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The renaissance of a cause of action

By what artifice might a state owe a duty to the world at large to maintain an adequate system for the administration of justice? It is one thing for states to assume obligations at their own diplomatic initiative. Few would question that legal duties will flow from a treaty by which two states promise each other that their nationals will be afforded a certain standard of treatment if they are accused of crimes in the other country, or a multilateral agreement by which each state promises all other signatories to abide by certain rules for international trade and investment. But by what contrivance is a state to be held responsible for an imperfect judicial system? When did any state make promises to that effect?

The answer is that the duty to provide decent justice to foreigners arises from customary international law. Indeed, it is one of its oldest principles.[1] From the Renaissance to the First World War – an international lawyer might say from sometime before Grotius to sometime after Calvo – claims of denial of justice were the staple of international legal disputes. There is nothing surprising here. Like most institutions, the nation state did not emerge full-blown and powerful, but inchoate and vulnerable. The territorial integrity of a polity aspiring to statehood would not long remain inviolate if it failed to warrant that it was not a zone of chaos and lawlessness.

So a paradox emerged; it was precisely in attempting to secure their exclusive jurisdiction over internal legal processes that states accepted the

[1] Having reviewed the conventions which proliferated in the sixteenth and seventeenth centuries, Judge Charles de Visscher (as he was to become) wrote in 1935 that the 'numerous treaties which stipulate free and ready access to tribunals do no more than confirm a principle the authority of which is independent of any convention' (de Visscher at p. 374; all translations of quotations from de Visscher are the present author's).

duty to maintain those processes at a minimum international standard. The content of that standard has been a matter of controversy. For many generations, the dominant Latin American view tended to be minimalist. But whatever the debate as to its scope, the principle that a state violates international law if it denies justice to aliens has been universally accepted for centuries.

It is easier to have opinions about a foreigner's claim of denial of justice than to understand its legal foundation. The word 'justice' is often emotive, and sometimes seems to paralyse reflection.[2] Although it was already then among the most venerable notions of unlawful state conduct, Alwyn Freeman began his seminal monograph on the subject in 1938 with the observation that denial of justice was 'one of the most poorly elucidated concepts of international law'.[3] He proceeded to give the matter his own elucidation in 623 pages, demonstrating that the topic, however poorly understood, was hardly bereft of material – whether arbitral awards, diplomatic practice, or academic writings.[4]

In the course of the succeeding three generations, the scope for invoking the grievance of denial of justice has broadened immensely. There are

[2] 'This striving towards justice is to all appearances one of man's strongest emotions, which is why reason has the greatest difficulty in controlling it' (Vladimir Bukovsky, Introduction, Arthur Koestler, *Darkness at Noon* (1940; trans. Daphne Hardy, London: Folio Society, 1980)).

[3] Freeman at p. 2.

[4] No work of similar depth appears to have been published subsequently. In his Third Report on Diplomatic Protection for the International Law Commission in 2002, Professor John Dugard expressed his intention to write an addendum on denial of justice, which he considered 'as central to the study of the local remedies rule as is the Prince of Denmark to Hamlet'. International Law Commission (Dugard), Third Report on Diplomatic Protection, UN Doc. A/CN.4/523 (2002) at p. 4, para. 13. (The point is obvious: if exhaustion of local remedies is required, a delinquent state must not be allowed to shunt the grievance into oblivion. This aspect of the problem was perfectly captured by the International Court of Justice in *Case concerning the Barcelona Traction Light and Power Co. Ltd* (*Belgium* v. *Spain*) (Preliminary Objections), 1964 *ICJ Reports* 6, at p. 46: '[t]he objection of the Respondent that local remedies were not exhausted is met all along the line by the Applicant's contention that it was, *inter alia*, precisely in the attempt to exhaust local remedies that the alleged denials of justice were suffered'.) The very prospect of such an addendum, however, caused strong headwinds to build up within the Commission, where voices were heard to the effect that the topic of denial of justice appertains to the forbidden realm of so-called primary rules. It appears unlikely that the announced addendum will see the light of day. The draft articles on diplomatic protection studiously avoid any reference to denial of justice for the explicit reason that they seek 'to avoid any suggestion' that they encompass 'primary rule[s]'. International Law Commission (Dugard), First Report on Diplomatic Protection, UN Doc. A/CN.4/506 (2000) at p. 15, para. 40.

two fundamental explanations. First, it has become universally accepted that national courts do not somehow stand apart from other institutions of a state, but are its instrumentalities. They are as much a part of the state as the executive or legislative branches, and their acts and omissions are equally attributable to it. Secondly, and more recently, the incidence of such complaints actually being raised has increased greatly with the emergence of procedures under which victims may act directly, under international law and before international jurisdictions, to seek redress. These procedures have notably been established in human rights treaties, and in treaties for the protection of investments.

Although direct access to the remedies of international law is a dramatic development generally, it is particularly so with respect to claims of denial of justice. In Freeman's day, it was a postulate that claims had to be prosecuted by the victim's state through the channel of diplomatic protection. But a government's foreign relations involve complex and countervailing objectives. Ministries of foreign affairs are disinclined to expend political capital pursuing the claims of individuals or corporations in the single-minded manner indispensable to success in litigation.

The world has changed. Complainants may now pursue states directly. They need not be inhibited by any deference to the fact that the wrong they believed was done to them took the form of a court judgment. Moreover, the number of states of whose conduct they might complain has tripled since 1938. They administer legal systems presenting vastly different degrees of imperfection. Finally, the pace and scope of international exchanges, with their inevitable share of disputes, have increased beyond recognition.

International lawyers therefore inevitably developed a renewed interest in the delict of denial of justice. Although the words come easily to the lips, their meaning is not necessarily fully formed in the mind. What kind of injustice, precisely, is denial of justice? Who commits it? Who is responsible for it? Who corrects it? When does the authority to effect such correction escape the exclusive domain of national institutions? What indeed is the remedy?

If the contours of the ancient landscape surveyed by Freeman were unclear, one should hardly be surprised that the more crowded and frenetic realities of current practice call out even more insistently for the systematic re-examination of a notion as open-textured as this one.

The most salient study in French, still valuable, is de Visscher. Of the numerous articles written on the subject, Fitzmaurice's gem-like study in 1932 captures the essence of the topic.

At its most general, the international delict may be stated thus: *a state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner*. The expression is not as nebulous as it may seem. Moreover the fact that rules have open texture is not inconsistent with the presence of a core of settled meaning which resolves most questions in a predictable manner.[5] The words 'administer justice' convey something meaningful, as this study will show, and so does the proviso that we are concerned with violations of international, not national, law. True, the sentence assumes rather than demonstrates the existence of international norms of 'fundamental unfairness'. They require elaboration.

Denial of justice in international law cannot be equated with the notion developed in most municipal systems, where it has the limited meaning of a refusal to hear a grievance. Under national law, a disappointed litigant who has been given full access to the procedures provided within the system – including appeals and possibly mechanisms for revision for mistake, fraud, suppressed evidence and the like – cannot ask for more justice, or different justice. The matter is *res judicata*; the system has given all it has to offer.

International law provides standards by which national systems can be judged from the outside. National courts are, without doubt, instrumentalities of the state, so the state may be judged for the acts or omissions of its courts with respect to aliens. It could not be otherwise. Internationally, the state is a single entity. The rule of law does not allow the very party whose compliance is in question to determine whether it is a transgressor.[6]

To the extent that the decisions of national courts disregard or misapply *international* law, they are subject to international censure like any other organ of a state. But since courts are charged with the administration of

[5] This sentence reproduces terms which some readers may recognise as recurrent in H. L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1994).

[6] 'In the case of international law, an international court is the proper organ finally to make the decision that a rule of international law has been broken. Municipal courts may pronounce on the issue, but it is clear that for the international legal system this cannot be final' (C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford: Clarendon, 1967), at p. 215).

The abundant arbitral jurisprudence of the nineteenth century is filled with statements like this: 'It is well settled that the decisions of a court, condemning the property of citizens of another country, are not conclusive evidence of the justice or legality of such condemnation' (*The Orient* (*US* v. *Mexico*), Moore, *Arbitrations* 3229, at pp. 3229–30). Umpire Lieber put it thus in the *Garrison* case: 'It is true that it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decisions of a court of another country, which nevertheless the law of nations universally allows in extreme cases. *It has done so from the times of Hugo Grotius*' (*US* v. *Mexico*, Moore, *Arbitrations* at p. 3129 (emphasis added)).

justice, it is tempting to refer to their failure to respect international law as a *substantive* denial of justice. This concept, however, is alien to most national legal systems because they incorporate corrective mechanisms which yield a final result deemed by definition to be right. In other words, denial of justice under international law has been thought to encompass a dimension – *substantive* denial of justice – mostly unknown in national law. (Switzerland, we shall see, is an exception.) There is no need to perpetuate such a confusing contrast between international and national notions. A thesis of this study is that the category of substantive denial of justice may now be jettisoned. When national courts misapply international law, they commit substantive violations which should not be called denials of justice; the state from which they are emanations incurs direct international responsibility for the violation without regard to the branch of government which was involved. Since the acts or omissions of its courts are attributable to the state, their transgressions of international law are those of the state. Nothing is added by giving violations of international law a special appellation only because they are effected by a judicial body.

To the extent that national courts disregard or misapply *national* law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as *technical* or *procedural* denial of justice. Although many national laws recognise this type of denial of justice, municipal concepts vary. Often they are exceedingly narrow; a judge's *refusal to hear* a petition may be severely sanctioned, but that is all. Once a judicial body takes up a matter, violations of procedural codes may naturally be the subject of appeals. This is daily fare for appellate courts, but such grievances have no reason to refer to the concept of denial of justice; the fact that they are being heard means that justice is not being denied. Under international law, the general notion of denial of justice generates liability whenever an uncorrected national judgment is vitiated by fundamental unfairness. Thus it must be, as long as international law does not impose specific supranational procedural rules in the guise of treaties.

Such fundamental instruments as the UN Universal Declaration on Human Rights,[7] the European Convention on Human Rights and the International Covenant on Civil and Political Rights define basic

[7] Article 10 of the Universal Declaration of Human Rights ('The world's first international bill of rights', General Assembly Resolution A/RES/217A (III), adopted 10 December 1948) provides: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

minimum standards and include norms which must be respected by any judicial system aspiring to international legitimacy.[8] To the extent that such rules emerge, the expression 'denial of justice' may lose currency as petitioners find it more convenient to invoke a breach of specific provisions of the relevant treaty. If so, the general rubric of denial of justice may be redundant in the light of the *lex specialis*, but its substantive tenor is not invalidated.

Although the expression as such does not appear in these and similar texts, the customary international law of denial of justice will continue to influence the way in which international treaties are applied. In turn, the application of treaty provisions will contribute to a modern understanding of the old doctrine. The reason for this inevitable cross-pollination is that the elements of the delict of denial of justice tend to reappear as treaty provisions, for example when they proscribe 'discrimination' or when they require 'fair and equitable treatment'. Thus, a complainant before an international tribunal may allege that a treaty has been breached by reference to its terms without invoking the doctrine of denial of justice by name. When the alleged breach has been committed by a judicial body, however, an assessment of *discrimination*, or *unfairness*, or *protection* immediately invites reference to the way such general notions have been understood in the context of denial of justice.

An illustration is the *Loewen* case, undoubtedly one of the most important international decisions rendered in the field of denial of justice.[9] The complaint alleged breaches of the North American Free Trade Agreement, a treaty which does not contain the expression 'denial of justice' as such. Yet the entitlement to treatment 'in accordance with international law' by virtue of Article 1105 of NAFTA encompasses protection against denials of justice.

With respect to more concrete and specific provisions of modern treaties, to the extent they represent a broad consensus they will inevitably be seen as providing content to the general concepts of customary international law even in cases where such treaties do not apply.

[8] See Aleksandar Jaksic, *Arbitration and Human Rights* (Peter Lang Publishing, Frankfurt am Main, 2002); cf. in counterpoint Marius Emberland, 'The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration', (2003) 20 *Journal of International Arbitration* 355. See generally chap. 4 ('Human Rights Law Requirements in International Arbitration') of Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, 2004), at pp. 109–165.

[9] *Loewen*, 26 June 2003.

At any rate, greater clarity may be achieved by observing that denial of justice is *always* procedural. The adjective is no longer needed.

State responsibility for denial of justice is justified, indeed required, in order to satisfy the international requirement that states provide for the effective protection of the rights of foreigners, whether those rights have been acquired by operation of national law or imposed by overriding international principles. A foreigner is always entitled to procedural fairness as measured by an international standard. That is the *raison d'être* of the notion of denial of justice. The doctrine of denial of justice is not required to protect substantive rights under international law, for the simple reason that national courts do not have the last word with regard to such rights; courts or tribunals entitled to apply international law will simply correct the failure to observe the right in question. Substantive rights under national law, on the other hand, are created by the state, and are subject to the sovereign authority to legislate, and to interpret. Therefore, the dismissal of a claim of right under national law by the properly constituted national authority, whether correct or incorrect as a matter of national law (as previously or subsequently understood), does not give rise to an international delict unless there has been a violation of due process as defined by international standards.

This study examines the bases on which international jurisdictions may give effect to that essential exception.[10] It will lead to three particularly important insights.

First, we will discover that international fora have no reason to recognise a category of substantive denials of justice. In international law, denial of justice is about due process, nothing else – and that is plenty.

Secondly, many definitions of denial of justice are misleading. The flaw lies in their concentration on individual instances of miscarriage of justice, using an infinite variety of adjectives to convey the egregiousness which undoubtedly is required to conclude that the international delict has indeed occurred. But international law does not impose a duty on states to treat foreigners fairly at every step of the legal process. The duty is to create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected*; '[I]t is the whole system of

[10] The author should disclose that he was a member of the arbitral tribunals in *Robert Azinian, et al.* v. *Mexico*, award, 1 November 1998, 5 *ICSID Reports* 269; *Himpurna California Energy Ltd* v. *PT. (Persero) Perusahaan Listruik Negara*, award, 4 May 1999, (2000) XXV *Yearbook Commercial Arbitration* 13; and *Generation Ukraine Inc.* v. *Ukraine*, award, 16 September 2003, (2005) 44 ILM 404 which are discussed in various sections of this book.

legal protection, as provided by municipal law, which must have been put to the test.'[11] It is the breach of that duty which constitutes denial of justice. Exhaustion of local remedies in the context of denial of justice is therefore not a matter of procedure or admissibility, but an inherent material element of the delict.[12] Many investment treaties contain a waiver of the exhaustion requirement to the effect that a foreigner may seize an international tribunal without first seeking to use reasonably available national remedies. Such waivers may ensure the complainant access to the international tribunal, yet a claim of denial of justice would fail substantively in the absence of proof that the national system was given a reasonably full chance to correct the unfairness in question. (There is no paradox in the notion of the *substance of a procedural duty*; it is simply the answer to the question: what is due process?)

Thirdly, claims of denial of justice cannot be decided without balancing a number of complex considerations which tend to be specific to each instance. Anyone who insists that international responsibility in this regard may not arise unless it is the product of a perfectly predictable application of objective criteria simply does not accept international adjudication of denial of justice – and to be consistent would have to maintain the same posture with respect to other fundamental matters such as international determinations of 'equitable' delimitation or 'proportional' armed response.

A final introductory comment: current international jurisprudence concerning denial of justice has found a particular expression in the field of foreign investment, perhaps more notably so than in the law of human rights. This may to some degree be the consequence of the fact that investors tend to be better situated to mobilise the resources required to prosecute high-stakes grievances in a sustained manner before international fora. But far more important is the relative paucity of access to effective remedies in the field of human rights. True enough, the European Convention on Human Rights offers the prospect of concrete remedies to millions of Europeans, but practice under the corresponding American and African instruments lags far behind, while the bulk of the world's population, in Asia, does not benefit from a regional human rights

[11] *Ambatielos Claim* (*Greece* v. *UK*), 6 March 1956, XII RIAA 83, at p. 120.
[12] *Accord*, A. A. Cançado Trindade, 'Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law', (1978) 53 *Philippine Law Journal* 404; International Law Commission (Dugard), Second Report on Diplomatic Protection, UN Doc. A/CN.4/514 (2001) at p. 6, para. 10.

convention at all. Moreover, as Professor Dugard wrote in his First Report on Diplomatic Protection for the International Law Commission:

> To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.[13]

He went on to note that with respect to aliens, although universal and human rights conventions in principle extend protection to all individuals whether nationals or foreigners:

> there is no multilateral convention that seeks to provide the alien with remedies for the protection of her rights outside the field of foreign investment.[14]

Dugard was of course examining the expansion of direct access as it relates to the ILC's inquiry into diplomatic protection. To emphasise his point, he observed that although the UN General Assembly in 1985 adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live,[15] instead of proposing any enforcement machinery that instrument simply reiterates the alien's right to seek diplomatic protection.

> This starkly illustrates the current position: that aliens may have rights under international law as human beings, but they have no remedies under international law – in the absence of a human rights treaty – except through the intervention of their national State.[16]

Investment arbitrations, on the other hand, have proliferated under the multitude of bilateral investment treaties now extant, and, as we shall see, claimants in such cases have rediscovered the grievance of denial of justice and pursued it with vigour.

[13] ILC, First Report on Diplomatic Protection at p. 8, para. 25.
[14] *Ibid.* at para. 26.
[15] General Assembly Resolution A/RES/40/144, adopted 13 December 1985.
[16] ILC, First Report on Diplomatic Protection at p. 9, para. 28.

2

The historical evolution of denial of justice*

Absence of a universal standard

Denial of justice is an elusive concept. Freeman called it that 'innocent-appearing phrase', only to deplore the 'chaotic heterogeneity' of views as to its proper scope. There are two readily apparent reasons why this should be so.

The first is a matter of definition; all kinds of injustice could be referred to as denial of justice, but then the expression could be invoked to complain about the disposition of any grievance. It would thus lack any particular meaning and lose all usefulness. The malleability of the words

* The first draft of this chapter was written in the little port of Gustavia, near the modest museum of the island of St Barthelemy and its even more humble library. This happenstance gave rise to one of those welcome diversions of historical research. The town was named after King Gustav III of Sweden, who acquired St Barthelemy in 1784. For the next century, the tiny Caribbean island became Sweden's only durable overseas dominion. The visiting author may perhaps be forgiven for having distracted himself by wondering when the first Swedish national set foot on the island. The true answer (Viktor von Stedingk, an officer of the merchant marine, debarked in 1783) is uninteresting; more entertaining is a false trail, namely the recent discovery that as early as 1633 four vessels with unmistakably Swedish names (*Stockholms Krona*, *Förgyllda Lejonet*, *Norrlandskeppet* and *Gefleskeppet*) anchored overnight off the site of what was to become Gustavia. They were part of a fleet embarked on a successful although ephemeral venture to conquer the island of St Martin – visible ten nautical miles away – but had initially, it seems, mistaken their target. More to the point, there was not a single Swede on board; the four ships were flying the flag of Spain, having been seized in San Lucar as reprisal for damage alleged to have been caused to Spanish vessels in the Baltic port of Wismar in Mecklenburg during its occupation by Swedish troops during the Thirty Years' War. The failure of Sweden to make reparations was thus, in Spain's eyes, the denial of justice; the reprisal was the remedy.