THREE IN ONE

STATE RESPONSIBILITY VS ALIEN PROTECTION

1. Modern doctrinal approaches (ILC--progressive--codification efforts) vs.

2. Traditional protection of aliens vs.

3. Human rights law (arguably protecting nationals at something like alien level)

UNDERLYING ISSUE WHAT YOU ARE PROTECTING & HOW
RESPONSIBILITY DOCTRINE

WHAT IS STATE RESPONSIBILITY, AND WHY DOES IT SOUND SO STRANGE TO US LAWYERS?

Doctrinally, heavy Civil Law orientation and formal recasting of mostly older alien treatment customary law

Different pictures of state responsibility in different legal systems

1. Anglo-American view quasi-tort for compensation
2. Continental legal science view quasi-criminal to uphold immaterial goods
3. ILC-level attempt via doctrine to replace Security Council System when frozen, mandatory response elements

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TRAD ELEMENTS

ELEMENTS OF TRADITIONAL STATE RESPONSIBILITY:

Duty
Breach
[culpa]- objective issue
[injury]- compensation issue

Alternate elements play into differing ideas of state responsibility, concept that violation recreates a separate new right too & elements changed in ILC Code
Since states act through human beings, the human link to state conduct as attribution problem.

Hypo 1: Private US groups soliciting ventures into Cambodia/Laos/Vietnam to search for MIAs claimed still to be alive.

Ans: Probably not covered under ILC articles 8 & 11.
Since states act through human beings, human link to state conduct as attribution problem (cont’d)

Hypo 2: US veterans groups go to Hanoi to assist in humanitarian task of returning remains of KIA airmen, where State Department may facilitate entry by not asserting travel bar, or by perhaps arranging some contacts through the American interests section of a foreign embassy such as Switzerland.

Ans: More US government assistance, harder question (ILC articles 8 & 11)
ATTRIBUTION III

Since states act through human beings, human link to state conduct as attribution problem (cont’d)

Hypo 3: Foreign ambassador’s briefcase is caught by drug sniffing dog at airport, arrest & conviction in state court follow despite diplomatic immunities

ans: Attribution through federal system and between arms of government (ILC article 4)
Hypo 4: Congress decides to change law mandated by a treaty with result that new statute takes precedence over old treaty

Ans: Simple violation across separation of powers despite consignment of most foreign affairs to Executive

(ILC articles 4 & 5)
Hypo 5: As part of Intifada, PLO leader on West Bank orders execution of “invaders,” defined as settlers establishing Jewish enclaves, but assume for sake of argument the Palestineans get wrong guy and kill him, so who is liable?

Ans: Leader responsible as individual, but presumably Jordan is not if treated as country, yet if PLO does succeed in establishing a Palestinian state on West Bank, new state would become liable (ILC article 10)
DUTY ELEMENTS

SUBJECTIVE VS OBJECTIVE BASIS OF STATE RESPONSIBILITY (FAULT)

1. Subjective would require intent, so basic issue whether the rule should normally focus on behavior (objective) versus intent (subjective)

2. Issue becomes whether element of negligence typically involved versus strict liability on broader rules
INJURY REQUIREMENT?

INJURY AS STANDING ISSUE (BARCELONA TRACTION)

1. Technical issue in ILC definition of state responsibility in eliminating traditional element of injury

2. Recognizes erga omnes concept involving distinction between those rights in which all states have an interest, being acts of aggression, basic human rights, recalling issues like jus cogens law

3. Crimes versus delicts character also brings up
1. *Restitution, in kind*, designed to reestablish the situation which would have existed if the wrongful act or omission had not taken place (preferred)

2. *Indemnity*, being monetary damages usually for loss of profit and confiscated property value to wipe out consequences of the illegal act

3. *Satisfaction* as non-material damages, in modern practice limited to presentation of official regrets, punishment of minor local officials and judicial recognition of the unlawful act
Note that the remedy system in international law is almost directly opposed to private law system in putting specific enforcement choice first.

Perhaps in the nature of state relations themselves, which are not necessarily economic.
DOCTRINAL CATEGORIES (BORROWED FROM CIVIL LAW) OF CIRCUMSTANCES PRECLUDING WRONGFULNESS

Consent, subject to preemptory norm limitations (eg, no consent to genocide or slavery)

Force majeure and fortuitous event, idea of material impossibility as when a ship is blown into restricted waters in a storm

Distress, idea that while compliance is possible, it would threaten lives
DOCTRINAL CATEGORIES (BORROWED FROM CIVIL LAW) OF CIRCUMSTANCES PRECLUDING WRONGFULNESS (CONT’D)

Necessity as safeguarding essential state interest threatened by a grave and imminent peril (but cannot overcome jus cogens)

NB technically, this is the way that, under the use of force law, self-defense differences appear when the Caroline precedent is redefined from self-defense into necessity in terms of using force on foreign territory

Self-defense itself, redefined away from indirect aggression given no state sponsorship under ILC art 8, taking place only on state’s own territory or aggressor’s territory

2. *Retorsion* as measures generally permissible without prior breach (suspending diplomatic relations, etc.).

*DOCTRINAL APPROACH IS IN PART TO DEVELOP THROUGH DOCTRINAL FRAMEWORK LIMITATIONS ON COUNTERMEASURES*
LOCAL REMEDIES

Exhaustion of local remedies rule

Considered to be a mixed substance and procedure rule, since no int’l violation in theory if still can be remedied domestically
TRAD ALIEN PROTECTION

Underlying theories of diplomatic protection based on nationality, mostly economic protection in modern setting but also security

Derivative protection doctrinally, since injury to national is conceived of as injury to state (so can be raised only by state and cannot be bargained away by nationals as with direct compensation as with Iran Flight 655 incident 1980s)

Scope of duties to foreigners important (link to state responsibility per se), since no absolute guarantee of life or property but rather guarantee traditionally of int’l standard of protection & process
OLDER CUSTOMARY LAW I

ALIEN ECONOMIC INTEREST PROTECTION OVER TIME

1. Extensive older law fixed in 19th & early 20th century precedents in various claims tribunal proceedings (eg, US-Mexican claims tribunal in 1920s following revolution)

2. Lack of consensus between capital importing and exporting states especially post WW II on law’s scope and giving foreigners more protection than locals
   a. South America, starting Calvo doctrine on local courts & municipal law, more recently forced licensing following local use of technology
   b. Asia & Africa 1960s rejection of int’l law restraints on expropriation on sovereignty grounds, followed by New Int’l Economic Order or NIEO starting late 1960s)
ALIEN ECONOMIC INTEREST PROTECTION OVER TIME (CONT’D)

3. Partially displaced since 1980s with investment treaty protections to attract foreign private capital (eg, NAFTA now Bush Admin pattern investment treaty)
   a. But re NAFTA, distinguish substantive scope of protection (abandonment of Calvo position by Mexico)
   b. **NAFTA dispute innovation** as with Chapter 11 direct state-individual arbitrations

4. Parallellism & overlap with human rights (albeit differing original source, focus on property rights but note no human rights coverage for juristic persons, so human rights interpretation commonly of minimal use for investment protection)
DENIAL OF JUSTICE I

OLDER PRECEDENTS

Denial of Procedural Justice

ex:  *Chattin Claim (US-Mex Claims Trib 1927)* US railroad conductor arrested on bare statement of colleague accused of fraud, tried w/o translator under trad. Mexican inquisitorial process w/o public proceedings, right of confrontation, on basis of file, etc.; violated int’l standard in lack of investigation, confrontation, knowledge of charge, undue delay, treating open hearing as formality
OLDER PRECEDENTS (CONTD)
Denial of Justice in Failure to Protect/Prosecute

ex: Laura James Claim (US-Mex Claims Trib 1926) Foreigner murdered w/o police undertaking serious pursuit of known killer; violated int’l standard in authorities’ failure to take prompt and efficient action (looks like dilatory actions, not wanting to catch perpetrator)

(also Chapman Claim, consul wounded after threats when Mex govt provided no protection despite warnings, plus lack of pursuit after attack)
ALIEN ECONOMIC INTERESTS

ECONOMIC INTEREST PROTECTION

older expropriation, newer discriminatory treatment issues

1. General idea that states can prohibit foreigner entry, but once allowed in cannot take property w/o reasonable compensation or discriminate against w/o reason

2. But there are specific substantive areas where state retains controls irregardless as not a “taking,” reviewed under non-commercial risk unit 13
DUTY TO PAY

WHAT MAY TRIGGER A DUTY TO PAY (FOREIGN) INVESTORS IN CONNECTION WITH UNLAWFUL INT’L ACT?

1. Expropriation not meeting int’l compensation standard
   a. Calvo clause, domestic vs foreign standard issues
   b. Problem not with taking, only with not paying

2. Discriminatory treatment
   a. National treatment necessary?
   b. Issues of express discrimination versus discrimination as applied

3. Retaliatory action against aliens for unrelated actions of 3-Ps (or their governments)
WHAT IS THE DISAGREEMENT REGARDING COMPENSATION STANDARD AND DOES IT MATTER?

Basic substantive law issue is whether to be governed by international law or municipal law (ex: Calvo clause)

Hull formula “adequate, prompt & effective”

“Just” compensation later (focus only on interests of alien, like Hull)

“Appropriate” compensation is floating around, generally understood to permit consideration of interests other than alien’s (states aims in social programs, available foreign currency, etc.)

[Off the record]
WHAT ARE OTHER COMMON ISSUES UNDER THE CUSTOMARY LAW PROTECTING ALIEN INVESTMENT?

1. Public use requirement on taking

2. Confiscatory taxation, but how much is too much?

3. Beyond, parallel to general domestic law of regulatory takings and how much is too much?

4. Discriminatory treatment, but issue is always “on its face” vs. “as applied”