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International Law, National Tribunals and the Rights of Aliens:

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International Law, National Tribunals and the Rights of Aliens: A Symposium*

INTRODUCTION

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There is growing concern everywhere these days with the application of substantive international law rules to individuals as well as to nations. Indeed, after years of relative neglect, the procedural side of international law is coming into its own, a development that is as welcome as it is overdue. To readers who recall Morris R. Cohen's observation that "students of legal history know the truth of the statement that 'the substantive law is secreted in the interstices of procedure,' nor need practitioners be reminded how frequently changes in procedure affect the substantive right of parties,"[1] this trend is a particularly reassuring one.

While recognizing that "continuing attention must be paid to clarification and development of the substantive law to keep it responsive to the needs of an evolving world society,"[2] the Procedural Aspects of International Law Institute, founded in 1965 by a distinguished group of international lawyers,[3] has embarked upon a major study of the mechanics by which international law is and can be made applicable to the conduct of individuals and states. This re-

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1. M. COHEN, LAW AND THE SOCIAL ORDER 128 (1933).

2. YOUNG, INTERNATIONAL REMEDIES IN INVESTMENT DISPUTES: A FORWARD VIEW, IN THE RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 359, 377 (1965).

3. The Institute, with headquarters at 200 Park Avenue, New York, New York 10017, sponsors and conducts research into various areas of procedural international law, disseminating the results of such research through monographs, articles, meetings, conferences, and exchanges. Membership in the Institute is open to all persons in the United States and abroad who are concerned with this area of international law. Persons interested in its work are urged to contact this writer, its Director, at the above address. *See* Note, *Procedural Aspects of International Law Institute*, 60 AM. J. INT'L L. 816 (1966).

search project, financed by a four-year grant from the Ford Foundation,[4] involves separate but interrelated studies of the broad areas of human rights,[5] property rights,[6] and, in a more limited sense, procedural rights (that is, of aliens before national tribunals).[7]

Foreign trade, travel and investment are at an all-time high today. The tempo of international transactions, as Frank G. Dawson points out in his article, "has been vastly accelerated, thereby increasing sharply the number, content and possible legal interrelationships between aliens and foreign nations, as well as opportunities for disagreement and dispute."[8] When an individual's person or property is injured or taken by a foreign country, however, the old dogma that individuals are not subjects of international law still precludes him from direct access to an international remedy. As the Supreme Court acknowledged in *Banco Nacional de Cuba v. Sabbatino*, "the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."[9]

The main rationale behind the exhaustion of local remedies rule, of course, is "the desire to settle disputes between aliens and states on the local level rather than make them matters of international concern."[10] Unfortunately, the obvious inadequacy of local remedies in some countries has contributed to the decline of the rule's application today, thus casting far too many relatively minor disputes into the international arena.[11] As Ivan L. Head in a recent survey of the current status of the rule has noted, "true climates of confidence will only exist when ex-partners, investors and tourists all have some reasonable expectation that their proper claims will be adjudicated promptly and fairly by the courts of the state in which they have

4. Letter from Am. Soc'y Int'l L. to members, July-August, 1966.

5. *See generally Symposium—International Procedures to Protect Human Rights*, 53 IOWA L. REV. 268 (1967).

6. *See generally Symposium—Settlement of International Claims by Lump Sum Agreements*, 43 IND. L.J. (1968).

7. "The emphasis of the third segment of the project is on a comparative study of the procedural barriers preventing aliens from obtaining access to, and enforcing their rights in, national tribunals, particularly as these obstacles relate to the so-called 'exhaustion of local remedies' rule." Dawson, *International Law and the Procedural Rights of Aliens Before National Tribunals*, 17 INT'L & COMP. L.Q. 404, 405 (1968).

8. Dawson, *International Law, National Tribunals and the Rights of Aliens: The Latin American Experience*, *infra*, at 712.

9. 376 U.S. 398, 422-23 (1964).

10. Lillich, *The Effectiveness of the Local Remedies Rule Today*, 58 PROCEEDINGS OF THE AM. SOC'Y INT'L L. 101 (1964). Other policy justifications for the rule are listed by Dawson, *supra* note 7, at 408 n.14.

11. *See generally* Lillich, *supra* note 10.

suffered injury or loss; that they, as aliens, will be able to seek and recover justice in the foreign court."[12]

The research study involving procedural rights of aliens seeks initially to identify the various procedural obstacles which preclude or limit the availability of effective remedies to injured aliens in foreign countries. A detailed investigation of the statutory, administrative, and case law in a score of countries on five continents has been undertaken, to be supplemented by extensive field research including interviews with attorneys, judges, government officials, businessmen, and scholars in the selected countries.[13] Upon the completion of these case studies, specific recommendations can be made which hopefully will increase the effectiveness of, and hence the resort to, local remedies.[14] For, as this writer has observed elsewhere, "[o]nly when they are sufficiently adequate to allow the invocation of the rule in those situations where it is relevant today can we expect the rule to perform its traditional function of nipping potential international claims in the bud."[15]

The following articles, which constitute the first joint product of this study, originally were presented to the Fifth Regional Meeting of the American Society of International Law held in Syracuse, New York, on March 18, 1968. They are based upon visits by the study's Research Director, Dawson, to Argentina, Brazil, Peru and Surinam; by Research Fellow Head to Ghana, Kenya, Nigeria and Tanzania; and by Research Fellow Herzog to Austria, France and Germany. Happily, and somewhat surprisingly, they reach a common conclusion, namely that aliens face less obstacles in enforcing their rights abroad than generally had been believed.

Thus, Dawson observes that "aliens receive equitable treatment in Latin American courts, especially in commercial matters," although

12. Head, *A Fresh Look at the Local Remedies Rule*, 5 CAN. Y.B. INT'L L. 142, 145 (1967).

13. "Comparison of statutes is of little value. Study of the decisions of the courts, their interpretation and application of legislation is better, but not enough. Of the thousands and thousands of daily transactions at home, in the market, on the exchanges, on the farms and in the factories, how few ever reach a court of last resort and the law reports. But it is only in daily life that we can study the effect of the law." P. EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW 157 (1950).

14. "The end product, it is hoped, will serve as a comparative record of existing standards, providing a guide to executive decision upon requests for espousal, as well as a source of information for aliens travelling, living and working abroad. To the extent that access to judicial and administrative relief may be unavailable within certain legal systems, the project intends to present policy recommendations designed to increase the effectiveness of local remedies and thereby enhance the role and prestige of national tribunals as components of the international legal order." Dawson, *supra* note 7, at 427.

15. Lillich, *supra* note 10, at 107.

he enters the caveat that "to a certain extent this may vary with the political environment, and the nationality of the particular alien."[16] Head, writing about African Commonwealth countries, notes that "the alien may, as a rule of thumb, assume, justly, that he will always . . . have access to the courts and, secondly, that a sophisticated range of remedies is available to him."[17] And finally Herzog concludes that "in summary, one might say that obstacles encountered by American plaintiffs in Western Europe certainly do not warrant the conclusion that the local remedies rule should be abandoned."[18]

Whether the conclusions reached in this symposium will prove generally valid cannot be foretold. Among the additional countries already visited or scheduled for study are Australia, Ceylon, Costa Rica, Cuba, Guatemala, Honduras, India, Italy, Malaysia, Pakistan, Singapore, Venezuela and Yugoslavia. What insights such further comparative study will reveal are uncertain, but without doubt they will be significant indeed.

16. DAWSON, *supra* note 8, at 712.
17. Head, *International Law, National Tribunals and the Rights of Aliens: The African Commonwealth Countries' Experience, infra,* at 706.
18. Herzog, *International Law, National Tribunals and the Rights of Aliens: The Western European Experience, infra* at 760.