believed at the time to ordain. The international society has not, however, acted in this way. It shows its concern in the recurrent sinister reactions of even an unruly member howsoever brought about, and with the forms of conduct known to be certainly productive of them. Roughly speaking, it takes cognizance of any conduct serving to arouse in one or more of its members reactions indicative of a sense of outrage, or a desire for revenge, or profound ill-will. When such reactions are widespread and acute and persistent, they serve to create doubt whether the law which tolerates the conduct which produces them makes adequate response to the needs of the international society; and they themselves become the source of a constant stream of fresh amendatory suggestions for the improvement of that law and for incorporation into it. In a word, external mental reactions to State conduct serve to bring about a remolding or refashioning of the standards by reference to which international law finds itself unceasingly adjusted to the requirements of the time. It is not suggested that these reactions suffice in themselves to change the law. They do, however, set in operation forces which may result in changes, and which will surely do so if their influence is sufficiently widespread and prolonged.

It may, therefore, become important for a State to learn what is the direction and strength of the tide of general opinion on a particular rule of conduct or matter of policy, regardless of its acknowledged propriety. That tide may be incoming, manifesting a broad sweep of increasing approval, or it may be outgoing, slowly yet perceptibly welding together a common sense of disapproval of acts which a State tenaciously asserts the right to commit. Or the tide may be about to turn. Whatever be its direction, the facts are of public concern. If they can be ascertained and statesmen thereby enabled to see beyond the horizon, the nature of the development of the law may be anticipated, and the very trend of that development be furthered or retarded. Thus it is that scientific examination of foreign mental reactions to any activity of State life may be expected to bear much fruit, for it commands a vision not elsewhere to be had. It is capable of revealing what general opinion may demand that the law of nations require or denounce, and of so enabling the international society to avoid devious paths, and in the shortest time to lay straight its course for the advancement of justice.

CHARLES CHENEY HYDE.

## THE ACCESS OF INDIVIDUALS TO INTERNATIONAL COURTS

In recent years there has been a growing demand by certain jurists and publicists that aliens be given by international treaty the privilege of suing States before an international court. Two members of the Committee of Jurists which framed the Statute of the Permanent Court of International Justice in 1920 wished to confer such jurisdiction on the Permanent Court. The demand springs from a feeling that justice is now often unobtainable by

the alien in national courts, that the processes of diplomacy are too political, inefficient and occasionally unfair to cure the defects, and that some international judicial guaranty of the alien's rights is essential. While there is a solid basis for dissatisfaction in certain respects with the operation of the present system of insuring justice to aliens, the demand for reform has sometimes been justified on such doubtful grounds and has been so far-reaching in scope that the whole proposal is in danger of complete defeat. To call attention to these exaggerated claims and to what seem to the writer misconceptions, is the purpose of the present editorial.

It is asserted by some of the proponents of the reform that national courts are frequently biased against aliens, that a contract between an alien and a government is international in character, that a tort committed upon an alien is in no different case, that an international claim advanced on behalf of a national is in effect a private claim, that diplomatic interposition operates unjustly because of its dependence on political considerations, and in the case of stateless persons operates not at all, and that precedents are to be found in the abortive International Prize Court of 1907, in the convention establishing the Central American Court of Justice, and in the Mixed Courts of Egypt. The demand goes so far as to support the right of an alien to sue the State whenever he thinks he has a justifiable ground of complaint against the State. The international forum thus envisaged is a sort of Court of Claims which is to pass upon the controversy between the alien and the State either as a court of first instance or as a court of appeals or review from national courts.[1]

When it is borne in mind that the only way of effecting this reform is to secure the assent of States by treaty, it will be realized that the premises upon which the reform is justified are not calculated to obtain the assent of many States. How many States are likely to sign a convention which proceeds from the assumption that aliens cannot be certain of justice when they sue the State in its local courts, because the local judges are apt to be biased against them? Indeed, in most civilized States the assumption in principle would hardly accord with the facts. Moreover, the demand in so unqualified a form runs counter to the prevailing tendency of national legislation, as of international law, to require the alien to submit to the local law and to the local courts, if available and effective, and to enable him to invoke international processes only in the event of denial of justice, as that term is understood in international law.

Again, is there any justification for the statement that a contract between the alien and a State is governed by international law? Such a contract may, in the event of a denial of justice, give rise to an international claim; but on what ground can it be said that such a contract is anything but a domestic contract governed by local law? An international tribunal having

[1] See Jean Spiropoulos, *L'individu en droit international*, Paris, 1928, 44 *et seq.*, and authorities cited by him.

to interpret the contract will ordinarily use the local law as a referent, and to that extent the local law will under ordinary circumstances become the international law of the case. But this is far from the suggestion that local law is international law because one of the parties to the contract is an alien, or that any breach of local law (including the contract itself) is automatically a breach of international law—although failure to afford redress might have that result. Nor would such a tribunal ordinarily be justified in applying as a referent principles or rules derived from natural law or international law independently of the local law.

Nor is it any different in the matter of tort. When an alien comes to a country he is subject to the local law. If he, like a national, is injured by an officer of the State, he must (apart from the State's criminal prosecution) necessarily exhaust those remedies for curing the injury which the local law provides. This may be an action against the officer, as is usually the case in the United States and Great Britain, or an action against the State, as in France and Germany and many other countries. It is to be hoped that the time is not far distant when all States will permit themselves freely to be sued for injuries committed by their agents. But, in any event, this recourse of the alien is a domestic claim, and international law is not concerned with it. There is no international claim or right of the alien's State to interpose or a privilege of invoking an international forum, until the alien establishes a denial of justice, either an absence of administrative or judicial remedy or an abuse of such remedy to his disadvantage. Until that time has arrived, there is, strictly speaking, no international responsibility of the State or, in other words, no international claim. The suggestion that when an alien alleges injury there is international responsibility, whereas when a national alleges injury there is municipal responsibility, involves, it is respectfully submitted, a fundamental misconception of both municipal law and international law.

It has been deemed axiomatic that a formal international claim advanced by a State on behalf of its national is a public and not a private claim. Adherence to this theory has its advantages, although it need not becloud the fact that this is often a matter of form only, that in practice the private individual is the essential prosecutor and beneficiary of the claim, and that his State, while having a public interest in all its citizens and in the preservation of their rights against invasion abroad, actually appears in most cases in a representative character only.

If the proposal that foreigners when claiming injury by a State are to be privileged at once to invoke, instead of a domestic tribunal, an international tribunal, were to be put in effect, the result would be a sort of extraterritoriality for aliens. The danger to a State's domestic jurisdiction of accepting aliens on such a condition would persuade some States to decline to accept them. I do not believe the suggestion, therefore, encourages more friendly or peaceful relations. The United States, for example, like most

countries, grants to aliens practically an unrestricted right of suit in contract, and full rights of suit against an officer in tort and, to a very limited extent, even against the State in tort. I have not heard it suggested often that, even in time of crisis, the courts of the United States have exerted any national bias against aliens; and any proposal which begins from the assumption that a State's courts are not impartial toward aliens would probably induce widespread rejection for the whole proposal.

There remains, however, a fundamental objection to the present system, namely, that the remedy of the complaining alien today, after the vain exhaustion of local remedies, when available, is through the diplomatic channel only. This political recourse obviously has great disadvantages. The very fact that it is associated with politics indicates one of its weaknesses. The success of the alien's remedy often depends upon the particular nationality he may enjoy, the strength of his State, the weakness of the defendant State, the political relations between the two States, the uncontrollable political disposition of his State to entertain his claim, and similar factors. The defendant State, if weak, has occasionally to submit to claims which are unsound. As I have ventured to point out elsewhere,[2] all three parties to the issue, the plaintiff State, the defendant State and the injured alien, are varyingly subject to disadvantages under a system which gives the alien the protection of diplomacy only. The system of diplomatic protection has obvious weaknesses in the case of dual nationality and of no nationality.

To cure the manifest defects of this system, however, it seems injudicious to jump to the extreme conclusion of proposing to deprive the local courts of their primary jurisdiction, for it may be that the local court's disposition of the case will show that the allegation of injury is quite unfounded and that an international claim is quite unjustified. Indeed, if an international claim and corresponding State liability were immediately to arise whenever an alien complains, it would amount to an assertion that, whenever an alien *claims* to have been injured, though an investigation may actually demonstrate no wrongful act, the local jurisdiction and control over the case become at once limited and restricted, and the foreign State has the privilege of taking the case out of the hands of the local courts and substituting its own *ex parte* views of the rights of the foreigner and of the validity of the defenses of the alleged wrongdoer. This extraordinary privilege shall now be extended to individuals, it is proposed. It is doubtful whether any independent State, however one may qualify or challenge the theory of sovereignty, would tolerate such a view of its legal relations to foreigners.

Inasmuch as it is not possible to speak, in my judgment, of international responsibility, under ordinary circumstances, until local remedies have been exhausted, it seems equally inappropriate, both from a theoretical and a practical point of view, to suggest resort to international courts until one can

[2] Annals of the American Academy of Political and Social Science, July, 1929, Publication 2235.

assert an international responsibility. The two go together. In this limited resort, however, the proposal is much aided by the more general signature by States of the Optional Clause—Article 36—of the Statute of the Permanent Court of International Justice. This article would automatically make it possible for two States signatories of the Optional Clause to invoke the court's jurisdiction on behalf of an injured alien, and make correspondingly unnecessary a resort to the diplomatic channel. I am inclined to doubt whether the individual should have a right to resort to the court or to any international court under circumstances and terms where his State would not have that right. And yet the wide proposal now under consideration would make that possible, for it suggests recourse to an international forum whenever an alien is involved in a legal dispute with a State, either in contract or in tort, without requiring a preliminary resort to the local courts and the establishment of a denial of justice or violation of international law.

The precedents cited by proponents of the reform involve qualifications which it would be well not to overlook. For example, in connection with the International Prize Court, the law there to be administered was international law, not municipal law. There is, therefore, in such a case, a very sound reason why there should be an appeal from a national prize court to an international court, because local courts should not be the final judges of international law. This is especially true when belligerent countries, by Orders in Council, or statute, purport to change international law to their own advantage, and when local prize courts are bound by the change thus made in international law. The absence of an international prize court has emphasized a recognized weakness in international law, for the alleged uncertainty in the law or the inability to rely upon it has necessarily induced a resort to increased force on the part of naval Powers.

The precedent of the Central American Court of Justice also does not perhaps sufficiently emphasize the fact that Article 2 of the convention contains the words:

> . . . *pourvu que les remèdes que les lois des pays respectifs eussent pu apporter au cas envisagé, fussent épuisés ou qu'un déni de justice eût été prouvé.*

This is an important qualification upon the resort of individuals to international courts. It is believed to be sound in theory and in practice.

The analogy drawn from Egypt is perhaps not an argument in favor of the proposal, for few States would wish to give aliens that special jurisdiction which by treaty they have acquired in Egypt. The Mixed Tribunals in Egypt are really Egyptian courts; but I doubt whether any moderately independent State would be willing to assign to aliens a special forum which implies that the ordinary courts are not disposed to do justice to aliens.

The proposal of an independent and unqualified resort of aliens to an international forum springs in part from a postulate, which has acquired popu-

larity among certain publicists, to the effect that the individual is now a subject of international law, and should be privileged to invoke it whenever he desires. Whether the individual is or is not a subject of international law is a matter of concepts, and hardly justifies the metaphysical discussion the question has engendered. He is at least the beneficiary of international law, and sometimes bears the liabilities and disabilities which it imposes. Such recourse to an international forum as may be granted to the alien would arise by virtue of treaties between States, so that the issue as to whether he is or is not a subject of international law, seems quite academic.

If the demand of the advocates of a judicial forum were limited to cases in which the alien must allege a denial of justice or other violation of international law which his State could validly prosecute, the proposal would have demonstrable advantages and should command support. It would substitute for an inefficient and political method of affording justice to the alien an efficient and judicial method, relieving his State and his fellow-citizens from the burdens and dangers of political interposition and relieving the defendant State and international relations of a constant cause of friction. Such a reform would require treaties by which States would agree to permit themselves to be sued, but there ought to be a strong incentive on the part of all States, potential plaintiffs or defendants, to institute an international judicial forum for pecuniary claims. What is desired and needed is to assure to the alien the protection of due process of law without the necessity of political coercion or controversy with all its implications. By enabling the injured citizen to sue the defendant State in the international forum, possibly with the financial aid of his government if the claim is deemed meritorious, but without governmental committal to the views he expresses before the court, all three parties to the issue and the cause of peace would be benefited, for the parties would rely on legal processes for the assurance of due process of law to the alien.

It ought not to be difficult for States which have already signed the Optional Clause and which, therefore, may be drawn into court by other States suing on behalf of injured aliens, to take the next step of authorizing their respective nationals to bring such claims against other States in the international forum, provided that an international responsibility of the defendant State can be plausibly asserted. Because of this limitation, it may be desirable, at least in the beginning, to attach certain conditions to this resort, such as an endorsement of his claim by his national State. Such endorsement would imply that his State was of the opinion that his claim was ripe for international action, hence that the alien had resorted sufficiently to the local courts and that it seemed evident that complete justice had not been, or could not be, obtained from them. Such a limitation would make prospective defendant States more willing to support a treaty permitting themselves to be sued by aliens in the international forum. Under the limitation suggested, all States, prospective plaintiffs and prospective

defendants, and individual aliens as well, should eagerly embrace this opportunity to promote the administration of justice in international relations. By removing legal cases from the diplomatic to the judicial forum under the safeguards above-mentioned, both justice and peace are promoted.

EDWIN M. BORCHARD.

## FOOD SUPPLIES AND BELLIGERENTS

The publication of the volumes on the public relations of the Commission for Relief in Belgium is opportune.[1] There are still problems in regard to immunities of noncombatant populations and property which have long been discussed. As early as 1781, Franklin wrote:

> There are three employments which I wish the law of nations would protect, so that they should never be molested or interrupted by enemies even in time of war. I mean farmers, fishermen, and merchants, because their employments are not only innocent, but are for common subsistence and benefit of the human species in general. As men grow more enlightened, we may hope this will in time be the case. Till then we must submit, as well as we can, to the evils we can not remedy.[2]

In 1907, Mr. Choate at the Second Hague Peace Conference made an elaborate argument upon the exemption from capture of private property at sea, supporting the traditional attitude of the United States on this contention as well as on the closely related doctrine, the freedom of the sea. Mr. Choate, referring to what were sometimes called "commerce destroyers," said:

> The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such service, and to concentrate their entire resources upon the construction of great battleships whose encounters with those of their adversaries shall decide any contest, thus confining war, as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land.[3]

When the question of exempting private property at sea came before the conference for vote, among the states voting in the negative were France, Great Britain, Japan and Russia.

During the World War the battleship was a factor, but the cutting off of the food supply by vessels of less tonnage was a main objective. There was also a question as to what constituted food, and the list of contraband was enlarged to an extent heretofore unknown, so that almost every commodity might be included. States mobilized their entire populations. It was difficult to determine whether women working in munition factories behind the lines were more essential or the men at the front. Some argued

[1] See book-note in this JOURNAL, January, 1930, p. 209.

[2] *Deuxième Conférence Internationale de la Paix*, Tome III, p. 777.

[3] 9 Sparks, Works of Franklin, p. 41.