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March 16, 1978

Mr. Douglas J. Bennat, Jr.
Assistant Secretary for Congressional
Relations
Department of State
Washington, D.C. 20520

RE: John Victor Stoen

Dear Mr. Bennet:

As you may recall, I represent Ms. Grace Stoen in her effort to regain custody of her son, John Victor Stoen. In response to several congressional inquiries into this matter, you have both misstated an opinion which I have expressed as well as arrived at an inaccurate interpretation of international law. I wish to set the record straight on both these matters.

In early January of this year, I accompanied Mr. and Mrs. Stoen to Guyana to attend a hearing concerning several legal arguments raised by Ms. Joyce Touchette of the People's Temple. I am informed that the hearing was held over a period of a week. While the Stoens remained in Guyana for the entire period, I was present only the first day. I discussed the case at that stage with Mr. Richard McCoy, and informed him that the judge had decided in our favor on one of many points which were raised at that time. The precise reason that it was necessary to advise Mr. McCoy was because the judge had excluded him from the hearing.

My primary concern at that stage, which I discussed with Mr. McCoy was whether the United States Government would tolerate continued Guyanese governmental interference with the court process in that country. As you may recall, it was necessary for United States representatives in Guyana to write a Diplomatic Letter complaining of alleged governmental interference. I do not know at this stage whether the Government is applying political pressure, but I remain suspicious.

I met with Mr. Frank Tumminia, who is on the Guyanese desk of the Department of State, just prior to traveling to Guyana. At that time, I provided him with our research concerning the legal question of the United States Government's responsibility to insure Mr. and Mrs. Stoen of a just and expedient resolution in this matter. Enclosed please find copies of these materials.

Referring to the Digest on International Law, at page 698, it is clear that the United States owes diplomatic protection to its nationals where there has been a denial of justice. A denial of justice has been defined as an unwarranted delay or obstruction of access to the courts. The Habeas Corpus in this matter was brought within the Guyanese system in September of 1977. It is hornbook law that the Habeas Corpus proceeding, because of its intrinsic urgency, is entitled to top priority. It is nearly seven months since the motion was filed and we still have no court decision. In addition, our own representatives, as referenced above, have diplomatically noticed obstructive practices.

In conclusion, it seems clearly inconsistent that the State Department takes the position that there is little that can be done. Our system of justice, if it is to be respected, cannot tolerate this abuse. With the passage of time, your position in this matter becomes increasingly more irresponsible.

Very truly yours,

JEFFREY A. HAAS

JAH/sh
Enclosure

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Dear Mr. Haas:

I have been asked to reply to your letter of March 16 addressed to Assistant Secretary Douglas J. Bennet, Jr. I regret that you found our responses to congressional inquiries on the John Victor Stoen custody case unsatisfactory.

The attorney's favorable opinion expressed in these responses is that of Clarence Hughes, The Stoens' attorney in Guyana.

On February 24 the American Consul in Georgetown, Guyana met with the new Minister of Justice, Mohamed Shahabuddeen who stated that child custody cases are civil disputes and there is no legal requirement that hearings be scheduled within a specific time period. Further, the Minister indicated that a judge's written opinion may take at least four months to complete and release. Consequently, the delay to date in this case is not considered excessive.

The Department appreciates the Stoens' desire to be reunited with their son. Although the Department cannot intervene in this case, it will continue to take appropriate measures to ensure that the decision is reached fairly and in accordance with the laws of Guyana.

I am forwarding a copy of your letter to the Department's Office of the Legal Advisor for comment on the issue of the interpretation of international law. If you have further questions, please contact our Consular Services on 632-3015.

Sincerely,

Stephen A. Dobrenchuk
Chief
Emergency and Protection
Service Division

DEPARTMENT OF [redacted]
VIEWED BY [redacted] DATE
[redacted] or EXEMPT. DATE
REASON(S)
[redacted]

Jeffrey A. Haas, Esquire
3609 Sacramento Street
San Francisco, California 94118

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Whitzman, Digest on International Law

In the Comment on the words "reasonably developed legal systems", employed in § 104 (2) and in § 165 (2) (b), the authors of the Restatement explain:

> "c. 'Reasonably developed legal systems.' Reference to the international standard of justice as the standard of 'civilized states' is customary in the literature of international law, and the Statute of the International Court of Justice lists among the sources of law to be applied by the Court those derived from 'the general principles of law recognized by civilized nations.' Art. 38(1)(c). However, comparison of the law of any state to the law of 'civilized nations' has recently been criticized as inappropriate in view of the advanced civilizations in all parts of the world. It is believed that reference to 'states that have reasonably developed legal systems' more aptly identifies this source of law." Comment "c", ibid., pp. 593-594.

"Intervention, on the one hand, and diplomatic protection or interposition, on the other, are to be distinguished. American Republics continue to interpose diplomatically on behalf of their nationals, as against the United States, and the United States continues to extend diplomatic protection on behalf of its nationals, as against the American Republics, in appropriate cases. The right of diplomatic protection under international law has not been renounced or out-lawed. . . . The diplomatic protection of nationals who having suffered injury or loss in a foreign country and having exhausted such local remedies as may be available, have sustained a denial of justice, does not constitute 'intervention' in the affairs of the State where the case arises."

Assistant Legal Adviser Whiteman to the United States Mission to the United Nations (Bilbrey), memorandum, Oct. 28, 1951. MS. Department of State, file 220.1122/10-2851.

Article 9 of the Harvard Research (1929) reads as follows:

"A state is responsible if an injury *to* an alien results from a denial of justice. Denial of justice exists where 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 guaranties which are generally considered indispensable to 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."

23 Am. J. Int'l L. Supp. (Special No.) (Apr. 1929) 173. And see, particularly, the "Comment" on article 9, *ibid.* 175-187.

In its Comment on the term "*Denial of Justice*", the American Law Institute states:

". . . '*Denial of justice.*' It is frequently said that a state is responsible under international law for a 'denial of justice' to an alien. However, the term is used in a great variety of senses, including: (1) any treatment of an alien that violates international law, (2) treatment of an alien that departs from generally

of legal proceedings, (3) failure to afford an alien an adequate remedy or protection in the administration of justice, (5) failure to prosecute the perpetrator of a crime causing injury to an alien, or (6) failure to provide an adequate domestic remedy for an injury to an alien for which the state has international responsibility. The rules in the Restatement of this Subject deal with these different types of injury to an alien but use the term 'denial of justice' only in the modified form, 'denial of procedural justice,' which is confined to the third and fourth meanings indicated above. . . ."

American Law Institute, Restatement of the Law, Second, *Foreign Relations Law of the United States* (1965), pt. IV, "Responsibility of States for Injuries to Aliens", pp. 592-593.

In 1947 the delegation of Panama submitted to the General Assembly of the United Nations a Draft Declaration on Rights and Duties of States, which together with observations on the draft was submitted to the International Law Commission for use as a basis of discussion in connection with preparation of its Draft Declaration on Rights and Duties of States. The second sentence of article 7 of the Panamanian Draft was in the form of a paragraph reading:

"Foreigners may not claim rights different from, or more extensive than, those enjoyed by nationals."

As to this sentence, the United Kingdom observed:

"The second sentence [*supra*] of this article is not in accord with existing international law, as His Majesty's Government apprehend it. There is much international authority for the existence of a minimum international standard, with which States are obliged to comply in their treatment of foreigners, whether or not they do so in the treatment of their nationals. If, and in so far as international law develops so as to limit the domestic jurisdiction of States in the treatment of their nationals to such an extent that every treatment of a national, which falls below the international standard, is a breach of international law (and therefore a matter on which other States may intervene), then the existing principle of international law with regard to the 'international standard' will apply to both nationals and foreigners. Unless and until that position is reached, His Majesty's Government consider that the doctrine of the minimum international standard, with regard to the treatment of foreigners, remains part of international law and that agreement to abolish that doctrine will not be attained. In fact, this point was one on which the Hague Conference of 1930 with regard to the responsibility of States broke down. His Majesty's Government are very willing that the International Law Commission should devote most careful study to this question."

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary-General of the

Article 2 of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, and the accompanying Explanatory Note with respect thereto, are based on the principle of a State's obligation to extend a minimum standard of treatment to the alien within its jurisdiction. Article 2 and portions of the Explanatory Note read:

"1. The responsibility of a State under Article 1 is to be determined according to this Convention and international law, by application of the sources and subsidiary means set forth in paragraph 1 of Article 38 of the Statute of the International Court of Justice.

"2. A State cannot avoid international responsibility by invoking its municipal law.

"3. Nothing in this Convention shall adversely affect any right which an alien enjoys under the municipal law of the State against which the claim is made if that law is more favorable to him than this Convention.

"EXPLANATORY NOTE

"*Paragraph 1:* This paragraph provides that the treatment of aliens is to be governed by an international minimum standard. This standard is to be distinguished from the 'national treatment' standard, not infrequently relied upon by respondent States, according to which the alien can expect no better legal protection than that accorded by a respondent State to its own nationals. The acceptance of the view that international responsibility should be governed by the 'national treatment' standard would entail as a necessary consequence that a violation of international law as regards the treatment of an alien could be established only if the alien was in fact discriminated against in the application of national law.

"The 'national treatment' theory admittedly has a certain plausibility. Especially if an alien has been long resident on the soil of a foreign State, enjoying the advantages of life in that State and the protection of its government, there is some basis for maintaining that he should in corresponding degree become assimilated to a national of that State. . . .

"Quite aside from being objectionable on the grounds which have just been suggested, the principle that an alien should become subject to local law in proportion to the length of his residence in the respondent State and the strength of the bond of economic and other interests he has formed with that State would be difficult of application in individual cases. Is there a stage at which international protection ceases and the national standard is applied or should the diminution of international protection be a gradual one proportionate to the alien's involvement in the life of the country? The line between international and national protection is impossible to draw. . . ."

Draft Convention on the International Responsibility of States for Injuries to Aliens, Draft No. 12, Apr. 15, 1961, Reporters, Eagleton and Dozier, Harvard Law School, prepared at the suggestion of the Director of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat and Secretary, U.N. International Law Commission (Dr. Yuen-li Liang), pp. 57, 59-60. This draft Convention is printed in part in 55 Am. J. Int'l L. (1961) 545, 548 (art. 2), 547 (comment on art. 2).

"The special rapporteur, states . . . that the 'international standard of justice' has always suffered from 'vagueness and imprecision' and from a 'fundamental defect' in that it has never been fully defined. To the writer, this is not a defect. It is in the nature of legal concepts that they grow, and this is as it should be. The 'international standard of justice' in a case arising in 1930 may be different from that in a case arising in 1900. In our local jurisprudence, the term 'due process of law' employed in the Constitution of the United States is not defined in that instrument. It is a legal concept which grows with the times. It is foolish to attempt at one time to write down all of its possible meanings, for all time, in all situations. So with the 'international standard of justice'. It is impossible for any tribunal, or for the International Law Commission to define it with complete exactitude; it can only be defined as a broad concept."

Memorandum prepared by Marjorie M. Whiteman, Assistant Legal Adviser, Department of State, "Comments on Report on 'International Responsibility', by Garcia-Amador, Special Rapporteur, International Law Commission (A/CN.4/96, 20 January 1960)", Dec. 18, 1960, MS. Department of State, p. 84. See II *Yearbook of the International Law Commission 1960*, pp. 173, 202.

In the 1961 "Revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens", Dr. Garcia-Amador, Special Rapporteur on the subject for the International Law Commission, included the following text as article 1:

"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:

"(*a*) The right to life, liberty and security of person;

"(*b*) The right to own property;

"(*c*) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

"(*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 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 undue delay or to be released.

"3. The enjoyment and exercise of the rights and freedoms specified in paragraph 2 (a) and (b) are subject to such limitations or restrictions as the law expressly prescribes on reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others."

Article 1, "Revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens", Doc. A/CN.4/31/Add.1, Dec. 11, 1961; II *Yearbook of the International Law Commission 1961*, p. 46. In his commentary on this draft, the Special Rapporteur explained:

> "Article 1 of the revised draft replaces articles 5 and 6 of the original draft. Like them, article 1 lays down the principle that aliens enjoy the same rights and are entitled to the same legal guarantees as nationals, but that these rights and guarantees may in no case be less than the 'human rights and fundamental freedoms' recognized and defined in contemporary international instruments; nevertheless, the enjoyment and exercise of certain of these rights and freedoms are subject to the limitations or restrictions laid down expressly by law for any of the reasons mentioned in the article." *Ibid.*, p. 50.

For articles 5 and 6 of the original draft, see Third Report on "International Responsibility", Doc. A/CN.4/111, Jan. 2, 1958; II *Yearbook of the International Law Commission 1958*, p. 71.

The Special Rapporteur (Garcia-Amador) had commented on the concept underlying what became articles 5 and 6 of his 1960 draft in his 1960 Report on "International Responsibility". See II *Yearbook of the International Law Commission, 1956*, pp. 173, 190, 203; First Report on "International Responsibility", Doc. A/CN.4/96, Jan. 20, 1956.

[illegible] the International Law Commission appointed [illegible] Rapporteur on the subject of "State responsibility". II *Yearbook of the International Law Commission 1956*, p. 42. In his first report (in 1956) the Special Rapporteur dealt with the scope of the topic and proposed to treat first with the "responsibility of States for damage caused to the person or property of aliens". First Report, Doc. A/CN.4/96, Jan. 20, 1956, II *ibid. 1956*, pp. 173 ff. His succeeding reports with draft articles and commentary on the subject indicated were: Second [illegible] Third Report, [illegible]

ternational responsibility of the State for injuries caused in its territory to the person or property of aliens", submitted by Special Rapporteur (García-Amador), International Law Commission, see Doc. A/CN.4/134/Add.1, Dec. 11, 1961; II *ibid. 1961*, pp. 46 ff.

In 1962 the Commission decided to establish a Subcommittee composed of ten members on the general aspects of State responsibility. II *ibid. 1962*, pp. 188-191. At its session in 1963, the Commission unanimously approved the report of the Subcommittee "on the main points to be considered as to the general aspects of the international responsibility of the State", and named Roberto Ago (Italy) as Special Rapporteur for the topic of "State responsibility". *Report of the International Law Commission on the work of its fifteenth session 6 May-12 July 1963*, U.N. Gen. Ass. Off. Rec. 18th Sess., Supp. No. 9, A/5509, pp. 30, 39; II *Yearbook of the International Law Commission 1963*, p. 224. In 1964 the International Law Commission postponed consideration of the subject of State Responsibility, pending consideration of certain other topics. *Report of the International Law Commission on the work of its sixteenth session 11 May-24 July 1964*, U.N. Gen. Ass. Off. Rec. 19th Sess., Supp. No. 9, A/5809, p. 31; II *Yearbook of the International Law Commission 1964*, p. 229.

"Although the International Law Commission of the United Nations has had the subject of 'State responsibility' under study for nearly a decade, there has been a curious uncertainty about the subject matter of the codification. When Dr. F. V. García-Amador was appointed as Special Rapporteur for the subject, he laid bases of discussion [Int'l Law Comm'n Yb. 173, 219 (1956-II)] before the Commission in order to elicit a preliminary expression of views. He conceded that the whole topic of state responsibility was so broad that the entire subject could not be codified and proposed to deal *first with the responsibility of States for damage caused to the person or property of aliens.*' [Ibid.] The discussion in the Commission, which ranged over the notions of fault, of criminal responsibility, of the position of individuals in international law, and a variety of other topics, was inconclusive [Int'l Law Comm'n Yb. 228-48 (1956-I)], and the Special Rapporteur—quite properly under the circumstances—proceeded to formulate articles and commentary on the narrower subject of the international responsibility of states for injuries to aliens. Because the Commission was occupied with other subjects and because, one must suspect, it was not anxious to start work on a topic which gave every indication of being ideologically controversial, there was hardly any discussion of the Special Rapporteur's learned reports.

"After Dr. García-Amador had left the Commission, the General Assembly gently nudged the Commission with a recommendation that it 'continue' its work in the field of state responsibility. [Res. 1686 (XVI), Dec. 18, 1961, U.N. Gen. Ass. Off. Rec. 16th Sess., Supp. No. 17, at 62 (A/5100) (1962).] A general discussion in the Commission brought forth a variety of opinions. [International Law Comm'n, Report, U.N. Gen. Ass. Off. Rec. [illegible] Sess., Supp. No. 9, at 31-32 (A/5209) (1963).] Some favor[illegible] continuation of the work along the lines laid out by the

Restatement of Foreign Relations Law, Rstmt 2, 1965
A.L.I.

4. The same official, without just cause, accuses Y, a national of B, of smuggling, but passes his goods through customs without substantial delay. The incident is not witnessed by any other person and thus causes no harm to Y's reputation, although it causes him acute distress. The incident does not give rise to international responsibility of A, since Y has not suffered an injury as defined in this Section.

Even if the damage constitutes injury, the state is responsible under international law only if the conduct causing the injury is wrongful under international law. See § 165, Comment g.

c. *Unavailability of legal remedy against state under domestic law.* If damage is of a kind for which private persons are required to make reparation under the principles of justice generally recognized by states that have reasonably developed legal systems, it is not excluded from the definition of "injury" in Subsection (2) by the fact that such principles permit a state to invoke the principle of sovereign immunity in suits brought against it in its own courts. As to the application of this principle in suits by aliens, see § 180 (2) and Comment *b* thereto.

§ 165. When Conduct Causing Injury to Alien is Wrongful under International Law

(1) Conduct attributable to a state and causing injury to an alien is wrongful under international law if it

(a) departs from the international standard of justice, or

(b) constitutes a violation of an international agreement.

(2) The international standard of justice specified in Subsection (1) is the standard required for the treatment of aliens by

(a) the applicable principles of international law as established by international customs, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.

(3) The rules that follow as to specific types of conduct, attributable to a state and causing injury to an alien, that are wrongful under international law because they depart from the international standard, are stan-

trative, not exclusive. Conduct, attributable to a state and causing injury to an alien, that is not covered by any such rules may be, but is not necessarily, wrongful under international law as a departure from the international standard.

Comment:

a. National treatment and the international standard. Some states maintain that an alien is not entitled to a higher standard of justice than a national, and that consequently a state is not responsible under international law for any damage caused to an alien if he has received the same treatment that is accorded to nationals under domestic law. This Section follows the prevailing rule that such national treatment is not always sufficient, and that there is an international standard of justice that a state must observe in the treatment of aliens, even if the state does not observe it in the treatment of its own nationals, and even if the standard is inconsistent with its own law.

b. Basic human rights under international law. It has recently been suggested that states are bound by international law to respect certain basic human rights of all persons, whether aliens or nationals, and that responsibility for injuries to aliens is merely one aspect of such a general responsibility. However, the rule stated in this Section is based on the principle that states have certain obligations to aliens under international law that are independent of any obligations with respect to human rights generally. The question whether international law imposes any obligations with respect to the treatment by a state of its own nationals is beyond the scope of the Restatement of this Subject, except in the special case of a national in the service of an international organization under the rule stated in § 170. As to situations where a national has certain immunities from the exercise of jurisdiction by his state, see §§ 73(2), 92, and 93.

c. "Denial of justice." It is frequently said that a state is responsible under international law for a "denial of justice" to an alien. However, the term is used in a great variety of senses, including: (1) any treatment of an alien that violates international law, (2) treatment of an alien that departs from generally accepted standards of substantive law, (3) treatment of an alien that departs from generally accepted standards for the conduct of legal proceedings, (4) failure to afford an alien an adequate remedy or protection in the administration of justice, (5) failure

or (6) failure to provide an adequate domestic remedy for an injury to an alien for which the state has international responsibility. The rules in the Restatement of this Subject deal with these different types of injury to an alien. We do not use the term "denial of justice" only in the modified form, "denial of procedural justice," which is confined to the third and fourth meanings indicated above. Rules with respect to the denial of justice in this sense are stated in §§ 178–182.

d. Meaning of "international standard." The test for determining whether conduct attributable to a state complies with the international standard is twofold. It must, in the first place, comply with the requirements specified by international law as established by the usual sources of such law, which are discussed in the Restatement of this Subject under the heading: "*Sources of International Law*," in § 1, Comment *c*. However, where authority from such sources is conflicting or absent, international law adopts, in this as in many other areas, analogous principles from reasonably developed legal systems. In other words, the conduct of a particular state towards an alien must comply with the standard recognized by such systems, although not required by its own law, and even though such compliance is inconsistent with its own law.

Illustration:

1. X, a national of state A, is prosecuted in state B for a criminal offense. He is required to submit to a form of the objection test, specified by the law of B for all criminal trials, and is convicted on the basis of the evidence furnished by the test. After exhaustion of all available domestic remedies, A presents a claim on X's behalf to an international tribunal having jurisdiction of all disputes between the two states involving violations of international law. In the absence of precedents from the sources of international law as such, the tribunal, in determining whether the test violates the international standard, will consider the extent to which similar tests might be used in the administration of justice by other states that have reasonably developed legal systems.

e. "Reasonably developed legal systems." Reference to the international standard of justice as the standard of "civilized nations" is customary in the literature of international law, and the Statute of the International Court of Justice lists among the sources of law to be applied by the Court those derived from "the customs of law to be applied by the Court those derived from "the customs as recognized by civilized nations." Article

lized nations" has recently been criticized as inappro-
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in §§ 179-182 regarding denial of procedural justice
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stated in §§ 183-186. These rules are *merely illus-*
deal with the types of situations in which questions
sponsibility have most frequently arisen, but they
ded to designate specifically all types of state action
y to an alien that may be wrongful under interna-
a departure from the international standard of jus-
ample, if a state were to legalize slavery and prosecu-
dawn for seeking to escape, such action would clear
international standard with respect to substantive
the arrest and trial satisfied the requirements of
lure stated in §§ 179-182.

not wrongful under international law. Most types
ntionally" to a state and causing injury (not merely
the distinction indicated in § 151, Comment *d*) to
wrongful under international law as a departure from
nal standard of justice. However, this is not neces-
the situations in which the alien nationality of the
ut the injury is of relatively incidental significance
circumstances. Such situations include some types of
ment, as indicated in § 183 and certain unintention-

. an alien, is badly hurt in an accident caused by
gent driving of a mail truck by a post office employee
He sues A in a court of A. After a fair trial, the
ies, erroneously but in good faith, on conflicting
that the driver was not negligent, and dismisses
Under the rule stated in § 182, the state is not re-
or the erroneous decision. X has suffered an in-
accident, but it is not caused by conduct that is
under international law.

ion of international agreement. Where conduct
n constitutes a violation of an international agree-

ment, wrongfulness of the conduct under international law is established by violation of the agreement without reference to the international standard of justice. However, the consequences of such wrongfulness, to the extent not specified in the agreement, are determined by the rules stated in this Part.

Illustration:

3. An international agreement between states A and B provides that the nationals of each shall be permitted to engage in commercial activities in the territory of the other under the same circumstances as nationals of the territorial state. In violation of the agreement, A refuses to issue a commercial fishing license to X, a national of B. The conduct of A is wrongful under international law, even though reserving the exploitation of natural resources to nationals would not constitute discrimination under the rule stated in § 166. The assertion of A's claim for the injury is governed by the rules as to waiver and settlement stated in §§ 202-205 and exhaustion of domestic remedies in §§ 206-210.

Reporters' Notes:

1. *The international standard of justice.* The Permanent Court of International Justice recognized "the limits set by generally accepted principles of international law" in regard to the treatment of aliens, and stated that "the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners. . . ." Case Concerning certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No. 7, at 22 (1926); see also Chorzow Factory Case, P.C.I.J., ser. A, No. 9 (1927); Case of the Treatment of Polish Nationals in Danzig, P.C.I.J., ser. A/B, No. 44, at 24-25 (1932).

A number of arbitral awards have recognized the duty of a state to conform to the international standard of justice although it may be in conflict with domestic law. In the Chevreau Claim for alleged illegal arrest and detention of an alien, the tribunal stated that, in order to satisfy international law, the arresting state must treat an alien "in a manner . . . which conforms to the standard habitually practiced among civilized nations." France v. Great Britain (1931), 27 Am. J. Int'l L. 153, 160 (1933). In the Roberts Claim, involving the arrest and detention of a national of the United States, the commission rejected the Mexican defense that the prisoner was treated no differently from any other prisoner, stating:

"Facts with respect to the equality of treatment of aliens and nationals may be important in determining the merits

of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization." Roberts Claim (United States v. Mexico), [1927] Opinions of the Commissioners 109, 105. See also Hopkins Claim (United States v. Mexico), *id.* at 42, 50–51; Neer Claim (United States v. Mexico), *id.* at 71, 73.

The United States has been a leading exponent of the international standard. Its position in this respect was summarized by Secretary of State Elihu Root:

> "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized communities as to form a part of the international law of the world. The condition upon which any country is entitled to withdraw the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens. . . ." The Rights of Protection of Citizens Residing Abroad, 4 Am. J. Int'l L. 513, 525–22 (1910).

The international standard has also been successfully invoked against the United States in the Permanent Court of Arbitration. Norway, v. United States, Proceedings of the Tribunal of Arbitration (1922), 17 Am. J. Int'l L. 362, 381–90 (1923), 1 U.N.R.I.A.A. 307, 330–39.

2. Responsibility of state for injury to own nationals. The suggestion referred to at the beginning of Comment *b* has been made by the Rapporteur of the International Law Commission. See State Responsibility, [1956] 2 Yb. Int'l L. Comm'n 198–203. The Charter of the United Nations includes, as one of the purposes of the Organization, "promoting and encouraging respect for human rights and for fundamental freedoms for all," Art. 1(3), but provides no sanctions to enforce such respect. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, on the other hand, establishes specific remedies to that end. Eur.T.S. No. 5 (1950), 213 U.N.T.S. 221.

3. International agreements as to treatment of aliens. Many bilateral treaties of friendship, commerce, and navigation entered into by the United States, especially since World War II, specify in considerable detail various obligations of each state with respect to treatment of nationals of the other, but such agreements usually do not specify remedies beyond conferring jurisdiction on the International Court of Justice. See Wilson, U. S. Commercial Treaties and International Law 327 (1960). A number of multilateral conventions have been proposed that would define with more precision the responsibility of states for injuries to aliens. The texts of several such conventions are reprinted in [1956] 2 Yb. Int'l L. Comm'n 221–230. Later proposals include a draft convention prepared by the Rapporteur of the International Law Commission, [1961] 2 Yb. Int'l L. Comm'n 46–54; The Harvard Convention on the International Responsibility of States for Injuries to Aliens, 55 Am. J. Int'l L. 545 (1961); and the Draft Convention on the Protection of Foreign Property, prepared by a committee of the Organization for Economic Co-operation and Development, O.E.C.D. No. 15077/Dec. 1962. In 1962 a new sub-committee on State Responsibility of the International Law Commission, headed by Roberto Ago of Italy, was formed to consider the problem. See its first report, Report of the Int'l L. Comm'n on the Work of its 15th Session, Annex 1, at 79 (1963) A/5509. For a summary of the developments concerning multilateral conventions in this field, see The Protection of Private Property Invested Abroad, a Report of the Committee on International Trade and Investment, Section of International and Comparative Law, American Bar Association 40 (1963). The most recent convention is that of The World Bank on the Settlement of Investment Disputes between States and Nationals of other States (March, 1965). As of Sept. 1, 1965, this convention had not yet entered into force. See Hyming, The World Bank's Plan for the Settlement of International Investment Disputes, 51 A.B.A.J. 558 (1965). *Cf.* § 175, Comment *b*.

§ 166. Discrimination against Alien

(1) Conduct, attributable to a state and causing injury to an alien, that discriminates against aliens generally, against aliens of his nationality, or against him because he is an alien, departs from the international standard of justice specified in § 165.

(2) Conduct discriminates against an alien within the meaning of Subsection (1) if it involves treating the

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Chapter 2

INADEQUATE ADMINISTRATION OF LAW

INTRODUCTORY NOTE

As indicated in § 165, conduct that is attributable to a state causes injury to an alien is wrongful under international if it departs from the international standard of justice. The stated in this Chapter, §§ 178–183, relate to applications of tandard to the procedure followed by a state in the adminis- n of justice, as distinct from the provisions of its substantive These rules, as indicated in § 165(3), are not exclusive. uct of a state in the administration of justice may depart the international standard even though it is not contrary y of the rules stated in this Chapter. See for example, , Illustration 1.

TOPIC 1. DENIAL OF PROCEDURAL JUSTICE

178. Denial of Procedural Justice Defined

As used in the Restatement of this Subject, "denial of procedural justice" means conduct, attributable to a state and causing injury to an alien, that departs from the international standard of justice specified in § 165 with respect to the procedure followed in enforcement of the state's law as it affects the alien in criminal, civil, or administrative proceedings, including the determination of his rights against, or obligations to, other persons.

Comment:

a. Cross references. The various meanings attached to the term "denial of justice" are discussed in § 165, Comment *c*. The rules stated in this Chapter (§§ 178–183) are subject to the exceptions stated in § 199 regarding emergencies that may justify conduct inconsistent with these rules. Conduct attributable to a state in the course of the administration of law may also be wrongful under international law because it constitutes a violation of an international agreement, as indicated in § 165(1) (b), or because it discriminates against an alien, as indicated in § 166.

b. Relation to earlier wrongful conduct. A denial of procedural justice under the rules stated in this Chapter may constitute the initial wrongful conduct giving rise to state responsibility, where the denial occurs in proceedings arising out of a cause not itself constituting a wrong under international law. A denial of procedural justice may also occur when the state fails to provide an appropriate remedy for previous conduct attributable to the state that is wrongful under international law.

Illustrations:

1. X, an alien enters into a contract for the sale of merchandise to Y, a national of state A. After accepting delivery, Y repudiates the contract without claim of justification and refuses to pay for the merchandise. X sues Y for the purchase price in a court of A. The court arbitrarily dismisses the suit without allowing X to introduce any evidence. The breach of the contract is not wrongful under international law. The dismissal of the suit is wrongful under the rule as to a fair trial stated in § 181.

2. State A enters into a contract with X, an alien, for the purchase of military supplies. After accepting the supplies, it repudiates the contract without claim of justification and refuses to pay for them. Under procedure provided by the law of A, X brings suit in a court of claims of A. The court arbitrarily dismisses the suit without allowing X to introduce any evidence. The breach of the contract is wrongful under the rule stated in § 183(1)(a). The dismissal of the suit is wrongful under the rule stated in § 181.

Reporters' Note:

Bibliography. On the general subject of procedural justice for aliens, see Ellert, NATO Fair Trial Safeguards, Precursor to an International Bill of Procedural Rights (1963).

lictity to the rights of aliens in this respect, but define the rights all persons including aliens.

181. Fairness of Trial or other Proceeding

In order to conform to the requirements of §§ 179(2)(c) and 180, a trial or other proceeding to determine the rights or liabilities of an alien must be fair. In determining whether the proceeding is fair, it is relevant to consider, among other factors, whether the alien has had the benefit of

(a) an impartial tribunal or administrative authority,

(b) adequate information with respect to the nature of the proceedings so as to permit the alien to present his claim or defense,

(c) adequate interpretation and translation into his own language at all stages of the proceeding,

(d) reasonable opportunity to contest evidence against him,

(e) reasonable opportunity to obtain and present witnesses and evidence in his own behalf,

(f) reasonable opportunity to communicate with a representative of his government with respect to the proceeding,

(g) reasonable opportunity to consult counsel and time to prepare for the proceeding, and

(h) reasonable dispatch by the tribunal or administrative authority in reaching a determination.

ument:

a. Relation to international standard. The rule stated in Section represents specific applications of the general internal standard of justice with respect to the treatment of aliens stated in § 165. It is not intended to list all factors that may be to be considered in determining whether an alien has been orded a fair trial or hearing.

b. Relevance of different factors in different types of proceedings. Although most decisions of international tribunals hold-

ing that an alien has been denied a fair trial or other proceeding have involved several of the factors mentioned in this Section, the language of the opinions generally indicate that any one of the factors might have been determinative. On the other hand, it is clear that they are not all required in all types of proceedings. The extent to which the specific safeguards indicated in this Section may be requisite for a fair trial or other proceeding will depend primarily on (1) the seriousness of the consequences to the alien, and (2) the extent to which the exercise of administrative discretion is reasonably involved in the determination of the case. In a criminal trial involving a severe penalty or in a civil trial involving a substantial claim, each of the safeguards is normally essential. In an administrative proceeding to determine, for example, the issuance or revocation of a license to engage in a particular occupation, the specific safeguards may not all be necessary or practicable. Other examples of administrative proceedings in which the circumstances may not call for each of the specific safeguards are the granting or denying of a variance under a zoning ordinance, the granting and termination of parole to a convicted criminal, the exercise of executive clemency, the waiver or assessment of a penalty for overdue taxes, the granting of a permit to travel in a restricted area, and the granting of a public utility franchise.

c. Effect of favorable determination. In a proceeding in which an alien is denied a fair trial or hearing but receives a favorable determination, the denial is nevertheless wrongful under international law. Normally, however, the damage to the alien is nominal, and no claim is asserted.

§ 182. Unjust Determination

An adverse determination that is manifestly unjust in a proceeding determining criminal charges against an alien, or determining his rights and liabilities of a civil nature, is a denial of procedural justice.

Comment:

a. General. A decision is manifestly unjust within the meaning of the rule stated in this Section if it is so obviously wrong that it cannot have been made in good faith and with reasonable care, or if a serious miscarriage of justice is otherwise clear. Mere error in a decision, if not manifestly unjust, does not constitute a denial of procedural justice.

Commissioners From September 14, 1949 to March 31, 1954, pp. 217-219, 230, 241-242. Article IV of the 1950 Convention provided that the American claims should be adjudicated by an agency established or designated by the United States. As to these claims see further post, pp. 1230–1252.

Failure to give effect to court decision

"The principle of international law that the failure of a state to give effect to the decisions of its own courts in favor of aliens, particularly judgments against the state, constitutes a denial of justice is so well settled as to require no citation of authority. In fact, it would be difficult to find circumstances constituting a more flagrant denial of justice. The fact that the delinquent state treats its own nationals in the same manner is wholly irrelevant, since that is a domestic matter and not governed by principles of international law as where aliens are involved."

Assistant Legal Adviser for International Claims (English) to the Division of Caribbean Affairs (Walker), memorandum concerning failure of the Cuban Government to satisfy judgments rendered against it by Cuban courts on behalf of American nationals, Nov. 21, 1947, MS. Department of State, file 437.11/11-2147.

Government withholding of evidence

"After the International Court of Justice held [[1952] I.C.J. Reports 28, 46 A.J.I.L. 739 (1952); and [1953] I.C.J. Reports 10, 47 A.J.I.L. 708 (1953)] the United Kingdom under a duty to submit to arbitral decision the Ambatielos claim [based on an English court decision enforcing against Ambatielos a mortgage on ships purchased by Ambatielos from the United Kingdom Government], this case was heard by a special arbitral commission which found in favor of the defendant United Kingdom, rejecting the Greek claim. The International Court of Justice ruled that the United Kingdom was under a duty to arbitrate only insofar as the Anglo-Greek Treaty of 1886 gave rise to the claim.

". . . Greece . . . argued that the provision in Article 15 of the Anglo-Greek treaty promising freedom of access to the courts was violated when the British Government put forward before the British courts against Ambatielos a case 'contrary to documents in their possession,' withheld documents from the defendant Ambatielos, and did so in circumstances when they knew he lacked power to compel the government to disclose them.

"The Commission held that the 'free access to the courts' granted to Greek nationals in the United Kingdom by Article 15 of the 1886 Anglo-Greek treaty 'includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.' The Commission found that:

> 'Hence, the essence of "free access" is adherence to and effectiveness of the principle of non-discrimination against