case*, the claimant argued that he would have made great profits from real estate investments if the money which he proposed to use had not been confiscated by Hayti. The tribunal replied: "They are not proved, and if they were, they were too remote consequences, if consequences at all."⁶⁷ Again, in the *Valentiner Case*, a claim made because laborers had been drafted and crops therefore lost was denied because

". . . there are so many elements of uncertainty dependent upon conditions of weather, health and industry of laborers preparing the crop for shipment and transportation, and ultimate realization on the crop, that the umpire is inclined to the opinion that the damage would be too remote."⁶⁸

The tribunal may also feel that too many other influencing causes have entered into the production of the injury, so that the act complained of cannot be regarded as the necessary cause of the damage done. In the case of *Yuille, Shortridge and Co.*, the Senate of Hamburg, which acted as arbiter, pointed out that, aside from the denial of justice complained of on the part of Portugal, there had been bad management on the part of the

but prospective profits were disallowed because of the uncertainty of calculating how many deaths would occur in Caracas, how many interments would take place in Oliva's pantheon, the profits resulting, etc. *Ibid.* 781. See the Sanchez Case, *ibid.* 937-939; the Rice Case, MOORE, *op. cit.*, *supra* note 25, at 3248; Burt Case, NIELSEN'S REPORT (1926) 598; Brower Case, *ibid.* 615 (in which claimant was deprived of land on which he hoped to find buried treasure).

⁶⁶ DECISIONS AND OPINIONS, *supra* note 1, at 134.

⁶⁷ MOORE, *op. cit.* *supra* note 25, at 1779.

⁶⁸ RALSTON, *op. cit.* *supra* note 21, at 564.

company, losses by it elsewhere, and a general failure of crops in that year.⁵⁹ A similar position was taken in the recent *Wielc-mans Case*, before the Belgian-German tribunal, which pointed out that the claimant lost no profits through the confiscation of his car because, in the first place, he was a captive and could not have used it, and, in the second place, his social position would not have permitted him to rent it.⁶⁰

For various other reasons peculiar to the case before them, tribunals have denied indirect damages in some form. It has been held in a number of cases that profits lost because of war could not be recovered. Umpire Lieber, in the case of *Aaron Brooks*, said:

"These potential and prevented profits, called consequential damages, are but rarely and reluctantly allowed by law unless plainly fair. They are hardly ever allowed, if ever, when the injury done has been occasioned by an authority doing its bounden duty, and never when the injury suffered was inflicted by the authority doing its sacred duty to defend and save the country."⁶¹

In the case of the *Brig William* a claim for lost profits was rejected; but before doing so, the Umpire had inquired as to the laws of Mexico concerning such compensation and as to the degree of certainty with which it could have counted on passengers.⁶² Finally, it should be noted that, in many of the cases cited as rejecting the principle of indirect damages, the principle is expressly admitted, though damages may be denied on the facts of the case. Thus, in the case of *Mora and Arango*, "it is usual in such cases to award indemnity for prospective earnings"; but this case was "of a very speculative character, as depending upon most uncertain contingencies."⁶³

⁵⁹ 2 LAPRADELLE ET POLITIS, *op. cit. supra* note 43, at 109. The editors assert that this decision follows the rule consecrated in practice—that indirect damages should not be indemnified. *Ibid.* 117. It is not correct, however, to say that this opinion asserts such a rule; it merely says that in this case, the injury was produced by other causes than the one complained of. See Hauriou, *op. cit. supra* note 43, at 215-217.

⁶⁰ 2 TRIBUNAUX ARBITRAUX MIXTES 230. In the *Di Caro* case, Umpire Ralston refused to allow for profits lost because of an illegal blockade, for the reason that fighting was at the same time in progress which would have as effectively prevented any profits. For another item, loss of profits was allowed. RALSTON, *op. cit. supra* note 21, at 817.

⁶¹ MOORE, *op. cit. supra* note 25, at 4310. See also the *Dix Case* in RALSTON, *op. cit. supra* note 21, at 9; *Henry Case*, *ibid.* 25; *Kunhardt and Co.*, *ibid.* 69; and the rule of the Nicaraguan Claims Commission (1915) 9 AM. J. INT. LAW 865.

⁶² MOORE, *op. cit. supra* note 25, at 4226.

⁶³ *Ibid.* 3783. In the arbitration of 1896, between Colombia and Great Britain, the Swiss Tribunal allowed in principle for *lucrum cessans* as well

While it thus appears that the cases in which the principle of indirect damages is denied outright are extremely few, there are, on the other hand, a large number of decisions which show that the right to award such damages has been widely asserted. In the case of the *Horace B. Parker*, before the American and British Claims Arbitration Tribunal, it was said:

"It is contended in the answer that the damages claimed are 'remote, speculative, contingent, and incapable of ascertainment.' As to this, it is enough to say that a long line of decisions of international tribunals has established as the measure of damages for such cases loss of use of the vessel, to be measured by probable catch. For this purpose, the catch of other vessels, or the average catch under the conditions at hand has often been taken as the measure."⁶⁴

In the *Fabiana Case*, *dommage causé par la faillite* and *dommage indirect* constituted three times as much as all other items combined.⁶⁵ There has been no hesitation in awarding damages for losses incurred through illegal interference with contracts or concessions. In the *Delagoa Bay Case*, it was said that the damages comprehended according to universally admitted rules both *damnum emergens* and *lucrum cessans*, the prejudice incurred and the loss of profit.⁶⁶ Tribunals have been equally willing to grant damages for other violations of international law, as, for example, in many cases of arrest. In the case of *Gahagan*, there was awarded, in addition to \$10,000 for the imprisonment, \$6,000 for "the loss of his employment, and

as for *damnum emergens*, but said that there was no demonstrable loss of profits in this case. LA FONTAINE, *PASICRISIE* (1902) 552; RALSTON, *op. cit. supra* note 18, at 257; Yntema, *op. cit. supra* note 44, at 147n. See also the Monnot Case, RALSTON, *op. cit. supra* note 21, at 171, and the case of the Union Bridge Co., NIELSEN'S REPORT (1926) 381.

⁶⁴ *Ibid.* 570; citing *The Wanderer*, *ibid.* 470; *Favorite*, *ibid.* 518; *Kate*, *ibid.* 487; *Hope On*, MOORE, *op. cit. supra* note 25, at 3261; *Bering Sea Damage Claims*, *ibid.* 2131; *Costa Rica Packet*, *ibid.* 4948, and FOREIGN RELATIONS (1902) App. I, 451, 454, 459. See also the *Chorzow Factory Case*, *supra* note 2, at 47-48, 53; and comments thereon in 1 ANZILOTTI, *op. cit. supra* note 1, at 531.

⁶⁵ LA FONTAINE, *op. cit. supra* note 63, at 343. In the case of the *Masonic*, \$5,000 a year was allowed for anticipated profits. *Ibid.* 281. In the arbitration of 1839 between Great Britain and Brazil, there was allowed, among other things, losses in port charges or in freight due at the port of discharge, losses due to inability to fulfill charter parties, demurrage, wages, etc. *Ibid.* 91-92. See also cases of the *William Lee* ("for loss of the whaling season"), MOORE, *op. cit. supra* note 25, at 3406; *Aspinwall*, *ibid.* 1015; *Bark Jones*, *ibid.* 3054, 3063; *Jane*, *ibid.* 3120; *Ferrer*, *ibid.* 2721; *C. H. White and Borden v. Chile*, RALSTON, *op. cit. supra* note 18, at 252.

⁶⁶ LA FONTAINE, *op. cit. supra* note 63, at 402. See also the *Martini Case*, RALSTON, *op. cit. supra* note 21, at 843; *Orinoco Asphalt Co.*, *ibid.* 589; *Cheek Case*, MOORE, *op. cit. supra* note 25, at 5068.

expenses resulting therefrom.”⁶⁷ In the *Irene Roberts Case* it was said:

“Under these circumstances well-established rules of international law fix a liability beyond that of compensation for the direct losses sustained. . . . The derangement of Mr. Quirk’s plans, the interference with his favorable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for the injury he sustained.”⁶⁸

To summarize, it is very rare that an international tribunal has denied in principle the right to award indirect damages. That such damages should be refused in particular instances is quite natural, and it would be absurd to offer such cases as proof of a rule forbidding indirect damages. On the contrary, the evidence is overwhelming that indirect damages are permissible and have frequently been allowed by international tribunals.⁶⁹

The real problem is not the question of whether indirect damages should be allowed at all, but of the degree, or kind, of damages which it is permissible to award. The difficulty is in the vagueness of the term, which should be dropped from the terminology of international law, and in the confusion which it has brought into the whole subject.⁷⁰ Such confusion demands a new statement of the rule. And as to this, it should be noted first of all that it would be impossible to devise a rule which would cover every case. The chief need at present is to release international tribunals from an asserted—though, as has been seen, unprovable—rule to the effect that indirect damages are prohibited in international law. Judges must for the most part be left to their own discretion.

The start must be made from the universally accepted rule that full compensation must be made; that the situation must

⁶⁷ *Ibid.* 3241. See also *Cauty’s Case*, *ibid.* 3309.

⁶⁸ RALSTON, *op. cit. supra* note 21, at 145. For goods seized in the case of Joseph Smith, “a reasonable mercantile profit” was allowed. MOORE, *op. cit. supra* note 25, at 3374. See the *Howland Case*, *ibid.* 3228; the *Lavarello Case*, between Italy and Portugal, LA FONTAINE, *op. cit. supra* note 63, at 411; the case of *Don Pacifico*, 1 LAPRADELLE ET POLITIS, *op. cit. supra* note 43, at 595 and doctrinal note at 596; statement of the German Commissioner Kiesselbach as to Administrative Decision No. VII, DECISIONS AND OPINIONS, *supra* note 1, at 306; and the *Russian Indemnity Case*, SCOTT, HAGUE COURT REPORTS (1916) 312.

⁶⁹ It may be noted at this point that systems of private law offer support to the above conclusions. It is believed that international law should be built upon its own foundations; and no investigation, therefore, is made of domestic law. Reference may be made, however, to Yntema, *op. cit. supra* note 44, at 140-145, who investigates the Roman, French, German, and Anglo-American law. See also SEDGWICK, ELEMENTS OF THE LAW OF DAMAGES (1909) 15, 21, 117-118, etc.

⁷⁰ 1 ANZILOTTI, *op. cit. supra* note 1, at 533. The confusion is so great that certain cases have been cited on both sides of the controversy. See EAGLETON, *op. cit. supra* note 7, at 200, n. 40.

be restored as it was before the injurious act took place; that the injured party must be made whole.⁷¹ If this rule be accepted, it would appear that compensation should be made for all damages which were caused by the illegal act, and are traceable exclusively to it. The difficulty, of course, lies in ascertaining what full compensation is in each case. This involves two questions: has the loss complained of been produced exclusively by the illegal act and, can the loss be calculated with reasonable certainty?

The first question involves the rule of proximate cause, and the whole problem of remote and foreign elements of causation. As to this, a clear statement was made by Judge Parker:

"This is but an application of the familiar rule of proximate cause—a rule of general application both in private and public law—which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained, so long as there is a clear unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain, and the loss can be clearly, unmistakably, and definitely traced, link by link to Germany's act. But the law cannot consider . . . the 'causes of causes and their impulsion one on another.' Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss."⁷²

In tracing back an effect to find its cause, it may be found that other elements than the act complained of have entered into the production of the loss claimed. Illustrations may be found in the cases of *Yuille, Shortridge and Co.*, and of *Wielemans*, above cited. In such a case the illegal act is no longer the sole generating cause. It is perhaps a too conservative statement to insist that all consequences for which other causes are even in part responsible should be eliminated; perhaps it should be said that compensation should be made in proportion to the damage ac-

⁷¹ Mr. Borchart says that "international tribunals do not necessarily apply the rule of municipal courts to the effect that a claimant must, so far as possible, be placed in the same condition as he would have been if he had been allowed to proceed without interference." BORCHARD, *op. cit. supra* note 18, at 418. Whatever may be the explanation of this—and it should be observed that international courts have often applied the rule—the state, even more than an individual, should be called upon to make full reparation. A state has greater power of injury, greater capacity to repair injury, and it should have a greater sense of responsibility.

⁷² Administrative Decision No. III, DECISIONS AND OPINIONS, *supra* note 1, at 12-13, 46.

tually caused by the respondent's act.⁷³ Such a statement has the disadvantage of adding to the already great difficulties of the judge.

Once it has been established that the loss is due to the illegal act, it remains to estimate that loss; and for this calculation, few rules can be laid down. Hypothetical and entirely conjectural losses should be thrown out by the tribunal. Only where the loss can be calculated with a reasonable degree of certainty should it be permitted. Thus, if a ship has definite contracts which cannot be carried out because of its arrest, the loss of profits may be estimated with reasonable sureness. If it has no such contracts, but picks up business as it can from time to time, its profits will be more difficult to compute. In such cases, the average of its own gains for several years may be taken (*Masonic*), or its gains for the past year (*William Lee, Aspinwall*), or comparison may be made with other ships of the same type during the same period. A large amount of freedom must be left to the judge;⁷⁴ but accumulated precedents will be of much help to him. Such precedents have fixed with fair accuracy the amount to be allowed for false imprisonment, or the measure of damages in death cases. The only principles which need be stated are that the judge is free to award indirect damages, but that he is limited in the award to damages proximately caused by the illegal act, and in the calculation of the damages to those reasonably capable of estimation.

IV

One further point, of less significance, remains in measuring full compensation. To accomplish this, interest is often required. Arbitral tribunals have usually allowed interest, even though the convention under which the tribunal operated made no mention thereof. Only for exceptional reasons, such as long delay in presenting claims, or for lack of jurisdiction, has interest been refused. The problem in this connection is as to the date from which interest should run. The rate is determined according to the circumstances, the object being to ascertain a just compensation for the wrong.⁷⁵

⁷³ "Le seul principe qu'on puisse poser c'est que reparation est due pour tout dommage resultant des faits generateurs de la responsabilite dans l'exacte mesure dont il se rattache a eux," 2 LAPRADELLE ET POLITIS, *op. cit. supra* note 43, at 977, doctrinal note to the Alabama Case.

⁷⁴ "It is clear that in each particular case the computation of damages must largely be based upon the given facts; of necessity the problem is such that a considerable discretion must be exercised by the judge." Yntema, *op. cit. supra* note 44, at 136.

⁷⁵ As to interest, see Administrative Decision No. III, DECISIONS AND OPINIONS, *supra* note 1, at 62; case of John B. Okie, DECISIONS AND OPINIONS, *op. cit. supra* note 8, at 64; RALSTON, *op. cit. supra* note 18, at 128-131; EAGLETON, *op. cit. supra* note 7, at 205.