

EDITORIAL COMMENT

THE PROBLEM OF THE APPLICABILITY OF EXISTING INTERNATIONAL PROVISIONS FOR THE PROTECTION OF HUMAN RIGHTS TO INDIVIDUALS WHO ARE NOT CITIZENS OF THE COUNTRY IN WHICH THEY LIVE

The above title does not come trippingly off the tongue, which undoubtedly is one reason why the topic (which has been an item on the agenda of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities for the last four years) has attracted so little public attention and scholarly comment.¹ A second, more plausible explanation for this lack of concern is the low estate in which the subject matter, traditionally one of the major areas of international law, now finds itself.² For, stripped of the excess verbiage apparently necessary to make it palatable to present day UN participants,³ the above title actually covers little more than selected aspects of that familiar old subject—the Responsibility of States for Injuries to Aliens.⁴

How the Sub-Commission became seised of a subject normally thought to be within the jurisdiction of the International Law Commission is worth noting. In August 1972, following its refusal to criticize General Amin's

¹ But see L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 135–36 (1973), and McDougal, Lasswell, & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 AJIL 456 n.99 (1976).

² See text accompanying note 4 *infra*.

³ Cf. Freeman, *Human Rights and the Rights of Aliens*, 45 ASIL Procs. 120, 122 (1951), who a quarter of a century ago caustically observed that “[e]ven those nations which in the recent past would have choked trying to swallow the much more restricted concept of a minimum standard for aliens, today apparently do not experience as great a degree of indigestion at the conference table when asked to partake of a bill of fare garnished in a dressing called ‘human rights.’”

⁴ A subject which has been under renewed attack for several decades. Cf. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AJIL 359 (1975), especially the authors cited in note 1 thereof. The imaginative efforts to restate this body of international law by the International Law Commission's first Special Rapporteur, Dr. Garcia-Amador, unfortunately came to naught. See Garcia-Amador, *(Sixth) Report on State Responsibility*, [1961] 2 Y.B. INT'L L. COMM'N 1, UN Doc. A/CN.4/134 & Add. 1 (1961). The mandate of the Commission's second Special Rapporteur, Dr. Roberto Ago, gives priority to the definition of “general rules governing the international responsibility of the State,” relegating to evidential purposes “the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens. . . .” Ago, *Report of the Sub-Committee on State Responsibility*, [1963] 2 Y.B. INT'L L. COMM'N 227, UN Doc. A/CN.4/152 (1963). As McDougal, Lasswell, and Chen trenchantly remark, “[t]he more recent work of the Commission has been at such a high level of abstraction as to shed but a dim light upon specific controversies.” McDougal, Lasswell, & Chen, *supra* note 1, at 454 n.92.

expulsion of resident Asians from Uganda, the Sub-Commission, in large measure to atone for its inaction, adopted a resolution recommending that "the Commission on Human Rights should consider the problem of the applicability of the present provisions for the international legal protection of human rights of individuals who are not citizens of the country in which they live and to consider what measures in the field of human rights would be desirable."⁵

The Commission on Human Rights considered the matter in March 1973, and in turn requested the Economic and Social Council to ask the Sub-Commission to study the problem and recommend "what measures in the field of human rights, *including the possibility of a declaration*, would be desirable. . . ."⁶ ECOSOC adopted this suggestion in May 1973,⁷ the Secretariat prepared an informative Survey⁸ over the summer, and the Sub-Commission first considered the subject in September 1973.⁹ At this session the member from the United Kingdom, Baroness Elles, proposed that the Sub-Commission prepare "a draft declaration on the human rights of individuals who are not citizens of the country in which they live, which would be submitted in due time to the higher bodies."¹⁰ The Sub-Commission, however, took no action on this suggestion.

At its next session in August 1974, Lady Elles renewed her arguments for a draft declaration.¹¹ Considerable support emerged for this approach, but in the event the Sub-Commission handled this "matter of high priority" by adopting another resolution—this time instructing Lady Elles to prepare a report, supplementing the Secretariat's Survey, which was to contain "a critical enumeration of measures which might be desirable, including the possibility of a declaration on the subject-matter."¹² A preliminary version of this report, including a revised draft declaration, was submitted to the Sub-Commission in August 1975,¹³ at which time Lady Elles stated that the complexity of the study and the slowness of states to respond to requests for information would delay completion of her final report.¹⁴ It is to be

⁵ Twenty-Fifth Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/1101, E/CN.4/Sub.2/332, at 60 (1972).

⁶ 54 UN ECOSOC, SUPP. 6, at 71 and 98, UN Doc. E/5265 (1973) (emphasis added).

⁷ *Id.*, SUPP. 1, at 25, UN Doc. E/5367 (1973).

⁸ *The Problem of the Applicability of Existing International Provisions for the Protection of the Human Rights of Individuals Who are Not Citizens of the Country in which They Live*, UN Doc. E/CN.4/Sub.2/335 (1973).

⁹ Twenty-Sixth Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/1128, E/CN.4/Sub.2/343, at 37 (1973).

¹⁰ *Id.*

¹¹ Twenty-Seventh Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/1160, E/CN.4/Sub.2/354, at 22-26 *passim* (1974).

¹² *Id.*, at 55, 57.

¹³ UN Doc. E/CN.4/Sub.2/L.628 & Add.1-4 (1975).

¹⁴ (Draft) Twenty-Eighth Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/XXVIII/CRP.3/Add.7, at 2 (1975).

hoped that the Sub-Commission will consider it at length this year and take dispositive action with respect to the draft declaration to be included therein.¹⁵

Admittedly, there is a body of opinion that may regard a "Draft Declaration on the Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live" as surplusage.¹⁶ Although the law governing the Responsibility of States for Injuries to Aliens was one of international law's first attempts to protect human rights,¹⁷ according to some authorities it has been preempted, in whole or in part, by the generation by the United Nations of new international human rights norms applicable to nationals and aliens alike.¹⁸ The fact that not all states subscribe to such norms and that, in any event, the machinery to implement them generally is non-existent or inadequate, is overlooked or ignored in such quarters.¹⁹ Thus, if one accepts the preemption argument, aliens actually may have less protection now than in years past. Even if one does not, "[t]he new epoch in the international protection of human rights ushered in by the United Nations has, paradoxically, been attended by some unnecessary confusion about the continued protection of aliens."²⁰

Given the present state of international human rights law, substantively and procedurally, this writer has little trouble in rejecting the preemption rationale and urging the continued relevance of the traditional law governing the Responsibility of States for Injuries to Aliens. The new international human rights norms obviously should supplement, rather than supplant, traditional law. As McDougal, Lasswell, and Chen persuasively argue, "[t]he newly emerged contemporary human rights prescriptions, including both the United Nations Charter and ancillary expressions, would indeed appear, however these prescriptions may ultimately be synthesized with the older doctrines of state responsibility, to have importantly increased the transnational protection that the world constitutive process affords aliens."²¹

¹⁵ The writer is informed by Lady Elles that her final report will include a draft declaration. Compare text at note 16 *infra*. There has been some opposition over the years to such a declaration, but the possibility of its being adopted always has been recognized. See text at notes 5, 6, and 7 *supra*.

¹⁶ UN Doc. E/CN.4/Sub.2/L.628/Add.2, at 2-4 (1975). But see text at and accompanying note 19 *infra*.

¹⁷ See generally L. SOHN & T. BUERGENTHAL, *supra* note 1, at 137-211.

¹⁸ Even before the United Nations existed Garcia Robles of Mexico had advanced the prototype of this thesis. See Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AJIL 121, 122, 125 (1946).

¹⁹ *Id.* Compare Lillich, note 4 *supra*. Also ignored is the fact that, while some human rights guarantees found in instruments concluded under the auspices of the United Nations protect all individuals, including aliens, other guarantees, often for no apparent reason, cover only citizens or nations. To the extent that no rational ground for a given discrimination against aliens exists, the present situation aptly can be described as "intolerable." Twenty-Seventh Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *supra* note 11, at 24.

²⁰ McDougal, Lasswell, & Chen, *supra* note 1, at 452.

²¹ *Id.* at 456.

Whether the draft declaration will be adopted by the Sub-Commission, much less by "higher bodies," is a matter of speculation. It is not the writer's intention to evaluate its provisions in this editorial.²² In some areas it seems too timid,²³ while in other matters it appears overly aggressive.²⁴ Suffice to say, however, that whatever its ultimate fate it will have served to focus attention upon a topic that has received less than even-handed treatment of late—the standards of state behavior to which individuals are entitled under contemporary international law when they reside, travel, or invest abroad.

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²² A forthcoming article will evaluate the draft declaration in some detail.

²³ Thus, under Article 1, its coverage reaches only to those noncitizens who reside, on a permanent or semi-permanent basis, in a state, excluding tourists and less-than-semi-permanent residents.

²⁴ Thus, under Article 9(2), when the assets of noncitizens are expropriated they are deemed entitled to "prompt, adequate and effective compensation."