

Of all these various formulas, the one propounded by Switzerland seems to be the most legally sound. In view of the difficulties which this matter entails, the first requirement is not to confuse the cases of deficient organization of the judiciary with the cases of improper administration of justice due to the lack of judicial authorities, or legal actions, or regular speedy proceedings, or refusing foreigners access to the courts, or the rendering of wrongful decisions prompted by motives beyond the purview of the law. These are concrete cases which might properly form the basis of clear responsibility. The definitions of "a denial of justice" which include the consideration of the fact as to whether or not the courts offer proper guaranties introduce a very dangerous general conception. The insufficiency of the judicial system itself does not form basis of responsibility; this must be established by the facts. It is the facts, therefore, which give rise to responsibility. In other instances and in certain circumstances, responsibility might be involved even in connection with a regular and well organized judicial system. Another fact consists in that the proceedings or the trial should be unusually inconsistent with the principles of justice or constitute a manifest injustice. This type of injustice might be due to animosity towards foreigners in general or towards a certain nationality in particular. Or it might be due to corruption. In any event, to draw a line of distinction between these facts and court errors seems to be an insurmountable difficulty. Therefore, it is exclusively for international practice to determine the application of these two doctrines with such varied juridical import.

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As soon as the State has, in good faith, fulfilled its obligations, it is not in principle answerable for the erroneous decisions of its judges. The State must, however, be held responsible whenever it has not acted in perfect good faith or its judges have clearly allowed themselves to be influenced by considerations unconnected with the dispensation of sound justice. In such case, the erroneous judgment would be a violation of the principle of judicial protection due to foreigners and would thus amount to an offence against international law for which the State would be responsible.

"Wrongful delay on the part of the courts undoubtedly involves the international responsibility of the State. Such delay is really one form of a denial of justice, an act which is contrary to international law. The arbitral award given by the President of the Swiss Confederation on December 30th, 1896, in the Franco-Venezuelan dispute concerning the case of Fabiani, expressly stated that, "if we examine the general principles of international law with regard to a denial of justice, that is to say, the rules common to most bodies of law or laid down by doctrine, we shall see that a denial of justice includes, not only the refusal of a judicial authority to exercise its functions and, in particular, to give a decision on the request submitted to it, but also wrongful delay in giving judgment." (League of Nations Publication C. 75. M. 69. 1929. V., pp. 47-48.)