on Japanese mental hospitals, "legislation was introduced to regulate the admission and treatment of mental hospital patients." Unfortunately no such legislation has been introduced or is programmed.

As the Japanese representative at the Sub-Commission said, the Minister of Health and Welfare asked his advisory group in June 1984 to draft guidelines on the treatment of patients in mental hospitals. This is as far as they have gone, and it was set in motion before the meeting of the Sub-Commission. It will not involve any new legislation, and will merely set recommended standards of practice without any force of law.

NIALL MACDERMOT
Secretary-General, International Commission of Jurists

TO THE EDITOR IN CHIEF:

May 17, 1985

In an Editorial Comment last year (78 AJIL 121 (1984)), Oscar Schachter objected to continued reliance on the so-called Hull formula, requiring the payment of "prompt, adequate and effective" compensation in cases of otherwise lawful expropriation of alien property; he argued in favor of a "just compensation" formula which, in his view, was more flexible and could in certain cases (for the most part unspecified) warrant the payment of less than full compensation. This year, in the April issue (79 AJIL 414 (1985)), I took issue with one aspect of this argument, viz., his analysis of the international case law in relation to the *adequacy* of compensation. Whilst Professor Schachter was correct in stating that none of the international judicial or arbitral decisions had upheld the Hull formula in so many words, I ventured to suggest that his analysis was either misleading or erroneous insofar as it tended to suggest (in line with his general thesis) that the case law supported a flexible standard of "just" compensation rather than the payment of full compensation.

In a reply appended to my Note (*id.* at 420), Professor Schachter attempts to counter this criticism. In the course of doing so, he misinterprets my clearly stated position and raises issues outside the scope of the discussion; but even then, it is submitted, he fails to refute my argument.[1]

Briefly, my point was that, even if the cases do not employ the Hull formula as such, the tribunals concerned did require the payment of full compensation

[1] Schachter's original piece was written in defense of the formulation of the "just compensation" rule in a draft of the *Restatement of the Foreign Relations Law of the United States (Revised)*, which appeared to be somewhat hesitant about declaring the Hull formula to be general international law. *See* §712 (Tent. Draft No. 3, 1982). Contemporaneously with the publication of my reply, however, a new draft was issued (Tent. Draft No. 6, 1985), which states the rules regarding compensation for expropriation in a more "conservative" fashion. While avoiding use of the Hull formula, the new draft approximates it:

> [F]or compensation to be just under this Subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and must be paid at the time of taking, or within a reasonable time thereafter with interest from that date, and in a form economically usable by the foreign national.

At its meeting on May 14–17, 1985, the American Law Institute tentatively approved this revised version for incorporation in the new *Restatement*.

and provided no positive support for Schachter's supposed flexible rule. I also sought to show that references in those decisions to "just" or "fair" compensation, far from supporting his thesis, were in fact understood by the tribunals concerned to entail the payment of the full value of the property taken.

Of course it is true, as Schachter's reply emphasizes so heavily, that "no decision asserts that the specific criteria of valuation applied in the case are universally applicable" (p. 421); I made that point myself. But this does not further his argument. In the first place, since different cases involved (and may involve) different types of property, it is hardly surprising that the "specific criteria of valuation" employed in any given decision were not claimed to be universally applicable; what is more to the point is that they all[2] required the payment of the full value of the property.[3] Secondly, it is a common practice of courts (still more of arbitrators) to deal with the facts before them rather then indulge in broad generalizations; those who come after have to derive the general principles from the particular decisions. Thirdly, it is a fact that, in a number of these cases (including the famous *Chorzów Factory* case[4]), the existence of a duty to pay full compensation was treated as axiomatic. Furthermore, if, as Schachter contends, the level of compensation is variable and depends on circumstances, one might perhaps expect these matters to have been canvassed in at any rate some of the cases, where mitigating factors were arguably present.

In short, the least that one can say about these cases is that, when properly analyzed, they give no positive support to the flexible standard for which Schachter contends—which was the main point of my article. It could, indeed, be plausibly argued that they provide some authority for the contrary thesis that *full* compensation is required—which would be hardly surprising, given the political and philosophical climate prevalent at the time when most of the decisions were handed down.

Schachter also characterizes me as an unreconstructed supporter of the Hull formula. For me to have nailed my colors to that or any other mast merely on the basis of case law would have been foolish indeed: as I myself stated, a complete statement of the rules would entail a comprehensive examination of a variety of sources of international law, of which "[c]ase law is far from being the only, or the most important" (p. 419). Within the confines of a short article, I was simply attempting to correct a misleading account of the cases on one aspect of the problem—quantum—and was not purporting to give a synoptic picture of even the "traditional" customary law. Insofar as Schachter's reply to me canvasses other matters, such as state practice and the opinions of jurists, it consequently misses the point.

Finally, Professor Schachter relies on policy considerations, such as the interests of investors and the countries concerned. As it happens, there are

[2] With the partial exception of the controversial *LIAMCO* arbitration (Libyan American Oil Co. v. Government of the Libyan Arab Republic, Apr. 12, 1977, 62 ILR 140 (1982), 20 ILM 1 (1981)).

[3] Since I wrote my Note, a further decision of the Iran-United States Claims Tribunal supporting the "full compensation" standard has come to hand: Starrett Housing Corp. v. Islamic Republic of Iran, Dec. 19, 1983 (Chamber One), 23 ILM 1090 (1984). *See also* the award in Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, June 29, 1984 (Chamber Two), IRANIAN ASSETS LITIGATION REP., July 13, 1984, at 8,820, 8,828–29.

[4] 1928 PCIJ, ser. A, No. 17.

a number of radical reforms of the international economic system which I would personally like to see; but that is not the issue. I stated more than once in my contribution that I was not discussing *lex ferenda;* past decisions are past decisions, and I strongly believe in the desirability of not allowing one's view of the facts to be clouded by what one might or might not like to see.

Whether the case law on expropriation is to my taste is not, therefore, the point; all that I have tried to do is to give an honest and accurate account of it. With all due respect, I do not think that Professor Schachter has succeeded in refuting that account.

M. H. MENDELSON
St. John's College, Oxford