

# The Act of State Doctrine, Diplomatic Protection, and International Remedies at the Turn of the Twentieth Century

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## 1 Introduction: An Inconvenient Dictum

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed

of by sovereign powers as between themselves. — *Underhill v. Hernandez*, 1897.<sup>1</sup>

The Act of State doctrine is a mess. Scholars are confused. Judges are confused. Both groups have decried this mess.<sup>2</sup> But both have simultaneously added to the morass with each and every judgment and article. The Supreme Court has not ruled on the topic for nearly three decades.<sup>3</sup> And when the Court finally did issue a unanimous opinion (way back in 1990), the then spry (and alive), 53-year-old Justice Scalia obscured as much as he clarified.<sup>4</sup> Courts and scholars cannot figure out what to do and some have gone so far as to call for the doctrine's abolition.<sup>5</sup>

Confusion and contention exists at both the normative and descriptive level. There is confusion over what the doctrine is. There is confusion over what the rationale for the doctrine is. There is contention over what the

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1. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

2. The scholarly literature is pretty much in agreement that the doctrine is a mess. See, e.g., John Harrison, "The American Act of State Doctrine," *Georgetown Journal of International Law* 47 (Winter 2016): 508 ("[...] the Act of State] doctrine is subject to serious misconstruction. As misconstrued, it conflicts with other legal principles and leads to irrational results."); Joseph W. Dellapenna, "Deciphering the Act of State Doctrine," *Villanova Law Review* 35, no. 1 (February 1990): 5-6, (arguing that there is "fundamental confusion over what the doctrine means and how it is to be applied[.]" and that "the doctrine resembles the proverbial elephant described by a committee of the blind."); Gregory H. Fox, "Reexamining the Act of State Doctrine," *Harvard International Law Journal* 33 (1992): 521 (arguing "[...] the act of state doctrine cannot be understood in any coherent fashion."); Michael J. Bazyler, "Abolishing the Act of State Doctrine," *University of Pennsylvania Law Review* 134 (1986): 329, (arguing that "[...] the decisions of these courts [concerning act of state doctrine] have created considerable confusion about the doctrine, and the confusion seems to be getting worse with each successive court opinion [...]"]); and *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("the act of state doctrine is an airy castle"). There are, however, a few (very few) brave souls who dissent from this view. See, e.g., Andrew D. Patterson, "The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong," *Davis Journal of International Law and Policy* 15 (Fall 2008): 112 (arguing, "[...] courts have shown considerable wisdom and consistency in applying the doctrine.").

3. *W.S. Kirkpatrick and Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990). Although the Court has discussed the doctrine in two subsequent cases. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) and *Samantar v. Yousuf*, 560 U.S. 305 (2010).

4. For a critique of *Kirkpatrick*, see Fox, "Reexamining the Act of State Doctrine," 521 (arguing, "[...] after *Kirkpatrick*, the act of state doctrine cannot be understood in any coherent fashion.").

5. See, e.g., Bazyler, "Abolishing the Act of State Doctrine."

doctrine should be. And there is contention over what the rationale for the doctrine should be. Scholars and judges have described the act of state doctrine variously as being based on separation of powers concerns<sup>6</sup> or on international comity.<sup>7</sup> Accordingly, they have characterized the doctrine as a kind of international full faith and credit,<sup>8</sup> as a rule of abstention,<sup>9</sup> as a rule of immunity,<sup>10</sup> as a rule of repose,<sup>11</sup> and as a rule of decision.<sup>12</sup> But beyond confusion over the rationale and the characterization of the doctrine, Courts have been loath to apply the doctrine in every applicable case. As a result, they have further muddled the already swamp-like doctrine with the articulation of a half-dozen exceptions ranging from deference to the Department of State to respect for human rights.<sup>13</sup>

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6. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.”). See also *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 769 (1972) (Rehnquist, J., plurality) (“[...] the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of government.”).

7. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918) (“[the doctrine rests] upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.’”).

8. Eugene F. Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine* (University of Kentucky Press, 1967), 25-26.

9. Restatement (Third) Foreign Relations Law § 443 comment a (1987) (“[...] the act of state] doctrine was developed [...] as a principle of judicial restraint [...]”).

10. Antonia Dolar, “Act Of State And Sovereign Immunities Doctrines: The Need To Establish Congruity,” *University of San Francisco Law Review* 17 (1982): 93-94 (“Act of state immunity developed as a corollary to sovereign immunity, extending personal immunity to officials empowered to act on the state’s behalf.”).

11. Dellapenna, “Deciphering the Act of State Doctrine,” 45-53 (“Viewing the act of state doctrine as a rule of repose [...] accounts for all the other major features of the doctrine.”).

12. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 n.18 (1976) (the act of state doctrine can be described in “choice of law terms.”); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1113 (“[...] the act of state doctrine operates as a super-choice-of-law rule.”). See also Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine*, 27-28.

13. See Bazyler, “Abolishing the Act of State Doctrine,” 365-373; Stepehn Jacobs, Robert H. King, and Sabino Rodriguez, “The Act of State Doctrine: A History of Judicial Limitations and Exceptionos,” *Harvard International Law Journal* 18, no. 3 (Summer

The Supreme Court recently reaffirmed its support for the “rule of decision” model.<sup>14</sup> Writing for a unanimous Court, Justice Scalia emphasized, “As we said in *Riccaud*, ‘the act within its own boundaries of one sovereign State [...] becomes [...] a rule of decision for the courts of this country.’”<sup>15</sup> As for the rationale, Scalia noted that the “description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years.” The Court, Scalia continued, “once viewed the doctrine as an expression of international law, resting upon the highest considerations of international comity and expediency. We have more recently described it, however, as a consequence of domestic separation of powers, reflecting the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs.”<sup>16</sup> In effect, the Act of State Doctrine has mutated from a “rule of immunity” based upon considerations of comity to a “rule of decision” that is based on separation of powers principles.<sup>17</sup>

Chronicles of the doctrine’s evolving meanings and rationales have been penned by legal scholars<sup>18</sup> and judges,<sup>19</sup> as has the doctrine’s close (and some would argue inseparable<sup>20</sup>) relationship with the concept of sovereign immunity.<sup>21</sup> The narratives are often the same. They begin in time immemorial

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1977): 677–697.

14. *Kirkpatrick*, 493 U.S. 400 (1990).

15. *Ibid.* at 406.

16. *Ibid.* at 404 (internal quotation marks and citations removed).

17. And, undoubtedly, Justice Scalia’s intense disdain for incorporating international law into U.S. jurisprudence. See, e.g., Scalia-Breyer Debate on Foreign Law, 13 January 2005, American University, available at: <http://www.freerepublic.com/f-news/1352357/posts>.

18. See, e.g., Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine*.

19. Justice Harlan traced the origins of the doctrine in a brief paragraph in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (“The [...] act of state doctrine, which appears to have taken root in England as early as 1674, *Blad v. Bamfield*, 3 Swans. 604, 36 Eng.Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see e.g., *Ware v. Hylton*, 3 Dall. 199, 230, 1 L.Ed. 568; *Hudson v. Guestier*, 4 Cranch 293, 294, 2 L.Ed. 625; *The Schooner Exchange v. M’Faddon*, 7 Cranch 116, 135, 136, 3 L.Ed. 287; *L’Invincible*, 1 Wheat. 238, 253, 4 L.Ed. 80; *The Santissima Trinidad*, 7 Wheat. 283, 336, 5 L.Ed. 454.”).

20. Dolar, “Act Of State And Sovereign Immunities Doctrines: The Need To Establish Congruity.”

21. A relationship that seems to have confounded the modern Court’s formalistic sensibilities. Indeed, the Government in its *amicus curiae* brief in *Kirkpatrick* complained that “the Court’s prior decisions had appeared to take a rather rigid view of the act of state

and proceed methodically through the decades.<sup>22</sup> They focus on easily digestible gobbets of decisions in order to track the subtle changes in words as they flow from the Year Books of early-modern England into volume after volume of West Publishing's reporters.

But while the doctrine has a long past, it is Justice Fowler's dictum from the 1897 case *Underhill v. Hernandez*<sup>23</sup> that has stuck and become the "classic American statement" of the doctrine.<sup>24</sup> Indeed, as one scholar has complained, this dictum from *Underhill* has been referred to as "the classic formulation in nearly every case or scholarly work concerning the act of state doctrine."<sup>25</sup> While Justice Fowler's formulation in *Underhill* is not the first expression of the doctrine in the common law, it is the rupture in time that separates the studies of the doctrine's deep historical foundations from its modern history.<sup>26</sup> It was in *Underhill* that the modern "Act of State Doctrine was judicially created from whole cloth."<sup>27</sup> If one were to rely entirely on opinions and scholarship, it seems that everything before *Underhill* was mere prologue. Indeed, according to at least one scholar, the "anomalous situation [of the Act of State Doctrine] arises from the misuse and over-application of dictum from *Underhill v. Hernandez*, and the perpetuation of this dictum as

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doctrine" and urged the Court "that the doctrine effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government." Brief for the United States as Amicus Curiae, p. 6, *Kirkpatrick*, 493 U.S. 400 (1990) (internal quotation marks removed).

22. See, e.g., Bazyler, "Abolishing the Act of State Doctrine," 330-333; Edward D. Re, *Foreign Confiscations in Anglo-American Law: A Study of the Rule of Decision Principle* (New York: Oceana, 1951), 32-51.

23. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

24. *Sabbatino*, 376 U.S. 398, 416 (1964) ("The classic American statement of the act of state doctrine [...] is found in *Underhill v. Hernandez* [...]. See also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 716 n1 (1976) ("The classic American formulation of the doctrine, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 [...].").

25. Steven C. Krane, "Rehabilitation and Exoneration of the Act of State Doctrine," *New York University Journal of International Law and Politics* 12 (1980): 599-651.

26. For judicial treatments of *Underhill* as the rupture in time, see *Dunhill*, 425 U.S. 682; *Sabbatino*, 376 U.S. 398. For academic treatments, see Patterson, "The Act of State Doctrine is Alive and Well: Why Critics of the Doctrine are Wrong" ("Underhill v. Hernandez was the first American case where the act of state doctrine was used as a means to deny jurisdiction."); Bazyler, "Abolishing the Act of State Doctrine"; Krane, "Rehabilitation and Exoneration of the Act of State Doctrine"; Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine*.

27. *ibid.*, 165.

the classic formulation in nearly every case or scholarly work concerning the act of state doctrine.”<sup>28</sup>

Despite the central significance of *Underhill*, few scholars have spent time widely contextualizing the decision.<sup>29</sup> Depending on the work it is either treated as the starting point for the evolution of the doctrine, or the hinge-point from which the modern doctrine pivoted. It is upon Justice Fowler’s dictum that the modern doctrine has evolved. Like the *Australopithecus*, *Underhill* marks something new, it’s a shifting point. But like *Australopithecus*, it’s what comes after that scholars are usually concerned with explaining. It is the departures from *Underhill* that guide today’s practitioners and not *Underhill* itself.

In part that is because Justice Fowler’s dictum is somewhat enigmatic. As even a cursory glance at the text of *Underhill* reveals, Fowler was quite parsimonious in his citations. There is nothing cited following his famous articulation of the doctrine.<sup>30</sup> We are told, “[...] the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory [...]” and then we are left with nothing.<sup>31</sup> A whole paragraph intervenes before we are presented with a single citation.<sup>32</sup> Altogether, there are three strings of citations in the entire opinion. These three strings point to a grand total of eight opinions.<sup>33</sup> All but two of those eight opinions are used to simply bolster the holding that “acts of legitimate warfare cannot be made the basis of individual liability.”<sup>34</sup> In fact, none of the cases that scholars usually cite as precursors are mentioned anywhere in the decision.<sup>35</sup> But textual parsimony aside, the decision can still be placed in a politico-historical context in order to better understand the developments within international jurisprudence more generally that may have led Justice Fowler to feel comfortable simply stating the doctrine without citation.<sup>36</sup>

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28. Krane, “Rehabilitation and Exoneration of the Act of State Doctrine,” 599.

29. Eugene F. Mooney being one of the notable exceptions. Mooney, *Foreign Seizures: Sabatino and the Act of State Doctrine*.

30. *Underhill*, 168 U.S. 250.

31. *Ibid.* at 252

32. *Ibid.* at 253.

33. *Ibid.* at 252-253.

34. *Ibid.* at 253.

35. *Ibid.* at 252-254. Compare the three strings of citations in *Underhill* to the thirty-three in Justice Scalia’s “short, curt opinion” in *Kirkpatrick*. For the description of Scalia’s opinion as “short” and “curt,” see Fox, “Reexamining the Act of State Doctrine,” 521.

36. Other than, of course, the blessed use of fewer citations in late nineteenth cen-

This paper does not aim to provide clarity to the modern doctrine. Only a court could do that at this point (and even then, with difficulty). But it will place *Underhill* within its historical context to better understand the nature of that decision and the rationale of the doctrine as Justice Fowler articulated it in 1897. In doing so, I argue that Justice Fowler had on his mind alternative forms of adjudication that were open to individual claimants and that his articulation of the Act of State Doctrine was in part a kind of *forum non conveniens* dismissal.<sup>37</sup> This dismissal certainly had separation of powers overtones. But it was far from primarily concerned with abstaining from a judgment that might “hinder the conduct of foreign affairs.”<sup>38</sup> Instead, the focus in *Underhill* was navigating the law of international claims, also known as “diplomatic protection,” which was far more in vogue in the 1890s as an individual remedy for an international tort than it is now. Justice Fowler’s Act of State was a *forum non conveniens* with the idea that a plaintiff should first exhaust his or her local remedies and then seek diplomatic intervention for a denial of justice, perhaps leading to an international arbitration, before bringing a case before a U.S. Court. The rest of this paper is divided into seven parts.<sup>39</sup> Those seven parts<sup>40</sup> narrate Mr. Underhill’s arrest, describe the global age of the nineteenth century to provide context for the case, argue that diplomatic opinion was a central part of that global age, interpret the opinions of both the Second Circuit and the Supreme Court in light of those contextualizations, describe the later arbitration, interpret the first major opinions to apply the doctrine in the decades following *Underhill*, and finally conclude.

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tury (and really pre-Shephard’s) opinions and scholarship. See Robert C. Berring, “Legal Information and the Search for Cognitive Authority,” *California Law Review* 88, no. 6 (December 2000): 1686 (“Just as the text of the cases is shorter and less convoluted [in 1899], the number of cases cited is smaller.”).

37. Indeed Bazyler thought that *forum non conveniens* was one of many good alternatives to the act of state doctrine. Bazyler, “Abolishing the Act of State Doctrine,” 385-386.

38. *Kirkpatrick*, 493 U.S. at 404.

39. An unacceptable number for such a short paper, but there are no obnoxious subsections, so that makes me feel better about the division.

40. Inhale deeply here.

## 2 Underhill's Arrest

In March of 1892, an(other) insurrection broke out in Venezuela following the sitting President's attempt to amend the constitution to extend his reign. A group of *caudillos* (military and political leaders) organized by lengthily-named Joaquín Sinforiano de Jesús Crespo Torres ("Crespo") opposed the amendment and took up arms to defend the liberal constitutional order, starting what would later be known as *La Revolución Legalista* (the Legalist Revolution).<sup>41</sup> In August of that year, Crespo's hand-less right-hand man, General José Manuel Hernández, colorfully known as *El Mocho* (the hand-less),<sup>42</sup> took command of the city of Bolívar. *El Mocho* then did what any general in his situation would do—he began to secure the city's vital infrastructure.

Bolívar's water was supplied by a waterworks constructed and overseen by George F. Underhill, an American citizen.<sup>43</sup> Needing Underhill's expertise and cooperation to maintain the water supply, *El Mocho* took Underhill and his wife into custody in order to coerce him to maintain the Bolívar's water supply while the city was under occupation by the revolutionary forces.<sup>44</sup> Underhill was eventually released and he quickly sold his business and the concession on their waterworks. They then returned to the United States angry and much poorer.

The following year, *El Mocho* was visiting New York City, drumming up support for the new duly recognized Venezuelan Government, led by the now-President Crespo following the successful revolt.<sup>45</sup> George F. Underhill brought suit in Federal Court against *El Mocho* for false imprisonment and assault and battery.<sup>46</sup> *El Mocho* was arrested, just as he was about to return to Venezuela (indeed his arrest nearly prevented him from making his scheduled sailing). Following his arrest, *El Mocho* was served with process and was required to post a bond.<sup>47</sup>

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41. For background on the conflict, see R. A. Rondón Marquez, *Crespo y la revolución legalista* (Caracas: Ediciones de la Contraloría, 1973).

42. Edgar Esteves González, *Las guerras de los caudillos* (Caracas: Los libros de el nacional, 2006), 112.

43. *Ibid.* at 578.

44. *Ibid.* at 579.

45. The fact of recognition of the new government by the United States was noted in the opinions of the Circuit and Supreme Courts. See *Underhill I*, 65 F. 577, 578.

46. *Ibid* at 578.

47. "Bail Came Just in Time, Gen. Hernandez Arrested on Point of Sailing," *New York*

The case came before a federal court in New York. Unfortunately for Mr. Underhill, the trial judge instructed the jury to find in favor of *El Mocho*.<sup>48</sup> Underhill appealed. His case wound its way up the American judicial system to the Supreme Court.<sup>49</sup> However, before discussing the opinions of the Circuit and Supreme Courts, the next two sections will attempt to place the facts of Underhill's case in their historical context before taking up an analysis of both the Second Circuit and the Supreme Court opinions.

### 3 An Age of Globalization

Underhill's plight was hardly unique in the world of the late nineteenth century. Over the past twenty years, historians have demonstrated just how interconnected and global the world before 1914 was (or 1929 depending on whom you ask).<sup>50</sup> Migration, trade, and foreign investment reached levels that are similar to, and in some cases surpass, modern levels. Writing in 1999, a pair of economists argued, "[...] in some ways, the world of 1914 was more tightly integrated than ours is today."<sup>51</sup> In real and meaningful ways, foreign investment was more global in the nineteenth century than the twentieth. The recent expansion of trade, investment, and migration has been far more concentrated in a few specific, northern hemispheric regions than its nineteenth century predecessor.<sup>52</sup> The period from roughly 1850-1914

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*Times*, 5 November 1893, pg. 9.

48. *Underhill I*, 65 F. at 578. Perhaps the judge and jury found the handless-yet-handsome *El Mocho* sympathetic?

49. *Ibid.* at 577; *Underhill II*, 168 U.S. 250.

50. See, e.g., Kevin H. O'Rourke and Jeffrey G. Williamson, *Globalization and History* (Cambridge, MA: MIT Press, 1999); Michael Lang, "Globalization and Its History," *Journal of Modern History* 78, no. 4 (December 2006): 899–931; Jürgen Osterhammel, *Kolonialismus: Geschichte, Formen, Folgen* (Munich: Beck, 2003); Jürgen Osterhammel, *The Transformation of the World: A Global History of the Nineteenth Century* (Princeton, NJ: Princeton University Press, 2014); Emily S. Rosenberg, ed., *A World Connecting, 1870–1945, A History of the World* (Cambridge, MA: Harvard University Press, 2012); Harold James and Kevin H. O'Rourke, "Italy and the First Age of Globalization, 1861–1940," in *The Oxford Handbook of the Italian Economy since Unification*, ed. Gianni Toniolo (Oxford University Press, 2013), 37–68.

51. Richard Baldwin and Philippe Martin, "Two Waves of Globalization: Superficial Similarities, Fundamental Differences," NBER Working Paper No. 6904 (1999), 1.

52. See, e.g., Alan Rugman, *The End of Globalization: Why Global Strategy Is a Myth and How to Profit from the Realities of Regional Markets* (New York: AMACOM, 2001).

saw such an expansion in trade that commodities globally saw a convergence that was equalled only in the past few decades.<sup>53</sup> So far as investment goes, economists have argued, “the only real debate among informed observers is whether we have returned [in 1999] to 1914-levels of financial integration, or have yet to reach that those levels.”<sup>54</sup> Migration, moreover, was far greater in the nineteenth century age of globalization than in today’s. As two scholars recently put it, the level of migration in the nineteenth century was “[...] staggering by modern standards. Emigration flows equal to two to five percent of the population were entirely normal during this period.”<sup>55</sup> But few statistics or analyses could do better than John Meynard Keynes’ (lengthy) description of the globalized world that came to an end with the guns of August in 1914:

What an extraordinary episode in the progress of man that age was which came to an end in August 1914! The inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth, in such quantity as he might see fit, and reasonably expect their early delivery upon his doorstep; he could at the same moment and by the same means adventure his wealth in the natural resources and new enterprises of any quarter of the world, and share, without exertion or even trouble, in their prospective fruits and advantages; or he could decide to couple the security of his fortunes with the good faith of the townspeople of any substantial municipality in any continent that fancy or information might recommend. He could secure forthwith, if he wished it, cheap and comfortable means of transit to any country or climate without passport or other formality, could despatch his servant to the neighboring office of a bank for such supply of the precious metals as might seem convenient, and could then proceed abroad to foreign quarters, without knowledge of their religion, language, or customs, bearing coined wealth upon his person, and would consider himself greatly aggrieved and much surprised at the least interference.

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53. On commodity price convergence, see O’Rourke and Williamson, *Globalization and History*.

54. Baldwin and Martin, “Two Waves of Globalization: Superficial Similarities, Fundamental Differences,” 8.

55. *ibid.*, 19.

But, most important of all, he regarded this state of affairs as normal, certain, and permanent, except in the direction of further improvement, and any deviation from it as aberrant, scandalous, and avoidable.<sup>56</sup>

Globalization, however, required security. It required that migrants, as they embarked on an oceanic liner, felt they would be relatively secure when they disembarked. It required that traders, as they loaded their goods onto a barge, felt secure that the recipient would honor their agreements. It required that investors, as they adventured their wealth in the natural resources and new enterprises of any quarter of the world, felt secure that their investments would not be expropriated.

European States crafted three methods for providing certainty by eliding legal difference in order to provide security and legal certainty in the latter-half of the nineteenth century. The first, formal empire, effectively eradicated legal difference by replacing the law of the conquered territory with that of the metropole. The second, extraterritoriality, was infamously imposed by unequal treaty upon China, Japan, the Ottoman Empire, and Tunisia. Extraterritorial privilege eradicated legal difference by permitting foreigners to be governed by the law of their distant sovereign.<sup>57</sup> These two methods both involved the formal imposition of law upon territories that Europeans considered to be outside of international society, and not entitled to sovereign equality. They were overtly imperial methods that could not be applied within international society as it was conceived of in the nineteenth century—that is within the world of formal states that made up the western hemisphere and Europe. The third method, and the subject of this chapter, turned to international law and made reference to the “responsibility of states,” “standards of civilization,” and “international comity” to protect aliens in States not susceptible to overt imperialism.<sup>58</sup> It was the legal basis of a

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56. John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace, / Howe, 1920), 10-12.

57. See Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012); Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2012); Turan Kayaoglu, “The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality,” *International Studies Quarterly* 51, no. 3 (September 2007): 649–75.

58. See Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (Oxford:

kind of covert imperialism and of “informal empire.”<sup>59</sup> It was this third method that was used in what jurists at the time referred to as “international society,” or those States of Europe and North and South America that had the privilege of being sovereign, but also had the responsibility of abiding by a set of international norms and regulations for the treatment of foreigners. It was this regime to which Venezuela belonged and was subject.

## 4 Diplomatic Protection

The protection of merchants and travelers had always been one of the chief duties of consulates, but after 1850 the general protection of nationals and their interests abroad became a central concern of foreign ministries themselves. The best illustration of the new orientation of foreign ministries is in the quantity and type of paperwork that piled up in their sparsely staffed offices. Beginning mid-century, foreign ministries were buried under an avalanche of correspondence relating to the protection of nationals abroad. The British Foreign Office, for example, saw its total number of dispatches double from 51,000 in 1849 to 102,000 in 1869.<sup>60</sup> In response, the Foreign Office peppered the Law Officers of the Crown with questions related to passports, nationality, naturalization, and protection.<sup>61</sup> In France, the picture was similar. With the increase in the number of French nationals living abroad came an expansion in the number of consuls and the scope of their duties. By the last decade of the nineteenth century, the directorate of Consulate and Trade Affairs was responsible for more than 70 percent of the correspondence flowing through the entire Ministry of Foreign Affairs.<sup>62</sup> The United States Department of State, uniquely among the world’s major

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Oxford University Press, 1984).

59. The classic work on informal empire is John Gallagher and Ronald Robinson, “The Imperialism of Free Trade,” *Economic History Review* 6, no. 1 (1953): 1–15.

60. Zara S. Steiner, *The Foreign Office and Foreign Policy, 1898-1914* (London: Cambridge University Press, 1969), 3-4.

61. Reports of the Law Officers of the Crown, 1861-1921, TNA: FO 834/3 – FO 834/30.

62. Jörg Ulbert, “A History of the French Consular Services,” in *Consular Affairs and Diplomacy*, ed. Jan Melissen and Ana Mar Fernández, Diplomatic Studies (Leiden: Martinus Nijhoff, 2011), 306; Jean Baillou, ed., *Les affaires étrangères et le corps diplomatique français* (Paris: Editions du CNRS, 1984), 2:80. See also Paul Gordon Lauren, *Diplomats and Bureaucrats: The First Institutional Response to Twentieth-Century Diplomacy in France and Germany* (Stanford, CA: Hoover Institution Press, 1976).

foreign ministries, kept a unified indexical record of all outstanding claims on behalf of individuals made either by or against the United States between 1900 and 1936. Requiring two archival staff to lift, the record itself is a colossal, leather-and-wood-bound ledger containing more than 1,100 pages stacked more than 10 inches high. Each page—more than two feet in width—was capable of recording up to 15 outstanding claims.<sup>63</sup> The size and weight bespeak the burden that foreign claims placed upon the State Department. Similarly, until the Office of the Legal Advisor replaced it, the U.S. Department of State relied upon the Solicitor, an advisor from the Department of Justice to weigh in on legal matters. In a report on the Solicitor's duties in 1911, the Department of State noted, “owing to the almost continual increase of foreign enterprise, the number of claims and complaints lodged by American citizens (who have gone and are going to foreign countries in large numbers, and who have invested in such countries enormous amounts of capital) has become very great and is increasing.”<sup>64</sup> The claims, which those citizens would file in the event of a problem, the same report noted, could run in excess of 2000 pages.<sup>65</sup> The result being that by far the largest category of work undertaken by the chief legal advisor to the U.S. Department of State involved the protection of nationals and their investments abroad.<sup>66</sup>

The increased flow of paper through the foreign ministries cannot merely be attributed to the burgeoning of state bureaucracies. The French Ministère des Affaires Étrangères, the U.S. State Department, and the British Foreign Office had neither a comparable increase in staff nor a comparable increase in other activities.<sup>67</sup> Instead, the ocean of paper bespeaks the increase in global

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63. Indeed a rarity within the State Department legal records, which are otherwise scattered throughout NARA. Register of International Claims, ca. 1900 - ca. 1936; Records of Boundary and Claims Commissions and Arbitrations, 1716 – 1994; Record Group 76.

64. Department of State, *Outline of the Organization and Work of the Department of State* (Washington, DC: Government Printing Office, 1911), 28, 29-50.

65. *Ibid.*

66. This has also been noted by Benjamin Coates in Benjamin Allen Coates, “Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919” (PhD diss., Columbia University, 2010), 246.

67. See, e.g., Steiner, *The Foreign Office and Foreign Policy, 1898-1914*, 3-4; There has recently been good work on the Ottoman Foreign Ministry's Office of the Legal Advisor, which saw its role within Ottoman foreign policy dramatically increase in the decades before 1914. See Aimee M. Genell, “The Well-Defended Domains: Eurocentric International Law and the Making of the Ottoman Office of Legal Counsel,” *Journal of the Ottoman and Turkish Studies Association* 3, no. 2 (November 2016): 255–275.

migration, trade and investment, and demonstrates the heightened potential for conflicts in an age of global mobility. Each one of these complaints had the potential of leading to armed conflict.<sup>68</sup>

Indeed, most of the rationales for military action between 1850 and 1914 could be traced to the protection of nationals and their property abroad. Between 1830 and 1900 the United States (the only major power to keep unified use of force records) employed military force abroad more than 75 times. Nearly 60 of those instances were premised upon the protection of American nationals or property abroad or reprisals for uncompensated damages.<sup>69</sup> The Blockade of Athens, the Bombardment of Greytown, The Boer War, the Opium Wars, the British Occupation of Egypt, the Third Anglo-Ashanti War, the Venezuelan Blockade, the American siege of Veracruz, the French invasion of Mexico, the American invasion of Cuba, just to name a few, were all justified with reference to the right to protect nationals abroad. As President McKinley put it before the U.S. invasion of Cuba, “We owe it to our citizens in Cuba to afford them [...] protection [...].”<sup>70</sup> Likewise, the vast majority of international arbitrations between 1794 and 1945 were the result of disputes involving individuals. The Jay Treaty of 1794<sup>71</sup> and

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68. See, e.g., the hundreds of examples contained within both Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims* (New York: Banks Law Publishing, 1915), and Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore: Johns Hopkins Press, 1932). The Supreme Court of the United States, looking back over the previous century eloquently noted the danger: “One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.” *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

69. Ellen C. Collier, *Instances of Use of United States Forces Abroad, 1798 - 1993* (Washington: Congressional Research Service, 1993). The size of the forces used could range from “a dozen seamen” to more than “three thousand men [...] engaged in long campaigns.” For more details on these interventions see the fairly exhaustive Milton Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (Baltimore: Johns Hopkins Press, 1928), 1. Unfortunately, no similar report or study has been compiled for any European power.

70. Qtd. in John Bassett Moore, *A Digest of International Law* (Government Printing Office, 1906), 6:211-23.

71. See Jackson H. Ralston, *The Law and Procedure of International Tribunals*, revised ed. (Stanford, CA: Stanford University Press, 1926), xxvi.

even the treaties arising out of the Congress of Vienna of 1815<sup>72</sup> were heavily concerned with compensating individuals harmed by a foreign state. But the trend accelerated in line with trade and commerce in mid-century. There were more than 200 uses of public international arbitration to deal with disputes involving individual issues between 1845 and 1914.<sup>73</sup> Similarly, between 1845 and 1945, excluding the numerous tribunals established after the First World War, there were more than 60 mixed claims commissions established as part of arbitral agreements. Many of these tribunals dealt with hundreds or thousands of individual claims. The 1923 claims commission between Mexico and the United States, for example, heard 3,617 cases.<sup>74</sup> Such was the caseload of each commission that by the end of the nineteenth century the vast majority of written decisions of an international character involved individuals—not high affairs of state. Owing to the vast storehouse of case law that emerged out of these tribunals, in 1946 a prominent international jurist argued, “the international law governing the responsibility of states for injuries to aliens [became] one of the most highly developed branches of [international] law.”<sup>75</sup> But even outside of the elaborate claims commissions, which were established to remedy large numbers of disputes between two or more states, many tribunals were set up to hear individual conflicts that arose between States over

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72. See, e.g., “Convention between Great Britain and France, relative to the Claims of British Subjects,” *British Foreign and State Papers, 1814-15, 3:342-58.*

73. Based on a survey of: A.M. Stuyt, *Survey of International Arbitrations, 1794-1938* (The Hague: Martinus Nijhoff, 1939); Alfred Lapradelle and Nicolas Politis, *Recueil des arbitrages internationaux* (Paris: A. Pedone, 1905); Henri La Fontaine, *Pasicrisie internationale* (Berne: Stämpfli, 1902); William Evans Darby, *International Tribunals*, 4th ed. (London: J.M. Dent, 1904).

74. General Claims Commission (Convention of September 8, 1923) (United Mexican States, United States of America), 4 February 1926 - 23 July 1927, RIAA 4, pg. 3. To place this number in perspective, the caseload of this commission alone was greater than that of the 2014 caseload for the European Court of Human Rights, the most active international courts in the world as of this writing. That court issued 2,388 judgments in 2014, about 2/3 of the 1923 claims commission’s 3,617. European Court of Human Rights, Analysis of Statistics 2014 (January 2015), pg. 5. Similarly, the caseload of the ten largest international arbitral institutions plus ICSID in 2008 numbered 3,328. ICSID, The ICSID Caseload — Statistics, Issue 2016-2, available at: [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID Web Stats 2016-2 \(English\) Final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID Web Stats 2016-2 (English) Final.pdf); Other numbers compiled from statistics available from the Hong Kong International Arbitration Centre, available at <http://www.hkiac.org/index.php/en/hkiac/statistics> (Archived May 2012).

75. Philip C. Jessup, “Responsibility of States for Injuries to Individuals,” *Columbia Law Review* 46, no. 6 (November 1946): 904.

wrongs done to their subjects. In short, the claims of individuals or groups of individuals were tied to the explosion in the use of public international arbitration in the second-half of the nineteenth century.<sup>76</sup>

Treatises and legal research reflected this new emphasis on individuals. Prior to the second-half of the nineteenth century, treatment of the protection of nationals abroad or the responsibility of states was constrained to small sections of consular manuals or was included only as a part of a more general treatise on international law. By the 1890s, the first legal treatises exclusively on the subject began to appear *en masse* (or at least as en masse as can be in the world of legal publishing). Edmond Pittard, the future Swiss delegate to the League of Nations, authored the first, as his dissertation.<sup>77</sup> Several works followed,<sup>78</sup> with Anzilotti's *Teoria generalla della responnsabilita dello stato nel diritto internazionale* being the most influential owing to the author's prominent position within the *Institut de Droit International*.<sup>79</sup> This turn of the century academic interest in the subject culminated with the publication of Edwin Borchard's *The Diplomatic Protection of Nationals Abroad* in 1915.<sup>80</sup> At more than 1,000 pages, it is still the longest treatment of the subject. These works on diplomatic protection and state responsibility were accompanied by the release of several massive compendia containing all the decisions of international arbitral tribunals convened since the Jay Treaty of 1796.<sup>81</sup>

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76. For statistics on the increase in international arbitration around mid-century, see Fontaine, *Pasicrisie internationale*.

77. See Edmond Pittard, *La protection des nationaux à l'étranger* (Geneva: W. Kündig, 1896).

78. See, e.g., *Le droit de protection exercé par un état à l'égard de ses nationaux résidant à l'étranger* (Paris: A. Pedone, 1898); P. Pradier-Fodéré, *Cours de droit diplomatique* (Paris: A. Pedone, 1899); Gaston de Leval, *De la protection diplomatique des nationaux à l'étranger* (Brussels: Émile Bruylants, 1907).

79. See Dionisio Anzilotti, *Teoria generalla della responnsabilita dello stato nel diritto internazionale* (Florence: F. Lumachi, 1902).

80. See Borchard, *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims*.

81. Most of these projects were undertaken in response to the increasing successes of peace advocacy in favor of arbitration, culminating in the establishment of the Permanent Court of Arbitration as a result of the Peace Conference held at The Hague in 1899. These tomes, it was thought, could provide a set of jurisprudence whence the new court could draw. See, e.g., Darby, *International Tribunals* (Darby's tome was compiled explicitly at the request of the International Law Association in 1895 in order to study the feasibility of an international court.); Moore, *A Digest of International Law*; Fontaine, *Pasicrisie*

Many of the cases contained within these compendia involved sovereign bond defaults or the repudiation of concessions granted to foreigners and fit in with a narrative of informal economic imperialism. Many of the cases, however, involved the protection of individual civil rights—protection from arrest, destruction of property, or prolonged detainment. The complaint of a British whaler improperly arrested and detained by the Dutch received attention and he was awarded compensation.<sup>82</sup> The complaint by a British trade unionist of improper arrest and expulsion by Belgium received ample attention, with the case arbitrated by an expert from the *Institut de Droit International*.<sup>83</sup> Cases like these were common and handled systematically by foreign ministries. As Elihu Root, the American Secretary of State and an internationally renowned scholar of international law, noted in his 1910 address to the American Society of International Law:

The diplomatic history of this country presents a long and painful series of outrages on foreigners by mob violence [...] [D]efenseless Chinamen were mobbed at Denver in 1880, and at Rock Springs, Wyoming, in 1885; Italians were lynched in New Orleans in 1891, and again at Rouse, Colorado, in 1895; and Mexicans were lynched at Yreka, California, in 1895; and Italians at Tallulah, Louisiana, in 1899, and again at Erwin, Mississippi, in 1901. Our Government was practically defenseless against claims for indemnity because of our failure to extend over these aliens the same protection that we extend over our own citizens, and the final result of long diplomatic correspondence in each case was the payment of indemnity for the real reason that we had not performed our international duty.<sup>84</sup>

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*internationale*; Lapradelle and Politis, *Recueil des arbitrages internationaux*.

82. Costa Rica Packet Arbitration, TNA: FO 37/792; FO 37/793; FO 37/794; FO 37/795; FO 37/796; FO 37/804; FO 37/815; FO 881/6389X; FO 881/6532; FO 881/6677; FO 881/6685; FO 881/6829X; FO 881/6963; Convention Between Great Britain and the Netherlands for the Arbitration of the Costa Rica Packet Claim, 16 May 1895, 181 C.T.S. 253, 87 B.S.P. 21; Award of the Czar of Russia in the Arbitration of the Costa Rica Packet Case Between Great Britain and The Netherlands, 25 February 1895, 184 C.T.S. 240, 89 B.S.P. 1284.

83. The Arrest and Expulsion of Ben Tillett and Arbitration, TNA: FO 10/771, FO 10/772; Convention Between Belgium and Great Britain Referring to Arbitration the Case of Mr. Ben Tillett, 19 March 1898, 186 C.T.S. 193.

84. Elihu Root, “The Basis of Protection to Citizens Residing Abroad,” *Proceedings of*

The frequency with which the events Root speaks occurred is indicative of an extensive regime of protection that had built up over the course of the nineteenth century. Disputes between states involving the improper arrest, detention, imprisonment, expulsion, personal injury, or even death as a result of negligence of state authorities were resolved by reference to a clear, collectively agreed upon procedure throughout much of the Atlantic World.<sup>85</sup> The process was not invented anew with each and every dispute. An injured national would file a complaint with his or her consulate. The consulate would, if the complaint were valid, forward it on to the bureaucrats of the foreign ministry. Lawyers—like the Law Officers of the Crown, the Solicitor at the U.S. Department of State, or the Ottoman Office of Legal Counsel—would offer a legal opinion. If a resolution was not readily available, arbitration might be had, either in a single hearing or through the use of a standing mixed commission. Cases were quietly adjudicated and money was distributed. Disputes involving sovereign default and expropriation were resolved by reference to the same procedure.<sup>86</sup> The protection of migrants and sojourners and the protection of merchants and investors involved the same institutions, the same procedures, and the same set of practices. The exercise of the sovereign authority to avenge an injury to a national had been regularized and turned into a legal process that mediated competing claims over human beings. It also effectively created an international realm of legal protection.<sup>87</sup>

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*the American Society of International Law at Its Annual Meeting (1907-1917)* 4 (April 1910): 24.

85. See, e.g., the cases illustrated in Marjorie M. Whiteman, *Damages in International Law* (Washington: Government Printing Office, 1937).

86. Manley O. Hudson took note of the systematic nature of these ad hoc tribunals: “Claims made by individuals or private companies against States have long been fruitful of international litigation. Numerous international tribunals have been created to deal directly or indirectly with such claims, and their jurisprudence has had a formative influence on the development of international law with respect to State responsibility. The circumstances in which such tribunals should be created, the precise law which they should apply, and the execution of their decisions, are all matters on which controversy surges. Yet to some extent practices have been evolved which constitute a systematic approach to these problems, and on the basis of which constructive effort must proceed for the future.” Manley O. Hudson, *International Tribunals: Past and Future* (Washington: Carnegie Endowment for International Peace, 1944), 187.

87. See also a similar claim made by Chittharanjan F. Amerasinghe, *Diplomatic Protection* (Oxford: Oxford University Press, 2008), 14 (“By the middle of the nineteenth century, governments had begun consistently to treat questions of protection of nationals

Resort to arbitration was also becoming increasingly formalized via treaty. Throughout the late nineteenth century the arbitration of international disputes had been at the top of the agenda for international peace activists on both sides of the Atlantic.<sup>88</sup> Activity had surged following the success of the Alabama Claims Commission, established in 1870 to settle all the remaining differences between Great Britain in the United States arising out of the American Civil War. As hundreds of individual claims (as well as more political claims) were dispensed with by an international commission, peace activists became increasingly convinced that general arbitration agreements for international disputes (including those concerning primarily individual claims) were an actual possibility.<sup>89</sup> At the First Pan-American Conference, the United States had supported a “definite plan of arbitration of all questions, disputes, and differences” that might have arisen between the States of the Western Hemisphere.<sup>90</sup> In 1897 the United States signed a treaty with Great Britain promising to submit “all questions in difference between them” to arbitration.<sup>91</sup> By the 1890s, then, the United States was arguably on its way to becoming a “Legalist Empire,” to use the title of a recent book on the subject arguing for the importance of international law in the foreign relations of the United States in the early twentieth century.<sup>92</sup> Indeed, by 1904 the United States had participated in the creation of the Permanent Court of Arbitration and Theodore Roosevelt proclaimed that he would “[...] lay before the Senate treaties of arbitration with all powers which are willing to

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abroad as legal questions which justified interposition by appeal to principles of international law, from whatever source they may be derived. The settlement of disputes of this nature was gradually becoming subject to legal methods and the institution of diplomatic protection for all practical purposes took root.”).

88. See Sandi E. Cooper, *Patriotic Pacifism: Waging War on War in Europe, 1815-1914* (Oxford: Oxford University Press, 1991); A.C.F. Beales, *The History of Peace: A Short Account of the Organised Movements for International Peace* (New York: MacVeagh, 1931); Paul Laity, *The British Peace Movement, 1870-1914* (Oxford: Clarendon Press, 2001); Alexander Tyrrell, “Making the Millennium: The Mid-Nineteenth Century Peace Movement,” *The Historical Journal* 21, no. 1 (1978): 75–95.

89. Cooper, *Patriotic Pacifism: Waging War on War in Europe, 1815-1914*.

90. International American Conference, *Report of Committees and Discussions Thereon* (Washington, DC: Government Printing Office, 1890), 1:8; Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford: Oxford University Press, 2016), 30.

91. Qtd. in *ibid.* The United States never ratified the treaty.

92. *ibid.*, 2-3; Coates, “Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919.”

enter into these treaties with us.”<sup>93</sup>

While diplomatic protection and intervention was increasingly common in the late-nineteenth century, the practice was not without its critics and its debates. There were two major debates that were raging amongst the relatively subdued international legal community in the late-nineteenth century. The first was the “Standard of Civilization” versus “national treatment” debate for expectations and legal rights.<sup>94</sup> Proponents of the first model argued that all States that were members of international society were bound to provide a minimum set of protections to all duly admitted foreigners.<sup>95</sup> These included rights to property and to what Americans might call “due process.” Proponents of the second model argued that foreigners were entitled to the same treatment as nationals.<sup>96</sup> Nothing more, nothing less. The second was the “denial of justice” debate.<sup>97</sup> Legal scholars were divided (mostly along hemispheric lines) over when a State had the right to intervene on behalf of its nationals abroad. European States were willing to intervene in the first instance, prior to the exhaustion of local remedies. The states of the Western Hemisphere, however, had a different view. Carlos Calvo, for example, Latin America’s preeminent international jurist (and the only member of that region inducted into the prestigious and influential *Insititut Droit International*) argued that resort to diplomatic protection by a foreigner was only appropriate in the case of a “denial of justice.”<sup>98</sup> That is, if the domestic court system had, for example, refused to entertain a foreigner’s case. This was an addendum to the exhaustion of local remedies rule.

Calvo’s eponymous doctrine, while controversial, did gain widespread recognition, particularly in the Western Hemisphere.<sup>99</sup> By the end of the nineteenth century, the United States and its co-hemispheric companions were fiercely advocating for national treatment (with a minimum standard in the case of U.S. policymakers) and for a recognized requirement that local

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93. Theodore Roosevelt, “Message of the President to the Senate and the House of Representatives,” 6 December 1904, in United States Department of State, *Foreign Relations of the United States, 1904* (Washington: Government Printing Office, 1905), XLI.

94. See Gong, *The Standard of ‘Civilization’ in International Society*.

95. See *ibid.*

96. See *ibid.*

97. Amos S. Hershey, “The Calvo and Drago Doctrines,” *American Journal of International Law* 1, no. 1 (January 1907): 32-33.

98. See Carlos Calvo, *Droit International* (Paris: Nouvelle de droit et de jurisprudence, 1896), § 1297.

99. Hershey, “The Calvo and Drago Doctrines.”

remedies be exhausted before seeking diplomatic intervention.<sup>100</sup>

By the 1890s, then, there was a regularized system of international dispute resolution for individual claimants. Diplomatic Protection was exceedingly regular. In 1944, Manley O. Hudson, one of the grand old men of Harvard Law, observed, “[the] practices [of protection] have been evolved which constitute a systematic approach to these problems, and on the basis of which constructive effort must proceed for the future.”<sup>101</sup> Writing in 1946, Philip C. Jessup echoed Hudson, noting, “The practice which has become so frequent in the course of the last century and a half of setting up mixed claims commissions for the adjudication of claims presented by states for injuries to their nationals in other states, has provided an abundant body of ‘case law’ which appeals so strongly to the lawyer trained in the common law. Masses of briefs and of dissenting opinions are also available for study and these frequently constitute useful guides to the diplomatic correspondence in which governments have set forth their views as to the applicable rules of international law.”<sup>102</sup> And these were not just the result of major political controversies. Cases were often dispatched through ad hoc arrangements and one-off arbitrations as well.<sup>103</sup> Moreover, the movement toward even further regularizing the arbitration of international claims was a major political program in the 1890s, with dozens of treaties winding their way through the capitals of Europe and the Western Hemisphere to make arbitration mandatory—culminating in 1899 with the Hague Conference and the establishment of the soon-to-be-sleepy Permanent Court of Arbitration.

It is against this backdrop that the Second Circuit and the U.S. Supreme Court heard Underhill’s case.

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100. See, e.g., Root, “The Basis of Protection to Citizens Residing Abroad.”

101. Hudson, *International Tribunals: Past and Future*, 187.

102. Jessup, “Responsibility of States for Injuries to Individuals,” 904-905.

103. See the collections of ad hoc cases in Fontaine, *Pasicrisie internationale*. Also, indicative of just how regular the system could be, Edwin Borchard, writing in 1930, took note of just how pro forma State espousal had become in order to argue that the individual had in fact, if not in law, become a subject of international law. Edwin M. Borchard, “The Access of Individuals to International Courts,” *American Journal of International Law* 24, no. 2 (April 1930): 361 (“[Espousal] is often a matter of form only, that in practice the private individual is the essential prosecutor and beneficiary of the claim, and that his State [...] actually appears in most cases in a representative character only.”).

## 5 The Opinions

The Second Circuit, like the trial court, found in favor of *El Mocho*.<sup>104</sup> Judge Wallace, unlike Justice Fowler, cited and discussed lots of precedent in his opinion and he touched upon many of the cases that scholars later identified as important in the development of the Act of State Doctrine. At the center of the reasoning was the question of the immunity of *El Mocho* as an agent of the of a successful revolutionary government, which the Circuit Court found as being beyond dispute. “The acts of the defendant, as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently. The organization, of which he was a part, represented that kind of a *de facto* government.”<sup>105</sup>

But Judge Wallace did not end his analysis there. Instead he turned to a number of opinions issued by several different Attorneys General over the decades establishing the need to first exhaust local remedies before making an appeal to your own government.<sup>106</sup> In doing so, he quoted at length an opinion issued in 1871 in which the Attorney General advised:

It has often been laid down that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule, plainly, is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid all occasion for international discussion.”<sup>107</sup>

The Attorney General clearly expressed the requirement that any claimant for intervention must have exhausted the local remedies (a principle that, as mentioned above was becoming more widely accepted by the last few decades of the nineteenth century).<sup>108</sup> But the Attorney General also defined a clear procedure for escalation. Should the “offending government” fail to do justice for an injured national, then there would be occasion for “international

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104. *Underhill I*, 65 F. 577.

105. *Underhill I*, 65 F. at 583.

106. *Ibid.* at 581.

107. *Ibid.* (citing 13 Op.Attys.Gen. 550.).

108. *Ibid.*

discussion.”<sup>109</sup> Importantly, that “international discussion,” as was discussed above in section four, had become formalized into a standard procedure over the previous several decades.

For Judge Wallace, these principles were key. First, the fact that Underhill had not yet availed himself of the Venezuelan courts was consequential.<sup>110</sup> Second, in the closing paragraphs of his opinion he held that the immunity granted to Acts of State did not in any way detract from the *responsibility* of Venezuela for an injury done to Mr. Underhill. But, the extent of that responsibility was to be “[...] adjudicated by the two governments by international action, according to the principles of international law applicable to such cases.”<sup>111</sup>

When Underhill appealed to the Supreme Court, neither the opinion nor the reasoning changed much in Justice Fowler’s rendering.<sup>112</sup> He began his opinion with what has become the famous rendering of the doctrine, stating, “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” While that dictum is certainly important, he adds to it, “Redress of grievances by reason [...] must be obtained through the means open to be availed of by sovereign powers as between themselves.” It is that second sentence that this paper argues is key. Like Judge Wallace, Justice Fowler is directly referencing the system of intervention and arbitration that was used extensively and had become relatively systematic by the 1890s. This policy of abstention out of considerations of comity was articulated when a systematic alternative was readily available—the fora of Venezuela and, should those fail, a system that had, in effect, become a kind of international adjudication for individual claims.<sup>113</sup>

As scholars have subsequently pointed out, the Act of State as it was articulated in both of these opinions was about immunity.<sup>114</sup> And that is certainly true. But the articulation of the Act of State Doctrine in these terms occurred in an age when there were clear, effective, and frequently used alternative remedies. And it is this fact that later opinions have often failed to take into account.

In *Underhill* both Judge Wallace and Justice Fowler dismissed Underhill’s

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109. *Ibid.*

110. Judge Wallace spent four paragraphs of a relatively short opinion on the subject.

111. *Ibid.* at 583.

112. *Underhill II*, 168 U.S. 250.

113. See Borchard, “The Access of Individuals to International Courts,” 361.

114. See, e.g., Bazyler, “Abolishing the Act of State Doctrine,” 331-332\*.

complaints out of considerations of comity and on the basis of immunity. However, they dismissed the case with the understanding that the dispute, if valid, would be dealt with by the Venezuelan courts, or through diplomatic intervention and possible arbitration. The language mobilized by both opinions expressed little concern for the Executive's monopoly of foreign affairs—as Justice Rehnquist and Scalia's did decades later. *Instead, Judge Wallace and Justice Fowler's opinions acknowledged that there were more appropriate fora for the claim to be brought.* Underhill's claim was dismissed not because it might bring embarrassment to the executive, but rather because the judiciary had faith that should Underhill exhaust his remedies, he would have ample opportunity to bring his claim before the State Department and have the U.S. Government espouse his claim before an arbitral tribunal. This was a faith derived from the rather systemic use of diplomatic protection and public international arbitration in the late nineteenth century. And that faith was not naive or misplaced. Six years after the Supreme Court delivered its opinion, Venezuela and the United States signed a treaty in which they agreed:

All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the commission hereinafter named by the Department of State of the United States or its Legation at Caracas, shall be examined and decided by a Mixed Commission [...].

Mr. Underhill's case was about to be heard on its merits in an international forum—just as Judge Wallace and Justice Fowler expected.

## 6 The Arbitration

Sadly, Mr. Underhill died in Havana in October of 1901.<sup>115</sup> His wife, however, brought a claim before the claims commission on her behalf and as the successor to her husband's interest.<sup>116</sup> There were three issues before the tri-

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115. *Underhill Cases*, 9 RIAA 155. His place of death serves as further evidence of just how mobile a person could be in the late nineteenth century. From the court cases alone we know that he spent time in New York, Venezuela, and Cuba.

116. *Ibid.*

bunal. First, there were Mr. Underhill's claims.<sup>117</sup> Second, there were Mrs. Underhill's claims.<sup>118</sup> Third, there was the claim of Mrs. Underhill's right to Mr. Underhill's claim through a succession in interest following her husband's death.<sup>119</sup> The Venezuelan and American commissioners were deadlocked on all three issues. As to Mr. Underhill's claim, the Venezuelan commissioner made much of the fact that the "last judgment of the Supreme Court took place seven years before Underhill's death, and during all those years he never tried to enter before the Venezuelan courts any action of responsibility for the alleged personal offenses, all rights of civil action thus perishing with his own death."<sup>120</sup> Moreover, the American naval officer who had observed the transactions seemed to think the Underhills were not treated quite as badly as they claimed.<sup>121</sup> The umpire<sup>122</sup> did not comment on this question, instead he found that Mrs. Underhill failed to present sufficient evidence to prove her succession in interest.<sup>123</sup> Mr. Underhill's claims were, therefore, left to rest with Mr. Underhill himself.

The umpire held, however, that Mrs. Underhill was "unjustly prevented by Venezuelan authorities from leaving the country during about a month and a half, the claim for unlawful detention has to be recognized." In recognition of that detention, the commission awarded her the hefty sum (in 1903) of \$3,000.<sup>124</sup> The claims of the Underhills were then deemed closed.

The point of relaying the results of the arbitration here is to further

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117. *Ibid.*

118. *Ibid.*

119. *Ibid.*

120. *Ibid.* at 156.

121. *Ibid.*

122. The tie-breaking, jointly appointed commissioner.

123. *Ibid.* at 155.

124. *Ibid.* at 161. This was far short of the \$100,000 she claimed. However, it was still a significant amount. \$3,000 in 1903 dollars by one measure would represent \$519,000 in 2015 dollars in terms of economic status, that is the relative "prestige value" of that amount of money. Alternatively it could also represent \$2,070,000 in 2015 dollars in terms of "economic power," that is the influence of the wealth's owner in terms of controlling the composition of the economy. Had her initial claim of \$100,000 gone through she would have received the "prestige value" and "economic power" of a sum equal to \$17,300,000 and \$68,900,000 respectively. See Samuel H. Williamson, "Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to present," MeasuringWorth, 2016. Also see the MeasuringWorth Relative Value of the U.S. Dollar Calculator, available at <https://www.measuringworth.com/uscompare/>. Clearly inflated claims are hardly a new phenomenon.

illustrate that international claims were, indeed, dealt with systematically through Diplomatic Protection and that it's likely that Judge Wallace and Justice Fowler both assumed that in dismissing these cases they weren't condemning them to oblivious. They likely believed, rightfully as this arbitration illustrates, that Mr. Underhill could find justice in the courts of Venezuela and, failing that, through the systematic involvement of the Executive through diplomatic protection. Had the Courts of Venezuela been closed to Mr. Underhill, or if the Executive's use of Diplomatic Protection was rare or capricious, it seems less likely that Judge Wallace and Justice Fowler would have been so quick to dismiss.

## 7 The Aftermath: *Ricaud* and *Oetjen*.

Nearly two decades after *Underhill*, the Supreme Court applied the Act of State doctrine in another set of cases.<sup>125</sup> These cases involved the state expropriation of private property, an act which would become endemic in the twentieth century.<sup>126</sup> Mexico, in the midst of its revolution expropriated lots of property of both Mexican and American Nationals. *Ricaud* and *Oetjen* both involved property seized by a revolutionary military commander (like *El Mocho*) of a subsequently recognized government. The property was then sold to Americans who brought the property to the United States. In both cases, claimants filed suit claiming the the seizure of their property in Mexico had been unlawful and thus proper title still remained with them. The Supreme Court applied the Act of State doctrine in both cases either directly quoting or closely paraphrasing Justice Fowler in *Underhill*.<sup>127</sup> And, like *Underhill*, the Court noted the alternative remedies available in the courts

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125. See *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918).

126. Even a cursory survey from 1917-1960 reveals just how expansive the government seizure of private property was. Russia, Bolivia, Mexico, Turkey, Estonia, Latvia, Lithuania, Bulgaria, France, the Netherlands, Czechoslovakia, Hungary, Poland, Austria, Britain, Romania, Burma, New Zealand, China, Iran, Guatemala, India, Yugoslavia, Egypt, Indonesia, Iraq, Cuba, and Brazil all seized private property en masse during that forty year period. Mooney, *Foreign Seizures: Sabbatino and the Act of State Doctrine*, 3-4.

127. *Ricaud*, 246 U.S. at 309 ("the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory."). *Oetjen*, 246 U.S. at 303 ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.").

of Mexico and “the diplomatic agencies of the political department of our government.”<sup>128</sup>

Edwin Borchard, who was the leading treatise writer on the subject of Diplomatic Protection in the English language (and probably in the French language as well),<sup>129</sup> penned his own (blessedly short) review of the Supreme Court’s opinions in *Oetjen* and *Ricaud*.<sup>130</sup> He approved of both, arguing, “The same principle which induces the courts to refrain from drawing into question or passing upon acts of the political department of our own government acting within its jurisdiction would *a fortiori* exempt from similar examination the acts of a foreign government acting within its jurisdiction [...].”<sup>131</sup> The reason for such a rule, according to Borchard, was anchored in separation of powers and comity.<sup>132</sup> But that reason was “[...] fortified in the case of acts of a foreign government by the fact that a re-examination of such acts in municipal courts would ‘imperil the amicable relations between governments’ and *by the further fact that individual recourse is not barred, but is merely directed to be sought in other quarters, namely, in the courts of the foreign country or through a diplomatic claim instituted on behalf of the citizen by the foreign office of his own government.*”<sup>133</sup> We don’t know how the Court would have ruled had any of the claimants fully exhausted their local remedies and the Department of State refused to pursue a claim or

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128. *Oetjen*, 246 U.S. at 304 (“The remedy [...] must be found in the courts of Mexico or through the diplomatic agencies of the political department of our government.”); *Ricaud*, 246 U.S. at 310 (“Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government.”).

129. See Borchard, *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims*; Edwin M. Borchard, *Les Principes de la protection diplomatique des nationaux à l'étranger* (Leiden: Brill, 1924). For extensive praise, see, e.g., Philip Marshall Brown, “The Theory of the Independence and Equality of States,” *American Journal of International Law* 9 (1915): 305–335; Jr J. Reuben Clark, “Review of The Diplomatic Protection of Citizens Abroad or the Law of International Claims by Edwin M. Borchard,” *American Journal of International Law* 10, no. 1 (January 1916): 182–190. For contemporary references to his importance, see John Dugard, *Articles sur la protection diplomatique*, United Nations Audiovisual Library of International Law, 2014, [http://legal.un.org/avl/pdf/ha/adp/adp\\_f.pdf](http://legal.un.org/avl/pdf/ha/adp/adp_f.pdf) (“À la même époque, plusieurs ouvrages de référence sont consacrés au sujet, comme notamment l’imposant *The Diplomatic Protection of Citizens Abroad* d’Edwin Borchard (1919.”).

130. Edwin M. Borchard, “The Act of State Doctrine Applied to Acts of Mexican Revolutionists,” *Yale Law Journal* 27, no. 6 (April 1918): 812–816.

131. *ibid.*, 813–814.

132. *ibid.*, 814.

133. *ibid.* (emphasis added).

found the other State to be uncooperative—that is, we can't know whether the Court would have been so quick to apply the Act of State Doctrine should there have been no remedy available to the claimant.

Later in the twentieth century the Court faced the question of whether the Department of State could suggest to the Court that the Act of State Doctrine should not be applied.<sup>134</sup> Justice Rehnquist, writing for a plurality of the Court in 1972, suggested that “where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.”<sup>135</sup> One could read this in terms of the available remedies. The executive urged the Court to take judicial notice that local remedies were not readily available and arbitration was not forthcoming. However, the Legal Advisor’s “Bernstein Letter” in that case turned on the issue of embarrassment and interference with international politics, rather than remedy. But the so-called “Bernstein Exception” has never gained a majority.

Justice Brennan, in his dissent in *First National City Bank*, characterized the Act of State doctrine as a kind of “political question” dismissal.<sup>136</sup> But in doing so he noted, in an echo, perhaps, of earlier concerns long passed out of the Courts’ jurisprudence.<sup>137</sup> There were many circumstances that made an issue like this not “not cognizable in our courts” and “[o]nly one—and not necessarily the most important—of those circumstances concerned the possible impairment of the Executive’s conduct of foreign affairs.<sup>138</sup> “To the contrary,” Brennan continued, “the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been

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134. *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767–68 (1972) (plurality), approving of *Bernstein v. N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 2120 F.2d 375, 376 (2d Cir. 1954).

135. *First Nat. City Bank*, 406 U.S. at 768.

136. *Ibid.* at 789 (Brennan, J. dissenting) (“In short, *Sabbatino* held that the validity of a foreign act of state in certain circumstances is a ‘political question’ not cognizable in our courts.”).

137. *Ibid.*

138. *Ibid.*

harmed all point toward the existence of a ‘political question.’”<sup>139</sup> Here, at least, Justice Brennan acknowledged that part of the dismissal did, indeed, turn on questions of remedy and not entirely politics. But it was a faint acknowledgment. Times had changed, as had the Act of State Doctrine.

## 8 Conclusion

Justice Fowler’s articulation of the act of State Doctrine must be read in its totality. Sure, “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” But that principle comes with the tacit acknowledgment that redress could be had through diplomatic intervention.<sup>140</sup> When Justice Fowler penned those two sentences, he was likely well aware of the increasingly regular channels through which an injured party could find redress in the international system. After all, the establishment of the Permanent Court of Arbitration was a mere two years in the future. In the very year that he was penning the decision, the United States was about to sign a general arbitration agreement with Great Britain<sup>141</sup> and more were in the works.

In the first decades of the twentieth century, that system of protection and arbitration began to break down. States were increasingly reluctant to use diplomatic protection and ad hoc arbitration to provide remedies for their injured nationals abroad. Elihu Root, then Secretary of State, complained, “Natives of other countries [...] become naturalized here for the purpose of returning to their homes or seeking a residence in third countries with the benefit of American protection.”<sup>142</sup> In response to such abuses, the United States reformed its laws so as to forcibly expatriate Americans who spent more than a few years abroad.<sup>143</sup> “The new rule,” wrote Secretary Root, “is

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139. *Ibid.* (emphasis added).

140. *Underhill II*, 168 U.S. at 252 (1897).

141. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, 30.

142. Root, “The Basis of Protection to Citizens Residing Abroad,” 19.

143. See Act of March 2, 1907, 34 Stat. 1228 (1907). See also Expatriation of American Citizens, Report to Accompany H.R. 24122, 59th Cong., 2nd sess., H.Rep. 6431, pg. 2 (“Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. [...] Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world, without any intention of returning to this country. [...]”

that when a naturalized citizen leaves this country [for an extended period of time he is presumed to have renounced his citizenship and] the obligation of protection by the United States is deemed to be ended.”<sup>144</sup> The United States would have fewer nationals abroad if it expatriated those who were gone for an extended period of time. Likewise, the United States was getting less interested in defending the activities of its corporate nationals abroad. President Roosevelt, for example, complained that he was “[...] always afraid of seeming to back any big company which has financial interests in one of [the] South American states.”<sup>145</sup>

In addition to the disentangling of the globe through an all out assault on dual nationals, the First World War, and the Great Depression dramatically reduced international intercourse. As this paper illustrated above in Section 3, the late nineteenth century’s level of interconnectedness in terms of migration, trade, and investment was unmatched until near the twenty-first. The rather regular system of diplomatic protection and the convening of either ad hoc tribunals or standing claims commissions fell out of favor and was far less useful in a post-1929 world.<sup>146</sup>

In general, historians have noted, the international legalism of the early twentieth century gradually gave way to the international politics of the mid- and late twentieth. And with that transition the concept of “international relations” gradually replaced international law as the intellectual foundation of international order.<sup>147</sup> It is in the paradigm of “international relations” instead of “international law” that the transition from the world of *Underhill* to the world of *Kirkpatrick* took place. In *Underhill*, the Courts relied upon

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This is not right.”).

144. Root, “The Basis of Protection to Citizens Residing Abroad,” 19.

145. Roosevelt to Jacob H. Hollander, July 3, 1905, in Elting E. Morison, *Letters of Theodore Roosevelt*, IV (Cambridge: Harvard University Press, 1951), 1259. Qtd. in Cyrus Veeser, *A World Safe for Capitalism* (New York: Columbia University Press, 2002), 148; For extensive discussion of the controversy over the San Domingo Improvement Company, see *Ibid.* and Benjamin Allen Coates, “Securing Hegemony through Law: Venezuela, the U.S. Asphalt Trust, and the Uses of International Law, 1904–1909,” *Journal of American History* 102, no. 2 (September 2015): 388.

146. There are, of course, some notable exceptions, the Iran-United States Claims Tribunal being the most prominent.

147. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Hersch Lauterpacht Memorial lectures (Cambridge: Cambridge University Press, 2001), 413-509; Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, 182-183.

alternative systems and remedies available in both foreign and international law to justify dismissal. But by the time of *Kirkpatrick* the rationales had shifted toward respecting the central and political role of the executive in conducting international relations.