ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Дипломатическая защита

Джон Дугард

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Diplomatic Protection

John Dugard

ТОМ 9
VOL. 9

Москва 2022
Moscow 2022

ISSN 2687-105X

Центр международных и сравнительно-правовых исследований
International and Comparative Law Research Center

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

Дипломатическая защита

Джон Дугард

COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW

Diplomatic Protection

John Dugard

ТОМ IX / VOL. IX

Москва
2022

УДК 341.1/8
ББК 67.91
Л43

Лекции Летней Школы по международному публичному праву = Courses of the Summer School on Public International Law. – Т. IX. Дипломатическая защита = Vol. IX. Diplomatic Protection / Джон Дугард = John Dugard. — М.: Центр международных и сравнительно-правовых исследований, 2022. — 86 с.

Настоящее издание содержит материалы лекций Джона Дугарда по теме «Дипломатическая защита», прочитанных им в рамках Летней Школы по международному публичному праву 2019 года.

The present publication contains the text of lectures by John Dugard on the topic “Diplomatic Protection”, delivered by him within the frames of the Summer School on Public International Law 2019.

УДК 341.1/8
ББК 67.91

Летняя Школа по международному публичному праву 2019 года
Summer School on Public International Law of 2019

Дорогие друзья!

Центр международных и сравнительно-правовых исследований продолжает публикацию лекций, прочитанных в рамках Летней Школы по международному публичному праву.

Летняя Школа — проект Центра, призванный дать возможность тем, кто изучает международное право, занимается или планирует заниматься им, получить дополнительные знания о предмете и стимулировать самостоятельную работу слушателей. Занятия в Летней Школе состоят из лекций и семинаров общего курса и объединённых рамочной темой специальных курсов, которые проводятся ведущими экспертами по международному праву, а также индивидуальной и коллективной работы слушателей.

В 2019 году состоялась вторая Летняя Школа. Специальные курсы были посвящены теме «Ответственность в международном праве». Их прочитали Джеймс Катека («Ответственность государств»), Мигель де Серпа Суареш («Ответственность международных организаций»), Ивана Хрдличкова («Международная уголовная ответственность индивида»), Джон Дугард («Дипломатическая защита»), Алина Мирон («Контрмеры и санкции»). Общий курс международного публичного права прочёл Туллио Тревес.

Центр международных и сравнительно-правовых исследований выражает благодарность членам Консультативного совета Летней Школы: Р. А. Колодкину, С. М. Пунжину, Л. А. Скотникову, Б. Р. Тузмухамедову — и всем, кто внёс вклад в реализацию этой идеи, в том числе АО «Газпромбанк» за финансовую поддержку проекта.

Dear friends,

The International and Comparative Law Research Center continues publication of lectures delivered within the Summer School on Public International Law.

The Summer School is a project of the Center aimed at providing those learning, working, or aspiring to work in the sphere of international law, with an opportunity to obtain advanced knowledge of the subject and encouraging participants to engage in independent research. The Summer School's curriculum is comprised of lectures and seminars of the general and special courses under one umbrella theme delivered by leading international law experts, as well as of independent and collective studying.

The second Summer School was held in 2019. The Special Courses were devoted to the topic "Responsibility in International Law". The courses were delivered by James Kateka ("Responsibility of States"), Miguel de Serpa Soares ("Responsibility of International Organizations"), Ivana Hrdličková ("Individual Criminal Responsibility in International Law"), John Dugard ("Diplomatic Protection"), and Alina Miron ("Countermeasures and Sanctions"). The General Course on Public International Law was delivered by Tullio Treves.

The International and Comparative Law Research Center wishes to express its appreciation to the members of the Advisory Board — Roman Kolodkin, Sergey Punzhin, Leonid Skotnikov, and Bakhtiyar Tuzmukhamedov — as well as others who helped implement the project, including Gazprombank (JSC) for their financial support.


INTERNATIONAL
AND COMPARATIVE
LAW RESEARCH
CENTER

Джон Дугард

Джон Дугард является почётным профессором Лейденского и Витватерсрандского университетов и ранее был Директором Лаутерпахтского центра исследований в области международного права (Кембриджский университет). Он участвовал в разработке демократической Конституции ЮАР 1996 года. В период с 1997 по 2011 год Профессор Дугард был членом Комиссии международного права и специальным докладчиком по теме «Дипломатическая защита». Он также был Специальным докладчиком ООН по вопросу о положении в области прав человека на палестинских территориях (2001–2008) и судьёй *ad hoc* в Международном Суде (2000–2018). Профессор Дугард преподавал в Гаагской академии международного права и стал автором нескольких книг и множества статей по вопросам международного права. Он является членом Института международного права (Institut de Droit International) и почётным членом Американской ассоциации международного права.

John Dugard

John Dugard is an Emeritus Professor of Law of the Universities of Leiden and the Witwatersrand and former Director of the Lauterpacht Centre for International Law, Cambridge. He participated in the drafting of South Africa's democratic Constitution of 1996. He was a member of the International Law Commission (1997–2011) and Special Rapporteur on the subject of diplomatic protection, UN Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory (2001–2008), and Judge *ad hoc* of the International Court of Justice (2000–2018). He has taught at The Hague Academy of International Law and has published several books and many articles on international law. He is a member of the Institut de Droit International and an Honorary Member of the American Society of International Law.

TABLE OF CONTENTS

List of Abbreviations

AD	Annual Digest and Reports of Public International Law Cases
AJIL	American Journal of International Law
BCLR	Butterworths Constitutional Law Cases
BFSP	British and Foreign State Papers
BYIL	British Year Book of International Law
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
ETS	European Treaty Series
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
IUSCTR	Iran-United States Claims Tribunal Reports
LJIL	Leiden Journal of international Law
LN	League of Nations Treaty Series
RIAA	United Nations Reports of International Arbitral Awards
SAJHR	South African Journal of Human Rights
SALR	South African Law Reports
UNTS	United Nations Treaty Series
ZASCA	South Africa Supreme Court of Appeal Reports

DIPLOMATIC PROTECTION

Prologue

Diplomatic protection, which seeks to ensure the protection of foreigners abroad, has a long and controversial history[1] dating back to 1758 when the Swiss jurist Emmerich Vattel declared that "[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen".[2] It is a subject that features in every general international law treatise. That it is a significant topic is evidenced by the fact that the International Law Commission recently devoted eight years to a study of the subject (1998–2006) and produced a set of nineteen draft articles on diplomatic protection.[3] Its importance is further illustrated by the attention given to the subject by debates in the Sixth Committee and by resolutions of the General Assembly.[4]

However, unlike other branches of international law, there is little mention of it in the media and little evidence of it in daily life. The law of treaties is about agreements that govern many aspects of everyday life, ranging from trade to air traffic; international humanitarian law governs conflicts that occur in many parts of the world and are widely reported; the law of immunities is a constant feature of diplomatic life; the law of the sea regulates navigation on the seas; and so on. Most branches of international law are highly relevant to everyday life and are widely publicized. But not so diplomatic protection.

Of course, there are many examples of instances in which foreigners are very badly treated abroad — killed, tortured, imprisoned without a fair trial, and arbitrarily deprived of their

[1] See CF Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 8–20.
[2] E Vattel, *The Law of Nations, or the Principles of Natural Law* (1758) book II, chapter VI.
[3] Yearbook of the International Law Commission (2006), Vol. II, Part Two, 24.
[4] General Assembly Resolutions 61/35 (4 December 2006), 62/67 (6 December 2007).

property in circumstances in which responsibility may be attributed to the host State. In Iran alone, there are over 14 dual and foreign nationals imprisoned and maltreated by the organs of the State.[5] Gulf State employers are regularly accused of maltreating Philippine migrant workers. Can such action be attributed to the government for failing to take steps to protect such workers? Following the shooting in El Paso, Texas, on 3 August 2019, Mexico complained that the United States was responsible for killing seven Mexican nationals.[6] Could this shooting be attributed to the US government because of the lax gun laws and anti-Mexican rhetoric of the US government? Despite examples of this kind and the prevalence of maltreatment of nationals abroad, there are few instances in which the State of nationality is prepared to demand the release of such nationals or compensation for harm caused in inter-State proceedings — diplomatic protection.

In March of this year, the United Kingdom took the unusual step of deciding to exercise diplomatic protection on behalf of a dual British-Iranian national, Nazanin Zaghari-Ratcliffe against Iran for imprisoning a predominantly British national without a fair trial in conditions constituting cruel and inhumane treatment.[7] Whether this constitutes a revival of diplomatic protection remains to be seen.

In these lectures, I will consider the nature of diplomatic protection and its legal basis; examine the requirements that must be met for its exercise; describe its consequences; consider whether individuals have a right to insist on diplomatic protection; examine

[5] See Human Rights Watch, "Iran: Targeting of Dual Citizens. Foreigners" (26 September 2018) <https://www.hrw.org/news/2018/09/26/iran-targeting-dual-citizens-foreigners>.

[6] See report in *The Guardian* (5 August 2019) <https://www.theguardian.com/us-news/2019/aug/04/mexico-legal-action-us-terrorism-amlo>.

[7] See P Wintour, "Iran Rejects UK Claim of Diplomatic Status for Zaghari-Ratcliffe" *The Guardian* (8 March 2019); M Milanovic, "UK's Position on the Diplomatic Protection of Nationals" (8 March 2019) <https://www.ejiltalk.org/uks-position-on-the-diplomatic-protection-of-dual-nationals/>.

the institutions of international law that also provide protection to the foreign national injured abroad; and conclude by discussing whether diplomatic protection remains relevant today.

In recent years, diplomatic protection has become the plaything of scholars who have seen it as a subject for academic analysis and scholarly debate rather than as an instrument for achieving justice for aliens. I will not be able to bypass these debates in my lectures but I wish to make it clear at the outset that I am concerned with the practical utility of diplomatic protection and not with the soundness of the institution as an exercise in logic.

I.

What Diplomatic Protection Is and What It Is Not

Diplomatic protection is a procedure by which a State provides protection to the person or property of one of its nationals, whether a natural or legal person, who has been or is being subjected to treatment by another State in violation of international law. It has nothing to do with the protection of diplomats, who are protected by the Vienna Convention on Diplomatic Relations of 1961[8] which provides extensive protection and immunities to diplomats. It is a peaceful procedure that does not include the use of force to protect nationals whose lives are threatened in another State. The use of force in such circumstances may be justified as self-defence under Article 51 of the United Nations Charter[9] but not as diplomatic protection. Diplomatic protection may be used by a State to protect the investments of its nationals abroad and to claim compensation for the unlawful seizure of such property. Today, however, the protection of foreign investment is largely secured by bilateral investment treaties (BITs) which provide for the direct settlement of investment disputes between the investor and the host State before an *ad hoc* arbitration tribunal or tribunal established by the International Centre for the Settlement of Investment Disputes (ICSID).[10] This protection of foreign investment is not diplomatic protection.

[8] 500 UNTS 95.
[9] See further below.
[10] See further below.

II.

The Place of Diplomatic Protection in International Law

Diplomatic protection is a branch of the law of State responsibility. When a State commits an internationally wrongful act against another State it incurs international responsibility.[11] In such a case, the delinquent State is obliged to make reparation.[12] A State may incur responsibility directly or indirectly. A State incurs responsibility directly when, acting through its organs or agents, it violates its obligations to another State under general international law or under a treaty. Indirect responsibility, on the other hand, arises when a State injures the person or property of a foreign national. In such a case, the State is deemed to have injured the State of nationality of the injured person itself.

Substantive rules requiring States to act in a particular way or to abstain from certain actions in their relations with other States are termed "primary rules". Examples of primary rules that result in the direct responsibility of a State are those prohibiting the use of force against another State, breach of a treaty obligation owed to another State, violation of the territorial sovereignty of another State, failure to respect the immunities of diplomats, interference with the freedom of navigation of another State or the pollution of the environment of another State.

Rules providing for the implementation or enforcement of such rules are termed "secondary rules". Examples of such rules are those

[11] Art. 1 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that "Every internationally wrongful act of a State entails the international responsibility of that State" (Yearbook of the International Law Commission (2001), Vol. II, Part Two, 26).
[12] Ibid, Art. 31.

dealing with the attribution of conduct to a State, circumstances which preclude wrongfulness, the procedures for invocation of the responsibility of a State, and the consequences of the internationally wrongful act.

The rules governing the indirect responsibility of a State comprise the body of law known as diplomatic protection. As in the case of the direct responsibility of States, the indirect responsibility of States — diplomatic protection — consists of primary rules relating to the treatment of aliens that prescribe the conduct that gives rise to diplomatic protection and secondary rules dealing with the implementation of the primary rules.

Again, like the law of direct State responsibility for internationally wrongful acts, diplomatic protection is mainly about secondary rules. In addition to the secondary rules referred to above, there are two principal secondary rules of diplomatic protection — the requirement that the injured person be a national of the protecting State and the requirement that local remedies be exhausted before diplomatic protection is exercised. These two rules will be the main focus of the present lectures.

The primary rules of diplomatic protection should not, however, be overlooked. After all, it is the violation of the rules relating to the treatment of aliens that drive a State to exercise diplomatic protection on behalf of the injured national. The establishment of the nationality of the injured person and whether she or he has exhausted local remedies are only means to an end — the attainment of justice for the injured person.

III.

The Treatment of Aliens[13]

An individual has no right of entry to a State of which she or he is not a national. If she is admitted, she may be expelled; but maltreatment is not permitted in the process of expulsion.[14] According to Article 13 of the International Covenant on Civil and Political Rights, a person facing expulsion is entitled to submit reasons against his or her expulsion and to have his or her case reviewed by a competent authority "except where compelling reasons of national security otherwise require".[15] Moreover, according to a 1985 Resolution of the General Assembly,[16] "individual or collective expulsion of…aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited". In 2014, the International Law Commission adopted a set of Draft Articles on the Expulsion of Aliens[17] which deals with the right of a State to expel an alien, the rights of a person subject to expulsion, and the procedures to be followed by a State in effecting an expulsion. While a State has the right to expel an alien,[18] a State must treat such a

[13] See generally, EM Borchard, *The Diplomatic Protection of Aliens Abroad* (New York, Banks Publishing Co, 1919, re-published by William S. Hein & Co, New York, 2003); CF Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, Clarendon Press 1967); J Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005).

[14] *Boffolo Case* (1903) 10 *RIAA* 528; *Rankin v Iran* (1987) 82 *ILR* 204.

[15] In the *Diallo Case (Guinea v DRC*) (Merits), the International Court of Justice held that Guinea had violated Article 13 of the International Covenant on Civil and Political Rights in expelling Mr. Diallo: [2010] ICJ Rep paras. 64–74.

[16] Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, Resolution 144(XL) (1985).

[17] Report of the International Law Commission at its 66th Session A/69/10 p. 10; General Assembly Resolution 69/119 (18 December 2014). See further, J Woinowska-Radziska, *The Right of an Alien to be Protected against Arbitrary Expulsion in International* Law (Brill/Nijhoff 2015).

[18] Ibid, Art. 3.

person with humanity and respect for his or her human rights[19] and without discrimination.[20] Collective expulsion is prohibited,[21] and provision is also made for procedural rights to be enjoyed by the alien in the process of expulsion.[22]

An individual admitted to residence in a foreign state may be subjected to certain restrictions to which citizens are not subject. He or she will usually be denied the right to vote, to hold public office, and to be employed (without special permission). But, subject to restrictions of this kind, an alien must be treated decently, in accordance with civilized standards of behaviour. As Judge Nugent stated in the South African decision of *Minister of Home Affairs v Watchenuka*, "[h]uman dignity has no nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human".[23]

There is a dispute among States over the standard of treatment to be accorded to aliens. While some (mainly developing States) argue that the standard is a national one, requiring States to treat aliens as well as they treat their own nationals, others (mainly developed States) maintain that there is an international minimum standard, which accords to aliens a higher standard of treatment where the national standard fails to meet international standards. The difference is illustrated by the *Roberts Claim*.[24] Roberts, an American national, was held without trial in Mexico for seven months, in a small cell, together with 30 or 40 Mexicans. Ventilation was poor, sanitary and ablution arrangements primitive, food scarce and coarse, and exercise denied. When sued by the United States for its treatment of Roberts, Mexico responded that he was treated in the same way as his fellow Mexican prisoners. In

[19] Ibid, Art. 13, 16–20.
[20] Ibid, Art. 14.
[21] Ibid, Art. 9.
[22] Ibid, Arts. 26–28.
[23] (2004 (4) SALR 326 (SCA) at 339 (para. 25).
[24] *US v Mexico* (1926) 4 *RIAA* 77.

upholding the claim of the United States, an international tribunal stated:

> "Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. The test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization".[25]

The Personal Rights of Aliens

In 1985, the United Nations General Assembly adopted a Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live,[26] which recognizes that the human rights expounded in the Universal Declaration of Human Rights and other international instruments should "also be ensured for individuals who are not nationals of the country in which they live". Although it is difficult to contend that all the rights of aliens expounded in the 1985 Declaration form part of the minimum standard under customary law, it is clear that those provisions of the Universal Declaration of Human Rights which have become part of international customary law are part of the international minimum standard for the treatment of the persons of aliens. These principles include non-discrimination on grounds of race, the prohibition of torture and inhuman or degrading treatment or punishment, and the right to a fair trial. In considering the question of whether an alien has been mistreated, international tribunals may accordingly turn to the jurisprudence of human rights tribunals for guidance. In this way, the international minimum standard for the treatment of aliens and the human rights standards for the treatment of a State's own

[25] (1926) 4 *RIAA* at 80.
[26] Resolution 144 (XL).

nationals have merged. This was acknowledged by the International Court of Justice in the *Diallo* case when it declared that the scope of diplomatic protection "originally limited to alleged violations of the minimum standard of aliens, has subsequently widened to include, *inter alia,* internationally guaranteed human rights".[27]

The international minimum standard is of particular importance in respect of the administration of criminal justice. It is also in this area that there is most consensus on the treatment of aliens. Aliens must be permitted consular visits before trial,[28] must not be subjected to inhuman prison conditions,[29] must be given the counsel of their choice,[30] brought to trial within a reasonable period of time,[31] and tried in accordance with fair trial standards.

The right of an alien who has been arrested or detained to be visited by a consular officer of his State of nationality has been codified by the Vienna Convention on Consular Relations of 1963[32] which obliges States to inform "without delay" arrested aliens of their right to be visited by and communicate with consular officials of their State of nationality, who may arrange for their legal representation. In two cases, the International Court of Justice found the United States to be in breach of this obligation when it failed to inform arrested aliens of their rights to consular access and they were subsequently tried without proper counsel, convicted, and sentenced to death. In *La Grand*[33] and *Avena*,[34] Germany and

[27] *Diallo Case (Diallo v Democratic Republic of Congo)* Preliminary Objections [2007] ICJ Rep 582, 599.
[28] *Chevreau Claim (France v UK)* (1931) 2 *RIAA* 1113 at 1123.
[29] *Roberts Claim* (n 24).
[30] *Pope Case* in MM Whiteman *Digest of International Law* (1967) vol. 8 at 709.
[31] *Roberts Claim* (n 24).
[32] Ibid, Art. 36(1).
[33] *Germany v USA* [2001] ICJ Rep 466; (2001) 40 *ILM* 1069. See further, C Miles "La Grand *(Germany v USA)*" in E Bjorge and C Miles, *Landmark Cases in Public International Law* (Hart Publishing, 2017) 509.
[34] *Mexico v USA* [2004] ICJ Reports 12; (2004) 43 *ILM* 581. See further A Künzli "Case Concerning Mexican Nationals" (2005) 18 Leiden Journal of International Law 49.

Mexico, respectively, successfully brought legal proceedings against the United States in terms of the Optional Protocol to the Vienna Convention on Consular Relations, which confers jurisdiction on the International Court in respect of disputes relating to the application of the Convention. (The United States has since withdrawn from the Optional Protocol to avoid further proceedings being brought against it.) In the *Diallo Case (Guinea v DRC) (Merits)*, the International Court of Justice likewise found that the DRC had violated its obligation to inform the consular authorities of Guinea of Mr. Diallo's arrest.[35]

The Property Rights of Aliens, Including the Expropriation of Property[36]

A State incurs responsibility for injury to the property of an alien, as well as to his or her person. If a State arbitrarily confiscates the property of an alien without paying compensation, it is liable for violation of the international minimum standard. Difficulties arise, however, when alien property is seized as part of a policy of nationalization of the resources of a State, particularly where the "taking" is on a grand scale involving the nationalization of an entire industry, such as the oil industry. Here ideological differences between capitalist and socialist States, historical differences between erstwhile colonial powers and decolonized States, and economic differences between developed and developing States preclude consensus on the rules of State responsibility. While the former group of States insists on an international standard to govern the expropriation of alien property, the latter claims that

[35] [2010] ICJ Rep paras. 90–7. See further, A Vermeer-Künzli "The ICJ and the *Diallo* Case" (2011) 24 Leiden Journal of International Law 607.

[36] R Higgins "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Recueil des Cours 259; P Norton "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation" (1991) 85 AJIL 474.

this matter is governed entirely by the national law of the taking State. This area of law therefore remains unsettled.

There is an agreement that international law does not prohibit the expropriation of alien property. Disagreement, however, exists as to the conditions that must be fulfilled to prevent it from becoming unlawful. Traditional international law, as formulated by capital-exporting States, insists that there is an international minimum standard requiring an expropriation to be non-discriminatory, for a public purpose, and accompanied by prompt, adequate, and effective compensation. This rule, however, has been brought into question by a number of resolutions of the General Assembly.

The Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) of 1962 recognized some of the traditional requirements, but in a weaker form. It declared that expropriation must be based on grounds of national interest but that in such cases the owner might be paid appropriate compensation only. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures is to be exhausted. However, upon agreement by States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[37] This resolution was adopted by 87 votes to 2, with 12 abstentions.

Less accommodating to the interests of developed States is the Charter of Economic Rights and Duties of States, contained in Resolution 3281 (XXIX) of 1974.[38] It declares that each State has the right:

[37] See para. 4.

[38] See para. 2(2)(c). This resolution is supported by General Assembly Resolution 3171 (XXVIII) of 1973, and the Declaration on the Establishment of a New International Economic Order contained in Resolution 3201(S-VI) of 1974. See, further, on Resolution 3281 (XXIX), BH Weston "The Charter of Economic Rights and Duties of States and deprivation of foreign-owned wealth" (1981) 75 AJIL 437.

> [t]o nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled by the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

This resolution was adopted by 120 votes to 6, with ten abstentions.

A number of arbitration awards have found that Resolution 1803 (XVII), which retains the international-law standard, and not Resolution 3281 (XXIX), accurately reflects customary international law.[39]

It is difficult to state with certainty what remnants of the traditional rule can be salvaged from these developments. First, expropriation must be for a proper public purpose, as is recognized by Resolution 1803(XVII).[40] However, "[i]t is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that States, in practice, are granted extensive discretion".[41] Second, although not specifically mentioned in Resolution 1803 (XVII), the requirement of non-discrimination also appears to remain part of customary international law.[42] Third, international law continues to require the payment of compensation, but the standard to be employed for determining this compensation is unsettled.

---

[39] See in particular *Texaco v Libya* (1978) 17 *ILM* 1 ; (1977) 53 *ILR* 38; See also *Aminoil Case (Kuwait v American Independent Oil Co)* (1982) 21 *ILM* 976 paras. 90, 143—4.
[40] *Amoco v Iran* (*US v Iran*) (1988) 27 *ILM*, paras. 113, 145–6; *BP Case (UK v Libya)* (1974) 53 *ILR* 297 at 329. *Sed contra* the *Liamco Case (Libyan American Oil Co v Libya)* (1981) 20 *ILM* 1 at 58–9.
[41] *Amoco v Iran* (n 40) at para. 145.
[42] *Liamco Case* (n 40) at 58–9; *Amoco Case* (n 40) at paras. 140–2.

Today the standard of "appropriate" compensation — the phrase employed by Resolution 1803 (XXII) — seems to enjoy the greatest support and has been approved by several arbitral awards.[43] "Appropriate" compensation will certainly be less than "prompt, adequate, and effective" compensation, the traditional requirement enunciated by the United States, but it has no fixed meaning of its own and will depend upon the circumstances of each case with special reference to the legitimate expectations of the parties.

Uncertainty about the rules governing the expropriation of a foreign national's property and the compensation to be paid is compounded by the strict rules of diplomatic protection relating to proof of nationality and the exhaustion of local remedies. This has led foreign investors to resort to other means to obtain security for their investments. The chief methods for achieving this are the bilateral investment treaty (BIT) and the multilateral investment treaty which lay down clear rules for the protection of foreign investment, provide for the establishment of tribunals with direct access to hear disputes, and allow the investor to litigate directly against the host State.

Consequently, diplomatic protection in the field of investment has to a large extent been replaced by treaties providing for protection in the event of the taking of a foreigner's property.[44]

The result of this development is that diplomatic protection is today invoked mainly in respect of personal injury to a foreign individual flowing from the failure of the host State's system of criminal justice to comply with the minimum standard of treatment required for the treatment of foreign nationals. The minimum standard continues to apply in respect of the taking of the property of a foreign national, but uncertain rules of law and the prevalence of investment treaties ensure that less use is made of diplomatic protection in such cases.

[43] *Texaco Case* (n 39) at para. 88; *Aminoil Case* (n 39) paras. 143–4.
[44] See further below.

IV.

History of the Law of Diplomatic Protection

Diplomatic protection is a product of the Westphalian system of States and of the distinction between nationals or citizens and aliens. The principle of diplomatic protection was expounded by the Swiss jurist Emmerich Vattel in 1758[45] and entered the practice of international law in the late eighteenth century, largely under the influence of the Jay Treaty of 1794 between the United States and Great Britain which provided for the settlement of disputes between these States relating, *inter alia,* to claims on behalf of nationals, by means of arbitration.[46] In the nineteenth century, the institution was mostly invoked to protect the nationals of European Powers and the United States against the newly independent Latin-American States whose governments failed to provide protection to such nationals who sought to do business in these States. In an age in which international law placed no restraint on the use of force, such interventions not infrequently gave rise to armed interventions. Not surprisingly, the reputation of diplomatic protection suffered as it increasingly came to be seen as an instrument to be used by strong States to compel weak States to allow foreign adventurers and investors to exploit the resources of newly independent States.[47] Latin-American resistance to the institution of diplomatic protection was led by the Argentine jurist, Carlos Calvo, who rejected the notion of the minimum standard of treatment for aliens and

[45] See above n 1.

[46] See Amerasinghe, n 1, 12.

[47] See the statement of Judge Padilla Nervo in *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 at 246; "The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and military aggression under the flag of exercising rights of protection…"

argued that aliens were entitled to the same standard of treatment as nationals of the host State.[48]

The prohibition of diplomacy involving the use of force for the settlement of the claims of aliens and the realization on the part of newly independent States that the fair treatment of aliens was essential to attract foreign investment resulted in diplomatic protection acquiring a more favourable image in the twentieth century. Diplomatic protection came to be seen as a part of the subject of responsibility of States, a subject ripe for codification. Although these codification efforts brought few results in the 1930s,[49] they did pave the way for renewed attempts at codification after the second World War.

The subject of State responsibility was one of the first subjects included on the agenda of the International Law Commission, established in 1948. Special Rapporteur Garcia Amador embarked on a study of this subject which focused mainly on State responsibility for injury to aliens and their property, that is, the primary rules of diplomatic protection. He was replaced in 1963 by Roberto Ago of Italy who transformed the study into a consideration of the secondary rules of State responsibility. Subsequent Special Rapporteurs continued this approach and in 2001, guided by Special Rapporteur James Crawford of Australia, the International Law Commission produced a set of Draft Articles on the Responsibility of States for Internationally Wrongful Acts[50] which focuses entirely on the secondary rules governing State responsibility and diplomatic protection. Only one article in these Draft Articles — Article 44, dealing briefly with the admissibility of claims relating to nationality and the exhaustion of local remedies — deals specifically with diplomatic protection.[51]

---

[48] See DR Shea, *The Calvo Clause, a Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955).

[49] See the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 179 LNTS 89.

[50] Yearbook of the International Law Commission (2001), Vol. II, Part Two, 26.

[51] See generally on the history and content of these Daft articles, J Crawford, A Pellet and S Olleson (eds) *The Law of State Responsibility* (Oxford University Press 2010).

In 1997, the International Law Commission decided to draft a set of articles on the subject of diplomatic protection and appointed Mohammed Bennouna as Special Rapporteur. He resigned in 1999 and in that year the present writer was appointed as Special Rapporteur. I wrote seven reports which resulted in a set of 19 draft articles on diplomatic protection that were finally adopted by the International Law Commission in 2006.[52] The Commission recommended that the General Assembly of the United Nations should elaborate a convention on the basis of these draft articles,[53] which deal with the secondary rules of diplomatic protection, that is, nationality and the exhaustion of local remedies.[54] Like the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, these draft articles have not been transformed into a multilateral treaty. The main reason for this is that it is generally accepted that the Draft Articles on Diplomatic Protection will, if adopted as a treaty, form part of a convention with the Draft Articles on State Responsibility for Internationally Wrongful Acts. So they must wait until there is general consensus on the latter draft articles, which contain a number of controversial provisions on the responsibility of States for violation of peremptory norms. In the meantime, both sets of draft articles serve as a restatement of the law. A general consensus on both sets of draft articles is beginning to emerge that is reflected in decisions of the International Court of Justice and other tribunals and in the practice of States. This means that in the not too distant future there may be a convention on the secondary rules of State responsibility that includes the secondary rules governing diplomatic protection. Until then, the Draft Articles on Diplomatic Protection may be used as a restatement of the law on this subject as, with few exceptions, they reflect the rules of customary international law.

---

[52] Yearbook of the International Law Commission (2006), Vol II, Part Two, 24.

[53] See Resolution 62/67 (8 January 2008).

[54] See J-F Flauss "Vers un aggiornamento des conditions d'exercise de la protection diplomatique?" In J-F Flauss (ed) *La Protection diplomatique, mutations contemporaines et pratiques nationales* (Bruylant, 2003) 29–61.

V.

The Nature of Diplomatic Protection: Fact or Fiction?

Historically, the right of diplomatic protection is premised on the doctrine that an injury to the individual is an injury to the State of nationality. This doctrine dates back to the eighteenth century, when Emmerich de Vattel declared that:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[55]

This formulation of diplomatic protection was substantially repeated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case when it stated.

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.[56]

---

[55] *The Law of Nations, or the Principles of Natural Law* (1758) Book II, Chapter VI.
[56] *Mavrommatis Palestine Concessions Case (Greece v UK)* (Jurisdiction), PCIJ Rep Series A, No. 2, p. 2 (1924). This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railways Case (Estonia v Lithuania),* PCIJ Rep Series A/B No. 76, p. 16 (1938).

This explanation for diplomatic protection has been widely accepted.[57] In the *Nottebohm* case, the International Court of Justice declared that diplomatic protection is a measure "for the defence of the rights of the State",[58] and in *Barcelona Traction*, the Court stated that "[s]ince the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action".[59] In 1965, the Institute of International Law described diplomatic protection as possessing "the national character of a State".[60]

It is difficult to defend the traditional view expounded in *Mavrommatis* as a coherent and consistent doctrine. It is factually inaccurate as it is "an exaggeration to say that whenever a national is injured in a foreign state, their State as a whole is necessarily injured too".[61] As a doctrine, it is impaired by three features of diplomatic protection that contradict the notion that an injury to a national is an injury to the State of nationality. First, the nationality of the injured person must continue from the date of the injury to the date of the presentation of the claim. Second, the exhaustion of local remedies rule requires the injured person to first seek redress through the courts of the injuring State before the claim is presented on the international level. Third, in practice the quantum of damages awarded for injury is fixed to accord with the loss suffered by the individual.[62]

The notion that an injury to the individual is an injury to the State itself is not consistently maintained in judicial proceedings. When States bring proceedings on behalf of their nationals they

[57] See the First Report of Special Rapporteur John Dugard in A/CN.4506 (2000), Yearbook of the International Law Commission (2000), Vol. II, Part One, 221.
[58] [1955] ICJ Rep 4 at 24.
[59] *Case Concerning the Barcelona Traction, Light and Power Company, Ltd Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 at 44.
[60] *Resolutions de l'Institut de Droit International, 1957–91* (1992) 56, Art. 3.
[61] A Clapham, *Brierly's Law of Nations* (7th edn Oxford University Press 2012) 256.
[62] These issues are dealt with below.

seldom claim that they assert their own right and often refer to the injured individual as the "claimant".[63] Consequently, it has been suggested that when it exercises diplomatic protection a State acts as agent on behalf of the injured individual and enforces the right of the individual rather than that of the State.

The explanation for diplomatic protection expounded by Vattel and *Mavrommatis* has been seriously challenged by scholars and practitioners who claim that it is a flawed explanation — and that it is nothing but a fiction.[64] Doubts about the basis for diplomatic protection were reflected in the debates in the International Law Commission.[65] Some members challenged the use of a fiction to justify such protection while others argued that it was necessary to acknowledge that the right to diplomatic protection is that of the individual and not the State.

It is impossible to deny that the notion that an injury to a national is an injury to the State of nationality is a fiction. On the other hand, it must be accepted that most advanced legal systems use fictions on occasion to achieve an equitable result. Roman law, the basis for most developed systems of law, relied heavily on fictions in order to achieve equity. Praetors invoked legal fictions to enable them to apply legal rules to cover situations that had not been foreseen when the rules were drafted. In the same way, *Mavrommatis* allowed a system of international law governing relations between States only, and one that refused to accept the individual as a legitimate

[63] In the *Interhandel* case, the International Court of Justice speaks of the applicant State having "adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law": [1959] ICJ Reports 6 at 27.

[64] For an examination of diplomatic protection as a fiction, see AMH Vermeer-Künzli, "As if: the Legal Fiction in Diplomatic Protection" (2007)18 EJIL 37.

[65] In his Preliminary Report to the Commission, Special Rapporteur Mohamed Bennouna asked the Commission for guidance on the question whether a State in bringing an international claim is enforcing its own right or the right of its injured national. A/CN.4/484, para. 54; Yearbook of the International Law Commission (1998), Vol. II, Part One, 316.

concern of this legal order, to provide protection to an individual injured in a foreign State. Seen in historical context, *Mavrommatis* afforded relief to an individual injured abroad at a time when the notions of the promotion of human rights and respect for the rights of the individual were not part of international law.

Today it is argued that because international law recognises the human rights of the individual it is unnecessary to invoke a fiction to protect these rights, that *Mavrommatis* has consequently lost its relevance and that it should be abandoned. International law, so the argument goes, should acknowledge that the right to diplomatic protection is an individual right.[66]

The first reading draft of the International Law Commission adopted the *Mavrommatis* explanation for diplomatic protection. It stated that:

> Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State *adopting in its own right the cause of its national* in respect of an injury to that national arising from an internationally wrongful act of another State.[67]

This formulation was strongly objected to by Italy on the ground that the phrase "adopting in its own right the cause of its national" implied that "the right of diplomatic protection belongs only to the State". This, said Italy, was "no longer accurate in current international law".[68] Italy's view was endorsed by Professor Alain Pellet. In the Commission, he argued that the fiction expounded by *Mavrommatis* might have been necessary in 1924 when the State

[66] See the discussion of this issue by the first Special Rapporteur on Diplomatic Protection, Mohamed Bennouna, ibid. See further, M Bennouna "La protection diplomatique, un droit de l'Etat?" in *Boutros Boutros — Ghali Amicorum Discipulorumque Liber* (1988) 245.
[67] Art. 1, Yearbook of the International Law Commission (2006), Vol. II, Part One, 6. Italics added.
[68] Ibid, 37.

was the sole subject of international law but that resort to such a fiction was no longer necessary as today "diplomatic protection concerned the rights of individuals and not the rights of the State".[69]

As a result of these criticisms, Article 1 of the Draft Articles on Diplomatic Protection was changed to read:

> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is the national of the former State with a view to the implementation of such responsibility.[70]

This formulation deliberately "leaves open the question whether the State exercising diplomatic protection does so in its own right or that of its national — or both".[71] It is a compromise designed to satisfy all.

Critics of *Mavrommatis* are correct in saying that its explanation for the right of diplomatic protection was formulated at a time when individual rights were not recognized by international law and that its fictional explanation is no longer necessary as international law today recognizes the rights of the individual. Such critics take little account of the jurisprudential basis of the rule in *Mavrommatis* and

[69] Ibid, Vol. I, 10–11. See too the strong criticism by Alain Pellet of the ILC for failing to completely discard the doctrine of *Mavrommatis* in "The Second Death of Euripides Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection" (2008) 7 The Law and Practice of International Courts and Tribunals: A Practitioner's Journal 33. See further, G Gaja "Quel prejudice pour un etat qui exerce la protection diplomatique?" in A Alland *et al., Unite et diversite du droit international: ecrits en l'honneur de Pierre-Marie Dupuy* (Nijhoff, 2014) 487.
[70] Yearbook of the International Law Commission (2006), Vol. II, Part Two, 24.
[71] Commentary to Art. 1, ibid, 27. See too the comments by the chairperson of the Drafting Committee, Roman Kolodkin, Yearbook of the International Law Commission (2006), Vol. I, 89 at para. 6.

no account of the political realities that face the protection of the individual under contemporary international law.

Those who argue that a claim for diplomatic protection is in reality that of the individual and not of the State fail to have regard to the important distinction between primary and secondary rules. The individual has a right not to be tortured. This is a primary rule that is the right of the individual. This right is, however, a limited right as the only way in which the individual can enforce it on his own is by petitioning an international human rights monitoring body — *in casu* the Committee against Torture — for relief and this only if the torturing State is a party to the Convention Against Torture and has accepted the right of individual petition in Article 22. So in practice it is largely a right without an effective remedy. The rule in *Mavrommatis,* on the other hand, invokes the fiction that the torture of a national violates the right of the State of nationality. This secondary rule allows the State itself to assert a claim on the inter-State level with the full force of international law. It is a far more effective means of protection than that afforded by human rights law which is largely concerned with the assertion of primary rules.[72] The failure of human rights conventions to provide effective remedies is discussed below.

[72] See the argument along these lines in the commentary to draft Art. 1 in Yearbook of the International Law Commission (2006), Vol. II, Part One, 6.

VI.

Nationality

The terms "nationality" and "citizenship" are used interchangeably and loosely by both politicians and lawyers to indicate a connection between individual and State. Nationality is essentially a term of international law and denotes that there is a legal connection between the individual and the State for external purposes.[73] In practice, this means that a national may travel on a passport of the State in question and is entitled to the protection of that State if injured in another country. Citizenship, on the other hand, is a term of constitutional law and is best used to describe the status of individuals internally, particularly the aggregate of civil and political rights to which they are entitled.

A State may provide diplomatic protection to its nationals alone. As the Permanent Court of International Justice observed in the *Panevezys-Saldutiskis Railway* case, "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".[74]

Nationality of Natural Persons

It is for each State to determine under its own law who are its nationals. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declared: "It is for each State to determine under its own laws who are its nationals".[75]

---

[73] See generally on nationality, A Annoni and S Forlati (eds), *The Changing Role of Nationality in International Law* (Routledge 2013).

[74] Supra (n 56) at 16.

[75] 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws: 179 LNTS 89. This Convention came into force in 1937. This principle is endorsed by the 1997 European Convention on Nationality, ETS. No. 166, Art. 3.

There are certain recognized grounds for the conferment of nationality which are followed by most States. These are birth (*jus soli*), descent (*jus sanguinis*), and naturalization, following upon a period of residence. While it is the right of a State to prescribe rules relating to the acquisition of its nationality by means of its own legislation, it is international law that determines whether a State is entitled to exercise diplomatic protection on behalf of a national.[76] This is made clear by Article 4 of the ILC's Draft Articles on Diplomatic Protection which provides:

> For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States, or in any other manner, *not inconsistent with international law*.

Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.[77]

In most cases, nationality and the right of diplomatic protection will coincide. However, in exceptional cases, international law may refuse to recognize nationality for the purpose of diplomatic protection. This is illustrated by the *Nottebohm* case.[78]

---

[76] See the advisory opinion of the Inter-American Court of Human Rights on *Proposed amendments to the naturalization provision of the Political Constitution of Costa Rica,* 79 ILR 283 at 296.

[77] Art. 9(1) of the Convention on the Elimination of All Forms of Discrimination against Women prohibits the acquisition of nationality in such circumstances.

[78] [1955] ICJ Rep 4. See further on this case JM Jones "The *Nottebohm Case*" (1956) 5 ICLQ 230; JL Kunz "The *Nottebohm* Judgment" (1960) 54 AJIL 536.

Mr. Nottebohm was born in Germany in 1881. In 1905, he went to Guatemala, where he built up a highly successful business. Thereafter, he visited Germany sporadically, but the centre of his business, family, and social life was in Guatemala. In 1939, shortly after the start of the war in Europe, Nottebohm visited his brother in Liechtenstein and, fearing that his German nationality might create problems if Guatemala should declare war on Germany, he obtained the nationality of Liechtenstein, a neutral in World War II. Although Liechtenstein law required three years' residence as a condition for the granting of nationality by naturalization, this requirement was waived in the case of Nottebohm. Nottebohm then immediately returned to Guatemala. In 1943, Guatemala declared war on Germany. Nottebohm was arrested and interned in the United States as an enemy alien. His property was confiscated and he was prohibited from returning to Guatemala after the war.

In 1951, Liechtenstein instituted proceedings before the International Court of Justice in which it claimed compensation from Guatemala on the ground that it had violated its obligations under international law towards Liechtenstein by "arresting, detaining, expelling and refusing to admit" Mr. Nottebohm, a Liechtenstein national, and by "seizing and retaining his property without compensation".[79] In reply, Guatemala questioned Liechtenstein's right to exercise diplomatic protection on behalf of Nottebohm.

In its judgment, the Court emphasized the need for real and effective nationality as the basis for diplomatic protection. While it recognized that a State is free to decide on the rules governing the grant of its own nationality, it warned that "a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the [protecting] State".[80]

[79] Ibid, 6–7.
[80] At 23.

Such a bond between State and individual has "as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred … is in fact more closely connected with the population of the state conferring nationality than with that of any other State".[81] The facts of this case revealed that while Nottebohm's connections with Liechtenstein were "extremely tenuous"[82] and failed to constitute a "bond of attachment", there was a long-standing and close connection between Nottebohm and Guatemala.[83] The Court accordingly held that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[84]

The Court did not purport to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis *Guatemala*. It therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State with which he had no close connection. This question is probably best answered in the affirmative as the Court was determined to propound a relative test only,[85] ie that Nottebohm's close ties with Guatemala trumped the weaker nationality link with Liechtenstein.

Article 4 of the ILC's Draft Articles, cited above, does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case as an additional factor for the exercise of diplomatic protection.

---

[81] Ibid.
[82] At 25.
[83] At 26.
[84] Ibid.
[85] *Flegenheimer Claim* Italian-United States Conciliation Commission (1958) 25 *ILR* 91; *Barcelona Traction Light and Power Company, Limited* [1970] ICJ Rep 3 at 42.

The ILC took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Nottebohm and Liechtenstein were "extremely tenuous" compared with the close ties between Nottebohm and Guatemala for a period of over 34 years. It concluded that the Court did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, the ILC was mindful of the fact that if the genuine link requirement proposed by the *Nottebohm* case was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have drifted away from their state of nationality and made their lives in states whose nationality they never acquire or have acquired nationality by birth or descent from states with which they have a tenuous connection.[86]

Despite the refusal of the ILC to treat a "genuine link" as an additional requirement for the exercise of diplomatic protection, the *Nottebohm* case constitutes a salutary reminder to States that ultimately it is for international law to decide whether nationality has been conferred in a manner not inconsistent with international law for the purpose of diplomatic protection.

Dual and Multiple Nationality

It is in the area of dual and plural nationality that the influence of *Nottebohm* is the greatest. Although many States disapprove of the exercise of dual or multiple nationality and

[86] Commentary on Art. 4, Yearbook of the International Law Commission (2006), Vol. II, Part Two, 30.

have adopted legislation aimed at prohibiting such nationality, international law does not prohibit several States from conferring their nationality upon the same individual. A woman born in South Africa of a British father, who marries an Italian and lives for many years in Brazil may qualify for South African, British, Italian, and Brazilian nationalities. But which of these States is to protect her if she is injured in Argentina? Or may one of her four national States protect her against another if she is injured by that national State?

The ILC has adopted two rules on this subject. The first deals with the situation in which a State exercises diplomatic protection on behalf of a dual national against a State of which the injured person is not a national. Article 6 provides that:

> (1) Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.
>
> (2) Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Although there is some support for the requirement of a "genuine link" in such a case, the ILC found that the weight of authority does not require such a condition.[87]

The situation is, however, very different when the injured person is a national of both the applicant and the respondent State. This is a problem that arises particularly where the dual national has a close and genuine connection with the applicant State and has not been able to relinquish her or his nationality of the respondent State because the latter State does not allow its nationality to be renounced. Several States follow this practice, of which Iran is probably the best known.

[87] Commentary on Art. 6, Ibid, at 33–34. See the *Salem Case* 2 *RIAA* 1165 at 1188 (1932); *Mergé Claim* (1955) 22 *ILR* 443 at 456; *Dallal v Iran* 3 IUSCTR (1983) 23.

Early authorities hold that in such circumstances a rule of non-responsibility applies according to which one State of nationality may not bring a claim against another State of nationality.[88]

Several post-*Nottebohm* arbitral decisions reject this principle and allow the State with which the dual national has an effective and dominant link to sue another State of which the individual is a national. In the *Merge Claim*, which concerned the claim of an American national by birth but an Italian national by marriage against Italy arising out of damage to property, the Italian-United States Claims Commission stated:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality".[89]

This issue has featured prominently before the Iran-United States Claims Tribunal, established in 1981 by the Algiers Declarations.[90] In cases before this Tribunal the majority, comprising non-Iranian judges, permitted a dual United States — Iran national whose effective link was with the United States to bring proceedings against Iran. In determining the dominant and effective nationality, said the Tribunal, it would consider "all relevant factors, including habitual residence, centre of interests, family ties, participation in

[88] The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (supra n 75) declares in Art. 4 that: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". In 1949, in its advisory opinion on *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice" [1949] ICJ Rep 186. See further the discussion of the authorities on this subject in Special Rapporteur Dugard's First Report on Diplomatic Protection, Yearbook of the International Law Commission (2000), Vol. II, Part One, 230–236.
[89] *Mergé Claim* (1955) 22 *ILR* 443.
[90] (1981) 20 ILM pp. 224–233.

public life and other evidence of attachment".[91] The United Nations Compensation Commission, established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait in the Gulf War also applied this principle.[92]

Although the question whether one State of nationality might claim against another State of nationality on behalf of a national whose nationality was predominantly that of the applicant State was vigorously debated in the ILC, it was not challenged by any State.[93] Consequently, it was adopted by the ILC in Article 7 which provides:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of the injury and at the date of the official presentation of the claim.

In March 2019, the United Kingdom announced that it would provide diplomatic protection to Nazanin Zachary-Ratcliffe, a dual British-Iranian national, with predominant British nationality, who has been imprisoned in Iran in harsh conditions and denied proper medical treatment after a trial that violated due process of law standards. Iran has objected to the claim of the United Kingdom,

---

[91] *Iran — United States, case No. A-18 (Dual Nationality)* (1964) 5 IUSCTR 251, (1984) 78 *AJIL* 912 at 914; *Esphahanian v Bank Tejerat* (1983) IUSCTR 157, (1983) 77 *AJIL* 646. See further on these decisions, A Vermeer-Künzli "Nationality and Diplomatic Protection: A Reappraisal" in A Annoni and S Forlati (eds) *The Changing Role of Nationality in International Law* (Routledge, 2013) 76, 80.; P Klein "La protection diplomatique des doubles nationaux: reconsideration des fondaments de la regle de non-responsibilite" (1988) 21 Revue Belge de Droit Internationale 184; F de Castro "La nationalite, la double et supra-nationalite" (19611) 102 Recueil des Cours 514, 582.

[92] Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, as revised at the 24th meeting on 16 March, 1992: criteria for additional categories of claims (S/AC.26/1991/7/Rev.1) para. 11.

[93] Yearbook of the International Law Commission (2006), Vol. l, 7.

arguing that it does not recognize dual nationality and that "irrespective of UK residency, Ms Zaghari thus remains Iranian".[94]

The diplomatic protection of dual nationals by one State of nationality against another State of nationality is of particular importance in cases where States — like Iran — refuse to recognize the right of a national to renounce her or his nationality. While a State may retain the right to treat its nationals as its own nationals in perpetuity for internal purposes, the question to be considered here is whether a State may reject a rule of international law allowing diplomatic protection to be exercised against that State by another State with which the person is predominantly connected. In essence, such States reject the predominance test expounded in Article 7. But if this is the case, one must ask why such States did not object to Article 7 when it came before the Sixth Committee. In fact, while some States stated that the term "predominance" required further clarification,[95] many States welcomed it as an exercise in codification.[96] No State unequivocally objected to it. This has serious consequences for Iran which had unsuccessfully challenged the notion of dual nationality in the Iran-US Claims Tribunal in the 1980s. Instead of challenging Article 7 in order to be able to claim that it had persistently objected to the rule and was in consequence not bound,[97] it remained silent.[98]

Did this failure to object constitute acquiescence in Article 7?

[94] See P Wintour "Iran Rejects UK claim of diplomatic status for Zaghari-Ratcliffe" *The Guardian* (8 March 2019).

[95] See, for instance, the statement by the United Kingdom in Yearbook of the International Law Commission *(*2006), Vol. II, Part One, 45.

[96] See in particular the statement by the Nordic countries, ibid.

[97] In its 2018 Draft Conclusion 15 on the Identification of Customary International Law, the International Law Commission proposed that "where a State has objected to a customary rule of international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection. 2. The objection must be clearly expressed, made known to other States, and maintained persistently" (A/73/10, para. 65 (2018).

[98] See the Comments and Observations received from Governments on the final draft of the articles on diplomatic protection: Doc A/CN.4561 and Add 1–2 contained in Yearbook of the International Law Commission (2006), Vol. II, Part One, 44–45.

Nationality of Corporations and Shareholders

The diplomatic protection of corporations was once the main focus of diplomatic protection. Today this protection is to a large extent provided by bilateral and multilateral investment treaties. Nevertheless, it remains an important issue as not all cases involving the protection of corporations are covered by investment treaties. The diplomatic protection of corporations raises different issues from the protection of natural persons and therefore requires special attention.

Two issues relating to the diplomatic protection of corporations and their shareholders that require special consideration are: first, the question of which State is entitled to protect a company; second, the question whether the separate legal personalities of the company and shareholders in municipal law preclude a State from protecting its nationals who are shareholders in a company incorporated in another State when damage is inflicted on the company.

The principal judicial decision on this subject is the *Barcelona Traction* case of 1970 in which the International Court of Justice held that the State of registration (or incorporation) of a company may exercise diplomatic protection on behalf of the company and that, subject to certain exceptions, the State of nationality of the shareholders in the company is not entitled to do so.[99] In this case, the Court rejected the argument that a company registered in Canada with an 88 per cent Belgian shareholding might be protected by Belgium, with which the company had a genuine link of the kind expounded in the *Nottebohm* case, against Spain, arising out of an injury inflicted on the company by Spain. Considerations of public policy contributed to this decision. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the

[99] *Second Phase (Belgium v Spain)* [1970] ICJ Rep 3, 42 (para. 70); See too *Diallo Case (Preliminary Objections) (Guinea v DRC)* [2007] ICJ Rep para. 61.

exercise of its discretion decline to exercise its right of diplomatic protection.[100] Second, many corporations engaged in transnational business have shareholders from several countries; to allow the State of nationality of the shareholders to bring proceedings on behalf of its shareholders may result in a multiplicity of claims by different States, all arising out of injury to the same company.[101]

Barcelona Traction is sometimes construed as authority for the proposition that only the State of registration of the corporation is entitled to protect it diplomatically and that there is no need for any other connection between the corporation and the State of registration. This perception arises from the dictum of the Court that international law "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has a registered office".[102] This is not, however, an accurate assessment of the decision as the Court made it clear that it required more than incorporation for the exercise of diplomatic protection. Although it did not reiterate the requirement of "genuine connection" expounded in *Nottebohm*,[103] the Court stated that, in addition to incorporation and registration, there should be "a close and permanent connection between the corporation and the State exercising protection".[104] The Court found such a connection in the facts that the corporation had been registered in Canada for over fifty years, held board meetings in Canada, and was listed in the records of the Canadian tax authorities and was recognized by other States as being of Canadian nationality.[105] All of this meant, said the Court that Barcelona Traction's links with Canada were "manifold".[106] In this case, the Court was therefore not confronted with a situation in

[100] *Barcelona Traction,* ibid, 35 (para. 43), 46 (paras. 86–7), 50 (para. 99).
[101] Ibid, 48–9 (paras. 94–6).
[102] Ibid, 42 (para. 70).
[103] Loc cit.
[104] Ibid, 42 (para. 71).
[105] Ibid, 42–44, paras. 71–76.
[106] Ibid, 42, para. 71.

which the company was registered in one State and has a "close and permanent connection" with another State.

Article 9 of the ILC Draft Articles on Diplomatic Protection recognizes that incorporation confers nationality on a corporation for the purpose of diplomatic protection, but provides an exception for cases where there is no significant connection between the corporation and its State of incorporation. The article provides that:

> For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

The commentary to Article 9 makes clear that there must be some tangible connection with the State in which the corporation is formed in addition to incorporation. It states:

> Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.[107]

Barcelona Traction firmly establishes the principle that a corporation is to be protected by its State of nationality and not by the State of nationality of its shareholders. This principle is premised on domestic legal systems which draw a distinction between the corporation and its shareholders. There are, however, exceptions to the rule expounded in *Barcelona Traction*, that is

[107] Para. 4 of commentary on Art. 9, Yearbook of International Law Commission (2006), Vol. II, Part Two, 38.

cases in which the court will lift the corporate veil in order to allow the State of nationality of the shareholders to exercise diplomatic protection. This means that where the shareholders in a company are nationals of different States, several States of nationality may be able to exercise diplomatic protection.

The first and most obvious exception is where there is injury to the direct rights of the shareholders, distinct from the company's rights. This will occur, for instance, when a company fails to pay declared dividends, or denies shareholders the right to attend and vote at general meetings, or does not allow shareholders to share in the residual assets of the company on liquidation.[108]

The second exception arises where the company has ceased to exist in its place of incorporation or has lost its capacity to act — for example, where it has gone into liquidation. This exception was accepted by the Court in *Barcelona Traction* although it was not relevant on the facts.[109] The question whether this has occurred is governed by the law of the State of the company's incorporation.[110]

The third exception is where the State of incorporation is itself responsible for inflicting injury on the company, and the foreign shareholders' sole means of protection on the international level is through their State(s) of nationality.[111]

This exception is the most important. It is not uncommon for a developing State to require foreigners wishing to obtain some concession or licence to exploit a resource in that State to establish

[108] *Barcelona Traction* [1970] ICJ Rep 36 (paras. 46–47). This principle is included in Article 12 of the ILC Draft Articles on Diplomatic Protection. In the *Diallo Case (Guinea v DRC),* (Merits) [2010] ICJ Rep 639, the International Court acknowledged that a shareholder might be protected where his direct rights in a corporation were infringed but held that Mr. Diallo's direct rights had not been infringed: 679–687 (paras. 114–48).
[109] [1970] ICJ Rep 40–1 (paras. 65–8).
[110] Art. 11(a) of ILC Draft Articles.
[111] This exception was acknowledged by the International Court of Justice in the *Barcelona Traction Case*: [1970] ICJ Rep 48 (para. 92).

a company for this purpose, under the laws of that State, with themselves as principal shareholders. If the licence is withdrawn and the assets of the company are confiscated by the government of the State of incorporation, the foreign shareholders are left without a State to protect them unless their own State of nationality is able to exercise protection. There is considerable support for the rule that in such circumstances the State of nationality of the shareholders may exercise diplomatic protection.[112] Support for such a rule is particularly strong where the injured corporation has been compelled to incorporate in the wrongdoing State. In the *Delagoa Bay Railway* case, the United Kingdom and the United States successfully intervened on behalf of Anglo-American shareholders in a Portuguese company, created in accordance with Portuguese law at the insistence of the Portuguese government, to construct a railway line from Lourenço Marques to Komatipoort in 1889, when the Portuguese government confiscated the assets of the company.[113] In a similar case in which the United Kingdom made a claim on behalf of its nationals who were shareholders in a Mexican company, the government of the United Kingdom replied to the Mexican argument that a State might not intervene on behalf of its shareholders:

> If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means

[112] Several judges in the *Barcelona Traction Case*, [1970] ICJ Rep, expressed themselves in support of such a rule in separate opinions: Fitzmaurice 72–5; Tanaka 133–4; Jessup 191–3. (*Sed contra*, see the separate opinions of judges Padilla Nervo 257–9; Morelli 240–1; Ammoun 318). See further, JM Jones "Claims on Behalf of Nationals who are Shareholders in Foreign Companies" (1949) 26 BYIL 225; L Caflisch, *La protection des societies commerciales et des interets indirecte en droit international public* (Nijhoff, 1969) 203.

[113] JB Moore, *International Arbitrations* (1898) vol. 2 at 1865; JB Moore, *Digest of International Law* vol. 6 (1906) 648; (1888–9) 81*BSFP* 691.

> would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.[114]

This exception has received some support in judicial decisions[115] subsequent to *Barcelona Traction* and has been endorsed by the ILC in its Draft Articles on Diplomatic Protection. Article 11(b) provides that a State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of shareholders unless:

> The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing businesses there.

---

[114] *Mexican Eagle (El Aguila),* in M Whiteman, *Digest of International Law*, vol. VIII, 1272–4; *Romano-Americano,* in Hackworth, *Digest of International Law*, vol. V, 841. See, too, *El Triunfo*, 15 *RIAA* 467 (1902); *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*, 2 *RIAA* 779 at 790 (1926). See, further, Yearbook of the international Law Commission (2006), Vol. II, Part Two, 41–42; and the Special Rapporteur's Fourth Report on Diplomatic Protection, Yearbook of the International Law Commission (2003), Vol. II, Part One, 3–30.

[115] See the commentary of the ILC on Art. 11(b), Yearbook of the International Law Commission (2006), Vol. II, Part Two, 41–42. In the *ELSI Case* [1989] ICJ Rep 15 a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damage suffered by an Italian company whose shares were wholly owned by two American companies, without any serious question having been raised as to the lawfulness of the espousal by the United States of its companies' claims. The Chamber avoided pronouncing on the compatibility of its findings with *Barcelona Traction* despite an objection raised by Italy. It is therefore possible to infer support for the exception in favor of the right of the State of shareholders of a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation. Cf *Diallo Case (Preliminary Objections) (Guinea v DRC)* [2007] ICJ Rep para. 87. See further Y Dinstein "Diplomatic Protection of Companies under International Law" in K Wellens (ed) *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 505, 512; M Diez de Velasco "La protection diplomatique des societies et des actionnaires" (1974–1) 141 Recueil des Cours 87, 166.

In the *Diallo Case (Preliminary Objections*), the International Court of Justice left open the question whether the rule contained in Article 11(b) is a rule of customary international law.[116]

This issue has been raised in the courts of South Africa in two cases. In *Van Zyl and Others v Government of the RSA and Others*,[117] the question was whether South Africa might extend diplomatic protection to a national who held shares in and controlled a company registered in Lesotho, where the national had been compelled by the Lesotho authorities to incorporate the company in Lesotho as a condition for obtaining mining rights there, and these rights and the property of the company had been confiscated without compensation. The Supreme Court of Appeal found it unnecessary to decide this issue but expressed doubts as to whether Article 11(b) of the ILC Draft Articles reflected customary international law.[118] In *Von Abo v Government of the RSA*,[119] Prinsloo J in the Transvaal Provincial Division gave approval to the exception contained in Article 11(b), but the Supreme Court of Appeal in this case held that it was unnecessary to decide on this matter.[120]

Continuous Nationality

A State is entitled to exercise diplomatic protection in respect of a natural person or corporation who was its national continuously from the date of injury to the date of the official presentation of the claim.[121]

---

[116] *Preliminary Objections (Guinea v DRC)* [2007] ICJ Rep paras. 91–4. See AMH Vermeer-Künzli "*Diallo* and the Draft Articles, the Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadi Diallo Case*" [2007] 20 Leiden Journal of International Law 194. See, too (2011) 24 *LJIL* 607.

[117] 2008 (3) South African Law Reports 294 (SCA). The author acted as counsel in this case.

[118] Ibid, 319–20.

[119] 2009 (2) South African Law Reports 526 (T) 544–5.

[120] *The Government of the Republic of South Africa v Von Abo* 2011 (5) South African Law Reports 262 (SCA).

[121] ILC Draft Arts. 5 and 10.

The requirement of continuous nationality is difficult to reconcile with the traditional view that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. Logically, if this were indeed the case, nationality at the time of the injury alone would suffice. The rule has been seriously criticized because it may cause a great injustice where the injured individual has undergone a *bona fide* change of nationality after the occurrence of the injury unrelated to the bringing of the claim. For example, in the case of voluntary or involuntary acquisition of a new nationality by marriage or the succession of States.

The rule is justified on the ground that it prevents an individual from changing his nationality in order to find a national State that will most effectively pursue the claim.[122]

The first requirement of the rule that the injured person must be a national of the claimant State at the date of injury is not disputed. Uncertainty prevails, however, over the date until which continuous nationality is required. Most treaties, judicial decisions, and academic writings identify the date of the presentation of the claim as the final date — the *dies ad quem.* There is, however, support for the date of the making of the award or rendering of judgment in the matter in *Loewen v USA*.[123] This date was not favoured by the International Law Commission and was not followed in *Yukos (Isle of Man) v Russian Federation*.[124]

The International Law Commission gave its approval to the rule of continuous nationality despite arguments that it was not a rule of customary international law. Articles 5 (natural persons) and 10 (corporations) both require that a person in respect of whom a claim is brought be a national of the claimant State at the date of the injury and of the official presentation of the claim. Continuity is presumed if nationality existed at both these dates.

---

[122] See *Administrative Decision No. V (US v Germany)* (1924) 7 RIAA 119 at 141.
[123] (2003) 42 *ILM* 811 at 847–9.
[124] PCA Case No. AA 220 (2010) 199–200 (paras. 551–2).

VII.

Exhaustion of Local Remedies

The second requirement that must be satisfied before a claim for diplomatic protection may be brought is that the injured national must have exhausted all local remedies.[125] This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"[126] and by a Chamber of the International Court in the *Elettronica Sicula (ELSI)* case as an "important principle of customary international law".[127] The exhaustion of local remedies rule ensures that before a claim is brought on the international plane for a wrongful act, "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[128]

"Local remedies" mean the remedies which are as of right open to natural or legal persons before the judicial or administrative courts or bodies, whether ordinary or special, of the State responsible for causing the injury.[129] This means that if the municipal law permits an appeal to a higher court in the circumstances of the case, an appeal must be brought in order to obtain a final determination of the case. Extra-legal remedies or

---

[125] See Art. 14(1) of the Draft Articles on Diplomatic Protection.
[126] [1959] ICJ Rep 6 at 27.
[127] [1989] ICJ Rep 15 at 42 (para. 50).
[128] *Interhandel (Switzerland v USA), Preliminary Objections* [1959] ICJ Rep 6 at 27. In the *Ambatielos Claim* the arbitral tribunal declared that "[I]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test" (1956) 12 *RIAA* 83 at 120. See further on this subject, CF Amerasinghe *Local Remedies in International Law* (2nd edn, Cambridge University Press 2004); A Cançado Trindade *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983).
[129] See Art. 14(2) of ILC Draft Articles.

remedies as of grace or favour do not qualify as remedies to be exhausted.[130] Requests for clemency or resort to an ombudsman fall into this category. The remedies must, moreover, be available and effective both in theory and in practice.

It is not necessary to exhaust local remedies where there is direct injury to the plaintiff State itself. However, claims are often mixed in the sense that they involve both the direct interests of the State and the interests of its national. In such a case, the court will apply a preponderance test to decide which interest is the greater.[131] In practice, it is sometimes difficult to decide whether the claim is "direct" or "indirect" where it is "mixed". Many disputes before international courts have presented the phenomenon of the mixed claim. In the *Hostages* case,[132] the International Court found that the claim was preponderantly direct and there was therefore no need to exhaust local remedies where Iran had failed to protect American diplomats and consuls, who were at the same time American nationals. Conversely in the *Interhandel* case,[133] the International Court found the claim was preponderantly indirect where Switzerland claimed for a direct wrong to itself arising out of a breach of treaty and for an indirect wrong resulting from an injury to a national corporation. In the *Avena* case,[134] in which Mexico brought proceedings against the United States arising out of the maltreatment of Mexican nationals by the United States, the International Court found that it was not necessary to exhaust local remedies where the rights of the State and the individual nationals were "interdependent".

---

[130] *Diallo Case (Preliminary Objections) (Guinea v DRC)* [2007] ICJ Rep para. 47.
[131] See Art. 14(3) of Draft Articles on Diplomatic Protection.
[132] *United States Diplomatic and Consular Staff in Tehran* (*US v Iran*) [1980] ICJ Rep 3.
[133] [1959] ICJ Rep 6.
[134] *Case Concerning Avena and Other Mexican Nationals (Mexico v USA)* [2004] ICJ Rep at para. 40. See too (2004) 43 *ILM* 581 at 599. See too *La Grand (Germany v USA)* (Merits) [2001] ICJ Rep 466, 491–494.

There are a number of situations in which local remedies need not be exhausted. These exceptions are recognized in Article 15 of the Draft Articles on Diplomatic Protection.

Article 15(a) contains the so-called "futility principle" according to which local remedies need not be exhausted where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress".

This provision is supported by judicial decisions which have held that local remedies need not be exhausted where local legislation excludes jurisdiction or judicial review or where an appeal lies only to a higher court on a question of law and the trial court has ruled against the alien on a question of fact.[135]

The provision also allows local remedies to be bypassed where the local courts are notoriously lacking in independence or have demonstrated their hostility to the alien. This is illustrated by the case of *Robert E. Brown*,[136] in which an arbitration tribunal found that a national was not obliged to exhaust local remedies when the court had been reconstituted to block his claim. The tribunal declared that it is not necessary to exhaust justice "when there is no justice to exhaust".[137]

The International Law Commission has included two additional species of "futility" in Article 15. Local remedies need not be exhausted where there is undue delay in the remedial process and where the injured person is "manifestly precluded" from pursuing local remedies.

Local remedies need also not be exhausted, in terms of Article 15(c), when there is no relevant connection at the date of the injury

[135] *Finnish Ships Arbitration (Finland v UK)* (1934) *3 RIAA* 1479.
[136] *United States v Great Britain* (1923) 6 *RIAA* 120. See J Dugard *Human Rights and the South African Legal Order* (1978) 21–4.
[137] Ibid, 129.

between the injured person and the State alleged to be responsible.[138] The purpose of the exhaustion of local remedies rule is to give the State in which the injured alien resides, carries on business, or owns property an opportunity to provide redress through its own courts. Consequently where the alien is involuntarily within the territory of the respondent State — or where he or she has been injured by transboundary environmental harm or some other wrongful act which occurred outside the territory of the respondent State, there is no need for local remedies to be exhausted. This situation is well illustrated by the explosion at the Chernobyl nuclear plant in Ukraine in 1986 which caused radioactive fallout as far away as Japan and Scandinavia. Clearly, farmers affected by radioactive fallout in these countries could not be expected to exhaust local remedies in Ukraine before claims might be brought on their behalf. Another case which illustrates this principle is that of the *Aerial Incident* [139] in which Israel, in claiming compensation from Bulgaria for the shooting down of an Israeli civilian aircraft over Bulgarian territory, maintained that the exhaustion of local remedies rule was inapplicable because the Israeli nationals killed in the shooting had no voluntary or deliberate connection with Bulgaria. A voluntary link or connection with the respondent state cannot be created by the unlawful act itself.

Local remedies need not be exhausted where the responsible State has waived compliance with this requirement.[140] Waiver of local remedies must not, however, be readily implied. In the *ELSI* case, a Chamber of the International Court of Justice stated that it was:

> unable to accept that an important principle of customary international law should be held to have been tacitly dispensed

[138] See the criticism of this provision by Amerasinghe (n 128) 176.
[139] *Aerial Incident of 27 July 1955 (Israel v Bulgaria) (Preliminary Objections)*, Oral Pleadings of Israel, [1959] ICJ Pleadings, 531–2.
[140] Art. 15(e) of Draft Articles on Diplomatic Protection.

with, in the absence of any words making clear an intention to do so.[141]

Bilateral investment treaties (BITs) frequently waive local remedies when they provide for arbitration as the only dispute settlement procedure. The local remedies rule is not, however, to be seen as having been implicitly waived simply because a matter is regulated by a BIT. Whether this requirement has been expressly or implicitly waived must be determined by an interpretation of the agreement.[142]

The burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is generally on the applicant State to show that there are no effective remedies open to the injured person.[143]

Calvo Clause

Dr. Calvo, an Argentinian jurist, devised an ingenious scheme to obstruct the use of diplomatic protection by the Western Powers. In response to the frequent diplomatic interventions by the Western Powers in Latin America, the governments of these States inserted a clause — known as the Calvo Clause — in contracts between the State and a national of a European State in which the latter agreed to confine himself to the available local remedies and to renounce diplomatic protection. Although the Calvo Clause has been widely recognized by Latin-American States, its validity has been rejected by the United States and other Western States on the ground that the individual may not renounce a right

[141] [1989] ICJ Rep at 42 (para. 150). See M Adler "The Exhaustion of Local Remedies Rule after the ICJ's decision in ELSI" (1990) 39 ICLQ 641.
[142] See Amerasinghe (n 128) 167–276.
[143] The question of burden of proof was considered by the Special Rapporteur in the Third Report on Diplomatic Protection; A/CN.4/523 and Add 1, paras. 102–118. The ILC decided not to include a draft article on this subject: *GAOR*, 57th Session, Supplement No. 10 (A/57/10) paras. 240–52.

that belongs to the State and not the individual. Although the Special Rapporteur proposed a provision in the draft articles on this subject, the International Law Commission, after a debate which revealed deep divisions on this subject, preferred not to include any such provision.[144] This debate provided illustration of the commitment of many members of the Commission to the *Mavrommatis* notion that diplomatic protection was the right of the State.

[144] See further on the Calvo Clause, D Shea *The Calvo Clause* (1955); R Jennings and A Watts (eds) *Oppenheim's International Law,* Vol. II (9th edn, Longman 1992) at 930. *North America Dredging Company v Government of* Mexico (1951) 4 *RIAA* 26.The Calvo Clause was considered by the Special Rapporteur in an Addendum to the Third Report on Diplomatic Protection, Yearbook of the International Law Commission (2002), Vol. II, Part One, 75; General Assembly Official Records, 57th Session, Supplement No. 10 (A/57/10) paras. 253–73.

VIII.

The Implementation of Diplomatic Protection

This topic embraces a number of issues, such as the consequences of diplomatic protection, the remedies available to States asserting diplomatic protection, the difference between diplomatic protection and consular assistance, and the right of the injured person to diplomatic protection.

The Consequences of Diplomatic Protection

The draft articles on diplomatic protection do not deal with the consequences of diplomatic protection or the remedies available to States in asserting diplomatic protection. This is because the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, together, with their comprehensive commentary, cover most aspects of this subject.[145] These principles are of equal application to diplomatic protection.

Action to enforce diplomatic protection may take the form of protest, request for an inquiry, negotiation, mediation and conciliation, or arbitral or judicial proceedings.[146] This action will be designed to secure the release of the national if arbitrarily imprisoned or reparation, including compensation, for damage caused to person or property.

One issue relating to reparation that is peculiar to diplomatic protection was, however, considered by the ILC. This is the

[145] See Arts. 28–39 of these draft articles in Yearbook of the International Law Commission (2001), Vol II, Part Two, 87–110.
[146] See the commentary to Art. 1 of the draft articles on diplomatic protection, Yearbook of the International Law Commission (2006), Vol. II, Part Two, 27.

unsatisfactory practice that allows a claimant State to refuse to hand over compensation received for injury to the national. This practice may be justified on the ground that the right of diplomatic protection, in accordance with the *Mavrommatis* doctrine, is that of the State from which it follows logically that the claimant State may itself retain the compensation received. This grossly unfair practice has been widely criticized and led to a recommendation in Article 19 of the draft articles on diplomatic protection that "a State entitled to exercise diplomatic protection…should…transfer to the injured person any compensation obtained for the injury from the responsible State…"[147]

The Difference Between Diplomatic Protection and Consular Assistance

International law recognizes two kinds of protection that States may exercise on behalf of their nationals, consular assistance, and diplomatic protection.[148] Although it is sometimes unclear whether the actions of a government constitute diplomatic protection or consular assistance, there are fundamental differences between the two. First, consular assistance is inevitably confined to the functions and powers of a consul, set out in the Vienna Convention on Consular Relations of 1963,[149] which are not as extensive as those of a diplomat. Only diplomatic protection permits the kind of action described above — protest, negotiation, arbitral or judicial proceedings. Second, consular assistance is preventive, designed to ensure that a national is not treated below the minimum international standard of justice, and

[147] See further the commentary on this provision and the Seventh Report of the Special Rapporteur in Document A/CN.4/567 in Yearbook of the International Law Commission (2006), Vol. II, Part One, 3, 23.
[148] See, generally, AMH Vermeer- Künzli, "Exercising Diplomatic Protection. The Fine Line between Litigation, Desmarches and Consular Assistance" (2006) 6 Zeitschrift fur auslandisches Recht und Volkerrecht 321.
[149] UNTS, vol. 596, p. 261.

includes consular advice and legal assistance to ensure that he or she receives a fair trial. Diplomatic protection, on the other hand, is remedial and seeks to secure redress for the violation of the international minimum standard and the failure to have a fair trial. Diplomatic protection may also have a preventive character where the violation is ongoing.

La Grand[150] and *Avena,*[151] which involved the violation of the obligations of the United States towards foreign nationals under the Vienna Convention on Consular Relations (VCCR), and the subsequent exercise of diplomatic protection by Germany and Mexico on behalf of their nationals, has unfortunately given rise to some confusion over the distinction between consular assistance and diplomatic protection This, despite the fact that the International Court made it clear that individual rights arising from the VCCR could be claimed through the vehicle of diplomatic protection.[152]

Diplomatic protection is of a more serious nature than consular assistance as it involves inter-State action in which the respondent State is not merely requested to avoid international wrongdoing but confronted with the accusation that it has violated international law and the demand that it cease such wrongdoing and make reparation. Obviously, it is politically easier for a State to label its action as consular protection even if the national has already been injured and the international wrong committed. This explains why States sometimes prefer to exercise consular protection, either by describing their action as consular assistance or simply refusing to label their assistance. It also explains why there is often confusion over whether a State is exercising consular assistance or diplomatic protection.

---

[150] *La Grand* (*Germany v USA*) (Merits) [2001] ICJ Rep 466, 482–483, 492–494.

[151] *Case Concerning Avena and Other Mexican Nationals (Mexico v USA)* [2004] ICJ Rep 12, 35–36, 39.

[152] See, too, the *Jadhav Case* (*India v Pakistan)* [2019] ICJ Rep 418, 459-460, <https://www.icj-cij.org/en/case/168> accessed 20 July, 2019. Here too the Court found that the respondent State had failed to grant consular access to a national.

This is illustrated by the case of Nazanin Zaghari-Ratcliffe, the dual British Iranian national imprisoned in Iran in conditions falling below the international minimum standard, after a trial that failed to meet international standards of due process of law. Initially, the British government insisted that its representations were in the nature of consular assistance despite the fact that the internationally wrongful act had already been committed and all local remedies exhausted. Only later after the Iranian government refused to respond to consular representations did the British government declare that it had decided to accord diplomatic protection to her.[153]

Is There a Right to Diplomatic Protection?

A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a state to extend diplomatic protection to a national, but international law imposes no such obligation. The position was clearly stated by the International Court of Justice in the *Barcelona Traction* case:

> within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress… The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of

[153] *The Guardian* (8 March 2019).

> which may be determined by considerations of a political or other nature, unrelated to the particular case.[154]

This view is premised on the legal fiction declared in *Mavrommatis*[155] that an in exercising diplomatic protection "a State is in reality asserting its own rights".

There is growing support for the view that there is some duty on States to afford diplomatic protection to nationals subjected to serious human rights violations in foreign States. The constitutions of many States recognize the right of individuals to receive some sort of protection for injuries suffered abroad, though whether this includes the right to diplomatic protection and, if so, whether the right is enforceable in the national courts of these States is far from clear.[156] The Constitution of the Russian Federation, for instance, provides in Article 61 that "The Russian Federation shall guarantee to its citizens protection and patronage abroad", without specifying whether this right includes a right to diplomatic protection. There is apparently no evidence to suggest that it may include such a right.

In 2000, as Special Rapporteur on Diplomatic Protection to the International Law Commission, I proposed that a duty of protection be imposed on the State of nationality if the injury to the national was the result of a grave breach of a *jus cogens* norm on the part of the host State, but this proposal was rejected by the Commission as unsupported by State practice and going beyond the permissible limits of progressive development.[157]

---

[154] [1970] ICJ Rep 44 (paras. 78–9). This view is supported by Edwin Borchard *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (The Banks Law Publishing Co, New York, 1919) 29.
[155] [1924] PCIJ Rep Series A no. 2 at 12.
[156] See J Dugard, "First Report on Diplomatic Protection", Yearbook of the International Law Commission (2000), Vol. II, Part One, 224–225.
[157] "First Report on Diplomatic Protection", Yearbook of the International Law Commission (2000), Vol. II, Part One, 223.

Whether there is a right to diplomatic protection falls to be decided in the first instance by national courts and not international courts because the injured national will have to assert this right in her or his own national courts. As the individual has no *locus standi* before most international courts this is not a right that can be claimed before an international court.

In recent years several national courts have been faced with demands from individuals, that their State of nationality exercise diplomatic protection on their behalf. Claimants have argued that either customary international law or national law, or both such legal systems, recognise a right to diplomatic protection. National courts have generally refused to accept that customary international law recognizes such a right but have found that national law offers some redress where it can be shown that the executive had acted irrationally in refusing diplomatic protection. While acknowledging that the executive has a discretion in the granting of diplomatic protection, courts have generally shown a willingness to examine whether the measures being taken by the government to secure redress are serious and likely to be effective.[158]

In *Abbasi and Another v Secretary of State for Foreign and Commonwealth Affairs*,[159] in which an order was unsuccessfully sought in 2002 to compel the British Government to provide diplomatic protection to British nationals held by the United States in Guantanamo Bay, the court held that the executive's decision not to grant diplomatic protection was in principle reviewable, in this case on the ground of a legitimate expectation of protection,[160] but that such review was not justified by the facts before the court. That

[158] See the comprehensive examination of judicial decisions on this subject by A Vermeer-Künzli "Restricting Discretion: Judicial Review of Diplomatic Protection" (2006) 75 Nordic Journal of International Law 279.
[159] [2002] EWCA Civ 1598; [2002] All ER (D) 70; (2003) 42 *ILM* 358. In this case, the Court considered the proposal made to the ILC to impose an obligation on States to provide diplomatic protection in the case of serious human rights violations.
[160] Ibid, para. 82.

the British government was in fact engaged in seeking to secure their release was confirmed when the nationals in question were released in 2005.

This matter was the subject of a decision of the South African Constitutional Court in *Kaunda and Others v President of the Republic of South Africa*,[161] in which an order was sought to compel the South African government to intervene diplomatically on behalf of a group of South African nationals who had been arrested in Zimbabwe, allegedly en route to Equatorial Guinea to assist in a coup to overthrow the government of that State. These nationals had been subjected to inhuman and degrading treatment in Zimbabwean prisons and had good cause to fear that they would be denied a fair trial and sentenced to death if extradited to Equatorial Guinea. The majority of the court dismissed the application both on the facts and out of deference to the executive in its conduct of foreign affairs. Although the Court, relying on *Barcelona Traction* and the failure of the proposal of the Special Rapporteur to the ILC to compel States to provide diplomatic protection, accepted that international law does not at present oblige States to provide diplomatic protection to its nationals, it recognized that in terms of the 1996 South African Constitution, premised as it is on a commitment to international human rights, there is *some* obligation on the part of the government to protect its nationals abroad. Chaskalson CJ, on behalf of the majority, declared that:

> There may…be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult,

[161] 2005 (4) SALR 235 (CC). See M du Plessis "John Dugard and the Continuing Struggle for International Human Rights" (2010) 26 SAJHR 292, 295. See too M Coombs in (2005) 99 AJIL 681; D Tladi and S Dlagnekova "The Act of State Doctrine in South Africa: Has *Kaunda* settled a Vexing Question?" (2007) SA Public Law 444.

> and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.[162]

The Court stated that if a decision of government on diplomatic protection was irrational it would intervene. It continued:

> If government refuses to consider a legitimate request, or deals with it in bad faith or irrationally, a court could require government to deal with the matter properly. Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision.[163]

In fact, following representations from the South Africa government, the group was returned to South Africa.

South African courts have considered the question whether there is a right to diplomatic protection in subsequent cases. In *Van Zyl v Government of the Republic of South Africa*,[164] the Supreme Court of Appeal held that while there was no right to diplomatic protection under South African law the government was obliged to consider requests for such protection "rationally".[165]

In *Von Abo v Government of the Republic of South Africa*,[166] where the South African government had failed to protect a national whose farms in Zimbabwe had been expropriated without compensation, the trial court held that that the government was guilty of an "abject failure and dereliction of duty" and had "done absolutely nothing" to assist Von Abo.[167] Although the court accepted that customary international law did not recognize a

[162] Ibid, para. 69.
[163] Ibid, para. 80.
[164] 2005(11) 2008(3) SALR 294 (SCA).
[165] Ibid, paras. 6, 51–2.
[166] 2009 (2) SALR 526 (T) 544.
[167] Ibid, 550 (paras. 91–2).

right to diplomatic protection,[168] it found that *Kaunda* recognized that a court might exercise judicial review where the government had acted in bad faith or irrationally. The court therefore made an order declaring that the failure of the government "to rationally, appropriately and in good faith" consider Von Abo's request for diplomatic protection was inconsistent with the Constitution, that he had a right to diplomatic protection and that the government was under an obligation to provide him with diplomatic protection in respect of the violation of his rights by the government of Zimbabwe. When the South African government still failed to provide diplomatic protection to von Abo the court ordered the government to pay damages to von Abo and declared:

> The internationally recognised forms of diplomatic intervention have been designed to force offending states to toe the line. There is no room for an argument that diplomatic intervention becomes toothless, simply because the offending state exhibits no intention ever to co-operate. It is precisely under those circumstances when the recognised interventions come into play: the strength of the intervention depends on the level of resistance. South Africa is the powerhouse of the region. It is common knowledge that Zimbabwe is dependent on South Africa for almost every conceivable form of aid and assistance. I see no reason why the respondents cannot apply the necessary pressure, under these circumstances, to assist their valuable and long-suffering citizens, such as the applicant. In breach of their constitutional duties, the respondents have refrained from affording such assistance for almost a decade.[169]

The appeal by the government against this decision to the Supreme Court of Appeal (SCA) succeeded.[170] The SCA held that the

[168] Ibid, 560 (para. 137).
[169] *Von Abo v Government of the Republic of South Africa* 2010(3) SALR 269 (GNP) at 292.
[170] *The Government of the Republic of South Africa v Von Abo* (283/10) (2011) ZASCA 65 (4 April 2011).

trial court had erred in finding that Von Abo had a constitutional right to diplomatic protection as a result of the government's failure to rationally and in good faith consider his request for diplomatic protection.[171]

These decisions, and other decisions of national courts,[172] confirm that it is possible for national courts to pressurize governments to exercise diplomatic protection by reviewing their failure to protect in accordance with domestic rules of law. The review of administrative discretion on grounds of rationality (as in *Kaunda*) or legitimate expectation (as in *Abbasi*) are examples of how States may be compelled or shamed into exercising diplomatic protection. This is an area of law that provides lawyers with creative opportunities to use domestic remedies designed to curb administrative discretion to advance diplomatic protection. An argument which has been suggested in this connection is that a State might be accused of violating its obligation to prohibit torture under a human rights convention to which it is a party when it fails to protect a national being tortured in another State since it has the power to limit or end this torture by exercising diplomatic protection.[173]

After the first reading of the Draft Articles on Diplomatic Protection in the International Law Commission, they were

[171] Para. 24. This finding is difficult to reconcile with the court's own finding that "this case is an example of how government, founded on a constitutional dispensation and culture of human rights, is not supposed to treat its citizens and its courts" (para. 39).
[172] See Kunzli, note 158 above, for a discussion of these cases.
[173] See N Karazivan "Diplomatic Protection: Taking Rights Extraterritorially" (2006) 44 Canadian Yearbook of International Law 299 at 347–8, 349–350. Cf *Canada (Prime Minister) v Kadr,* [2010]1 SCR 44 (Supreme Court of Canada). Here the Supreme Court of Canada held that where a Canadian national was treated in violation of the Canadian Charter of Rights by the United States in Guatanamo Bay the appropriate remedy was not to order the government of Canada to secure his return to Canada by repatriation. "Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Kadr a declaration that his Charter rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond" (para. 2).

submitted for consideration to member States of the United Nations prior to the second reading. At this stage, Italy proposed that States be placed under a legal duty to exercise diplomatic protection if the injury to the national results from a grave breach "of an international obligation of essential importance for safeguarding the human being," such as the protection of the right to life, the prohibition of torture or inhumane treatment, and the prohibition on slavery and racial discrimination.[174]

This question was reconsidered by the International Law Commission which included a new provision in the final draft articles under the title "recommended practice". This Article 19 recommends to States that they "give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred", have due regard to the views of the injured person on this subject and transfer to the injured person any compensation obtained for the injury from the responsible State. This provision does not create a binding obligation on States and it does "not undermine a State's discretion as to whether to exercise diplomatic protection".[175] However, it does confirm that international law is moving in the direction of a right to diplomatic protection in the case of a serious invasion of human rights.

In 2011, the Korean Constitutional Court invoked Article 19 in deciding that Korean "comfort women" forced into sexual slavery by Japan during World War II were entitled to protection. In so finding, the court dismissed the argument of the government of Korea that this would strain diplomatic relations with Japan. Although the nature of diplomatic actions requiring strategic choices based on an understanding of international affairs might be taken into account, declared the court, it was difficult to conclude that an abstract reason such as "strained diplomatic relations" would qualify as a pertinent

[174] Yearbook of the International Law Commission (2006), Vol. II, Part One, 38.
[175] See the comment by the chairperson of the ILC drafting committee, Mr. Roman Kolodkin, Yearbook of the International Law Commission (2006), Vol. I, 96.

reason "for disregarding legal remedies for the complainants facing serious risks of basic rights violation".[176]

The obligation of the State to accord diplomatic protection to a national whose human rights have been violated abroad accords with obligations assumed by States under international human rights law. The principal multilateral human rights conventions require States to ensure to everyone within their jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress.[177] There is no reason why a State of nationality should not be obliged to extend protection of such rights to nationals when these rights are violated abroad. Whether there is an obligation on a State to exercise extraterritorial jurisdiction in such circumstances is contested.[178] However, relying on the decision of the European Court of Human Right in *Bancovic and others v Belgium*,[179] Noura Karazivan has argued that "[by denying diplomatic protection the State of nationality agrees to the continuous violation of the human rights of its national" as "only the State of nationality has the privilege of exercising diplomatic protection and hence the power to limit the violation. If a State stands by idly while its national is being tortured, could it be said that the State has *no control* over the violation of its national's fundamental rights?"[180]

[176] Challenge against the Act of Omission involving Art. 3 of Agreement on the Settlement of the Problem concerning Property and Claims and the Economic co-operation between the Republic of Korea and Japan, *64 Former Japanese military sex slaves v Minister of Foreign Affairs and Trade*, Decisions of the Constitutional Court Korea (English version) 121 at 151, 2006 Hun-Ma 788, Constitutional Court of Korea, 30 August 2011.

[177] See, for example, Art. 2 of the International Covenant on Civil and Political Rights, Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination and Articles 13 and 14 of the Convention against Torture and other Cruel and Inhuman of Degrading Treatment or Punishment.

[178] See *Abbasi,* above footnote 159, para. 71.

[179] (2002) 31 ILM 517; Case no. 52207/99 (12 December 2001) ECHR.

[180] "Diplomatic Protection: Taking Human Rights Extraterritorially" (2006) 44 Canadian Yearbook of International Law 299, 347–8.

IX.

Is Diplomatic Protection Relevant Today?

A common refrain today is that diplomatic protection is dead. Investment treaties have replaced diplomatic protection as a means for protecting the property rights of nationals abroad and human rights conventions have replaced it as a protection for the personal rights of nationals injured abroad — so the argument goes. The work of the International Law Commission on diplomatic protection was an attempt to try to rescue the institution from marginalization at best and obsolescence at worst, but this failed to achieve its purpose.[181] The necessary implication of this argument is that diplomatic protection has ceased to be of practical relevance and survives only as a relic of legal history which allows scholars to debate *ad nauseam* the academic features of the institution — particularly the question whether it is based on a fiction.

It is true than other mechanisms that aim to protect the rights of nationals abroad have provided methods of relief that are perhaps more speedy and more effective. Here one thinks particularly of bilateral investment treaties (BITs) that protect the rights of foreign investors, international human rights conventions, treaties that provide for compensation where large groups of foreigners have suffered at the hands of a foreign State and treaties for the transfer of convicted and sentenced persons to their home countries. These mechanisms have not, however, replaced diplomatic protection as a valuable institution for securing international justice. As Judge Jessup observed in the *Barcelona Traction* case "[t]he institution of the right to give diplomatic protection is surely not obsolete

[181] See, for example, V Pergantis "Towards a "Humanization" of Diplomatic Protection?" (2006) 66 Heidelberg Journal of International Law 351, 394–397.

although new procedures are emerging".[182] This is because there is as yet no international machinery guaranteeing third-party determination between alien claimants and States. Until such machinery is established "it is in the interest of all international lawyers not only to support the doctrine, but to oppose vigorously any effort to cripple or destroy it".[183]

Some of the procedures that provide relief to foreign nationals injured abroad will be briefly examined in order to show that there are still areas in which there is a need for diplomatic protection. It must, however, be clear that the customary law rules on diplomatic protection, which the ILC has sought to codify in its draft articles, and the rules governing foreign investment and the protection of human rights are complementary. This is stressed by the ILC draft articles 16 and 17 which declare that the draft articles are not intended to trump the right of States to resort to other procedures to protect their nationals.[184]

Protection of Foreign Investment by Bilateral Investment Treaties (BITs)

Today foreign investment is largely protected by bilateral investment treaties (BITs) which by abandoning or relaxing the conditions relating to the nationality of claims and exhaustion of local remedies provide foreign investors with a less cumbersome means for enforcing their rights and one which goes beyond the protection afforded by diplomatic protection.[185] There are nearly

[182] [1970] ICJ Rep, 3,165.
[183] RB Lillich "The Diplomatic Protection of Nationals Abroad: An Elementary Principle under Attack" (1975) 69 AJIL 359.
[184] Yearbook of the International Law Commission (2006), Vol. II, Part Two, 50–1.
[185] See the Joint Dissenting Opinion of Judges Al-Khasawneh and Yusuf in *Case Concerning Amadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639 at 711. The judges are critical of the failure of the International Court of Justice in this case "to bring the standard of protection of customary law up to the standard of modern investment law".

3,000 such agreements in existence which provide for direct settlement of domestic disputes between the investor and the host State before an *ad hoc* arbitration tribunal or a tribunal established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).[186]

In the *Diallo Case (Preliminary Objections)*, the International Court of Justice recognized this development when it declared:

> In contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.[187]

Although BITs cover many, perhaps most, investment disputes, they do not cover all cases involving the deprivation of wealth of persons in foreign countries. This is illustrated by the case of Ahmadou Diallo,[188] in which the Republic of Guinea claimed compensation from the Democratic Republic of the Congo on behalf of a national for both financial losses incurred by its national

[186] The Permanent Court of Arbitration today also provides its services to arbitrations between States and private parties. See BW Daly, E Goriatcheva and HA Meighen, *A Guide to the PCA Arbitration Rules* (2014) 4.

[187] [2007] ICJ Rep para. 88.

[188] *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Republic of Congo,* (Preliminary Objections) [2007] ICJ Rep 582.

and injury to his person. In this case, there was no treaty between the parties providing for the settlement of commercial disputes involving a national.

Another reason for discounting the comprehensiveness of BITs is that there is growing opposition to BITs on the part of capital importing countries which believe that BITs undermine a State's sovereignty by interfering in its domestic policy-making. On the one hand, BITs protect investments against treatment by the host State that is not "fair or equitable" by setting out in full the rights of the investor. On the other hand, the rights of the host State are not as fully recognized. This has led to complaints that BITs fail to achieve a balance between the rights of the investor and those of the host State. As a consequence, South Africa has terminated eleven BITs.[189] In these circumstances, it is not impossible that BITs will in future diminish in importance and that there will be a revival of the need for diplomatic protection to protect investments abroad.

Rescue of Nationals Subjected to Life Threatening Circumstances Abroad

On occasion groups of foreign nationals are threatened abroad in circumstances which impose a threat to their lives. If negotiations with the host State fail and military intervention is the only way to secure their safety, diplomatic protection as defined by the International Law Commission is not an appropriate remedy. This is because Article 1 defines diplomatic protection as a "means of peaceful settlement". That it was the intention of the ILC to exclude forcible diplomatic protection is evidenced by the Commission's rejection of a proposal by the Special Rapporteur that diplomatic protection be defined

[189] See J Dugard, M Du Plessis, T Maluwa, and D Tladi, *Dugard's International Law. A South African Perspective* (5th edn, Juta 2018) 643–4, 662–4.

to encompass the rescue of nationals exposed "to immediate danger to their persons" and the host State was unwilling to secure their safety. In rejecting this proposal, the Commission displayed a naïve belief that international law would constrain States from intervening forcibly to protect nationals, despite the body of State practice to support it. Take, for instance, Israel's forcible intervention in 1976 in Entebbe, Uganda, to rescue Israel nationals.[190] Here a flight with Israeli nationals on board had been hijacked and flown to Entebbe. Although their lives were threatened by the hijackers the government of Uganda failed to intervene. Israel then sent a group of commandos who rescued the hostages. No attempt was made to change the regime of Uganda. This incident seems to fall squarely within the confines of a defensive operation to save nationals which is arguably permitted by Article 51 of the UN Charter. This right has been grossly abused by States, particularly the United States in Latin America, but this does not mean that States will not intervene forcibly to protect groups of nationals threatened abroad. Moreover, they will claim that this is a legal right recognized by Article 51 and endorsed by considerable State practice. Clearly, there is no need to invoke diplomatic protection in such circumstances.

Inevitably, a State will only be able to claim the forcible defence of nationals as a species of self-defence where a substantial number of its nationals are endangered. The use of force to rescue a small number of nationals will not be permitted, as shown by the apology the Philippines extended to Kuwait for the forcible rescue of Philippine nationals by Philippine embassy staff from a Kuwaiti family that was maltreating these nationals.[191]

[190] See TM Franck, *Recourse to Force. State Action against Threats and Armed Attacks* (Cambridge University Press 2002) 76–96.
[191] See <https://www.bbc.com/news/world-asia-440-8801> accessed 25 July 2019.

Retrospective Claims for Compensation on Behalf of a Sizeable Number of Nationals Injured Abroad or by an Occupying Power

History is replete with incidents in which a large number of foreign nationals have been deprived of their property or subjected to life-threatening actions by the State in which they live or by an occupying power. Such incidents have seldom resulted in diplomatic protection. Instead, States have entered into lump sum settlement agreements or agreements to set up a Commission or tribunal to adjudicate upon such claims. Lump-sum settlement agreements are negotiated by the claimant and respondent State to satisfy the claims of nationals of the claimant State and then paid over to them on a *pro rata* basis. Claims Commissions resemble diplomatic protection more closely as in inter-State proceedings they adjudicate the claims of individuals against the respondent State.

An early Claims Commission was the US-Mexican General Claims Commission set up by the United States and Mexico in a bilateral treaty[192] to consider US claims on behalf of their nationals arising from revolutionary action in Mexico between 1910 and 1920. This three-person Commission delivered a number of decisions on treatment of aliens which have shaped the law on the minimum standard of treatment of aliens.[193]

In 1981, the Iran-US Claims Tribunal was set up after the overthrow of the Shah of Iran with competence to decide "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States".[194] Although the tribunal was established by an inter-governmental agreement

[192] (1924) 18 AJIL (Supp) 143–146.
[193] See, for example, the *Neer* Claim (1926) 2 RIAA 60; *Roberts* Claim (1926) 4 RIAA 77; *Youmans* Claim (1926) 4 RIAA 110.
[194] See Art. II of the Claims Settlement Declaration <http://www.iusct.net>; and (1981) 20 ILM 224.

and the two States had agents supervising the conduct of cases before the tribunal, the responsibility for the presentation of claims rested with the individual claimants. This innovation led Iran to argue that the Tribunal operated under the rules of diplomatic protection but the Tribunal insisted that it had been established to resolve a dispute between States and not to extend diplomatic protection.[195] The jurisprudence of this Tribunal includes a number of significant decisions on the predominant nationality of dual nationals.[196]

Two other Commissions that dealt with claims by nationals resembling diplomatic protection but were essentially concerned with inter-State claims were the United Nations Compensation Commission (UNCC) established by the Security Council[197] to process claims for compensation for losses resulting from Iraq's invasion of Kuwait (1990–91) and the Eritrea-Ethiopia Claims Commission (EECC) set up to decide on claims for damages suffered from violations of international law in the course of the armed conflict between these two States. In both of these cases, claims were submitted on behalf of individuals or corporations by States (or international organizations in the case of the UNCC).[198]

---

[195] See *Islamic Republic of Iran v United States,* Case No. A18 (Dual Nationality) 6 April 1984, (1985) 5 *IUSCT* 257, 261.

[196] Ibid; *Esphahanian v Bank Tejerat* (1983) 2 IUSCTR 157; (1983) 77 AJIL 646.

[197] Security Council Resolution 687 (1991), para. 16.

[198] On the UNCC, see UNCC Governing Council, Decision No. 10: Provisional Rules for Claims Procedure, Art. 5(1). See further MF Di Rattalma and T Treves (eds), *The United Nations Claims Commission — A Handbook* (Kluwer, The Hague, 1999) who state that in the claims procedure governments are expected to play a role halfway between simple representation and diplomatic protection (8). On the EECC, see para. 25 of the final awards in both cases: *Eritrea-Ethiopia Claims Commission — Final Award — Ethiopia's Damages Claim* (2009) 26 RIAA 631–770; *Eritrea-Ethiopia Claims Commission Final Award — Eritrea's Damages Claim* (2009) 26 RIAA 505–630. Here the Commission stated that both States had filed their claims as inter — State claims despite the fact that the rules of procedure allowed claims to be filed on behalf of individuals. Nevertheless, said the Commission, some of the State's claims were made in the exercise of diplomatic protection in that they were predicated on injuries suffered by the claimant State's nationals.

Treaties for Transfer of Persons Sentenced Abroad to the State of Nationality

When prison conditions in a foreign State fall below the international minimum standard and are both abusive and inhumane there will often be pressure on the State of nationality to secure the return of its nationals sentenced to prison in such a State. This may be achieved by means of a multilateral or bilateral treaty for the transfer of sentenced persons between the State of nationality and the State of imprisonment.[199] Today there are regional multilateral treaties between European States, Latin- American States, and the Commonwealth of Nations for such prisoner transfers. There are likewise many bilateral treaties for this purpose and in 1985 the United Nations adopted a Model Agreement for the Transfer of Foreign Prisoners.[200] Such agreements are largely designed to allow nationals to be returned to serve their prison sentences in their home State to ensure their rehabilitation and re-integration into their State of nationality. At the same time, however, such treaties do allow a State to ensure that its national is not imprisoned in a foreign State in violation of the international minimum standard.

Many (perhaps most) investors in foreign lands do not need diplomatic protection — they will be protected by BITs. Foreigners whose lives are threatened abroad will be rescued by their State of nationality acting under Article 51 of the UN Charter — if they are lucky. Foreigners who lose property or liberty in an armed conflict, whether internal or international, will possibly be compensated after the conflict in terms of a treaty between parties to the conflict that establishes a procedure for handling claims. Foreigners imprisoned in inhumane conditions abroad may be allowed to serve their sentences humane conditions in their home State. In summary,

[199] See the *Handbook on International Transfer of Sentenced Persons* (Office of Drugs and Crime, New York 2012).
[200] UN Publications, Sales, No. E.86.IV.1.

there are mechanisms in place or that can be put in place to replace diplomatic protection in many circumstances.

This leaves only the individual, or handful of individuals, injured abroad in person or in property in violation of international law as needing diplomatic protection. But here it is argued that individuals do not need diplomatic protection as they are already amply protected by international human rights law. Is this so? Do human rights treaties really offer meaningful protection?

Have Human Rights Treaties Replaced Diplomatic Protection?

Great changes have been made in the field of international human rights since World War II. The Universal Declaration of Human Rights (1948), universal multilateral treaties, such as the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (1966) and the International Convention on the Elimination of All Forms of Racial Discrimination, and regional human rights conventions have succeeded in expounding and defining the fundamental rights of the person. There can be no doubt in today's world as to the substantive rights of the individual. Also, there can be no doubt that these substantive rights are part of the common heritage of mankind. After all the International Covenants have been ratified by almost 170 States and the International Convention on the Elimination of All Forms of Racial Discrimination has been ratified by nearly 180 States.

More recently, international instruments have asserted the rights of foreigners. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are Not Nationals of Countries in Which they Live in order to make it clear that aliens enjoy the rights expounded in the Universal Declaration

of Human Rights.[201] In 1990, the International Convention on the Protection on All Migrant Workers and Members of their Families was adopted to proclaim the rights of migrant workers, including the right not to be discriminated against.[202] In 2014, the International Law Commission adopted a set of Draft Articles on the Expulsion of Aliens which prescribes the rights of an alien on expulsion, the procedures to be followed and the prohibition of collective or discriminatory expulsion.[203]

These advances in the recognition of the human rights of the individual have led some to argue that diplomatic protection is obsolete as international human rights law has replaced the need for diplomatic protection. This is false.

The recognition of rights without remedies is meaningless. And there are few remedies as the following brief analysis shows.

First, many States, including China, Cuba, Myanmar, North Korea, and Saudi Arabia, are not party to the International Covenant on Civil and Political Rights. Second, even more States are not party to the First Optional Protocol permitting individuals to petition the Human Rights Committee for violation of the rights contained in the ICCPR. This list includes Egypt, Eritrea, Ethiopia, India, Indonesia, Iran, Iraq, Israel, Pakistan, the United Kingdom, and the United States. In any event, the remedial powers of the Human Rights Committee are minimal. The decisions of the Committee contained in "views" are not legally binding and there is no court to take a binding decision on the matter, as with the European Court of Human Rights. Third, there is no regional human rights treaty for Asia, which accommodates the majority of the world's population. Consequently, to suggest that international human

[201] Resolution 40/144, annex.
[202] This convention came into force in 2003 but to date has been ratified by only 54 States.
[203] Report of the International Law Commission on its 66th Session A/69/10 at 10; General Assembly Resolution 69/119 (18 December 2014).

rights conventions provide effective remedies for the protection of most, indeed many, of the people in today's world is to engage in fantasy.

The position of aliens abroad in terms of contemporary international human rights law is even worse. International human rights conventions generally protect the rights of all persons in the territory of the contracting State but in practice many States discriminate against aliens. Attempts to alleviate their plight are not successful. The International Convention on the Protection of All Migrant Workers and Members of their families has been ratified by a mere 54 States — excluding all permanent members of the Security Council, member States of the European Union, India, South Africa, etc. Some solace is to be found in Article 23 of the Convention which generously recognizes the right of migrant workers to have recourse to diplomatic protection — a right most honoured in the breach!

The sad truth is that modern human rights treaties are strong on definition and weak on remedies. They offer relief, cumbersome and slow, to the few while failing the many. Diplomatic protection — *if invoked* — on the contrary, offers more immediate and more effective relief. This explains why many have warned against abandoning diplomatic protection before there is some effective mechanism to replace it.[204] The notion that international human rights law has replaced it, advanced by critics of the *Mavrommatis* doctrine, is a *fata morgana*.

The suggestion that a multilateral treaty be adopted to allow individuals, irrespective of their nationality, to bring claims before an international tribunal to secure justice for the most egregious violation of human rights is an exercise in

[204] See the First Report of Special Rapporteur Dugard in Yearbook of the International Law Commission (2000), Vol. II, Part One, 213–5; CF Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 73–78.

fantasy.[205] There is no support whatsoever for such a procedure. Also without support, or any real prospect of support, is the argument that Article 48(1) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[206] may be employed to achieve this purpose.

Article 48(1) permits any State other than an injured State to invoke the responsibility of another State for breach of an obligation owed to the "international community as a whole" — that is an obligation *erga omnes*.[207] Whereas diplomatic protection involves an indirect injury to a State, and requires the injured person to be a national of that State and to have exhausted local remedies, here the State other than the injured State has a direct claim that arises from its membership of the international community, with the consequence that there is no need to satisfy the conditions of nationality or exhaustion of local remedies.[208] That this procedure provides an alternative to diplomatic protection was recognized by the ILC in its Commentary to Article 16.[209] It was also endorsed by Judge Simma in *Armed Activities in the Territory of the Congo*.[210] Problems of interpretation confront this argument as is difficult to reconcile this provision with Article 44 of the Articles on State

[205] In 1968, Judge Philip Jessup suggested that that "some international agency, such as the United Nations Commission on Human Rights" might be empowered with such a task. "Action by such an international body would…take no account of the nationality of the injured individual" (P Jessup, *A Modern Law of Nations* (Archon Books 1968) 102). Still earlier, in 1958, Special Rapporteur Garcia Amador proposed that claims by injured individuals of any nationality should be submitted to an international body for settlement — but only with the consent of the respondent State: "State Responsibility: Some New Problems" (1958) 94 Hague Recueil 363, 471.
[206] Yearbook of the International Law Commission (2001), Vol. II, Part Two, 26, 126.
[207] This provision gives effect to the celebrated dictum of the International Court of Justice in the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (Second Phase)[1970] ICJ Rep 3, 32 (para. 33).
[208] For a comprehensive account of this argument, see AHM Vermeer- Künzli "A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*" (2007) 56 ICLQ 553.
[209] Yearbook of the International Law Commission (2006), Vol. II, Part Two, 51.
[210] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 108, 338–350.

Responsibility which requires the conditions of both nationality and exhaustion of local remedies to be fulfilled. But a far greater obstacle to the argument that this procedure might subsist alongside diplomatic protection is that there is no indication whatsoever of States being prepared to invoke such a procedure to protect non-nationals in the case of a breach of an obligation *erga omnes*. The sad truth is that States are unwilling to engage in acts of altruism of this kind that will disturb their relations with other States. There is abundant evidence to support this. Witness the paucity of cases brought by States to protect non-nationals under the inter-State procedure of the European Convention on Human Rights;[211] the total absence of such claims under the inter-State procedures of the ICCPR;[212] and the abysmal failure of States to comply with their obligation under Article 1 the Geneva Conventions on the Laws of War to ensure that Stares comply with their obligations to ensure compliance with the rules of international humanitarian law — despite an admonition from the International Court of justice.[213]

[211] Art. 33 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 has been sparingly used by States. In most cases, one State has brought a complaint against another State in order to defend persons with ethnic ties, as in the case of the case brought by Ireland against the United Kingdom for maltreatment of persons in Northern Ireland: Series A, vol. 25, Judgment of 18 January 1978. Scandinavian countries have, however, brought complaints against Greece and Turkey where their own kith and kin were not involved.

[212] The procedure for inter-State complaints in terms of the ICCPR contained in Article 41 has not been used at all.

[213] Art. 1 of the four Geneva Conventions requires contracting States "to ensure respect" for the Conventions "in all circumstances". In the advisory opinion of the International Court of Justice in the *Legal Consequences for the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para. 163 D the Court declared that States were obliged to "ensure compliance by Israel with international humanitarian law as embodied in [the Fourth Geneva] Convention". This admonition has been totally ignored by the international community.

X.

The Future of Diplomatic Protection

Today, as shown above, there are many procedures other than diplomatic protection which provide some form of redress to the national injured abroad in person or property. Most of these procedures which have replaced the need for traditional diplomatic protection were not in existence sixty years ago. This does not, however, mean that diplomatic protection is obsolete or that there is no longer a need for diplomatic protection. BITs do not cover all cases involving the unlawful taking of property belonging to the alien. And human rights treaties, while expounding the substantive rights of individuals, including aliens, provide scant effective remedies for violation of their rights. The recognition of the individual as a participant in the international legal system, if not a full subject, has important implications for diplomatic protection. It raises questions about the validity of the *Mavrommatis* doctrine that diplomatic protection is the right of the State and not that of the individual but at the same time it fails to provide the injured alien with a remedy that can be asserted without the intervention of the State of nationality and the exhaustion of local remedies.[214] In short, diplomatic protection — *if employed by the State of nationality* — remains the most effective means for the protection of the foreign national abroad.

[214] This is my main objection to the views of Alain Pellet that the *Mavrommatis* doctrine is outdated; the suggestion that an injury to a national is an injury to the State of nationality is wrong; and the right to diplomatic protection is that of the individual ("The second death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection" (2008) 7 *The Law and Practice of International Courts and Tribunals* 33). The problem with this argument is that without the intervention of the State of nationality there is often no remedy available to the individual.

This somewhat optimistic assessment is challenged by the evidence that States display a chronic failure to invoke diplomatic protection even in circumstances where diplomatic protection is most needed and public opinion at home demands it. States are guided by the exigencies of politics rather than the suffering of the individual.[215] "If the relations between the two States are good, the claimant State may be reluctant to spoil them by raising the claim. If relations are bad, the respondent State is unlikely to be co-operative".[216]

If diplomatic protection is to be revived as an important institution of international law for the protection of the individual, it is necessary to assure States that diplomatic protection has not been effectively replaced by the alternative procedures described above. In addition, it is necessary to convince developing States that it is no longer the instrument of powerful nations to be wielded against weaker nations — as evidenced by the fact that the most recent case on diplomatic protection before the International Court of Justice — the *Diallo* case — was brought by one developing nation (the Republic of Guinea) against another developing nation (the Democratic Republic of the Congo).[217] States could revive and promote diplomatic protection by adopting a multilateral treaty to give effect to the ILC Draft Articles on Diplomatic Protection. This would send out a clear message to States that diplomatic protection is a recognized procedure for the protection of nationals that may be employed by States without such action being perceived as an unacceptable intrusion in a State's domestic affairs.

Negative views about the continuing relevance of diplomatic protection are simply wrong.[218] This is confirmed by the decision

[215] See EM Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (The Banks Law Publishing Co, 1919) 835.
[216] V Lowe, *International Law* (Clarendon Press, 2007) 198.
[217] See further, CF Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008) 19.
[218] See A Clapham, *Brierly's Law of Nations. An Introduction to the Role of International Law in International Relations* (7th edn, Oxford University Press, 2012) 260.

of the government of the United Kingdom to exercise diplomatic protection on behalf of Nazanin Zaghari — Ratcliffe, the first such claim made by the United Kingdom on behalf of an individual for over a hundred years.

I end with the comments made in my First Report as Special Rapporteur on Diplomatic Protection.

> "Although individuals enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights. Instead of seeking to weaken this remedy by dismissing it as an obsolete fiction that has outlived its usefulness, every effort should be made to strengthen the rules that comprise the right of diplomatic protection".[219]

[219] Yearbook of the International Law Commission (2000), Vol. II, Part One, 215.

Научно-практическое издание

ЛЕКЦИИ ЛЕТНЕЙ ШКОЛЫ
ПО МЕЖДУНАРОДНОМУ ПУБЛИЧНОМУ ПРАВУ

COURSES OF THE SUMMER SCHOOL
ON PUBLIC INTERNATIONAL LAW

ТОМ IX / VOL. IX

Джон Дугард / John Dugard

Дипломатическая защита

Diplomatic Protection

На английском языке

Корректор *Ю. В. Субачев*
Вёрстка *В. В. Котов*
Дизайн обложки *Д. Кравец*

ISSN 2687-105X

Подписано в печать 30.11.2021. Формат 60 × 90 1/16.
Гарнитура «PT Serif». Печать цифровая. Усл. печ. л. 5,4.
Тираж 100 экз.

АНО «Центр международных и сравнительно-правовых исследований»
119017 Россия, г. Москва, Кадашёвская набережная, д. 14, к. 3
E-mail: info@iclrc.ru
Сайт: www.iclrc.ru

Отпечатано в типографии «Onebook.ru»
ООО «Сам Полиграфист»
129090, Москва, Волгоградский проспект, д. 42, к. 5
E-mail: info@onebook.ru
Сайт: www.onebook.ru

www.iclrc.ru