

privileges cannot be exercised without an exequatur from the lessee government.

On the other hand, if the rights of navigation on the inland rivers are rights *in rem*, like servitudes or easements, derived from grants of the legitimate sovereign, then such rights may perhaps follow the territory and become a limitation on the fee in the hands of the military occupant.¹⁵

If the present adventure in China is not a war, the responsibilities of Japan will be quite different and they may well be sufficient to impel her ultimately to admit (if she has not already done so) that this affair with China is and has been from the beginning a public war, albeit by Japanese logic a "peaceful" war.

L. H. WOOLSEY

THE ROBINSON CASE

Mr. Adolph Arnold Rubens, not known to be an American citizen, obtained an American passport for himself and one for his wife, Mrs. Ruth Marie Rubens. He also obtained in New York two other fraudulent passports issued in the names of two deceased children, Donald Louis Robinson and Ruth Norma Robinson.¹ By using the Rubens passports the couple proceeded to France and later entered Russia early in November by means of the fraudulent Robinson passports for which an authentic Soviet visa had been obtained. At Moscow they established themselves at a hotel two doors from the American Embassy, but did not visit the Embassy. When Mr. Rubens disappeared and the matter was brought to the attention of the Embassy officials, they made a call on Mrs. Rubens, known as Mrs. Robinson, late in the afternoon, to see if they could assist her in her distress. When they returned the following day to complete the investigation they found that Mrs. Rubens, alias Robinson, had also disappeared. Whereupon a request for information was made to the Soviet authorities. While the Embassy awaited a reply to its request, the Department of State, as a result of its investigation, learned that the Robinson passports were fraudulent and so informed the Soviet authorities. On January 21, the American Chargé d'Affaires at Moscow, Mr. Loy W. Henderson, was informed over the telephone by a member of the Foreign Office that he had been instructed to inform Mr. Henderson as follows:

(a) The woman in question entered the country in possession of a passport in the name of Ruth Norma Robinson; (b) her Soviet visa was valid; (c) the internal authorities state that it would be inconvenient for the Embassy to visit her in prison until after their investigation of her had been completed. He added that the internal authorities permit the representatives of no foreign country to visit their nationals in prison

¹⁵ Magoon's Reports, pp. 328-331.

¹ Press Releases, U. S. Dept. of State, Dec. 18, 1937, p. 472; Jan. 22, 1938, p. 133; Jan. 29, 1938, p. 173; Feb. 12, 1938, p. 260; New York Times, Dec. 30, 1937; Dec. 31, 1937; Jan. 23, 1938; Jan. 26, 1938; Feb. 11, 1938.

during the course of investigations and could make no exception to the United States.²

Whereupon Secretary of State Hull by cable instructed Chargé d'Affaires Henderson to address a formal communication to the Minister of Foreign Affairs at Moscow. In this second and more emphatic demand that an American representative be permitted to visit Mrs. Rubens in the Soviet jail, where she was "held on the suspicion of spying",³ Mr. Henderson was instructed

to call attention to the letter of the Minister for Foreign Affairs of November 16, 1933, to the President of the United States⁴ in which Mr. Litvinoff stated that nationals of the United States would be granted rights with reference to legal protection which would not be less favorable than those enjoyed in the Soviet Union by nationals of the nation the most favored in this respect. In this connection Mr. Litvinoff called the President's attention to the text of certain articles of the agreement concerning conditions of residence and business and legal protection in general which was concluded on October 12, 1925, between the Union of Soviet Socialist Republics and Germany. Paragraph 2 of the final protocol to Article 11 of this agreement reads in part as follows:

"In places of detention of all kinds, requests made by consular representatives to visit nationals of their country under arrest, or to have them visited by their representatives, shall be granted without delay."⁵

Mr. Henderson was also instructed to say that the Government of the United States is unable to accept any interpretation of this paragraph which would operate to restrict in any way whatsoever the granting without delay of requests made by its representatives to visit American nationals under arrest, or to have such American nationals visited by representatives of American consular or diplomatic officers.

Mr. Henderson was instructed to add that the Government of the United States continues to expect that an officer of our Embassy at Moscow will be permitted without delay to interview the person whom the Soviet authorities refer to as Mrs. Robinson.⁶

On February 10, Chargé d'Affaires Henderson, accompanied by the Second Secretary of the Embassy, Mr. Angus I. Ward, were permitted to interview Mrs. Rubens in the Butyrskaya Prison at Moscow, where she was detained. The Department gave out the following account of the interview:

Others present were an investigating magistrate, a Russian official who acted as interpreter, and a representative of the Foreign Office. The purpose of the visit was definitely to identify Mrs. Rubens and to endeavor to establish whether she is an American citizen. Inasmuch as the

² Press Releases, U. S. Dept. of State, Jan. 22, 1938, p. 133.

³ Associated Press, New York Times, Jan. 26, 1938.

⁴ Dept. of State, Eastern European Series, No. 1, Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, U. S. Govt. Printing Office, Washington, 1933, p. 11; also this JOURNAL, Supp., Vol. 28 (1934), p. 8.

⁵ *Ibid.*

⁶ Press Releases, U. S. Dept. of State, Jan. 29, 1938, p. 173.

investigation by the Russian authorities has not been completed, questions dealing with matters connected with the official investigation could not be asked, but the interview did elicit definite identification by Messrs. Henderson and Ward of Mrs. Rubens.

Mrs. Rubens stated that she is Ruth Marie Rubens and that she left New York and was in transit under the name Rubens and entered the Soviet Union in the early part of November on a passport under the name of Ruth Norma Robinson. She said that she does not know how the Robinson passport was obtained. Her husband procured it for her and did not tell her how it was obtained or explain why.

Mrs. Rubens stated that she does not have an attorney representing her at present and that she does not desire an attorney. She made no complaint of her treatment. When asked if there was anything which the Embassy could do to make her more comfortable or to assist her she said that she was grateful for the offer of assistance but that she wanted no assistance.

Mrs. Rubens was neatly dressed and fairly well groomed.⁷

The releases above referred to do not indicate that the Secretary of State instructed our representatives to protest at the failure of the Soviet authorities to notify the Embassy of the arrest of Mrs. Rubens, an American citizen, in accordance with the terms of the Roosevelt-Litvinoff exchange wherein the Soviet Commissar specifically prescribed that such notice would be given, and President Roosevelt, acknowledging the Soviet undertakings, said:

Let me add that American diplomatic and consular officers in the Soviet Union will be zealous in guarding the rights of American nationals, particularly the right to a fair, public and speedy trial and the right to be represented by counsel of their choice. We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national.⁸

The protocol to Article 11 of the German treaty referred to above required that the Soviet authorities should give notice of the arrest "in large towns, including capitals of districts, within a period not exceeding three times twenty-four hours."⁹ The failure of the Soviets to extend the benefit of this provision under the most-favored-nation clause and to apply it in the Robinson case may perhaps have had some justification, in view of the fact that through their reliance on the validity of an American passport they had been subjected to the danger of admitting a spy to their territory. For a similar reason our representatives may not have been in a very favorable position to insist upon the right to conduct a less strictly censured interview with the prisoner.

There is no more important obligation of the state than that of protecting its nationals from abuse and injustice when abroad. The United States has recently indicated the adoption of the viewpoint that Americans who reside or

⁷ Press Releases, U. S. Dept. of State, Feb. 12, 1938, p. 260.

⁸ Dept. of State, Eastern European Series, No. 1, p. 12; this JOURNAL, Supp., Vol. 28 (1934), p. 9

⁹ *Ibid.*, p. 8.

travel abroad, as well as those who invest their capital beyond our frontiers, must assume the risks of the adventure and cannot expect the nation to incur the dangers of recourse to force in order to guarantee them the enjoyment of their rights under international law. This change of policy, for it cannot yet be considered a change of law, is merely a notification to American citizens that they cannot expect the government to use force for their protection, but it does not mean that the United States has assured other governments that it will so refrain from protecting them. It is not, however, to be expected that we shall have recourse to armed intervention against a great Power to obtain redress for the injurious treatment of a national in any particular instance. But violations of the rights of our nationals, especially when repeated, may lead to a dangerous state of tension and ultimately result in war. In any event it still remains true that any abusive treatment of an alien engages the responsibility of the state and justifies the alien's government in the exercise of its protective action and the employment of such appropriate means as may be adequate to secure redress. In order to fulfil its duty of protection of nationals abroad, it is essential that our representatives should be able freely to communicate with them at all times. If an alien can be seized and held in prison *incomunicado* without notification to the diplomatic or consular representatives of his state, the protection to which he is entitled under international law is rendered illusory.

Certain states claim the right to hold arrested persons *incomunicado* for a limited period while the investigation is in progress. According to our system of law, the dangers which the exercise of an arbitrary power of arrest may hold for the rights of the individual are met in part, at least, by the writ of *habeas corpus*. The failure of a state to provide any such remedy may be a matter within the sovereign discretion of the state, but its lack will not justify the application to an alien of regulations which may permit unjustifiable detention and prevent the representative of his government from aiding him to secure his release. It is obvious that an alien who is ignorant of the language and legal system will be at a disadvantage in establishing his innocence of any offense of which he may be accused or suspected.

The United States has consistently contended that notice of the imprisonment of a national should be given and that its representative should be permitted to visit the prisoner in order to ascertain that he was not subjected to any unreasonable restriction of his liberty or abuse of his rights. This right of access to nationals in prison is so clearly a necessary adjunct or adjective provision of the right to protect nationals when abroad from injustice or abusive treatment that it must inescapably be recognized as a rule of international law. This is true notwithstanding the divergent views expressed by certain states and their failure in some instances to acquiesce in its application.

It is to be regretted that the texts pay so little attention to this important rule. This is doubtless due to the fact that international law has generally

been studied more from the angle of natural law principles than from the practical point of view of the procedure appropriate to secure international legal rights. There is no right without a remedy, and if the remedy be defective the right will suffer accordingly.

The Harvard Research in International Law does not fall into this error, for its draft convention on the Legal Position and Functions of Consuls contains in its Article 11 (d) the provision that the receiving state shall permit a consul, "To communicate with, to advise and to adjust differences between nationals of the sending state within the consular district; to visit such nationals especially when they are imprisoned or detained by authorities of the receiving state; to assist such nationals in proceedings before or relations with such authorities; and to inquire into any incidents which have occurred within the consular district affecting the interests of such nationals."¹⁰

This right to visit imprisoned nationals would *a fortiori* include the right of a member of the diplomatic mission to exercise a similar right of visit in appropriate cases, and this application or interpretation is made in President Roosevelt's letter quoted above. It will be noted that the permission to visit nationals in the Harvard Research draft convention is given "especially when they are imprisoned." Following the same course of reasoning, the comment on the draft text points out that this right of visit is especially important when the alien is held *incomunicado*.¹¹ Then, if ever, he is in need of the aid and protection of his diplomatic or consular representatives to prevent any disregard of his rights, whether intentional or not.

ELLERY C. STOWELL

THE VILLA CASE

The *New York Times*, in a dispatch dated November 20, 1937, reported that a military court in Palma de Majorca had sentenced Antonio Fernandez Villa to twenty years imprisonment on charges of sympathizing with the enemy. His wife was sentenced to twelve years in prison. The dispatch added that both are naturalized American citizens, but that the court had refused to admit this plea; and that the American Vice-Consul at Leghorn had been sent to Majorca to protect the interests of the Villas.

As a matter of fact, the two had been held in jail since the end of 1936. The first notice of this was a home-made Christmas card received by his brother, Professor Pedro Villa Fernandez, of New York University, containing an acrostic with one word in English, "jail." Professor Fernandez at once took the matter up with the Department of State, which has been working assiduously on the matter since that time. The case presents some peculiarities and difficulties which make it worthy of discussion.

In April, 1937, it was reported by unofficial workers that Villa would be released if he had an American passport—his own was hidden away, and he

¹⁰ Harvard Research in International Law, *The Legal Position and Functions of Consuls*, this JOURNAL, Supp., Vol. 26 (1932), pp. 267-268.

¹¹ *Ibid.*, p. 270.