The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack

That the traditional international law governing the Responsibility of States for Injuries to Aliens has been under attack for several decades should come as no surprise to readers of this *Journal.*[1] What is perhaps less familiar is the fact that this attack on the substantive norms of one of the most important areas of international law has been followed in recent years by a similar, albeit more limited, attack on its procedural counterpart, the diplomatic protection of nationals abroad.[2] While the doctrine of diplomatic protection admittedly has its imperfections, weakening or abolishing it under present conditions would effectively undercut the substantive norms developed by state practice over the past 150 years,[3] for, as Mr. Justice Holmes once remarked, "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."[4] Hence, pending the establishment of international machinery guaranteeing third-party determination of disputes between alien claimants and states, it is in the interest of all international lawyers not only to support the doctrine, but to oppose vigorously any effort to cripple or destroy it.[5]

[1] *See* Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AJIL 863 (1961). *See also* R. Anand, New States and International Law 39–43 (1972); Castañeda, *The Underdeveloped Nations and the Development of International Law,* 15 Int'l Org. 38, 39 (1961); F. Okoye, International Law and the New African States 178–84 (1972); and S. Sinha, New Nations and the Law of Nations ch. VI (1967). *Cf.* Falk, *The New States and International Legal Order,* 118 Recueil des Cours (Hague Academy of International Law) 1, 94–96 (1966–II). For a convincing reply to these writers, *see* Jessup, *Non-Universal International Law,* 12 Colum. J. Transnat'l L. 415 (1973).

[2] A preliminary survey of these attacks will be found in Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?*, in 3 The Valuation of Nationalized Property in International Law, to be published by the University Press of Virginia during 1975.

[3] State practice in this area of international law is so extensive that the League of Nations found the subject "ripe" for codification nearly 50 years ago. For various attempts at codification, *see* Lillich, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility,* 16 Syracuse L. Rev. 721, 724–31 (1965). *See generally* Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens,* 16 *id.* 745 (1965).

[4] The Western Maid, 257 U.S. 419, 433 (1922).

[5] Weakening or abolishing the right of diplomatic protection, Freeman observed when opposing an earlier attempt along the lines of recent ones, in effect frees "an interested state from restraints imposed by international law upon conduct which would otherwise produce a pecuniary liability to its sister nations. The far-reaching implications of this doctrine are so sinister and so deplorable that it should be resisted by the profession with every means at its command." Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law,* 40 AJIL 121, 125 (1946).

Despite unsuccessful attempts over the past century, especially by the Latin American states, to restrict diplomatic protection,[6] the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case described the doctrine as "an elementary principle of international law,"[7] a view which has been reaffirmed repeatedly by the International Court of Justice,[8] most recently in the *Barcelona Traction* case.[9] Attempts during the past decade to water down the substantive norms of UN General Assembly Resolution 1803(XVII) on Permanent Sovereignty Over Natural Resources,[10] however, also purport to dilute the doctrine of diplomatic protection, at least insofar as claims based upon "wealth deprivation"[11] are concerned. Heretofore unnoticed, these attempts deserve examination and refutation, especially Resolution 88(XII) adopted by the Trade and Development Board of UNCTAD on October 19, 1972,[12] Resolution 3171(XXVIII) adopted by the UN General Assembly on December 17, 1973,[13] and the Charter of Economic Rights and Duties of States adopted by the UN General Assembly on December 12, 1974.[14]

[6] *See generally* A. FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE ch. XVI (1938). Such attempts occur regularly every generation. *See, e.g.*, the replies of Hershey, *The Calvo and Drago Doctrines*, 1 AJIL 26 (1907), and Brown, *The "Cardenas Doctrine,"* 34 *id.* 300 (1940). *See* text at and accompanying note 19 *infra*.

[7] Case of the Mavrommatis Palestine Concessions, [1924] PCIJ, ser. A. No. 2, at 12:

> It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels.

[8] *See, e.g.*, the Nottebohm Case, [1955] ICJ REP. 4, 24: "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defense of the rights of the State."

[9] Case Concerning the Barcelona Traction, Light & Power Co., Ltd., [1970] ICJ REP. 3, 32–51 *passim*. *See* text at note 40 *infra*.

[10] GA Res. 1803, 17 UN GAOR, SUPP. 17, at 15, UN Doc. A/5217 (1962).

[11] "The term 'wealth deprivation' . . . [is] used principally to avoid the simultaneous and, hence, ambiguous reference to both facts and legal consequences which so often characterizes the more popular 'expropriation,' 'confiscation,' 'condemnation,' 'taking,' 'forfeiture,' and the like. It is therefore conceived as a neutral expression which describes the public or publicly sanctioned imposition of a wealth loss (or blocking of a wealth gain) . . . which in the absence of some further act on the part of the depriving party would involve the denial of a *quid pro quo* to the party who sustains the deprivation (the component 'wealth' . . . being preferred to the more popular 'property' because it refers to all the relevant values of goods, services, and income without sharing the latter's common emphasis upon physical attributes nor the civil law's stress on 'ownership'). Depending on a multitude of factual variables, a wealth deprivation may be found lawful or unlawful." B. WESTON, INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE 12 n.10 (1971).

[12] 12 UN TDOR SUPP. 1, at 1, UN Doc. TD/B/423 (1973). The resolution, which was adopted by a 39–2–23 vote, Greece and the United States voting against and the developed states abstaining, is reprinted in 11 ILM 1474 (1972). *See* Note, *UNCTAD: Permanent Sovereignty over Natural Resources*, 7 J. WORLD TRADE L. 376 (1973).

[13] UN Doc. A/RES/3171 (XXVIII) (1974); 68 AJIL 381 (1974).

[14] UN Doc. A/RES/3281 (XXIX) (1974); reprinted in *Official Documents* section, *infra* p. 484 and in 14 ILM 251 (1975). The Charter was adopted by a vote of 120–6–10, the United States voting against along with Belgium, Denmark, the Federal Republic of Germany, Luxembourg, and the United Kingdom.

The UNCTAD resolution, after reaffirming the principle of permanent sovereignty over natural resources, states that "any dispute" concerning a state's nationalization of foreign-owned property "falls within the sole jurisdiction of its courts. . . ." [15] Similarly, Resolution 3171(XXVIII) provides that "any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures," [16] surely an open invitation to nationalizing states to enact measures making their domestic courts the final arbiters on disputed questions.[17] Finally, the Charter of Economic Rights and Duties of States specifically requires that "where the question of compensation gives rise to a controversy, it shall be settled under the domestic laws of the nationalizing State and by its tribunals. . . ." [18] Read together, the two resolutions and the Charter are no more than a thinly-disguised attempt to endow the Calvo Doctrine, which maintains "that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before local authorities," [19] with limited international status. This development, which would immunize states from potential international responsibility by denying alien claimants the right to seek the diplomatic protection of their states, is as unnecessary as it is unfortunate.

In the first place, whatever pragmatic arguments once existed in favor of the Calvo Doctrine now have disappeared. To the extent that it originated as a defensive reaction to substantive norms which allegedly discriminated against smaller states, as some authorities have suggested,[20] surely this *raison d'être* carries little weight today in the wealth deprivation field, where the standard of compensation required has been leveled from "prompt, adequate and effective" to "appropriate" to "possible." [21] Having participated fully in this reformulation of the substantive norms, it is somewhat inconsistent for the developing states—which pushed through the above two resolutions and the Charter—to support a doctrine per-

[15] 11 ILM 1475.

[16] *See* note 13 *supra*.

[17] An invitation Kuwait immediately decided to accept. The Times (London), Mar. 20, 1974, at 19, col. 2.

[18] UN Doc. A/RES/3281 (XXIX) (1974) (Art. 2(2)(c)).

[19] D. SHEA, THE CALVO CLAUSE 19 (1955). As Shea correctly notes, "[i]t is apparent that the acceptance of these two concepts would result in the elimination of the 'enemy' of diplomatic protection." *Id.* at 20. Supporters of the Calvo Doctrine are frank to acknowledge this objective. For instance, in his Separate Opinion in the Barcelona Traction Case, *supra* note 9, at 294, Judge Ammoun states flatly that it "is aimed at nothing less than the abolition of unilateral diplomatic protection. . . ."

[20] *See, e.g.*, Judge Ammoun's comments in the Barcelona Traction Case, *supra* note 9, at 290–95 *passim*. *See generally* the writers cited in note 1 *supra*.

[21] Resolution 3171(XXVIII) provides that "each State is entitled to determine the amount of possible compensation and the mode of payment. . . ." *See* note 13 *supra*. Moreover, paragraph 4(e) of the Declaration on the Establishment of a New International Economic Order, adopted by the UN General Assembly at its Sixth Special Session in 1974, while reaffirming what it characterizes as a state's "inalienable right" to nationalization, for the first time omits entirely any reference to a corresponding duty of compensation—even under a "possible" compensation standard. UN Doc. A/RES/3201 (S–VI)(1974). The resolution is reprinted in 68 AJIL 798 (1974) and in 13 ILM 715 (1974).

mitting them to avoid the application of those same norms.[22] Moreover, to the extent that it originated as a reaction to the acknowledged abuses surrounding diplomatic protection in the past,[23] surely the elimination of the right of forcible self-help to protect property abroad [24] and the general international atmosphere of the postwar period have combined to redress the balance.[25] In short, states whose conduct measures up to international standards have little to fear from diplomatic protection, while its abolition would leave alien claimants without even nominal procedural safeguards under the existing international legal order.[26]

With the above pragmatic arguments no longer persuasive, supporters of the Calvo Doctrine have fallen back upon the anachronistic notion of state sovereignty in their attempts to discredit diplomatic protection, contending that it is "in flagrant contradiction with international democratic tendencies" [27] for one state to press upon another state claims originating in alleged injuries to the former's nationals. Actually, as Freeman has observed from an inclusive world order perspective, if anything is antidemocratic "it is the dogma of extreme sovereignty which repudiates the international responsibility of the state, and which would remove all restraints upon arbitrary and illegal conduct, whether directed against nationals and foreigners alike, or against foreigners alone." [28] For, despite the fact that the Calvo Doctrine, both in general and as incorporated in the UNCTAD resolution, Resolution 3171(XXVIII), and the Charter of Economic Rights and Duties of States, is couched in procedural terms,

> the real issue involved is the international responsibility of the State. Its opponents simply do not want any question raised as to compliance with their international obligations; they do not wish to run

[22] *Cf.* A. FREEMAN, *supra* note 6, at 462: "No political entity claiming to enjoy the rights and privileges of membership in the society of nations can defend the inconsistent position of 'legislating itself' out of its international obligations." Unfortunately, many developing states apparently take precisely this position.

[23] For a forceful critique of past abuses, *see* Judge Padilla Nervo's comments in the Barcelona Traction Case, *supra* note 9, at 247.

[24] *See generally* D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW ch. V (1956). On the right of forcible self-help to protect persons abroad, *see* Lillich, *Forcible Self-Help to Protect Human Rights*, 53 IOWA L. REV. 325 (1967), and HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973).

[25] Indeed, as Freeman observed some years ago:

> [T]he shoe appears to be on the other foot. Now certain of the weaker states have adopted a policy of resisting every claim, irrespective of merits, at all costs, and of seizing every opportunity to tear asunder the principles of state responsibility which operate for the benefit of the international community as a whole. This is a most unfortunate tendency, not only from the standpoint of true justice, but from that of these states' real interests. To seek to eliminate diplomatic protection is short-sighted in that its disappearance must inevitably discourage the influx of that capital which undeveloped countries still need to fulfill their destiny.

Freeman, *supra* note 5, at 143–44.

[26] "Although the acceptance of the Calvo Doctrine would eliminate the abuses of diplomatic protection, it would also eliminate the institution itself, without substituting an acceptable alternative." D. SHEA, *supra* note 19, at 20.

[27] García Robles, *quoted in* Freeman, *supra* note 5, at 139.

[28] *Id.*

> the risks of an adverse award that might result from submission to arbitration. They wish to encourage foreign talent to assist in developing the country but they also wish to be completely free to take any measures they desire without being subject to a demand for compensation arising out of violations of rights. In brief, they would have the benefits of their bargain but not its obligations.[29]

While some readers may think the above criticism too harsh, there is considerable collateral evidence to support it. In almost all cases involving wealth deprivation, Amerasinghe observes, "offers of international arbitration have been rejected by the nationalizing States."[30] Many of the same states voting for the above two resolutions and the Charter, moreover, have refused to ratify the World Bank Convention on the Settlement of Investment Disputes,[31] a neutral-principled document establishing impartial procedures to resolve such disputes, which specifically preempts diplomatic protection.[32] Additionally, when three U.S. aluminum companies recently asked for arbitration of Jamaica's 500 percent rise in bauxite royalties, that country, an original party to the convention, challenged its applicability the following day.[33]

It can be argued, although not very convincingly, that such actions are attributable only to misguided notions of state sovereignty.[34] Whatever their cause, however, they lead inescapably to the conclusion that the

[29] *Id.* at 144.

[30] Amerasinghe, *The Quantum of Compensation for Nationalized Property,* in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW, note 2 *supra.*

[31] The convention is conveniently reprinted in 60 AJIL 892 (1966) and in 4 ILM 532 (1965). Significantly, no Latin American country has ratified it. *See* Szasz, *The Investment Disputes Convention and Latin America,* 11 VA. J. INT'L L. 246 (1971).

[32] Under Article 27(1) of the convention, "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." 60 AJIL at 899. *See* Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* 136 RECUEIL DES COURS (Hague Academy of International Law) 331, 371–80 (1972–II).

[33] N.Y. Times, June 26, 1974, at 66, col. 2.

[34] Young noted a decade ago that the acceptance of international jurisdiction over such disputes "seems to be considered as in some way derogatory to a state's sovereign dignity and national pride. This is to look at the matter the wrong way round. The advance of technology and the economic and social forces at work in the modern world demand of all peoples, whatever their stage of development, continually closer cooperation for the benefit of all. The provision of machinery for the settlement of differences concerning private foreign investment should be viewed in this context, as part of the growth of international institutions of all kinds required to keep the modern world functioning." Young, *International Remedies in Investment Disputes: A Forward View,* in RIGHTS AND DUTIES OF PRIVATE INVESTORS ABROAD 359, 377–78 (1965). Thus, for a newly-independent state to accept international jurisdiction "is not to regress into colonialism but to exercise the right of a free people to join with others in securing a rule of law before which all stand equal. This is not to move backward but to lead the march toward a better legal order in this field." *Id.* at 378.

states involved simply are unwilling to accept an international regime to resolve wealth deprivation disputes, even one which meets and satisfies their objections to the traditional substantive norms and procedural techniques. This state of affairs is doubly disappointing, for as Young has remarked:

> Procedural improvements . . . are not only desirable in themselves but may also be expected to have a beneficial effect on the growth of the substantive law. Good machinery does not, alone, ensure good law; but good machinery invites use, and use builds the practice and precedents which put flesh on the bones of principles.[35]

Unfortunately, the immediate prospects for the establishment of new or the use of existing international machinery, which would help to put "flesh on the bones" of documents such as the UNCTAD resolution, Resolution 3171 (XXVIII), and the Charter of Economic Rights and Duties of States, look pretty bleak.[36]

Given the above situation, Judge Jessup's comment in the *Barcelona Traction* case that "[t]he institution of the right to give diplomatic protection is surely not obsolete" [37] is truer now than ever before. With its impressive juridical credentials,[38] its incorporation in the Vienna Convention on Diplomatic Relations,[39] and its recent "unquestioning adoption" [40] by the International Court of Justice, there normally would be little cause for concern in the camp of its supporters. The efforts to circumscribe the doctrine described in this Editorial, however, obviously are regarded by many states as the thin edge of the wedge.[41] For this reason alone, until the international community grants alien claimants access to effective international machinery guaranteeing third-party determination of wealth deprivation disputes, the modern doctrine of diplomatic protection of

[35] *Id.* at 377.

[36] Indeed, all signs point to further attempts to institutionalize the Calvo Doctrine in the wealth deprivation field.

[37] Barcelona Traction Case, *supra* note 9, at 165.

[38] *See* text at and accompanying notes 7–9 *supra.*

[39] Under Article 3(1)(b) of the Vienna Convention on Diplomatic Relations of 1961, one of the stated functions of a diplomatic mission is "protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law. . . ." The convention is conveniently reprinted in 55 AJIL 1064, 1065 (1961). *See* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities,* 56 *id.* 88, 94–95 (1962).

[40] The phrase is from a forthcoming essay by Fatouros entitled *The Transnational Corporation.* Even as bitter a critic of diplomatic protection as Judge Padilla Nervo admitted in the Barcelona Traction Case that "[f]or the time being, the principle which recognizes the capacity of a State to intervene, by way of diplomatic protection of a company of its own nationality, has proved to be a fair and well-balanced safeguard or insurance, both for the investor and for the State, where foreign companies operate." Barcelona Traction Case, *supra* note 9, at 245.

[41] *See* Judge Ammoun's admission in the Barcelona Traction Case, *supra* note 9, at 294, that "[t]he path toward this unconcealed objective [abolition of diplomatic protection] is certainly a long and arduous one. . . ."

nationals abroad [42] warrants the continued vigorous support of all enlightened internationalists.[43]

R. B. LILLICH

[42] By "modern" is meant a doctrine stripped of the abuses surrounding its use in the past, *see* text at and accompanying notes 23–26 *supra*, and sensitive to the real or imagined grievances not only of alien claimants, but of respondent states as well. For an intriguing "self-preservation model" of diplomatic protection, *see* Goodsell, *Diplomatic Protection of U.S. Business in Peru*, in U.S. FOREIGN POLICY AND PERU 237 (D. Sharp 1972). Examples of the growing use of assistance short of formal espousal may be found in R. LILLICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 98–101 (1962).

[43] This support, moreover, need not be defensive in nature nor grudgingly given, since regardless of its present imperfections the doctrine remains what it always has been: one of the few halfway effective procedures for the international protection of human rights. On the generally overlooked interrelationship between diplomatic protection and human rights, *see* Freeman, *Human Rights and the Rights of Aliens*, 45 ASIL PROCS. 120 (1951); García-Amador, *State Responsibility in the Light of the New Trends of International Law*, 49 AJIL 339 (1955); and Weis, *Diplomatic Protection of Nationals and International Protection of Human Rights*, 4 HUMAN RIGHTS J. 643 (1971). *See also* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS ch. 2 (1973).

After the expulsion of the Ugandan Asians in 1972, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to "consider the problem of the applicability of the present provisions for the international legal protection of the human rights of individuals who are not citizens of the country in which they live and to consider what measures in the field of human rights would be desirable." UN Doc. E/CN.4/1101, at 60 (1972). At present the Sub-Commission is considering several draft declarations on the subject. *See, e.g.*, UN Doc. E/CN.4/Sub. 2/L.598 (1974). This exceptionally important development seems to bear out Freeman's caustic observation that "[e]ven those nations which in the recent past would have choked trying to swallow the much more restricted concept of a minimum standard for aliens, today apparently do not experience as great a degree of indigestion at the conference table when asked to partake of a bill of fare garnished in a dressing called 'human rights.'" Freeman, *supra*, at 122. In any event, the Sub-Commission's long overdue attempt at a synthesis of these two branches of international law is a welcome development, especially when compared to the trends considered in this Editorial.