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THE "MINIMUM STANDARD" OF THE TREATMENT OF ALIENS*

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IN its note of August 3, 1938, the Mexican Government, by its Minister of Foreign Affairs, contested the right of the United States to demand compensation for the agricultural lands of American citizens expropriated by Mexico since 1927. It asserted that the countries of this continent have vigorously maintained

> "the principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country . . . in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity."[1]

The Mexican Minister of Foreign Affairs then invoked article 9 of the Convention on the Rights and Duties of States signed at Montevideo, 1933, which provides for complete jurisdiction of states within their national territory over all inhabitants, to the effect that

> "nationals and foreigners are under the same protection of the law and the national authorities, and foreigners may not claim rights other than or more extensive than those of nationals."[2]

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[1] The entire correspondence is printed in 32 AM. J. INT. L. SUPP. 181-207 (1938). The above quotation is at page 188.

[2] U. S. DEPT. STATE, TREATY SER. No. 881 (1935).

Secretary Hull in his reply of August 22nd paid tribute to the doctrine of equality but contended that it "invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights."[3] He then expressed surprise at Mexico's announcement of the "astonishing theory" that this beneficent principle of equality should be invoked not "to protect both human and property rights" but to deprive and strip "individuals of their conceded rights." He denied that this was permissible because Mexican nationals were also despoiled. As to exposure to the same risks and the claim that aliens enjoy a privileged position by seeking to escape confiscation, Secretary Hull maintained that the Mexican doctrine of risk

> "presupposes the maintenance of law and order consistent with principles of international law; that is to say, when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."[4]

He denied that this was a claim of special privilege in contravention of the Montevideo treaty and maintained that confiscation could not be excused by the "inapplicable doctrine of equality."

During the meeting of the Committee of Experts for the Codification of International Law at Lima, Mr. Cruchaga Ossa of Chile contended that article 9 of the Montevideo Convention on the Rights and Duties of States[5] made the equality of rights the maximum that could be claimed by any alien. He denied the existence of any "minimum standard" for the treatment of aliens; but remarked that even if there were one recognized in Europe the countries on this continent had in the first, second, fifth and seventh Inter-American Conferences committed themselves to the doctrine of absolute equality, which henceforth constituted the rule of law in the Americas. Although Chile had in 1930 conceded that a denial of justice gave a foreign government a privilege of intervening diplomatically on behalf of its nationals, Mr. Cruchaga in 1938 was driven by the logic of his own position to dispute the possibility of invoking diplomatic protection against denials of

[3] 32 AM. J. INT. L. SUPP. 198 (1938).

[4] Ibid.

[5] The United States made a long reservation to this convention, reserving its rights under international law. U. S. Dept. State, Treaty Ser. No. 881 (1935). The reservation was not referred to by Mr. Hull in his reply of August 22, 1938. 32 AM. J. INT. L. SUPP. 191 (1938).

justice, because nationals could not enjoy it.[6] On September 10, 1938, President Cardenas of Mexico attacked the whole conception of diplomatic protection as an impairment of national sovereignty.

Source of the Rights of Aliens

These positions require us to re-examine the whole structure of international law. If it is true that the doctrine of equality is the final test of international responsibility, then the source of international responsibility lies in municipal law. Only when a state denies equality, may international responsibility be asserted. Although this would seem to contradict the rule that a state's international obligations are determined by international law, anything in its municipal law to the contrary notwithstanding,[7] the growing spirit of nationalism, which Latin American countries have not escaped, and the memory of past impositions have persuaded some of their publicists and statesmen to advocate the suppression of diplomatic protection by Calvo clauses, by an assumed automatic nationalization if not naturalization of the alien, by restricted statutory or treaty definitions of the term denial of justice[8] and now finally by the contention that the doctrine of equality forecloses all diplomatic protection.

In its note of September 2, 1938, Mexico insisted that municipal law, not international law, was the source of the rights of individuals, including aliens, and cited Oppenheim in support.[9] It contended that

[6] Borchard, "The 'Committee of Experts' at the Lima Conference," 33 AM. J. INT. L. 269 at 276-278 (1939). See the argument for equality in YÉPES, LE PANAMÉRICANISME 121-127 (1936).

[7] Cf. 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht, 283 (1937): "It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability."

[8] See Guerrero, "Report of Subcommittee," Annex to Questionnaire No. 4, L. OF N. 1927. V (C. 196.M.70), p. 100. The Report is discussed by Borchard, "Theoretical Aspects of the International Responsibility of States," 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, pt. 1, p. 223 at 228 et seq. (1929).

[9] 32 AM. J. INT. L. SUPP. 204-205 (1938), citing 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht 508-509 (1937). See also Monnot (U. S.) v. Venezuela, February 17, 1903, RALSTON, VENEZUELAN ARBITRATIONS OF 1903, p.

expropriation without compensation was in line with the "standards of international law in accordance with the evolution which the traditional concepts of that law have necessarily undergone."[10] Without now entering upon the specific question whether international law protects against uncompensated expropriation, it may be agreed that the so-called "rights of man"[11] are not a product of international law and that the primary source of the alien's rights is municipal law. But the argument overlooks the fact that treaty and custom have in the course of the eighteenth and nineteenth centuries placed limitations on the arbitrary power of a state to deprive aliens of elementary rights, and that international tribunals enforce these claims. This is a body of law which can be disregarded by a state only at the peril of international responsibility, and while fashioned empirically it operates as a check on arbitrariness. Like the common law, it has grown interstitially from case to case. Thus, while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits. Whether called the fundamental, natural, or inherent rights of humanity or of man or of the alien, this minimum has acquired a permanent place in the protective ambit of international forums.

Growth and Function of International Law

But international law has not only been woven from the approved practice of states in their diplomatic intercourse and from the decisions of arbitral tribunals. It is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before article 38 of the Statute of the Permanent Court of International Justice made the "general principles

171 (1904) [S. Doc. 316, 58th Cong., 2d sess. (1904)]; Smith (U. S.) v. Mexico, April 11, 1839, 4 MOORE, ARBITRATIONS 3374 (1898); Lewis (Gt. Brit.) v. United States, May 8, 1871, 3 ibid., 3019; Only Son (U. S.) v. Great Britain, February 8, 1853, 4 ibid., 3404. See also STEINBACH, UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT 90, note (1931).

[10] 32 AM. J. INT. L. SUPP. 202 (1938).

[11] Cf. Declaration of the Rights of Man, adopted by the Institute of International Law at its Briarcliff meeting, 1929, 24 AM. J. INT. L. 560 (1930); Kaufmann, "Règles Générales du Droit de la Paix," 54 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 313 at 427 (1935), where they are called the fundamental rights of aliens; bibliography in 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht, 510, note (1937).

of law recognized by civilized states" a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice. For example, the doctrine *nulla poena sine lege* is accepted by common practice as a fundamental right of the alien, and the professed revolutionary departure from this principle by certain states would, if applied to aliens, meet with strong resistance. The disability of the alien to claim political rights and his immunity from military service and other political obligations have now a stronger source than the statutes or treaties in which these disabilities and privileges were orginally recorded. They now rest on common law. In most states, the elementary private rights of life, liberty and property, within their well-recognized and increasing limitations, are not denied to aliens any more than they are to nationals.

When, then, in particular cases they are withheld by administrative action in spite of the constitution or law, the international claim would rest on the state's violation of its own law and not on the minimum standard. It is well known that aliens may be denied numerous privileges, such as the ownership of real property and engagement in certain occupations, and may be restricted in other respects by municipal law. Yet the alien must enjoy police and judicial protection for such rights as the local law grants and its arbitrary refusal is a denial of justice. Bad faith, fraud, outrage resulting in injury, cannot be defended on the ground that it is a custom of the country to which nationals must also submit. The helpless position of the alien in the Roman law and through the Middle Ages has undergone a change with the growth of the national state and the migration of men. The unlimited power of spoliation has been subjected to the control of international law. Who can deny that this has been an advantage to the world?

Indeed, the limitations on arbitrariness have exerted a useful influence on municipal law, and these in civilized states have operated to the benefit of all men. Due process of law has been to some extent internationalized by the fact that international tribunals have drawn on the mores of the average and not of the crudest municipal practice. While at times diplomatic protection in the hands of dominant powers has oppressed weak states, I venture to say that the shoe is now on the other foot. Indeed, the effect of international adjudication, the growth of nationalism, the movements for codification, the greater tolerance of social experimentation have encouraged weak states to invoke their

national sovereignty either to escape the restrictions of international law, or to maintain that international law has changed content so as to support what it once disapproved.[12]

The Doctrine of Equality

The states of Latin America lay claim to a peculiar virtue in placing the alien on a footing of civil equality with the national. This provision was first introduced into modern civil codes by Andrés Bello, the famous Venezuelan who in 1855 drafted the Chilean Civil Code. In granting such equality, they go beyond the requirements of international law. But in so doing they cannot, as some profess, escape the obligations of international law. And the civil equality, even if it were in practice granted as written, is a very limited one and hardly different from that accorded by most western states. Most impositions and discriminations come from public law and administrative encroachments. If these could freely be perpetrated, and if the fact that nationals are also spoliated or prejudiced were an adequate defense, the state would escape the control of international law, and that in effect is the implied purpose of the argument. Mexico, in its note of September 2, 1938, frankly contended that the equality of treatment was not established "to protect the rights of foreigners against the state," but, on the contrary, to defend "weak states against the unjustified pretension of foreigners who, alleging supposed international laws, demanded a privileged position."[13] But what of justified pretensions? The doctrine of equality as the final test of international obligations is thus in effect a repudiation of the many decisions of international tribunals which establish such obligations as a rule of international law.

And yet the campaign for equality as the final test is unrelenting. At the Hague Codification Conference, Dr. C. C. Wu of China made

[12] If there were no force in international law to insure respect for the rights of aliens, and if it had no substantive content, the Permanent Court of International Justice would have been wrong in asserting the existence of a common or generally accepted international law respecting the treatment of aliens, applicable to them despite municipal legislation. HAGUE, PERM. CT. INT. J., SER. A, No. 7, pp. 22, 23 (May 25, 1926). The Treaty of Lausanne of 1923 provides that citizens of the allied powers shall be treated in accordance with "modern" or "ordinary" international law. Art. 2, 18 AM. J. INT. L. SUPP. 68 (1924). The treaty between the United States and Germany, 1923, provides that nationals of each country shall be treated by the other with "that degree of protection that is required by international law." Art. 1, 20 AM. J. INT. L. SUPP. 5 (1926). See FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 502 et seq. (1938), an excellent summary of the evidence on the minimum standard.

[13] 32 AM. J. INT. L. SUPP. 205 (1938).

the plausible argument that when a foreigner comes to a country he must be prepared for all the local conditions, political and physical, as he is prepared for the weather. He must take what he finds and cannot complain of a defective or corrupt administration any more than nationals can. Seventeen countries, mainly the lesser states, supported this argument, although it was restricted to the remedies available to injured aliens. Twenty-one countries, including all the great powers represented, opposed it as contrary to international law, and on that issue the projected draft of a convention fell to pieces. As in other cases, those who are opposed to prevailing rules of international law avail themselves of a codification conference to endeavor to break down rules of law that conflict with their interests. Sovereignty is more emotionally invoked by the less mature than by older states. These weaker countries often disregard the rule, axiomatic in fact, that a state claiming the privileges of international law must comply with its duties, or deny that there is any duty to establish any degree or standard of organization or perform any normal obligations with respect to aliens. All such requirements are deemed to impose upon them some external standard as a condition of statehood and this they resent. They thus claim that the test of their responsibility for injuries is purely domestic and that if nationals are despoiled aliens will also have to submit. Otherwise they maintain the alien would be to them a source of danger. They wish to be the exclusive judges of their conduct toward all inhabitants, including aliens.

Up to a certain point, we might agree. For nearly all purposes, equality of treatment with nationals would satisfy international law requirements. Most states comply with that vague minimum which has been posited as indispensable to an admissible state. Equality then grants more than the alien or his government can ordinarily ask, for in the absence of treaty there is no rule prohibiting certain discriminations against aliens. But in spite of and beyond equality, there is a margin of fundamental privileges and immunities which cannot be transgressed without responsibility under international law. While it is inaccurate to assume that this collection of "fundamental" rights is claimable by all individuals against any state, they are claimable on the alien's behalf by his own state, as yet the only authorized vindicator of local rights improperly denied; for their observance a state is responsible even if nationals have no redress.

Reasons Why Equality is Insufficient

The doctrine of equality has therefore little or no relation to the minimum which practice has established. If it delimited the international minimum, as it does the local maximum, municipal law would replace international law as the test of international responsibility. International tribunals seek their criteria of responsibility not merely in municipal law but in common experience rooted in the mores of the time. In the nineteenth and early twentieth centuries these were found in constitutions which placed the individual on a high plane of protection in his relations with the state. It is possible that the retrogressions of the twentieth century will create new mores which will disregard the rights of the individual, deny him all protection against the group and possibly even subordinate international law to the sovereign state. That will require something of a revolution in thought and law. But only then will we have reached the stage where the doctrine of equality will have become the final test of state responsibility. Until that time, we are warranted in assuming that the common practice of western civilization still respects the elementary rights which we have come to associate with the modern world and enlightened civilization and that the decisions of international tribunals which reflect these mores are to be deemed law. No single state or even group of states can resign from that law.

The doctrine of absolute equality—more theoretical than actual—is therefore incompatible with the supremacy of international law. The fact is that no state grants absolute equality or is bound to grant it. It may even discriminate between aliens, nationals of different states, e.g., as the United States does through treaty in the matter of the ownership of real property in this country. While states naturally desire a free hand in dealing with all their inhabitants and while it is probably embarrassing to be restrained by treaty or international law in perpetrating excesses, this is one of the conditions of international intercourse. Contrary to the common view, the United States and other strong states probably pay more in damages for breach of international duty than do the smaller states, which are disposed to invoke their abstract sovereignty to escape international responsibility. For example, United States mob violence cases are unfortunately a frequent source of responsibility, and it would seem strange to an American to contend that aliens like nationals must suffer such excesses without redress. When the argument for equality is associated with a refusal to accept the requirement of some normal degree of state organization, it is apparent that it is a demand for escape from international obligations. Even an

admission that treaties have placed some limitations upon this freedom of action would not concede that general international law has any say in the matter.

As a further explanation of why the alien is not bound to submit to exceptional excesses, even if nationals cannot escape, John Bassett Moore in his brief in the *Constancia Sugar* case before the Spanish Treaty Claims Commission remarked that nationals are presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards against oppression.[14]

Yet another powerful reason is the fact that diplomacy, international practice and arbitral decision have established the rule that equality of treatment, while prima facie a fair defense, is not conclusive of international duty and responsibility. Acting Secretary Polk in 1918 was not the first to point this out.[15] In the *Hopkins* case before the United States-Mexico General Claims Commission of 1923 the tribunal concluded that by virtue of their diplomatic and arbitral appeal aliens may on occasion receive "broader and more liberal treatment" than nationals under municipal law.[16] But the court denied that this

[14] In Library of Congress, Briefs and Records, Spanish Treaty Claims Commission, JX238.

[15] "The Government of the United States is firmly of the opinion that the great weight of international law and practice supports the view that every nation has certain minimum duties to perform with regard to the treatment of foreigners, irrespective of its duties to its own citizens, and that in default of such performance, it is the right of the foreign government concerned to enter protest. . . . While the Mexican Government may see fit to confiscate vested property rights of its own citizens, such action is in equity no justification for the confiscation of such rights of American citizens and does not estop the Government of the United States from protesting on behalf of its citizens against confiscation of their property." Mr. Polk, Acting Secretary of State to Ambassador Henry P. Fletcher, December 13, 1918, FOREIGN RELATIONS OF THE UNITED STATES 786-787 (1918) (U. S. Dept. State). See also address by Mr. Root, "The Basis of Protection to Citizens Residing Abroad," 4 PROC. SOC. INT. L. 16 at 21 (1910); also 1 HYDE, INTERNATIONAL LAW 466 (1922); Note of Secretary Hull to Mexico, August 22, 1938, 32 AM. J. INT. L. SUPP. 191 (1938).

[16] "If it be urged that under the provisions of the Treaty of 1923 as construed by this Commission the claimant Hopkins enjoys both rights and remedies against Mexico which it withholds from its own citizens under its municipal laws, the answer is that it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws. The reports of decisions made by arbitral tribunals long prior to the Treaty of 1923 contain many such instances. There is no ground to object that this amounts to a discrimination by a nation against its own citizens in favor of aliens. It is not a question of discrimination, but a question of difference in their respective rights and remedies. The citizens of a nation may enjoy many rights which are withheld from aliens, and,

amounted to a discrimination against a state's own citizens and in favor of aliens. In the *Roberts* case the tribunal remarked:

> "Roberts was accorded the same treatment as that given to all other persons. . . . Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization."[17]

Disregard of the Doctrine of Equality in Most Cases of Denial of Justice

It is only in the matter of substantive law, when the claim is advanced that particular rights, such as the right of property, may not be withdrawn from aliens, that the issue of equality seriously arises to challenge the claim that the international standard has been violated. Mexico in its notes of 1938 referred to its agricultural expropriations as "general and impersonal" in character, affecting "equally all the inhabitants of the country." There were various considerations, historical, legal, and conventional, which militated against the uncompensated expropriation of American-owned agricultural lands, but in principle it is always difficult, though not impossible, to contend that a change in substantive national policy violates common international law. Such questions cannot be answered in the abstract. Few countries would concede that their substantive law or administration falls below a civilized standard.

The bulk of the cases arise out of a denial of justice in the matter of procedure, some gross deficiency in the vindication and enforcement

conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens." Hopkins (U. S.) v. Mexico, Mar. 21, 1926, 1 OPINIONS OF COMMISSIONERS, GENERAL CLAIMS COMMISSION (U. S. and Mexico, 1923), 42 at 50-51 (1927) [hereinafter cited Op. Comm.]. See also Neer (U. S.) v. Mexico, 1 OP. COMM. 71 (Oct. 15, 1926); Faulkner (U. S.) v. Mexico, ibid., 86 (Nov. 2, 1926).

[17] Roberts (U. S.) v. Mexico, 1 OP. COMM. 100 at 105 (Nov. 2, 1926). In its case against Belgium before the Permanent Court of International Justice, known as the Oscar Chinn case,—HAGUE, PERM. CT. INT. J., SER. C, No. 75, p. 41 et seq. (Dec. 12, 1934)—the British Government adduced the Sicilian sulphur monopoly case, the Uruguayan and Italian insurance monopolies of 1911, and the well-known collection of opinions solicited by Edouard Clunet on the propriety of the Italian monopoly, practically all of which support the principle that the mere equality of treatment of national and alien will not be sufficient to satisfy the international standard.

of alien rights. A corrupt administration of justice, judicial or administrative, which is now more common than in the nineteenth century, gives rise to responsibility, regardless of the question whether nationals must submit to the same corruption. A perversion of justice by judges carrying out a national policy and not applying impartially the rules of law, is especially reprehensible and excuses the resort to or exhaustion of local remedies. Bad faith cannot be tested by national standards; it invites a more general criterion which international tribunals have not hesitated to invoke.[18] The more extreme denials of justice will be judged international delinquencies without reference to the question of equality.[19]

In order to limit the international responsibility of the state, several attempts have been made by Latin American countries to confine the term denial of justice by legislative definition to such matters as the

[18] See address by Root, "The Basis of Protection to Citizens Residing Abroad," 4 PROC. AM. SOC. INT. L. 16 at 25 (1910): "in many countries the courts are not independent; the judges are removable at will; they are not superior, as they ought to be, to local prejudices and passions, and their organization does not afford to the foreigner the same degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world." Accord: DUNN, THE PROTECTION OF NATIONALS 119 (1932); Kuhn, "Protection of Nationals Charged with Crime Abroad," 31 AM. J. INT. L. 94 at 96 (1937); BRIERLY, THE LAW OF NATIONS, 2d ed., 173 (1936). See also Chattin (U. S.) v. Mexico, 1 OP. COMM. 422 at 441 (July 23, 1927) (Nielsen's opinion); Roberts (U. S.) v. Mexico, ibid., 100 at 105 (Nov. 2, 1926).

[19] Neer (U. S.) v. Mexico, 1 OP. COMM. 71 at 73 (Oct. 15, 1926): "the propriety of governmental acts should be put to the test of international standards." The tribunal added: "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." See also Garcia (Mexico) v. United States, ibid., 163 at 169 (Dec. 3, 1926); Roberts (U. S.) v. Mexico, ibid., 100 at 105 (Nov. 12, 1926); Fabiani (France) v. Venezuela, Dec. 30, 1896, 5 MOORE, ARBITRATIONS 4878 at 4893 (1898). See also cases discussed in FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 543 et seq. (1938).

HUBER, RÉCLAMATIONS BRITANNIQUES DANS LA ZONE ESPAGNOLE DU MOROC 54 (1925), after denying liability for the acts of individuals, added that "restriction thus attached to the right of States to intervene for the protection of their citizens assumes that the general security in the country of residence does not fall below a certain level and that at least their protection by the courts does not become purely illusory."

In several cases before the General Claims Commission, United States and Mexico, the facts disclosed a maladministration of justice "below the standard prescribed by international law." Galvan (Mexico) v. United States, 1 OP. COMM. 408 at 410 (July 21, 1927); Swinney (U. S.) v. Mexico, ibid., 131 (Nov. 16, 1926). See numerous quotations in FREEMAN, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 560-562 (1938), from the decisions of other tribunals.

refusal of access to the courts and the discriminatory refusal to exercise jurisdiction such as nationals enjoy, and to overlook as immaterial local bias the nature and integrity of the judicial machinery and its conformity with elementary principles of justice. This was the substance of the Guerrero Report to the Codification Conference of 1930.[20] International tribunals and Foreign Offices have not consented to such limitations of international responsibility.

The Standard of Civilized Justice

It is thus apparent[21] that both in its substantive and procedural aspects international law, as evidenced by diplomatic practice and arbitral decision, has established the existence of an international minimum stand-

[20] Borchard, "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," 23 AM. J. INT. L. SPECIAL SUPP. (Part II) 175, 219 (1929); Guerrero, "Report of Subcommittee," Annex to Questionnaire No. 4, L. OF N. 1927. V (C. 196.M.70), p. 92 at 100; Borchard, "Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners," 20 AM. J. INT. L. 738 (1926).

[21] Beside the cases referred to, see the report of the international conference at Paris on the treatment of aliens, 25 REVUE DE DROIT INTERNATIONAL PRIVÉ 218 (1930): "Without doubt it is recognized today in all civilized states that the treatment of aliens is subject to a certain standard of international law whose violation may give rise to diplomatic action of governments." Also the following publicists: Scelle, in 1 REVUE DE DROIT INTERNATIONAL (Lapradelle) 1116 (1927): "The Permanent Court of International Justice has held that aliens have the right to a treatment better than nationals whenever nationals are treated contrary to [international] common law." Kaufmann, "Der ungarisch-rumänische Streit über die rumänische Agrarreform vor dem Völkerbundsrate," [1927] ZEITSCHRIFT FÜR OSTRECHT 1243 at 1260, and in his brief before the Permanent Court, HAGUE, PERM. CT. INT. J., SER. C., No. 11, 343 at 412 (1926): "Whenever internal law with respect to aliens is found below the requirements of the international standard, notably if there is a denial of justice, the alien has even a right to treatment superior to that which internal law accords nationals." As put by STEINBACH, UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT 80 (1931), the state only then meets the requirements of international law in granting equality to nationals and aliens when the treatment of nationals corresponds to the measures which international law requires. In support of this view, he cites an article by Barthélemy, 2 CAUSES CELEBRES 314 (1929); also Anzilotti, Richter and Schmid.

Other authors who sustain these views are: 1 HYDE, INTERNATIONAL LAW, §§ 266-267 (1922); Dunn, "International Law and Private Property Rights," 28 COL. L. REV. 166 at 175 (1928); 1 ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO 335-336 (1933); 8 LAPRADELLE, RÉPERTOIRE DE DROIT INTERNATIONAL, "Etranger," (Basdevant), ¶¶ 7-19, 303 et seq. (1930); 1 MÖLLER, INTERNATIONAL LAW IN PEACE AND WAR, translated from Danish by H. M. Pratt, 133, 148 (1931); Witenberg, "La protection de la propriété immobilière des étrangers," 55 J. DU DROIT INTERNATIONAL (Clunet) 566 (1928); HALL, INTERNATIONAL LAW, 8th ed., by Higgins, 59-60 (1924); Leibholz, "Das Verbot der Willkür und des Ermessensmissbrauches in Völkerrechtlichten Verkehr der Statten," 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, pt. 1, p. 77 at 97-99 (1929);

ard to which all civilized states are required to conform under penalty of responsibility. Even Latin American authors sustain this view.[22]

But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means gives us a definition of its content. Frequent reference to it may easily give rise

see also III HATSCHEK UND STRUPP, WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 821 (1924); STRUPP, DAS VÖLKERRECHTLICHE DELIKT 118 (1920) (3 HANDBUCH DES VÖLKERRECHTS, pt. 3); TRIEPEL, VÖLKERRECHT UND LANDESRECHT 330 (1907). CAVAGLIERI, CORSO DI DIRITTO INTERNATIONALE, 3d ed., 334 (1934); I FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, part 1, 928 (1922); DECENCIÈRE-FERRANDIÈRE, LA RESPONSABILITÉ INTERNATIONALE DES ETATS 57 (1925); BRIERLY, THE LAW OF NATIONS, 2d ed., 172 (1936).

[22] ALVAREZ, ESPOSÉ DE MOTIFS ET DÉCLARATION DES GRANDS PRINCIPES DU DROIT INTERNATIONAL MODERNE 52, 54-55 (1936): "In no case, may aliens claim more rights than nationals, unless the country in which they reside does not assure to its inhabitants, in permanent fashion, the minimum of rights to which Article 25(b) and Articles 28 and 29 refer" (Article 30). Article 25(b) provides that states must maintain a political and legal organization which permits all persons residing on their territory to exercise their rights and enjoy advantages which the sentiment of international justice to-day imposes on all civilized people. Article 28 provides that every state must assure to every individual on its territory the full and entire protection of the right to life, liberty, and property without distinction of nationality, race, language, or religion. Article 29 provides for the free exercise of all faiths, etc.

While these provisions may to some extent be deemed aspirations, they indicate that the author approves the minimum standard. See also the AMERICAN INSTITUTE OF INTERNATIONAL LAW, CODIFICATION OF AMERICAN INTERNATIONAL LAW, Projects 15 and 16 (1925), which establish that each Government is obliged to maintain "internal order and governmental stability indispensable to compliance with its international obligations," probably an excessive requirement, and that they only are responsible when they have not "maintained order in the interior" or have been "negligent in the suppression of acts which disturb that order," or have omitted to take "reasonable precautions to avoid" injuries to aliens. In "Diplomatic Protection" (project no. 16, ibid.), the American Institute established that aliens cannot claim more "obligations and responsibility" than are conceded to nationals in "the constitution, laws and treaties in force." But diplomatic protection is permitted when there has been a "denial of justice by those authorities, undue delay or violation of the principles of international law."

In 1933, the American Institute submitted to the Montevideo Conference the following article: "The jurisdiction of States, within limits of the national territory, extends to all the inhabitants. The inhabitants, nationals and aliens, enjoy a single protection as the national laws and authorities provide. Aliens cannot demand rights different or more extended than the rights of nationals. [This] equal protection must assure nationals and aliens the minimum [of rights] exacted by international law." See also I RUIZ MORENO, LECCIONES DE DERECHO INTERNATIONAL PUBLICO 238, 260 (1934); I ACCIOLY, TRATADO DE DIREITO INTERNACIONAL PUBLICO 268 (1933).

MAURTUA and SCOTT, RESPONSIBILITY OF STATES, 45 (1930): "There is a minimum juridical standard imposed by human civilization, without which neither the existence of the State as a sovereign entity nor that of the international community could be conceived." I ULLOA, DERECHO INTERNATIONAL PUBLICO, 2d ed., 224, 243 (1938).

to the erroneous inference that it is definite and definable,[23] whereas the variability of time, place and circumstance make it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it. Referring to its procedural aspects, Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."[24]

While the standard is mild, flexible and variable according to circumstances, some attempt has been made to collate out of experience a number of minimum rights which all states claiming membership in the family of nations may be required to accord. While not identical with the unofficial "rights of man" which the Institute of International Law hoped to exact from each state, the substantive content of the standard nevertheless is associated with certain elementary privileges of human existence which every state admitting aliens may be deemed to extend—mainly rights to life and the elementary liberties connected with the earning of a living. How far these privileges may be impaired or curtailed in the public interest must be determined from case to case, and equality of sacrifice with nationals is naturally an important test. As a rule, unjustified discrimination will be found an ingredient in sustainable claims.[25]

In recent years the question whether the protection of private property against confiscation is included within the minimum standard has

[23] Cf. BATY, THE CANONS OF INTERNATIONAL LAW 133 (1930).

[24] Root, "The Basis of Protection to Citizens Residing Abroad," 4 PROC. AM. SOC. INT. L. 16 at 21 (1910), quoted in 1 HYDE, INTERNATIONAL LAW 466, note 2 (1922).

[25] In 1929 a conference was held in Paris under the auspices of the League of Nations to endeavor to work out a convention on the treatment of foreigners. Preparatory Documents, L. of N. 1929. II (C. I. T. E. 1. C. 36.M.21); Draft Convention on the Treatment of Foreigners, L. OF N. 1928. II (C. 174.M.53). The Convention broke down largely because many states declined to commit themselves to concede equality to foreigners. Cutler, "The Treatment of Foreigners," 27 AM. J. INT. L. 225 (1933); Kuhn, "The International Conference on the Treatment of Foreigners," 24 AM. J. INT. L. 570 (1930). Interestingly, the Hague Codification Conference of 1930 on responsibility of states broke down largely because the majority of states refused to admit that equality of treatment satisfied in all cases the international standard.

given rise to much debate.[26] Mexico openly asserted in its notes to the United States of August 3 and September 3, 1938, that there is no international obligation to make compensation for the expropriation of property, "general and impersonal" in character, provided a social purpose is served, and that its only duty in the premises arose under Mexican law. In the light of the recent invasions of the institution of private property, in Russia, in the agrarian reforms of eastern European countries, in article 297 of the Treaty of Versailles, and in the many extensions of the police power, a few publicists, notably Sir John Fischer Williams, seem to support the Mexican view.[27] The great majority, however, rely on modern constitutions and treaties which still respect private property, permitting direct expropriation only against compensation, and regard the instances cited as aberrations not impairing the general principle.[28] Perhaps it is dangerous to rely on any general principle for decision of a concrete case, but it can hardly be maintained that private property has lost all legal protection and that the state can confiscate at its pleasure. But how far it may go will have

[26] See THE MEXICAN EXPROPRIATIONS IN INTERNATIONAL LAW, memorandum filed in Department of State, October 11, 1938, pp. 103-130.

[27] Williams, "International Law and the Property of Aliens," 9 BRITISH YEAR BOOK OF INTERNATIONAL LAW 1 (1928); MARBURG, DER RUMÄNISCH-UNGARISCHE OPTANTENSTREIT VOR DEM GEMISCHTEN SCHIEDSGERICHT UND DEM VÖLKERBUND (1928); also in 3 HATSCHEK UND STRUPP, WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE 820 (1929). Cf. 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., by Lauterpacht, 283-285 (1937) (partial compensation necessary).

[28] Chorzów case, HAGUE PERM. CT. INT. J. SER. A, No. 7, pp. 21-22 (May 25, 1926), immunity from confiscation deemed a part of the "accepted principles of international law." Peter Pázmány University (Hungary) v. Czechoslovakia, HAGUE PERM. CT. INT. J., SER. A/B, No. 61 (Dec. 15, 1933). Judge Robert Fazy (Switzerland) in the case between Germany and Rumania, September 27, 1928, held that the "respect of private property and vested rights of aliens is uncontestably a part of the general principles admitted by the law of nations." 3 REVUE DE DROIT INTERNATIONAL (Lapradelle) 558 (1929). See British Observations in Portuguese expropriations of religious properties, quoted in Fachiri, "Expropriation and International Law," 6 BRITISH YEAR BOOK OF INTERNATIONAL LAW 159 at 168 (1925). Also Fachiri, "International Law and the Property of Aliens," 10 BRITISH YEAR BOOK OF INTERNATIONAL LAW 32 at 38 (1929); Shufeldt (U. S.) v. Guatemala, 1931, U. S. DEPT. STATE, ARBITRATION SER. No. 3 (1932); STEINBACH, UNTERSUCHUNGEN ZUM INTERNATIONALEN FREMDENRECHT 90, note (1931); 34 REP. INT. L. ASSN. 248 (1926); Verdross, "Règles Générales du Droit International de la Paix," 30 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 271 at 442 (1929); Verdross, "Les Règles Internationales Concernant le Traitement des Etrangers," 37 ibid. 327 at 330, 359 (1931); Kaeckenbeeck, "The Protection of Vested Rights in International Law," 17 BRITISH YEAR BOOK OF INTERNATIONAL LAW 16 (1936).

to be determined from case to case. The doctrine of vested rights depends on so many variables that prediction is hazardous.[29]

On the procedural side, we are perhaps in less doubt of the content of the standard, although we must still be satisfied with general principles. Fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control, seem essentials of international due process. While the details of procedure necessarily vary considerably from country to country, certain essential elements of a fair trial and objective justice are required of all systems. It is probably less difficult to apply than to define these principles, and we have in their application the aid of innumerable precedents from international practice. In spite of the legislative effort strictly to narrow the conception of denial of justice and the privilege of diplomatic interposition, few foreign countries have been willing to abandon their nationals to the arbitrariness of corrupt courts or administrative bodies.

Policy

It is well that this is so. Notwithstanding the determined effort of several countries to make equality the final test of international responsibility, it is doubtful whether even the Montevideo Convention will be given such an interpretation. For some Latin American countries this endeavor is part of the general campaign to get rid of diplomatic protection. It might be called an exemplification of the Calvo Clause; a Mexican author has recently baptized it as the Cardenas Doctrine.[30] What it means is a repudiation of international law, a claim for the supremacy of local law over international law, a denial that local law and arbitrariness may be limited by international requirements. Its assertion does not raise the prestige of the countries who advance it, but on the contrary creates suspicion. As already observed, few if any countries are now the victims of unjustified diplomatic interposition on behalf of foreign claimants; indeed, much is now tolerated which even ten years ago would have elicited forceful action. Countries that seek to escape international responsibility by maintaining that they have no or few obligations with respect to aliens neither win respect for their sovereignty nor awaken that confidence which is reflected in

[29] Cf. the excellent article of Dunn, "International Law and Private Property Rights," 28 COL. L. REV. 166 (1928).

[30] MENDOZA, LA DOCTRINA CARDENAS 78 (1939). It is partly expressed as follows: The national who migrates abroad [the alien] permanently or temporarily must accept the local law as if he were a national and must abandon any rights attached to alienage, including diplomatic protection.

foreign investment. Strong powers, able to make demands for unlimited sovereignty, refrain from so doing and submit frequently to arbitration and the test of international law. With the current general disapproval of the use of force in the collection of claims, there is no reason why weaker states cannot entrust their complaints and defenses to the test of law. The international standard restricts their freedom but very slightly. A voluntary conformity to the standard and to the rules of international law and practice which it embodies would be more profitable in the long run than the ill-will and lack of confidence aroused by unsuccessful revolt against the standard and by a professed freedom from the restraints on arbitrariness hitherto associated with international law.