

LECTURE ELEVEN

INTERNATIONAL RESPONSIBILITY

International Responsibility is an important factor in the adherence to International Law since without it there is no remedy for breach of international law obligations and no distinction civil and criminal law. In consequence remedies in International Law depend on International Responsibility. The principle of International responsibility is indispensable to and complements International law.

- 1) The Breach of an International Obligation is an illegal act and an International Tort.
- 2) Commission of an International Tort gives rise to a duty to make reparations

See *The Chorzow F. Case* It is a "Principle of International Law that a breach of engagement involves an obligation to make reparations in adequate form Reparation is the inevitable complement to a breach of International Law"

Regarding indemnity. It is a "Principle of International Law and a general concept of law the breach of an obligation gives rise to reparations and the corollary is that a failure to do so is a violation of the obligation between states."

Meaning of a breach of International Obligation

- 1) Ad invitum. It must be against D's will i.e. prior consent, retrospective acceptance or acquiescence heals a breach
- 2) Lack of Justification e.g. Hot Pursuit permits arrest foreign vessel on high seas for an offence in one's own territory.
- 3) Breach voluntary and attributable to a subject of international law and not due to duress.

Therefore must be an act or omission, unjustified, attributable to a subject of International Law committed voluntarily ie Mens Rea.

Legal Interest in Tortiously Relevant Acts against Objects of International Law (Locus Standii).

Example : State A imprisons Mr. X and refuses State B access where X is a foreigner and citizen of State B

International Customary Law sets minimum standards of Justice for states in respect of International Torts which must be so recognised by International Customary Law. There is no International Tort regarding stateless persons.

For a valid international tort claim there must have been an unsuccessful exhaustion of remedies by the national concerned.

Regarding Nationality there are 3 groups of exception where a state may exercise protection.

- 1) Protective Persons - occupants of a protectorate
- 2) Members of Armed forces & ships crews and
- 3) Rights given under treaties.

Preconditions of an international tort include a Time element. A party must show continuity "*Dies a quo to dies ad quem*". The individual must be state national at date of tort, though this may work an injustice where a national dies and the inheritor of a tortious cause of action comes from another state.

Exhaustion of Local Remedies When the legal interest of the state commences every reasonable effort must be made by the individual to gain a remedy from the sovereign state and exhaust such actions resulting a failure of the claim. Compliance is presupposed by the State with main standards of justice . one must go to all potential courts.

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What is the Position of Delay & the doctrine of laches ?

Am Gatielos Case . A state against which an International Action is brought has a right to resist - if the alleged Plaintiff has not exhausted municipal remedies.

Finnish Ship Case 1934 (F. & U.K.) The object of the rule is to enable the state to do justice in its ordinary way. The case stressed the importance of exhaustion and held that this was satisfied since there is no effective remedy against the Admiralty Board. The Basis of claim was that Finnish ships were requisitioned in World War I. The Remedy was via application to an arbitration board which found as a fact that ships had been requisitioned by Russia. There was a right of appeal to courts on questions of law but no appeal on questions of fact, so the plaintiff could go to the International court.

AMGATIELOS . Procedural facilities . If one has a right to call witnesses and fails to do so, and thus loses a case, there is a failure to exhaust local remedies.

Exceptions to local remedies rule : Two groups

- 1) Lack of any effective local remedies and
 - 2) Waiver of this rule by the Defendant state..
- 1) **Lack of effective remedies;**
 - a) Minimum standards - a rule of law - eg providing courts for foreigners to question treatment by the local authority
 - b) Lack of Jurisdiction for relief against highest organs of the state.
 - c) Lack of power in the courts to give remedy where International Law and Municipal law are incompatible.
 - d) Where courts submit to governmental pressure . seldom the position must be shown beyond doubt : problems with evidence.
 - e) Where courts are bound by precedent no room for remedy problems regarding distinguishing precedent.
 - 2) **Waiver of this rule by the Defendant state.** This often occurs if there is a revolution causing Damage to foreign nationals. After the revolution there is a global treaty containing a waiver and access to an independent court under International Law.

Identity of Tortfeasor : Attributability

An actionable international tort should be the act of or commissioned by an International Person. However states act through individuals and institutions . in what circumstances can their acts be attributable to the state and what kind of acts can be attributed to a state ?

- 1) Actions instigated by the legislature. Can there be a tort if a law contravenes International Law but has not yet been implemented or acted upon ? ie a disaster waiting to happen ? This if a law gives the state the power to nationalise foreign owned property. If implemented it amounts to a Tort. The position if the statute is not used is a nominal breach resulting in presumably in Nominal compensation. If compensation for nationalisation under the statute is payable in State A's currency and not removable this is the equivalent of illegal confiscation, not legal expropriation There is no clear answer in these circumstances though the existence of the legislation might destroy the marketability of the property contrary to International Law.
- 2) Executive actions are problematical in that High or State Authority for the actions must be established to attribute the act to the state, similar to the concepts of vicarious liability and agency. See the *Massey Claim* 1927 and the *Way Claim* 1928. There are two relevant factors, the character of the action and the public office of the individual concerned. One must consider the use and abuse of the office and the role of Equity.

The Border Cases. The Mexico / U.S. Cases 1920/30's.

Stephen's Claim 1927. Stephens was shot by a sentry from the auxiliary forces. The carriage he was in had failed to stop. There was no warning of an intent to fire. The officer was arrested and convicted but then successfully appealed. Held . Mexico responsible. Auxiliary forces are government armed forces and agents of the state. The Responsible for denial of justice by not punishing the officer.

PUBLIC INTERNATIONAL LAW

Kling Case 1930 Mexico again held responsible U.S. citizen shot by Mexican troops. Shots were fired in the air by victim's companions for fun which was imprudent but the Mexican attack was unprovoked.

Youman's Case 1926 Three United States citizens killed in 1880 . This involved a Mexican mob and a labour dispute. The Mayor sent for troops to quell the riot. Instead the troops fired on the U.S. citizens and killed one, then mob killed three more. There was no trial of the soldiers. **Held:** there had been a lack of diligence in punishing the perpetrators . the troops' actions were the direct responsibility of Mexican Government as Troops on duty, under supervision of commanding officer. They were not acting in a private capacity. Soldiers when looting etc. are always acting against state orders but if this view taken there would never be any responsibility.

Gordon's Claim 1930 Mexico held not liable for the acts of two officers who injured U.S. citizens during shooting practice. This was outside the line of service and not within the scope of their authority so there was no state responsibility. A failure to punish them was not a denial of justice (Whilst the acts amounted to gross negligence the essential element was the lack of state authority).

Within the hierarchy of Civil Servants it may be possible to draw a distinction. See the Massey Claim 1927. It is undoubtedly a sound general principle whenever there is misconduct that whatever status or rank of a person under domestic law, if their acts result in a failure to follow International Law obligations the nation must bear the responsibility for the acts of its' servants. This covers minor executive officers. See the Quintanilla Case and the Deputy Sheriff and the Roper Case 1927 regarding that Police officer.

- 3) **Acts of The Judiciary** : Needs a high level of commission . reason . reflects wish of International Law that states should give the judiciary the maximum degree of independence A High degree needed resulting in a need to an exorbitant degree of judicial injustice before International Law will act.

Salem 1932 U.S./Egypt The must be an absolute denial of justice / inexcusable delay / obvious discrimination of foreigners / palpable and pernicious (injustice) iniquity of judgement.

Chatham Claim 1927 Mexico/U.S. There must be an outrage bad faith insufficiency of action apparent to any unbiased man.

What is the standard of proof laid down in respect of direct and indirect tortious acts by the Judiciary. It must be established where or not such acts amount to an inability to obtain a remedy or the imposition of an incommensurate penalty.

Kennedy 1927 Mexico/U.S. Kennedy fired on by a Mexican and was hospitalised permanently. The assailant got two months Held a denial of justice by the Judge.

Mallen Case Claim by Mexican consulate twice assaulted by U.S. policeman first time they threatened to kill him but Policeman only given a \$5 fine which was held not to be incommensurate with the offence even though there was a failure to warn him about his conduct. The Second time the Mexican was injured and the U.S. Authority found him liable and fined him \$100. Held this alone was not a denial of justice in the light of the evidence, but the fine not paid and he was not jailed and therefore there was a denial of justice.

Undue delay of a trial is Tortious

The De Galvan Case . 1927 . Mexico v United States. United States held liable for a failure to prosecute a murderer of a Mexican subject. He had been indicted before a Grand Jury but Six years later there had still been no trial.

Dyches Case 1929 Spent 2½ years in a Mexican prison for an offence with a maximum penalty of year awaiting trial then found not guilty !

Dependent States : State Authorities etc. The Mother or Federal state is responsible for subordinate units in as much as they have no international personality.

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Revolutions Which is the government responsible for the government acts ? Depends on success of the revolution. If they succeed they become the state and responsible under international law. If they fail they are subject to municipal law

Successful Revolutionaries are responsible in Equity for their own acts and acts of the old government.

If they are Unsuccessful Revolutionaries who have caused damage to foreign nationals the state has international minimum standards of "diligentia quam in suis" ie the same degree of Diligence that the state can and does provide for it's own affairs regarding

- 1) Prevention,
- 2) Suppression, &
- 3) Repression.

The acts may amount to crimes against foreign nationals, but are they otherwise internationally tortious? Whilst they are the indirect responsibility or secondary responsibility of the state this is subsequent to the act of a private individual e.g where there is a riot by Private individuals and the state has notice that it is directed against foreign individuals then if the authorities take no action at all or negligently arrive too late and fail to suppress or later punish perpetrators the State may be liable for the inaction - but the state is not responsible for the Riot itself.

James Case 1926 Indirect responsibility for the murder of a foreign individual The actual murder of James was the responsibility of the murderer under Domestic law but the secondary failure to redress was the responsibility of the state.

Reparations

Chorzow (1929) Factory Case An Essential principle contained in the notion of an illegal act is that Reparations must as soon as possible wipe out consequences of the illegal act and place it in position "Restitutio in Integrum" that it would have been in if it had not occurred. But this implies more than status quo ante requiring Restoration and Compensation.

Restitution in kind is the first line of action but where this is not possible there can be Monetary compensation corresponding to the value of loss plus damages for the loss sustained. Restitution may be Restitution simplicitor or equitable restitution.

Alternatively the remedy may be Satisfaction : covering any non monetary form of reparation and is often used where the breach has not incurred material damage or where money is not appropriate e.g. **Corfu Channel** Case findings against Albania & U.K. Declaration violation of Romanian sovereignty. The Declaration itself was appropriate satisfaction and the equivalent of nominal damages. Semble the award in respect of Israel's kidnapping of Eichman.

Distinguish international and personal acts / claims . Measure of damages may be set on the level of the loss of an individual e.g. where State A's vessels is denied access to state B. Even if an individual vessel is excluded, damages are payable to State A for the value of loss to the vessel but there is no obligation on State A to actually pay the vessel's owner the money.

It is possible to have mixed Damages. see **I'm Alone Case** 1939 U.S. gave satisfaction to Canada - Non material damage - breach of freedom of the seas \$25,000 : + damage for the crew's loss of \$25,000 each.

FURTHER READING

Cheng : General Principles of Law Applied by International Courts and Tribunals 1953

Schwarzenberger & Brown Manual Ch 6 :

Schwarzenberger Vol 1 Ch31-33

Harris Ch 8

Chorzow Factory Case PCIJ 1928 Green 607 Harris 375 & 395

North American Derdging Claim 1926 Green 639

Panevezys-Saldutiskis Railway Harris 440 & 468

The Ambatielos Claim Green 657, Harris 464 -45-