ISSUES ARISING FROM FINDINGS OF DENIAL OF JUSTICE

by

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BIOGRAPHICAL NOTE

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International Administrative Tribunals : World Bank (President), European Bank for Reconstruction and Development (President), Organisation for Economic Co-operation and Development (President), International Monetary Fund (Member).

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INTRODUCTION

Fourteen years ago, I published a book called *Denial of Justice in International Law* [1]. At that time, the most recent comprehensive work on the subject was of considerable vintage : Alwyn Freeman's *opus classicus* [2], which had appeared in 1938. Since then, a series of important developments had caused Freeman's book to fall seriously out of date. As my beginning sentences explained :

> "the possibilities for prosecuting this offence have evolved in fundamental ways. It is now settled law that States cannot disavow international responsibility by arguing that their courts are independent of the government. Even more importantly, the doors of international tribunals have swung wide open to admit claimants other than States : non-governmental organisations, corporations, and individuals.
>
> A vast number of new treaties for the protection of investment allow private foreign investors to seise international tribunals to claim denial of justice. This has given rise to intense controversy. There are those who consider that the very prospect of an international tribunal passing judgment on the workings of national courts constitutes an intolerable affront to sovereignty. Others believe that such must precisely be the role of international tribunals if the rule of law is to prosper." [3]

Having seen that Freeman's volume was outdated after 67 years, I now observe that it did not take much more than a decade for the same fate to befall my own book. The most outdated of the nine chapters turned out to be number eight – the one devoted to the subject of remedies. Hence the focus of these lectures.

Several cases decided since the turn of the century had stimulated in-depth consideration of important questions which were dealt with only cursorily in most older judgments and awards. There are a number of reasons for the prior neglect, and they merit mention.

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1. It is part of the series of Hersch Lauterpacht Memorial Lectures published by Cambridge University Press.
2. *The International Responsibility of States for Denial of Justice* (London/New York).
3. At page (i).

At the greatest level of generality, it may be observed that remedies tend to be far more readily ascertainable when the victim of a denial of justice had, in the proceedings giving rise to the complaint, been a defendant rather than a claimant. Many old cases involved illegitimate judgments – whether leading to prison terms, orders to pay money, or dispossession – where the remedy was obvious : annulment. (Whether the original case might be reintroduced is a separate question. In matters of criminal law, it may be constrained by a rule against double jeopardy. More broadly, it may from a practical point of view be unrealistic due to changed circumstances and the passage of time.)

Moreover, most cases that arose prior to the emergence of treaty-based investor-State arbitrations in the 1980s were brought by the State of the injured party in the exercise of diplomatic protection. The prevailing fiction was that that State was the injured party, and that its interest, notably in upholding international law, could be adequately protected by relief of a kind which the injured party might well consider to be uselessly abstract, such as the symbolic acknowledgment of the international delict, an apology, or a modest amount of money unaccompanied by any attempt to place a value on the loss caused to the complaining party. Whether any sums awarded to the claiming State would then be passed on to its injured citizen was a matter for its discretion. At any rate, even if an attempt was made to assess an appropriate pecuniary compensation, immaterial prejudice such as the suffering caused by a failure to investigate or prosecute the case of murder of a spouse do not lend themselves to accounting exercises likely to produce useful precedents with respect to the evaluation of lost investments.

Even in many cases where the injured individual had been the plaintiff in the original action, things could be quite simple. If a court denied justice to an individual seeking to establish his rightful ownership to a building, an international court or tribunal considering that the prejudice caused was equal to its value could proceed to an ordinary assessment of the value of the deprivation (and the State claiming on his behalf would likely turn the money over to him).

The difficulties come to the fore, and have done so repeatedly in the past two decades in the context of investor-State arbitrations, when one considers rights which are subject to contingencies, and the complaining party is able to bring an international claim on his own behalf. If a foreigner has been frustrated by a denial of justice in the context of a private law suit, plainly the measure of damages to be paid by the

offending State cannot be whatever the amount the foreigner might have been claiming. Does that mean that the international adjudication, in order to establish the prejudice caused by the delict, will involve an assessment of the merits of the suit, serving as a substitute for the national court?

Or what if a foreigner was denied renewal of a valuable licence without being given the occasion to rebut the findings which were said to justify the non-renewal? Should the remedy be the full value of that licence, or should the international court or tribunal conduct a reappraisal – this time properly – of the merits of the licensee's entitlement to renewal under the relevant administrative regulations?

The answer can hardly be as simple as saying that the national authority should be given a second chance, because that would mean that a consummated denial of justice is followed by no adverse consequence to the offending State, and, even worse, would create an unhealthy incentive. Effective justice, as Kant said, requires legislation for a nation of devils. Cynical officials minded to deal roughly with a foreigner could trample on due process after calculating that *(a)* in many if not most cases private parties will absorb the blows because they do not have the confidence or resources to bring an international case against a State, and above all and in any event *(b)* the worst that would happen if such a case were brought would be that the matter would be reconsidered and the State would be accountable for what it should have done in the first place – with no adverse consequence flowing from the denial of justice itself.

CHAPTER I

WHAT OUR SUBJECT LOOKED LIKE AT THE DAWN OF THE TWENTY-FIRST CENTURY

Before grappling with the central preoccupations of these lectures, it is useful to reflect on how our predecessors understood denial of justice. This chapter accordingly resumes the lie of the land, so to speak, as it appeared at the time of the first edition of *Denial of Justice in International Law*.

Overview

For several centuries preceding the twentieth, interventions by foreign Governments, acting on behalf of their nationals to obtain reparation for alleged violations of their rights, were often said to be justified by local denials of justice. The triggering event might be any action deemed to breach international law, whether or not related to the administration of justice. Forcible intervention was thus justified by the complaint that the initial wrong had not in fact been repaired by whatever means, and this was a denial of justice – full stop.

One consequence of this usage of the expression was that some scholars concluded that it applied only to instances of refusal of redress, so that it would cover failure or extreme delay in the hearing of a complaint, but not cases of miscarriage of justice affecting *defendants*. If the latter were international wrongs, it was said, they would have to be known by some other appellation such as *"manifest injustice"*, because they were not properly to be understood as justice *denied*, but as justice wrongly *rendered*.

To compound the confusion, some writers and indeed adjudicators concluded that denial of justice could never be a primary wrong, but could only be present when the initial wrong, whatever it may have been, was followed by a failure to correct it. The ensuing habitual coupling of denial of justice with every type of international wrong was doubtless an even more serious consequence of the use of the expression *denial of justice* to legitimize the use of force. The original wrong done to the defendant was blended with the failure of national redress, and the two grievances merged as an indistinct condition for more or less aggressive "diplomatic" intervention.

These mental constructs have long since been exposed as misleading and unsound. The unnecessary multiplication of formal causes of action, depending on who had initialled the action, sowed confusion. It made life difficult for lawyers, adjudicators and negotiators of the instruments of international law. So did insistence on the proposition that exactly the same facts that constitute miscarriage of justice, such as the flat refusal to hear a litigant, gave rise to one delict if they take place in connection with attempts to redress an "original wrong" (whether or not connected with the administration of justice), but quite another if they are invoked as the primary wrong. Above all, these quiblings were connected with a preoccupation, namely the justification for diplomatic intervention, which has to do with remedies and not with the criteria for establishing responsibility.

These conceptual ambiguities were initially the handiwork of those who were seeking to extend the protection of international law. They undoubtedly included both idealists and opportunists. Whatever their motivation, they were seen by weaker States as providing cover for dubious unilateralism. And so the defenders of those States which habitually found themselves debtors and respondents to claims of denial of justice continued to introduce qualifications of their own, equally productive of confusion.

Although all writers on the subject accept that a claim of denial of justice is an international complaint which cannot be resolved by the very State whose conduct is in question, there was once a wave of commentators seeking with great determination to restrict its definition. The most extreme positions were taken by those who insisted that only a refusal to consider a case could give rise to international responsibility. Once a formal judgment was rendered, no matter how many years after the petition, no matter how unfair the conduct of the trial, indeed no matter how clear the proof of bias or even corruption, it would be an affront to national sovereignty for international adjudicators to examine the actions of the local judiciary. This extreme view would have turned denial of justice into a shimmering mirage. It has no serious proponents in modern international law. (As for the insult to national pride, such emotive comments will always be voiced by the ignorant or the manipulative whenever they find international law to be ill suited to their motives; international law is by definition and in its essence a restriction on national prerogatives.)

A less extreme but in effect equally perverse limitation was the proposition that the expression denial of justice could be used only with

respect to the conduct of judicial officers of the State. The support for this proposition is less extensive than some authors have supposed [4]. Some proponents of this theory were interested only in the *a priori* objective of dismantling the international delict of denial of justice. They can and should be disregarded. As for the others, an examination of their writings suggests that they were primarily concerned with correcting the unacceptable channelling of all international grievances into the delict of denial of justice. In other words, their concern was to achieve agreement to the effect that denial of justice is a meaningful concept only if it is understood as relating to the administration of justice. Once that is established, the issue is simply whether the wrongful acts or omissions are attributable to the State or not. Unless one wishes to open the door to the evisceration of international law by political fiat, it matters not whether the internationally wrongful administration of justice is perpetuated by the executive, legislative, or judicial branches [5].

The Difficult Emergence of a General International Standard

International law would not crumble with the disappearance of the expression "denial of justice". Yet if it did not exist it would have to be invented in some other guise, and whatever concept were enlisted in its place would share two of its features : (i) it would have to be expressed as an abstraction [6] and (ii) it could not be applied mechanically.

If these two related propositions were not accepted, formalism would rule ; any State could avoid responsibility for the way its system of justice treats foreigners simply by going through expedient motions.

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4. In particular, Cançado Trindade's impressive list of authorities ostensibly favouring the limitation of denial of justice "to wrong conduct of courts or judges" – including Borchard, Durand, Bevilaqua, Anzilotti, Strisower, Accioly, C. Rousseau, Rolin, Oppenheim, Lauterpacht, Brownlie, Kelsen, Castberg, Ago, Brierly – in "Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law", (1978) 53 *Philippine Law Journal* 404, at p. 411, quickly dissolves into a flood of qualifications and exceptions upon examination of the quoted works.

5. See the section entitled "Denial of Justice by Non-Judicial Authority" in Chapter 5 of *Denial of Justice in International Law*.

6. During the 1954 session of the Institut de Droit International, only a small minority of the participants found merit in the prospect of defining denial of justice by enumeration of instances ; the majority favoured overarching formulae, (1954) 45 *Annuaire de l'Institut de droit international* 97. Oliver J. Lissitzyn, "The Meaning of the Term Denial of Justice in International Law", (1936) 30 *AJIL* 632, at p. 644, on the other hand, favoured avoidance of the term altogether because of its inconclusiveness, given that "particular acts or omissions meant to be covered by it can be enumerated and defined expressly".

True, by the study of treaties, precedents and doctrine international adjudicators could seek to decide whether there has been an international delict without using the particular abstraction *denial of justice*, but they would still find themselves struggling with the task of finding meaningful applications of other abstractions that seek to encapsulate an evolving consensus as to the minimum international standard required of national legal systems when they deal with the rights of foreigners. This is unavoidable due to the natural inclination of perpetrators of unfairness to cloak their actions in the appearance of fairness.

Freeman described various tentative codifications which in his day had sought to avoid what was viewed, not without reason, as a fuzzy and controversial notion, unlikely to yield predictability. After noting that "vagueness is characteristic of growing, living branches of legal science, and allows necessary leeway for the law to pass through its formative periods", he concluded:

> "the expression should not be tossed aside as incapable of useful service. It is true that considerable controversy rages over its meaning. Yet an imposing of authority is gradually coming to recognize that its rightful province is synonymous with every failure on the part of the State to provide an adequate judicial protection for the rights of aliens. And as such, 'denial of justice' merits preservation". [7]

International law has already built on this conclusion. It can no longer be seriously maintained that denial of justice means nothing but access to formal adjudication, no matter how iniquitous; nor that State responsibility cannot attach to wrongful acts of the judiciary. And if a foreigner is entitled to the protections of international law, the organs of a State cannot have the last word when such entitlements are invoked. Ignorance, bad faith and the outraged unseasoned rejection of criticism will always be with us, but the controversy of Freeman's day has abated.

The modern consensus is clear to the effect that the factual circumstances must be egregious if State responsibility is to arise on the grounds of denial of justice. If a foreigner has been convicted of a crime by a jury of five and complains that other courts empanel juries of nine for such cases, there is little prospect of concluding that an international standard has been violated. On the other hand, if jury members had been allowed to hear the prosecution but not the defence, there can be little

7. Freeman, at pp. 182-183.

doubt that a denial of justice has occurred. International adjudicators do not require an explicit rule or an exactly matching precedent to reach a conclusion in either case. The organs of the State do not necessarily defy the fundaments of a fair legal process by the use of a smaller jury (indeed there is no international standard to the effect that facts must be tried by a jury, even in criminal law). But they do so if they silence an accused.

The indispensable line between fundamental violations and others is easy to draw in the instances just imagined, but other cases are less clear cut. What if the defence is given only 30 minutes to answer the prosecution's hour-long summation? How about five minutes? What if the jury includes only members of a particular religion which is alleged to be hostile to the complaining foreigner, or gives greater weight to the testimony of co-religionists, or to men as opposed to women? What if the judgment looks impressively well-reasoned and balanced, but the trial record shows that important elements of the foreigner's evidence were excluded? Most difficult questions are matters of degree. Sometimes they are given weight only when there is an accumulation of disturbing evidence. These concrete questions are at the heart of the matter, and merit assiduous reflection.

A less worthwhile inquiry concerns the taxonomy of State organs to be acknowledged as dispensing justice, or the types of interactions with authorities to be acknowledged as part of the processes of justice. For example, it might be argued that a denial of justice can occur only if an alien is thwarted in his attempt to initiate a suit to protect his rights, but that the expression is inapposite if he is the victim of a miscarriage of justice *as a defendant*; since in the latter case he is by definition before the court, there is no *denial* of justice but rather something that must find another name, such as "manifest or notorious injustice". Or it may be posited that internationally unacceptable conditions of arrest or detention are international wrongs of a genus different from denial of justice *stricto sensu* because they occur, as it were, in connection with judicial proceedings rather than as a part of them, and involve the conduct of non-judicial officers. Indeed scholars in times past found it necessary to debate such matters.

The phrase "denial of justice", no matter how elaborately defined, will never yield instant clarity as to how actual cases are to be decided in a complex and untidy world. It seems futile to develop refined theories about what conduct is encompassed by a given expression of such elasticity. To some extent the debate is one of nomenclature; it

does not concern the *existence* of an international delict, but what to call it.

The preferred solution is doubtless to adopt a broad definition that encompasses all aspects of the adjudicatory process. Certainly a detainee held for years without a trial would find it difficult to understand why he is not the victim of a denial of justice simply because no judge ordered his incarceration and the opening gavel for his trial has not yet been brought down. This study proceeds on the premise that the delict of denial of justice occurs when the instrumentalities of a State purport to administer justice to aliens in a fundamentally unfair manner. The interesting debate is not whether international delicts are placed in the right category, but whether they are delicts in the first place.

Grotius conceived two types of denial of justice : (i) where "a judgment cannot be obtained against a criminal or a debtor within a reasonable time" and (ii) where "in a very clear case judgment has been rendered in a way manifestly contrary to law" [8]. There are two difficulties with this exposition which have created much confusion over the centuries.

The first problem is that Grotius focused on cases where the complainant was frustrated *as a plaintiff*. This conception of the issue has caused some scholars of successive generations to view denial of justice exclusively as a matter of *thwarted redress*. Well into the twentieth century, voices were heard to the effect that denial of justice was "restricted to those cases in which the alien appears as plaintiff" [9]. Some tribunals reasoned that there must have been some "original" injustice with respect to which a court thereafter denied redress [10]. But of course a foreigner may suffer from a miscarriage of justice as a defendant ; the *Loewen* case is an obvious example. To maintain that denial of justice comes into play with respect to only the wrongful treatment of grievances therefore made it necessary to speak of "manifest

8. Hugo Grotius, *De Jure Belli ac Pacis, libri tres* (Oxford, Clarendon, 1925), book III, chap. 2.

9. Clyde Eagleton, "Denial of Justice in International Law", (1928) 22 *AJIL* 538, at p. 553. *Contra* Freeman, at pp. 151 *et seq.* ; de Visscher, at p. 393 ; Fitzmaurice, at p. 105.

10. In the course of colloquy with counsel in the *Cayuga Indians* case, Arbitrator Pound said : "First there is an injustice antecedent to the denial, and then the denial after it" (*US* v. *Great Britain* ; Fred K. Nielsen, *American and British Claims Arbitration under the Special Agreement of August 18, 1910*, at p. 258). This phrase, pithy but misleading (see Freeman's comment at p. 155, n. 1), was cited in the important *Chattin* case in support of the unfortunate conception that the expression "denial of justice" is inappropriate when "the courts themselves did injustice", IV *RIAA* 282, at p. 286.

injustice" as a category additional to that of denial of justice. Moreover, this approach suggested that the claimant to whom justice was denied must have been right with respect to his grievance, which logically leads to the unacceptable conclusion that one is entitled to a proper hearing only if one's case is good. Since the substance of the delict of denial of justice is indistinguishable from that of "manifest injustice" as that phrase was used to cover the special pseudo-category of judicial wrongdoing independent of antecedent injustice, the irresistibly better view is to consider, simply and naturally, that denial of justice covers all situations where a foreigner has been deprived of a proper judicial process, whether he is seeking to establish *or to preserve* legal interests.

Fitzmaurice archly dismissed this as "a particularly barren distinction of no practical utility", and moreover one of doubtful theoretical validity [11]. The question, he observed, is whether "a wrong similar in every respect" must be given "some other name" because it was committed against an alien defendant who is not seeking redress for a prior wrong but is seeking to resist an effort to obtain redress against himself. His analysis in response to this question merits full quotation:

> "The point is usually obscured by the fact that in nearly all cases an appeal lies, and owing to the familiar rule that all appeals must be exhausted before formal diplomatic intervention can take place, such intervention can, in fact, when the time comes, usually be based on a failure to redress a previous wrong, i.e. in the case of a defendant, on the improper failure, due e.g. to a lack of impartiality, on the part of a higher court to redress the injury caused by a wrong judgment in a lower one. But it is possible to conceive a case where this would not be so. Imagine that A sues B, a foreigner, for money lent. The court quite properly decides in favour of B, it being clear that he never borrowed the money. A appeals. The court of appeal confirms the judgment. A appeals to the final court of appeal. This court, being clearly prejudiced against B on the ground that he is a foreigner, reverses the previous judgments, and condemns him to pay. Most people would say that this would constitute a denial of justice. Yet it would not consist in a failure to redress a previous injury done to B. On the contrary it would constitute an original wrong done to him.
>
> This instance brings into glaring relief the unreality of the distinction between a denial of justice committed by the courts,

11. Fitzmaurice, at p. 105.

and an original wrong or *in*justice committed by them. The distinction may be sound in theory, but it is unreal in practice. In either case there is a failure on the part of the courts to do justice, and in either case there is a failure to render to the injured party the justice which he had the right to expect in a court of law; in other words a denial to him of justice – be he plaintiff or defendant. But the distinction, even if it be valid in pure theory, becomes still more unreal when considered in connexion with the by no means unusual class of case, to which attention has already been drawn, where the parties before the court are neither plaintiff nor defendant, but as it were both – where each seeks to establish a right and to contest the other's right but without alleging any actual injury. If in such a case a court, e.g. the highest court of appeal, delivers a judgment against one of the parties, a foreigner, which obviously constitutes a flagrant piece of dishonesty, clearly involving the international responsibility of the state, can it be said with any real justification that the party in question has not suffered a denial of justice because there has been no failure by the court to redress a prior wrong (when none was asserted) and that the wrong committed by the court must be called by some other name?

The conclusion to be drawn seems to be that, at any rate for all practical purposes, every injury involving the responsibility of the state committed by a court or judge acting officially, or alternatively every such injury committed by any organ of the government in its official capacity in connexion with the administration of justice, constitutes and can properly be styled a denial of justice, whether it consists in a failure to redress a prior wrong, or in an original wrong committed by the court or other organ itself." [12]

Fiztmaurice found support for this view in the following passage from Borchard:

> "Whether it is technically possible or desirable to make the distinction where courts are involved between primary and secondary injuries, for example, whether it is practical to say where a mob or the executive controls the courts in a case where the alien is a defendant, that a denial of justice has not occurred, but

12. Fitzmaurice, at pp. 107-109.

> only an 'unjust judgment', seems rather doubtful. Foreign Offices would probably not make the distinction, nor have international tribunals or writers generally."[13]

The expression "manifest injustice" of itself is an unhappy one, because it is irremediably ambiguous; it could refer to either an unjust judgment or an unfair trial. This ambiguity is precisely the second difficulty with the Grotian formulation. A judgment "rendered in a way manifestly contrary to law" could be vitiated either because the court disregarded the procedural code or because it misapplied principles of liability. If anything is clear about the international law of denial of justice, it is that it does not concern itself with bare errors of substance. Fitzmaurice wrote that it "hardly seems necessary to give authority for the proposition that mere error of fact or mere error in the interpretation of the national law does not *per se* involve responsibility", and went on to quote eloquent and categorical passages to that effect from four awards [14].

Grotius's discussion of this subject was incidental; he was not proposing a new doctrine to reflect the limits of the territorial prerogatives of emerging nation States, but simply considering all grievances that might be said to legitimize war. The true intellectual father of denial of justice was Vattel, who in 1758 proposed a systematic approach to the illegitimate *refusal* of justice under three heads:

- not admitting foreigners to establish their rights before the ordinary courts,
- delays which are ruinous or otherwise equivalent to refusal,
- judgments "manifestly unjust and one-sided" [15].

Two centuries of debate focused on the third category. (No serious international lawyer contests either of the first two.) That phrase – "manifestly unjust and one-sided" – is the heart of this study. Much may lie in the two adjectives. *Unjust* is not enough; the conjunctive "and" signifies that something more is required. *One-sided* then opens the door to the manner in which the process was conducted; all fundamental rules of procedure are, after all, intended to ensure the absence of partiality. The proper reaction to discrimination, fraud,

13. (1929) I *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 223, quoted in Fitzmaurice, at p. 109.
14. *Op. cit. supra* footnote 13, at p. 111, note 1.
15. Vattel, Book II, at para. 350.

bias, malice or harassment, abuse of form, or arbitrariness should not engender controversy in principle; they are forbidden. But to anticipate the greatest difficulty of our subject, it should follow that gross or notorious injustice – whatever the words used – is not a denial of justice merely because the conclusion appears to be demonstrably wrong in substance; it must impel the adjudicator to conclude that it could not have been reached by any impartial judicial body worthy of that name. (Thus the unexplained disregard of a century of unbroken jurisprudence might be viewed with suspicion if it happens to benefit powerful local interests arrayed against a politically controversial foreigner [16].)

Freeman quoted De Visscher's formulation of denial of justice, namely:

> "toute défaillance dans l'organisation ou dans l'exercice de la fonction juridictionnelle qui implique manquement de l'Etat à son devoir international de protection judiciaire des étrangers" [17],

and offered the observation that "it may well be wondered whether any future jurist will be able to improve upon" [18] that definition. One might object that the word "definition" does not easily apply to a sentence which includes the unexplained words "failure", "duty", and "judicial protection".

Certainly Freeman's own attempt, offered almost apologetically in light of the author's admiration for de Visscher's phrase, can be criticized on the same basis. He wrote:

> "If there is anything even remotely approaching a tendency toward a uniform definition in recent doctrinal utterances, it is to apply the phrase 'denial of justice' to all unlawful acts or

16. As Spain's Counter-Memorial in *Barcelona Traction* put it, a State is liable for erroneous judicial decisions, or *maljugé*, only if it is found that the relevant courts exhibited some degree of "bad faith or discriminatory intention". Quoted in Eduardo Jiménez de Aréchaga, "International Responsibility of States for Acts of the Judiciary", in W. G. Friedmann, L. Henkin and O. J. Lissitzyn (eds.), *Transnational Law in a Changing Society – Essays in Honor of Philip C. Jessup* (New York, Columbia University Press, 1972), 171, at p. 179. An example of a legal basis for a national judgment so outlandish that it is rejected by the international tribunal is the peculiar notion of *res judicata* in the *Idler* case, discussed in the section on "Gross Incompetence" in Chapter 7 of *Denial of Justice in International Law*.

17. In de Visscher, at p. 390, quoted in Freeman, at p. 162 ("any shortcoming in the organisation or exercise of the jurisdictional function which involves a failure of the state to live up to its international duty of extending judicial protection to foreigners").

18. Freeman, at p. 163.

> omissions engaging the State's responsibility in connection with the entire process of administering justice to aliens." [19]

This is circular. No great insight is required to understand that "unlawful acts or omissions" give rise to responsibility. What we want to know is precisely *what makes them unlawful*. All we can say, as we try to apprehend the sense of such oft-recurring intensifiers as *shocking*, or *surprising*, is that the issue is one of *fundamental unfairness*. Since the days of de Visscher and Freeman, we have learned to live with inherently elastic concepts relating to the international legitimacy of national judicial processes. The fundamental conventions of human rights which have come into being since then have struggled to do better than to refer to abstractions such as *fair trials* [20]. Yet political consensus has been reached as to the articulation of those general principles, and international adjudicators have been able to give them life. An international legal *culture* emerges that enables us to perceive concrete boundaries of national discretion – with more or less certainty, as always in the life of the law, the closer we find ourselves to the boundary beyond which the international delict arises. The situation is the same with respect to denial of justice. And so perhaps a phrase will do, such as Irizarry y Puente's succinct formulation : "the international obligation of the state not to administer justice in a notoriously unjust manner" [21]. As seen above, *unfair* might be preferable to *unjust*, because it denotes not just error, but fault. At any rate, and whatever assistance may be provided by precedents and by crystallizing general principles relating to due process, the perception of what is fundamentally unfair will, in the difficult cases, ultimately be a matter of subjective discernment.

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19. Freeman, at p. 161.

20. Although one must recognize the contribution of the United Nations on the specific issue of the independence of the judiciary and of lawyers : see, e.g., Commission on Human Rights resolution 2003/43, "Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", UN doc. E/CN.4/2003/L.11/Add.4, at p. 57 ; Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN doc. A/CONF.121/22/Rev.1, at p. 59 ; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN doc. A/CONF.144/28/Rev.1, at p. 118 ; and General Assembly resolutions A/RES/43/153, adopted 8 December 1988, A/RES/48/137, adopted 20 December 1993, and A/RES/58/183, adopted 18 March 2004, all on "Human rights in the administration of justice".

21. J. Irizarry y Puente, "The Concept of 'Denial of Justice' in Latin America", (1944) 43 *Michigan Law Review* 383, at p. 406 (emphasis omitted).

Before concluding these reflections on the contemporary standard, it seems appropriate to suggest that it is time to put aside the confrontational vocabulary which was perhaps unavoidable in the convulsive period of decolonization which gathered momentum in the wake of the Second World War and culminated in the watershed year of 1960. One can understand how Judge Guha Roy could have written in 1961 that the protection of rights obtained in a colonial regime "cannot for obvious reasons carry with them in the mind of the victims of that abuse anything like the sanctity the holders of those rights and interests may and do attach to them", and that universal adherence cannot be expected to accrue to a law of State responsibility which "protects an unjustified status quo or, to put it more bluntly, makes itself a handmaid of power in the preservation of its spoils" [22]. But we are no longer talking about the perpetuation of rights originating in King Leopold's shameful private domain, or handed down from colonial concessions. Half a century has gone by, and we are now concerned with the reliability of legal rights and interests defined by autonomous Governments who have encouraged foreigners to rely on them. To deny the capacity of sovereign States to generate international acquired rights is to condemn them to suffer a handicap tantamount to perpetual credit-unworthiness. It is to deprive them of the most powerful of tools in the vast process of economic development.

An Evolving Standard

One of the insights of the modern conception of denial of justice is that its evolution is bound to continue. A good and uncontroversial illustration of this perception is provided by the *Mondev* arbitration.

As the arbitral tribunal found [23], the principal issue in the case concerned "the content of the notion of denial of justice" under the international law minimum standard of treatment of aliens (as applicable under the North American Free Trade Agreement). Referring with approval to the award in *Pope & Talbot* [24], the tribunal found that this was an evolutionary standard to be informed by practice, including treaties. Intervening as a third-party signatory of NAFTA, Mexico observed that

22. S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *AJIL* 866.

23. *Modev International Ltd.* v. *United States of America*, Award, 11 October 2002, 6 *ICSID Reports* 192, at para. 99.

24. *Ibid*., at para. 105, *Pope & Talbot Inc*. v. *Canada*, Award on Damages, 31 May 2002, 7 *ICSID Reports* 148, at para. 59 (Greenberg, Belman, Dervaird (presiding)).

the customary international law standard "is relative and that conduct which may not have violated international law [in] the 1920s may very well be seen to offend internationally accepted principles today"; the core idea is that "of arbitrary action being substituted for the rule of law" [25]. Canada, as the second intervening third party, noted that its "position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high" [26]. Canada referred to the conception of customary international law articulated by the Claims Commissions of the interwar years, notably that of the Mexican Claims Commission in the *Neer* case which found a requirement that, for there to be a breach of international law,

> "the treatment of an alien . . . should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" [27].

In oral argument, the respondent United States itself acknowledged that "like all customary international law, the international minimum standard has evolved and can evolve" [28].

The *Mondev* tribunal immediately noted that cases like *Neer* (which had been decided in 1926) did not involve the treatment of foreign investment, but rather the physical safety of aliens. Neer himself had been killed by armed men who were not alleged to have been carrying out government instructions. The complaint was rather that the authorities were lax in their investigation and pursuit. The *Mondev* tribunal was unwilling to assume that the protection of foreign investment in treaties like NAFTA was "confined to the *Neer* standard of outrageous treatment" [29]. It also noted that:

> "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith . . . the content of the minimum

25. *Mondev*, at para. 108.
26. *Ibid*., at para. 109.
27. *L. F. H. Neer and Pauline Neer* (*US* v. *Mexico*), 15 October 1926, IV *RIAA* 60, at pp. 61-62.
28. *Mondev*, at para. 124.
29. *Ibid.*, at para. 115.

> standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s." [30]

In an oft-quoted sentence, it added:

> "A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case." [31]

This sentence was qualified by the consideration that an arbitral tribunal "may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable', without reference to established sources of law" [32].

The debates concerning the international law standards of protection for foreign investment in the early years of this century focused on the issue whether the concepts "fair [or 'just'] and equitable" treatment and "full protection and security" are synonymous with, or part of, the customary-law "minimum standard of the treatment of aliens". This issue gave rise to sub-questions: (i) whether treatment compliant with the customary-law minimum standard is by definition fair and equitable (and consistent with the duty to ensure protection and security); and (ii) whether the customary-law standard of treatment is frozen in time. But a more basic matter was sometimes eluded by a hasty assumption, namely that the minimum standard of treatment looks to a single, generally applicable standard of review with respect to all types of State conduct, and that the test was set forth in *Neer*.

A review of the authorities carved out by Georgios Petrochilos and myself [33] showed that this assumption is unsustainable. The *Neer* criterion of "outrage, . . . bad faith, . . . willful neglect of duty" and glaring "insufficiency of governmental action" applied only to what the Claims Commission in *Neer* regarded as denial of justice claims. In all other cases, and in particular with respect to "direct responsibility for acts of executive officials", the elements of the *Neer* formulation were "aggravating circumstances", and not necessary to constitute an international wrong.

Demise of Substantive Denial of Justice

Three generations ago, conventional doctrine was expressed confidently by Freeman as follows:

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30. *Mondev*, at paras. 116 and 123.
31. *Ibid*., at para. 118.
32. *Ibid*., at para. 119.
33. "*Neer*-ly Misled?", *Foreign Investment Law Journal – ICSID Review* 242 (2007).

> "practice, as well as the overwhelming preponderance of legal authority, recognises that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgment itself" [34].

The distinction has, it seems, been perpetuated by repetition; writers continue to describe denial of justice as either *procedural* or *substantive*.

Yet in modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that perplexing and indeed unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a *substantive* denial of justice reserved for "grossly" unconvincing determinations is to create an unworkable distinction. If a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment. That is the basis for responsibility, not the misapplication of national law in itself.

Extreme cases should thus be dealt with on the footing that they are so unjustifiable that they could have been only the product of bias or some other violation of the right of *due process*. Once again, Fitzmaurice merits extensive quotation:

> "if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, even though it results in serious injustice, the state is not responsible.
>
> There can be no question of the soundness of the above position. Yet, as everyone who has had any practical experience of the matter knows, the rule that a state is not responsible for the *bona fide* errors of its courts can be, and all too frequently is, made use of in order to enable responsibility to be evaded in cases where there is a virtual certainty that bad faith has been present, but no conclusive proof of it . . .
>
> One of the chief difficulties in applying the rule that the *bona fide* errors of courts do not involve responsibility lies in the fact that the question of whether there has been a 'denial of justice' cannot, strictly speaking, be answered merely by having regard to the degree of injustice involved. The only thing which can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such

34. Freeman, at p. 309.

> question as 'Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?' If the answer to this question is in the negative, then, strictly speaking, it is immaterial how unjust the judgment may have been. The relevance of the degree of injustice really lies only in its evidential value. *An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given*." [35]

The most difficult cases in this respect are evidently those where there is strong suspicion, but no proof, of bad faith. Fitzmaurice's solution was as follows:

> "In almost all such cases it is probable that the court will have committed some more or less serious error, in the sense of a wrong conclusion of law or of fact. This suggests that the right method is to concentrate on the question whether the court was competent rather than on whether it was honest. The question will then be, was the error of such a character that no competent judge could have made it? If the answer is in the affirmative, it follows that the judge was either dishonest, in which case the state is clearly responsible, or that he was incompetent, in which case the responsibility of the state is also engaged for failing in its duty of providing competent judges." [36]

We can go further. Pleading for Spain in *Barcelona Traction*, Paul Guggenheim conceded that a presumption of judicial bad faith or *culpa late* could arise, in the case of "exceptionally outrageous or monstrously grave" *breaches of municipal law*. In such cases, he added, it must be shown that "one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason" [37]. Three decades earlier, the Government of Venezuela, in its memorial in the *Martini*

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35. Fitzmaurice, at pp. 112-113 (emphasis added).
36. *Ibid*., at pp. 113-114. De Visscher conceived, at p. 381, that part of a State's international obligation concerns the "proper recruitment of judges" *(recrutement convenable des magistrats)*; and, at p. 394, that its duty is to "place at the disposal of foreigners a judicial organisation capable, by the laws that regulate it *as well as by the men who comprise it*, of achieving the effective protection of their rights" (emphasis added).
37. CR 69/25, 23 May 1969, quoted in Jiménez de Aréchaga, "International Responsibility of States", at p. 185.

case, had similarly acknowledged that "not an erroneous judgment, but a gross error, an inexcusable error" could give rise to international responsibility [38].

This approach may give rise to more controversy and discord than one would wish to see in the international realm, where national sensitivities are acute. If in such difficult cases the perpetrators of the unfairness are incapable of dissimulating their conduct under the cover of formally irreproachable reasoning, they are also likely to be guilty of serious procedural missteps which provide better justification for finding denial of justice ; to declare that judgments under national law are rationally unsustainable may expose the international jurisdiction to the criticism that it did not have an adequate understanding of the relevant national law.

It may seem that this discussion seriously undercuts the conclusions of the previous section (the general rule of non-revision) as well as the title of the present one. What needs to be understood is that even if in extreme cases the substantive quality of a judgment may lead to a finding of denial of justice, the objective of the international adjudicator is *never* to conduct a substantive view. As Fitzmaurice put it in the lengthier of the two quotations above : "it is immaterial how unjust the judgment may have been" [39].

The demonstration of this proposition requires that one consider two questions : does a judicial organ of a State which violates international law thereby automatically commit a denial of justice ? Absent a violation of international law, may such an organ commit a denial of justice by erroneously applying its national law ? The answer to each question is negative.

Attempts at Codification

The word "codification" appears in the title of a collection of texts published in 1974 by three eminent scholars who had been particularly involved in the work of the International Law Commission on State Responsibility (Professor García-Amador) and in the elaboration, under the aegis of the Harvard Law School, of the 1961 Draft Convention

38. Quoted in de Visscher, at p. 406, note 1. The Venezuelan Government's comment was not, however, directly on point. The issue was not whether a Venezuelan judgment repudiating an international award was an error, inexcusable or not, of national law, but whether it violated an international undertaking to respect that award.

39. Fitzmaurice, at p. 112.

on the International Responsibility of States for Injuries to Aliens (Professors Sohn and Baxter) [40]. Of course their use of the word should not disguise the fact that these efforts were merely aspirational; they were *attempts* at codification [41].

Graver reservations must be made with respect to earlier efforts. In his Report to the ILC, García-Amador decried that international case law on denial of justice, "considered as a whole, do[es] not yield any general and objective criteria applicable to situations which occur in reality". He immediately went on to refer to previous proposed codifications, which he contended offered "surer guidance"; although not always agreeing "on the definition of the acts and omissions which give rise to responsibility, they do in general agree remarkably on fundamental points" [42].

He was demonstrably wrong. There may have been some justice in his critique of the body of precedents, but that will always be so with respect to the application of fundamental open-textured principles such as "equitable delimitation", "proportional response", or, with regard to our subject, "fair trial". This study seeks to prove that the international jurisprudence is not chaotic. But García-Amador was flatly in error about what he said he perceived as remarkable agreement on fundamental points in early texts proposing formulation of an international rule of denial of justice. This is manifest in his own citations.

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40. F. V. García-Amador, Louis B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Dobbs Ferry, NY, Oceana, 1974).

41. The Governments which generated the Charter of the United Nations were firmly opposed to conferring on the United Nations legislative power to enact binding rules of international law. They also rejected proposals to give the General Assembly the power to impose conventions on States by vote. There was, however, strong support for conferring on the General Assembly the more limited powers of study and recommendation for the purpose of "encouraging the progressive development of international law and its codification" (UN Charter, Article 13 (1) *(a)*). When the International Law Commission was established in 1947, its Statute provided that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". Article 15 makes a distinction "for convenience" between *progressive development* as "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and *codification* as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

42. García-Amador, Sohn and Baxter, *Recent Codification*, at p. 24, reprinting paras. 133 *et seq.* of the author's Second Report to the ILC, UN doc. A/CN.4/106 (1957).

He first referred to the so-called Guerrero Report from 1927, which had been thoroughly discredited by Freeman [43] (whose own seminal work was curiously not cited by García-Amador). That Report stands as a high-water mark of Latin American attempts to minimize the ambit of the international delict; it was resolutely focused on affirming what type of conduct should *not* be deemed a denial of justice, rather than on the contrary. It proposed, for example:

> "That a State has fulfilled its international duty as soon as the judicial authorities have given their decision, even if those authorities merely state that the petition, suit or appeal lodged by the foreigner is not admissible."

That proposition naturally left only the narrowest scope for responsibility:

> "Denial of justice consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them. A refusal of the competent judge to exercise jurisdiction also constitutes a denial of justice." [44]

There is a blindingly obvious omission from this proposal: any qualitative requirement of the processes of national courts.

In this respect the Guerrero Report was wholly at odds with other texts quoted by García-Amador. For example, the Institute of International Law had proposed, in Article V (3) of its draft on the International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners, adopted in Lausanne the same year, findings of liability whenever "the tribunals do not offer the guarantees which are indispensable to the proper administration of justice" [45].

Proposition 5 (4) of the so-called "Bases of Discussion" drafted by the Preparatory Committee of the Hague Conference in 1930 suggested that an unappealable judgment would constitute a denial of justice if it "is irreconcilable with the treaty obligations or the international duties of the State" [46]. Such a proposition is unhelpful; there is no purpose in duplicating an existing duty by incorporating its breach in the concept of denial of justice.

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43. See the quotations in the section on "The Impulse to Limit the Scope of Denial of Justice" in Chapter 2, *Denial of Justice in International Law*.
44. League of Nations Document C.196.M70.1927.V, at p. 104.
45. (1928) 22 *AJIL* 330 (Special supplement).
46. Freeman, at p. 634.

The Montevideo Conference of American States in 1933, following closely on Guerrero's conception, specified that the scope of denial of justice "shall always be interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have risen" [47]. This promotion of a special rule of evidence for denial of justice happily seems to have found no echo in jurisprudence, which contents itself with the general principles that a claimant must prove his case and that it is not lightly to be concluded that the organs of a State consciously violate international law.

Other inter-American texts made it clear that wrongfulness could be determined only in accordance with municipal law [48], thereby amputating the fundamental basis of an international obligation.

The 1929 Harvard-sponsored draft Convention on the Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners represented a significant advance. Its Article 9 made a commendable effort at specificity (which moved it all the further away from Guerrero's minimalism):

> "A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice." [49]

At the most extreme antipode of the Guerrero Report was the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens [50], which defines denial of justice under three articles. The first two – captioned "Denial of Access to a Tribunal or an Administrative Authority" and "Denial of a Fair Hearing" – were

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47. The International Conferences of American States, First Supplement, 1933-1940 (Washington, DC, Carnegie Endowment for International Peace, 1940), at p. 92; Freeman, at p. 722.

48. García-Amador, Sohn and Baxter, *Recent Codification*, at p. 25; see, e.g., the Santiago Conference of American States in 1923; Freeman, at p. 717; defining, as denial of justice, cases where "the fundamental rules of the procedure *in force in the country* have been violated" (emphasis added).

49. Harvard Law School, *Research in International Law, II, Responsibility of States* (Cambridge, MA, 1929), at p. 134; (1929) 23 *AJIL* 133, at p. 173 (Special supplement).

50. (1961) 55 *AJIL* 548. This text was to a considerable degree based on the 1929 Harvard draft, above.

innovative only in their attempt at exhaustiveness. The title to Article 8 would clearly lift some eyebrows : "Adverse Decisions and Judgments". Its content would do more than that ; subparagraph *(b)* makes clear that the authors of the draft were proposing that a judgment should be held internationally wrongful "if it unreasonably departs from the principles of justice recognized by the principal legal systems of the world" [51]. In view of what the present chapter has sought to establish by way of positive international law, it should not be surprising that the award in *Amco II*, by an ICSID tribunal presided by Rosalyn Higgins, flatly referred to this Draft Convention generally as being "of doubtful weight as persuasive authority of international law" [52].

García-Amador's own reports for the ILC are extensive and interesting. For present purposes, it is sufficient to note that by 1961 – the year before he left the ILC – the draft which appeared as an addendum to his sixth report treated our subject in two ways : implicitly, among the definitions in Article 1 of "rights of aliens", and explicitly, under Article 3 entitled "Acts and omissions involving denial of justice" [53]. Article 1 provided :

> "1. For the purpose of the application of the provisions of this draft, aliens enjoy the same rights and the same legal guarantees as nationals, but these rights and guarantees shall in no case be less than the 'human rights and fundamental freedoms' recognized and defined in contemporary international instruments.
>
> 2. The 'human rights and fundamental freedoms' referred to in the foregoing paragraph are those enumerated below :
>
> . . .
>
> *(d)* The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law ;
>
> *(e)* In criminal matters, the right of the accused to be presumed innocent until proved guilty ; the right to be informed of the charge made against him in a language which he understands ; the right to present his defence personally or to be defended

51. (1961) 55 *AJIL*, at p. 551.

52. *Amco Asia Corp. et al.* v. *Republic of Indonesia*, Award, 5 June 1990, I *Foreign Investment Law Journal – ICSID Reports* 569, at para. 123.

53. International Law Commission (García-Amador), Sixth Report on State Responsibility, Addendum, UN doc. A/CN.4/134/Add.1 (1961).

> by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released."

Article 3 read thus:

> "1. The State is responsible for the injuries caused to an alien by acts or omissions which involve a denial of justice.
>
> 2. For the purposes of the foregoing paragraph, a 'denial of justice' shall be deemed to occur if the courts deprive the alien of any one of the rights or safeguards specified in article 1, paragraph 2 *(c)*, *(d)* and *(e)*, of this draft.
>
> 3. For the same purposes, a 'denial of justice' shall also be deemed to occur if a manifestly unjust decision is rendered with the evident intention of causing injury to the alien. However, judicial error, whatever the result of the decision, does not give rise to international responsibility on the part of the State.
>
> 4. Likewise, the alien shall be deemed to have suffered a denial of justice if a decision by a municipal or international court in his favour is not carried out, provided that the failure to carry out such decision is due to a clear intention to cause him injury."

This bifurcation of the subject illustrates a development which had taken a concrete and important form in 1950 when the European Convention of Human Rights was promulgated. Like Article 1 of the just-quoted draft, that Convention does not use the expression "denial of justice", but gives its principal substantive elements the force of positive international treaty-based law. (As noted, the general heading *denial of justice* may lose currency in *lex specialis*, but its substance and its influence will remain.)

Still, viewed on the whole, the old attempts at codification are of limited value. Worse, when taken in isolation they can lead to great error. Fortunately, drafts remain drafts, and we can today benefit from the cross-fertilization of the customary international law of denial of justice and the important jurisprudence that has arisen pursuant to the positive international legislation to be found in modern treaties, notably in the realm of human rights.

Summary

No enumerative approach to defining denial of justice has succeeded in the past, and there are no prospects that one will emerge in the future. Rather, as with the norms of due process that have developed with respect to the protection of human rights, international adjudicators will perforce have to confront the task of giving concrete content to the notion of "fundamental fairness in the administration of justice".

Denial of justice is always procedural; it concerns failures of due process, not substantive injustice. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the State's failure to provide a decent system of justice, and should not be perceived as an international appellate review of national judgments.

A national court's breach of other rules of international law, or of treaties, is not a denial of justice, but a direct violation of the relevant obligation imputable to the State like any acts or omissions by its agents.

At the heart of the matter lies an irreductible difficulty: the notion of fundamental procedural fairness. Defenders of the conduct of national authorities will in all difficult cases be able to insist with vehemence that there has been no *proof* that they have failed to meet minimum standards. These are issues of degree and judgment, and ultimately come down to acceptance or rejection of international adjudication.

To observe this difficulty is not, however, to concede that there is something extraordinary about denial of justice that requires apology for the elasticity of the concept. Law (international and national alike) knows many such notions. It is not possible to "prove" in an absolute sense that a party has acted in *reasonable* reliance on the representations of another, or that it has taken *reasonable* or *proportional* steps to mitigate damages or to protect itself. Any law student could multiply the examples. It is possible only to prove such propositions *to the satisfaction of a trier of fact*. So once again the issue is whether one accepts to yield sufficient national sovereignty to respect the judgment of international jurisdictions.

To say that a concept is inherently difficult is not to say that it is *confusing*. So why did Freeman and the other leading writers of his day – de Visscher, Fitzmaurice, Eagleton – decry their subject as one of such confusion? If they were right, should one not admit that the subject remains confused?

They were right, but their conclusion no longer holds. The confusion of their time was artificial. It was born of the impulse to expand the notion of denial of justice to encompass every form of international wrong, due to the fact that demands for international reparation were once invariably articulated as responses to denials of justice. *Any wrong would thus be spoken of as a denial of justice because it was not remedied by national justice*. Moreover, unnecessary fictions were created to the effect that denial of justice related only to the mishandling of claims rather than defences, and that a denial of justice was necessarily a second wrong in the failure to correct an initial wrong. The notion of "manifest injustice" emerged to cover the cases of mistreated defendants, or of maladministration of justice independent of a separate initial wrong. These were indeed confusing concepts, and they were compounded by the fact that the delict was invariably prosecuted by the means of diplomatic protection, which meant that the victim of a wrong had to demonstrate the failure of local remedies ; denial of justice thus slipped into a usage in which it was confused with the precondition for raising any number of delicts.

These confusions have dissipated. We know that there are many international wrongs apart from denial of justice. Familiar cases like *El Triunfo* [54] today would be a case of contract breach, or of expropriation, and the claim would stand or fall without a word of denial of justice. Direct access to international jurisdictions without the diplomatic espousal of claims has made it unnecessary to resort to fictions to demonstrate exhaustion of local remedies. The alleged wrong is not a denial of justice. There is no need to allege that national courts prevented a remedy by the means of a denial of justice ; it is sufficient to invoke their simple refusal to grant the remedy. (No matter how perfectly a national court system administers a claim of expropriation, its decision is subject to plenary international review to the extent that the matter includes the breach of an international duty.) If the alleged wrong is a denial of justice, exhaustion is required as a matter of substance, and this is true even if it has been waived or dispensed with as a matter of procedure.

54. *(US* v. *El Salvador)*, Award, 8 May 1902, XV *RIAA* 455.

CHAPTER II

SPECIAL DIFFICULTIES IN REPAIRING DENIALS OF JUSTICE

Denial of justice is an international delict, and as such gives rise to a duty to repare its consequences. The *Factory at Chorzów* case tells us that this means complainants must be put into the position they could have been in if the wrong had not occurred.

What precisely does this mean? The obvious way of achieving such a result may be the pure and simple annulment of a judgment produced by the denial of justice. But the matter does not necessarily end there. Given that the remedy should seek as much as possible to wipe out the consequences of the breach, we must confront the problem of just how to "wipe out the consequences", which turns out to be a matter of considerable difficulty. We cannot go back in time; some acts are irreversible; and the true *equivalent* of reversing a past act is elusive. These difficulties are as acute with respect to denials of justice as with respect to other internationally unlawful acts.

Amco v. *Indonesia* is an instructive case [55]. The more recent cases of two sets of claims brought by the Chevron Corporation against Ecuador lead to a consideration of concrete consequences outside the territory of the respondent State.

Amco *v.* Indonesia *(ICSID)*

The final award dates back to 1990; for long it remained a solitary precedent. These were the central facts. The claimants acted under an authorization given by the Indonesian authorities in 1968 to build and operate a hotel for 40 years. On the night of 31 March/1 April 1980, the hotel was invaded by armed men who evicted the personnel and installed new managers who reported to a business entity controlled by the Indonesian Army. In early July 1980, the Indonesian Capital Investment Coordination Board, at the conclusion of what the arbitrators found to be a hasty process, withdrew the claimants' licence

55. *Amco Asia Corp. et al.* v. *Republic of Indonesia*, Award of 5 June 1990, ICSID Case No. ARB/81/1, *ICSID Reports* 569.

to do business in Indonesia. The Claimants initiated ICSID arbitration.

A first arbitration was concluded in favour of the Claimants on the grounds that the process by which the licence was revoked had been unfair. They were awarded their lost income. That award was partially annulled. The finding of an unlawful revocation was maintained. A new tribunal was constituted, presided by Professor Rosalyn Higgins (later elected a Judge and thereafter President of the International Court of Justice.) Since the finding of unlawful revocation had not been annulled, Indonesia could no longer argue against it and instead contended that there had been no damages. In support of this assertion, Indonesia insisted that it was *now* in a position, having in mind that the objective of remedies in international law is to restore the *status quo ante*, to prove *before the ICSID Tribunal* that the Claimants had been operating under a licence which was in fact doomed ; the terms of their authorization to do business in the country included a requirement that they make investment in a minimum amount of hard currency, and this they had not done – and this could now be shown with full respect for due process.

One way of defining the *ex ante* position of the claimants was that they had been the holders of a valid investment licence which was wrongfully annulled and thus ruined their business. Another way of looking at them was as holders of a *precarious* licence, which Indonesia had the right to revoke.

Indonesia naturally took the latter view. In consequence, it invited the Tribunal *(a)* to make its own inquiry onto the claimants' performance under the licence, and *(b)* to conclude that their performance had been inadequate and that therefore the revocation, however unlawful, had caused no damages since the Claimants were anyway disentitled by their own failings.

The Claimants argued to the contrary that "the due process violation of itself entitled it to compensation and this would be so even if . . . the revocation . . . was substantively valid".

The Tribunal distanced itself from both contentions in this important passage :

> "The Tribunal believes that the relevant issue is not whether (as Amco contends) procedural irregularities generate compensation, even if the substantive decision might be lawful ; nor whether (as Indonesia contends) compensation is only due for procedural

> violations if these are themselves the cause of an unlawful substantive decision. Rather, *the issue that must be determined is whether there exists a generally tainted background that necessarily renders a decision unlawful, even if substantive grounds may exist for such a decision*." [56]

After a detailed review of the record, the arbitrators concluded that "the whole approach to the issue of revocation of the license was tainted by bad faith, reflected in the events and procedures" [57]. (These included over-reliance on the representations of the party seeking Amco's eviction, and careless fact-finding insufficiently based on a "detailed and independent verification". They also found that Amco had engaged in some "discreditable behavior" with respect to its corporate accounts, but "that fact could not justify [the regulatory agency's] approach to the question of revocation" [58].

What therefore remained for the Tribunal to assess, in view of the arbitrators' definition of the issue that must be determined (in italics in the last indented quotation), was whether *(a)* "a procedurally unlawful act per se generates compensation" and *(b)* "a decision tainted by bad faith is necessarily unlawful". To do so, the Tribunal looked at both Indonesian and international law, as required by the ICSID Convention. (The case did not arise under a treaty creating ICSID jurisdiction, but under Indonesian regulations having the same effect.) The arbitrators engaged in substance with the Indonesian law materials put before them. Although there was, they wrote, "some slight authority for the view that these last two questions might be answered in the affirmative under Indonesian law", they did not find these materials conclusive [59].

In these circumstances, the Tribunal's decision was based on international law. Both parties were represented by prominent international law firms [60]. They invoked precedents from the European Court of Human Rights, a number of pre-World War II decisions of various tribunals and claims commissions, and a sole decision of the International Court of Justice. Few of these precedents addressed the precise question before the Tribunal, and their inappositeness gives clear indications of the difficulties of the question.

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56. *Op. cit. supra* footnote 55, para. 75.
57. *Ibid.*, para. 98.
58. *Ibid.*, para. 112.
59. *Ibid.*, para. 121.
60. Coudert Brothers for the claimants, White & Case for Indonesia.

With respect to the *Fabiani* case, for example, the Tribunal observed that it

> "shows only that if the unjust procedure is the cause of the loss, damages will follow ; but it does not address the converse, namely, whether damages are available for unjust procedure that is not shown to be the cause of the breach" [61].

As for an ECHR decision invoked by Indonesia, namely *Sramek* [62], in which a tribunal had included a person who did not have the requisite lack of independence, but the European court nonetheless dismissed the complaint because "the evidence in the file does not warrant the conclusion that had it been differently composed [the tribunal] would have arrived at a decision in Mrs. Sramek's favour", the *Amco* Tribunal noted that (i) the ECHR applies a *lex specialis* of "just compensation" (as opposed to the *Chorzów* standard of compensation putting the injured party into the position in which it would have found itself but for the delict) and (ii) at any rate Mrs. Sramek had failed to prove pecuniary loss.

The fact that adverse consequences might also have befallen the claimant as the result of a separate, and this time lawful, process thus did not disentitle the claimant to recover on account of the unlawful acts.

The first case of the two *Chevron* v. *Ecuador* cases we shall now consider involved the treatment given to Chevron by the Ecuadorian courts as a claimant, the second what happened in far more notorious circumstances when court judgments were procured in the names of Ecuadorian individuals against Chevron.

Chevron *v.* Ecuador*: The Aggrieved Claimant*

The first case was decided by an award rendered on 30 March 2010 by a tribunal presided by Professor Karl-Heinz Böckstiegel (also including Judge Charles Brower and Professor Albert Jan van den Berg). Chevron was claiming monies long due under a series of commercial contracts entered into in the 1970s between its predecessor in interest (Texaco) and Ecuador's national oil company (now known as PetroEcuador), who held joint interests in oil fields in an eastern Ecuadorian region in

61. *Op. cit. supra* footnote 55, at para. 122.
62. Discussed, *ibid.*, at para. 125.

the Amazon basin. The narrative of Texaco's involvement in Ecuador will be set out in somewhat greater detail below when we come to examine the second *Chevron* v. *Ecuador* case.

The issues dealt with in the 2010 award were notably these : 1. Was there a denial of justice under customary international law on the grounds of undue delay or manifestly unjust decisions ? 2. Did the conduct of the Ecuadorian courts violate specific standards of the BIT ? 3. Was there a requirement of exhaustion ? 4. What if any should be the remedies ? They were disposed of as follows :

1. The Treaty provided (in Article II (3)) that any "[i]nvestment shall in no case be accorded treatment less than that required by international law". The treaty did not explicitly refer to denial of justice, but it is subsumed as part of customary international law. While a finding of denial of justice does not require that the claimant show bad faith attributable to the State, "it nevertheless requires the demonstration of 'a particularly serious shortcoming' and egregious conduct that 'shocks, or at least surprises, a sense of judicial propriety'" [63]. Article II (7) of the Treaty defines a different obligation : "Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations." [64] If this "independent, specific treaty obligation" had been violated, there would be no need to examine whether the possibly different requirements of customary international law were also met.

In the seven cases in which Chevron had sought to pursue its contractual claims, the delays had been "unreasonable" [65]. The most recent of the cases had been filed in 1993 ; the arbitration has started in 2006. The 13-year delay could not be excused by three factors examined by the Tribunal : the cases were of no "extraordinary complexity", Chevron had not been lacking in diligent pursuit, and Ecuador could not prove that the courts in question were overworked.

2. The Tribunal observed that "a qualified requirement of exhaustion of local remedies applies under the 'effective means' standard of Article II (7)" [66]. It continued :

63. Para. 244.
64. A "relatively rare" provision in such treaties, but also relevant to three prior cases : *Petrobart*, *Amto*, and *Duke Energy*.
65. Para. 251.
66. Para. 323.

> "strict exhaustion is not necessary but a claimant is required to make use of all remedies available and might have rectified the wrong complained of . . . In the case of undue delay, the delay itself usually evidences the futility of all remedies except those that specifically target the delay." [67]

3. "The tribunal must step into the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome should have been . . . rather than directly apply its own interpretation of the agreement." [68]

Since the delay was unreasonable, there was no reason to examine whether the breach was a "manifestly unjust decision" [69].

The arbitrators rejected the loss-of-chance analysis advanced on by Ecuador, reasoning as follows:

> "the Tribunal must determine what TexPet should have received in judgments issued by the courts . . . it is clear that the Ecuadorian courts would not have applied a discount of 'loss of chance' when issuing a judgment. No deference is due to what is 'juridically possible' because the Ecuadorean courts had had their chance to decide and failed to do so."

4. And so the Tribunal's task, in a phrase repeated in the introduction to the individual analyses of liability under each of the seven contracts [70], was "to decide the courts cases as an honest, independent, and impartial Ecuadorean court, applying Ecuadorean law, would have done". In aggregate, with interest the award was for some $689 million.

Chevron *v.* Ecuador*: The Aggrieved Respondent*

To set the stage for the far better known second *Chevron* v. *Ecuador* arbitration, we may be assisted by a digression of some length.

In the beginning of this century, the ICJ dealt with cases in which the United States was found to be in breach of its obligation under the Vienna Convention on Consular Relations to ensure that the competent authorities would notify consular officials of other countries of the pendency of serious criminal actions in its courts against their

67. Para. 326.
68. Para. 375.
69. Para. 376.
70. E.g., para. 467.

nationals. Such an action is not in and of itself a denial of justice, since the treaty obligation to notify exists even if the court proceedings were irreproachable, but the issue of remedies give rise to reflections which may be usefully contrasted with the problems that may arise when considering the consequences of findings of denial of justice.

The first of these cases involved two brothers named Karl-Heinz and Walter LaGrand, long-time residents of the United States but still German nationals who were tried and convicted in 1984 for the murder of a bank manager in the course of the attempted robbery. Nearly ten years later, in the course of their appeals, the LaGrands learned of the Unites States' neglect of its duty to notify Germany and sought to invalidate their conviction on that ground. Their attempt was rejected on as untimely (by application of a "procedural default" rule).

Germany claimed before the ICJ that if it had been promptly notified, *(a)* it might have intervened to present a "persuasive mitigation" argument likely to save the LaGrands' lives by leading to a reduced sentence, and *(b)* intervention as a post-trial (i.e. appellate) phase would not have remedied the "extreme prejudice" to the brothers given the narrow scope for post-conviction redress. The Court agreed that the United States had breached its obligation under the Convention.

As for remedies, Germany argued that the United States should be ordered to provide assurance that it should "provide effective review and remedies for criminal convictions impaired" by a violation of the Convention. The United States objected that the requirement to give such assurances was unprecedented and exceeded the ICJ's "jurisdiction and authority". Germany responded that its petition was worded "as to leave the choice of means by which to implement the remedy to the United States".

In its judgment [71], the Court took note of the fact that the United States had repeated in all phases of the proceedings that it was carrying out a comprehensive programme to ensure future compliance, and provided "important" information about it. It considered that the United States' repeated references to the substantial activities which it was carrying out in order to achieve compliance with the Convention expressed a commitment to follow through with the efforts in this regard. Although the programme in question could not in and of itself provide certitude that the United States would never again fail to observe the obligation of notification under the Convention, no State could give such a guarantee

71. *LaGrand (Germany* v. *United States of America)*, 21 June 2001.

and Germany did not seek it. The Court considered that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations of notification must be regarded as meeting Germany's request for a general assurance of non-repetition.

If the United States, notwithstanding its commitment, should fail in its obligation of consular notification to the detriment of German nationals, the Court made clear that an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or sentenced to severe penalties. In the case of such sentences, the United States would be bound to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation could be carried out in various ways. The choice of means must be left to the United States.

In the meanwhile, attention was brought to the circumstances in which 52 Mexican nationals had also been condemned by US courts without notification to Mexico's consular authorities. This gave rise to an ICJ case known as *Avena* [72] and a judgment rendered less than three years after *LaGrand*. At that time, the situation of the Mexican nationals had not been affected by the United States programme to "ensure compliance" with the Convention. Moreover, no provision had been made by the United States to prevent the application of the "procedural default" from having the effect that the failure of notification would make it impossible for a violation of the Convention to be raised in the initial trial as a result of the intervention of the protecting State.

Once again, the Court found the United States to be in breach and that the appropriate reparation consisted in the obligation of the United States of America to provide, by means of its own choosing, "review and reconsideration" of the convictions and sentences of the Mexican nationals.

The notion of "wiping out the consequences" of a breach is sometimes couched in terms of an obligation of restitution. Thus Mexico contended that as

> "an aspect of *restitutio in integrum*, it was . . . entitled to an order that in any subsequent criminal proceedings against the nationals,

72. *Avena and Other Mexican Nationals (Mexico* v. *Untied States of America)*, 31 March 2004.

> statements and confessions obtained prior to notification to the national of his right to consular assistance be excluded".

The Court took the view that this question was one to be examined under the concrete circumstances of each case by the United States courts concerned in the process of their review and reconsideration, and therefore rejected this request.

In paragraph 132 of *Avena*, the ICJ took note of the US argument to the effect that when the Court in *LaGrand* had called for a process of review by the US judiciary, "the Court necessarily implied that one legitimate result of that process might be a conclusion that the conviction and sentence should stand".

It is useful to quote at some length passages of the Court's reasoning in response:

> "138. The Court would emphasize that the 'review and reconsideration' prescribed by it in the *LaGrand* case should be effective. Thus it should 'tak[e] account of the violation of the rights set forth in [the] Convention' (*I.C.J. Reports 2001*, p. 516, para. 128) and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process. Lastly, review and reconsideration should be both of the sentence and of the conviction.
>
> 139. Accordingly, in a situation of the violation of rights under Article 36, paragraph 1, of the Vienna Convention, the defendant raises his claim in this respect not as a case of 'harm to a particular right essential to a fair trial' rights under the United States Constitution – but as a case involving the infringement of his rights under Article 36, paragraph 1. The rights guaranteed under the Vienna Convention are treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law. In this regard, the Court would point out that what is crucial in the review and reconsideration process is the existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration . . .
>
> 142. . . . The Court accepts that executive clemency, while not judicial, is an integral part of the overall scheme for ensuring

> justice and fairness in the legal process within the United States criminal justice system. It must, however, point out that what is at issue in the present case is not whether executive clemency as an institution is or is not an integral part of the 'existing laws and regulations of the United States', but whether the clemency process as practised within the criminal justice systems of different states in the United States can, in and of itself, qualify as an appropriate means for undertaking the effective 'review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention', as the Court prescribed in the *LaGrand* Judgment (*I.C.J. Reports 2001*, p. 514, para. 125).
>
> 143. It may be true, as the United States argues, that in a number of cases 'clemency in fact results in pardons of convictions as well as commutations of sentences'. In that sense and to that extent, it might be argued that the facts demonstrated by the United States testify to a degree of effectiveness of the clemency procedures as a means of relieving defendants on death row from execution. The Court notes, however, that the clemency process, as currently practised within the United States criminal justice system, does not appear to meet the requirements described in paragraph 138 above and that it is therefore not sufficient in itself' to serve as an appropriate means of 'review and reconsideration' as envisaged by the Court in the *LaGrand* case. The Court considers nevertheless that appropriate clemency procedures call supplement judicial review and reconsideration, in particular where the judicial system has failed to take due account of the violation of the rights set forth in the Vienna Convention . . ."

A few concrete consequences are notable. First of all, the ICJ did not purport to overrule, let alone annul, the US court decisions. Indeed it did not question the propriety of the judicial process *per se*, but focused on the particular violation of the Convention on Consular Relations and ordered the United States "review and reconsider" the outcomes of the criminal cases in light of its failure to give notice. To "wipe out the consequences" of the violation in the case of the LaGrands was of course impossible, but in other cases this presumably meant that convictions should be reassessed by considering the conceivable effect of the Mexican interventions which did not occur in the absence of notification. Perhaps retrials would be in order, and perhaps the exercise

could be made considerably less speculative if Mexico were invited to intervene.

In any event, the result of this process of review might well be, as the United States noted (see above), the "conclusion that the conviction and sentence should stand". Directed to proceed in accordance with means of its own choosing, the United States might have chosen *to assess the probabilities* of a different outcome if the notice requirement had been respected. Or it might have chosen to recommence the criminal action from the beginning, i.e. a new trial, but this time without violating international law. Under any hypothesis, there would be no guarantee that the outcome would be different.

The partial award (of some 500 pages) rendered in 2018 and dealing with the principal issues of liability, in the most important of the *Chevron* v. *Ecuador* awards, to date perhaps the most notorious of international cases of denial of justice, quoted the following passage from *Avena* in the introduction to the section on remedies :

> "The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows : 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.' (*Factory at Chorzów, Jurisdiction,* 1927, P.C.I.J., *Series A,* No. 9, p. 21.) What constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows : 'The essential principle . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.' (*Factory at Chorzów*, *Merits,* 1928, P.C.I.J., *Series A,* No. 17, p. 47)." [73]

Chevron v. *Ecuador* did not involve murder, but alleged corporate responsibility for environmental damage caused by oil field operations

73. *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, ICJ, Judgment, 31 March 2004, *ICJ Reports 2004* 12, para. 119 ; quoted at para. 9.7 of *Chevron* v. *Ecuador*, Partial Award of 30 August 2018.

in the Oriente, a region of Ecuador in the Amazonian basin. The following account repeats facts as found by the Arbitral Tribunal after years of debate and deliberation [74]. Chevron itself had never done business in Ecuador, but was sought to be held liable for the operations carried out by Texaco Petroleum beginning in 1964. (The Texaco entities were absorbed by Chevron as the result of a merger in 2001.) From 1976, Texaco Petroleum was a 37.5 per cent shareholder in the consortium that operated the relevant fields. PetroEcuador, the national oil company, held 62.5 per cent. In 1990, PetroEcuador took over the role as operator from Texaco Petroleum and has continued in that capacity ever since. According to the findings of the Arbitral Tribunal [75] the Government of Ecuador and PetroEcuador had by 2002 collected 97.7 per cent of the revenues from the fields, a total of $23.3 billion, the revenues to Texaco Petroleum amounting to $480 million. From 1992 to 2008, PetroEcuador recovered 1.2 billion barrels of crude oil from the fields, representing a market value of $57 billion.

Five years after relinquishing its operating role to PetroEcuador, Texaco Petroleum withdrew from Ecuador in 1995, and in connection with that withdrawal entered into a Settlement Agreement with the Ecuadorian authorities, accompanied by a Remedial Action Plan pursuant to which Texaco paid some $40 million for remediation works in return for an acknowledgment of no further liability. There could be little certainty as to what proportion of degradations unremediated by PetroEcuador and observable two decades later had been caused under the exclusive stewardship of PetroEcuador (which has faced no legal action for environmental damage).

Given the Settlement Agreement, neither the Ecuadorian Government nor PetroEcuador could make a claim against Chevron. Instead, a suit before a series of sole judges in the province of Sucumbíos where the town of Lago Agrio is situated was pursued in the names of numerous individuals from the Amazonian region who came to be known as the Lago Agrio Plaintiffs. The effort was notably formented and organized by a US lawyer named Stephen Donzinger and a local lawyer named Pablo Gajardo Mendoza [76].

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74. The author was a member of Chevron's team of counsel in the arbitration.

75. Paras. 4.64-4.65.

76. The 485-page decision of a federal court in New York in 2014 rejecting an attempt to enforce the Lago Agrio Judgment referred to in the next paragraph summarized Donzinger's role as follows:

> "foisting fraudulent evidence on an Ecuadorian court, coercing Ecuadorian judges, illegally writing all or much of the Ecuadorian court's purported decision,

The case became an international *cause célèbre*, intensely litigated in both Ecuador and the United States, and subsequently in a number of countries – notably Canada, Argentina, and Brazil – where the Lago Agrio Plaintiffs sought to enforce an Ecuadorian judgment rendered in 2011 by a judge in the Provincial Court of Sucumbíos, ordering Chevron to pay US$8.646 billion, and moreover a further US$8.646 billion unless Chevron issued a public apology within 15 days. (Six judges heard the case at various times between 2003 and 2011 ; two of them were later removed from the judiciary for reasons unconnected with the case against Chevron.) Chevron's attempts to overturn this judgment at appellate levels of the Ecuadorian courts failed.

Chevron's claim of denial of justice was pursued against Ecuador under the United States/Ecuador BIT [77]. The ensuing disputation, not only in arbitration but in a number of national jurisdictions dealing with the enforceability of the Lago Agrio Judgment, gave rise to endless written comments [78], ranging from dispassionate scholarly analysis to unreliable polemics. For present purposes, it will be sufficient to quote the Tribunal's summary of Chevron's complaint in the 2018 award :

> "2.4. In brief, the Claimants assert . . . that the Respondent agreed (in 1995-1998) on the extent of the responsibility of TexPet, Texaco and subsequently Chevron for clean-up operations and on the extent of their residual liability for environmental harm in the concession area ; that, in breach of that agreement, the Respondent facilitated legal proceedings by the Lago Agrio Plaintiffs in the form of the Lago Agrio Litigation against Chevron ; that

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and then procuring the signature of an Ecuadorian judge on a $19 billion judgment against Chevron that the co-conspirators had written, in part by the promise of a $500,000 bribe".

Donzinger was suspended from the practice of law in 2018 by a New York state court, which referred to "uncontroverted evidence of serious professional misconduct which immediately threatens the public interest" in relation to his efforts to secure the Lago Agrio Judgment.

77. The case was administered by the Permanent Court of Arbitration in The Hague under the UNCITRAL Rules by a tribunal chaired by V. V. Veeder QC, an English barrister noted for his scholarship in the history of international arbitration, and also including Vaughan Lowe QC, Emeritus Chichele Professor of Public International Law and an Emeritus Fellow of All Souls College in the University of Oxford, and Horacio Grigera Naon, an Argentine national and the Director of the Center on International Commercial Arbitration at the Washington College of Law (American University, Washington, DC).

78. Including a book by a best-selling non-fiction author : Paul J. Barre, *The Law of the Jungle*, subtitled "The $19 Billion Legal Battle over Oil in the Rain Forest and the Lawyer Who'd Stop at Nothing to Win" (Crown Publishers, 2014).

such proceedings were subject to procedural fraud and judicial misconduct by judges of the Lago Agrio Court; that the Lago Agrio Judgment was 'ghostwritten' by representatives of the Lago Agrio Plaintiffs in corrupt collusion with the presiding judge of the Lago Agrio Court; that the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court left such fraud, misconduct and corruption unremedied; that the Lago Agrio Appellate Court rendered enforceable the Lago Agrio Judgment, within and without Ecuador (in 2012); and that the Respondent (by its judicial branch, aided and abetted by its executive branch) failed to provide to both Chevron and TexPet the legal protections to which they were entitled in the Lago Agrio Litigation.

2.5. The Claimants (as USA nationals) contend that these facts disclose multiple breaches by the Respondent of their rights under the Treaty (including customary international law); that many of these breaches have a continuing character that was renewed, repeated and maintained in successive factual developments; and that these international wrongs have caused and are still causing injuries to each of them; and that the Claimants (particularly Chevron) became and remain exposed to potentially disastrous legal proceedings for the enforcement of the corrupt Lago Agrio Judgment in multiple jurisdictions, not limited to Ecuador or the USA.

2.6. The Claimants contend that these breaches of the Treaty are rooted in: (i) the failure of the Respondent to give effect to the agreements made by the Respondent concerning the responsibility and residual liability for environmental damage (collectively, the '1995 Settlement Agreement'); (ii) the issuing, rendering enforceable and maintaining the enforceability of the Lago Agrio Judgment (as varied by the Cassation Court); and (iii) the failure of the Respondent to take effective steps to address and remedy the procedural fraud, judicial misconduct and 'ghostwriting' of the Lago Agrio Judgment." [79]

These claims were broadly upheld [80]. In paragraph 8.60, after hundreds of pages of analysis of the factual evidence and detailed analysis of legal authorities, the Tribunal concluded thus:

79. Partial Award of 30 August 2018.

80. The 2018 Award was challenged before the courts of the Netherlands and is pending at this time of writing.

> "the Lago Agrio Judgment was, in the words of the award in *ELSI* [81], 'clearly improper and discreditable' with the result that the Claimants' investments have 'been subjected to unfair and inequitable treatment'. That judgment was left unremedied by the Respondent's own legal system, including the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts and the Respondent's prosecutorial authorities. That conduct amounted to a failure of the Respondent's national system as a whole to satisfy minimum standards required under international law."

Of interest for present purposes is the way in which the arbitrators applied the principles set out in the passage from *Avena* quoted above.

They first cleared away two incidental matters as follows:

> "the Tribunal's finding of denial of justice under the FET standard equates with finding the Respondent also in breach of its obligations under customary international law for denial of justice" [82],

and the Lago Agrio Plaintiffs' lawyers' "corrupt and other nefarious practices during the Lago Agrio Litigation [are] not attributable to the Republic under international law".

The arbitrators then defined the starting point for disposing of the matter of remedies: Articles 16 and 28-38 of the International Law Commission, *Factory at Chorzów*, and *Avena* [83]. They noted that they would follow the ICJ in making the distinction identified in *Avena* between the "process" of the Lago Agrio Litigation and the "correctness" of the Lago Agrio Judgment, comparing this distinction made by the ICJ in the *Arrest Warrant* case (2002) where the court noted that the Belgian warrant continued to exist and Belgium must "by means of its own choosing" cancel it. Likewise, in the case concerning *Jurisdictional Immunities* (2010), the ICJ ordered the respondent States to ensure that the court decisions would "become unenforceable" [84]. It followed that the Tribunal in *Chevron* v. *Ecuador* had

> "no power to annul the Lago Agrio Judgment [which] . . . exists as a fact under Ecuadorean law; . . . the remedy of annulment, as

81. *Sic:* correctly "judgment", since *ELSI* was rendered by a chamber of the ICJ.
82. Para. 9.4.
83. Para. 9.6.
84. Para. 9.13.

such, lies with the Respondent's internal law. The Tribunal has no power to apply such an internal remedy, as an international tribunal. It does, however, have the power to order the Respondent to take steps to secure that result."[85]

"As to international law, the Tribunal has decided that the Respondent had breached its treaty obligations by committing a denial of justice when it issued the Lago Agrio Judgment, rendered it enforceable, and maintained its enforceability." [86]

". . . any injury caused to [the Claimants] caused by the recognition and enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as also decided by the Lago Agrio Appellate, Cassation, and Constitutional Courts) shall be injuries for which the Respondent is liable to make full reparation under international law" [87].

"The Tribunal declares that, given the Respondent's said denial of justice, the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) grossly violated the fundamental procedural rights of the First Claimant (including its rights of defence); the said Lago Agrio Judgment (as thus decided) is contrary to international public policy; and no part of the said Lago Agrio Judgment should be recognised or enforced by any State with knowledge of the Respondent's said denial of justice." [88]

These conclusions built notably on propositions developed earlier in the award as follows:

"7.12. As regards the FET standard and customary international law in Article II (3) *(a)* of the Treaty, the Tribunal considers that these two bases, whether together or separately, provide similar protections against denial of justice. It was decided in *Azinian* v. *Mexico*, as also in *Mondev* v. *USA* [89] that the FET standard

85. Para. 9.14.
86. Para. 9.15.
87. Para. 9.36.
88. Para. 10.10.
89. Citing *Robert Azinian, Kenneth Davitian, and Ellen Baca* v. *United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paras. 91 and 102-103; *Mondev International Ltd.* v. *United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127; also cross-citing to these references in paragraph 8.24: *Waste Management* v. *United Mexican States (No. 2)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 97-98; *International Thunderbird Gaming Corporation* v. *United Mexican States*, UNCITRAL *(Ad hoc)*,

in NAFTA Article 1105 included protection against a denial of justice. However, the FET standard, not being limited to a protection against a denial of justice, provides a broader protection than denial of justice under customary international law, both in scope and as to the time when a choate claim accrues other than for denial of justice (by reason of the principle of judicial finality applicable to a claim for denial of justice, as considered separately below).

7.13. Hence, the Tribunal does not need to treat the protection against denial of justice under customary international law as a separate standard of protection from denial of justice under the FET standard. It is also unnecessary to do so on the facts of the present case as found in this Award : a denial of justice under customary international law necessarily will entail a breach of the FET standard in Article II (3) *(a)* of the Treaty. Accordingly, references below to denial of justice under the FET standard should be understood, where appropriate, as referring also to denial of justice under customary international law."

"8.24. . . . ordinarily, the protection for denial of justice under an FET standard in a treaty (such standard providing the international minimum standard for fair and equitable treatment of an alien) is neither broader nor narrower than protection for denial of justice under customary international law [90]. Conversely, apart from denial of justice, an FET standard in a treaty (even limited

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Award, 26 January 2006, para. 194 ; *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 188 ; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 651 *et seq.* ; *Victor Pey Casado and President Allende Foundation* v. *Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (later partially annulled on other grounds), paras. 656-657 ; *Limited Liability Company AMTO* v. *Ukraine*, SCC Arb. No. 080/2005, Final Award, 26 March 2008, para. 75 ; *Mohammad Ammar Al-Bahloul* v. *Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award, 2 September 2009, para. 221 ; *Liman Caspian Oil BV and NCL Dutch Investment BV* v. *Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, para. 268 ; *Frontier Petroleum Services Ltd.* v. *Czech Republic*, PCA Case No. 2008-09, Award, 12 November 2010, para. 293 ; *Spyridon Roussalis* v. *Romania*, ICSID Case No. ARB/06/01, Award, 7 December 2011, para. 315 ; *Jan Oostergetel and Theodora Laurentius* v. *Slovak Republic*, UNCITRAL *(Ad hoc)*, Final Award, 23 April 2012, para. 272 ; *Swisslion DOO Skopje* v. *The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para. 262 ; and *Flughafen Zürich A.G. and Gestión de Ingeniería IDC S.A.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, paras. 630-631.

90. Citing *Iberdrola Energía S.A.* v. *Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, para. 427.

> to fair and equitable treatment under international customary law) provides a broader protection to a covered investor than does denial of justice under customary international law : Vivendi (2007)." [91]

So here we have it : the internationally wrongful conduct. Next : to what remedies does this conclusion lead ? Among other things, to this paragraph 10.10 :

> "The Tribunal declares that, given the Respondent's said denial of justice, the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) grossly violated the fundamental procedural rights of the First Claimant (including its rights of defence) ; the said Lago Agrio Judgment (as thus decided) is contrary to international public policy ; and no part of the said Lago Agrio Judgment should be recognised or enforced by any State with knowledge of the Respondent's said denial of justice."

What is this about ? Let me bring you back to what the Tribunal called the "starting point" for its analysis of remedies, which it defined as follows :

> "9.6. In regard to the Claimants' material requests for relief regarding the Respondent's internationally wrongful acts, the Tribunal's starting-point comprises the *ILC's Articles on State Responsibility*, the judgments of the Permanent Court of International Justice in *Chorzów Factory* (1927 & 1928) and the judgment of the International Court of Justice in *Avena I* (2004)."

And then :

> "9.9. As regards the ILC Articles on State Responsibility, the Tribunal refers, in particular, to Articles 16 and 28 to 38."

This reference to the ten articles 28 to 38 are unsurprising : they are the meat of Part Two dealing with remedies. But what is this outlier, Article 16, which is not in the Remedies section at all ? Article 16 is the first Article in the Chapter entitled "Responsibility of a State in Connection with the Act of Another State". It is important to reflect on the reason why the Arbitral Tribunal made this reference. We have

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91. Citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.4.10-11.

already seen a hint in paragraph 10.10, where the Tribunal declared "no part" of the Lago Agrio Judgment "should be recognised or enforced by any State with knowledge of the Respondent's said denial of justice".

The sense that the arbitrators were mindful of the risk of complicity by States whose courts might be asked to enforse the Sucumbíos judgment is reinforced by paragraph 10.13 (iii), which contains this passage:

> "on notice from the First or Second Claimants, advise promptly in writing any State (including its judicial branch), where the Lago Agrio Plaintiffs may be seeking . . . the enforcement . . . of the Lago Agrio Judgment . . . of this Tribunal's declarations and orders regarding the Respondent's internationally wrongful acts comprising a denial of justice; and, for this purpose . . . any Party shall be entitled to disclose to the State's judicial branch (on whatever terms that its courts may order) a copy of this Award and its earlier awards, orders and decisions".

Chevron had never done significant business before in Ecuador, and Texaco Petroleum's concession had ended 25 years ago. There was no Chevron money in Ecuador and there had never been any. The Lago Agrio Plaintiffs faced the prospect of going abroad to try to enforce their claim, and of course Chevron would resist the enforcement of judgment found to have been corrupt. Indeed extensive litigation has been pursued in Argentina, in Brazil, and in Canada – and additional jurisdictions might also be brought into play.

The Arbitral Tribunal of course had no jurisdiction over any country except Ecuador, and could not order courts elsewhere to deny petitions for enforcement. But it found violations of international law that would be internationally wrongful if committed by other States. And it also ordered Ecuador, at Chevron's request, to inform any such courts of the declarations and orders of the Tribunal in this case, and that is unmistakably with a view to establishing "knowledge", a key element of liability for aid or assistance with respect to unlawful acts.

It is therefore important to recall how liability for complicity in international law may be established.

For most of the second half of the last century, the International Law Commission laboured mightily but unsuccessfully to agree on a draft text called the Articles on State Responsibility. They were intended to define the consequences of State action that violates international law. This was heavy and unrewarding work. But with the dawn of the

twenty-first century came success, and the text was finally revised in a way which produced agreement.

These Articles contain something very interesting, namely Article 16. Until the appearance of this Article 16, States had a rather carefree life when it came to being nice to each other. As long as one recalls that States have no friends, only interests – as Lord Palmerston said, and Charles de Gaulle, Henry Kissinger, and doubtless many others – there is no need for a State to worry whether it might be extending *quid pro quo* favours to other Governments that were up to no good.

But now we have a rule of complicity as a matter of State responsibility which can be transformative. A State acts unlawfully and engages its responsibility, including liability for harm caused, if it "aids or assists" another State in the commission of a wrong. Suddenly you have to be careful of the company you keep. This can be a real nuisance. The cost of the favour you extend to a State you wish to befriend might be a lot steeper than you think. Princes and potentates must be turning in their graves. Sovereignty isn't really what it used to be.

Article 16 was a controversial text. Still, not only was it adopted – it was rather quickly recognized as a general principle of international law by the International Court of Justice itself. Here it is:

> *Article 16*
>
> *Aid or assistance in the commission of an internationally wrongful act*
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> *a.* That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> *b.* The act would be internationally wrongful if committed by that State."

Many years ago, in an earlier draft of Article 16, which then appeared as Article 27, a more robust rule was proposed, to the effect that

> "aid or assistance . . . is wrongful . . . even if taken alone, such aid or assistance would not constitute a breach of international law".

Apparently this was a bridge too far. The implications are evident. Very simply, if the principal actor State does something which would breach its own obligations under international law – for example

because it was failing to respect something it promised in a treaty – this more far-reaching rule would entail a breach of international law on the part of the aiding or assisting State, even if that second State had made no such promises. There were certainly reasons to support this unsuccessful proposal. I would expect that under most national laws, if my lazy, no-good nephew, who has never worked in his life and at age 35 still lives with his parents, asks me to hold on to some precious paintings which have gone missing from the museum until the police have finished searching his room, I will be in trouble even if there is nothing unlawful in and of itself about giving my nephew some space in my closet for safe-keeping his stuff. Why shouldn't it also be unlawful to abet *international* lawlessness?

Well, Article 16 is as we see it, and it takes little imagination to understand why the earlier draft was not accepted; States readily perceived that this was a considerable expansion of international legal responsibility, and they were not ready for it. And so we have the last bits of subparagraph *(b)* – a State which aids or assists another State in doing something which would not be unlawful if done *by the assisting State* does *not* get itself into legal hot water. For example: the unlawful act is a breach of a promise made by the acting State to a third State in a treaty, while the assisting State has made no such promise.

This is not to deny that Article 16 represents an important advance. I shall try to give you some idea why indeed it is.

But first of all a question: is it really reliable as a rule of international law? Recall that the mission of the International Law Commission has been to contribute to the *codification* of existing law, and – here is the controversial part – to its *"progressive development"*. Article 16 could hardly be said to be a codification of existing law. During the drafting sessions, the usually very diplomatic Swiss delegation asserted with some stridency that this rule "had no basis in positive law" and should simply be "deleted" [92]. Others, notably Germany and the United States, queried whether existing international law was capable to applying the abstract concept of "aid and assistance" [93]. True enough, candour requires us to admit that a more meaningful definition has yet to be worked out, as we shall see. At any rate, it is clear that Article 16 was accepted as progressive development (which means making law, but

92. *ILC YB* 1998/II(1).
93. *Ibid*., p. 129.

we should not say so) and that subparagraph 2 *(b)* was essential in reaching agreement.

Now even those who haven't delved deeply into the development of international law may remember having heard that the task of the ILC was not to define *substantive* obligations, but to formulate rules of *remedy* for substantive breaches. Substantive rules are spoken of, in the lexicon of the International Law Commission, as *primary* rules, and the rules of remedies as *secondary* rules. (Many practitioners find it hard to understand what is secondary about remedies, but words can of course be assigned whatever meaning we like.)

Anyway, consider Article 16 once more. Do you think it defines *a remedy*? If to the contrary you think it rather defines a substantive obligation, what is it doing in these Articles?

Yet here it is. I am a full supporter, and I hope you are too. So we can applaud the ILC for having run this provision up the flagpole, as the expression goes, and now we need to see whether those who count have saluted it.

You can breathe a sigh of relief. It has been saluted. It happened as soon as 2007. And those who saluted it were persons of significance, namely the judges of the International Court of Justice in the *Genocide* case, who made it perfectly plain that Article 16 had attained the status of customary international law [94]. There is no longer any room, it seems, to argue that Article 16 has transgressed the boundaries of "progressive development".

This is all we need to know about the *Genocide* case for present purposes. Still, you may recall that *on the merits* it was a controversial decision. Antonio Cassese, a prominent scholar of the international criminal law who in 1993 had been elected the first President of the International Criminal Tribunal for the former Yugoslavia, did not mince his words: he called the ICJ's judgment in the *Genocide* case a "judicial massacre". The case involved precisely the Srebrenica massacre. As you probably know, the ICTY (as it's called) has the authority to judge individuals, while the ICJ judges States. The ICJ here did find that what had happened was a genocide. It is useful to have that clear authoritative statement of what constitutes genocide. But having made that important pronouncement, the Court went on to absolve Serbia on the ground that the Bosnian Serbs who had led the offending troops were neither acting

94. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *ICJ Reports 2007*, p. 43, at p. 217.

as agents of Serbia nor acting on its Government's instructions. Cassese protested against the "unreasonably high standard of proof for finding Serbia to have been legally complicit"; the Court had found that "it had not been proven" that the intention of committing the acts of genocide "had been brought to Serbia's attention".

This comment takes us back to Article 16 in its generality. The unhappy Cassese insisted that

> "one can also be guilty of complicity in a crime by not stopping it while having both the duty and the power to do so, and when, through one's inaction, one decisively contributes to the creation of conditions that enable the crime to take place" [95].

We may fully agree, but does Article 16 say so? Is there a necessary implication that passivity can be complicity? What would be the authority for it? I am not saying no; just that it seems that we will have to await more decisions, and perhaps persuasive commentary, before we see how the application of Article 16 to the facts of a variety of cases finally contributes granularity to these abstract phrases.

In his valuable monograph *Complicity and the Law of State Responsibility,* published in 2011, the German professor Helmut Philipp Aust analyses the concept of "assistance" in other treaties, such as the ones on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and Their Destruction (1997), on Cluster Munitions (2008), and Non-Proliferation of Nuclear Weapons (1968). Aust concludes that with respect to those *sui generis* treaties most States "are eager to limit the concept of assistance to cases in which active participation is given" [96]. If this is so, Judge James Crawford wrote in his professorial capacity that "mere incitement will not be considered a violation of Article 16, although . . . it may infringe other rules of international law" [97].

Aust poses a number of other important questions. What kind of support is enough? What knowledge? Is *joint* intention necessary? Is it appropriate or necessary to consider a division of responsibility, and if so when, and with what limitations? Does it matter whether the original wrongful act breaches nothing more than a "technical rule" rather than a matter of imperative *jus cogens*?

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95. "A judicial massacre", *The Guardian*, 27 February 2007.
96. P. 209 (2009).
97. *State Responsibility* 403 (2013), citing *ILC YB* 1978/II(1), pp. 54-55.

Even when a rule is nebulous, or simply uncertain in particular circumstances, we must recall that international law does not tolerate a *non liquet*, that is to say a refusal to decide due to the absence of a sufficiently clear rule. Hersch Lauterpacht, commenting on this requirement, suggested how to deal with it by referring beautifully to the "shaping of legal rules thorough a process of reconciling competing legal claims". It sounds lovely, but let us not fool ourselves into thinking that this will be a smooth path applauded without objection by exulting multitudes.

EMERGING CONCLUSIONS

Conceptually, the holdings of the Böckstiegel Tribunal in the *Chevron* v. *Ecuador* arbitrations sometimes referred to as "the commercial cases" are perfectly straightforward. Contractual entitlements that are not given a hearing despite the foreigner's sustained efforts before the national courts may instead be resolved by an international tribunal, which thus goes on to examine the claim of denial of justice. The debt is upheld (or not) under the law applicable to it; the right to elevate the matter to the international level is a matter of international law.

The decision of the Veeder Tribunal in the case of the national court judgment found to be fraudulent, on the other hand, is not the end of that matter. Only by a future final award will the arbitrators finally resolve the matter of remedies in light of pleadings yet to be made before them. The losses that would not have been incurred in the absence of the wrongful act (i.e. the fraudulent judgment) are said in particular to be the considerable costs of resisting that award before a number of courts in Ecuador and elsewhere. The issues that will be raised, and their resolution, are likely to be of great import – but are for another day.

That leaves *Amco* v. *Indonesia*, as we now perceive it with the passage of time. There are of course regulatory takings that are not compensable because they constitute a valid exercise of sovereign power. On what basis can an international court or tribunal conclude that a failure to compensate for the consequences of the exercise of governmental power gives rise to international liability under international law? In *Amco* v. *Indonesia*, the State argued that even if its conduct constituted a denial of justice there could be no damages because the investor had forfeited his right to his licence in any event. If he were *now* given due process by the international tribunal, the arbitrators would see that there should be no compensation because the outcome was in any event justified on grounds not previously pleaded.

As we have seen, the Higgins Tribunal rejected this argument. The key to the arbitrators' decision, when one considers the role of the expression "a generally tainted background that necessarily renders a decision unlawful" in their reasoning, is *the intentional nature* of the acts constituting breach. There is a striking difference between, on the one hand, a situation where a State's interference with property rights aims *(a)* to put an end to the complainant's activities, or *(b)* to deploy

the power of eminent domain to allow different use of land, in both cases pursuing the perceived public interest, and, on the other hand, taking over a profitable business and continuing to exploit it in the same way. Where the State action is pretextual, a perverse incentive would be created if the international tribunal would imagine how the State could have achieved its objective without infringing international law (as Indonesia invited it to do). A State acting with the intent of ignoring its legal duties would be encouraged by the thought that the worst that could happen to it would be that international adjudication would oblige it to do – most likely much later – what it should have done in the first place (such as to pay adequate compensation). In many situations even that remedy would not be pursued by the foreign complainant given the cost and uncertainties of litigating against sovereigns.

The reviewing adjudicatory body should therefore take a realistic view of the State action, and not be paralyzed by self-serving declarations. It may be a sensitive matter to characterize the actions of public officials as pretextual, but that is no reason to shirk the duty to ensure the application of law. And in many cases, such as the takeover of the investor's business in *Amco* v. *Indonesia,* the unlawful motive is plain to see. As it was memorably put in 1977 by a prominent American federal appellate judge, Henry Friendly, courts reviewing the legitimacy of administrative acts are "not required to exhibit a naiveté from which ordinary citizens are free". *U.S.* v. *Stanchich*, 550 F. 2d 1294, 1300 (CA2). Friendly's idea was that courts should not hesitate to conclude that a governmental action is pretextual if the evidence so shows. One may readily assent to that abstract proposition, but it is useful to fortify it by perusing the concrete circumstances and factors which have in practice persuaded important jurisdictions to nullify State action as pretextual.

Such a case was *Department of Commerce* v. *New York*, decided by the US Supreme Court in June 2019, several months after these lectures. The challenged action concerned the questionnaire to be used in the nationwide census. It is undertaken every ten years, and addressed to all persons present on US territory. It determines things like drawing electoral districts and allocating federal funds to the individual states of the United States. The Census Bureau is a statistical agency of the Department of Commerce. The specific controversial action was the decision of the Secretary of Commerce to reinstate a question about the citizenship of respondents. It is understood that the presence of that question reduces the response rate of non-citizens. Some States contend

that the under-reporting of non-citizen households by as little as 2 per cent affects them in terms of the distribution of federal funds on the basis of population. In other words, it is a politically sensitive matter.

Under the US Administrative Procedure Act, courts may set aside actions of governmental agencies that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

Chief Justice John Roberts, writing for the majority, accepted that the reviewing courts are "deferential" to administrative decision-making, but then immediately quoted Judge Friendly's phrase reproduced above, and explained that

> "agencies must offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise." [98]

The trouble with the Secretary of Commerce's decision to reintroduce a citizenship question was that it was said to be responsive to concerns raised by the Department of Justice about the enforcement of the Voting Rights Act in the absence of more accurate records in relation to the distribution of citizens. This wholly failed to persuade the Supreme Court:

> "the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rational he provided.
>
> The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary's Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to 'find the best rationale'. The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility

98. No. 18-966, Slip Opinion, p. 28.

that DOJ's Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ's Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ's interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data – what one might expect of a typical request from another agency – to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau's offer to discuss alternative ways to meet DOJ's stated need for improved citizenship data, further suggesting a lack of interest on DOJ's part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale – the sole stated reason – seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decision-making process." [99]

In the end, the Court's final words were unequivocal :

"Reasoned decision-making under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction." [100]

True enough, this case may be said to deal with principles of liability. At the same time, however, it also makes an important contribu-

99. Slip opinion, p. 28.
100. *Ibid*.

tion to the matter of remedies. When a State action is pretextual, the adjudicator's task is not to imagine how the outcome might have been otherwise justified, and to diminish the injured party's recovery on that account. The "tainted background" makes it clear that the objective pursued was not some other hypothetically justifiable goal. The actor had not chosen to pursue a legitimate objective, and had presented a rationale which, when duly examined under the legal standards under which the State authority purportedly was exercised, was found to be "contrived". It would be perverse, and antithetical to the rule of law, to reward the unlawful act with impunity on the basis that the outcome might have been achieved innocently.