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# Responsibility of States for Injury to Aliens

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# **Responsibility of States for Injury to Aliens**

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## RESEARCH METHODOLOGY

### **AIM AND OBJECTIVE:**

This paper aims to analyze the current law on the topic of State Responsibility of the Injury to Aliens. The objective of the paper is to give a comprehensive view of the law and also arrive at a conclusion that the law on State responsibility in relation to injuries to aliens, as a whole, is difficult to be brought under the umbrella of Customary International Law and hence any attempts to codify this law into a treaty or Convention will be inconsistent.

### **SCOPE AND LIMITATIONS:**

This paper will deal with the major themes of the law of State Responsibility for Injury to Aliens and will try to address the major issues faced by States in this regard. The topics covered in this paper are not exhaustive and the author acknowledges that due to paucity of space, word limit and time, the vast area cannot be covered in this paper. The author also acknowledges that the law of State responsibility is predominantly seen in judicial pronouncements and no attempts of codification have been made by international organizations. Also, that this law is ridden with contradictions of standards of treatment and practices by various states.

### **RESEARCH HYPOTHESIS:**

On lines of codification of the general law of State Responsibility by the International law Commission, the law of State Responsibility for Injury to Aliens has achieved status of customary international law along with widespread practice and hence can be codified and transformed into a treaty.

### **RESEARCH QUESTIONS:**

1. How has the law of State Responsibility for Injury to Aliens developed with time?
2. What are the different categories of State Responsibility for Injury to Aliens?
3. Is there is an International Minimum Standard for treatment of Aliens?
4. Does the National Treatment doctrine contradict the International Minimum Standard and does this contradiction cause an ambiguity about the Law on State Responsibility for Injury to Aliens?
5. Can there be a consistent practice on Nationalization or Expropriation of property of Aliens?

6. What are the mechanisms of redress available to Aliens when they have suffered injury by a foreign State? Is this mechanism a widely accepted state practice?
7. How are disputes settled on an international scale when an Alien is affected?
8. Is the law of State responsibility consistent enough for purposes of codification (Research Hypothesis)?

### **CHAPTERIZATION:**

1. *Introduction:* This chapter gives an idea as to what State Responsibility comprises of and what would constitute a wrong under international law for which responsibility would arise. Also, the State responsibility vis-à-vis alien is considered with a small history and also with categories of such injuries to Aliens.
2. *Denial of Justice:* This section examines the various aspects of denial of justice in international law, the problems of an international minimum standard of justice and due diligence factors in the process of justice when State responsibility is incurred on account of injury to an Alien. Also whether the national treatment doctrine and the international minimum standard doctrine stand their ground is addressed.
3. *Expropriation of Property of Aliens:* This section deals with the issues of expropriation or nationalization of property of Aliens in foreign country by the foreign government. Also, what kinds of expropriations are lawful and unlawful have been considered. The issue whether Compensation for the expropriated property should comply with any international standard and what is the kind of reparation that must be made in terms of compensation.
4. *Settlement of Disputes:* In this part, the entire issue of raising an international claim and how local remedies must be exhausted before approaching any international body is considered. The problem of waiver of a right to raise a claim is also considered in light of the Calvo Clause.
5. *Conclusion:* The Conclusion basically contains the answers to all the research questions raised in the research paper and whether the Hypothesis Questions stands ground or not is addressed.

### **CITATION STYLE:**

The style of citation followed is the Modern Language Association (MLA) style. The citations are footnoted and not compiled as a Bibliography.

*Examples:*

**Journal- Author. "Title of Article." Volume number Title of Journal (Year): Page(s).**

Davis, William D., Thomas Cleary, Michelle Donnelly, and Samuel Hellerman. "Using Sensor Signals to Analyze Fires." 39 Fire Technology (2003): 295-308.

**Book- Author. Title of Book. City of Publication: Publisher, Year.**

Brinkley, Alan. The Unfinished Nation. New York: Knopf, 1993.

## INTRODUCTION

**The Concept of State Responsibility:** After decades of work on attempts to codify a law for State responsibility, the International Law Commission (hereinafter “ILC”) finally adopted the Draft Articles in 2001. These will remain as soft law, whose legal significance will derive only from whatever authority they possess as evidence of customary law. Some authors have observed that a convention could not have achieved any more than this.<sup>1</sup>

Once a state acquires statehood in International Law, it incurs obligations associated with its international status. Rapporteur Huber in the *Spanish Zone of Morocco Claims Case*,<sup>2</sup> held that: ‘responsibility is a necessary corollary of a right. All rights of an international character involve international responsibility.’ When the state breaches these rights and obligations it acquires, it commits an ‘internationally wrongful act’.<sup>3</sup> The State is required to make reparations for its international wrongdoing. This view was reflected by the Permanent Court of International Justice (hereinafter “PCIJ”) in *Case Concerning the Factory at Chorzow*.<sup>4</sup> A State could thus breach an obligation that affects just one State or the entire community of nations.<sup>5</sup>

Three fundamental elements trigger State responsibility: (1) the existence of a legal obligation recognized by International Law, (2) an act or omission that violates such an obligation and (3) some loss or articulable damage caused by the breach of the obligation.<sup>6</sup> The 2001 ILC draft corroborates this view. Article 1 of the 2001 ILC draft provides that every internationally wrongful act of a State entails the international responsibility of that State. Article 2 adds that “there is an internationally wrongful act of a State when the conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of that State.”

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<sup>1</sup> Koskenniemi, (2001) 72 British Yearbook of International Law 341. For a larger overview of the State Responsibility work by the ILC, see Rosenstock, Robert. "The ILC and State Responsibility." American Journal of International Law (2002): 792-797.

<sup>2</sup> (1925) 2 RIAA 615.

<sup>3</sup> M. Dupuy. “The International Law of State Responsibility: Revolution or Evolution?.” Michigan Journal of International Law, 1989:105.

<sup>4</sup> (1928) PCIJ ser. A, No. 17, p. 29.

<sup>5</sup> William R. Slomanson, Fundamental Perspectives on International Law, Thomson West, 2003.

<sup>6</sup> A Tanzi, “Is Damage a Distinct Condition for the Existence of an internationally Wrongful Act?” in M. Spinedi & B. Simma (Eds.), United Nations Codification of State Responsibility, Oceana, 1987.

The Rainbow Warriors arbitration affirmed that “the legal consequences of a breach of treaty including the determination of the circumstances that may exclude wrongfulness....and the appropriate remedies for breach, are the subjects that belong to the customary law of state responsibility.”<sup>7</sup>

**Aliens and State Responsibility:** Historically, state responsibility has been developing on the basis of cases concerning the unlawful treatment of aliens (or foreign nationals, corporations etc.) and the modern law of State responsibility revolves around these aspects.

Early commentators had practical reasons to focus on this category of State responsibility. Many nationals of one State – who have lied, traveled, or worked in another State – have endured abuse and discrimination throughout history.<sup>8</sup> A leading study has noted that since ancient times foreigners have been regarded with suspicion, if not fear, either due to their differences from the native people so much so that the Romans refused aliens the benefits of civil law (*jus civile*), thirteenth-century England limited their recourse to ordinary courts of justice (rather than all courts), and Imperial Spain denied them trading rights in the New World.<sup>9</sup> The law of State responsibility for injury to aliens began almost two centuries ago when one of the foremost commentators of that time, Emerich de Vattel wrote: “whoever ill-treats a foreign citizen injures the State, which must protect the citizen.”<sup>10</sup>

This branch of State responsibility relied on the internal tort law applied by many States. Tort law governs civil wrongs by individuals for unreasonable conduct that harms other individuals. If someone takes the property of another without justification, he is liable to compensate the other for such an infraction. This was the view adopted by many writers and jurists when considering wrongful act of a State for injuries to aliens.

A State is therefore under an international obligation, as discussed earlier, not to ill-treat any foreign nationals present in its territory and any violation of this obligation will incur international responsibility. This is one of the commonest forms of state responsibility that

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<sup>7</sup> (1991) 82 ILR 499, 551.

<sup>8</sup> Slomanson, *supra* note 5 at 97.

<sup>9</sup> F. Dawson & I. Head, “National Tribunals and the Rights of Aliens,” *c.f.* Slomanson, *supra* note 8.

<sup>10</sup> Emerich de Vattel, The Law of Nations, Oceana, 1964 (translated from the original 1758 edition).

arises in international law today.<sup>11</sup> The law of State Responsibility for Injury to Aliens has not yet been codified till date however several attempts have been made.<sup>12</sup>

Summarily, the entire law of State Responsibility for Injury to Aliens is a matter of existence of correlative rights and duties. The State has a right to expect that the alien will follow its local laws and the State has an obligation to protect the life and property of this alien under the various treaties and conventions of international law. Failure to observe any of these rights and duties entails and gives rise to international responsibility where both the parties are entitled to remedies which may be utilized through the various channels available in international law beginning with exhaustion of local remedies.<sup>13</sup>

William Slomanson categorizes the concept of State Responsibility for Injury to Aliens according to its conduct and customary violations:

- (1) Denial of Justice including wrongful arrest or detention and lack of due diligence;
- (2) Confiscation of Property or Expropriation; and
- (3) Deprivation of Livelihood.<sup>14</sup>

This paper will deal with the issues of Denial of Justice in relation to the existence of an International Minimum Standard for treatment of aliens, the problems of Expropriation and when it is deemed to be lawful or unlawful, finally with dispute settlement and the remedies available under international law for breach of obligations in relation to the procedural aspects of exhaustion of local remedies.

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<sup>11</sup> M. Dixon, International Law, OUP, 2007.

<sup>12</sup> **1929 draft**: "Responsibility of States", 23 American Journal of International Law, Special Supplement, 1929:131; **1953 draft**: G.A.O.R. (8th session) Supp (No. 17) at 52, UN Doc. A/2630. One of the most extensive works on attempting to codify a law on this matter was carried out by two Harvard Professors in **1961**: L. Sohn & M. Baxter, Draft Convention on the International Responsibility of States for Injury to Aliens, 55 American Journal of International Law, 1961: 545, 548.

<sup>13</sup> Hackworth, Digest of International Law, Vol. 5, 1943; *c.f.* M. Dixon & R. McCorquodale, Cases and Materials on International Law, Lawman India, 1995.

<sup>14</sup> Slomanson, *supra* note 8.

## CHAPTER 1

### DENIAL OF JUSTICE

Mistreatment of aliens giving rise to international responsibility can occur in a number of ways. Denial of Justice is one such mistreatment. When a foreign national is denied due process of law in respect of a legal dispute arising in the State, whether civil or criminal, he is said to be denied justice.<sup>15</sup> This is also applicable to a State's discriminatory application of its domestic laws to an alien where the standard procedures that apply to a citizen are withheld from an alien.<sup>16</sup> It is regarded as these deficiencies are basically on the part of the organs of the host State, principally concerning administration of justice.<sup>17</sup>

The best guide to the meaning of this term is the Harvard Research draft of 1929:

“Article 9: A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”<sup>18</sup>

The most controverted issue is the extent to which erroneous decisions may constitute denial of justice. One view suggests that an error of law accompanied by a discriminatory intention is a breach of international standard.<sup>19</sup> It is well established that the decision of a lower court open to challenge does not constitute a denial of justice and that the claimant must pursue remedies available in the higher judiciary.<sup>20</sup>

However there is no uniformity in practice of this form of injury. In Latin America, a denial of justice can only occur if the State has completely refused access to its courts or its courts will not take necessary steps to render a decision. If there is some access to some tribunal that will ultimately decide the particular matter, then a foreign citizen cannot complain about the

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<sup>15</sup> M. Dixon, *supra* note 11 at 255.

<sup>16</sup> Slomanson, *supra* note 5 at 199.

<sup>17</sup> Ian Brownlie, *Principles of Public International Law*, OUP, 2008.

<sup>18</sup> 1929 draft, *supra* note 12. This definition captures, at the least, the very essence of the term ‘denial of justice’ and casts it in very broad practical terms for wider application.

<sup>19</sup> See Adede, (1976) 14 *Canadian Yearbook of International Law*, 91.

<sup>20</sup> *Loewen v. United States of America*, 128 ILR 334, 393-7.

quality of justice even though different procedures apply in his or her home State.<sup>21</sup> Most nations adopt a broader interpretation of the term denial of justice. A State can be responsible for injuring an alien when its tribunals do not provide adequate time or legal representation to prepare a defense. If local citizens are allowed to seek legal assistance, then it would just be denial of justice to withhold that right just because the prisoner is a foreign citizen.<sup>22</sup>

It should be noted that what constitutes a 'denial of justice' may well depend on the appropriate standard of conduct which international law requires a State to adopt in its dealings with foreign nationals.

### **THE INTERNATIONAL MINIMUM STANDARD PARADOX**

Whether or not a State is internationally responsible for the way it treats foreigners depends on the standard of treatment which international law obliges that State to adopt. It is only when the State falls below this standard that it becomes internationally responsible.<sup>23</sup> Unfortunately, there is considerable debate over the right standard of treatment which international law requires. Generally speaking the two opposing views are that of a "national treatment" standard mainly followed by developing nations and an "international minimum standard"<sup>24</sup> (hereinafter "IMS") approach mainly followed by developed nations.<sup>25</sup>

**National Treatment:** Originally supported by Latin American countries, this view is favored today primarily by new and developing countries.<sup>26</sup> According to the national treatment standard, the State is responsible only if it fails to accord foreign nationals the same standard as accorded to its own nationals.<sup>27</sup> The disadvantage of the national treatment standard is that a state could subject an alien to inhuman treatment and justify such treatment on grounds that nationals are treated the same way.<sup>28</sup> But, international arbitration tribunals have denied that a

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<sup>21</sup> I. Puente, "The Concept of 'Denial of Justice' in Latin America", 43 Michigan Law Review, 1944:383.

<sup>22</sup> O. Lissitzyn, "The Meaning of the Term 'Denial of Justice' in International Law", 30 American Journal of International Law, 1936:632.

<sup>23</sup> M. Dixon, *supra* note 11 at 256.

<sup>24</sup> See Borchard, Edwin. "The "Minimum Standard" of the Treatment of Aliens." 38 Michigan Law Review (1940): 445-461.

<sup>25</sup> D J Harris, Cases and Materials on International Law, Thomson Sweet & Maxwell, 2004.

<sup>26</sup> Rebecca M. M. Wallace, International Law, Thomson Sweet & Maxwell, 2005. See also, 1933 Montevideo Inter-American Convention on Rights and Duties of States.

<sup>27</sup> M Dixon, *supra* note 23.

<sup>28</sup> R. Wallace, *supra* note 25 at 199.

state can exonerate itself by pleading that nationals are treated in the same way in the extent that the treatment of non-nationals falls short of the international minimum standard.<sup>29</sup>

**International Minimum Standard:** Supported by usually developed nations, this means that every State must treat foreigners within its territory by reference to a minimum international standard, irrespective of how national law allows the State to treat its own citizens. This treatment must conform to an international norm. The standard is not satisfied by pleading national law provisions unless they match up to the international minimum standard.<sup>30</sup>

What is probably the most definitive and equally broad statement defining international minimum standard was made by US Secretary of State Elihu Root in 1910:

“Each country is bound to give to the nationals of another country in its territory in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is [however] 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. The ....system of law and administration shall conform to this general standard. If any country’s system of law and administration does not conform to that standard, although the people of the country may be content to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment of its citizens.”<sup>31</sup>

The minimum standard test has been applied in a number of cases. In *Neer Claim*,<sup>32</sup> the US claimed that Mexico had failed to exercise due diligence in finding and prosecuting the murderer of a US national. The Court indicated that that the minimum standard will have to be applied and expressed as follows:

“...the propriety of governmental acts should be put to the test of international standards ....the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful 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.”

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<sup>29</sup> *Roberts v. United Mexican States*, (1926) 4 RIAA 77.

<sup>30</sup> M. Dixon, *supra* note 23.

<sup>31</sup> Elihu Root, “The Basis of Protection to Citizens Residing Abroad,” 4 Proceedings of the American Society of International Law, 1910: 20-21.

<sup>32</sup> *U.S. v. Mexico*, (1926) 4 RIAA 60.

In the *Chevreau*<sup>33</sup> case, France claimed on behalf of a French national in respect of his arrest and treatment in detention by Great Britain, the arbitrator said: “the detained man must be treated in a manner fitting his station, and which conforms to the standard habitually practiced among civilized nations.”<sup>34</sup> Another important case is the *Roberts*<sup>35</sup> arbitration in which Harry Roberts, a US citizen was arbitrarily and illegally arrested and held in jail for nineteen months without a hearing in intolerable conditions of incarceration. Holding that the treatment meted out to Roberts was cruel and inhumane, the Court said that equality is not the ultimate test of the propriety of the acts of authorities in the light of international law but that the test is, broadly speaking, whether aliens are treated in accordance with ordinary (minimum) standards of civilization.

In comparison, generally, proponents of national treatment argue that nationals of other states entering their territory must be prepared to take the host state as they find it accepting that responsibility will arise only in the case of discrimination against the foreigner. On the other hand, national treatment pays no regard to such matters as fundamental human rights and it is hardly credible that a State can escape international responsibility for, say, brutal torture of foreigners simply because national law allows it to abuse its own citizens.<sup>36</sup>

One approach to overcome this ambiguity is that neither ‘standard’ should be applied universally but the standard of care should vary with the type of application in question.<sup>37</sup>

### **LACK OF DUE DILIGENCE**

A State’s failure to exercise due diligence to protect an alien is wrongful if the unpunished act of a private individual is a crime under the laws of that State. Responsibility then arises if that State fails to apprehend or control the individual who has committed the crime against the foreign citizens.<sup>38</sup> A case in point is *United States Diplomatic and Consular Staff in Tehran Case (US v. Iran)*<sup>39</sup> where a group of Iranian citizens took a US Embassy hostage along with the Embassy staff. Iran incurred State responsibility for failing to take any action to stop the

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<sup>33</sup> *France v. Great Britain*, (1931) 2 RIAA 1113. English translation in (1933) 27 *AJIL* 153.

<sup>34</sup> *Id* at 160.

<sup>35</sup> *Supra* note 29.

<sup>36</sup> M. Dixon, *supra* note 11 at 257. See also, Brownlie, *supra* note 17 at 526.

<sup>37</sup> *Id.*

<sup>38</sup> Slomanson, *supra* note 5 at 202.

<sup>39</sup> 1980 ICJ Rep 3.

crowds from stampeding the persons and property of these foreign citizens. In a recent case, the international arbitration tribunal held that “due diligence” obligation under the minimum standard is a part of customary international law.<sup>40</sup>

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<sup>40</sup> *Asian Agricultural Products Ltd. case*, (1990) 30 ILM 577, 608.

## CHAPTER 2

### EXPROPRIATION OF PROPERTY OF ALIENS

Expropriation is the compulsory taking of private property by the State. Initially, the definition of property was said to include all moveable and immoveable property, whether tangible or intangible, including industrial, literary and artistic property, as well as the rights and interests in any property.<sup>41</sup> Expropriation extends beyond the actual physical taking of property to include any action which unreasonably interferes with “the use, enjoyment or disposal of property....”<sup>42</sup>.

A nation possesses an inherent right to nationalize or expropriate property belonging to foreign nationals and local citizens.<sup>43</sup> A succinct view on this is:

Public International law regards nationalization as a lawful exercise of state power. This is because each state, being possessed of sovereignty, naturally has the right within its own territory to prescribe whatever social and economic system it chooses to establish. Speaking more concretely, every State has the exclusive right to regulate....conditions of acquisition, loss and contents of ownership. Consequently, when one approaches this question from the standpoint of the principle of state sovereignty, one must recognize that the states enjoy their right to adopt nationalization measures. Nationalization belongs to matters of national jurisdiction and therefore....neither the United Nations nor other states have right to intervene when another country nationalizes the property.<sup>44</sup>

In *Texaco Overseas Petroleum Company v. Libyan Arabian Republic*,<sup>45</sup> it was held that:

“The right of a State to nationalize is unquestionable today. It results from international customary law, established as a result of general practices considered by the international community as being the law. The exercise of national sovereignty to nationalize is regarded as an expression of the State’s territorial sovereignty. Territorial sovereignty confers upon the State an exclusive competence to organize as it wished the economic structures of its territory and to introduce therein any reforms which may seem to be desirable to it. It is an essential prerogative of sovereignty for the constitutionally authorized authorities of the State to choose and build freely an economic and social system. International law recognizes that a State has this prerogative just as it has the prerogative to determine freely its political regime and its constitutional institutions. The exclusive nature of such a right is in fact confirmed by

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<sup>41</sup> Article 10(7), 1961 Harvard Draft Convention, *supra* note 12.

<sup>42</sup> Article 10 (3) (a), 1961 Draft, *supra* note 12.

<sup>43</sup> Slomanson, *supra* note 5 at 203.

<sup>44</sup> Li Hao-p’ei, Nationalization and International Law: A Documentary Study, *c.f.* Slomanson, *supra* note 42.

<sup>45</sup> (1977) 53 ILR 389.

the fact that in practice a decision to nationalize very often is made by the organ which is regarded as the supreme level in the hierarchy of State institutions.”

Expropriation especially during the post-colonial period became an important issue in international law with competing interests between capitalist and socialist states and between the developed and developing nations.<sup>46</sup> Capitalist developed countries require a guarantee of protection and security before investing abroad, while the socialist states are reluctant to allow too much foreign investment for fear of undermining their own resources.<sup>47</sup>

Both the competing interests recognize that every state has a legitimate right to expropriate property but the Western view is predominated by the feeling that such steps must comply with the international minimum standard accompanied by an effective compensation, this is denied by the developing nations. The position of the capitalist nations is represented in the General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources, which recognizes the right of peoples and nations “to permanent sovereignty over their natural wealth and resources.”<sup>48</sup> Paragraph 4 of the Resolution, which is regarded as reinforcing customary international law, provides:

“[N]ationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security of national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.”

In other words, in order to be valid, expropriation should be for public purposes, should not be discriminatory and should be accompanied by compensation assessed in accordance with rules in force in appropriate municipal and international law.<sup>49</sup> Without compensation, the taking of land is termed as confiscation which is unlawful under international law.<sup>50</sup>

### **LAWFUL AND UNLAWFUL EXPROPRIATION**

Nationalization should be for public purpose for it to be valid under international law. This means that it should not be done for merely political purposes but must be done for the

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<sup>46</sup> D J Harris, *supra* note 25 at 577.

<sup>47</sup> R. Wallace, *supra* note 26 at 203.

<sup>48</sup> (1962) G.A.O.R, 17<sup>th</sup> session, Supp. 17, p. 15.

<sup>49</sup> R. Wallace, *supra* note 47.

<sup>50</sup> Brownlie, *supra* note 17 at 532.

general well-being of the State.<sup>51</sup> However, this ground has not been given a predominant importance in international claims and it has been held that public utility principle is not a necessary requisite for legality of nationalization taking secondary importance.<sup>52</sup>

Nationalization which is discriminatory against foreigners has been regarded as being contrary to international law.<sup>53</sup> In the *Amoco case*, although discrimination was acknowledged as being prohibited, it was held that it could be permitted and tolerated in certain circumstances such as being reasonably related to public purpose.<sup>54</sup>

State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation.<sup>55</sup> Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and their quotas, or measures of devaluation of currency.<sup>56</sup>

## COMPENSATION

In the *Chorzow Factory case*,<sup>57</sup> the PCIJ held that:

“When expropriation happens unlawfully, reparation in the form of compensation is the necessary corollary of the violation of the obligations resulting from an engagement between States. The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.”

There is a notion that if compensation is paid, it must comply with the minimum international standard<sup>58</sup> and that it must be “prompt, adequate and effective”<sup>59</sup>. The term “appropriate compensation” has been adopted in the *Texaco case*<sup>60</sup> as being reflective of customary

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<sup>51</sup> *Amoco International Financial Corp. v. Iran*, 82 *AJIL*, 1986:358. See also, *British Petroleum Exploration Company v. Libyan American Republic case*, (1974) 53 ILR 297.

<sup>52</sup> *Libyan American Oil Company v. Libyan Arabic Republic*, (1977) 62 ILR 140.

<sup>53</sup> *Id.* See also, UK’s arguments in the *Anglo-Iranian Oil Co. Case*, (1951) ICJ Rep. (Pleadings) 81.

<sup>54</sup> *Supra* note 50.

<sup>55</sup> *Id.*

<sup>56</sup> Currency depreciation has been held to be lawful unless it is discriminatory: *Tabar claim*, (1953) 20 ILR 211. See also, *Zuk claim*, (1958, II) 26 ILR 284.

<sup>57</sup> *Factory at Chorzow (Claim for Indemnity) Case* (Germany v. Poland) (Merits), (1928) PCIJ Ser. A, no. 17.

<sup>58</sup> Chapter 1.

<sup>59</sup> Statement of U.S. Secretary of State, Hull in letter to Mexican Government: D. J. Harris, *supra* note 24 at 568.

<sup>60</sup> *Supra* note 45.

international law. Also, that such compensation must be assessed in the light of the circumstances peculiar to the particular case. In *Anglo-Iranian Oil case*,<sup>61</sup> the ICJ held that “effective compensation” means that the recipient of the compensation must be able to make use of it to be able to, say, use it to set up a new enterprise to replace the one that has been expropriated or to use it to such other purposes as he wishes. The compensation, therefore, must be freely transferable from the country paying it and so far as that country’s restrictions are concerned, convertible into other currencies. The idea of just compensation is understood as compensation equal to the full value of the expropriated assets.<sup>62</sup> Many number of hosts are willing to conclude treaties based on the principles of “prompt, adequate and effective compensation and more frequently on the principles of just compensation. The patterns of these agreements surely constitute evidence of an international standard based upon the principle of compensation even though the deals are usually negotiated and arrived at.<sup>63</sup>

In *Amco Indonesia case*,<sup>64</sup> it was stated that compensation should be awarded for the loss suffered (*damnum emergens*) and expected profits (*lucrum cessans*). In accordance with the established rules of State responsibility, unlawful expropriation should merit full restitution in kind or, alternatively, the loss or expected loss of profits. On the other hand, lawful expropriation would only warrant compensation reflecting the value of the property taken at the time of the takeover.<sup>65</sup> Majority of the Western countries support these rules of compensation.<sup>66</sup>

Jurists supporting this compensation rule recognize the existence of certain exceptions<sup>67</sup> such as confiscation as a penalty for crimes, seizure by way of taxation measures or fiscal laws, destruction of property of neutrals as a consequence of military operation, and taking enemy property as part payment of reparation for the consequences of an illegal war.

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<sup>61</sup> *Supra* note 53.

<sup>62</sup> *Supra* note 51.

<sup>63</sup> Dolzer, 75 *AJIL*, 1981:565.

<sup>64</sup> *Amco Asia Corporation v. The Republic of Indonesia*, (1985) 24 ILM 1022.

<sup>65</sup> *Supra* note 51.

<sup>66</sup> Garcia Amador’s Report, *Yearbook of the ILC* (1959) ii. 2-24.

<sup>67</sup> Sohn & Baxter, *supra* note 12 at 561-62.

To summarize the instances of compensation payable for lawful and unlawful expropriation, Ian Brownlie observes:<sup>68</sup>

1. Expropriation for certain public purposes e.g. exercise of police power and defence measures in wartime, is lawful even if no compensation is payable.
2. Expropriation of particular items of property is unlawful unless there is provision for payment of effective compensation.
3. Nationalization, i.e. expropriation for a major industry or resource is unlawful only if there is no provision for compensation payable on basis compatible with the economic objectives of nationalization, and the viability of the economy as a whole.

Certainly, seizures which are part of international crimes against humanity or genocide involve breaches of international agreements,<sup>69</sup> measures of unlawful retaliation or reprisal against another State,<sup>70</sup> are discriminatory, being aimed at persons of particular racial groups or nationals of particular states.<sup>71</sup> The principle of national treatment also finds its mention when it comes to compensation measures subscribing the view that an alien cannot complain provided he receives the same treatment as nationals, if the nationals of the expropriating state receive no compensation then the alien can expect none.<sup>72</sup> It is generally thought that the national treatment principle plays a subsidiary role in context of legal principles on expropriation.<sup>73</sup>

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<sup>68</sup> Brownlie, *supra* note 17 at 538.

<sup>69</sup> *German Interests in Polish Upper Silesia* (Merits) (1926) PCIJ, Ser. A, no. 7; *Chorzow Factory case* (Indemnity) (1928) PCIJ, Ser. A, no. 17, p. 46-7.

<sup>70</sup> *Banco Nacional de Cuba v. Sabbatino*, US Court of Appeals, 52 AJIL 1962:1085, 1101-4.

<sup>71</sup> *Id* at 1104-5.

<sup>72</sup> *Canevaro case*, (1912) 11 RIAA 397 translated in 6 AJIL 1912:746; *Standard Oil Co. Tankers case*, (1927) 8 BYIL 156. Some jurists who support this view: Dunn, 28 Columbia Law Review, 1928:166-80; Fischer Williams, (1928) 9 BYIL 28.

<sup>73</sup> Fischer Williams, *supra* note 72.

## CHAPTER 3

### SETTLEMENT OF DISPUTES

An injured alien will usually seek first redress from the state which has caused him injury.<sup>74</sup> This is called the “Exhaustion of Local Remedies” principle. If adequate redress is not forthcoming, the state of which the alien is a national can seek redress on his behalf.<sup>75</sup> This is called the “Nationality of Claims” principle.<sup>76</sup> Usually, there are international claims and arbitration tribunals set up which adjudicate upon and settle individual claims in accordance with international law. For e.g. in August 1991, the United Nations established a compensation fund to settle war crimes against Iraq arising from hostilities in the Gulf. The first decision of the UN Claims Commission was given in 1996.<sup>77</sup>

In 1965, the Convention on Settlement of Investment Disputes between States and Nationals of Other States established the International Centre for Settlement of Investment Disputes in Washington, DC.<sup>78</sup>

### EXHAUSTION OF LOCAL REMEDIES

Local remedies means:

“Not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law...”<sup>79</sup>

According to Article 44 of the 2001 ILC Draft, the responsibility of a state may not be involved if the claim is one of which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted. Therefore an injured individual

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<sup>74</sup> Oppenheim’s International Law, Peace, Vol. 1, 2005 at 536.

<sup>75</sup> *Id.*

<sup>76</sup> The general rule is that a state will only espouse a claim on behalf of an individual if the latter is a national at the time when the injury occurs and at the time the claim is presented: *See e.g.* Rule I of the Rules Regarding International Claims issued by the British Foreign and Commonwealth Office, 1985, 37 International Comparative Law Quarterly, 1988:1006. Judicial decisions on this rule: *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 ICJ Rep., p. 4; *Salem Case (Egypt v. U.S.)* (1932) 2 RIAA 1161; *Merge Claim* (1955) 22 ILR 443. This topic will not be dealt with in detail in this paper.

<sup>77</sup> (1996) 39 ILM 846.

<sup>78</sup> 575 U.N.T.S. 159.

<sup>79</sup> *Ambatielos Arbitration (Greece v. UK)*, (1956) 12 RIAA 83.

must exhaust remedies in courts of the defendant state before an international claim can be brought on his behalf.<sup>80</sup>

Many reasons have been suggested for this rule. The best is probably that it prevents friendly relations between states being threatened by a vast number of trivial disputes; it is a serious allegation to accuse a state of violating international law.<sup>81</sup> Of course, when it is clear that the local courts will not provide redress, the local remedies need not be exhausted.<sup>82</sup> Apart from the cases where local remedies are futile, this rule must be applied very strictly.<sup>83</sup>

In the *Ambatielos arbitration*,<sup>84</sup> a Greek ship owner, Ambatielos, contracted to buy some ships from the British government and later accused the British government of breaching the contract. The Greek government had brought a claim on behalf of Ambatielos alleging that he had been injured by acts of UK. Ambatielos had made limited use of the British national legal system, but had not conducted his original hearing with due diligence and had failed to pursue an appeal to the House of Lords. Upholding UK's objections on ground on non-exhaustion of local remedies, the Court noted that 'the state against which an international action is brought for injuries suffered by private individuals has the right to resist such action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that state'.

If the structure of the judicial system of a state is such that further progress through national courts is useless, then the state of nationality is not barred from making a claim because its citizen failed to take all procedural steps, as in the *Finnish Ships Arbitration (Finland v. Great Britain)*,<sup>85</sup> where the inability of the Court of Appeal to overturn findings of fact crucial to the individual's claim meant that local remedies had been effectively exhausted. In the *Elettronica Sicula SpA (ELSI) case (United States v. Italy)*,<sup>86</sup> a Chamber of the ICJ indicated that the local remedies rule is satisfied if the substance of a matter has been litigated

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<sup>80</sup> M.H.Adler, "The Exhaustion of Local Remedies Rule after the International Court of Justice's decision in the *ELSI*" 39 *International Comparative Law Quarterly*, 1990:641. For a detailed discussion on the Exhaustion of Local Remedies rule, see Ian Brownlie, *supra* note 17 at 492-501.

<sup>81</sup> *Akehurst's Modern Introduction to International Law*, Routledge, 2000.

<sup>82</sup> *Roberts case*, *supra* note 29.

<sup>83</sup> *Supra* note 81 at 268.

<sup>84</sup> *Supra* note 79.

<sup>85</sup> (1934) 3 RIAA 1479.

<sup>86</sup> 1989 ICJ Rep 15.

in local courts, even though every variation and nuance of the argument had not been presented and even if, as in this case, the local litigation was not pursued directly by the national alleged to have been injured. It must be pointed out that the rule of exhaustion of local remedies will apply only when a state brings a claim of responsibility because of an injury to a national. If the claim is that the state itself has suffered injury, then this rule will not apply.<sup>87</sup>

### **WAIVER FROM CLAIMS**

The “Calvo” clause, which was named after an Argentinean jurist and statesman, was frequently included in agreements between Latin American states and foreigners. Under the Calvo Clause, foreigners accepted that, in the event of a dispute, they would not attempt to invoke the assistance of their national State. The Calvo clause purported to deny a State its right of exercising diplomatic protection on behalf of one of its nationals. The validity of the Calvo clause has been refuted by international tribunals, which have maintained that an individual is not competent to fetter his/her State in such a way, and the right of diplomatic protection and its exercise belong exclusively to the State of nationality.<sup>88</sup>

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<sup>87</sup> *Case of Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 ICJ Rep. 10. Here Mexico alleged breaches of international law causing injury to its citizens (and hence exhaustion of local remedies rule applied) and breaches of international law causing damage to its own rights (and thus exhaustion of local remedies did not apply) hence to exempt liability a defendant state could not take the ground of exhaustion of local remedies.

<sup>88</sup> *North American Dredging Co. Case (U.S.v.Mexico)*, (1926) 4 RIAA 26, 29.

## CONCLUSION

The law of State Responsibility for Injury to Aliens has been a much debated and written about<sup>89</sup> issue ever since the law of State Responsibility was envisaged. In fact, the State responsibility for Aliens has been in practice even before the State responsibility between States came up. Several attempts of codification of this law have been made, but none of them have seen the lights of the day as a real substantive law in form of treaty or convention in the international sphere.<sup>90</sup>

The law of international responsibility of states for injury to aliens has developed tremendously over time. It kept changing with the changing times and as the world expanded into larger and larger smaller territories, this law became more and more conspicuous in the practice of states in their interactions with other states and nationals of other states i.e. aliens.<sup>91</sup>

As different countries have emerged, they have different economic and social norms in the world society and their international practice is mainly governed by their own socio-economic background. This gives rise to the problem of two conflicting standards of justice: the national standard of treatment and the international minimum standard. Both these standards have their own features and both are recognized by several countries as a part of their practice in treatment of aliens. This leads to an inconsistency and if and when a law on State responsibility for Injury to Aliens is codified and put on the table for ratification, this ambiguity and dichotomy of standpoints will have to be addressed. This seems a practical impossibility since the national treatment principle is predominantly practiced by developing nations, especially in Latin America and the international minimum standard principle is practiced by many Western developed countries who are economically better-off than their counterparts.

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<sup>89</sup> See Jessup, Philip C. "Responsibility of States for Injuries to Individuals." *Columbia Law Review* (1946): 903-928; Cornelius F. Murphy, Jr. "State Responsibility for Injuries to Aliens." *NYU Law Review* (1966): 125-147; Lillich, Richard B. "The Current Status of the Law of State Responsibility for Injuries to Aliens." *American Society of International Law Proceedings* (1979): 244-248; Roy, S. N. Guha. "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" *American Journal of International Law* (1961): 863-891.

<sup>90</sup> *Supra* note 12.

<sup>91</sup> For a historical analysis of the evolution of international law of state responsibility for injury to aliens, See Roy, S. N. Guha. "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" *American Journal of International Law* (1961): 863-891.

The dichotomy of standards of justice finds its way even into the practice of expropriation of property of foreign nationals. Even here, there are two standards of granting compensation for expropriated property and for parameters of granting compensation clash. However, the right of compensation has been recognized as a principle of international customary law. Many tribunals and judicial bodies have developed methods and principles of granting compensation for expropriated property. Also there are certain cases where expropriation can be justified without any compensation.

As means of redress in the international sphere, the alien who has been injured by any act of a foreign State has to first seek redress from the local judicial authorities. This means that before any claim can be raised internationally, the Alien has to exhaust all local remedial channels for want of justice. This rule of exhaustion of local remedies is also a customary practice which is widely accepted. Also, the standard of the judicial remedies and other nuances of the local remedial process do not fetter the chances of the alien under international law. Also, it is not possible for an Alien to enter an agreement (*see Calvo clause*) to waive off his right to an international claim.

Taking into consideration all the views that have been put forth in this paper in relation to the most fundamental aspects of State Responsibility for Injury to Aliens such as Denial of Justice, Expropriation, Settlement of Disputes, the research hypothesis question fails to stand ground. The law of State Responsibility vis-à-vis Aliens has many lacunae which are hard to fill and there is a lack of consistent practice among nations which cannot render it the tag of customary international law. Given that certain aspects of this state responsibility have achieved the status of a customary practice, their manifestations are the ones predominantly used by several States. This makes it difficult for anyone who wants to take up the job of codification of this law because there are several common principles which are ambiguous due to many points of view of standards. This dichotomy can be attributed to the variety of history that these States have gone through. Therefore, the hypothesis fails on grounds of inconsistency and variegated existence of contradictory practices.