DENIAL OF JUSTICE AND ITS RELATIONSHIP TO EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW

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1. *The proper meaning and extent of denial of justice*

The concept of denial of justice so often referred to in arbitral and judicial practice as well as in doctrine has always presented insurmountable difficulties to the task of devising formulae for determining its meaning and scope in precise terms, either by definition or enumeration. Yet, with regard to the application of the local remedies rule, a proper understanding of the notion of denial of justice remains relevant for the very determination of the international responsibility of States.

The term *denegatio justitiae* was incorporated into the terminology of international law in the course of a long historical evolution whose origins can be traced back to the early Middle Ages, strictly linked to the protection granted by the prince to his subjects abroad whose sanction *par excellence* was the warrant of private reprisals.[1] It is in the institution of these latter, as developed from the thirteenth and fourteenth-century onwards, that the historical roots of denial of justice are found: on the basis of the idea of collective responsibility, letters of marque were granted by the prince or the King to secure justice where it has been denied.[2] The origin of denial of justice is thus intimately connected with that of the rule of exhaustion of local remedies.[3]

By the sixteenth and seventeenth-centuries the system of private reprisals presented first signs of decline in some treaty provisions, as a result of the emergence of the modern State, politically organized and centralizing powers, vested with the exercise of the function of protection of nationals

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[1] De Visscher, *Le déni de justice en droit international*, 54 RECUEIL DES COURS DE L'ACADEMIE 45 DROIT INT'L. 370 (1935).

[2] De Visscher, *op. cit.*, p. 371-372 and note 4; MCNAIR, INTERNATIONAL LAW OPINIONS 297-304 (1956), and 3 MCNAIR, *op. cit.*, p. 414-415 (1956).

[3] *Cf.* A.A. Cancado Trindade, *Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law*, 12 REV. BELGE DROIT INT'L. 499-527 (1976); and see Trindade, *Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century*, 24 NETHERLANDS INT'L L. REV. 373-392 (1977).

abroad. Closely related with that protective function, the concept of denial of justice became one of *customary* international law.[4]

By the end of the eighteenth-century States as subjects and organs of international law had exclusively assumed the protection of interests of their nationals abroad, and denial of justice came to be used by reference to a failure of protective justice (already detached from the old practice of private reprisals). Private justice became condemned, and the new theory (with a prevailing unitary conception of the State) favoured a systematization of the international duties and responsibilities of States; on the other hand, however, it presented a certain narrowness attributable to an exaggeration of the notion of sovereignty.[5]

The more recent crystallization of the concept of illegality in international law has rendered an enlarged interpretation of the term "denial of justice" somewhat superfluous; hence the necessity to examine the particular failure of protective justice *in a given case*. Spiegel warns that "the whole theory of international responsibility is based on a standard varying according to several circumstances of the act in question. The term 'denial of justice' does not convey the innate characteristics of that standard; for the latter is dependent not only upon the person who is responsible for the act in question, but also upon numerous other circumstances, such as the situation of the country as a whole."[6] In fact, it is when one comes to attempts of determination of the *scope* of denial of justice that serious divergences have arisen.

Case-law of international courts and tribunals has afforded many examples of such difficulty. Thus, for instance, a particularly broad view of denial of justice was taken both in the *El Triunfo Company (U.S.) v. El Salvador* case (1902)[7] and in the *Robert E. Brown (U.S.) v. Great Britain* case (1923),[8] where it was asserted that not only acts of the courts, but also acts of a country's rulers, whether belonging to the legislative, executive or judicial branches of government, could contribute and amount to the establishment of denial of justice. The award in the *Interoceanic Railway of Mexico, et al. (Great Britain) v. Mexico* case (1931)[9] is likewise authority for the view that responsibility for denial of justice may not necessarily rest with judicial authorities only, but with non-judicial ones as well, though it was held in the case that no denial of justice had occurred.

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[4] FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 63 (1938).

[5] De Visscher, *op. cit.*, p. 373.

[6] Spiegel, *Origin and Development of Denial of Justice*, 32 AM. J. INT'L. L. 79-80 (1938). The author displays a hopeful outlook of the development of denial of justice, considering its evolution starting in the ancient practice of reprisals and culminating in modern times with peaceful reclamation by the State and — sometimes — settlement of the dispute by an arbitral award (*cf. ibid.*, p. 81).

[7] 15 U.N. Rep. Int'l. Arb. Awards 459-479 (1902).

[8] 6 U.N. Rep. Int'l. Arb. Awards 120-131 (1923).

[9] 5 U.N. Rep. Int'l. Arb. Awards 133, 178-190 (1931).

A rather narrower view of denial of justice was taken in the *Antoine Fabiani* case[10] (France v. Venezuela, 1896), involving failures to execute a foreign arbitral award supplied with a domestic *exequatur;* denial of justice was therein considered in relation to acts by judicial authorities (refusals of access to courts, undue delays, executive pressure upon the courts, suspension of proceedings). In the *Cotesworth and Powell* case[11] (Great Britain v. Colombia, 1875) denial of justice was examined in the context of misconduct in judicial administration and impossibility of execution of a judgment (due to an amnesty act relieving the wrongdoer from consequences of his acts); the distinction was drawn between denial of justice and acts of notorious injustice, the former covering, e.g., undue delays and refusals by tribunals to render judgment properly, the latter applying to sentences being pronounced and executed in manifest violation of law, thus going beyond refusal of access to courts.

In the *Janes (U.S.) v. Mexico* case (1925)[12] denial of justice was met in relation to failure of authorities to apprehend a murderer, while in the *Massey (U.S.) v. Mexico* case (1927)[13] it concerned failure of authorities to punish a murderer, it having been asserted that responsibility may exist for acts of misconduct of any officials, whatever their status or rank, thereby including minor ones as well. In the *North American Dredging Company of Texas (U.S.) v. Mexico* case (1926)[14] a Calvo clause was upheld, barring the applicant from presenting the claim to its government in relation to the contractual matter at issue, but the clause was not to operate in the event of denial of justice in violation of international law.

In the *Martini* case[15] (Italy v. Venezuela, 1930), denial of justice was considered in relation to a decision of a domestic Court of Cassation, covering the questions of the conduct of judges, the problem of erroneous or unjust judgments by municipal courts contrary to international awards. In the *Neer (U.S.) v. Mexico* case (1926)[16] the issue of denial of justice was raised in relation to international standards, the distinction betweeen its broad sense (i.e., applying to acts of executive and legislative authorities as well as to acts of the courts) and its narrow sense (applying to acts of

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[10] 10 U.N. Rep. Int'l. Arb. Awards 83-139 (1896).

[11] In 2 MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 2050-2085 (1898). And see also *Interocean Transportation Company of America (Great Britain v. United States* case (1937), ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL CASES (LAUTERPACHT, ED.), pp. 276-278 (1935-1937) and pp. 272-274 for the local remedies rule.

[12] 4 U.N. Rep. Int'l. Arb. Awards 82-98, 138 (1925).

[13] *Ibid.*, pp. 155-164 (1927).

[14] *Ibid.*, pp. 26-35 (1926).

[15] ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES (LAUTERPACHT, ED.), 153-158 (1929-1930). See also discussion (concerning proceedings in domestic courts) in the *Salem* case (United States v. Egypt, 1932), 2 U.N. Rep. Int'l. Arb. Awards 1188-1203 (1930).

[16] 4 U.N. Rep. Int'l. Arb. Awards 60-66, 138 (1926).

the judiciary) being deemed "immaterial".[17] Similarly, in the *Eliza* case [18] (United States v. Peru, 1863), treatment of aliens was held to be determined by reference to international law (denial of justice in the case consisting in failure to give effect to judicial decision of protection).

A distinction was drawn in the *Chattin (U.S.) v. Mexico* case (1927)[19] between indirect and direct liability, the former covering, e.g., lack of protection by the judiciary against acts of individuals wronging an alien, the latter resulting from acts of governmental officials unconnected with prior wrongful acts of individuals; the situation would be the same in relation to the damage, whether caused by the judiciary or the executive branch of the government, and denial of justice proper would only occur with regard to acts implying or amounting to indirect liability.

It could at this stage be recalled that, however much these cases might have clarified the issue of denial of justice, they evolved within the broader context of treatment of aliens, at a time when the exercise of diplomatic protection was the mechanism *par excellence* of the enforcement of the international responsibility of the State. This does not hold absolutely true any longer.[20] Furthermore, that practice has been the object of criticisms on distinct grounds (*infra*). And finally, the conditions and circumstances of international life have much changed, and so have the behaviour and attitudes of States in their relationships with each other.

Nonetheless, on one or two points that case-law displayed a certain uniformity of opinion: international action cannot take place until after unsuccessful exhaustion of local remedies with the consequent establishment of a denial of justice, and denial of justice cannot be assumed until after unsuccessful exhaustion of local remedies. Such was the position taken, e.g., in the Venezuelan Arbitrations of 1903. The Italian-Venezuelan Commission's umpire held in the *De Caro* case that as the claimant had not availed himself of the right — under the Venezuelan code of civil procedure — to lodge an appeal with a domestic court, he could not be granted damages: "certainly before he can appeal to an international tribunal, the suit in court having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject-matter of his appeal."[21] And in the *Puerto Cabello, etc., Railway* case the British-Venezuelan Commission's umpire stated that denial of justice could not be assumed as the claimant company had preferred to take diplomatic action without having

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[17] *Cf. ibid.*, p. 61.

[18] 2 DE LA PRADELLE & POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX 271-280 (1957). In their often-quoted *note doctrinale* on the case, the authors refer to the "notion du déni de justice, dont le caractère fuyunt et complexe semble défier toute définition" (*ibid.*, p. 280).

[19] 4 U.N. Rep. Int'l. Arb. Awards 282-312 (1927).

[20] It is recognized today that the heyday of denial of justice and exhaustion of local remedies, as traditionally approached in the treatment of aliens specifically, is past; see R. Ago, *First Report on State Responsibility*, 2 YRBK. INT'L. L. COM. 137 (1969).

[21] 10 U.P. Rep. Int'l. Arb. Awards 643-644.

previously had recourse to the Venezuelan domestic courts for a settlement of the questions in dispute.[22]

The problem of the extent of denial of justice was also discussed in proceedings before the International Court. Thus, in the *Losinger* case, for example, agent for the Swiss government (Mr. Sauser-Hall), in his oral argument of 5 June 1936, distinguished between denial of justice in municipal law and in international law. In municipal law the term covered cases of refusal of access to the courts, whilst in international law the term had a broader meaning, he argued: denial of justice in international law comprised obstruction of access to the competent courts, undue delays, obstacles in the process of exhaustion of local remedies prior to a claim for diplomatic protection. From the moment when the claimant could establish the ineffectiveness of legal channels with certainty, he would be entitled under international law to seek redress at international level by the intermediary of his government.[23]

Henri Rolin came more squarely to the point when, as counsel for the Belgian government in the *Electricity Company of Sofia and Bulgaria* case, he declared before the PCIJ on 1 March 1939 that there were two theoretical schools of thought on the question of denial of justice:— "il y a ceux qui entendent le déni de justice au sens large comme comprenant la violation du droit international, et il y a ceux qui, au contraire, considèrent le déni de justice comme le défaut de fonctionnement formal de l'organe judiciarie national, mais qui reconnaissent, à côté de cela, comme un cas de responsabilité internationale le violation d'un engagement international par une juridiction nationale."[24]

The topic of denial of justice has been touched upon in several attempts of codification of the law on State responsibility (mainly for injuries to aliens) undertaken by international organs, private bodies or individuals. Those attempts have disclosed some diversification in approaching the problem at issue. The 1925 project on diplomatic protection of the American Institute of International Law[25] and the 1965 Restatement of the Law by

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[22] 9 U.N. Rep. Int'l. Arb. Awards 527 (the case is also illustrative of the effect of failure to exhaust local remedies upon a demand for interest). Other cases could be referred to: in the case, e.g., of the claims of *R. Gelbtrunk and "Salvador Commercial Co.," et al.* (El Salvador v. United States, 1902), taking account of the local remedies rule the arbitrators held that an international claim would be justified in case of denial of justice or when appeal to domestic courts would clearly have been vain or useless; in the case the claimants were found to be entitled to compensation, 15 U.N. Rep. Int'l. Arb. Awards 476-478. But in the *S.S. "Lisman"* case (U.S. v. Great Britain, 1937), even though the applicant had not yet exhausted local remedies his claim was examined by the arbitrator in virtue of allegations of denial of justice; but in the end, as the arbitrator found no merit in the claim, it was accordingly rejected. 3 U.N. Rep. Int'l. Arb. Awards 1789-1790, 1793.

[23] *Losinger* case, P.C.I.J., Series C, no. 78 at 313 (1936).

[24] *Electricity Company of Sofia and Bulgaria* case, P.C.I.J., Series C, no. 88 at 418 (1939).

[25] Art. IV, cited in 2 YRBK. INT'L. L. COM. 227 (1956).

the American Law Institute[26] seem to adopt a broad concept of denial of justice, attributable to a State for acts not specifically of its courts but of its authorities in general. While some drafts leave the question open[27] or untouched,[28] the great majority of codification works on the subject envisaged denial of justice as pertaining to acts of domestic *courts* in particular: such was the case, e.g., of the 1930 draft convention on State responsibility for injuries to aliens prepared by *Deutsche Gesselschaft für Völkerrecht*,[29] also of Professor Roth's 1932 draft convention on State responsibility for international wrongful acts.[30]

But even those who identified denial of justice in the acts of *judicial* organs only, disagreed amongst themselves as to the *scope* of denial of justice. Two main trends can be ascertained: first, the one whereby denial of justice would cover also "manifestly unjust judgments" by national courts, as advocated by the 1929 draft of the Harvard Law School,[31] and in its 1927 session by the *Institut de Droit International*.[32] But it is pertinent to observe that in their 1961 draft Convention on International Responsibility of States for injuries to aliens Harvard Professors Sohn and Baxter preferred not to employ the expression "denial of justice" at all, and to use instead the terms "denial of access to a tribunal or an administrative authority" and "denial of a fair hearing."[33] Likewise, the Bases of Discussion (especially ns. 5 and 6) drawn up in 1929 by the Preparatory Committee of the Hague Conference for the Codification of International Law proceeded by means of enumeration, without employing the expression "denial of justice."[34] And once again, in 1930, Article 9 of the provisions adopted by the Third Committee of the Hague Codification Conference avoided to utilize the term "denial of justice."[35]

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[26] Foreign Relations Law of the United States, notes 178-182, cited in 2 YRBK. INT'L. L. COM. 195 (1971).

[27] Art. 34 of the "Alejandro Alvarez Project on Leading Principles of International Law" (as amended and adopted by the *Académie Diplomatique Internationale*, [1935]), cited in 15 REV. DROIT INT'L. 538 (1935).

[28] 1926 draft of the International Law Association of Japan, cited in 2 YRBK. INT'L. L. COM. 141 (1969); 1956 resolution of the *Institut de Droit International* on the rule of exhaustion of local remedies, in 46 ANNUAIRE I.D.I. 358 (1956); 1965 resolution of the *Institut de Droit International* on the national character of an international claim presented by a State for injury suffered by an individual, in 51 ANNUAIRE I.D.I. 260-262 (1965). And *cf.* the *Institut's* work of its sessions of 1900 on State responsibility for damages to aliens, and of 1931-1932 on diplomatic protection of nationals abroad.

[29] Art. 3(3), cited in 2 YRBK. INT'L. L. COM. 150 (1969).

[30] Art. 7, cited in *ibid.*, p. 152.

[31] Art. 9, cited in 2 YRBK. INT'L. L. COM. 229 (1956).

[32] 33 ANNUAIRE DE L'INSTITUT DROIT INT'L. 330-335 (1927); *cf.* mainly Arts. 5 and 6 of the resolutions, pp. 331-332.

[33] Arts. 6, 7 and 8, cited in 2 YRBK. INT'L. L. COM. 143-144 (1969).

[34] Cited in 2 YRBK. INT'L. L. COM. 223 (1956), and see pp. 223-225 for other pertinent Bases of Discussion.

[35] *Cf. ibid.*, p. 226, and see pp. 225-226 for other pertinent Articles. Similarly, the Panamanian-American General Claims Arbitration dispensed with the term "denial of justice"; *cf.* BRIGGS, THE LAW OF NATIONS 679 (2nd Ed., 1952).

The second trend presented possibly the strictest interpretation of the concept of denial of justice, equating it to a denial of *access* to domestic courts. Such was the position advanced in 1926 by G. Guerrero in his report to the League of Nations Committee of Experts for the Progressive Codification of International Law: "denial of justice consists of refusing to allow foreigners easy access to the courts to defend those rights which the national law affords them; a refusal of the competent judge to exercise jurisdiction also constitutes a denial of justice."[36] In the following year Professor Strupp's draft treaty on State responsibility for internationally illegal acts also characterized denial of justice as denial to foreigners of *access* to national courts.[37]

Denial of justice was also restrictively interpreted in a Majority Opinion on principles of international law governing State responsibility delivered in 1962 by the Inter-American Juridical Committee, representing the views of sixteen Latin American countries on the matter; the Opinion saw it fit to declare that "the State is not internationally responsible for a judicial decision that is not satisfactory to the claimant."[38]

A survey of legal literature on the subject discloses the same variety of approach of the problem of denial of justice. As exponents of a broader interpretation of the term stand, e.g., Hyde, to whom the term covers failures on the part of any department or agency of the State with respect to any duty towards aliens imposed by international law or by treaty with their country,[39] and Fitzmaurice, who supports the application of the term to every injury involving State responsibility, committed by courts or any organs of the government in their official capacity in connection with administration of justice.[40]

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[36] Cited in 2 YRBK. INT'L. L. COM. 222 (1956).

[37] Art. 6, cited in 2 YRBK. INT'L. L. COM. 151-152 (1969).

[38] OAS doc. OEA/Ser. I/VI.2, CIJ-61, p. 8. For conflicting United States views on the subject, see OAS doc. (September 1965) OEA/Ser. I/VI.2, CIJ-78, pp. 7-9. For a background of Latin American practice see materials in 2 YRBK. INT'L. L. COM. 226 (1956).

[39] 2 HYDE, INTERNATIONAL LAW 909-917 (2nd Rev. Ed., 1945).

[40] Fitzmaurice, *The Meaning of the Term 'Denial of Justice'*, 13 BRIT. YRBK. INT'L. L. 108-114 (1932). And see also GREIG, INTERNATIONAL LAW 420-425 (1970). Similarly, Moussa espouses in principle the broad conception of denial of justice, but adds that only in cases where denial does not result from "la suite donée au procès commencé" can the local remedies rule be suspended in its effects os account of denial of justice; Moussa, *L'étranger et la justice nationale*, 41 REV. GENERALE DROIT INT'L. PUBLIC 455 (1934), and see pp. 441-459. Irizarry y Puente objects to the strict view of denial of justice on the ground that this latter can occur in case of failure to act of a coordinate department of the government, thus involving the executive or legislative as well. To him, the broad definition of denial of justice presents four constitutive elements, namely: refusal of access to courts; refusal to decide, delay in deciding, or misapplying the law to a case; lack of, or inadequacy in, law; and administrative failure. But the alien's request for diplomatic protection for denial of justice would be barred if the right to enforce his rights in domestic courts was outlawed by the statute of limitations, or in case of a Calvo clause, or if the court's judgment has become *res judicata*. Nevertheless, the term denial of justice in principle comprises acts or omissions of *all* departments of government (executive, legislative and judicial), asserts the author. Admitting the possibility of a final or definitive domestic judgment being

But the overwhelming majority of expert writers favours, with variants, a narrower definition of denial of justice, properly limited to wrong conduct of courts or judges, i.e., of the judiciary organ in charge with the proper administration of justice: such is the position taken by Borchard,[41] Durand,[42] Bevilaqua,[43] Anzilotti,[44] Strisower,[45] Accioly,[46] Ch. Rousseau,[47] Henry Rolin,[48] Oppenheim-Lauterpacht,[49] Brownlie,[50] Kelsen,[51] Castberg,[52] Ago,[53] Brierly.[54]

The distinct connotations of the term "denial of justice" in international adjudications has led to some scepticism about its utility. The imprecise meaning of the term (narrow and broad interpretations) according to Lissitzyn, is due to the fact that "the determination of particular controversies has almost never depended upon the meaning attached to this term. In almost all cases the real question has always been whether or not a State was responsible internationally for a particular act or omission, and not whether such an act or omission can be called denial of justice. Hence the incidental use of the term in most cases."[55] The author thus concludes that the term should be avoided as much as possible, even because "the

impeachable by the alien on the ground of denial of justice, Irizarry y Puente adds that from the viewpoint of international law the legal efficacy of a final judgment must depend "on the international obligation of the State not to administer justice in a *notoriously unjust manner*". J. Irizarry y Puente, *The Concept of 'Denial of Justice' in Latin America*, 43 MICH. L. REV. 383-385, 395-401 and 405-406 (1944); the author thus cautiously subscribes to the view of the *international* standard of alien treatment.

[41] BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 330-343 (1916); Borchard, *Theoretical Aspects of the International Responsibility of States*, 1 ZEITSCHRIFT FUR AUSLUNDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 246 (1929).

[42] Durand, *La responsabilité internationale des États pour déni de justice*, 38 REV. GENERALE DROIT INT'L. PUBLIC 711-712 (1931).

[43] Bevilaqua, *Direito Público International*, Rio de Janeiro, (Ed., Freitas Bastos) 219 (1911); and see also S. Séfériades, *Le problème de l'accès des particuliers à des juridictions internationales*, 51 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 73-76 (1935).

[44] Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers*, 13 REV. GENERALE DROIT INT'L. PUBLIC 20-25 (1906).

[45] Author's statements in 33 ANNUAIRE DE L'INSTITUT DROIT INT'L. 476-479 (1927) and see discussions in 33 ANNUAIRE I.D.I. 120 ss (1927).

[46] Accioly, *Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence*, 96 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 378-385 (1959).

[47] ROUSSEAU, DROIT INTERNATIONAL PUBLIC 374-376 (1953) (including also "manifestly unjust judgments").

[48] Rolin, *Le contrôle international des juridictions nationales*, 3-4 REV. BELGE DROIT INT'L. 10-18, and see pp. 181, 188 and 202 (1967-1968).

[49] 1 OPPENHEIM, INTERNATIONAL LAW — A TREATISE (LAUTERPACHT, ED.) 359-361 (1967).

[50] BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 514-516 (1973).

[51] KELSEN, PRINCIPLES OF INTERNATIONAL LAW 370-371 (2nd Ed., 1966).

[52] Author's statements in 45 ANNUAIRE DE L'INSTITUT DROIT INT'L. 64 (1954).

[53] Author's statements in *ibid.*, pp. 35-39.

[54] BRIERLY, THE LAW OF NATIONS 286-291 (SIR HUMPHREY WALDOCK, ED., 1963). And for an appraisal of the term, see J. G. de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico*, 147-201 and 130-132 (1938) for the local remedies rule; and on the relationship between the local remedies rule and denial of justice (e.g., in the practice of U.S.-Mexican Claims Commissions), *cf.* further: DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO 199-273 and 24 (1933).

[55] Lissitzyn, *The Meaning of Denial of Justice in International Law*, 30 AM. J. INT'L. L. 645 (1936). See pp. 638-645.

particular acts or omissions meant to be covered by it can be enumerated and defined expressly."[56]

This view is contested by Freeman, who sees in the vagueness of the expression "denial of justice" a characteristic of "growing, living branches of legal science" in formative periods, emanating not exactly from terminological disagreement, but rather from conflicting views touching the very roots of State responsibility itself.[57] Throughout his elaborate analysis of the subject Freeman utilizes the expression "denial of justice" in relation to failures of the State of its international obligation to provide *judicial* protection to the rights of aliens.

Freeman's examination of the distinction between liability under domestic law and under international law, or of the relationship between domestic law and international law in the matter of judicial protection, constitutes possibly one of his main contributions to the study of the matter. In municipal law the notion of denial of justice was procedural (i.e., one is to have access to the courts of one's country, and the judge is to render justice properly), not extending to violation of rights under substantive law. In international law the problem was different: "the obligations of the State with reference to its nationals, and their mutual rights in court are one thing; the duties posited by international law with respect to the judicial protection of the *ressortissants* of other States are quite another. Denial of justice in the international sphere has an importance considerably larger than the concept in municipal law, being designed [...] to guarantee and to safeguard the rights of aliens. It should therefore be found necessary to modify the traditional procedural definition."[58]

The strict conception of denial of justice as a procedural refusal of access to courts reduced too much the rules governing a State's obligations concerning judicial treatment of aliens; on the other hand, the broad conception of denial of justice as covering every international wrong by any agency of the State against aliens gave rise to much confusion of principles. Consequently, both extremes were rejected by Freeman, who espoused a moderately narrow concept of denial of justice, denoting "some misconduct either on the part of the judiciary or of organs acting in connection with the administration of justice to aliens"; the term would thus possess "definite value in indicating a particular kind of international wrong and in placing

[56] Lissitzyn, *op. cit.*, p. 646. Years later, at the session of 1954 of the *Institut de Droit International*, rapporteur Verzijl raised the question whether denial of justice should be approached by means of definition or enumeration, and he found out that the great majority of participants preferred global formulae rather than enumeration of cases of denial of justice; Verzijl added that "si cela est recommendable pour le concept de 'deni de justice', il semble en être de même aussi pour la délimitation du domaine du *local redress* préalable et obligatoire." Author's statements in 45 ANNUAIRE L'INSTITUT DROIT INT'L. 97 (1954).

[57] Freeman, *op. cit.*, pp. 182-183, and see p. 175.

[58] *Ibid.*, p. 178, and see pp. 13-27 and 72-115.

analysis as to the propriety of a given claim under the local remedy rule on a comprehensive level."[59]

To Freeman, thus, "the obligations implicit in the concept of denial of justice are twofold: first, they cover the procedural operation of the judicial mechanism; and second, they embrace the substantive treatment which must be accorded to aliens by the courts or whatever other organs the State may have charged with the function of dispensing justice."[60]

Also concerned with a clear understanding of the term, Jiménez de Aréchaga warned that "the meaning of the term 'denial of justice' should not be employed as a method of restricting or enlarging the scope of the responsibility of the State; the obvious objection is that denial of justice and State responsibility are not co-extensive expressions, and that State responsibility for acts of the Judiciary does not exhaust itself in the concept of denial of justice."[61] But this does not amount to state that the meaning of denial of justice becomes a question of terminology only; it is also a question of practical importance, since most of the arbitration treaties which utilize the notion of denial of justice do not define it.[62]

Accordingly, "treaties concluded on the basis of the traditional concept of denial of justice as developed under the law of reprisals and as taught by writers like Vattel, Fauchille and Anzilotti, should be interpreted according to that concept, which is restricted to refusal of access to the courts or unreasonable delay in rendering decisions. A manifestly unjust judgment, or any other breach by the courts of international rules, may give rise to State responsibility, but the claim that a domestic judgment is unjust or unfair, is not *per se* subject to arbitration under these treaties. A special agreement to arbitrate such a claim would be necessary."[63]

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[59] *Ibid.*, p. 106, and see pp. 105-115 and 177. Jaenicke has observed that the various proposed definitions of denial of justice disclose that "the emphasis of the aliens right to judicial protection is placed on the institutional and organizational aspect of the remedies" (e.g., independence and impartiality of the courts, granting of adequate hearing, opportunity to furnish evidence on provisions against delays of proceedings, and so forth); an undisputed factor seems to be that "the legal protection against a denial of justice presupposes a functioning civil and criminal jurisdiction and that the alien must have access to the civil courts for prosecuting and defending his civil rights against others under the same conditions as nationals." G. Jaenicke, "Judicial Protection of the Individual within the System of International Law", in 3 *Gerichtsschutz gegen die Exekutive/Judicial Protection against the Executive*, Max-Planck-Institut fur auslandisches offentliches Recht und Volkerrecht, 303-304 (1971).

[60] Freeman, *op. cit.*, p. 51, and see p. 67. And for the author's survey of the various forms of denial of justice in international practice, *cf. ibid.*, chapters VIII to XIV, pp. 196-399.

[61] De Aréchaga, International Responsibility, in MANUAL OF PUBLIC INTERNATIONAL LAW (SORENSEN, ED.), 555, and see pp. 553-555 (1968).

[62] De Aréchaga, *op. cit.*, pp. 555-556.

[63] *Ibid.*, p. 556, and see pp. 556-557. For a discussion of denial of justice, whether comprising or not unjust judgments, in the light of the *Barcelona Traction* case, *cf.* De Aréchaga, *International Responsibility of States for Acts of the Judiciary*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY — ESSAYS IN HONOR OF PHILIP C. JESSUP (FRIEDMANN, HENKIN & LISSITZYN, EDS.), 171-187 (1972).

The meaning and extent of denial of justice have been clarified to some extent by a school of thought distinguishing the *formal* and *material or substantive* senses of denial of justice. One of its major exponents, Charles de Visscher, observed that while in the past denial of justice had already become the keystone of all international claims, only relatively recently had the general theory of the international responsibility of States been systematized, and the definition of denial of justice became the battle-field between expansionist States interested in having its meaning extended and other States trying to narrow the term as much as possible. Only more lately had one properly recognized that the international responsibility of the State was not reduced to denial of justice, and nor was this latter the only factor engaging that responsibility.[64]

Differences in terminology became superfluous in face of the basic problem of the conditions of existence of international responsibility. As conceived *stricto sensu* by classical writers, denial of justice consisted in the refusal of access to courts or undue delays and unjustifiable obstacles against aliens; Vattel, for instance, distinguished different ways in which denial of justice might occur, namely, denial of access to courts or undue delays — the *formal* sense of denial of justice — and manifestly unjust judgments — the *material* sense of denial of justice.[65]

The formal sense of the term was adopted by Charles de Visscher in defining denial of justice in his 1923 course at the Hague Academy of International Law;[66] but in his 1935 Hague course he proposed a broader definition of the term comprising manifestly unjust judgments as well, and thus covering all failures in the State's function and international obligation to provide judicial protection to aliens.[67] The term denial of justice was thus held to possess two main aspects, namely: *formal or procedural* denial of justice, in case domestic courts did not operate or were not accessible to aliens or when irregularities (such as undue delays) occurred in the ordinary course of the proceedings, and *material or substantive* denial of justice, in case of manifestly unjust judgments in violation of clear legal precept or in case of failure by the State to provide local remedies as required by international law; this distinction found express support also

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64 De Visscher, *op. cit.*, pp. 385 and 419.

65 *Ibid.*, pp. 388-389; he added that denial of justice appeared much more clearly under its formal than its material aspect (*Ibid.*, p. 395).

66 *Cf.* De Visscher, *La responsabilité des États*, 2 BIBLIOTHECA VISSERIANA 99-100 (1924).

67 De Visscher, *Le déni de justice . . ., op. cit.*, pp. 390 and 392, and see p. 389 note 2. In so doing, he rejected both the narrow view limiting responsibility to refusal of access to courts, and the broad view extending the term to whatever wrong against aliens (thus emptying the term of all technical meaning and giving rise to confusion); *cf. ibid.*, pp. 392-393 and 386, respectively. On the author's definition of denial of justice (in its formal and substantive aspects), see further: DE VISSCHER, THEORIES ET REALITIES EN DROIT INT'L. PUBLIC 307-317 (4th Rev., Ed., 1970).

in the writings of Kaufmann,[68] Guggenheim[69] and O'Connell.[70] Scelle preferred to speak of *"organic"* and *"functional"* types of denial of justice, the former occurring where the institutional machinery of local redress is not allowed to operate, the latter occurring where the machinery of reparation is organized but the final decision is manifestly unjust.[71]

The problem of denial of justice is rendered more difficult by the classical antimony underlying the subject, the one between the municipal and the international standards of treatment of aliens. The difficulty was perceived by García Amador, who, in his second report on State responsibility for injuries to aliens (1957) to the UN International Law Commission, remarked that "in the matter of responsibility for conduct of judicial bodies this is the fundamental problem: is the act or omission which caused the injury to be judged in conformity with an international standard or with the country's own municipal law?"[72] García Amador tried to provide a synthesis of the matter by associating the notion of denial of justice with the question of violation of fundamental human rights: "the problem cannot and should not be presented in terms of irreconcilable opposites, as was the practice in the past. The acts and omissions meant here are, of course, those which violate *fundamental* human rights,"[73] he declared.

In fact, his 1961 revised draft on State responsibility for injuries to aliens maintained that denial of justice would be deemed to occur if domestic courts deprived aliens of certain fundamental human rights or safeguards (right of access to them, right to a public hearing, other rights in criminal matters), or if a manifestly unjust decision was rendered (excluded judicial error which did not give rise to State responsibility), or if a decision by a municipal or international court was not executed with a clear intention to cause them injury.[74]

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[68] Kaufmann, *Regles generales du Droit de la paix*, 54 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 431-432 (1935).

[69] 2 GUGGENHEIM, TRAITE DE DROIT INTERNATIONAL PUBLIC 13-14 (1954).

[70] 2 O'CONNELL, INTERNATIONAL LAW 945-950 (2nd Ed., 1970).

[71] Author's statements in 45 ANNUAIRE DE L'INSTITUT DROIT INT'L. 79, and see pp. 78-81 (1954).

[72] 2 YRBK. INT'L. L. COM. 112, see pp. 110-112 (1957).

[73] *Ibid.* For an appraisal of the "national treatment" standard and the "minimum" standard in the framework of the law on alien treatment, *cf.* ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS 62-123 (1949).

[74] Art. 3, cited in 2 YRBK. INT'L. L. COM. 46-47 (1961) and see pp. 46-48 for Articles 4 to 6; as far as denial of justice is concerned, compare Articles 4 and 15(3) of the original draft with Article 3 to 6 and 18 of the revised draft. Approaching likewise the classical antinomy between the municipal standard and the international minimum standard of treatment of aliens, Jennings suggested that they might undergo new developments under the recent impact of the law of human rights, which together with the law on State responsibility for aliens may yet achieve eventually a synthesis. *Cf.* Jennings, *General Course on Principles of International Law*, 121 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 488 (1967), see pp. 486-494. Contemporary Soviet writers on international law and State responsibility, rather than dwelling upon denial of justice and related matters, seem to prefer to concentrate upon other and newer aspects of the law on the international responsibility of States (including State responsibility for acts affecting international peace, and for dangerous activities as in nuclear tests, environmental pollution, and so forth): *cf.* TUNKIN, DROIT INTERNATIONAL

2. *The interaction between denial of justice and exhaustion of local remedies*

Having considered the meaning and extent of denial of justice, the present examination may now address itself to its interaction with the rule of exhaustion of local remedies. As stated by arbitrator Huber in the *Spanish Zone of Morocco* case (United Kingdom v. Spain, 1924, claim n. 53, by M. Ziat and B. Kiran), it is a recognized principle of international law that in countries where aliens are subject to territorial jurisdiction an international claim presented on the basis of an allegation of denial of justice "n'est recevable que si les différentes instances de la juridiction locale compétente ont été au préalable épuisées."[75] Likewise, Freeman remarked, the local remedies rule is "an imperative which interacts with the concept of denial of justice to form the basis of most international claims."[76]

In fact, a certain amount of confusion between denial of justice and exhaustion of local remedies has occurred both in diplomatic practice and in international adjudication. In practice denial of justice as the ground of diplomatic interposition may well refer to the local remedies rule as a condition prior to that interposition. It is thus not surprising that in diplomatic practice the term denial of justice has been confused with the requirement of exhaustion of local remedies, in that it has been used to signify the absence or failure of those remedies.[77] It has been suggested, for example, that the award of the Arbitration Commission in the *Ambatielos* case (extending the scope of the local remedies rule to cover procedural remedies as well)[78] might have been "the result of a certain confusion between the exhaustion of internal remedies and the denial of justice strictly speaking."[79]

PUBLIC — PROBLÈMES THEORIQUES 191, and see pp. 191-227 (1965). Kouris's book review of D. B. Levine, *La responsabilité des États dans le droit international contemporain* [in Russian, Moscow, 1966], in 72 REV. GENERALE DROIT INT'L. PUBLIC 269-272 (1968); and for a similar approach, *cf.* also: Reuter, *Principes de Droit International Public*, 103 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 592-593 and 599 (1961); Quadri, *Cours Général de Droit International Public*, 113 RECUEIL DES COURS DE L'ACADEMIE DROIT INT'L. 456-457 and 468-471 (1964).

[75] 2 U.N. Rep. Int'l. Arb. Awards 731 (1925). And see Huber's subsequent remarks on denial of justice in 46 ANNUAIRE DE L'INTITUT DROIT INT'L. 40 (1956).

[76] Freeman, *op. cit.*, p. 410. Guerrero has referred to denial of justice as an essential element of the local redress rule; *cf.* statements in 45 ANNUAIRE DE L'INSTITUT DROIT INT'L. 67-68 (1954); see also Bourquin's comments on the subject, in *ibid.*, pp. 52, 54 and 57, and in 46 ANNUAIRE I.D.I. 29 (1956). On the relationship between substantive denial of justice and the local remedies rule, *cf.* also 2 O'CONNELL, *op. cit.*, pp. 945-946. Out of the considerably vast treaty practice touching on the question of denial of justice, two basic positions can be detected: the one whereby the international organ is made competent to settle controveries relating to denial of justice, and the one whereby the establishment of a denial of justice is a presupposition to the competence of the international organ to deliver a final decision on the case at issue. For examples of both positions, *cf.* long lists of treaties assembled in: GAJA, L'ESAURIMENTO DEI RICORSI INTERNI NEL DIRITTO INTERNAZIONALE 143-144 (1967), note 20; and on the question of "reasonable delays", *cf. ibid.*, pp. 166-168, note 51.

[77] Lissitzyn, *op. cit.*, p. 637.

[78] 8 U.N. Rep. Int'l. Arb. Awards 306 (1956).

[79] Pinto, *La sentence Ambatielos/The Ambatielos Award*, 84 J. DROIT INT'L. 599 (1957). Further, "before the International Court of Justice, the British government

But however interwoven those two issues might be, they remain distinct nonetheless. The substantive notion of international responsibility pertains to the State's obligation to repair the consequences of an illicit act imputable to itself; in this context, Charles de Visscher remarks, denial of justice is distinct from the duty of exhaustion of local remedies. The former is a kind of internationally illicit act constituted by the State's failure of its duties of judicial protection of aliens; the latter constitutes a procedural rule affecting less the conditions of existence of responsibility than the conditions of exercise of the claim.[80]

Possibly one of Eagleton's main contributions to the study of the problem was his clarification of the relationship between denial of justice and exhaustion of local remedies. "A denial of justice can only appear in those cases in which the rule of local redress applies", he stated; "the two rules are interlocking and inseparable: local remedies must be sought until a denial of justice appears; a denial of justice is a failure in local remedies."[81] On the basis of evidence afforded by State practice he added that the term "denial of justice" was commonly used to refer to "the failure of *judicial* remedies", and this reinforced the argument that denial of justice appeared only when local remedies failed.[82] The local remedies rule thus played a dual role: if successful, the operation of local remedies might serve to discharge a precedent responsibility; if unsuccessful, it might create an original, or else assert a final, responsibility, and it was this latter phase which afforded examples of denial of justice.[83]

The relationship between denial of justice and exhaustion of local remedies can be approached from a different angle, if one considers denial of justice as the basis of an international claim under which the basic issue is "what the respondent State, through the instrumentality of these institutions [of redress], did or failed to do to the detriment of the claimant", and if one considers as the basic issue underlying the local remedies rule "what the claimant did or failed to do to his own detriment in making use

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treated the Greek claim as if it had in view the defective functioning of the English courts, a denial of justice" (*Ibid.*, pp. 599-601).

[80] De Visscher, *Le déni de justice . . ., op. cit.*, p. 421, and see pp. 426-427.

[81] EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 113 (1928). He stresses that "denial of justice is practically always discussed in connection with the rule that local remedies must first be exhausted"; Eagleton, *Denial of Justice in International Law*, 22 AM. J. INT'L. L. 542 (1928).

[82] Eagleton, *Denial of Justice . . ., op. cit.*, pp. 543-433, see pp. 543-554.

[83] *Ibid.*, p. 551. Eagleton pondered that, although most often appearing in courts, denial of justice might also include "such executive or legislative action as interferes with the process of obtaining judicial relief"; denial of justice referred to "the failure of redress, which is usually a judicial process, and it includes judicial failures due to executive or legislative influences; on the other hand, it cannot be stretched to cover all positive illegalities resulting in international claims". Stressing the need for precise terminology, Eagleton maintained that "the term denial of justice should be limited in its bearing." *Cf. ibid.*, pp. 541-559.

of these institutions."[84] Viewing the problem from this angle, one may be tempted to suggest — as Mummery in fact did — that the rules relating to denial of justice may spring from roots different from those of the local remedies rule; but even so, as Mummery promptly added, one and the other are secondarily concerned with the opposite or countervailing aspect: "the denial of justice rule, with what the claimant did or failed to do, to his own detriment, thus contributing to the damage; the local remedies rule [. . .] with what the respondent State did or failed to do, i.e., provided or failed to provide, to the detriment of the claimant, thus failing to give effective remedy."[85] Thereby, after all, "notwithstanding the different standards which thus permeate the two rules, cases on the application of the one rule will often be of value in the context of the other; in particular, cases of denial of justice in the courts will at times provide *a fortiori* examples of ineffective local judicial remedies."[86]

Both the *Institut de Droit International* and the UN International Law Commission have touched on the question of the relationship between the local redress rule and denial of justice. The question was discussed at the 1954 session of the *Institut,*[87] and was also brought to the attention of the International Law Commission by *rapporteur* García Amador in 1957/1958, when he discussed the relationship between denial of justice and the Calvo clause under the general heading of "exhaustion of local remedies."[88]

Significantly, in the *Barcelona Traction* case (Preliminary Objections, 1964), the International Court of Justice, joining the fourth Spanish preliminary objection (of non-exhaustion of local remedies) to the merits, observed that the allegation of failure to exhaust local remedies was in the case "inextricably interwoven with the issues of denial of justice which constitute the major part of the merits", for "the 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."[89] The matter was pursued further in the pleadings of 1969 before the Court,

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[84] Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies,* 58 AM. J. INT'L. 412 (1964).

[85] Mummery, *op. cit.,* pp. 412-413, note 114.

[86] *Ibid.,* p. 414. More recently, Fawcett has pointed out that the questions of denial of justice and exhaustion of local remedies may in certain cases (e.g., ineffective remedies) appear inter-related and may compel the whole issue being joined to the merits; Fawcett, *op. cit., supra,* note 146, ch. XIV, at 528.

[87] *Cf.* 45 ANNUAIRE DE L'INSTITUT DROIT INT'L. 9-10, 24, 27-32, 35-39, 40-45, 50-57, 64, 67-68, 69, 72, 74, 76-83, 84, 88-97, 105 n. 1, 111 (1954); *cf.* in particular Bourquin's remarks in *ibid.,* pp. 51 and 57. *Cf.* also 46 ANNUAIRE I.D.I. 2-3, 12, 25-26, 29, 32-33, 40, 270, 277, 279-281, 309 and 313 (1956).

[88] *Cf.* 2 YRBK. INT'L. L. COM. 58-59 (1958); and *cf.* also 2 YRBK. INT'L. L. COM. 112 (1957).

[89] *Barcelona Traction* (Preliminary Objections) case, Belgium v. Spain, I.C.J. Rep. 46 (1964).

and particularly in the oral argument of Professor Guggenheim, counsel for Spain, of 23 May 1969.[90] It was also touched upon by Judge Tanaka's Separate Opinion in the *Barcelona Traction* case (Second Phase, 1970).[91]

3. *Conclusions*

It could hardly be doubted that denial of justice is intimately related to the local remedies rule, the two concepts interacting to form the basis of most international claims. Yet a variety of meanings has been ascribed to denial of justice, surrounding with difficulties the determination of its scope or extent. Case-law on the subject may well lead one to assume that the problem is one of the *cas d'espèce*. But this attitude would be of no avail to the interpreter and would afford no indications as to how to approach the problem.

Were denial of justice attributable to any international wrong (by the executive, legislative or judiciary) imputable to the State, it would be an expression devoid of all technical meaning. In fact, attempts of codification of the matter and the great majority of expert writing on the subject leave little room for doubt today that the term is properly applicable with particular reference to failures in the *judicial* activity of the State. Thus, *in its proper sense,* denial of justice implies the refusal by a State to accord judicial protection to aliens' rights through its domestic courts and remedies.[92]

As Presiding Commissioner Van Vollenhoven pertinently stated in his Opinion on the *Chattin (U.S.) v. Mexico* case (1927), if denial of justice was "applied to acts of executive and legislative authorities as well as to acts of judicial authorities [...] there would exist no international wrong which would not be covered by the phrase 'denial of justice', and the expression would lose its value as a technical distinction."[93] Far from being a terminological problem only, the issue of denial of justice touches the fundamentals of State responsibility in international law.

In relation to exhaustion of local remedies, denial of justice pertains to failures in the State's duty to provide those remedies. The term properly covers failures in judicial remedies and the work of domestic courts, in sum, the activity of the *judicial* branch of the State. In the exercise of the protec-

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[90] *Cf.* I.C.J. doc. C.R. 69/25 (translation) of 23 May 1969, pp. 2-4 and 15-25.

[91] *Barcelona Traction* (Second Phase) case, Belgium v. Spain, I.C.J. Rep. (1970), Separate Opinion Judge Tanaka, p. 144, and see pp. 141-160. Also on the "intimate relationship" between denial of justice and exhaustion of local remedies, see: Martínez-Agullo, *El Agotamiento de los Recursos Internos y el Caso de la 'Barcelona Traction'*, 23 REV. ESPAÑOLA DERECHO INT'L. 344-348 and 373-374 (1970); De la Muela, *El Agotamiento de los Recursos Internos como Supuesto de las Reclamaciones Internationales*, 2 ANNUARIO URUGUAYO DERECHF INT'L. 44 (1963).

[92] De Visscher, *La responsabilité des États, op. cit.*, p. 99.

[93] 4 U.N. Rep. Int'l. Arb. Awards 286 (1927), see pp 282-312 And see also the *Salem* case (Egypt v United States, 1932), 2 U.N Rep. Int'l Arb. Awards 1202 (1932), see pp. 1163-1237

tive function, domestic courts may incur faults amounting to denial of justice in cases of, e.g., undue delays or other procedural irregularities. Whether the term denial of justice may be substantively extended to cases of manifestly unjust judgments remains largely a disputed and debatable question.[94]

[94] Throughout the pleadings of 1969 in the *Barcelona Traction* case, Henri Rolin, co-agent and counsel for Belgium, argued that denial of justice proper would include acts on account of the content of the domestic judicial decision, but the view was contested by Paul Guggenheim, counsel for Spain, who replied that "the rules for the constitution of a denial of justice proper relate to refusal of access to the courts, refusal to give a decision or a delay in the proceedings to the detriment of a foreigner, and nothing more." I.C.J. Doc. C.R. 69/25 (translation) of 23 May 1969, p. 2, and see pp. 15-25. In similar lines, the Belgian memorial maintained a broad view of denial of justice (attributable to judicial, governmental and administrative organs), whilst the Spanish counter-memorial advanced a narrowed view of denial of justice as comprising either denial of free access to courts or undue delays in rendering judgment In relation to such debate in the *Barcelona Traction* (Second Phase) case, one of the judges of the International Court of Justice subsequently argued that in order to create international responsibility municipal judicial decisions must be grossly unjust, notoriously unfair and manifestly inequitable. *Cf.* De Aréchaga, *op. cit., supra,* note 63, at 171-187.