law so that it might one day truly lay claim to universality. This book makes an excellent and most welcome contribution to that admirable goal.

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Jan Paulsson, ***Denial of Justice in International Law***. Cambridge: Cambridge University Press, 2005. Pp. 306. ISBN 0521851181.

'By what artifice might a state owe a duty to the world at large to maintain an adequate system for the administration of justice?' This is the question that begins Jan Paulsson's book, *Denial of Justice in International Law* (at 1). He answers it with one of the oldest principles of customary international law: the international minimum standard of conduct known as denial of justice.

Paulsson's book grew out of the 2003 Hersch Lauterpacht Memorial Lectures at Cambridge. It is the first book-length treatment of denial of justice since Alwyn Freeman's 1938 treatise, *The International Responsibility of States for Denial of Justice.* Given the 'renaissance'[1] of denial of justice claims under international human rights and investment treaties, it is timely to revisit the basic elements of this venerable international delict in the context of the 21st-century state.

State responsibility for claims of denial of justice has once again become controversial due to the web of over 2,300 international investment treaties that guarantee minimum standards of treatment directly enforceable through investor-state arbitration mechanisms.[2] Denial of justice was, for instance, at the heart of the claim in *Loewen* v. *United States*,[3] in which a Canadian investor claimed that the treatment it received from the Mississippi court system amounted to a denial of justice for which the United States was responsible under the investment protection provisions of the North American Free Trade Agreement (NAFTA).

Denial of Justice in International Law is a succinct and illuminating modern treatise on denial of justice. The book reviews and comments on the classic authorities and addresses more recent international jurisprudence under international human rights and investment treaties. Chapters 1–4 outline the main elements and modern definition of denial of justice. Chapter 5 examines the relationship between denial of justice and exhaustion of local remedies. The substantive content of the delict is explored in Chapters 6 and 7. Chapter 8 addresses remedies and sanctions. The book moves from treatise to polemic in the ninth and final chapter in what Paulsson describes as '*hors sujet*' '*post scriptum*' (at 228). Paulsson brings his formidable experience and knowledge of international arbitration to a spirited defence of the necessity and legitimacy of international adjudication of denial of justice claims.

Paulsson reviews the history of denial of justice and provides a modern restatement of its essential elements. He develops three fundamental points. First, denial of justice is always procedural. Second, the international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected. Since denial of justice involves a system failure, exhaustion of local remedies is an inherent material element of denial of justice. Finally, the content of denial of justice cannot be reduced to a set of predictable or objective criteria. Neither can denial of justice be easily categorized, since the 'patterns of behaviour said to comprise denial of justice are often

[1] The first chapter of the book is aptly called 'The Renaissance of a Cause of Action'.

[2] For an overview of the increasing number of international investment treaties and investor-state arbitrations under those treaties, see UNCTAD, Investor-State Disputes Arising from Investment Treaties: A Review (2005).

[3] *The Loewen Group, Inc. and Raymond L. Loewen v. United States* (Award, 26 June 2003) 42 ILM 811 and 7 ICSID Reports 434 [hereinafter *Loewen*]. *Loewen* and other investment treaty awards and decisions are available online at http://ita.law.uvic.ca.

kaleidoscopic' (at 132). Terms like 'manifest injustice' and 'fundamentally unfair', which frequently recur in the jurisprudence, are inherently ambiguous. Claims of denial of justice require a balancing of a number of complex considerations. The international adjudicator's assessment of a claim is informed and constrained by a large body of arbitral jurisprudence and state practice that gives content to the various elements of denial of justice – a content that necessarily evolves over time (at 68).

The argument that denial of justice is always a matter of procedure is the book's most important and controversial contribution to the literature. According to Paulsson, this distinction is essential because it defines both the scope and essence of the delict. Debates in the earlier 20th century about the meaning of denial of justice occurred in the context of the wider dispute between capital exporting and importing states over the existence of a minimum standard of treatment with respect to foreigners and their property. Most Latin American states espoused the national treatment standard as it was expressed in the Calvo Doctrine and, in doing so, rejected the existence of an international minimum standard of compensation for expropriation. In the case of denial of justice, rather than rejecting a minimum standard outright, Latin American jurists tended to define the concept narrowly to include only a refusal of access to the judicial system. Thus, once the foreigner had gained access to national courts, the actual process or result was not measured against international standards, but against the standard of the domestic legal system. On the other hand, some scholars and arbitral awards have equated denial of justice with any wrong to a foreigner, thereby rendering the concept so broad that it loses any particular meaning and utility.

Like other leading publicists who have written on denial of justice,[4] Paulsson grounds the concept in the process of administering justice, something that goes beyond mere access to a judicial system. To the extent that he offers a definition of denial of justice, Paulsson argues that 'a state incurs responsibility if it administers justice to aliens in a fundamentally unfair manner' (at 4). In this way, Paulsson reasons that 'international responsibility arises as a result of the failure of a national legal system to provide due process' (at 36). He thus criticizes authorities that cloak other international wrongs in the cloth of denial of justice. A court judgment merely giving effect to a national law that breaches international law (such as an executive decree annulling an oil concession without compensation) should not be analysed in terms of denial of justice since international responsibility arises from the wrong in the form of the national law rather than a denial of justice occurring through its enforcement by a national court.

Another aspect of Paulsson's process-oriented focus is a rejection of the concept of substantive denial of justice. International law publicists have often bifurcated denial of justice into procedural denials, such as a refusal of access to courts or a lack of due process, and a substantive denial of justice arising from a manifestly unjust judgment or outcome.[5] Substantive denial of justice postulates that there is a threshold of reasonableness by which national judgments can be reviewed. Although this threshold is not crossed by mere error in the interpretation of national law, for which international responsibility does not arise, responsibility will arise where an error becomes 'manifestly unjust' (at 73). Paulsson, however, rejects the view that denial of justice is, or should be, a form of international judicial review of the substance of a national court judgment:

> Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state's failure to provide a decent system of justice. They do not constitute international appellate review of national law (at 98).

[4] For example, Fitzmaurice, 'The Meaning of the Term Denial of Justice' 13 *BYbIL* (1932) 93.

[5] For a recent restatement of this distinction see Bjorklund, 'Reconciling State Sovereignty and Investment Protection in Denial of Justice Claims', 45 *VJIL* (2005) 809.

In Paulsson's view, substantive denial of justice in the form of a manifestly unjust domestic judgment is properly viewed as a deficiency in process. The manifestly unjust judgment is evidence that the state has failed to provide a judicial system that meets international standards (at 82–88). In this way, a substantive international standard such as 'manifest injustice' is rejected in favour of the view that, if the error is one that no competent judge could have made, it can be inferred that the judge was either dishonest or incompetent.

Having himself rejected arid conceptualism and formalism in categorizing and defining denial of justice, we may nevertheless query whether Paulsson slips into the same trap. Paulsson's argument suggests that there is always a clear dividing line between procedural and substantive review. The legal realist may be sceptical of the process/substance distinction. In the context of constitutional law, critics have noted that courts take refuge in process, in order to avoid criticisms that they are engaged in substantive review of government policy decisions.[6] For this perspective, the shift from substance to procedure is seen as a strategy to depoliticize the 'reality' of constitutional adjudication. While judicial decision-making often relies on categorical distinctions, the conceptual difficulty is that there is always a twilight between the night and day of procedure and substance. Indeed, Paulsson has used this analogy in the context of the distinction between objections as to jurisdiction and admissibility.[7] This is not to suggest that we can or should abandon the use of legal categories but rather that legal categories, such as procedure and substance, often overlap at the margins rather than being mutually exclusive.

Rejection of substantive review is central to Paulsson's argument about the scope of denial of justice and, indeed, the legitimacy of its application by international tribunals. Why is the distinction between substance and procedure so important? As an international lawyer and arbitrator, Paulsson is keenly aware of national sensitivities involved in having international tribunals 'reviewing' state conduct for compliance with *national law*. He highlights the fact that to 'declare that judgments under national law are rationally unsustainable may expose the international jurisdiction to the criticism that it does not have an adequate intellectual foundation in the relevant national law' (at 83–84). By focusing on the process of administering justice, the legitimacy of denial of justice is enhanced. Denial of justice from this perspective never results in an international tribunal substituting its own view of national law for that of a state's highest court. In the opinion of this reviewer, while Paulsson's argument fails to acknowledge the potential overlap between procedure and substance, he is right to place denial of justice firmly in the realm of process. Customary international law requires states to maintain a judicial system that meets international minimum standards of due process in its treatment of foreigners. It does not serve to guarantee that final judicial outcomes are reviewable by international tribunals based on a standard of reasonableness.

The second main argument of the book is that denial of justice results from the failure of a national legal *system* to provide justice (at 36). Paulsson sets out the body of settled law and succinctly restates the view that states have an obligation to create a system of justice that allows errors in the administration of justice to be corrected (at 109). However, an important conclusion is drawn from this systemic element of denial of justice: since a denial of justice only occurs where 'there is no reasonably available national mechanism to correct the challenged action' (at 100), the exhaustion of local remedies becomes an inherent and material element of every denial of justice claim.

As a means of illustrating this issue, Paulsson turns to *Loewen*, in which a NAFTA investment tribunal determined that a Mississippi trial proceeding fell short of

[6] Petter and Hutchinson, 'Rights in Conflict: The Dilemma of Charter Legitimacy' 23 *UBCL Rev.* (1989) 531 and J. Bakan, *Just Words: Constitutional Rights and Social Wrongs* (1997).

[7] Paulsson, 'Jurisdiction and Admissibility' in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amircorum Robert Briner* (2005) 601.

international standards of due process.[8] In a much criticized decision,[9] the NAFTA tribunal held that it did not have jurisdiction over Loewen's claim because, as a result of a corporate reorganization, the corporate investor had not maintained continuous Canadian nationality.[10] For Paulsson's purposes, the NAFTA tribunal decision was important because the tribunal also refused jurisdiction (although technically in what was *obiter dictum*) on the basis that Loewen's failure to apply for US Supreme Court review of the Mississippi proceedings meant that local remedies had not been exhausted. Paulsson makes a strong case that local remedies should only be considered exhausted where they 'provide no reasonable possibility of an effective remedy' (at 118), one of the alternate formulations proposed by Special Rapporteur John Dugard in his Second Report on Diplomatic Protection to the International Law Commission ((at 115–119). In *Loewen*, the tribunal held that seeking review of the Mississippi proceedings by the US Supreme Court provided 'at most a reasonable prospect or possibility of success' (at 122) and that Loewen had failed to present evidence to justify its decision to settle with O'Keefe rather than pursue other local remedies (at 123). Yet, in the subsequent request by Raymond Loewen, in his personal capacity, for a supplemental decision,[11] it became clear that Loewen had submitted evidence on the rationale for not seeking Supreme Court review. Despite this evidence and the practical difficulties Loewen faced, the NAFTA tribunal held that it was not satisfied that Loewen's agreement to settle was the only course for Loewen to take. Paulsson rightly questions the *Loewen* tribunal's reasoning and conclusions on the availability of local remedies, despite the undoubted expertise of the tribunal members (at 185).

In addition to cataloging the type of acts and omissions that can give rise to denial of justice, Paulsson also uses Chapter 6 to focus on denial of justice by outside interference, such as denial of access to courts, manipulation of court composition by the state and failure to execute judgments. Chapter 7 focuses on denial of justice by the decision maker, such as refusals to judge, delays, lack of due process and corruption. These 75 pages are more of a sketch of the modern content of denial of justice than a comprehensive catalogue or treatise of its various permutations. In this sense, *Denial of Justice in International Law* can be viewed as a modern complement

[8] *Loewen*, *supra* note 3. Loewen was sued in Mississippi by O'Keefe for breach of a funeral services contract worth some US$4 million. The Mississippi jury awarded O'Keefe some US$500 million in damages. Loewen then sought to appeal the verdict but was required to post an appeal bond for 125% of the judgment as a condition of staying execution. The Mississippi Supreme Court refused to reduce the appeal bond, which effectively foreclosed Loewen's appeal rights. Loewen eventually settled with O'Keefe for US$175 million.

[9] See, for example, Rubins, '*Loewen v. United States*: The Burial of an Investor-State Arbitration Claim', 21 *Arbitration Int'l* (2005) 1.

[10] It was undisputed that Loewen must have Canadian nationality to bring a NAFTA investment claim against the United States. The investment protection provisions of NAFTA, like those in other investment protection treaties, provide investment protection to foreign investors. At issue in *Loewen* was whether the corporate claimant, Loewen Group, Inc., had maintained Canadian nationality for the purposes of NAFTA. Paulsson criticizes the tribunal's holding that customary international law requires that the claimant must maintain the relevant nationality until the date of the award, arguing that the date of the award requirement was 'perhaps the least plausible of a long series of alternative candidates' (at 183). After the tribunal's award, Raymond Loewen, who had also claimed in his personal capacity, requested a supplementary decision because the tribunal had only expressly addressed the nationality issue with respect to Loewen Group, Inc. and not with respect to Mr Loewen personally. In its subsequent decision, the tribunal rejected Mr Loewen's claim because of the failure to exhaust local remedies. The Loewen Group Inc. and Raymond Loewen v. United States (Decision on Respondent's Request for a Supplementary Decision, 13 September 2004) 44 ILM 836, 10 ICSID Reports (forthcoming).

[11] *Ibid.*

to Freeman's classic treatise. In addition, the book does not address developments under international human rights treaties in great detail or consider the extent to which procedural protections under these treaties have crystallized into customary international law.

The final chapter, entitled 'The Menace of Obscure Arbitrators', is a '*post scriptum*' – 'thoughts inspired by sidelong glances' (at 228) – on denial of justice in modern international law. Paulsson begins by noting the particular sensitivities about challenges to national justice, which 'strike at the heart of national pride' (at 228). As a result, denial of justice is a 'formidable test of commitment to the rule of international law' (at 228). Paulsson is highly critical of what he calls an uninformed 'neonationalist reaction' (at 232) to international adjudication as reflected in articles in the popular press and statements by NGOs and politicians. These critics suggest that any international adjudication of national measures is a violation of sovereignty. Paulsson views this simply as a negation of international law. Although supportive of the incremental reforms to the investor-state arbitration process, for example through greater transparency and access to *amici curiae*, he is sceptical of proposals for new types of appellate mechanisms for investment treaty awards and appears satisfied with existing corrective mechanisms. Paulsson is not convinced that appellate review of investment treaty arbitration would provide better or more consistent decisions and he contrasts highly fact-contingent investment arbitrations with disputes in the WTO state-to-state system. Paulsson also notes that even in the domestic sphere, it takes time to develop consistent jurisprudence and that investment state arbitration under investment treaties is in its infancy.

Paulsson's writing is clear, lucid and lively. The research and presentation of international authorities is meticulous and illuminating. Whether he is recounting the lynching of Italians in New Orleans by mobs in the 1800s or former Peruvian President Fujimori's attempts to manipulate Peru's Supreme Court, he brings the stories behind claims of denial of justice to life. Paulsson's thesis that denial of justice is always procedural provides a principled basis for maintaining an international standard while at the same time accepting that 'the varieties of legal culture that enrich the world' (at 205) should be respected. This book is indispensable to those interested in the evolving law of international claims.

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Roman Kwiecień, ***Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*** (State Sovereignty. The Reconstruction and Meaning of the Notion in International Law), Kraków: Kantor Wydawniczy Zakamycze, 2004. Pp. 205. ISBN 83-7333-435-1 (published in Polish).

The book under review is the first monograph in Polish on state sovereignty from an international law perspective. This gap in the literature for the period following World War II until the change of political system in 1989 is understandable, given the strong ideological nature of the subject. However, after 1989 and despite some important studies, the absence of a comprehensive book-length treatment of the subject was noticeable. This was even more striking given the European Union accession process, as it was accompanied by a debate (predominantly political) between – generally speaking – those who viewed accession as a deadly danger for Polish sovereignty and those who treated sovereignty as a relic of the past. This discussion was not surprising, especially in a country which had only recently fully regained political independence. In such circumstances, the lack of an in-depth reflection from an international law perspective was more than evident. This volume by Roman Kwiecień, lecturer in international law at the Maria Curie-Skłodowska University of Lublin, definitely fills this gap, even though it does not focus on the context of Polish membership in the EU. The book, which results from