THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE

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CHAPTER X

UNREASONABLE DELAY IN ADMINISTERING JUSTICE

1. In General. — Closely approximating the procedural denial of court access is another form of impediment to the normal benefits of judicial process: that of wilful or negligent dilatoriness evidenced by State officials administering justice with respect to causes in which the alien is a party. Culpable delay on the part of the courts in disposing of cases involving foreigners is one of the most typical instances of denial of justice and as such engages the State's international responsibility. This point has long been settled. In the *Fabiani* case between France and Venezuela, President Lachenal of the Swiss Confederation declared in his award of December 30, 1896: " Upon examining the general principles of international law with regard to denial of justice, that is to say, the rules common to most bodies of law or laid down by doctrine, one finds that denial of justice includes not only the refusal of a judicial authority to exercise his functions and, in particular, to give a decision on the request submitted to him, but also wrongful delays on his part in giving judgment. " [1]

In effect, ever since the era of private reprisals [2] it has been axiomatic that unreasonable delays are properly to be assimilated to absolute denials of access. Only a few protesting voices have been raised in dissent from this generally accepted proposition. It will be recalled that Señor Guerrero, the *rapporteur* of the sub-committee charged with drafting a report on State responsibility by the Committee of Experts, adamantly rejected the theory that responsibility could be incurred through abnormal delay in administering justice.[3]

[1] Moore, *Arbitrations*, p. 4895, (translation ours); s. c., La Fontaine, *Pasicrisie*, p. 356.

[2] See the authorities cited on p. 59, *supra*. As early as 1650, Zouche in his *Juris et Judicii Fecialis...* (p. 33), held justice to be denied where a judgment could not be obtained against a debtor *within a reasonable time.*

[3] See p. 121, *supra.*

An identical position was maintained in observations circulated by the Colombian Government to the members of the Third Committee at the Hague Conference on March 28, 1930.[1] Such attempts to deny that continuous unwarranted postponements of judicial action violate international law are now of the rarest occurrence. The principle of responsibility for unreasonable delay is one which is so overwhelmingly corroborated by a rich wealth of literature,[2] diplomatic correspondence [3] and arbitral decisions [4] as to be no longer

[1] " Unconscionable delay on the part of the courts may constitute a denial of justice, but international responsibility should not be invoked on this account. A remedy should be sought under the municipal law of the country. Delay is always relative. In some cases, justice is normally easy to administer, and there are fewer delays in a small village than in a large town. The judgment of the chief of a tribe is more expeditious than that of the court of a great country with an age-long civilisation. " *Observations Regarding Bases of Discussion* Nos. 5 and 6, *Minutes*, Annex II, p. 205.

[2] Consult the authorities cited on p. 118, *supra*, and see: Décencière-Ferrandière, *Responsabilité*, pp. 108-109; Durand, *op. cit.*, pp. 727 and ff.; Fitzmaurice, *op. cit.*, p. 103; Moussa, *op. cit.*, pp. 451-453; Oppenheim, I *International Law*, p. 303; Le Fur, *op. cit.*, pp. 360-361; De Visscher, in 52 *Recueil des Cours* (1935), p. 397; Kaufmann, in 54 *Recueil des Cours* (1935), p. 432; Kelsen, 42 *ibid.* (1932), p. 251; Borel, in 27 *Recueil des Cours* (1929), p. 547; Eustathiadès, *op. cit.*, vol. I, pp. 152 and ff.; De Leval, *La Protection Diplomatique*, par. 95. Compare Basis of Discussion No. 5, *op. cit.*, p. 48. " ...no State shall...prosecute an alien otherwise than by fair trial before an impartial tribunal and *without unreasonable delay...* " Article 12, *Draft Convention on Jurisdiction with respect to Crime*, Research in International Law, *op. cit.*, p. 596. Italics ours.

[3] Cf. Mr. Bayard to Mr. McLane, June 23, 1886, VI Moore, *Digest*, p. 266; Mr. Buchanan to Mr. Ten Eyck, Aug. 28, 1848, *ibid.*, p. 273; Mr. Frelinghuysen to Mr. Morgan, Mar. 5, 1884, *ibid.*, p. 277; Mr. Blaine to Mr. Ryan, June 28, 1890, *ibid.*, p. 282; Mr. Forsyth to Mr. Davee in the *Barker* case, Feb. 7, 1838, *ibid.*, p. 653; The Earl of Clarendon to Acting Consul Lewis J. Barbar, October 8, 1857, 48 *Brit. and For. State Papers*, pp. 345-346.

" Nearly three years have since elapsed, and yet the new charges against the *Josephine* have not been preferred.

" It is urged by the Venezuelan Minister that the delay in preferring those charges is due to the non-appearance of the master; but he resides in Trinidad, and it is not stated that any attempt has been made to cite him to appear, nor to acquaint him with the nature of the new charges; nor is it explained how the evidence justifying measures of such extreme rigour and severity as the seizure of the vessel and the imprisonment of the crew should only have been discovered six months later when the case reached the Court of Third Instance, and after the Court of Second Instance had declared that there was no evidence of guilt whatever, but, on the contrary, evidence of tampering with justice on the part of the accusers...

" It is abundantly clear not only that the British subjects concerned have suffered great wrongs and injuries at the hands of Venezuelan officials, but that there has been such delay and denial of justice on the part of the Venezuelan Tribunals as justifies Her Majesty's Government in declining to leave the owners of the *Henrietta* and *Josephine* to seek their remedy in the Venezuelan Courts as suggested by the Venezuelan Minister. " The Earl of Iddesleigh to Mr. F. R. St. John, October 8, 1886, 79 *ibid.*, p. 49.

Numerous arbitration treaties concluded since the last World War impliedly recognize the principle referred to in the text. Thus Article 3 of the Locarno Arbitration Agreement between France and Germany provides: " In the case of a dispute, the occasion of which, according to the municipal law of one of the parties, falls within the competence of the national courts of such party, the matter in dispute shall not be submitted to

subject to any doubt. Like direct refusal of access it may effectively bar the claimant from obtaining that relief to which he is justly entitled.

In some respects, delay in the conduct of the proceedings may be even more ruinous than an absolute refusal of access or wrongful rejection of the alien's petition. For, in the latter case, the claimant knows exactly where he stands and may appeal to his government for assistance immediately, (assuming, of course, that the rule requiring local remedies to be exhausted has been observed), without the possible pecuniary prejudice resulting from hopelessly protracted litigation; whereas, in the former hypothesis, the drawn-out conduct of the proceedings may itself be a source of additional, irreparable injury. But disregarding this possible element of damages, it is obvious that the failure to conduct proceedings with reasonable diligence and despatch may produce the same dire effects for the claimant as though he had been denied a judicial remedy altogether. Kohler's pointed query is here well worth recalling: "What advantages does the prospect of a just decision and subsequent powerful measures of realization offer, if I must submit to a delay of months and years, until perhaps the realization becomes merely theoretical, and the defendant has sunk so low financially that nothing can be had from him?" [1]

the procedure laid down in the present Convention until a judgment with final effect has been pronounced, *within a reasonable time* by the competent national judicial authority." Le Fur et Chklaver, *Recueil de Textes*, p. 868, (italics and translation ours). To the same effect: Article 3 of the Locarno Arbitration Treaty between Germany and Czechoslovakia, *ibid.*, p. 872; Article 31 of the General Act of September 26, 1928, *ibid.*, p. 997.

Undue delays were assimilated to denials of justice in many treaties concluded by Latin-American countries with European powers in the effort to limit diplomatic interposition. A typical example is that between France and Venezuela (Art. 5), of Nov. 26, 1885. De Martens, *Recueil*, vol. 12, 2nd series, p. 684.

[4] In addition to the *Fabiani* case, *supra*, p. 235, see the *Cotesworth and Powell* case, Moore, *Arbitrations*, p. 2050 at p. 2085; *Bullis* case, Ralston, *Venezuelan Arbitrations*, p. 170; *Salem* case, *Award of the Tribunal*, p. 65; and cf. the *Interoceanic Railway of Mexico Co.* and the *El Oro Mining and Railway Co.* cases, referred to on pp. 259-60, *infra*. In the case of the *Relief*, it was said in the course of argument in favor of restoring certain prize captures on *ex parte* evidence: "If the claimants in these cases were driven to plea ad proof they would have just ground of complaint against the sentence of the court; ...such a measure... would inevitably delay these causes for years... perhaps until another war; ...such a *delay* of justice would be a denial of it, and in many instances would operate as injuriously as a sentence of condemnation..." In that case, the captors had already been indulged by the court for a year after issuance of the monition. 3 Moore, *International Adjudications*, pp. 51-52.

[1] Kohler, *Lehrbuch der Rechtsphilosophie* (Eng. ed.), p. 247.

2. Principle of Delays Difficult to apply. — Most commentators glibly recite the canticle that unjustified delay in justice is tantamount to its denial with ingenuous indifference to the deceptive features of the proposition being expounded. They apparently regard it as so obvious a platitude as to require no further elaboration; and yet it is treacherous, uncertain soil upon which the unsuspecting may stumble into serious error. Although the principle of delays is simple, its application is often highly embarrassing because international law provides no convenient measure by which lapses of time may be condemned as excessive.[1] Whether it be the length of the detention prior to trial, procrastination during the trial itself, or abusive delay between trial and judgment, the arbitrator deciding issues which confront him is often forced to have recourse to general principles of law, or to what is sometimes a disguised but fallible emotional preconception as to the proper time-limits within which proceedings should be terminated.

Some assistance on this matter is furnished by provisions of the *lex fori* specifying determinate periods within which investigations must be begun, judicial activity taken, and cases decided. But the prescriptions of the local code can never of themselves be conclusive — a proposition which may be deduced from the impotence of municipal law to restrict international duties. Compliance with domestic standards of diligence does not necessarily preclude responsibility. On the other hand, neither does the fact that the time-limits set forth in the municipal code of procedure have been exceeded suffice, *of itself*, to generate international culpability. They offer, to be sure, a convenient starting index of comparison, but little more.

[1] *Dyches* case (United States v. Mexico), *Opinions* (1929), p. 193; *Roberts* case, *Opinions* p. 103; MacGregor, C., dissenting in the *Chattin* case, *ibid.*, p. 454.

However, treaties sometimes provide that persons accused of crime must be given a hearing within a stated interval. Thus in *Sartori's* case the Government of Peru was held responsible for a delay of fourteen hours in taking the claimant's formal declaration and bringing him to judgment as stipulated in its treaty with the United States. Moore, *Arbitrations*, p. 3123.

[2] Compare the *Perry* case (United States v. Panama), in which the complaint was made that certain criminal proceedings against the claimant were prolonged in violation of the period allowed by law. The Commission found that there were irregularities committed in that Perry was arrested and imprisoned in the morning of October 28, 1910, but his indagatory declaration, which should have been taken within 24 hours, was only taken on November 1, and a proper order for his arrest and detention was not issued before November 7. However the Commission did not sustain the contention of the American Agency that there were undue delays in the proceedings. *Hunt's Report*, p. 71 at p. 77.

In this class of cases again the substance of the litigation must be known and the facts of each case inspected in order to determine whether there were justifiable causes for the delays complained of, whether they were excused by various extenuating factors in criminal cases, or whether they were directly traceable to the alien's own laches in civil proceedings.

As a matter of principle, it would appear that criminal investigations should be handled with greater promptitude than civil litigations, as the shadows projected over the accused's character and their inevitable economic repercussions must be obliterated as quickly as is reasonably possible. Here it will be hard to refrain from assuming direct prejudice where local periods have been exceeded without visible justification. But in civil cases there seems no reason why delays of this kind should subject the State to an adverse arbitral award unless the claimant can prove that he has suffered substantial damages thereby, as, for one example, in cases of a refusal of immediate protection where time is of the essence.

These general principles aside, the decided cases do not permit the construction of a detailed, logically consistent theory with respect to wrongful delays in administering justice. About the most that one can affirm with confidence is that the injurious delay must be *abnormal* or *abusive*, and that the responsibility of the State can not be said to be engaged merely by the fact that the time requirements of the local law, if any, have not been observed. In considering the abusive character of the delay, any violations of provisions of the adjective law may well be taken into consideration; but as Durand has well noted, the responsibility of the State is not dependent upon such violations and may arise even where there is no domestic procedural provision obligating the courts to render judgment within a specified interval.[1]

3. Delays in Criminal Proceedings. — Delays as a ground of reclamation have been most frequently advanced in connection with

[1] Durand, *op. cit.*, p. 729. This position seems to be confirmed by negative implication in the 5th Basis of Discussion drawn up by the Preparatory Committee (*loc. cit.*). Paragraph 3 was thus worded: "A state is responsible for damage suffered by a foreigner as a result of the fact that: ... There has been unconscionable delay on the part of the courts." The provision may permit one to infer that the culpable character of the delay is by no means to be determined solely with reference to the local law, but in a broad way, with attention to common principles of justice.

complaints as to the investigation of criminal charges against aliens and the conduct of proceedings held to determine their guilt. Exceeding the period of five months within which, under the Mexican Code of Criminal Procedure, preliminary investigations against the claimant should have terminated, was one of the motives in the *Turner* case for decreeing responsibility.[1] However, a later decision[2] by the same tribunal, which refused to award damages for the failure of a Mexican judge to try an accused after eight months had elapsed, reveals that the award on behalf of Turner was based not so much upon the delays as it was upon the wrongful detention of the prisoner which resulted in his death.

In the *McCurdy* case — the decision referred to — it was claimed that the Mexican Courts were guilty of a denial of justice in not promptly trying the claimant, that the delays were undue, and that judgment could have been rendered much sooner than it was. The American Agency had not referred to any Mexican provision that might have been violated. On this alleged ground of responsibility the opinion said:

" In other instances the Commission has deemed it appropriate to guide itself by provisions of domestic laws that may exist in this regard. Now, from a general viewpoint it considers that, even though it deems that the investigation of the charges preferred against McCurdy could have been carried out with more promptness, the time spent by the Mexican Judge (eight months) is not so much out of proportion as to constitute a denial of justice. Judging the case in general, it does not appear under the circumstances that the Mexican Courts can be charged with bad faith, negligence or gross injustice, and this opinion is corroborated by those of the American Consular authorities expressed at the time of the occurrences. It appears from the documents submitted by the American Agency as part of its evidence, that said authorities...as well as the Mexican authorities, gave assurances to the effect that the proceedings were being conducted in accordance with the law and that all guarantees were being granted to McCurdy. The American Consul, Morawets, telegraphed to the American Embassy in Mexico as follows: ' McCurdy having fair and speedy trial... ' He further stated in a communication confirming said telegram, that: ' ...his trial is progressing in due form under Mexican law. Able consul has been employed in his behalf and the executive officers of Sonora assure me that his trial shall be absolutely fair and speedy. ' "[3]

[1] *Opinions*, p. 416.
[2] *McCurdy* case, *Opinions* (1929), p. 137.
[3] *Ibid.*, p. 148.

Where, in the absence of particularly convincing justification, more than a year elapses *before an accused is brought to trial*, it is difficult to refrain from concluding that a denial of justice has occurred;[1] but the possibility of extenuating factors mitigates the inflexible implications of this approach. Thus, for example, an *instruction* or preliminary examination may be unavoidably retarded by the necessity of sending out a rogatory commission and of investigating in several places where valuable witnesses are located. Conditions of this kind were present in the *White* case [2] and probably account for the Senate of Hamburg's failure to attach culpable import to the period of some nine months which passed between the date of the arrest, and final judgment of acquittal. The allegation of wrongful delays in connection with White's trial, and in the course of proceedings which preceded it, elicited the following observations from the tribunal:

" In the first place, with regard to the delay of the trial itself, it has already been stated that the mode of criminal procedure in Peru is a combination of proceedings on investigation and accusation, and that, in conformity therewith, the accusation can only be proceeded with after the preliminary investigation is fully completed.

" Now by decree of the Attorney General on the 8th of August, the penal proceedings were commenced, and the accused was informed of this decree on the same day; on the 11th it was ordered that Judge Carillo should take cognizance in First Instance after the penal accusation had been made, and he gave up the further instruction of the matter on the 14th to Juarez. On the 13th the Attorney General ordered the appointment of an interpreter, on the representation of the accused that he had to make some declaration in his cause. This interpreter was appointed on the 19th; on the 20th the final examination of the accused took place, and on the 23rd day of August came the public accusation on the part of the Attorney General. On the 26th of September the Advocate Pablo Mora, delivered his written defence; on the 30th Juarez ordered the examination on oath of the President Castilla for the completion of the documents. This examination took place on the 18th of October. On the 8th of November Juarez ordered the pro-

[1] " A delay of more than a year and a half consumed in a secret investigation ' can not be regarded as reasonable for the trial of an ordinary criminal charge, and to impose such a delay in order to obtain evidence of guilt is in reality to make the prisoner's apparent innocence the ground of his imprisonment. ' " Mr. Blaine to Mr. Ryan, June 28, 1890, VI Moore, *Digest*, pp. 281-282.

[2] Great Britain v. Peru, Award of the Senate of Hamburg of April 13, 1864, II Lapradelle-Politis, *Recueil*, p. 305; s. c., La Fontaine, *Pasicrisie*, p. 46; s. c., Moore, *Arbitrations*, p. 4967.

duction of an authenticated copy of the *decreto de interdiction*, which was obtained on the 10th, and on the 30th of November the sentence in First Instance was delivered. It is evident from this account that no delay had taken place from the delivery of the accusation to the 10th of November; and if the Judge in First Instance was reprimanded by the sentence of the Corte Superior for not having delivered his sentence sooner, this reprimand can only refer to a delay between the 10th and 30th of November, as he had not acted as judge at all in the investigation.

"As the sentence in Second Instance was given on the 14th of December, and that of the Corte Suprema on the 23rd of that month, it certainly appears that sentences in criminal cases are delivered in Peru with especial promptitude. But as the period of 20 days between the completion of the documents and the finding in First Instance, cannot be considered a delay of importance, compensation on this ground in favor of the accused can be the less demanded as, according to the Peruvian Law, a fine (*Ordnungsstrafe*) only can be imposed in cases of delay in official judicial proceedings.

"Now, as White was arrested on the 23rd of March, 1861, and the accusation of the Attorney General was not made until the 28th of August, it appears at first sight that the investigation lasted an unusually long time. But it was necessary, first of all, to examine a great number of witnesses, and at four places far distant from each other... and it appears from the documents that the time up to the 4th of July was fully occupied by that examination, and by the necessary official communications of the various courts with each other, as well as those of the acting judges with the higher authorities for the purpose of obtaining their decision; and there does not appear to be any ground for charging the courts and authorities with laziness." [1]

Obviously, where the circumstances of the offense are such as to require the use of rogatory letters to obtain the testimony of witnesses in different localities, allowance will have to be made for a reasonable

[1] La Fontaine, *op. cit.*, pp. 53-54. "The American Agency observes that Panama's fault consists in delays in carrying out the *sumario*. This charge, in addition to being groundless, is unjust because in addition to the fact that the time the investigation lasted was not excessive the reason for extending the periods was really a measure of condescension in deference to the Government of the United States which was always requiring the taking of additional evidence, such as the testimony of many soldiers who said that they knew something about the riot.

"An error is incurred in assuming that the investigation lasted *three years*. The order of the Supreme Court of Justice confirming the provisional quashing bears date of February 9, 1917. As has been said, a part of the delay was the result of the intervention of persons outside of the administration of justice. Moreover, the American Agency should not overlook the fact of the delays inherent in a criminal suit in which the liberty of a citizen is involved, together with all constitutional safeguards. It should not ignore, for example, that the famous American criminal trial of Sacco and Vanzetti lasted 7 years in the tribunals of justice of the United States." From the *Reply Brief of Panama* in the *Baldwin* claim, *Hunt's Report*, p. 328.

period of time sufficient for this purpose. In such cases, the lapse of a period of several months may be unavoidable. The reasonableness of the time consumed will depend on a number of factors, not the least of which is the communication facilities available in a given community as of a given era. From this one may again infer that as faulty means of communication give way to efficient ones with the progress of civilization, there will be a simultaneous elevation of the standard applicable to the determination of delays in this class of cases.

The *White* case seems to indicate that it is not always safe to rely solely upon a quantitative computation of time consumption for the purpose of appraising charges of undue delay. Yet it is none the less true that the lapse of time may itself be so great as to render undebatable the existence of the delinquency. Thus in the *Jones* case [1] a judgment of acquittal rendered three years after the alien's arrest was viewed as so unreasonably retarded as to create responsibility. However, substantially shorter periods were considered as culpable in the *Chattin*,[2] *Parrish*,[3] and *Haley* [4] cases before the United States-Mexico General Claims Commission. The award in the first of this group condemned the action of local authorities in detaining the prisoner for a period of over five months while he appealed without success to the judge for a proper disposition of his case. Chattin had been arrested on a charge of defrauding the railroad company for which he worked of the sum of 4 pesos. The arrest took place on July 9, 1910, trial being held in January, 1911. Conviction was secured on February 6, and sentence passed for two years imprisonment; but in May or June of 1911, the claimant was released as a consequence of disturbances caused by the Madero Revolution. Among the illegalities alleged to have occurred during the course of the prosecution was an unreasonable delay in the conduct of the proceedings. On this point the Presiding Commissioner (Van Vollenhoven) said:

"For undue delay of the proceedings... there is convincing evidence in more than one respect. The formal proceedings began on July 9, 1910. Chattin was not heard in court until more than one hundred days thereafter. The stubs and perhaps other pieces of evidence against Chattin were pre-

[1] United States, v. Spain, Dec. 27, 1880; Moore, *Arbitrations*, p. 3253.
[2] *Opinions*, p. 440. [3] *Ibid.*, p. 473. [4] *Ibid.*, p. 465.

sented to the Court on August 3, 1910; Chattin, however, was not allowed to testify regarding them until October 28, 1910. Between the end of July and October 8, 1910, the Judge merely waited. The date of an alleged railroad ticket delinquency of Chattin's (June 29, 1910) was given by a witness on October 21, 1910; but investigation of Chattin's collection report of that day was not ordered until November 11, 1910, and he was not heard regarding it until November 16, nor confronted with the only two witnesses... until November 17, 1910. The witnesses named by Ramírez in July were not summoned until after November 22, 1910, at the request of the Prosecuting Attorney, with the result that, on the one hand, several of them... had gone, and that, on the other hand, the proceedings had to be extended from November 18, to December 13. On September 3, 1910, trial had been denied Parrish, and on November 5, it was denied Chattin, Haley and Englehart; though no testimony against them was ever taken after October 21 (Chattin), and though the absence of the evidence ordered on November 11 and after November 22 was due exclusively to the Judge's laches. Unreliability of Ramírez's confession had been suggested by Chattin's lawyer on August 16, 1910; but it apparently was only after a similar suggestion of Camou on October 6, 1910, that the Judge discovered that the confession of Ramírez did not 'constitute in itself a proof against' Chattin. New evidence against Chattin was sought for. It is worthy of note that one of the two new witnesses, Estebán Delgado, who was summoned on October 12, 1910, had already been before the police prefect on July 8, 1910, in connection with Ramírez's alleged crime. If the necessity of new evidence was not seriously felt before October, 1910, this means that the Judge either has not in time considered the sufficiency of Ramírez's confession as proof against Chattin, or has allowed himself an unreasonable length of time to gather new evidence... Another remarkable proof of the measure of speed which the Judge deemed due to a man deprived of his liberty, is in that, whereas Chattin appealed from the decree of his formal imprisonment on July 11, 1910 — an appeal which would seem to be rather of an urgent character — 'the corresponding copy for the appeal' was not remitted to the appellate Court until September 12, 1910; this Court did not render judgment until October 27, 1910; and although its decision was forwarded to Mazatlán on October 31, 1910, its receipt was not established until November 12, 1910." [1]

In the *Parrish* case, which grew out of facts similar to those resulting in the arrest of Chattin, a period of twenty days expired between the

[1] *Opinions*, pp. 432 and ff. Cf. also the concurring opinion of Commissioner Nielsen, *ibid.*, pp. 441 and 443; s. c., *idem*, *I. L. A. R.*, pp. 239 and 242. Compare the vigorous, well-written dissent of Commissioner MacGregor in this case, *ibid.*, at p. 454.

"...these authorities should...have investigated the circumstances of the case without delay; and have released the vessel, captain, and crew, and for this purpose the term of three months from the date of the seizure of the vessel would have been sufficient. ...the unnecessary and illegal delay which occurred in the decision of their case [was] entirely unjustifiable." The *Rebecca Adams*, Moore, *Arbitrations*, pp. 2769-2770.

time when the accused was first arrested and the time when he was placed at the disposition of the competent judge. This interval and other delays in the court proceedings from August 16, 1910, to January 27, 1911, were held to constitute a ground for Mexico's responsibility.[1] A like result was reached in the *Haley* case on the basis of a lapse of five months — from August 12, 1910, to January 27, 1911 — during which criminal proceedings against the accused were dragged along. One of the circumstances condemned by the Commission in this case was the fact that whereas the claimant's appeal was filed on July 27, 1910, no decision was rendered upon it by the appellate court until Dec. 17, 1910. It is difficult to accept the Commission's conclusion that such an omission establishes an international delinquency. Does five months between filing date and final decision on an appeal seem so atrocious that a State should be penalized as having violated its international obligations ? Is it discountenanced by the ordinary practice of civilized communities *as of the year* 1910 ? And, apart from the instant case and just as a matter of general principle, might one not be forced to take notice of the fact that a court could have been in recess during a portion of the period complained of and that, indeed, courts frequently adjourn during the summer months ? It is to be feared that there are few instances of the exercise of appellate jurisdiction

[1] *Opinions,* pp. 476-478. MacGregor., C., dissenting, said : " The Presiding Commissioner concludes...that the vacillations of the Judge of Mazatlân in obtaining the apprehension of Parrish by the Judge of Sonora and then in having the prisoner placed at his disposition caused a delay which was prejudicial to the claimant. This delay lasted twenty days, from July 24, to Aug. 13, 1910... Perhaps the prisoner's transfer might have been made more rapidly, but I do not believe...that an arbitral commission may examine the governmental action of any State in its slightest details, as it may be supposed in the present case that the administrative machinery required certain steps which consumed the time above stated. " *Ibid.*, pp. 478-479.

Compare the *Chazen* case, in which MacGregor, C., delivering the opinion for the Commission, said: " Now Chazen was detained on December 7, 1921; the customs authorities should have placed him at the disposition of the Judge of First Instance of Tamaulipas on the 8th of December at the latest, but as they did not do so until the 13th, Chazen was unlawfully detained, according to Mexican law, for 5 days. This certainly resulted in an injury to him for the reason that as he obtained his liberty on bail 3 days after being placed at the disposition of the Judge, he would have been released 5 days earlier had he been turned over to the Judge on the day following his arrest...The Commission sees no excuse for the delay in placing Chazen at the disposition of the Judge as the Customs administrative proceedings against Chazen would not have suffered had the accused, immediately following his arrest, been placed at the disposition of the Judge who was to preside at his trial on a charge of smuggling, since in this event the Customs Authorities would have been able to continue to question him and to proceed with the investigation of the case. " *Opinions* (1931), p. 26.

in the world's legal systems that would not suffer the epithet of "inadequate" if such a position as that in the case of *Haley* or *Chattin* (where the majority certainly seems to have wrongly applied the international standard to acts not highly improper) were regularly adhered to by international tribunals.

On far surer ground is the award which was subsequently rendered by the same Commission in the *Dyches* case.[1] There the claimant was arrested for theft of a horse in May, 1911, and sentenced in May of the following year to six years and nine months imprisonment, and to a fine of $ 1,000. This conviction was affirmed on appeal, but was finally reversed by the Mexican Supreme Court in November, 1913. It was held — both national commissioners concurring — that Mexico was responsible for a procedure which was unjustifiably delayed "longer than it reasonably should have been." After dismissing the contention that a denial of justice had been worked by various irregularities in the proceedings, the Commission declared:

"But the fact remains that the procedure was delayed longer than what it should reasonably have been, in view of the simple nature of the case. Counsel for the American Agency has pertinently observed that Dyches remained deprived of his liberty for a period of two years and seven months, having committed no other offense than that of entering the house of a person without his consent, an offense which the Mexican law punishes with a maximum penalty of from two months to one year's imprisonment; and that the Supreme Court of the State of Nuevo León, in complying with the final decree of the Supreme Court of Justice of Mexico, stated that the term of imprisonment which the claimant had suffered was sufficient penalty for the only offense of which Dyches was liable, therefore setting him free. The American Agency observed also that under the Code of Criminal Procedure of the State of Nuevo León the preliminary investigation in a criminal cause should be concluded, *at the latest*, within the term of three months, when dealing, as is the case here, with offenses which should be tried by minor judges, (Article 103 of the Code of Criminal Procedure), and that the preliminary investigation in this case undoubtedly exceeded this term.

"The evidence submitted by both parties before the Commission is not sufficient for it to obtain an exact idea of the term in which such preliminary investigation was effected, but all the evidence, reasonably construed, shows that this term was exceeded; it readily appears that the decision in first instance was dictated on the 31st of May, 1912, that is, one year after Dyches was apprehended. In other cases the Commission has expressed

[1] *Opinions* (1929), p. 193.

its opinion that there is no rule of International Law fixing the period in which an alien accused of an offense may be detained in order to investigate the charges made against him, adding that it was deemed convenient to consider the local laws in order to decide this question. Applying that test to the present case, and considering that the only offense attributable to Dyches, according to his own confession, merited a maximum penalty of one year, in case it had been of the most serious character, it seens reasonable to believe that within that period, or a little longer, the claimant should have been finally sentenced, thus resulting that he was unduly imprisoned for nearly 18 months. This long and unjustified delay constitutes a denial of justice... "[1]

Two extremes must be avoided. On the one hand, a proper appreciation of the nature of functions performed by domestic judicatures demands that ordinary or normal delays in the conduct of criminal procedure should give no foundation for diplomatic claims. On the other hand, international awards should not, by benevolently indulging too great a sympathy for that " inevitable " degree of laxity which allegedly inheres in all systems of justice, be overly reluctant to condone unwarranted failures to conduct judicial proceedings with a reasonable amount of despatch. The arbitral tribunal in the *Salem* case unfortunately seems to have fallen into just such an error. There the United States Government complained, among other things, that Egyptian judicial (as well as administrative) authorities were guilty of excessive delay in failing to give effect to the claimant's treaty rights as an American citizen, and in failing to pronounce judgment with reasonable promptness as to their lack of jurisdiction over certain forgery charges brought against him.[2]

[1] *Ibid.*, pp. 196-197. And see Nielsen, C., concurring, *ibid.*, p. 198.
" The plaintiff government also argues that after the judge had taken the first steps in the Kaiser process the trial was completely suspended. In this respect it is pertinent to observe: ... (*b*) that the Mexican judge had before him...a very complicated process against all the partisans of Madero and that that of Kaiser was incorporated with the principal case, on account of which any delay which might be involved probably should not be adjudged, criticizing parts of the case instead of the entire process as a whole. In a document from the Secretariat of Justice of Mexico, offered as evidence by the respondent Government, it is stated in this regard: ' As the record is very voluminous and the personnel of the defendants very numerous, notwithstanding the preference which has been accorded in its handling, it has not yet been possible to put it into shape for submission to the Agent of the *Ministerio Público* and steps continue to be taken in the case because almost daily new defendants are arriving from different States of the Republic. ' In all events it appears that the judge did not, in so far as Kaiser was concerned, go beyond the period which Mexican law fixes for closing the investigation, a period which, for the reasons stated, this Commission has, on other occasions considered proper to bear in mind. " *Kaiser* case, *ibid.*, p. 80 at p. 86.

[2] *Brief of the United States, Salem* claim, *Arbitration Series* No. 4 (2), pp. 100 and ff.

It appeared that Salem had, on December 7, 1919, produced an authenticated certificate of his American nationality before the Court of Appeal at Tantah, asking that the native courts be declared incompetent. The series of hearings which followed this petition is thus summarized in the dissenting arbitrator's opinion:

"The Judge instructed the Parquet to investigate allegations made by the lawyer for Salem with respect to the latter's nationality, and directed an adjournment until February 8, 1920. The issue with respect to nationality and treaty rights was therefore at this stage postponed two months. On February 8, 1920, the Parquet asked for further adjournment to ascertain from the Ministry for Foreign Affairs if the accused possessed American nationality ' at the time of the forgery. '...

"On February 22, 1920, there was an adjournment. Only Salem appeared, a number of co-defendants having absented themselves. On February 29, 1920, there was a hearing, and again only Salem appeared, and there was an adjournment to March 21, 1920. On March 21, 1920, an adjournment was taken to allow the Parquet to carry on further investigations with respect to the question of nationality. On May 15, 1920, the accused parties did not appear, and an adjournment was taken to enable the Parquet to obtain information which it was said he was still awaiting with respect to the subject of nationality. On July 1, 1920, the accused parties were called but did not appear, and an adjournment was taken. At a hearing on August 5, 1920, the same situation existed, an adjournment being taken because the accused parties did not appear. On October 16, 1920, the accused parties failed to appear, and the lawyer for Salem declared himself ready in the absence of the latter to deal with the question of the incompetency of the Court. There was further adjournment. On November 18, 1920, the accused parties did not appear, and an adjournment was taken. On January 15, 1921, the parties failed to appear; Salem's attorney asked for a decision on the question of incompetency; the Court ordered an adjournment for fifteen days at the end of which a judgment was to be given as to the right of the lawyer to represent Salem in the latter's absence. On January 29, 1921, the accused parties failed to put in an appearance, and the Court not having terminated its deliberations ordered an adjournment for eight days. On February 5, 1921, the accused parties were absent, and the Court ordered that the power of attorney of Salem's lawyer be recognized. During all this time the question of treaty rights was left undetermined. On March 12, 1921, the Parquet requested to be allowed to declare the incompetency of the native courts with respect to George Salem, whose status as an American citizen was said to have been established by a letter from the Minister of Justice addressed to the Procureur General. Lack of jurisdiction over Salem was then declared by the Court." [1]

[1] Dissenting Opinion of Dr. Nielsen, *ibid.*, No. 4 (6), pp. 101-102.

The majority opinion (which was signed by Dr. Walter Simons and A. Badaoui, the Egyptian Arbitrator) was unable to see in this appalling succession of continuances any faulty delay in administering justice " because no document was presented from which it could be seen beyond doubt that the American Agency had clearly established to the knowledge of the occupying power with which ... the question ought to have been discussed, that Salem's right of citizenship had been a permanent one... " [1] This bewildering attempt to ascribe the judicial delinquencies in question to laches on the part of the claimant Government seems in plain contradiction with the record; for as of December 7 1919, the court was supplied with an official document certifying Salem's American nationality, which document was fully authenticated by the Egyptian Foreign Office.[2] In the light of all the facts confronting the tribunal, it is submitted that Commissioner Nielsen was quite sound in expressing the view that the Egyptian authorities failed to take such steps as might properly have been expected of them:

" With a very thorough appreciation of the difficulties inherent in local laws, and of occasional delays incident to judicial proceedings all over the world, I do not conceive that any Government's legal system should be so inelastic as to stand in the way of action more effective than that revealed by the records of these proceedings...

" The somewhat brief analysis made in the majority opinion of these proceedings... gives to them an aspect of regularity. But it seems to me that the conclusion which I have previously expressed as to the failure of administrative action, as well as judicial procedure, to give effect to the treaty rights becomes convincing in the light of these records. It is shown how easily the combined action of the Egyptian administrative and judicial authorities could be taken to give effect to rights secured by the United States and inuring to the benefit of Salem...

" When consideration is given to the character of the questions before the Egyptian Foreign Office and before the Egyptian courts — questions pertaining to treaty obligations and affecting, therefore, the relations of the two Governments; questions which...seriously concerned the property rights of Salem and his standing in the community; one cannot fail to take account of the fact that approximately for more than a year and a half no final disposition was made of them...

" ...generally speaking, to substantiate such a charge [of internationally illegal action] requires evidence of a pronounced degree of improper govern-

[1] *Award of the Tribunal, op. cit.*, p. 61.

[2] Cf. *Brief of the United States, op. cit.*, p. 102, and the *Case of the United States, Arbitration Series* No. 4 (1), pp. 18, 158, 160 and 177.

mental administration. It seems to me that, even in the light of such a principle of responsibility applied to facts disclosed by the record, there was an unjustifiable culpability in the delay of approximately one year and a half in giving effect to the rights invoked in behalf of Salem in November, 1919."[1]

Responsibility may also be incurred as a result of proven delays in connection with the prosecution of culprits guilty of crimes committed against aliens. Thus in the *Richards* case, an award was made where it appeared that more than six years had passed before the wrongdoers had been brought to judgment.[2] With this hypothesis, however, one has really left the legitimate domain of denials of justice *to aliens*, and has passed to what should in strict accuracy be designated rather as a defective administration of criminal justice, or the failure to fulfil an obligation owed toward foreign States to repress crimes committed against their nationals. This distinct category of international wrong is in no sense to be considered as a failure to fulfil the independent duty of providing aliens with an adequate judicial protection for the safeguard of their rights.

4. Delays in Civil Proceedings. — A denial of justice may also be produced by abusive delays in civil proceedings in which the alien is endeavouring to vindicate a right. Here, however, foreign offices should be more loath to intervene in the absence of convincing evidence that the delays are such as to render nugatory or seriously prejudice the alien's efforts to obtain justice from the local courts. International tribunals have applied this principle with varying effects. A delay of two months during which the local courts failed to grant claimant's petition for the appointment of liquidators was not considered so undue in the *Danford, Knowlton Co.* case as to warrant abandonment of further attempts to prosecute rights before the Cuban courts.[3] On the other hand, several months' vain efforts to obtain execution of a valid, private arbitral award was deemed

[1] Dissenting Opinion of Dr. Nielsen, *op. cit.* pp. 100, 103 and 105.

[2] *Opinions*, p. 412 ; s. c., Lauterpacht, *Annual Digest* (1927-28), case No. 151 ; 22. *A.J.I.L.* (1928), p. 660.

For additional examples of delay in the conduct of criminal investigations or delay during trial, see the following cases : *Renton, U. S. Foreign Relations*, 1904, p. 352 ; *Dolan* (award for unnecessary and illegal delay in the trial of an American citizen involved in the Zerman expedition), summed up in Dunn, *Diplomatic Protection of Americans in Mexico*, p. 205 ; *Faulkner, Opinions*, p. 86.

[3] Moore, *Arbitrations*, p. 3148.

worthy of notice in condemning other judicial misconduct consummating the denial of justice.[1]

That a final judgment in a civil action is favorable to the claimant does not at all preclude the presentation of a claim for damages where the delays interposed before judicial determination of the cause are such that the decision is deprived of all value as a " remedy ". In the *Howland* case, indemnity was decreed for the loss occasioned by, *inter alia*, the deterioration of certain goods during the time consumed in appealing against a wrongful sentence of condemnation.[2] Delays here were so destructive that a decree which merely restored the goods without more amounted to an inadequate compliance with the duty of judicial protection.[3]

Even where the alien's suit is properly dismissed as being unfounded, the responsibility of the State may be engaged where the decision is rendered so unduly long after inception of the action as to have caused material damage.[4] This can be deduced from the analogous principles followed in the *Consonno* case, in which the respondent government's failure to proceed with an action against the claimant during a period of over eight years was held to found a reclamation for the damages thereby inflicted.[5] An extraordinary retardation of this kind in conducting judicial proceedings would seem to require justification of the most convincing sort to explain away the *prima facie* case of denial of justice which it surely seems to make out. Nor is such an explanation furnished by pleading and proving that

[1] *Fabiani* case, *ibid.*, p. 4900; s. c.. La Fontaine, *Pasicrisie*, p. 356. And see the *Cotesworth and Powell* case (Moore, *Arbitrations*, p. 2084) : " The delay of nearly one whole year in notifying an important judicial sentence to the claimants was inexcusable. "

[2] Moore, *op. cit.*, p. 3227. The facts do not disclose whether the seizure was illegal or not. Assuming that it was not, *quaere* whether an action would lie in the absence of an unjustified delay, but where the goods deteriorated before the appeal was decided upon.

[3] In the *Croft* case (Great Britain v. Portugal), the British Government argued that a nine year delay on the part of the local authorities in granting a certain patent of registration, during which time the funds to which the patent should have attached were completely exhausted, was ineffective to repair the damage alleged to have been inflicted, and amounted to a denial of justice (II Lapradelle-Politis, *Recueil*, p. 15). The arbitration tribunal was unimpressed by this argument. Although the case is generally cited with approval, it is at least to be wondered whether the time consumed before rendering final judgment was not deserving of more serious consideration as a basis of responsibility.

[4] " En effet, l'activité économique de l'individu engagé dans un procès peut être entravée par l'incertitude sur l'issue de ce procès, surtout s'il espère continuellement une solution prochaine. " Durand, *op. cit.*, p. 728.

[5] Italy v. Persia, Moore, *Arbitrations*, p. 5019; s. c., La Fontaine, *Pasicrisie*, p. 342.

dockets of the local courts were so heavily over-burdened as to render expeditious procedure impossible, or that the case itself involved so tremendous a potentiality of financial liability to the State as to warrant unreasonably protracted investigation by the judiciary. In the *El Oro Mining and Railway Co.* case, for example, it was objected by the Mexican Agent that failure of the *Comisión Ajustadora de la Deuda Pública Interior* — to which the claimants had had recourse for their claims against the State — to render its decision within some nine years could not be construed as an undue delay in justice, because of the huge volume of work which confronted that court. This contention was swiftly brushed aside, the British-Mexican Claims Commission feeling obliged to hold that the claimant could justly complain of having applied for justice in vain:

"Nine years have elapsed since the Company applied to the Court to which the law directed it, and during all those years no justice has been done. There has been no hearing; there has been no award. Not the slightest indication has been given that the claimant might expect the compensation to which it considered itself entitled, or even that it might be granted the opportunity of pleading its cause before that Court.

"The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter. It will often be difficult to define the time limit between a careful and conscientious study and investigation, on the one hand, and procrastination, undue postponement, negligence and lack of despatch on the other. The Commission have, in their Decision No. 53 (Interoceanic Railway), laid down their opinion that a court with which a claim for an enormous amount had been filed in November 1929 could not be blamed for undue delay if it had not administered justice by June 1931. It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.

"But it is equally obvious that a period of nine years by far exceeds the limit of the most liberal allowance that may be made. Even those cases of the very highest importance and of a most complicated character can well be decided within such an excessively long time. A claimant who has not, during so many years, received any word or sign that his claim is being dealt with is entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice.

"10. In the opinion of the Commission, the amount of work incumbent upon the Court, and the multitude of lawsuits with which they are confronted, may explain, but not excuse the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion can be no

other than that the judicial machinery is defective, and that the organisation of its jurisdiction is not in proper proportion to the task it has to fulfil. A very obvious delay of justice originating in the overburdening with work of Courts insufficient in number is in effect equivalent to that undue delay of justice which the Commission have in their Decision No. 21, accepted as justifying claimants in applying to their own Governments, in spite of having signed a Calvo Clause." [1]

[1] Great Britain v. Mexico, *Further Decisions and Opinions of the Commissioners*, p. 141 at p. 150. Flores, the Mexican Commissioner, dissented from the proposition that the delay of nine years constituted a denial of justice, on the ground that the court "had many thousand cases to decide, some of them very complicated", and that, since it knew the claimant company had had recourse to the Anglo-Mexican Commission for a decision in the same case, "it was logical to suppose that the Adjusting Commission itself would await the opinion of the Anglo-Mexican Commission before dealing with the case." *Ibid.*, p. 151.

Compare the reasoning of the same Commission in the earlier case of the *Interoceanic Railway of Mexico Co.*, in which the claimants had ineffectually endeavoured to settle their claims with the Minister of Finance for six years, and had finally addressed themselves to the National Commission in November, 1929. This Commission had not, by June, 1931, rendered its decision: "...the Commission cannot hold that the claimants are the victims of an undue delay of justice. The time that has elapsed since they went to the *Comisión*... is not so considerable as to justify the charge that this Institution has deferred rendering justice longer than a court of law is allowed to do. The claims amount to over 77 million pesos Mexican gold, with interest compound at the rate of 6 per cent., and no one could criticise a tribunal for taking a substantial time for examining actions in which such huge interests are involved, quite apart from the fact that the *Comisión*... may have kept the claims pending so long as the International Tribunal, with which they knew that the motion had previously been filed, had not pronounced judgment as to their competence." *Ibid.*, p. 118 at p. 128.

In the *Cantero-Herrera* claim (now pending before the Permanent Commission of Washington) the Cuban Government advanced as one of the grounds of an alleged denial of justice on the part of Peruvian courts the existence of unecessary and unreasonable delays in their conduct of the proceedings. These delays were thus described in a report which Dr. Lucas Lamadrid, in his capacity as First Diplomatic Counselor, rendered to the Cuban Secretary of State:

"La primera, y de bulto, que se observa, está dada por el lapso de tiempo de *cinco años, cinco meses y diecinueve días* que media entre el 22 de Julio de 1913, fecha de la interposición de la demanda ordinaria de petición, partición y devisión de herencia, y el 10 de Enero de 1919, fecha de la sentencia dictada por el Juez de Primera Instancia de Lima, Doctor Don Toribio Alayza y Paz Soldán. Tan enorme lapso de tiempo para recorrer solamente la primera instancia, no tiene excusa ni justificación posibles ante los màs elementales principios reguladores de la moderna justicia civilizada.

"Examinando con algún detenimiento los antecedentes del caso, se comprueba que tan inusitada demora fué de antemano consciente y deliberamente preparada por el Juez de Primera Instancia Doctor Don Oscar Cebrían al disponer, de oficio, en 13 de Septiembre de 1915, contra toda ley y contra toda lógica, la acumulación de esta demanda ordinaria a juicio de cuentas, que ni siquiera radicaba en el mismo Juzgado, y el cual venían sosteniendo entre sí desde el año 1888, los demandados Saco y Flores y Canevaro y Compañia.

"Y por sí esto no bastara para la consecución de tan ilegal propósito, el mismo Juez tardo en disponer la absurda acumulación de autos, nada menos que *catrocientos veinte y tres días*, contados desde la fecha de la prividencia mandando traer el cuaderno a la vista para dictarla, cuando la ley peruana concede solamente cuarenta días para ello, (Artículo 507 en relación con el 256 del Côdigo de Procedimientos Civiles); y ni formuló excusas ni trató le justificar las causas de semejante demora.

"Como era de esperarse, la tardía e ilegal resolución hubo de ser recurrida ante la Corte

However, unreasonable delays productive of denial of justice may proceed not only from a defective organization of the courts and their procedure, but as well from the absence of an independent judiciary where the method and tempo of proceedings are under the control of political officers.[1] Both these unhappy conditions may unite to produce an administration of justice which is so malodorous as to provoke unconditional condemnation on the part of other States. A classical example of this is found in the deplorable plight which disgraced judicial functions in Venezuela during the latter part of the 19th century. On April 8, 1893, the Ministers of France, Germany, Spain and Belgium joined hands in signing a damning memorandum on the quality of justice there administered:

"Au Vénézuéla, les autorités à tous les degrés violent impunément les lois que le pays lui-même a faites en garantie des personnes et des propriétés étrangères, qu'il appelle à lui... Les lenteurs, inhérentes à toute procédure judiciaire, prennent parfois dans ce pays des proportions invraisemblables...; la justice vénézuélienne, telle qu'elle est organisée, ne mérite aucune confiance, principalement lorsqu'il s'agit de juger des différends dans lesquels l'Etat est partie ou à la solution desquels il est directement ou indirectement intéressé."[2]

Superior de Lima, que la revocó, a virtud de apelación interpuesta por Canevaro y Compañía.

"Posteriormente, y como también era de sospecharse, el otro demandado Saco y Flores pidió a su vez la acumulación, que al fin fué decretada por la Corte Suprema, quedando entre tanto en suspenso el curso de la demanda ordinaria, que en virtud de tales maniobras, a las que bien se echa de ver no fué ajeno el mismo citado Juez, invirtió en la sustanciación de la primera instancia los referidos cinco anos, *cinco meses y diez y nueve días*.

"En el protocolo de arbitraje firmado entre Francia y Venezuela en 11 de Febrero de 1913, se estableció que una demora de quince meses para el fallo de un tribunal local, da por sí misma lugar a la jurisdicción del tribunal internacional.

"La segunda, o por mejor decir, la tercera inusitada e injustificada demora que se observa en el procedimiento del juicio plenario, está dada por el lapso de tiempo de *seiscientos veinte y cinco días*, (*un año ocho meses y trece días*), transcurridos desde el 10 de Enero de 1919, fecha de la sentencia en primera instancia, hasta el 23 de Septiembre de 1920 en que dictó le suya la Corte Superior de Lima, resolviendo el recurso de apelación interpuesto por el Dr. Cantero-Herrera contra la anteriormente citada.

"Tenemos, pues, no uno, sino tres casos específicos, bien claros y definidos, de denegación de justicia, de la que hemos designado como injusticia notoria *in judicando*, y que consisten, como acabamos de ver, en las inexcusables e innecesarias demoras, dos de ellas de más de quince meses, y en conjunto sobrepasando de los cinco años, a que deliberadamente fueron sometides las resoluciones finales del pleito en la sustanciación tan sólo de dos instancias. Por lo que respecta a la incurrida por la Corte Superior de Lima, oportunidad tendremos de demonstrarlo cuando examinemos los trasiegos de personal habidos en su Sala Primera de lo Civil, con motivo de este mismo pleito." *Green Book* of the Department of State of Cuba (1933), *Informe del Consultor Diplomático Dr. Lucas Lamadrid*, pp. 13-14, (italics his).

[1] Kuhn, in 31 *A. J. I. L.* (1937), p. 97.

[2] II *R. G. D. I. P.* (1895), p. 346; and see Basdevant, *L'Action Anglo-Germano-Italienne contre le Vénézuéla*, 11 *ibid.* (1904), p. 362 at p. 391.

There has been some slight disagreement among publicists as to whether it is necessary to prove, along with facts establishing an unwarranted delay in judicial proceedings, the existence of certain suspicious factors indicating that the courts *purposefully* obstructed the claimant in the action prosecuted before them. The Mexican Commissioner in the *El Oro Mining and Railway Co.* case, *supra*, was of the opinion that " delay in administering justice...should be malicious. " [1] A few other jurists have adverted to the wilful or intended character of the protraction.[2] And in the text drafted by the Third Committee at the Hague Conference in 1930, responsibility was declared to exist when the foreigner " encountered in his proceedings unjustifiable obstacles or delays *implying a refusal to do justice.* " [3] The italicized phrase would seem to go almost so far as to require bad faith in the judge, manifested by a systematic attempt to retard progress of the litigation. But it is clear from the great preponderance of authority that this is immaterial. All that is needed to make out a case of denial of justice based on wrongful delays is a showing that the delays have been such as to indicate that judicial functions have been negligently performed, that the courts have consumed what in the light of the normal practice of modern civilized States is an altogether unreasonable amount of time. The test is purely objective, there being no need to probe judicial conduct for xenophobic tendencies. Proof of the judge's hostility, however, may go a long way in such cases to establish the abusive character of the delay.[4]

5. Excessive Haste as a Ground for Responsibility. — It is hardly necessary to add that the reverse of delays, an unreasonable haste in disposing of the alien's demands which fails to give them the serious consideration to which they are entitled, will also bring responsibility down upon the State, where the alien is thereby

[1] *Op. cit.*, p. 152.

[2] See the passage from Twiss, *Law of Nations*, quoted in Mr. Bayard to Mr. McLane, VI Moore, *Digest*, p. 266, and compare, Vattel, *op. cit.*, Liv. II, ch. XVIII, par. 350; Sipsom, the Rumanian delegate at the Hague Codification Conference, *Minutes*, p. 114; the substitute proposal of the French delegation with reference to Bases 5 and 6, *ibid.*, *loc. cit.* A *dictum* in the *Fabiani* case implies (unsoundly, it is submitted), that responsibility arises only when the denial of justice is the *intended* consequence of judicial action or omission and not when it appears as the result of simple negligence or erroneous interpretation of legal texts. Moore, *Arbitrations*, p. 4905; La Fontaine, *op. cit.*, p. 362.

[3] Article 9, par. 2, *Minutes*, Annex IV, p. 237 (italics ours).

[4] Durand, *op. cit.*, p. 729.

prejudiced. Excessively speedy proceedings will reveal that the alien has not benefited by a normal operation of judicial remedies.[1]

This may be particularly true of prosecutions for crime under a system which provides for summary methods of criminal procedure, or where the zeal of the authorities in desiring to establish an accused's guilt leads them to hound the victim with excessively lengthy interrogations.[2]

[1] In *Smith* v. *Compañía Urbanizadora...de Marianao*, the destruction of claimant's property within eight hours after an *ex parte* decree in a fraudulent condemnation proceeding was one of the elements held to evidence bad faith on the part of the local authorities. *Department of State Press Release*, May 16, 1929; s. c., 24 *A. J. I. L.* (1930), p. 384.

[2] Thus, for example, the continuous examination of Mr. Monkhouse for nineteen hours, and of Mr. Thornton for twenty-one hours, in the *Arrest of Employers of the Metropolitan-Vickers Company at Moscow, op. cit.*, Russia No. 1, p. 9 (Sir E. Ovey to Sir John Simon, March 14, 1933), and Russia No. 2, p. 16, (Mr. Strang to Sir John Simon, April 4, 1933), resp.

"It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." Sutherland, J. in *Powell v. Alabama*, 287 U. S. p. 45 at p. 59.