United Nations A/CN.4/506

General Assembly

Distr.: General
7 March 2000
English
Original: English/French

International Law Commission
Fifty-second session
Geneva, 1 May-9 June and 10 July-18 August 2000

First report on diplomatic protection

by Mr. John R. Dugard, Special Rapporteur

Contents

00-33076 (E) 060400

A. Introduction

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[1] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[2] At the same session the Working Group submitted a report which was endorsed by the Commission.[3] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[4] The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

2. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic. The General Assembly in paragraph 8 of its resolution 52/156 of 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

3. The Commission considered the preliminary report (A/CN.4/484) of the Special Rapporteur at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended Working Group, chaired by Mr. Bennouna, Special Rapporteur of the topic, to consider possible conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on the topic;

(b) The topic would deal with secondary rules of international law relating to diplomatic protection; primary rules would only be considered when their clarification was essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection;

---

[1] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249, and annex II, addendum 1.

[2] Ibid. *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[3] Ibid. para. 171.

[4] Ibid. paras. 189-190.

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of the topic, should be examined in the light of State practice and insofar as they related to specific issues involved such as the nationality link requirement;

(e) The discretionary right of the State to exercise diplomatic protection did not prevent it from committing itself to its nationals to exercise such a right. In that context, the Working Group noted that some domestic laws had recognized the right of their nationals to diplomatic protection by Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection;

(g) The Working Group recalled the decisions by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the current quinquennium.

5. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in chapter one, “Basis for diplomatic protection”, of the outline proposed by the previous year’s Working Group.

6. At its 2544th meeting, on 9 June 1998, the Commission considered and endorsed the report of the Working Group.

7. In 1999, Mr. Bennouna was elected as a judge to the International Court of Justice and resigned from the Commission. In July 1999, the Commission elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.

8. In July 1999 the Commission considered the topic at an informal Working Group meeting.

B. Structure of the report

9. The present report consists of three parts:

(a) An introduction to diplomatic protection which examines the history and scope of the topic and suggests how the right of diplomatic protection may be employed as a means to advance the protection of human rights in accordance with the values of the contemporary legal order;

(b) Several draft articles and commentaries on those articles. The articles raise a number of controversial issues on which the Special Rapporteur requires the views of the Commission to guide him in his future work. These matters might have been raised in an introductory report of the previous Special Rapporteur without an attempt to formulate them in draft articles. The format of draft articles does, however, place them in clearer focus for debate;

(c) An outline of the further articles to be submitted in future reports.

Introduction

10. There is much practice and precedent on diplomatic protection. Despite this, it remains one of the most controversial subjects in international law.[5]

11. Before the Second World War and the advent of the human rights treaty there were few procedures available to the individual under international law to challenge his treatment by his own State. On the other hand, if the individual's human rights were violated abroad by a foreign State the individual's national State might intervene to protect him or to claim reparation for the injuries that he had suffered. In practice it was mainly the nationals of the powerful Western States that enjoyed this privileged position, as it was those States that most readily intervened to protect their nationals who were not treated "in accordance with the ordinary standards of civilization"[6] set by Western States. Inevitably diplomatic protection of this kind came to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the human rights of aliens.

12. To aggravate matters for non-Western States, diplomatic protection or intervention was exalted by the fiction that an injury to a national constituted an injury to the State itself. In 1924, the Permanent Court of International Justice gave this fiction judicial blessing when it declared in the *Mavrommatis Palestine Concessions Case (Jurisdiction)* that:

"By taking up the case of one of its subjects and 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."[7]

13. This fiction had important consequences. At one level, it provided a justification for military intervention or gunboat diplomacy. At another level, it allowed the United States and European Powers to reject Latin American attempts to compel foreigners doing business in Latin America to waive or renounce diplomatic protection on the ground that the national could not waive a right that belonged to the State.[8]

14. The diplomatic protection of aliens has been greatly abused. The Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of the Witwatersrand. American military intervention, on the pretext of defending United States nationals in Latin America, has continued until recent times, as shown by the interventions in Grenada in 1983[9] and Panama in 1989.[10] Non-military intervention, in the form of demands for compensation for

---

[5] R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984) 1 (hereinafter Lillich, *Human Rights*).

[6] See the *Roberts* claim (US v Mexico, 1926) 4 R.I.A.A. p. 77; and the *Neer* claim (US v Mexico, 1926) 4 R.I.A.A. p. 60.

[7] (Greece v UK) *1924 P.C.I.J.*, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldutiskis Railway* case (Estonia v Lithuania) *P.C.I.J. Reports*, Series A/B, No. 76, p. 16.

[8] For a full account of the dispute over such a waiver or "Calvo Clause", see D. Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (1955).

[9] (1984) 78 *A.J.I.L.* p. 200.

[10] (1990) 84 *A.J.I.L.* p. 545.

injuries inflicted on the persons or property of aliens, has also been abused,[11] although one writer has suggested that the settlement of claims by arbitration often saved Latin American States from military intervention to enforce such claims.[12]

15. Much has changed in recent years. Standards of justice for individuals at home and foreigners abroad have undergone major changes. Some 150 states are today parties to the International Covenant on Civil and Political Rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribe standards of justice to be observed in criminal trials and in the treatment of prisoners. Moreover, in some instances the individual is empowered to bring complaints about the violation of his human rights to the attention of international bodies such as the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights or the African Commission on Human and People's Rights.

16. The foreigner who does business abroad also has new remedies available to him. The Convention of the Settlement of Investment Disputes between States and Nationals of Other States of 1965[13] permits companies to bring proceedings against a State before the International Centre for Settlement of Investment Disputes, provided the defendant State and the national State of the company have consented to this procedure. Bilateral investment treaties offer similar remedies to companies doing business abroad.[14] Undoubtedly the end of the Cold War and the acceptance of market economy principles throughout the world have made both the life and the investment of the foreign investor more secure.

17. These developments have led some to argue that diplomatic protection is obsolete. Roughly the argument runs as follows: the equality-of-treatment-with-nationals-standard and the international minimum standard of treatment of aliens have been replaced by an international human rights standard, which accords to national and alien the same standard of treatment — a standard incorporating the core provisions of the Universal Declaration of Human Rights.[15] The individual is now a subject of international law with standing to enforce his or her human rights at the international level. The right of a State to claim on behalf of its national should be restricted to cases where there is no other method of settlement agreed on by the alien and the injuring State. In such a case the claimant State acts as agent for the individual and not in its own right. The right of a State to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded — except, perhaps, in cases in which the real *national* interest of the State is affected.[16]

---

[11] See the separate opinion of Judge Padilla Nervo in the *Barcelona Traction, Light and Power Company Limited* case, *1970 I.C.J. Reports* p. 246.

[12] F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (1932) p. 58.

[13] (1965) 4 *International Legal Materials* p. 532.

[14] See J. P. Laviec, *Protection et Promotion des Investissements. Etude de Droit International Economique* (1985).

[15] F. V. García Amador, "State Responsibility. Some New Problems" (1958 II) 94 *Recueil des Cours* pp. 421, 437-439 (hereinafter García Amador, State Responsibility); García Amador, Second Report, United Nations document A/CN.4/106, *Yearbook ... 1957*, vol. II, pp. 112-116. See also M. Bennouna, "Preliminary Report on Diplomatic Protection", A/CN. 4/484, paras. 34-37 (hereinafter Bennouna, Preliminary Report).

[16] García Amador, State Responsibility, *supra* note 15 p. 472.

18. This argument is flawed on two grounds; first, its disdain for the use of fictions in law; secondly, its exaggeration of the present state of international protection of human rights.

19. In some situations the violation of an alien's human rights will engage the interests of the national State.[17] This is particularly true where the violations are systematic and demonstrate a policy on the part of the injuring State to discriminate against all nationals of the State in question. However, in the case of an isolated injury to an alien, it is true that the intervening State in effect acts as the agent of the individual in asserting his or her claim. Here the notion of injury to the State itself is indeed a fiction. This is borne out by two rules in particular: first, the rule that requires the individual to exhaust local remedies before the alien's State may intervene; and, secondly, the rule of continuous nationality that requires the individual to be a national of the protecting State both at the time of injury and at the time of presentation of the claim.[18] Moreover, judicial decisions make it clear that in assessing the quantum of damages suffered by the State, regard will be had to the damages suffered by the individual national.[19]

20. The fictitious nature of diplomatic protection was a prominent feature of Mr. Bennouna's Preliminary Report in which he asked the Commission for guidance on the question whether a State in bringing an international claim was "enforcing its own right or the right of the injured national?"[20]

21. The present Rapporteur does not share his predecessor's disdain for fictions in law. Most legal systems have their fictions. Indeed Roman law relied heavily on procedural fictions in order to achieve equity.[21] "The life of the law has not been logic, it has been experience", in the words of Oliver Wendell Holmes. We should not dismiss an institution, like diplomatic protection, that serves a valuable purpose simply on the ground that it is premised on a fiction and cannot stand up to logical scrutiny.

22. The suggestion that developments in the field of international human rights law have rendered diplomatic protection obsolete requires more attention. García Amador, the first Special Rapporteur of the International Law Commission on the subject of State responsibility, states that the traditional view of diplomatic protection that allowed the State to claim on behalf of its injured national belongs to an age in which the rights of the individual and the rights of the State were inseparable. Today the position is "completely different". Aliens, like nationals, enjoy rights simply as human beings and not by virtue of their nationality. "This

---

[17] J. L. Brierly, "The Theory of Implied State Complicity in International Claims" (1928) 9 *B.Y.I.L.* p. 48. See also M. S. McDougal, H. D. Lasswell and Lung-chu Chen, "The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights" (1976) 70 *A.J.I.L.* p. 442: "Like other 'fictions feigned', however, this identification of State and individual interests has been found, by disinterested observers as well as by claimant parties, to represent in many contexts a close approximation to social reality. People always have been, and remain, important bases of power for territorial communities."

[18] E. Wyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (1990).

[19] *Chorzów Factory Case (Indemnity) (Merits)* (Germany v. Poland) *1928 P.C.I.J. Reports*, Series A, No. 17, p. 28.

[20] *Supra* note 15, p. 15, para. 54.

[21] See on the *actio ficticia* in Roman law, R. Sohm, *The Institutes* (translated by J. Crawford Ledlie), 3rd ed. (1907), pp. 259-260.

means", he continues, "that the alien has been internationally recognized as a legal person — independently of his State; he is a true *subject* of international rights."[22] A necessary implication of this reasoning is that the individual, now a subject of international law, with rights and duties under international law, should, other than in exceptional cases, fend for himself when he ventures abroad.

23. The present report is not the appropriate place for a full examination of the position of the individual in contemporary international law. Clearly the individual has more rights under international law today than she enjoyed 50 years ago. But whether this makes her a subject of international law is open to question.

24. The debate over the question whether the individual is a mere "object" of international law (the traditional view) or a "subject" of international law is unhelpful. It is better to view the individual as a *participant* in the international legal order.[23] As such the individual may participate in the international legal order by exercising her rights under human rights treaties or bilateral investment agreements. At the same time it is necessary to recognize that while the individual may have rights under international law, her remedies are limited — a fact that García Amador overlooks.[24]

25. While the European Convention on Human Rights may offer real remedies to millions of Europeans, it is difficult to argue that the American Convention on Human Rights or the African Charter on Human and Peoples' Rights have achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, is not covered by a regional human rights convention. To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.

26. The position of the alien abroad is no better. Universal and regional human rights conventions do extend protection to all individuals — national and alien alike — within the territory of States parties. But there is no multilateral convention that seeks to provide the alien with remedies for the protection of her rights outside the field of foreign investment.[25]

---

[22] State Responsibility, *supra* note 15 p. 421 (emphasis added).

[23] R. Higgins, *Problems and Process. International Law and How We Use It* (1994) pp. 48-55.

[24] The following comment of McDougal, Lasswell and Chen, *supra* note 17, on García Amador's "noble 'synthesis' of the newer emerging law of human rights and the older law designed for the protection of aliens" (State Responsibility, *supra* note 15 at 454) best captures the differing responses to this "synthesis":

> "By some his proposal is thought to extend the substantive protection of aliens much beyond what States can reasonably be expected to accept and to exacerbate the problems of cooperation between States of differing degrees of socialization. By others he might be thought, perhaps justifiably, to weaken an important traditional remedy for the protection of aliens before any effective new remedy is established in replacement."

[25] *Supra*, para 14.

27. In 1991, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[26] was adopted. The Convention expounds a charter of rights for migrant workers, with a monitoring body similar to the United Nations Human Rights Committee and an optional right of individual petition. That these remedies are not intended to replace the right of diplomatic protection is emphasized by article 23, which provides:

> "Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired ...".

The Convention has not yet received the 20 ratifications required to bring it into force — which suggests an unwillingness on the part of States to extend rights to migrant workers.

28. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,[27] which seeks to extend the rights contained in the Universal Declaration of Human Rights to aliens. The Declaration provides no machinery for its enforcement, but it does reiterate the right of the alien to contact his consulate or diplomatic mission for the purpose of protection. This starkly illustrates the current position: that aliens may have rights under international law as human beings, but they have no remedies under international law — in the absence of a human rights treaty — except through the intervention of their national State.[28]

29. Until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged. As Professor Richard Lillich wrote in 1975:

> "Pending the establishment of international machinery guaranteeing third party determination of disputes between alien claimants and States, it is in the interests of international lawyers not only to support the doctrine [of diplomatic protection] but to oppose vigorously any effort to cripple or destroy it."[29]

30. A similar view was expressed in 1968 by Franciszek Przetacznik of the Polish Foreign Ministry. After listing the criticisms generally made against diplomatic protection, he wrote:

> "One may admit that this criticism is partially justified, but it contains some exaggeration and deliberate generalization. It cannot be denied, however, that diplomatic protection has often been abused, and that the stronger States

---

[26] See General Assembly resolution 45/158; see also (1991) 30 I.L.M. 1517. See further on this Convention, R. Cholewinski, *Migrant Workers in International Human Rights Law* (1997).

[27] General Assembly resolution 40/144, annex.

[28] W. K. Geck, "Diplomatic Protection" in *Encyclopaedia of Public International Law* (*E.P.I.L.*) (1992) pp. 1059-60.

[29] "The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack" (1975) 69 *A.J.I.L.* 359 (hereinafter Lillich, Diplomatic Protection). See also C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967) pp. 4-7.

> are in a better position in the performance of diplomatic protection. Thus, the fault lies primarily in too harsh practices and not in the institution itself …
>
> "As far as human rights are developed and strengthened, diplomatic protection may lose some of its significance. However, human rights will probably not be able to supersede diplomatic protection in its entirety.
>
> "As long as diplomatic protection cannot be replaced by any better remedies, it is necessary to keep it, because it is badly needed, and its advantages outweigh its disadvantages in any case."[30]

31. International human rights law does not consist of human rights conventions only. There is a whole body of conventions and customs, including diplomatic protection, that together comprise international human rights law. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other universal and regional human rights instruments are important, particularly as they extend protection to both alien and national in the territory of States parties.[31] But their remedies are weak. Diplomatic protection, albeit only available to protect individuals against a foreign Government, on the other hand, is a customary rule of international law that applies universally and, potentially, offers a more effective remedy. Most States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body.[32]

32. Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treatment for aliens set by Western Powers in an earlier era. It does not follow that these developments have rendered obsolete the traditional procedures recognized by customary international law for the treatment of aliens.[33] Although individuals today 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.

---

[30] "The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection)" (1971) 21 *Österreichische Zeitschrift für öffentliches Recht* p. 113.

[31] For example, Article 2(1) of the International Covenant on Civil and Political Rights requires parties "to respect and to ensure to all individuals within its territory" the rights recognized in the Covenant. See, also: article 1 of the European Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights.

[32] A complaint from an individual under the European Convention on Human Rights backed by a foreign Government is likewise likely to carry more weight. See *Soering v UK*, ECHR Series A, No. 161 (1989) (West Germany intervening); *Selmouni v France,* Application No. 25803/94, judgement of 28 July 1999 (Netherlands intervening). *Denmark v Turkey,* Application No. 34382/97, judgement of 8 June 1999.

[33] In the *Barcelona Traction* case, *supra* note 11 p. 165, Judge Jessup declared: "The institution of the right of diplomatic protection is surely not obsolete although new procedures are emerging."

C. Draft articles

Article 1
Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Comment

1. Diplomatic protection

33. The doctrine of diplomatic protection is closely related to that of State responsibility for injury to aliens. The idea that internationally wrongful acts or omissions causing injury to aliens engage the responsibility of the State to which such acts and omissions are attributable had gained widespread acceptance in the international community by the late 1920s. It was generally accepted that although a State was not obliged to admit aliens, once it had done so it was under an obligation toward the alien's State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment for aliens.[34]

34. Several attempts have been made to codify this principle. In 1927, the Institute of International Law adopted a resolution on "International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners", which declared that:

> "The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations."[35]

In 1930, the Third Committee of the Hague Conference for the Codification of International Law adopted in first reading a provision which stated that:

> "International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State."[36]

Later the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens proposed that:

---

[34] C. Joseph, *Nationality and Diplomatic Protection — The Commonwealth of Nations* (1969) 3. R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law,* 9th ed. (1992) pp. 897, 910-911 (hereinafter *Oppenheim's International Law*).

[35] Article 1 of the draft reproduced in F. V. García Amador, First Report, A/CN.4/96, in *Yearbook ... 1956*, vol. II, p. 227.

[36] Article 1, League of Nations publication. *V.Legal, 1930.V.17* (document C.351(c)M.145(c).1930.V), reproduced in García Amador, First Report, *supra* note 35 p. 225.

> "A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien."[37]

This principle has been accepted as a rule of customary international law and applied in a great number of judicial and arbitral decisions. During the period of decolonization, some rejected its universal applicability on the grounds that it was open to abuse by the imperialist Powers, that it was an essentially Western invention and that aliens should not enjoy more extensive protection than a State's own nationals.[38] Despite such criticism, State responsibility for injuries to aliens is generally accepted today.[39] It is also accepted that responsibility of this kind is accompanied by a duty to make reparation.[40] Thus in his revised draft presented to the Commission in 1961, Special Rapporteur García Amador proposed that:

> "For the purposes of this draft, the 'international responsibility of the State for injuries caused in its territory to the person or property of aliens' involves the duty to make reparation for such injuries ..."[41]

35. The present set of draft articles are essentially secondary rules. For this reason no attempt is made to present a provision incorporating a primary rule describing the circumstances in which the responsibility of a State is engaged for a wrongful act or omission to an alien. No attempt is made to formulate a provision on reparation either, as this is a matter dealt with in the draft articles on State responsibility.[42]

36. Historically the right of diplomatic protection is vested in the State of nationality of the injured individual. This right is premised on the fiction that an injury to the individual is an injury to the State of nationality. The origins of this doctrine or fiction date back to the eighteenth century, when Emmerich de Vattel stated 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."[43]

Although this traditional doctrine of diplomatic protection has given rise to considerable debate, especially with regard to the question of whose rights are

---

[37] Article 1(1) of the draft reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961) 55 *A.J.I.L.* 545 p. 548.

[38] See, for example, S. N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *A.J.I.L.* p. 863.

[39] See F. V. García Amador, *The Changing Law of International Claims* (1984) pp. 74-76 (hereinafter García Amador, *Changing Law*). This is also indicated by the fact that many authors deal with the treatment of aliens under the general topic of State responsibility. See, for example, *Oppenheim's International Law*, *supra* note 34; I. Brownlie, *Principles of Public International Law,* 5th ed. (1998) (hereinafter Brownlie, *Principles*); D. J. Harris, *Cases and Materials on International Law,* 5th ed. (1998); M. N. Shaw, *International Law,* 4th ed. (1997).

[40] For further expressions of this principle, see García Amador, State Responsibility *supra* note 15 pp. 393-394.

[41] *Changing Law, supra* note 39 p. 786.

[42] See article 42 of First Reading, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10) p. 142.

[43] *The Law of Nations* (1758), chap. VI, p. 136.

asserted when the State exercises diplomatic protection on behalf of its national,[44] it is a widely accepted rule of customary international law that States have the right to protect their nationals abroad. Although the State of residence has territorial jurisdiction over the alien, the State of nationality retains its personal jurisdiction over its national even while he or she is residing in another State.[45] The classical formulation of this position concerning the consequences of the personal jurisdiction of the State of nationality was stated by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case:

> "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."[46]

The right of the State of nationality to exercise protection in this way has been confirmed by judicial decisions[47] and the writings of scholars.[48] Furthermore, it has been codified in article 3 of the 1961 Vienna Convention on Diplomatic Relations and in article 5 of the 1963 Vienna Convention on Consular Relations, which lists as a function of diplomatic and consular missions

> "protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law."[49]

37. The general consensus on the right of the State to exercise diplomatic protection has prompted definitions of diplomatic protection which reflect the traditional State-centred position. In 1915, Borchard wrote that:

> "Diplomatic protection is in its nature an international proceeding, constituting 'an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties'."[50]

---

[44] This is discussed in more detail in the commentary to article 3, *infra*.

[45] G. I. F. Leigh, "Nationality and Diplomatic Protection" (1971) 20 *I.C.L.Q.* p. 453.

[46] *Supra* note 7 p. 12.

[47] *Panevezys-Saldutiskis Railway* case, *supra* note 7 p. 16, 17 and *Nottebohm* case, *1955 I.C.J. Reports,* p. 24.

[48] See, for example, Joseph *supra* note 34 p. 1. Leigh *supra* note 45 p. 453; Geck *supra* note 28 p. 1046; *Oppenheim's International Law, supra* note 34 p. 512.

[49] Article 3(1)(b) of the 1961 Vienna Convention on Diplomatic Relations States. The 1963 Vienna Convention on Consular Relations, in turn, contains a very similar, but somewhat more specific provision in article 5:

> "Consular functions consist in:
>
> (a) Protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; ...
>
> (e) Helping and assisting nationals, both individuals and bodies corporate, of the sending State."

The 1967 European Convention on Consular Functions endorses this principle in article 2(1). (E.T.S. No. 61).

[50] E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1915), p. 354, citing Blaine, Secretary of State. See also ibid., p. 357.

Joseph, more concerned about the injuries to the individual and the responsibility of the State, writes that:

> "diplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State."[51]

Charles de Visscher, cited with approval by García Amador, defines diplomatic protection as

> "a procedure by which States assert the right of their citizens to a treatment in accordance with international law."[52]

38. Geck, writing in the *Encyclopaedia of Public International Law*, presents a definition that takes account of developments relating to functional protection providing for agents of an international organization:

> "Diplomatic protection is … the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law."[53]

Functional protection, by an international organization, first expounded in the *Reparations for Injuries* case[54] in 1949, provides an important institution for the protection of the rights of individuals employed by an international organization.[55] Inevitably there are important differences between traditional diplomatic protection by a State and functional protection exercised by an international organization. For this reason the present set of articles make no attempt to deal with functional protection.[56]

39. Surprisingly, perhaps, García Amador made no attempt to provide a conclusive definition of diplomatic protection. Mr. Bennouna, the first Special Rapporteur on diplomatic protection, simply described it, in his Preliminary Report, as:

> "a mechanism or a procedure for invoking the international responsibility of the host State."[57]

He did, however, acknowledge that:

---

[51] Joseph *supra* note 34 p. 1. See also Leigh *supra* note 45 p. 453.

[52] "Cours Général de Principes de Droit International Public" (1954 II) 86 *Recueil des Cours* p. 507. García Amador quotes this definition in support of the idea that existing definitions emphasize the right of States to act. He himself did not offer any original definition. Instead, he quoted other authors and judicial decisions with similar emphasis (State Responsibility, *supra* note 15 pp. 426-427).

[53] Geck *supra* note 28 p. 1046.

[54] *1949 I.C.J. Reports* p. 174.

[55] The advisory opinion of the International Court of Justice on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999) 38 I.L.M. 873 provides an illustration of how the right of functional protection may be used.

[56] The 1997 Working Group on Diplomatic Protection took "no position on whether the topic of 'diplomatic protection' should include protection claimed by international organizations for the benefit of their agents." (*Supra* note 2 p. 136.)

[57] *Supra* note 15 p. 4.

> "diplomatic protection has been regarded from the outset as the corollary of the personal jurisdiction of the State over its population when elements of that population, while in foreign territory, have suffered injury in violation of international law."[58]

40. Article 1 does not purport to be a definition of diplomatic protection. It is a description of diplomatic protection as the term is understood in the language of international law. It substantially reflects the meaning given to the term by the Commission's 1997 Working Group on Diplomatic Protection:

> "On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by international jurisprudence as a right of the State …"[59]

Article 1 seeks to avoid any suggestion that it is a primary rule by omitting any reference to the concept of "denial of justice".

2. Meaning of the term "action"

41. Definitions of diplomatic protection fail to deal adequately with the nature of the actions open to a State in the exercise of diplomatic protection.

42. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court of International Justice appeared to distinguish between "diplomatic action" and "judicial proceedings"[60] — a distinction repeated by the International Court of Justice in the *Nottebohm* case[61] and by the Iran-United States Claim Tribunal in *Case No. A/18*.[62]

43. In contrast, legal scholars draw no such distinction and use the term "diplomatic protection" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force.[63] Dunn, in his 1932 study, stated in respect of the term diplomatic action that:

> "It embraces generally all cases of official representation by one Government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained ...
>
> "What ordinarily happens in the case of protection is that the Government of an injured alien calls the attention of the delinquent Government to the facts of the complaint and requests that appropriate steps be taken to redress the grievance ...

---

[58] *Loc. cit.*
[59] *Supra* note 2 p. 134 (para. 182).
[60] *Supra* note 7 p. 16.
[61] *Supra* note 47 p. 24.
[62] *Case No. A/18* (1984) 5 I.U.S.C.T.R. 251 p. 261.
[63] Borchard *supra* note 50 p. 439 *et seq*; Geck *supra* note 28 pp. 1061-1063; P. Weiss, "Diplomatic Protection of Nationals and International Protection of Human Rights" (1971) 4 *Human Rights Journal* p. 645 (hereinafter Weiss, Diplomatic Protection).

> the term 'diplomatic protection' is here used as a generic term covering the general subject of protection of citizens abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations ...
>
> it should be noted that we are here concerned only with representations or demands that are made (expressly or impliedly) under a claim of right. Governments often take action in behalf of their citizens abroad which is not based on any assertion of international obligation and does not fall within the category of protection in a technical sense."[64]

44. Bennouna in his Preliminary Report on diplomatic protection to the Commission likewise recognizes the wide range of actions open to a State in the exercise of the right of diplomatic protection when he states:

> "The State retains, in principle, the choice of means of action to defend its nationals, while respecting its international commitments and peremptory norms of international law. In particular, it may not resort to the threat or use of force in the exercise of diplomatic protection."[65]

45. The choice of means of diplomatic action open to a State is limited by the restrictions imposed on countermeasures by international law, now reflected in the draft articles on State responsibility.[66] Whether the right to the use of force in the exercise of diplomatic protection is completely excluded is dealt with in article 2.

46. Diplomatic protection is essentially concerned with the treatment of nationals, both legal and natural, abroad. In exceptional circumstances a State may extend diplomatic protection to non-nationals. This matter is dealt with in articles 8 and 10.

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

---

[64] *Supra* note 12 pp. 18-20. Emphasis in original. Geck, *supra* note 28 p. 1046, likewise makes it clear that demands not made under a claim of right do not constitute diplomatic protection:

"diplomatic or consular actions to obtain concessions or other government contracts for nationals from the receiving State, or the arrangement of legal defence for a justly imprisoned national are not diplomatic protection in our sense; they are usually neither directed against the other State nor based on a real or alleged violation of international law."

See, Bennouna, Preliminary Report, *supra* note 15 p. 4 (para. 12).

[65] Ibid. p. 4 (para. 11).

[66] See articles 47-50; and Doc. A/CN.4/498/Add.4 of 19 July 1999.

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Comment

47. As explained in article 1, the restrictions on the means of diplomatic action open to the protecting State are governed by general rules of international law, particularly those relating to countermeasures as defined in the draft articles on State responsibility.[67] The use of force as the ultimate means of diplomatic protection is frequently considered part of the topic of diplomatic protection and therefore requires special attention in the present draft articles.

48. History, both past and present,[68] is replete with examples of cases in which the pretext of protecting nationals has been used as a justification for military intervention. The writings of the Argentine jurist, Carlos Calvo, which sought to restrict the right of diplomatic protection, were a response to military interventions in Latin America.[69] The Drago doctrine of 1903,[70] which sought to outlaw military intervention for the recovery of contract debts owed to foreign nationals, was a response to the action taken by Italy, Germany and Great Britain against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those States. This resulted in the Porter Convention of 1907 Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Convention II of the 1907 Hague Peace Conference), which in article 1 obliged States "not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals." That this prohibition on the use of force was not absolute was made clear by the qualification to the article that:

> "this understanding is not, however, applicable when the debtor State refuses or neglects to reply to an offer of arbitration or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award."[71]

49. This history, coupled with the prohibition on the use of force contained in article 2, paragraph 4, of the Charter of the United Nations, has prompted previous special rapporteurs of the Commission to assert that the use of force is prohibited as a means of diplomatic protection.

50. In 1956, García Amador produced a report containing a number of "bases of discussion" (as a prelude to draft articles) which stressed the need to settle claims relating to diplomatic protection by peaceful means and proclaimed:

---

[67] Articles 47-50.

[68] Perhaps the best-known interventions of this kind in recent times are those of the United States in Grenada in 1983 ((1984) 78 *A.J.I.L.* 131, 200) and Panama in 1989 ((1990) 84 *A.J.I.L.* pp. 494, 545).

[69] *Supra* note 8.

[70] See García Amador, First Report, *supra* note 35 p. 217; and Papers Relating to the Foreign Relations of the United States 1903, pp. 1-5.

[71] *The Hague Conventions and Declarations of 1899 and 1907*, ed. Carnegie Endowment for International Peace, (1915) 89 reproduced in García Amador, First Report, *supra* note 35 p. 217.

> "In no event shall the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or any other form of intervention in the domestic or external affairs of the respondent State."[72]

Although the records of the discussions in the Commission do not indicate any objections to those paragraphs, the only views expressed in favour of the provisions were short notes of approval by Krylov and Spiropoulos.[73] In spite of this, the provision was omitted from all subsequent reports.

51. In his Preliminary Report, Bennouna declared, without qualification, that States "may not resort to the threat or use of force in the exercise of diplomatic protection."[74]

52. The wish to prohibit the threat or use of force in the exercise of diplomatic protection is laudable, but it takes little account of contemporary international law, as evidenced by interpretations of the Charter of the United Nations and the practice of States. The current dilemma facing international law is reflected in Nguyen Quoc Dinh, *Droit International Public*, which boldly states that the use of force is prohibited in the case of diplomatic protection but then considers as "delicate" the legality of cases in which States have intervened militarily to protect their nationals.[75] The present report, in contrast with previous reports, seeks to describe the present state of international law and to propose limits to the use of force which reflect current State practice.

53. Article 2, paragraph 4, of the Charter of the United Nations contains a general prohibition on the use of force:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

The only exception to this provision, permitting the unilateral use of force by States, is Article 51, which deals with the right of self-defence.

54. The use of force to recover contract debts is clearly prohibited by Article 2, paragraph 4.[76] So too is any threat or use of force by way of reprisal action aimed at the protection of nationals. This is not the appropriate place for a discourse on reprisals and the use of force. Suffice it to say that forcible reprisals are condemned as contrary to the Charter of the United Nations by the 1970 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,[77] a conclusion confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[78] and academic

---

[72] Basis of discussion No. VII(3) in García Amador, First Report, *supra* note 35 p. 221. See also ibid. pp. 216-219.

[73] *Yearbook ... 1956*, vol. I, 371st meeting (20 June 1956), pp. 234-235.

[74] Bennouna, Preliminary Report, *supra* note 15 p. 4, para. 11.

[75] 6th ed. (1999) P. Daillier and A. Pellet (eds.) pp. 777, 908. See also A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (1984) p. 905 (para. 1338).

[76] *Oppenheim's International Law*, *supra* note 34 p. 441.

[77] In the Declaration the General Assembly proclaims that "States have a duty to refrain from acts of reprisal involving the use of force" (resolution 2625 (XXV), annex, part 1).

[78] *1996 I.C.J. Reports* 226 p. 246 para. 46.

writings.[79] Suggestions by scholars that "reasonable" forcible reprisal action is tolerated by international law[80] are premised on the difficulties inherent in distinguishing between reprisal action taken sometime after an armed attack designed to deter future armed attacks and self-defence. However important this debate may be, it has no relevance to the use of force to protect nationals, which involves an immediate response to secure the safety of the nationals and not subsequent punitive action.

55. The threat or use of force in the exercise of diplomatic protection can only be justified if it can be characterized as self-defence. It is this question that must be addressed in the present study of diplomatic protection. There is no suggestion that defence of nationals may be categorized as humanitarian intervention, despite the fact that some writers[81] fail to draw a clear distinction between humanitarian intervention to protect the nationality of the injuring State and intervention by a State to protect its own nationals.

56. The right of self-defence in international law was formulated well before 1945. It required action taken in self-defence to be an immediate and necessary response to a situation threatening a State's security and vital interests. The response was to be kept within the bounds of proportionality. The scope of the right was wide and included both anticipatory self-defence and intervention to protect nationals.[82]

57. Article 51 of the Charter of the United Nations is less generous. It provides that:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at

---

[79] C. Tomuschat, "Article 2(3)", in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1994) p.105; D. W. Bowett, "Reprisals involving Recourse to Armed Force" (1972) 66 *A.J.I.L.* p. 1 (hereinafter Bowett, Reprisals); K. J. Partsch, "Reprisals" (1982) 9 *E.P.I.L.* p. 332; García Amador, First Report, *supra* note 35 p. 217, Harvard Law School, *Research in International Law,* II. Responsibility of States pp. 217-218 (1929) cited in García Amador, First Report, *supra* note 35 p. 216; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) pp. 216-217; I. Brownlie, *International Law and The Use of Force by States* (1963) p. 281 (hereinafter Brownlie, *Use of Force*); Verdross and Simma, *supra* note 75 pp. 294-295 (para. 480); O. Schachter, *International Law in Theory and Practice* (1991) pp. 128-129; B. O. Bryde, "Self-Defence" (1982) 4 *E.P.I.L.* pp. 215-216; K. J. Partsch, "Self-Preservation" (1982) 4 *E.P.I.L.* p. 218 referring to the Friendly Relations Declaration and the Final Act of the Helsinki Conference, R. Barsotti, "Armed Reprisals" in A. Cassese (ed.), *The Current Regulation of the Use of Force* (1986) 79 pp. 79-80.

[80] See Bowett, Reprisals, *supra* note 79 p. 3; Shaw *supra* note 39 p. 786; Y. Dinstein, *War, Aggression and Self-Defence,* 2nd ed. (1994) p. 222; Partsch, "Reprisals", *supra* note 79 p. 332; Partsch, "Self-preservation", *supra* note 79 pp. 218-219.

[81] N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (1985); W. Verwey, "Humanitarian Intervention" in A. Cassese (ed.) *The Current Regulation of the Use of Force* (1986) p. 57; Nguyen Qouc Dihn *supra* note 75 pp. 908-909.

[82] D. W. Bowett, *Self-Defence in International Law* (1958) pp. 96-105 (hereinafter Bowett, *Self-Defence*).

> any time such action as it deems necessary in order to maintain or restore international peace and security."

Some writers[83] argue that Article 51 contains a complete and exclusive formulation of the right of self-defence, which limits it to cases in which an armed attack has occurred against a State, while others maintain that the phrase "inherent right" in Article 51 preserves the pre-Charter customary right.[84] In the *Nicaragua* case the International Court of Justice gave support to the latter view when it held that "Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter".[85] The International Court confirmed this approach in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* when it declared that some of the constraints on the resort to self-defence "are inherent in the very concept of self-defence" while others are specified in Article 51. Moreover, said the Court,

> "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law."[86]

58. If Article 51 preserves the customary law right of self-defence, it is difficult to contend that the Charter's prohibition on the use of force extends to the protection of nationals abroad.[87] Such contention is made more difficult by the amount of State practice since 1945 in support of military intervention to protect nationals abroad in

---

[83] Brownlie, *Use of Force, supra* note 79 pp. 272-275; Verdross and Simma, *supra* note 75 p. 288 (para. 470); H. Kelsen, *Law of the United Nations* (1950) p. 914.

[84] Bowett, *Self-Defence, supra* note 82 pp. 184-6; C. H. M. Waldock, "The Regulation of the Use of Force by Individual States in International Law" (1952 II) 81 *Recueil des Cours* 451 pp. 496-497; H. G. Franzke, "Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland — insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen" (1966) 16 *Österreichische Zeitschrift für öffentliches Recht* pp. 169-170.

[85] *1986 I.C.J. Reports* 14 p. 94.

[86] *Supra* note p. 246, para. 41.

[87] Bowett, *Self-Defence, supra* note 82 pp. 87-105; Dinstein *supra* note 80 p. 212; G. N. Barrie, "Forcible Intervention and International Law" (1999) 116 *South African Law Journal* 791 p. 800; G. Dahm, *Völkerrecht* (1961) 209. *Sed contra,* see Brownlie, *Use of Force, supra* note 79 pp. 289-301; *Corfu Channel Case (Merits) 1949 I.C.J. Reports* p. 35; Ronzitti *supra* note 81; G. Tunkin, "Politics, Law and Force in the Interstate System" (1989 VII) 219 *Recueil des Cours* pp. 337-338; V. I. Menzhinsky, *Neprimeniie sily v mezhdunarodnyh otnosheniiah* (1976) pp. 97-98. It is not clear what inference should be drawn from the judgment of the International Court of Justice in the *Nicaragua* case on this subject. While the Court expressly left open the question of the lawfulness of anticipatory self-defence (s*upra* note 85 p. 103 para. 194), it made no mention of the current status of defence of nationals as a form of self-defence.

time of emergency[88] and the failure of courts[89] and political organs[90] of the United Nations to condemn such action. In the words of *Oppenheim's International Law*, "there has been little disposition on the part of States to deny that intervention properly restricted to the protection of nationals is, in emergencies, justified."[91]

59. There is, however, general agreement that the right to use force in the protection of nationals has been greatly abused[92] in the past and that it is a right that lends itself to abuse.[93] The right must therefor be narrowly formulated to make it clear, first, that it may not be invoked to protect the property of a State's nationals abroad[94] and, secondly, that it may only be invoked in emergencies to justify the rescue of foreign nationals. The 1976 forcible intervention by Israeli commandos at Entebbe airport,[95] Uganda, may serve as a model for such a rescue operation. The present article, formulated on the basis of that precedent, aims to limit the right to use force to protect nationals to emergencies in which they are exposed to immediate danger and the territorial State lacks the capacity or willingness to protect them. This seems to reflect State practice more accurately than an absolute prohibition on the use of force (which is impossible to reconcile with actual State practice) or a broad right to intervene (which is impossible to reconcile with the protests that have been made by the injured State and third States on the occasion of such interventions). From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.

---

[88] *Oppenheim's International Law, supra* note 34 pp. 440-442.

[89] In the *United States Diplomatic and Consular Staff in Tehran* case, *1980 I.C.J. Reports* p. 18, the International Court of Justice declined to pronounce the legality of the unsuccessful United States attempt to rescue hostages "in the exercise of its inherent right of self-defence". Judges Morozov (p. 57) and Tarazi (p. 64) did, however, reject the United States argument and concluded that the rescue operation was not justified by Article 51. See J. R. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality under International Law" (1981) 21 *Virginia J. of Int. Law* p. 485.

[90] In all instances in which force has been used to rescue or protect nationals the Security Council has been unable to reach a decision in favour or against the intervention. Following the Entebbe raid in 1976 a resolution condemning Israel was not put to the vote: United Nations document S/12139; (1976) 15 I.L.M. p. 1227.

[91] *Supra* note 34 p. 440.

[92] See, for example, the criticisms of the military interventions of the United States in Grenada and Panama. See (1984) 78 *A.J.I.L.* p. 200; (1984) 78 *A.J.I.L.* p. 131; (1990) 84 *A.J.I.L.* p. 545; P. Nanda, "U.S. Forces in Panama: Defenders, Aggressors or Human Right Activists? The Validity of United States Intervention in Panama under International Law" (1990) 84 *A.J.I.L.* p. 494.

[93] See Borchard *supra* note 50 pp. 331, 447; García Amador, First Report, *supra* note 35 p. 216; Guha Roy *supra* note 38 pp. 880, 887; García Amador, *Changing Law, supra* note 39 at 79; Lillich, *Human Rights, supra* note 5 pp. 14-15; F. Orrego Vicuña, *The Changing Law of Nationality of Claims*: Final Report submitted to the International Law Association Committee on Diplomatic Protection. Unpublished manuscript, 3 (hereinafter Orrego Vicuña, *Changing Law*). For views denying that diplomatic protection presents a real danger of abuse see Dunn *supra* note 12 p. 19.

[94] *Oppenheim's International Law, supra* note 34 at 441; Shaw *supra* note 39 p. 793; Franzke *supra* note 84 p. 171.

[95] See R. D. Margo, "The Legality of the Entebbe Raid in International Law" (1977) 94 *South African Law Journal* p. 306; F. A. Boyle, "The Entebbe Hostage Crisis" (1982) p. 29 *Netherlands International Law Review* p. 32; 1976 U.N.Y.B. 315-320; (1976) 15 I.L.M. 1224.

60. In practice the right to use force in the protection of nationals has been invoked to protect non-nationals where they are threatened, together with nationals of the protecting State.[96] In an emergency situation it will be both difficult and unwise to distinguish sharply between nationals and non-nationals. There should be no objection to the protecting State rescuing non-nationals exposed to the same immediate danger as its nationals, provided the preponderance of threatened persons are nationals of that State. Where the preponderance of threatened persons are non-nationals the use of force might conceivably be justified as a humanitarian action but not as self-defence in the protection of nationals. Whether international law recognizes a forcible right of humanitarian intervention falls outside the scope of the present study.

Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Comment

61. In doctrine the most controversial aspect of diplomatic protection concerns the question *whose* rights are asserted when the State of nationality invokes the responsibility of another State for injury caused to its national. The traditional view maintains that the State of nationality acts on its own behalf since an injury to a national is an injury to the State itself. Today this doctrine is challenged on the ground that it is riddled with internal inconsistencies and is nothing more than fiction. Contemporary developments which grant individuals direct access to international judicial bodies to assert claims against both foreign States and their State of nationality lend support to this criticism.

62. The traditional view has its origin in a statement by Vattel that:

> "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen."[97]

This claimed indirect injury has been considered the basis of diplomatic protection for centuries. The thesis that the State has a general interest in the treatment of its nationals abroad and in ensuring respect for international law, and as a necessary corollary that it asserts its *own* right when it brings an international claim arising out of an injury to a national, has repeatedly been confirmed by international tribunals. The classical formulation of the doctrine is to be found in the judgement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, where the Court made the following statement:

> "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. The question, therefore, whether the

[96] *Oppenheim's International Law, supra* note 34 p. 442.
[97] Vattel *supra* note 43 p. 136.

> present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."[98]

This doctrine was endorsed by the Guerrero report adopted by the Subcommittee of the League of Nations Experts for the Progressive Codification of International Law[99] and the Harvard Research draft of 1929.[100] The principle was also restated by the International Court of Justice in the *Nottebohm* case in 1955 after criticism of the traditional conception had been voiced by writers:[101]

> "Diplomatic protection and protection by means of international judicial procedings constitute measures for the defence of the rights of the State."[102]

At its 1965 Warsaw session the Institute of International Law resolved that:

> "An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection."[103]

63. The basis of the State's right to ensure respect for international law in the person of its nationals has been claimed to lie in the "right of self-preservation, the right of equality and the right to intercourse".[104] A more satisfactory explanation was given by Brierly in 1928 in his comment on the assertion that an injury to a national is an injury to the State of nationality:

> "Such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest … on anything so intangible as the 'wounding of national honour'; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated … Such Government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case …"[105]

Brierly's view is premised on the inability of the individual to present an international claim himself,[106] a premise emphasized by Geck in the *Encyclopaedia of Public International Law* when he asserts that the traditional doctrine of

---

[98] *Supra* note 7 p. 12. Fifteen years later the Court made the same statement in the *Panevezys-Saldutiskis Railway* case, *supra* note 7 p. 16.

[99] García Amador, First Report, *supra* note 35 p. 192.

[100] Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, article 1. (1929) 23 *A.J.I.L.* Special Supplement 22.

[101] For an example of such early criticism, see P. C. Jessup, *A Modern Law of Nations,* reprint (1968) p. 116.

[102] *Supra* note 47 p. 24.

[103] *Resolutions de l'Institut de Droit International, 1957-91* (1992) 56, article 3.

[104] Borchard *supra* note 50 p. 353, citing Hall, Rivier, Despagnet, Pomeroy and Oppenheim.

[105] *Supra* note 17 p. 48.

[106] Ibid. p. 47.

diplomatic protection is a "necessary consequence of the lack of an international material right" on the part of the injured individual.[107]

64. 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 seldom claim that they assert their own right and often refer to the injured individual as the "claimant".[108] 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." [109]

65. In these circumstances it is not surprising that some writers[110] argue 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. Logical inconsistencies in the traditional doctrine, such as the requirement of continuous nationality, the exhaustion of local remedies rule and the practice of fixing the quantum of damages suffered to accord with the loss suffered by the individual, lend support to this view. Some writers seek to overcome the flaws in the traditional doctrine by explaining that the material right is vested in the individual, but that the State maintains the procedural right to enforce it.[111] Other writers are less patient with the traditional doctrine and prefer to dismiss it as a fiction that has no place in the modern law of diplomatic protection.[112]

66. Developments in international human rights law, which elevate the position of the individual in international law, have further undermined the traditional doctrine. If an individual has the right under human rights instruments to assert his basic human rights before an international body, against his own State of nationality or a foreign State, it is difficult to maintain that when a State exercises diplomatic protection on behalf of an individual it asserts its *own* right. Investment treaties which grant legal remedies to natural and legal persons before international bodies raise similar difficulties for the traditional doctrine.

67. No attempt is made to justify the traditional view as a coherent and consistent doctrine. It is factually inaccurate, for as Brierly pointed out in *The Law of Nations*,

---

[107] *Supra* note 28 p. 1057. See also García Amador, State Responsibility, *supra* note 15 p. 471.

[108] This approach was followed by the drafters of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens. See Sohn and Baxter, *supra* note 37, article 21(5) p. 578. Writing in 1915, Borchard described diplomatic protection as an "extraordinary legal remedy granted to the citizen, within the discretion of the State." *Supra* note 50, p. 353.

[109] *1959 I.C.J. Reports* 6 p. 27.

[110] For a detailed presentation of these arguments, see García Amador, First Report, *supra* note 35 pp. 192-193; García Amador, State Responsibility, *supra* note 15 pp. 413-428; García Amador, *Changing Law*, *supra* note 39 pp. 497-501, Bennouna, Preliminary Report, *supra* note 15 pp. 5-11, 14-15, Orrego Vicuña, Changing Law, *supra* note 93 pp. 1-6, Geck *supra* note 28 pp. 1057-1059; Guha Roy *supra* note 38 pp. 877-878.

[111] Geck *supra* note 28 p. 1058; Guha Roy *supra* note 38 p. 878.

[112] Bennouna, Preliminary Report, *supra* note 15 p. 8. See too M. Bennouna, "La Protection Diplomatique, un Droit de L'État?" in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber. Paix, Développement, Démocratie* (1998) p. 245.

> "it is an exaggeration to say that whenever a national is injured in a foreign State, his State as a whole is necessarily injured too."[113]

Moreover, as a doctrine it is impaired by practices which contradict the notion that an injury to the individual is an injury to the State, and by contemporary developments in human rights law and foreign investment law which empower the individual to bring proceedings in his own right before international tribunals. It cannot therefore seriously be denied that the notion that an injury to a national is injury to the State is a fiction.

68. The present report is more concerned with the utility of the traditional view than its soundness in logic. As shown in the introduction,[114] diplomatic protection, albeit premised on a fiction, is an accepted institution of customary international law, and one which continues to serve as a valuable instrument for the protection of human rights. It provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and it provides a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments.

69. The debate on the identity of the holder of the right of diplomatic protection has important consequences for the scope and effectiveness of the institution. If the holder of the right is the State, it may enforce its right irrespective of whether the individual himself has a remedy before an international forum. If, on the other hand, the individual is the holder of the right, it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual. This course is suggested by Orrego Vicuña in his 1999 final report to the International Law Association Committee on Diplomatic Protection:

> "A residuary role for diplomatic protection seems more adequate to the extent that this mechanism might only intervene when there are no international procedures directly available to the affected individual. It should be noted, however, that if direct access is available diplomatic protection would be excluded altogether, except perhaps in order to ensure the enforcement of an award or secure compliance with a decision favouring that individual: in particular there would be no question of diplomatic protection after the individual has resorted to international procedures or in lieu thereof.
>
> "There is still the possibility of a parallel operation in which a State may espouse a claim at the same time that the individual pursues direct remedies, but this alternative would result in various kinds of interference with the orderly conduct of the procedures and eventually the outcome of the decision."[115]

This view reflects the position advocated by García Amador in his reports to the International Law Commission.[116]

---

[113] 6th ed. (1963) p. 276.

[114] Paras. 17-31, *supra*.

[115] *Supra* note 93 pp. 7-8.

[116] First Report, *supra* note 35 pp. 215-217; Third Report, A/CN.4/111, in *Yearbook ... 1958*, vol. II, 47 pp. 61-63; Fifth Report, A/CN.4/125 in *Yearbook ... 1960*, vol. II 41 pp. 51-55; State Responsibility, *supra* note 15 pp. 462-473.

70. A compromise solution is that proposed by Jessup[117] and Sohn and Baxter in the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,[118] which would allow both the injured individual and the State of nationality to pursue claims against the injuring State, but to give priority to the State claim. Article 3 is compatible with such a solution: it does not preclude the possibility of a claim being pursued by the individual on the international plane — *where there is a remedy available*. At the same time it places no restraint on the State of nationality to intervene itself.

71. Another solution offered by Doehring is that the State may bring the claim when its own rights are affected, which would also apply in the case of the expropriation of the property of a national. On the other hand, where the personal fundamental rights of the individual are affected, both the individual and the State may bring claims. This suggestion is also compatible with the proposal contained in article 3.[119]

72. Another argument that seeks to "cure" diplomatic protection of its fictitious character, but which substantially reduces the scope of diplomatic protection, runs as follows: The doctrine that an injury to the individual is an injury to the State is only a fiction when the State intervenes to protect an isolated individual or small group of individuals whose human rights, including property rights, have been violated by the territorial State. Where the injury is systematic and directed at a substantial number of nationals, thereby providing evidence of a policy of discrimination against a particular State's nationals, the State of nationality is in fact injured as the conduct of the territorial State constitutes an affront to the State itself.[120] In the latter case, and the latter case only, the State of nationality may intervene.

73. Article 3 codifies the principle of diplomatic protection in its traditional form. It recognizes diplomatic protection as a right attached to the State, which the State is free to exercise in its discretion (subject to article 4) whenever a national is unlawfully injured by another State. The State of nationality is not limited in its

---

[117] *Supra* note 101 pp. 116-117. Jessup argues that the individual should be free to resort to international procedures only after the State has decided not to intervene.

[118] Sohn and Baxter, *supra* note 37 pp. 578-580. Article 22 permits the injured individual to present his own claim directly to the injuring State; and article 23 provides for claims by the State. Article 23(1) provides that:

"If a claim is being presented both by a claimant and by the State of which he is a national, the right of the claimant to present or maintain his claim shall be suspended while redress is being sought by the State."

[119] K. Doehring, "*Handelt es sich bei einem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protection ausübenden Staat zusteht, oder geht es um die Erzwingung von Rechten des betroffenen Individuums*?" G. Ress and T. Stein, *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1996) 13 pp. 18-20. See also similar comments by Ress and Stein, ibid. pp. 22-23.

[120] See García Amador:

"in any of the cases in which responsibility arises by reason of an injury caused to the person or property of the alien, the consequences of the acts or omissions may, owing to their gravity or to their frequency or because they indicate a manifestly hostile attitude towards the foreigner, extend beyond this specific personal injury. In other words, there may exist circumstances involving acts or omissions the consequences of which extend beyond the specific injury caused to the alien."

State Responsibility, *supra* note 15 p. 422. See also ibid. pp. 466-467, 473-474; García Amador, First Report, *supra* note 35 pp. 197, 220 Basis of discussion No. III(2)(b); García Amador, Third Report, *supra* note 116 pp. 62, 65; Jessup *supra* note 101 pp. 118-120.

right of diplomatic intervention to instances of large-scale and systematic human rights violations. Nor is it obliged to abstain from exercising that right when the individual enjoys a remedy under a human rights or foreign investment treaty. In practice a State will no doubt refrain from asserting its right of diplomatic protection while the injured national pursues his international remedy. Or it may, where possible,[121] join the individual in the assertion of his right under the treaty in question. But in principle a State is not obliged to exercise such restraint as its *own* right is violated when its national is unlawfully injured.

74. The discretionary power of the State to intervene on behalf of its national is considered in the commentary on article 4.

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Comment

75. According to the traditional doctrine of diplomatic protection, a State has the right to protect its national but is under no obligation to do so. Consequently, a national of the State injured abroad has no right to diplomatic protection under international law. That there is *no duty* on a State under international law to protect a national was clearly stated by Borchard in 1915:

[121] See, for example, *Soering v. UK*, *supra* note 32; *Selmouni v. France*, *supra* note 32.

> "Many writers[122] consider diplomatic protection a duty of the State, as well as a right. If it is a duty internationally, it is only a moral and not a legal duty, for there is no means of enforcing its fulfilment. Inasmuch as the State may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf — for the interests of the majority cannot be sacrificed — it is clear that by international law there is no legal duty incumbent upon the State to extend diplomatic protection. Whether such a duty exists towards the citizen is a matter of municipal law of his own country, the general rule being that even under municipal law the State is under no legal duty to extend diplomatic protection."[123]

Borchard was equally adamant that there is *no right* to diplomatic protection on behalf of the injured national:

> "It is hardly correct … to speak of the citizen's power to invoke the diplomatic protection of the Government as a 'right' of protection. … his call upon the Government's intervention is addressed to its discretion. At best, therefore, it is an imperfect right … Being devoid of any compulsion, it resolves itself merely into a privilege to ask for protection. Such duty of protection as the Government may be assumed to owe to the citizen in such cases is a political and not a legal one, responsibility for the proper execution of which is incurred to the people as a whole, and not to the citizen as an individual."[124]

This position was reaffirmed by the International Court of Justice in the *Barcelona Traction* case in 1970:

> "… within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national 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 international 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, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case." [125]

76. While most writers accept the traditional position,[126] voices have been raised against it. De Visscher stated that "the absolute discretion left to the State in the exercise of protection goes ill with the principle that the treatment due to aliens is a

---

[122] Writers cited by Borchard include Grotius 2.25.1 and Vattel 1.2.13-16.

[123] *Supra* note 50 p. 29.

[124] Ibid., p. 356.

[125] *Supra* note 11 p. 44.

[126] D. W. Greig, *International Law* 2nd ed. (1976) 523; *Oppenheim's International Law, supra* note 34 p. 934; Geck, *supra* note 28 pp. 1051-1052; García Amador, State Responsibility, *supra* note 15 p. 427; H. F. van Panhuys, *The Role of Nationality in International Law: An Outline* (1959) pp. 103, 221.

matter of international law."[127] Orrego Vicuña in his report to the International Law Association has described this aspect as one of the principal "disadvantages" of the current system.[128]

77. While the institution of diplomatic protection may be seen as an instrument for the furtherance of the international protection of human rights, it is not possible to describe diplomatic protection as an individual human right.[129] This is confirmed by the two international human rights instruments concerned with the right of aliens — the 1985 United Nations General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live[130] and the 1991 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[131] — which reaffirm the right of the alien to have recourse to his diplomatic or consular mission for protection but place no duty on the State of nationality to protect him.[132]

78. Recent discussions in the Sixth Committee of the General Assembly illustrate the divergence of views on this issue. Most speakers considered that the decision whether or not to exercise diplomatic protection was the sovereign prerogative of the State with a full discretion.[133] Baker (Israel) stated that States might be influenced by overriding foreign policy concerns in declining the exercise of that right. Moreover, as the individual's claim might be wrong or unfounded in international law, the exercise of diplomatic protection should remain within the discretion of the State in order to prevent the individual from putting the State in a "futile position".[134] In contrast, while agreeing that diplomatic protection was primarily the prerogative of States, Skrk (Slovenia) proposed an examination of the legislative practice of States that afforded the right of diplomatic protection to their nationals.[135]

79. There was also a discussion of whether diplomatic protection should be considered a human right. Cede (Austria) expressed doubts about such a possibility, maintaining that such a view was not supported by existing international law and could not be expected to become part of the legal order in the near future.[136] In a somewhat more liberal manner, Gray (Australia) called for the examination of the

---

[127] C. de Visscher, *Theory and Reality in Public International Law* (translated by P. E. Corbett) (1957) p. 275.

[128] *Supra* note 93 p. 7. See also Bennouna, Preliminary Report, *supra* note 15 p. 16 (paras. 47-48).

[129] K. Skubiszewski, "Introduction" in E. Lauterpacht and J. G. Collier (eds.) *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) p. 10.

[130] *Supra* note 27, article 10.

[131] *Supra* note 26 p. 1517, article 23.

[132] C. Warbrick, "Protection of Nationals Abroad: Current Legal Problems" (1988) 37 *I.C.L.Q.* p. 1004.

[133] B. Sepulveda (Mexico) A/C.6/53/SR.16; A. de Aguiar Patriota (Brazil), ibid.; J. Benitez Saenz (Uruguay), ibid.; M. Z. Reza (Indonesia), A/C.6/53/SR.15; J. O'Hara (Malaysia), ibid.; M. Gray (Australia), A/C.6/52/SR.23; H. W. Longva (Norway), A/C.6/53/SR.14; F. Berman (United Kingdom), ibid.; F. Orrego-Vicuña (Chile), ibid.; S. Fomba (Mali), arguing, however, that the development of human rights should be taken into account A/C.6/53/SR.13; L. Caflisch (Observer for Switzerland), ibid.; P. Tomka (Slovakia), A/C.6/53/SR.22; O. S. Shodeinde (Nigeria), A/C.6/53/SR.17; H. M. al-Baharna (Bahrain), A/C.6/53/SR.21.

[134] A. Baker (Israel), A/C.6/53/SR.15. On the first part of the argument, see also R. Abraham (France), A/C.6/53/SR.14.

[135] M. Skrk (Slovenia), A/C.6/52/SR.23.

[136] F. Cede (Austria), A/C.6/53/SR.15.

legal basis (in the views and practice of States) of the right possessed by the individual and pointed to the necessity of considering whether it could be categorized as a human right.[137] Giralda (Spain) appeared to support the view that the right to diplomatic protection was a human right as he contended that the individual had a right to compensation for violations of his rights, as well as for the lack of diplomatic protection.[138]

80. Discussions in the Sixth Committee revealed that some members of the international legal community believe that the individual should be entitled to diplomatic protection as a matter of right. Although limited, there is in fact some State practice to support this view. Constitutional provisions in a number of States, mainly those belonging to the former communist bloc, recognize the right of the individual to receive diplomatic protection for injuries suffered abroad. These include: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia. Usually the relevant article of the Constitution contains formulations such as the "the State shall protect the legitimate rights of X nationals abroad" or "nationals of Y shall enjoy protection while residing abroad". The Italian, Spanish and Turkish constitutional provisions contain very vague and loose formulations, providing for the protection of certain rights of workers abroad, or in the case of Spain, state that the State "shall try to safeguard the economic and social rights" of its nationals working abroad.[139] The Constitution of the former Yugoslav Republic of Macedonia is even more limited, stating that the State "cares for" the well-being of its nationals abroad. At the other end of the spectrum, the Constitutions of the Republic of Korea and Guyana establish the "duty" of those States to protect their nationals abroad. Ukraine "guarantees" protection and the Polish Constitution talks about the right of the individual national to protection abroad, whereas the Hungarian Constitution states that "Hungarian citizens are entitled to enjoy the protection" of Hungary while residing abroad.[140] It is uncertain whether and to what extent those rights are enforceable under the municipal law of those countries, and whether they go beyond the right of access to consular officials abroad.[141] On the other hand, they suggest that certain States consider diplomatic protection for their nationals abroad to be desirable.

81. State practice on this matter is difficult to trace. In his report on diplomatic protection to the International Law Association, Orrego-Vicuña[142] refers to a nineteenth century Chilean law according to which the Ministry of Foreign Affairs was required to send any request for diplomatic protection to the Advocate General of the Supreme Court for a binding legal opinion as to whether the Government should exercise protection in the case. Geck, in turn, refers to unwritten

---

[137] M. Gray (Australia), A/C.6/52/SR.23.

[138] A.P. Giralda (Spain), A/C.6/53/SR.18.

[139] 1992 Constitution of Spain, article 42.

[140] 1949 Hungarian Constitution with amendments up to 1997, article 69.

[141] L. T. Lee, *Consular Law and Practice*, 2nd ed. (1991), chap. VIII, 124 et seq. Lee doubts whether the duty imposed on consular officials by many national statutes to safeguard the interests of nationals is justiciable (ibid. 125-127).

[142] Orrego Vicuña, Changing Law, *supra* note 93 p. 8. See also F. Orrego Vicuña, "Chile" in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) 123 pp. 138-141.

constitutional rights to protection given to individuals by certain countries, and to an unwritten constitutional duty in other States to grant diplomatic protection.[143] He describes the constitutional tradition of Germany developed under the Constitutions of 1866, 1871 and 1919, and applied without constitutional provision to that effect since 1949 in the Federal Republic of Germany. According to this tradition, the German State has a constitutional duty to provide diplomatic protection if certain prerequisites have been met. The Federal Constitutional Court (Bundesverfassungsgericht) and other German courts have in their decisions confirmed this obligation on the part of the German authorities.[144] Besides conditions imposed by international law, diplomatic protection must be granted only if it "does not run counter to truly overriding interests of the Federal Republic".[145] This condition has been interpreted by the courts to give the political authorities a discretion to determine whether overriding interests of the State and the people as a whole preclude diplomatic protection.

82. Although Israel lacks any formal legal provisions requiring the State to protect Israeli nationals abroad and the exercise of such protection is usually seen to fall within the discretion of the Government, the Supreme Court held in 1952 that the State has a duty to protect a national in an enemy country "insofar as it is able to defend him through the good offices of a friendly Government."[146] A similar decision was reached by the Haifa District Court in 1954.[147]

83. In Switzerland, the Government does not have a duty to exercise diplomatic protection on behalf of its nationals[148] but, as pointed out by Caflisch, certain provisions of the Constitution and the 1967 Consular Regulations recognize a limited duty on the part of Swiss consular missions to protect Swiss nationals unless it would prejudice the interests of the Confederation.[149]

84. The United Kingdom of Great Britain and Northern Ireland does not recognize the right of individuals to enforce the Crown's duty of diplomatic protection before domestic courts.[150] However, according to Warbrick, it is possible to argue today, that British citizens have at least a "legitimate expectation" that they will be

---

[143] Geck, *supra* note 28 p. 1052.

[144] *Hess-Entscheidung*, 7 July 1975, BVerfGE 55, p. 349, reproduced in 90 I.L.R. p. 387; *Ostverträge*, 16 December 1980, BVerfGE 40, p. 14, reproduced in 78 I.L.R. p. 177. See also E. Klein, "Anspruch auf diplomatischen Schutz?" in G. Ress and T. Stein (ed.), *Der diplomatische Schutz im Völker-und Europarecht: Aktuelle Probleme und Entwicklungtendenzen* (1996) p. 125 and related discussion.

[145] Geck, *supra* note 28 p. 1052.

[146] Y. Blum, "Israel", in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) p. 314, citing *Hakim v. Minister of Interior* (1952), 6 Piskei Din p. 642.

[147] See ibid., referring to *Attorney General v. Steiner* (1954), 9 Psakim Mehoziim 473 p. 489.

[148] This has been established in *Heirs Oswald v. Swiss Confederation* (1926), Arrêts de Tribunal fédéral 52 II 235 and *Gschwind v. Swiss Confederation* (1932), Arrêts de Tribunal fédéral 58 II 463, *Schoenemann v. Swiss Confederation* (1955) Arrêts de Tribunal fédéral 81 I 159 cited by Caflisch ("Switzerland" in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) pp. 504-505).

[149] Ibid., pp. 506-508.

[150] *Mutasa v. Attorney-General* (1979) 3 All E. R. pp. 257, 261-262; 78 I.L.R. p. 490; *R v. Secretary of State for Foreign and Commonwealth Affairs: Ex Parte Butt* unreported judgment of the Court of Appeal of 9 July 1999. See also the response of the United Kingdom to the International Law Commission, July 1999, para. 3.

afforded diplomatic protection if the conditions stated in the rules of the United Kingdom applying to international claims (continuous nationality, exhaustion of local remedies, etc.) are fulfilled.[151]

85. In France, the right to exercise diplomatic protection is an *act de gouvernement* — which is not subject to review by administrative bodies.[152] Although there is no general duty on the part of the executive to exercise diplomatic protection on behalf of nationals in the United States of America, the so-called Hostage Act of 1868 requires the President to intervene whenever a United States citizen has been "unjustly deprived of his liberty by or under the authority of any foreign Government." In such a case the "president shall use such means not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release."[153]

86. In a number of cases, British, Dutch, Spanish, Austrian, Belgian and French claimants have attempted to assert a right to diplomatic protection.[154] Although the cases were not decided in their favour, the submission of the claims indicates that the claimants had reasons to believe that they had such a right.

87. In sum, there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad. This approach is clearly in conflict with the traditional view. It cannot, however, be dismissed out of hand as it accords with the principal goal of contemporary international law — the advancement of the human rights of the individual rather than the sovereign powers of the State. This issue is therefore one that needs to be considered, if necessary by way of progressive development. This would accord with the suggestion by Orrego Vicuña in his 1999 report to the International Law Association Committee on diplomatic protection that:

---

[151] *Supra* note 132 p. 1009.

[152] Nguyen Quoc Dinh *supra* note 75 p. 777.

[153] 22 U.S.C. 1732 (Supp. II 1990). See further J. Young, "Torture and Inhumane Punishment of United States Citizens in Saudi Arabia and the United States Government's Failure to Act" (1993) 16 *Hastings International and Comparative Law Quarterly* p. 663; K. Hughes, "Hostages' Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity" (1993) 26 *Columbia Journal of Law and Social Problems* p. 555.

In *Redpath v. Kissinger* the Court held that the discretion of the President to enter into diplomatic negotiations to secure the release of an American national was not subject to judicial control. (415 F Supp.566 (W.D.Tex.1976), aff'd., 545 F.2nd 167 (5th Cir).)

[154] Ibid., 1004, *Mutasa v. Attorney-General supra* note 150; *R v. Secretary of State for Foreign and Commonwealth Affairs Ex parte Butt* (1999), *supra* note 150; *Van Damme* case, *NRC Handelsblad* 5 January 2000; *HMHK v. the Netherlands* 94 I.L.R. p. 342; *Commercial FSA v. Council of Ministers* 88 I.L.R. p. 694; cases cited in I. Seidl-Hohenveldern, "Austria" in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) p. 31; *Mandelier* (1966) 81 Journal des tribunaux p. 721 and (1969) Pasicrisie belge II 246 cited in M. Waelbroeck, "Belgium" in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) p. 59; cases cited in P. Weil, "France" in E. Lauterpacht and J. G. Collier, *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) pp. 278-279.

"The discretion exercised by a Government in refusing to espouse a claim on behalf of an individual should be subject to judicial review in the context of due process."[155]

88. Article 4 seeks to give effect to developments of this kind. As it involves an exercise in progressive development, rather than codification, care is taken to limit the proposed duty on States to particularly serious cases, to give States a wide margin of appreciation, and to restrict the duty on States to nationals with a genuine link to the State of nationality.

89. Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection.[156] It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*.[157] If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress,[158] there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.

90. Obviously a State should be given a wide margin of appreciation in the exercise of this duty. Article 4 (2) (a) permits a State to refuse to exercise diplomatic protection where to do so would jeopardize both its national and its international interests. Article 4 (3), however, subjects the decision of the State to review by a court or other independent national authority. This accords with the proposal made by Orrego Vicuña in his report to the International Law Association.[159]

91. Article 4 (1) relieves the State of the obligation to protect if the national has a remedy himself or herself before a competent international body. Thus where the injuring State is a party to a human rights instrument which provides for access on

---

[155] *Supra* note 93 p. 26, clause 2.

[156] See article 53 of the 1969 Vienna Convention on the Law of Treaties. Article 19 of the ILC draft articles on State responsibility adopted on first reading characterizes the breaches of norms protecting the most fundamental interests of the international community as international crimes. Although that provision makes no reference to *jus cogens* there is a clear correlation between norms of *jus cogens* and the examples cited, namely aggression, denial of the right of self-determination, slavery, genocide, apartheid and massive environmental pollution.

[157] Doehring distinguishes between fundamental human rights norms and other norms for the purpose of diplomatic protection and claims:

"If … compensation or another form of reparation is provided for the violation of a right which concerns so-called absolute human rights, i.e. those which the person holds in any case as a subject of international law, … *it is also the affected individual who is entitled to reparation* …"

(Doehring *supra* note 119 p. 19. Emphasis added. See also ibid., pp. 14-15). Moreover, while submitting that international law neither prohibits nor establishes an obligation on the part of the State to protect or a corresponding right on the part of the individual under municipal law, he claims that such an obligation may be derived from the application of the principle of *pacta sunt servanda* in municipal law. See K. Doehring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes* (1959), p. 15.

[158] See article 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; articles 13 and 14 of the Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment.

[159] See above, para. 87.

the part of the injured individual to a court or other body, the State of nationality is under no obligation to exercise diplomatic protection.

92. In certain circumstances the injured national may be protected by another State. This would occur where the individual is a multiple national and another State of nationality has extended diplomatic protection to the individual. Another State of which the injured individual is not a national might also decide to extend diplomatic protection to the individual.[160] In these circumstances the State of nationality will be under no duty to extend diplomatic protection.

93. Finally the State will be under no obligation to protect a national who has no effective or genuine link with the State of nationality. Although this requirement proclaimed in the *Nottebohm* case is rejected where the State of nationality chooses to exercise its *right* to intervene on behalf of an injured national[161] with whom it has a bona fide link, it seems justified to accept this requirement in respect of the *duty* to exercise diplomatic protection.

Article 5

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

Comment

94. According to traditional doctrine, as shown in the commentary on article 3, the State's right to exercise diplomatic protection is based on the link of nationality between the injured individual and the State. Consequently, except in extraordinary circumstances, a State may not extend its protection to or espouse claims of non-nationals.[162]

95. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

> "in the present state of international law, questions of nationality are … in principle within the reserved domain."[163]

---

[160] See article 10. (This article will deal with the controversial question of whether a State may protect a non-national in the case of the violation of an obligation *erga omnes*.)

[161] See article 5.

[162] Van Panhuys *supra* note 126 pp. 59-73; Jessup *supra* note 101 p. 99; Orrego-Vicuña, Changing Law, *supra* note 93 p. 8; García-Amador, Third Report, *supra* note 116 p. 66 para. 22; Geck *supra* note 28 p. 1049; D. C. Ohly, "A Functional Analysis of Claimant Eligibility" in R. Lillich (ed.) *International Law of State Responsibility for Injuries to Aliens* (1983) p. 284; García-Amador, *Changing Law*, *supra* note 39 p. 501; *Oppenheim's International Law, supra* note 34 p. 512; *Nottebohm* case, *supra* note 47 p. 23; 1929 Harvard Draft Convention, *supra* note 100, article 15(a); 1930 Hague Codification Conference, Third Committee, Basis of Discussion No. 28, League of Nations publication V. Legal, 1292.V.3 (document C.75.M.69.1929.V) reproduced in García Amador, First Report, *supra* note 35 p. 223; 1960 Harvard Draft Convention article 2(b), and article 23(3), in Sohn and Baxter, *supra* note 37; 1965 Institute of International Law Resolution (Warsaw session) article 1(a), *supra* note 103.

[163] (1923) *P.C.I.J. Reports*, Series B, No. 4, p. 24.

This principle was confirmed by article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws:

> "It is for each State to determine under its own law who are its nationals."[164]

96. More recently it has been endorsed by the 1997 European Convention on Nationality[165] and it is difficult to resist the conclusion that it has acquired the status of customary law.[166]

97. A State's determination that an individual possesses its nationality is not lightly to be questioned. According to Oppenheim:

> "It creates a very strong presumption both that the individual possesses that State's nationality as a matter of its internal law and that the nationality is to be acknowledged for international purposes."[167]

98. The State's right to determine the nationality of the individual is not, however, absolute. This was made clear by the Permanent Court of International Justice in the *Nationality Decrees in Tunis and Morocco* case when it stated that the question whether a matter was "solely within the jurisdiction of a State" — such as the conferment of nationality — "is essentially a relative question; it depends upon the development of international relations."[168] Moreover, even if a State in principle has an absolute right to determine nationality, other States may challenge this determination where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred.[169]

99. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying its proclamation that "it is for each State to determine under its own law who are its nationals" with the provision that:

> "This law shall be recognized by other States in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality."[170]

100. Today, conventions, particularly in the field of human rights,[171] require States to comply with international standards in the granting of nationality. This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's

---

[164] 179 L.N.T.S. p. 89.

[165] E.T.S. No. 166, article 3.

[166] Bar-Yaacov, *Dual Nationality* (1961), p. 2.

[167] *Oppenheim's International Law*, *supra* note 34 p. 856.

[168] *Supra* note 163.

[169] M. O. Hudson, *Nationality, Including Statelessness*, report, *Yearbook ... 1952*, vol. II, document A/CN.4/50, p. 10; Verdross and Simma, *supra* note 76 pp. 788 and 789 (paras. 1192 and 1194).

[170] *Supra* note 164. See also, article 3(2) of the 1997 European Convention on Nationality, *supra* note 165.

[171] See, article 20 of the American Convention on Human Rights; article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 9 of the Convention on the Elimination of All Forms of Discrimination against Women. See also the ILC draft articles on nationality in relation to succession of States, A/CN.4/L.581/Add.1.

power, which limits are linked to the demands imposed by the international system for the protection of human rights."[172]

101. International custom and general principles of law likewise set limits on the conferment of nationality by describing the linkages between State and individual that will result in the nationality conferred by a State being recognized by international law for the purpose of diplomatic protection. Birth, descent and naturalization are the connections generally recognized by international law. Whether in addition to one of these connecting factors, and particularly in the case of naturalization, there must be a "genuine" or "effective" link between State and individual, as held in the *Nottebohm* case,[173] is a matter that requires serious consideration.

102. Birth (*jus soli*) and descent (*jus sanguinis*) are recognized by international law as satisfactory connecting factors for the conferment of nationality. Some writers describe this recognition as a customary rule,[174] others as a general principle of law.[175] Treaties[176] and judicial decisions[177] confirm this recognition.

103. Naturalization is, in principle, also recognized as a satisfactory link for the conferment of nationality for purposes of diplomatic protection. The circumstances in which States confer nationality by means of naturalization vary considerably from State to State.[178] Some confer nationality automatically (without the consent of the individual) by operation of law,[179] for example in the cases of marriage and adoption. Others confer nationality by naturalization only on application by the individual after a prescribed period of residence or on marriage to a national.[180]

104. International law will not recognize naturalizations in all circumstances. Fraudulently acquired naturalization[181] and naturalization conferred in a manner that discriminates[182] on grounds of race or sex provide examples of naturalization that may not be recognized. Probably naturalization would not be recognized for the purpose of diplomatic protection when it was conferred in the absence of any link whatsoever, or, possibly, a very tenuous link. Here the refusal to recognize would be based on the abuse of right on the part of the State conferring nationality, which

---

[172] 79 I.L.R. 283 p. 296.

[173] *Supra* note 47 p. 4.

[174] Brownlie, *Principles, supra* note 39 pp. 390-391; van Panhuys, *supra* note 126 pp. 160-161.

[175] I. Brownlie, "The Relations of Nationality in Public International Law" (1963) 44 *B.Y.I.L.* 284 pp. 302, 314 (hereinafter Brownlie, Relations of Nationality).

[176] Article 20 of the American Convention on Human Rights: "Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality."

[177] *Flegenheimer* claim (1958) 25 I.L.R. p. 91.

[178] For circumstances in which nationality may be acquired by naturalization, see article 6 of the European Convention on Nationality, *supra* note 165.

[179] See Hudson *supra* note 169 p. 8.

[180] See generally, Brownlie, *Principles, supra* note 39 pp. 394-397. D. P. O'Connell, *International Law*, 2nd ed. (1970) p. 682.

[181] Brownlie, *Principles, supra* note 39 p. 402; P. Weiss, *Nationality and Statelessness in International Law*, 2nd ed. (1979) pp. 218-220, 244 (hereinafter Weiss, *Nationality and Statelessness*); Bar-Yaacov *supra* note 166 p. 143; *Flegenheimer* claim *supra* note 177 pp. 98-101; *Salem* case (1932) 2 R.I.A.A. p. 1184; *Esphahanian v. Bank Tejarat* (1983) 2 I.U.S.C.T.R. p. 166.

[182] *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica, supra* note 172 p. 304.

would render the naturalization process *mala fide*.[183] Recognition would be withheld also in the case of forced naturalization, whether or not it reflected a substantial connection between State and individual.[184]

105. There is, however, a presumption in favour of good faith on the part of the State.[185] Moreover, as the Inter-American Court of Human Rights stressed in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the State conferring nationality must be given a "margin of appreciation" in deciding upon the connecting factors that it considers necessary for the granting of nationality.[186]

106. The *Nottebohm* case[187] is seen as authority for the position that there should be an "effective" or "genuine link" between the individual and the State of nationality, not only in the case of dual or plural nationality (where such a requirement is generally accepted[188]), but also where the national possesses only one nationality. Here the International Court of Justice stated:

> "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests 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, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection which has made him its national."[189]

107. Before addressing the question whether customary international law recognizes the requirement of an "effective" link of nationality for the purpose of diplomatic protection, it is necessary to stress two factors that may serve to limit *Nottebohm* to the facts of the case in question.

108. First, it seems that the Court was concerned about the manner in which Liechtenstein conferred nationality upon Nottebohm as, in order to accommodate the urgency of his application for naturalization, Liechtenstein had waived some of its own rules relating to the length of residence required. Faced with the choice between finding that Liechtenstein had acted in bad faith in conferring nationality on Nottebohm and finding that he lacked a "genuine link" of attachment with Liechtenstein, the Court preferred the latter course as it did not involve condemnation of the conduct of a sovereign State. This view, which draws some

---

[183] *Oppenheim's International Law, supra* note 34 p. 855. See also van Panhuys *supra* note 126 pp. 158-165.

[184] G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law" (1957 II) 92 *Recueil des Cours* 1 pp. 196-201; M. Jones, *British Nationality Law and Practice* (1956) p. 15 (hereinafter Jones, *British Nationality*).

[185] Brownlie, *Principles, supra* note 39 pp. 402-403.

[186] *Supra* note 172 pp. 302-303.

[187] *Supra* note 47 p. 4.

[188] See articles 6-7, *infra.*

[189] *Supra* note 47 p. 23.

support from the dissenting opinions,[190] relies heavily on the operation of an inarticulate judicial premise on the part of the majority and is insufficient to provide a satisfactory basis for limiting the scope of the Court's judgment. Nevertheless, it does suggest that the judgment should not too readily be applied in different situations in which there is no hint of irregularity on the part of the State of nationality.

109. Secondly, the Court was clearly concerned about the "extremely tenuous"[191] links between Nottebohm and Liechtenstein compared with the close ties between Nottebohm and Guatemala over a period of 34 years. It therefore found it unfair to allow Liechtenstein to protect Nottebohm in a claim against Guatemala. This explains its repeated assertion that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala."[192] The crucial dictum in this case is not therefore that referred to above on the "genuine link"[193] but the following:

> "[The] facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations."[194]

110. 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. [195] This question is probably best answered in the affirmative as the Court was determined to propound a relative test only,[196] i.e. that Nottebohm's close ties with Guatemala trumped the weaker nationality link with Liechtenstein. In these circumstances the *Nottebohm* requirement of a "genuine link" should be confined to the peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection.

111. The suggestion that the *Nottebohm* principle of an effective and genuine link be seen as a rule of customary international law in cases not involving dual or plural nationality enjoys little support. The dissenting opinion of Judge Read that the

---

[190] See the opinion of Judge Read, *supra* note 47 pp. 37-39, Klaested, *supra* note 47 pp. 29-33; J. Kunz, "The Nottebohm Judgment" (1960) 54 *A.J.I.L.* pp. 548-560; C. Parry, "Some Considerations upon the Protection of Individuals in International Law" (1956 II) 90 *Recueil des Cours* pp. 707-708.

[191] *Supra* note 47 p. 25.

[192] Ibid. p. 26.

[193] See *supra* note 187 and accompanying text.

[194] *Supra* note 47 p. 26. Emphasis added.

[195] See Leigh *supra* note 45 p. 468; van Panhuys *supra* note 126 p. 99.

[196] *Flegenheimer* claim, *supra* note 177 p. 91. *Barcelona Traction* case, *supra* note 11 p. 42.

principle found no support outside the field of dual nationality[197] was shortly thereafter endorsed by the Italian-United States Conciliation Commission in the *Flegenheimer* case. In that decision the Commission limited the applicability of the principle to cases involving dual nationals, stating that:

> "when a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a State law."[198]

The Commission furthermore stated that it was doubtful that the International Court of Justice "intended to establish a rule of general international law" in the *Nottebohm* case.[199] That States are unwilling to support such a principle is evidenced by the failure in practice of the attempt to apply the genuine link principle to ships,[200] a field in which social and economic considerations probably justify such a rule. Available State practice also shows little support for the *Nottebohm* principle.[201]

112. Academic opinion is divided on this issue. Geck,[202] Randelzhofer,[203] Parry,[204] Kunz[205] and Jones[206] do not accept the genuine link requirement as a rule of customary international law. Many of these scholars have pointed out that there is often little connection between the individual upon whom nationality has been conferred and *jus soli* or *jus sanguinis* and that it is difficult to limit the genuine link requirement to cases of naturalization. Other scholars[207] are well disposed towards the genuine link requirement. Brownlie contends that it is supported by pre-*Nottebohm* literature and national judicial decisions and that it has a "role as a general principle with a variety of possible applications"[208] outside the context of

---

197 *Supra* note 47 pp. 41-42.

198 *Supra* note 177 p. 150.

199 Ibid. p. 148.

200 Article 91 of the 1982 United Nations Convention on the Law of the Sea; 1986 Convention on Conditions for the Registration of Ships. Cf. Article 3(3) of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1994), 33 I.L.M. p. 968.

201 The rules regarding international claims made by the British Government make no mention of the "genuine link requirement" in relation to individuals (rule I): Warbrick, *supra* note 133 p. 1006. Cf. rule IV in which this principle is applied to corporations.

202 *Supra* note 28 p. 1050.

203 "Nationality" 3 *E.P.I.L.* p. 507.

204 *Supra* note 190 p. 707.

205 *Supra* note 190 p. 536.

206 "The Nottebohm Case" (1956) 5 *I.C.L.Q.* pp. 239-240, 243-244 (hereinafter Jones, Nottebohm Case).

207 Van Panhuys *supra* note 126 pp. 158, 161; Fitzmaurice *supra* note 184 pp. 206-207; D. Ruzié, "Nationalité, Effectivité et Droit Communautiare" 1993 *Revue Générale de Droit Internationale Public* p. 113; F. de Castro, "La Nationalité, La Double et Supra-Nationalité" (1961 I) 102 *Recueil des Cours* 514 p. 582; J. Bojars, *Grazhdanstvo gosudarstv mira* (1993) pp. 308-310.

208 *Principles, supra* note 39 p. 412. See also p. 415. See further Brownlie, Relations of Nationality, *supra* note 175 pp. 349, 364.

dual nationality. He does, however, suggest that the principle should not be applied in "too exacting" a manner.[209]

113. Support for the principle of effectiveness is to be found in other quarters. Several members of the International Law Commission gave it their support in the fifth session debate on nationality, including statelessness.[210] García-Amador proposed the codification of a similar rule in article 23(3) of his last report to the Commission in 1961:

> "A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two."[211]

More recently one of the Co-rapporteurs for the International Law Association Committee Diplomatic Protection of Persons and Property, Francisco Orrego Vicuña, has proposed the following rule as one that reflects contemporary "realities" and "trends":

> "The link of nationality to the claimant State must be genuine and effective."[212]

He does, however, recognize that the rule will have to be applied with "greater flexibility and adaptation to changing needs."[213]

114. The Commission's draft articles on nationality in relation to the succession of States,[214] in article 19, recognize the concept of effective link in relation to nationality but make no judgement as to its current status in the context of diplomatic protection.

115. In 1965 the Institute of International Law adopted a resolution on the national character of an international claim presented by a State for injury suffered by an individual, which gives some support to the genuine link principle:

> "An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment."[215]

116. The *Nottebohm* case featured prominently in the arguments before the International Court of Justice in the *Barcelona Traction* case.[216] Although the Court distinguished *Nottebohm* on the facts and in law, it did find that there was a

---

[209] Ibid. p. 423. Other writers also stress the need to limit the scope of application of the effective link test: J. Combacau and S. Sur, *Droit International Public,* 4th ed. (1999) p. 325.

[210] *Yearbook ... 1953*, vol. I, p. 180 (para. 24), p. 186 (paras. 5, 7), p. 239 (paras. 45-46) (Yepes); p. 181 (paras. 32-33), p. 218 (para. 63) (Zourek); p. 184 (para. 57), p. 237 (para. 24) (François); p. 239 (para. 50) (Amado).

[211] Sixth report, *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Add.1, p. 1.

[212] *Supra* note 93 p. 27, clause 6.

[213] Ibid. p. 12.

[214] *Supra* note 171. Article 19 reads:
"Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless."

[215] Article 4(c), *supra* note 103.

[216] *Supra* note 11 p. 42.

"permanent connection" between the Company and Canada.[217] The Court, however, carefully refrained from asserting that the principle expounded in *Nottebohm* reflected a principle of customary international law.

117. The genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. 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.[218] Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection. Even supporters of *Nottebohm*, like Brownlie and van Panhuys, accept the need for a liberal application of *Nottebohm*.[219]

118. Customary international law recognizes that a nationality acquired by fraud, negligence or serious error may not be recognized[220] and that it is the function of an international tribunal, with due regard to the presumption in favour of the validity of a State's conferment of nationality[221] and allowance for a margin of appreciation on the part of the State of nationality,[222] to investigate and, if necessary, set aside a conferment of nationality.[223] This principle may be consolidated into a requirement of good faith. A conferment of nationality will be recognized for the purpose of diplomatic protection provided it is not made in bad faith, the onus of proof being on the respondent State to produce evidence of such bad faith.[224]

119. In effect the Institute of International Law's 1965 resolution supports such a rule, as nationality conferred in the absence of "any link of attachment"[225] is prima facie conferred in bad faith.

120. In *Nottebohm* the Court was faced with an extreme situation in which the link between the respondent State and the individual was very strong, and the link with the plaintiff State very weak, with the hint that nationality had been conferred in bad faith. It is therefore wiser to confine the rule expounded in this case to the peculiar facts of the case and to adopt a rule which allows the conferment of nationality to be challenged on grounds of bad faith.

---

[217] Ibid.

[218] See K. Hailbronner, "Diplomatischer Schutz bei mehrfacher Staatangehörigkeit", in G. Ress and T. Stein (eds.) *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1996), p. 36.

[219] Brownlie, *Principles, supra* note 39 p. 423; van Panhuys *supra* note 126 p. 99 and 158.

[220] *Flegenheimer* claim, *supra* note 177 p. 112 and 153; *Salem* case, *supra* note 181 p. 1185; Brownlie, *Principles, supra* note 39 p. 422; R. Y. Jennings, "General Course on Principles of International Law" (1967 II) 121 *Recueil des Cours* 325 p. 458. See also note 181 above. Bar-Yaacov *supra* note 166 pp. 150-152, 158.

[221] *Supra* notes 170 and 185; Jennings, *supra* note 220 p. 459.

[222] *Supra* note 186.

[223] *Flegenheimer* claim *supra* note 177, pp. 96-112, especially pp. 98, 103, 104, 106; *Flutie* case in Ralston and Doyle, *Venezuelan Arbitrations of 1903* p. 34; van Panhuys *supra* note 126 pp. 153-155.

[224] *Flegenheimer* claim, *supra* note 177 pp. 99, 107, 110.

[225] *Supra* note 215.

Article 6

Subject to article 9, paragraph 4, [226] the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Comment

121. Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* and of the conferment of nationality by naturalization, which does not result in the renunciation of a prior nationality. This phenomenon has given rise to difficulties in respect of military obligations and diplomatic protection, where one State of nationality seeks to protect a dual national against another State of nationality.

122. The 1930 Hague Conference on the Codification of International Law set out to reduce or abolish dual and multiple nationality[227] but ended up recognizing its existence in article 3 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,[228] which provides:

> "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

Subsequent international attempts to eliminate dual and multiple nationality have likewise failed. The European States attempted to abolish it in the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality,[229] whose preamble declares "that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe". However, once again, the Convention stopped short of achieving its goal. Discussions on the issue continued throughout the following decades, and in the end resulted in the 1997 European Convention on Nationality,[230] which deals with dual nationality in a more liberal manner, reflecting the division of interests within the Council, with many members increasingly accepting the phenomenon.

123. Although many national laws prohibit their nationals from holding the nationality (passports?) of other countries, international law contains no such prohibition. It is therefore necessary to address the question whether one State of nationality may exercise diplomatic protection against another State of nationality

---

[226] This will read: "Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State." See also Fitzmaurice *supra* note 184 p. 193.

[227] M. O. Hudson, "The First Conference for the Codification of International Law", 24 *A.J.I.L.* pp. 450-451 (1930).

[228] *Supra* note 164.

[229] T.S. No. 88 (1971), E.T.S. No. 43. Similar attempts have been made in the League of Arab States in the framework of the 1954 Convention on Nationality. See Brownlie, Relations of Nationality, *supra* note 175 p. 351.

[230] *Supra* note 165, chap. V.

on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings are divided on this subject, but the weight of authority seems to support the rule advocated in article 6.

124. The 1929 Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners declared that:

> "A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national."[231]

This principle was endorsed by the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides in article 4 that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[232]

Differences of opinion, however, were apparent at the Codification Conference. A suggestion qualifying the above provision with the inclusion of the expression "if he is habitually resident in the latter state" was rejected by the majority. Some delegations would have preferred the provision omitted altogether. There were also suggestions which, if adopted, would have made the exercise of diplomatic protection in such cases possible if humanitarian concerns justified such intervention. Therefore, the rule represented a difficult compromise.[233]

125. That the concept of dominant or effective nationality was to be considered in the treatment of dual nationals was made clear by article 5 of the Convention, which provides:

> "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

Although this treaty came into force in 1937, only some 20 States are parties to it.

126. The 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[234] does not clearly permit or deny the right of a State of nationality to make a claim on behalf of a dual national against another State of nationality.[235] However, it leans against such a claim by providing that:

---

[231] Article 16(a). *Supra* note 100 p. 22.

[232] *Supra* note 164.

[233] R. B. Flourney, Jr., "Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law" (1930) 24 *A.J.I.L.* p. 471; (1930) *A.J.I.L.* pp. 192-233.

[234] Sohn and Baxter *supra* note 37.

[235] The definition of "national" in article 21(3)(a) is wide enough to include multiple and dual nationals and article 23(1), which deals with State claims, is silent on the question of claims on behalf of dual nationals against a State of nationality.

> "A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible."[236]

127. A further attempt to formulate a rule on this subject was made by the Institute of International Law in 1965. Article 4(a) of the resolution adopted at the Warsaw Session provided that:

> "An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (jurisdiction) seized of the claim."[237]

It is interesting to note that although the claim is inadmissible before a court, diplomatic or consular channels of diplomatic protection by one State of nationality against another are apparently not in principle excluded. The practical significance of this deviation from the language of article 4 of the 1930 Convention is, however, limited.

128. Before 1930, there was considerable support for the application of the principle of dominant nationality in arbitration proceedings involving dual nationals.[238] The first claim decided on the basis of dominant nationality was the case of *James Louis Drummond*, a French-British dual national whose property was expropriated by the French Government in 1792. In its decision of 1834, the British Privy Council rejected Drummond's claim, holding that:

> "Drummond was technically a British subject, but in substance, a French subject, domiciled (at the time of seizure) in France, with all the marks and attributes of French character .... The act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects." [239]

129. Another often cited case, that of *de Brissot and de Hammer*, concerned reparation to the widows and children of two United States nationals killed by Venezuelan rebels. The claims of the widows (Venezuelan nationals by birth and United States nationals by marriage) and their children (dual nationals by birth to an American father and to a Venezuelan mother in Venezuela) were rejected by the United States-Venezuelan Claims Commission in 1885 on the ground that in case of conflict between several nationalities, the nationality acquired by birth in the territory and domicile should be considered decisive.[240]

130. The *Milani, Brignone, Stevenson* and *Mathinson* cases decided by the Venezuelan Arbitral Commissions between 1903 and 1905 also support the dominant nationality principle. The last of these concerned a claim brought by a British-Venezuelan national before the British-Venezuelan Mixed Claims

---

[236] Ibid. article 23 (5).

[237] *Supra* note 103.

[238] See Joseph *supra* note 34 p. 19-21; Leigh *supra* note 45 pp. 462-464; Brownlie, *Principles, supra* note 39 pp. 403-404; Z. R. Rode, "Dual Nationals and the Doctrine of Dominant Nationality" (1959) 53 *A.J.I.L.* pp. 140-141; Weis, *Nationality and Statelessness, supra* note 181 pp. 160-176.

[239] 2 Knapp, P. C. Rep. p. 295, 12 Eng. Rep. p. 492. Emphasis added.

[240] 3 Moore, *International Arbitrations,* pp. 2456-2459 (1898).

Commission for loss caused by the Venezuelan Government. Umpire Plumley, having established the fact that Mathinson was a British national, declared that:

> "It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission."[241]

131. The *Canevaro* case,[242] decided by the Permanent Court of Arbitration in 1912, may also be cited in support of the principle of dominant nationality. Here the question before the Permanent Court of Arbitration was whether the Italian Government could bring a monetary claim on behalf of Rafael Canevaro, a dual Italian-Peruvian national, for damages suffered due to non-payment of cheques by the Peruvian Government. Having reviewed the life of Canevaro and found that he had repeatedly acted as a Peruvian national, even running for the Senate, and having been Peru's Consul General for the Netherlands, the Court of Arbitration concluded that the Peruvian Government was entitled to reject the claim of the Italian Government.

132. The *Hein* case concerned a claim for reparation for damage suffered by Hein, a British, but formerly German national. In response to the German contention that Hein was a German national and therefore Germany was not internationally responsible for damage caused to him, the Anglo-German Mixed Arbitral Tribunal held that whether or not Hein was still formally a German national had no relevance for the claim, as

> "he had become a British national, and as he was residing in Great Britain at the time of the entry into force of the Treaty he had acquired the right to claim."[243]

133. In 1923, the question arose again, this time before the French-German Mixed Arbitral Tribunal in the *Blumenthal* case, in which the Tribunal reached a similar conclusion.[244] In 1925, the Tribunal was called upon to decide whether a State could claim for damage to its national who was also a national of the respondent State. That case concerned a claim by Madame Barthez de Monfort, a French national by birth who became a German subject as a result of her marriage to a German national. The Commission considered that it had jurisdiction to hear the claim as the claimant had "never abandoned her French domicile", and as

> "the principle of active nationality, i.e., the determination of nationality by a combination of elements of fact and law, must be followed by an international tribunal, and … the claimant was accordingly a French national and was entitled to judgement accordingly."[245]

134. The French-Mexican Mixed Claims Commission dealt with the right of the Mexican Government to claim on behalf of Georges Pinson, born in Mexico but subsequently naturalized in France. As the evidence showed that prior to the claim

---

[241] *Mathinson* case, in Ralston, *Venezuelan Arbitrations of 1903*, pp. 429-438. Emphasis added. See also *Brignone, Milani* and *Stevenson* cases, ibid. pp. 710, 754-761, 438-455, respectively.

[242] Scott, *The Hague Court Reports*, vol. I, at p. 284.

[243] *Annual Digest and Reports of Public International Law Cases 1919-22*, case No. 148, p. 216. Emphasis added.

[244] *Recueil des Décisions des Tribunaux Mixtes*, vol. 3 (1924) p. 616.

[245] *Annual Digest and Reports of Public International Law Cases 1925-26*, case No. 206, p. 279. Emphasis added.

the Mexican Government had consistently treated Pinson as a French national, the Commission concluded that even if the dual nationality of Pinson could be established, the Mexican Government would not be entitled to bring a case on his behalf.[246]

135. In *Tellech*, decided by the United States-Austria and Hungary Tripartite Claims Commission in 1928, the United States brought a claim on behalf of Alexander Tellech for compensation for having subjected him to compulsory military service in Austria. The claim was rejected on the ground that Tellech had spent 28 of his 33 years in Austria and by voluntarily residing in Austria, being a dual national, he had taken the risk of having to comply with his obligations under Austrian laws.[247]

136. The interpretation of the above decisions has been questioned by Iranian judges in the Iran-United States Claims Tribunal, who have concluded that the correct interpretation of some of these cases (even those commonly interpreted in support of the dominant nationality doctrine) supports the doctrine of the non-responsibility of States for claims of dual nationals. In addition, the rest are, in their opinion, simply irrelevant as they were decided by commissions and tribunals established between a victorious Power and a defeated State based on treaties, leading to a basic asymmetry in their jurisdiction.[248] However, it is undeniable that, as the *de Brissot and de Hammer* case demonstrates, there are decisions that adopt the dominant nationality principle which reject the claims of nationals of the victorious Powers.

137. There was, however, also judicial support for the rule of non-responsibility of States for claims of dual nationals in judicial decisions before *Nottebohm.*

138. One of the best-known of these is the *Alexander* case, which concerned the claim of a British-United States dual national brought before the United States-British Claims Commission under the Treaty of Washington of 1871. Following the establishment of Alexander's dual nationality, the Tribunal rejected his claim, holding that:

> "To treat his grievances against that other sovereign as subject of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no Government would recognize the right of another to interfere thus on behalf of one whom it regarded as a subject of its own." [249]

139. Similarly, in the *Oldenbourg* and *Honey* cases decided by the British-Mexican Claims Commission in 1929 and 1931, respectively, the Commission rejected the claims with reference to the principle, later considered by it an "accepted rule of international law",

---

[246] *Annual Digest and Reports of Public International Law Cases 1927-28*, cases Nos. 194 and 195, pp. 297-301.

[247] (1928) 2 R.I.A.A. pp. 248-249.

[248] Dissenting opinion of Dr. Shafie Shafeiei on the Issue of Dual Nationality (cases Nos. 157 and 211), 2 I.U.S.C.T.R. p. 194. This view is shared by Bar-Yaacov, *supra* note 166 pp. 214, 226, and 233-235.

[249] (1898) 3 Moore, *International Arbitrations* p. 2529. Emphasis added.

> "that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal."[250]

The British agent accepted this view and withdrew all claims on behalf of dual-national claimants.[251] The same Commission reached similar conclusions in the *Adams and Blackmore* case in 1931.[252]

140. Dealing with a somewhat different claim, the Arbitral Tribunal in the *Salem* case was faced with the claim of a naturalized American national born in Egypt. Despite his birth in Egypt, evidence indicated that Salem had been born as a Persian national and was, therefore, Persian rather than Egyptian by birth. Still, Egypt, the respondent, contended that the Tribunal did not have jurisdiction over him as his effective nationality was Egyptian. In response, the Tribunal declared that:

> "The principle of the so-called 'effective nationality' the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous Canevaro case; but the decision of the Arbitral Tribunal appointed at that time has remained isolated. Accordingly, the Egyptian Government need not refer to the rule of 'effective nationality' to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject."[253]

141. In 1949 in its advisory opinion in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[254]

142. The strongest support for the application of the dominant or effective nationality principle in claims involving dual nationals is to be found in *Nottebohm* and *Mergé*.[255]

143. The *Nottebohm* case, which held that the nationality of the claimant State should be effective and reflect a "social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights

---

[250] *Oldenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97 and *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13. Cited in Rode, *supra* note 238, p. 141.

[251] Bar-Yaacov *supra* note 166 p. 212.

[252] 5 R.I.A.A. pp. 216-217.

[253] *Supra* note 181 p. 1187.

[254] *Supra* note 54 p. 186.

[255] According to P. de Visscher ("Cours général de droit international public" (1972 II) 136 *Recueil des Cours* 1 p. 163):

> "It is in the area of diplomatic protection for dual nationals that the link doctrine, seen as a specific requirement under international law, has made slow but steady progress."

See also P. Klein, "La Protection Diplomatique des Doubles Nationaux: Reconsidération des Fondaments de La Règle de Non-responsibilité" (1988) 21 *Revue Belge de Droit Internationale* p. 184; G. I. Tunkin, et al. *Mezhdunarodnoye pravo* (1974) p. 221.

According to Leigh, the Nottebohm decision

> "may have the effect of ensuring that a State may bring a claim on behalf of a national effectively connected with it, even when the claim is against another State of which the individual is also formally a national. In such cases, the principle of effectiveness acts to permit the bringing of claims, whereas the principle of equality would have barred them."

Supra note 45 p. 469.

and duties",[256] is fully considered in the commentary to article 5. Although the Court was concerned with a case of single nationality, the judgment was premised largely on precedents in the field of dual nationality. Thus the Court stated:

> "International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of diplomatic protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc."[257]

Indeed Judge Read in his dissenting opinion contended that the requirement of genuine or effective link was limited to claims involving dual nationals.[258]

144. The application of the principle expounded in *Nottebohm* to cases of dual nationality was confirmed in the same year by the Italian-United States Conciliation Commission in the *Mergé* claim, which concerned the claim of Florence Mergé, American national by birth but Italian national by marriage to an Italian national, for compensation for the loss of a piano and other personal property, attributable to Italy. Here the Commission stated that:

> "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 whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."[259]

In its opinion the Commission made it clear that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted, together with the criteria cited above, was applied by the Italian-United States Conciliation Commission in over 50 subsequent cases concerning dual nationals. In each case the Commission referred to its decision in the *Mergé* case.[260]

145. Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality to a great number of cases concerning claims of dual Iran-United States nationals against Iran. In its first dual national case, the *Esphahanian* case,[261] in which it was established for the first time

---

[256] *Supra* note 47 p. 23.

[257] Ibid. p. 22.

[258] Ibid. pp. 41-42.

[259] (1955) 22 I.L.R. p. 455 (para V. 5). See too (1955) 16 R.I.A.A. p. 247.

[260] See, for example, *Spaulding* claim (1956) 25 I.L.R. p. 452; *Zangrilli* claim (1956) 25 I.L.R. p. 454; *Cestra* claim (1957) 25 I.L.R. p. 454; *Puccini* claim (1957) 25 I.L.R. p. 454; *Salvoni Estate* claim (1957) 25 I.L.R. p. 455; *Ruspoli* claim (1957) 25 I.L.R. p. 457; *Ganapini* claim (1959) 30 I.L.R. p. 366; *Turri* claim (1960) 30 I.L.R. p. 371; *Graniero* claim (1959) 30 I.L.R. p. 451; *Di Ciccio* claim (1962) 40 I.L.R. p. 148. See also Verdross and Simma, *supra* note 75 p. 791 (para. 1197).

[261] *Supra* note 181 pp. 157-170, see also Dissenting Opinion of Shafeiei, *supra* note 248 pp. 178-

that the Tribunal had jurisdiction over such claims, the decision of Chamber Two of the Tribunal was based on the above jurisprudence and support in doctrine for the principle of dominant nationality. The authorities referred to in the majority opinion, namely Basdevant,[262] Maury[263] and Paul de Visscher, confirmed the validity and prevalence of the dominant and effective nationality theory.[264] The following passage of de Visscher was quoted with approval:

> "The effective link or dominant attachment doctrine was applied consistently in the nineteenth century; however, because it was usually applied in order to reject claims, it came to be seen as indicating that claims on behalf of dual nationals were generally inadmissible ... The idea established itself that any claim for protection on behalf of a dual national should be declared inadmissible. That rule ... which the Institute of International Law considered it necessary to reaffirm in 1965, does not accurately reflect current law ... in rendering the *Nottebohm* judgment, the International Court really did intend to state a general principle."[265]

Turning to the most recent literature, the majority (i.e. Judges Bellet and Aldrich) found support for the effective nationality theory also in the works of Rousseau,[266] Batiffol and Lagarde,[267] Siorat,[268] Rode[269] and the International Law Commission.[270] The majority furthermore held that tribunals had generally only held that one State of nationality might not claim on behalf of a dual national where the dual national was physically present in the respondent State of nationality.

146. That jurists are divided on the applicability of the principle of dominant nationality to cases involving dual nationals was emphasized by Judge Shafeiei[271] in dissent when he cited Borchard[272] and the 1965 discussion on the issue at the Institute of International Law,[273] Oppenheim,[274] Bar-Yaacov,[275] Nguyen Quoc Dihn, Dallier and Pellet[276] and von Glahn[277] in support of the principle of non-responsibility.

---

225. For a criticism of this decision, see R. Khan, "The Iran-United States Claims Tribunal: Controversies, Cases and Contribution" (1990) p. 120; J. F. Rezek, "Le Droit International de la Nationalité" (1986 III) 198 *Recueil des Cours* p. 368.

262 "Conflicts de nationalités dans les arbitrages Vénézuéliens de 1903-1905" (1909) *Revue de Droit International Privé* pp. 41-63.

263 *Mélanges en l'honneur de G. Scelle.*

264 *Esphahanian* case, *supra* note 181 p. 164.

265 *Supra* note 255 p. 162.

266 *Droit International Public,* Précis Dalloz (1976) p. 112.

267 *Droit International Privé* No. 82, 7th ed. (1981).

268 *Jurisclasseur Droit International,* La Protection Diplomatique, Fasc. 250-B, No. 20 (1965).

269 *Supra* note 238 p. 139.

270 García-Amador, Sixth Report, *supra* note 211 pp. 46, 49.

271 *Supra* note 248 pp. 199-201, 207.

272 (1931) 36-I Ann IDI p. 289; (1932) 37 Ann IDI p. 278.

273 (1965) 51-I and 51-II Ann IDI.

274 *International Law,* 8th ed. (1955), vol. I p. 348.

275 *Supra* note 166 p. 238.

276 *Droit international public* (1980) p. 711. See now 6th ed., *supra* note 75 p. 774. Combacau and Sur also doubt whether the traditional rule expounded in the 1930 Convention has been reversed by the *Mergé* case: s*upra* note 209 pp. 327-328.

277 *Law Among Nations* (1981), p. 207.

147. *Esphahanian* was confirmed by the Full Tribunal in *Case No. A/18*.[278] Again, the majority,[279] comprising non-Iranian judges, and the minority[280] claimed the preponderance of academic writings to support their respective positions.

148. The Iran-United States Claims Tribunal, established by the Algiers Declarations of 1981,[281] does not provide for inter-State claims on behalf of nationals. It is

> "not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals."[282]

Despite this institutional peculiarity there is no doubt that the jurisprudence of the Iran-United States Claims Tribunal has added considerably to the support for the dominant nationality principle.[283] Some 130 cases involving dual nationals have been brought before the Tribunal.[284]

149. Another institution which gives support to the dominant nationality principle is the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. The condition applied by the Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.[285]

150. The principle of dominant nationality was adopted in García Amador's reports to the International Law Commission. Article 21(4) of his third report states:

---

[278] *Supra* note 62.

[279] The majority added the following authors to those who support the dominant nationality principle: Reuter, *Droit International Public*, 5th ed. (1976) p. 236; Messia, "La protection diplomatique en cas de double nationalité", *Hommage a une génération de juristes au Président Basdevant* (1960) p. 556; Donner, *The Regulation of Nationality in International Law* (1983) p. 95; Leigh, *supra* note 45 pp. 453, 475; Griffin, State Department memorandum of 5 November 1957.

[280] The voluminous dissent of the Iranian judges relied on the authors cited in Judge Shafeiei's dissenting opinion in *Esphahanian*, adding Fitzmaurice *supra* note 184 p. 193 and Jessup *supra* note 101 p. 100. (See 5 I.U.S.C.T.R. pp. 327-328.)

[281] Declaration of the Government of the Democratic and Popular Republic of Algeria (1981) 20 I.L.M. pp. 224-229; and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 20 I.L.M. 230-233.

[282] *Esphahanian*, *supra* note 181 p. 165.

[283] See, generally, G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996) pp. 44-79; and C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (1998) pp. 32-42, 288-323.

[284] M. Aghahosseini, "The Claims of Dual Nationals Before the Iran-United States Claims Tribunal: Some Reflections" (1997) 10 *L.J.I.L.* p. 22.

[285] United Nations document S/AC.26/1991/7/Rev.1, para. 11.

> "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[286]

It is also supported by Orrego Vicuña in his 1999 report to the International Law Association.[287]

151. The 1997 European Convention on Nationality[288] fails to take sides on this issue. In article 17(2) it provides that its provisions on multiple nationality do not affect

> "the rules of international law concerning diplomatic or consular protection by a State Party in favour of one or its nationals who simultaneously possesses another nationality."

152. As demonstrated by the decisions of the Iran-United States Claims Tribunal, academic opinion is divided on the dominant nationality test in claims involving dual nationals. However, even writers[289] who are cited against such a test accept its utility. The latest edition of *Oppenheim's International Law*, which endorses the rule contained in article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (which it states is "probably" a rule of customary international law), concedes that the conflict between articles 4 and 5 of the 1930 Hague Convention is often settled in favour of article 5 in cases involving one State of nationality against the other, provided the dominant nationality of the individual is that of the claimant State.[290]

153. One of the principal objections to the dominant or effective nationality principle is its indeterminacy. While some authorities stress domicile[291] or residence[292] as evidence of an effective link, others point to the importance of allegiance[293] or the voluntary act of naturalization.[294] The jurisprudence of the Iran-United States Claims Tribunal has made a major contribution to the elucidation of the factors to be considered in determining the effectiveness of the individual's link with his or her State of nationality. Factors it has considered in a large number of cases include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in

---

[286] García-Amador, Third Report, *supra* note 116 p. 61. See also article 23(5) in García-Amador, Fifth Report, *supra* note 116 p. 49.

[287] Orrego Vicuña proposed the following rule:

> "In cases of dual nationality the effectiveness of the link should prevail over other considerations, allowing if justified for claims against the State of which the individual is also a national."

Supra note 93 p. 27, clause 11.

[288] *Supra* note 165.

[289] Brownlie, *Principles, supra* note 39 p. 404; Geck *supra* note 28 p. 1051; Parry *supra* note 190 p. 699.

[290] *Supra* note 34 p. 516.

[291] Borchard *supra* note 50 p. 589; Parry *supra* note 190 p. 711.

[292] Article 5 of the 1930 Hague Convention, *supra* note 164; Bar-Yaacov *supra* note 166 pp. 136-137, 260; Fitzmaurice *supra* note 184 p. 193.

[293] Judge Read in his dissenting opinion in *Nottebohm, supra* note 47 pp. 44-45; Brownlie, *Principles, supra* note 39 p. 422.

[294] Jennings *supra* note 220 p. 459; Randelzhofer *supra* note 203 p. 507.

each country, the nationality of the family and the registration of birth and marriage at the embassy of the other State of nationality; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality and other ties with it; possession and use of passport of the other State; renunciation of one nationality; and military service in one State. None of these factors was given a decisive role, and the weight attributed to each factor varied according to the circumstances of the case.[295] The Tribunal has also had regard to factors indicating *mala fide* acquisition or use of nationality.[296]

154. Records of current State practice concerning diplomatic protection of dual nationals against another State of which they are also nationals are rare. However, available records suggest change in favour of the acceptance of the principle of dominant or effective nationality.[297]

155. In his treatise on *Dual Nationality* (1961), Bar-Yaacov states that contemporary United States practice rejects diplomatic protection for dual nationals against the other State of nationality, especially if they have taken up residence in that State. No protection was given to nationals who did not express a preference for United States nationality upon election, or when the individual elected United States nationality but subsequently took up residence in the other State of nationality. Concerning naturalized citizens, the original United States position was not to afford protection against the State of origin. However, in 1859, the policy was reversed. Denying the non-responsibility doctrine, the Department of State claimed that once an individual became a United States citizen, its alliance to the United States was exclusive. Based on that argument the Government of the United States attempted on several occasions to exercise diplomatic protection on behalf of naturalized Americans against their State of other nationality, even when they had returned to that country.[298] British practice demonstrated similar patterns. Protection was denied against the other State of nationality as long as the person was residing there. In contrast to United States policy, the United Kingdom did not expand protection to

---

[295] Brower and Brueschke *supra* note 283 pp. 32-42.

[296] For the treatment of these factors and the caveat concerning fraudulent acquisition or use of nationality see, for example, *Esphahanian* case, *supra* note 181 p. 166. *Golpira v. Iran* (1983) 2 I.U.S.C.T.R. 171 p. 174; *Danielpour (M.) v. Iran* (1989) 22 I.U.S.C.T.R. 118 p. 121; *Danielpour (S. J.) v. Iran* (1989) 22 I.U.S.C.T.R. p. 126; *Berookhim v. Iran* (1990) 25 I.U.S.C.T.R. 278 p. 285; *Nemazee v. Iran* (1990) 25 I.U.S.C.T.R. 153 p. 159; *Golshani v. Iran* (1989) 22 I.U.S.C.T.R. 155 p. 159; *Etezadi v. Iran* (1990) 25 I.U.S.C.T.R. 264 p. 270; *Hemmat v. Iran* (1989) 22 I.U.S.C.T.R. 129 p. 136; *Ebrahimi v. Iran* (1989) 22 I.U.S.C.T.R. 138 p. 144; *Perry-Rohani v. Iran* (1989) 22 I.U.S.C.T.R. 194 p. 198; *Abrahamian v. Iran* (1989) 23 I.U.S.C.T.R. 285 p. 287; *Ghaffari (A.) v. Nioc* (1990) 25 I.U.S.C.T.R. 178 p. 184; *Mahmoud v. Iran* (1985) 9 I.U.S.C.T.R. p. 350; *Malek v. Iran* (1988) 19 I.U.S.C.T.R. 48 p. 52; *Nourafchan v. Iran* (1989) 23 I.U.S.C.T.R. p. 310; etc. See also Aldrich, *supra* note 283 pp. 61-80; Brower and Brueschke, *supra* note 283 pp. 298-305, 315-316; D. J. Bederman, "Nationality of Individual Claimants before the Iran-United States Claims Tribunal" (1993) 42 *I.C.L.Q.* 119 p. 129.

[297] Hailbronner has argued, with reference to contemporary State practice and legal developments in the field of human rights law granting protection also against the State of nationality, that although there is not yet a clear uniform practice in this field and although the majority of States may be opposed to protection in such cases, there is at least a slow change towards acceptance of the principle of effectiveness in this context. (*Supra* note 218 pp. 30-36.) *Sed contra* Lee, *supra* note 141 p. 159.

[298] Bar-Yaacov *supra* note 166 pp. 64-72 and 147-155.

British nationals who were naturalized in the United Kingdom if they decided to return to their State of origin.[299]

156. However, owing to changes of policy in both States, Bar-Yaacov's conclusions have become outdated. Currently the United States Department of State applies the principle of effective nationality[300] and, according to the 1985 rules of the British Government,

> "HMG will not normally take up [a dual national's] claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent has, in the circumstances which gave rise to the injury, treated the claimant as a UN [sic U.K.] national."[301]

157. In the 1970s, the Chilean Government refused diplomatic protection against another State of nationality.[302] At the same time, the Federal Republic of Germany was not opposed to the informal exercise of such protection,[303] whereas Switzerland, although considering non-responsibility to be the general rule, did not deny the possibility of protection against another State of nationality in exceptional cases.[304]

158. Inevitably the application of the principle of effective or dominant nationality in cases of dual nationality will invoke a balancing of the strengths of competing nationalities. A tribunal should be cautious in applying the principle of preponderance of effectiveness where the links between the dual national and the two States are fairly evenly matched, as this would seriously undermine the equality of the two States of nationality.[305]

159. A helpful manner of resolving disputes between States of nationality over dual nationals is to be found in the caveat expounded by the Iran-United States Claims Tribunal in Case No. A/18:

> "In cases where the Tribunal finds jurisdiction based upon a dominant or effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim."[306]

According to this rule the Tribunal must examine the circumstances of the case at the merits stage. If it finds that the dual national used the nationality of the

---

[299] Ibid. pp. 72-75 and 155-157.

[300] Brownlie, *Principles*, *supra* note 39 p. 404, citing the *Digest of US Practice* (1979). See also Lee, *supra* note 141 p. 160. The Netherlands follows the same principle. Ibid. p. 161.

[301] Rule III of Rules Applying to International Claims, quoted in Warbrick, *supra* note 132 p. 1007.

[302] Orrego Vicuña, Chile, *supra* note 142 p. 141.

[303] Seidl-Hohenveldern, "Federal Republic of Germany", in E. Lauterpacht and J. G. Collier (eds.), *Individual Rights and the State in Foreign Affairs: An International Compendium* (1977) 243 p. 247.

[304] Caflisch, *supra* note 148 p. 499.

[305] Rezek *supra* note 255 pp. 266-267. See also Klein *supra* note 255 p. 184. This is the way the Mergé claim (*supra* note 259 p. 455, para. V.5 quoted *supra* in the commentary of article 6 (para. 91)) has been interpreted: see van Panhuys (*supra* note 126 p. 78); Verdross and Simma (*supra* note 75 p. 905 (para. 1338)); Jürgens (*Diplomatischer Schutz und Staatenlose* (1987), p. 206) and Leigh (*supra* note 45 p. 472).

[306] *Supra* note 62 pp. 265-266.

respondent State to secure benefits available only to nationals of the respondent State, it may refuse to make an award in favour of the claimant State.[307]

160. The weight of authority supports the dominant nationality principle in matters involving dual nationals. Moreover, both judicial decisions and scholarly writings have provided clarity on the factors to be considered in making such a determination. The principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the State of which they are nationals.[308]

Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Comment

161. The effective or dominant nationality principle has also been applied where a State of nationality seeks to protect a dual national against a third State. In the *de Born* case decided by the Yugoslav-Hungarian Mixed Arbitral Tribunal in 1926 concerning the claim of a dual Hungarian-German national against Yugoslavia, the Tribunal declared that it had jurisdiction, having established that:

> "It was the duty of the tribunal to examine in which of the two countries existed the elements in law and in fact for the purpose of creating an effective link of nationality and not merely a theoretical one, and it was the duty of a tribunal charged with international jurisdiction to solve conflicts of nationalities. For that purpose it ought to consider where the claimant was domiciled, where he conducted his business and where he exercised his political rights. The nationality of the country determined by the application of the above test ought to prevail."[309]

162. This principle received some support from article 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws,[310] which provides:

> "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall,

---

[307] See *Khosrowshahi (F. L.) v. Iran* (1990) 24 I.U.S.C.T.R p. 45; *Saghi (J.) v. Iran* (1993) Award No. 544-298-2. See further, Aldrich *supra* note 283 pp. 76-79; Brower and Brueschke, *supra* note 283 pp. 296-322.

[308] See Hailbronner *supra* note 218 p. 35.

[309] *Annual Digest and Reports of Public International Law Cases* 1925-26, case No. 205.

[310] *Supra* note 164.

> of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is principally and habitually resident, or the nationality of the country with which in the circumstances he appears in fact to be most closely connected."

Although the article makes no specific mention of diplomatic protection, it can be applied to the protection of dual nationals.

163. Subsequent codification proposals adopted a similar approach. In 1965, the Institute of International Law, at its Warsaw Session, adopted a resolution which stated in article 4(b):

> "An international claim presented by a State for injury suffered by a individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (jurisdiction) seized of the claim unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State."[311]

164. The 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[312] gave implicit support to this rule as its general support for the principle of effective nationality may be interpreted to apply to all cases involving the diplomatic protection of dual nationals. García Amador adopted a similar approach in his Third Report of 1958, which contained a proposal to the effect that no diplomatic protection should be possible on behalf of dual or multiple nationals unless it can be demonstrated that the individual has "stronger and more genuine ties" with the State offering such protection than with any other States.[313]

165. The weight of judicial opinion is against the requirement of a dominant or effective nationality where proceedings are brought on behalf of a dual national against a third State, of which the injured person is not a national.

166. In the *Salem* case the Arbitral Tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It held that:

> "the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two Powers whose national is interested in the case by referring to the nationality of the other Power."[314]

167. A similar conclusion was reached by the Italian-United States Conciliation Commission in the *Vereano* claim, which concerned a claim on behalf of an American national who had acquired Turkish nationality by marriage. There the Commission quoted its decision in *Mergé*, according to which:

---

[311] *Supra* note 103.
[312] Article 23(3). Sohn and Baxter *supra* note 37.
[313] Ibid., article 21(4).
[314] *Supra* note 181 p. 1188 (1932).

> "United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United States nationals" under the Treaty, even if their prevalent nationality was that of a third State."[315]

168. This rule was confirmed in 1958 by the Commission in the *Flegenheimer* claim.[316]

169. In the Stankovic claim, the same Commission dealt with a claim brought by the United States on behalf of a Yugoslavian national who had emigrated to Switzerland after the establishment of the Federal Republic of Yugoslavia and obtained a stateless passport there in 1948. In 1956, he became a naturalized citizen of the United States. Following objection by the Italian authorities, the Commission stated that the United States was entitled to espouse Stankovic's claim even if he was also a national of another State. In their opinion a change from the nationality of one United Nations member to that of another member would not affect the jurisdiction of the Commission.[317]

170. The above conflict over the requirement of an effective link in cases of dual nationality involving third States is best resolved by a compromise which requires the claimant State only to show that there exists a bona fide link of nationality between it and the injured person. This rule has been followed by the Iran-United States Claims Tribunal in a number of cases concerning claimants who were at the same time nationals of the United States and a third State.[318] Even where the issue of dominant nationality was raised in such cases, the required proof was often considerably less strict than in cases concerning Iran-United States dual nationals.[319] However, in some cases the Tribunal indicated that if it could be proved that the claimant also possessed the nationality of a third State, it would be necessary to determine his or her dominant nationality.[320]

171. The United Nations Compensation Commission follows the same approach, as it will not consider claims "on behalf of Iraqi nationals who do not have bona fide nationality of another State" while there is no restriction on claims by dual nationals of States other than Iraq.[321]

172. Where the State of nationality claims from another State of nationality on behalf of a dual national there is a clear conflict of laws.[322] No such problem arises, however, where one State of nationality seeks to protect a dual national against a

---

[315] *Mergé* claim, *supra* note 259 p. 456, para. 8, cited in *Vereano* claim (1957) 25 I.L.R. pp. 464-465.

[316] *Supra* note 177 p. 149.

[317] (1963) 40 I.L.R. p. 155.

[318] See, for example, *Dallal v. Iran* (1983) 3 I.U.S.C.T.R. 10 p. 23. Bederman, *supra* note 296 pp. 123-124.

[319] See, for example, *Saghi (J.M.) v. Iran* (1987) 14 *I.U.S.C.T.R.* 3 pp. 4, 6; *McHarg, Roberts, Wallace and Todd v. Iran* (1986) 13 I.U.S.C.T.R. p. 289. See further Aldrich *supra* note 283 pp. 56-57.

[320] *Uiterwyk Corporation v. Iran* (1988) 19 I.U.S.C.T.R. 107 pp. 107 and 118. (Aldrich considers that this case supports the view that less strict evidence was required in these types of cases. *Supra* note 283 p. 57.) *Asghar v. Iran* (1990) 24 I.U.S.C.T.R. pp. 242-243; *Daley v. Iran* (1988) 18 I.U.S.C.T.R. pp. 236-237.

[321] *Supra* note 285 p. 3.

[322] Parry *supra* note 190 p. 707.

third State. Consequently there is no reason to apply the dominant or effective nationality principle.[323] This approach is adopted in British State practice.[324]

173. The respondent State is, however, entitled to object where the nationality of the claimant State has been acquired in bad faith to bring the proceedings in question. Diplomatic protection should therefore be possible in cases of multiple nationals by any of the States with which they have a bona fide link of nationality against any third State. A multiple national should be allowed to bring a claim for reparation under any arrangement which makes it possible for a national of any of the States with which (s)he has a bona fide link of nationality to bring an international claim.

174. In principle there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. The joint exercise of diplomatic protection by two or more States with which the injured individual has a bona fide link should therefore be permissible.[325]

Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

Comment

175. As shown in article 1(1) and the commentary thereto, diplomatic protection is traditionally limited to nationals.[326] That it did not extend to stateless persons was made clear in *Dickson Car Wheel Company v. United Mexican States*, when the Tribunal stated:

> "A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."[327]

---

[323] See, for example, *Oppenheim's International Law, supra* note 34 p. 883. See also S. V. Chernichenko, *Mezhdunarodno-pravovye voprosy grazhdanstva* (1968) pp. 110-112; N. A. Ushakov et al., *Kurs mezhdunarodnogo Prava* (1990) pp. 80-82; Hailbronner *supra* note 218, p. 36. According to Lee, consular protection is usually rendered in such cases without the objection of the host State. (S*upra* note 141, p. 159.)

[324] The first sentence of rule III of the British Government's Rules Applying to International Claims cited in Warbrick, *supra* note 132 pp. 1006-1007, states that:

> "Where the claimant is a dual national, HMG may take up his claim (although in certain circumstances it may be appropriate for HMG to do so jointly with the other Government entitled to do so)."

[325] Van Panhuys *supra* note 126 p. 80; Ohly *supra* note 162 p. 289; Warbrick *supra* note 132 pp. 1006-1007.

[326] At the 1930 Hague Codification Conference the Netherlands proposed that the right of the host State to protect refugees should be recognized. This proposal was not adopted. See van Panhuys, *supra* note 126 p. 72.

[327] 4 R.I.A.A. 699 p. 678.

The traditional rule fails to take account of the position of both stateless persons and refugees and accordingly is out of step with contemporary international law, which reflects a concern for the status of both these categories of persons.[328] This is evidenced by such conventions as the Convention on the Reduction of Statelessness (1961)[329] and the Convention on the Status of Refugees (1951).[330]

176. Refugees present a particular problem as they are "unable or … unwilling to avail [themselves] of the protection of [the State of nationality]".[331] If a refugee requests and enjoys the protection of her State of nationality, she loses her refugee status.[332] Moreover, it is argued by Grahl-Madsen that the State of nationality loses its right to exercise diplomatic protection on behalf of the refugee.[333]

177. Some protection is offered to stateless persons and refugees by human rights conventions which confer rights on all persons resident in a State party. This protection is inevitably limited, as a majority of States do not accept these instruments or the right of individual complaint.

178. Conventions on refugees and statelessness fail to address the question of diplomatic protection satisfactorily. The Schedule to the 1951 Convention Relating to the Status of Refugees provides for the issue of Convention Travel Documents,[334] but makes it clear that "the issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue and does not confer on these authorities the right of protection."[335] On the other hand, Goodwin-Gill states that "in practice … assistance falling short of full protection is often accorded by issuing States …"[336] The 1954 Convention relating to the Status of Stateless Persons[337] suggests that stateless persons might be considered by the State of residence as "having the rights and obligations which are attached to the possession of the nationality of that country."[338] It further provides in the context of administrative assistance that:

> "When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities."[339]

---

328 See *Oppenheim's International Law, supra* note 34 p. 887.

329 989 U.N.T.S. p. 175.

330 189 U.N.T.S. p. 150.

331 Article 1(A)(2) of the Convention Relating to the Status of Refugees 189 U.N.T.S. p. 137.

332 See A. Grahl-Madsen, "Protection of Refugees by Their Country of Origin" (1986) 11 *Yale J.I.L.* p. 392.

333 Ibid. 389, 391, 394. For a discussion of this issue see Lee, *supra* note 141 pp. 352-359.

334 In terms of article 28.

335 Para. 16.

336 *The Refugee in International Law,* 2nd ed. (1996) p. 305. Switzerland takes the position that it will protect refugees who are no longer attached de facto to their home State, with the consent of the State against which the claim is presented: Note of 26 January 1978 ((1978) 34 *Schweiz J.I.R.* p. 113). Belgium provides administrative and consular protection abroad to non-Belgian nationals who have refugee status in Belgium. (Lee, *supra* note 141 p. 358.)

337 360 U.N.T.S. p. 117.

338 Article 1(2)(ii).

339 Ibid. Article 25 (1). See also article 14 with regard to artistic rights and industrial property.

In contrast, the 1961 Convention on the Reduction of Statelessness[340] is silent on the subject of protection.

179. In these circumstances it has been suggested that the State in which the refugee or stateless person has been resident for a substantial period of time and with which that person has an effective link should be entitled to exercise diplomatic protection on his or her behalf.[341] This would accord with the view expressed by Grahl-Madsen that:

> "an application for asylum or refugee status in not merely an expression of a desire, but is a definite legal step that may result in the granting of asylum or refugee status. If granted, such status resembles acquisition of a new nationality."[342]

This view is supported by Lee, who states:

> "Indeed, there are grounds for supporting the analogy of the status of a refugee with that of a national of the state of asylum. For, from the standpoint of the refugee, his application for political asylum demonstrates his intent to sever his relationship with the country of origin, on the one hand, and his willingness to avail himself of the protection of the State of asylum, on the other. The State of asylum, by granting asylum to the refugee and issuing identity and travel documents to him, demonstrates its willingness to accept and protect him."[343]

180. Residence is an important feature of the effective link requirement, as demonstrated by the jurisprudence of the Iran-United States Claims Tribunal.[344] It is also recognized as a basis for the bringing of a claim before the United Nations Compensation Commission.[345]

181. The 1967 European Convention on Consular Functions (not yet in force) establishes a similar system of protection for stateless persons based on habitual residence rather than on nationality:

> "A consular officer of the State where a stateless person has his habitual residence may protect such a person as if article 2, paragraph 1, of the present Convention applied, provided that the person concerned is not a former national of the receiving State."[346]

Its Protocol concerning the Protection of Refugees lays down a similar rule:

> "The consular officer of the State where the refugee has his habitual residence shall be entitled to protect such a refugee and to defend his rights and interests in conformity with the Convention, in consultation, whenever possible, with

---

[340] *Supra* note 329.

[341] Brownlie, *Principles, supra* note 39 p. 423; Ohly *supra* note 162 p. 313 fn 81. See also *Oppenheim's International Law, supra* note 34, pp. 886-887; Jürgens *supra* note 305, p. 218.

[342] *Supra* note 332 p. 381.

[343] *Supra* note 141 p. 358. See also decision No. 60 VIII 59 of 4 August 1959 of the Verwaltungsgerichtshof Munich.

[344] See the discussion of effective link in para. 97, *supra*.

[345] Article 5(a) of the Provisional Rules for Claims Procedure provides that: "A Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory". United Nations document S/AC.26/1992/10.

[346] E.T.S. No. 61, article 46(1).

the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it."[347]

182. Article 8 is therefore in line with contemporary developments relating to the protection of refugees and stateless persons. It is furthermore supported by the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,[348] which defines a "national" for the purposes of the Convention as a "stateless person having his habitual residence in that State." Orrego Vicuña in his 1999 report to the International Law Association[349] also recommends that it should be possible for claims to be brought on behalf of non-nationals in case of "humanitarian concerns where the individual would have no other alternative to claim for his rights."

183. Article 8 is an exercise in progressive development rather than codification. For this reason it is important to attach conditions to the exercise of that right. The proviso to article 8 restricts the exercise of that right to injuries to the individual that occurred after he or she became a resident of the claimant State. As the freedom of the refugee or stateless person to travel abroad will generally be limited by the reason of the absence of a passport or other valid travel document, this is a right that will rarely be exercised in practice.

184. The proviso contains an important qualification to the right to exercise diplomatic protection: in many cases the refugee will have suffered injury at the hands of his State of nationality, from which he has fled to avoid persecution. It would, however, be improper for the State of refuge to exercise diplomatic protection on behalf of the refugee in such circumstances. The objection to allowing a State of subsequent nationality to protect a national against a State of prior nationality applies a fortiori to the protection of refugees. This subject is discussed in the article dealing with continuous nationality.

Future reports (and articles)

185. A report will be submitted at a later stage dealing with two matters:

(a) The right of a State of which an injured person is not a national to exercise diplomatic protection on behalf of a person if a breach of a *jus cogens* norm has caused the injury and the State of nationality has refused to exercise protection. This draft article will examine the controversial question whether the doctrine of obligations *erga omnes* has any application to diplomatic protection;

(b) The requirement of continuous nationality and the transferability of claims.

186. Subsequent reports will deal with:

(a) The exhaustion of local remedies;

(b) Waiver of diplomatic protection on behalf of the injured person;

---

[347] E.T.S. No. 61A, article 2(2).

[348] See Sohn and Baxter *supra* note 37 p. 578 (Article 21(3)(c)).

[349] *Supra* note 93 p. 27, clause 7.

(c) Denial of consent to diplomatic protection on behalf of the injured person;

(d) Protection of corporations.

187. The protection of an agent of an international organization by the organization — "functional protection" — raises special issues distinct from diplomatic protection. At the current stage, the Special Rapporteur has not decided whether to include this topic in his study. The advice of the Commission on this subject will be of assistance.

188. "Denial of justice" is a topic closely associated with diplomatic protection. Nevertheless it seems to represent a primary rather than a secondary rule. Again, the advice of the Commission on whether to include this topic would be appreciated.