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STATE RESPONSIBILITY
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Legal instruments and documents

1. Articles on Responsibility of States for Internationally Wrongful Acts, 2001
For text, see *The Work of the International Law Commission*, 8th ed., vol. II, pp. 401-413
2. Draft articles on diplomatic protection, with commentaries (Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), A/61/10, p. 23)
3. *Materials on the Responsibility of States for Internationally Wrongful Acts*, United Nations Legislative Series, 2012 (ST/LEG/SER.B/25) (publication distributed)
4. United Nations General Assembly resolutions 56/83 of 12 December 2001, 59/35 of 2 December 2004, 62/61 and 62/67 of 6 December 2007, 65/19 and 65/27 of 6 December 2010, and 68/104 and 68/113 of 16 December 2013

Case law

5. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
6. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
7. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
8. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
9. *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, 15 July 1999 (Judgment)
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
10. *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*
11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, I.C.J. Report 2007, p. 43
For relevant excerpts, see *Materials on the Responsibility of States for Internationally Wrongful Acts*

12. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582*

**Draft Articles on Diplomatic Protection (with commentaries),
2006**

Yearbook of the International Law Commission, 2006, vol. II, Part
Two, p. 23



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Report of the International Law Commission

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**General Assembly
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Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2006*.

2. Text of the draft articles with commentaries thereto

50. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-eighth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.¹⁶ The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.¹⁷ Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.¹⁸

(2) Diplomatic protection belongs to the subject of "Treatment of Aliens". No attempt is made, however, to deal with the primary rules on this subject - that is, the rules governing the

treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only - that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the articles on Responsibility of States for internationally wrongful acts provides:

"The responsibility of a State may not be invoked if:

- "(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- "(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

The present draft articles give content to this provision by elaborating on the rules relating to the nationality of claims and the exhaustion of local remedies.

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as "functional protection". Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is traditionally a mechanism designed to secure reparation for injury to the national of a State premised largely on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the International Court of Justice in the *Reparation for Injuries* case: "In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the

¹⁶ *Yearbook ... 1956*, vol. II, pp. 173-231, *Yearbook ... 1957*, vol. II, pp. 104-30, *Yearbook ... 1958*, vol. II, pp. 47-73, *Yearbook ... 1959*, vol. II, pp. 1-36, *Yearbook ... 1960*, vol. II, pp. 41-68, and *Yearbook ... 1961*, vol. II, pp. 1-54.

¹⁷ *Ibid.*, *Official Records of the General Assembly Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 77, commentary on article 44, footnotes 722 and 726.

¹⁸ Articles 28, 30, 31, 34-37. Much of the commentary on compensation (art. 36) is devoted to a consideration of the principles applicable to claims concerning diplomatic protection.

Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. ...”¹⁹

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

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

Commentary

- (1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.
- (2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,²⁰ maintain the distinction between primary and secondary rules and deal only with the latter.

¹⁹ Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion, *I.C.J. Reports 1949*, p. 174 at pp. 185-186.

²⁰ See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, para. 77, general commentary, paras. (1) to (3).

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen,”²¹ and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case that “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, the right to ensure, in the person of its subjects, respect for the rules of international law.”²² Obviously it is a fiction - and an exaggeration²³ - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not “in reality” - to quote *Mavrommatis* - assert its own right only. “In reality” it also asserts the right of its injured national.

(4) In the early years of international law the individual had no place, no rights in the international legal order. Consequently if a national injured abroad was to be protected this could be done only by means of a fiction - that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign

²¹ E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, vol. III (1758, English translation by C.G. Fenwick, Carnegie Institution, Washington 1916), chap. VI, p. 136.

²² *Mavrommatis Palestine Concessions (Greece v. U.K.) P.C.I.J. Reports*, 1924, Series A, No. 2, p. 12. This dictum was repeated by the Permanent Court of International Justice in the *Panevezys Saldaitis Railway case (Estonia v. Lithuania) P.C.I.J. Reports*, 1939, Series A/B, No. 76, p. 16.

²³ J.L. Briery, *The Law of Nations: An Introduction to the International Law of Peace, 6th edition* (Oxford: Clarendon Press, 1963), Sir H. Waldock (ed), pp. 276-7.

Governments. This has been recognized by the International Court of Justice in the *La Grand*²⁴ and *Avena* cases.²⁵ This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights. The individual has rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose human rights have been violated abroad.

(5) Draft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national - or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act.

(6) Draft article 1 deliberately follows the language of the articles on Responsibility of States for internationally wrongful acts.²⁶ It describes diplomatic protection as the invocation of the responsibility of a State that has committed an internationally wrongful act in respect of a national of another State, by the State of which that person is a national, with a view to implementing responsibility. As a claim brought within the context of State responsibility it is an inter-State claim, although it may result in the assertion of rights enjoyed by the injured national under international law.

(7) As draft article 1 is definitional by nature it does not cover exceptions. Thus no mention is made of stateless persons and refugees referred to in draft article 8 in this provision. Draft article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.

(8) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between “diplomatic action” and “judicial proceedings” when

describing the action that may be taken by a State when it resorts to diplomatic protection.²⁷ Draft article 1 retains this distinction but goes further by subsuming judicial proceedings under “other means of peaceful settlement”. “Diplomatic action” covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. “Other means of peaceful settlement” embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4, of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection. Diplomatic protection does not include demarches or other diplomatic action that do not involve the invocation of the legal responsibility of another State, such as informal requests for corrective action.

(9) Diplomatic protection may be exercised through diplomatic action or other means of peaceful settlement. It differs from consular assistance in that it is conducted by the representatives of the State acting in the interest of the State in terms of a rule of general international law, whereas consular assistance is, in most instances, carried out by consular officers, who represent the interests of the individual, acting in terms of the Vienna Convention on Consular Relations. Diplomatic protection is essentially remedial and is designed to remedy an internationally wrongful act that has been committed; while consular assistance is largely preventive and mainly aims at preventing the national from being subjected to an internationally wrongful act.

(10) Although it is in theory possible to distinguish between diplomatic protection and consular assistance, in practice this task is difficult. This is illustrated by the requirement of the exhaustion of local remedies. Clearly there is no need to exhaust local remedies in the case of consular assistance as this assistance takes place before the commission of an internationally wrongful act. Logically, as diplomatic protection arises only after the commission of an internationally wrongful act, it would seem that local remedies must always be exhausted, subject to the exceptions described in draft article 15.

²⁴ *La Grand* case (*Germany v. United States of America*) *I.C.J. Reports 2001*, p. 466 at paras. 76-77.

²⁵ *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* *I.C.J. Reports, 2004*, p. 12 at para. 40.

²⁶ See Chapter 1 of Part Three titled “Invocation of the Responsibility of a State” (articles. 42-48). Part Three itself is titled “The implementation of the International Responsibility of a State”.

²⁷ *Mavrommatis Palestine Concessions, op. cit.*, *Panvezys-Saldutskis Railway case, op. cit.*, p. 4 at p. 16; *Nottebohm case (Liechtenstein v. Guatemala)*, Second Phase Judgment, *I.C.J. Reports 1955*, p. 4 at p. 24.

(11) In these circumstances draft article 1 makes no attempt to distinguish between diplomatic protection and consular assistance. The draft articles prescribe conditions for the exercise of diplomatic protection which are not applicable to consular assistance. This means that the circumstances of each case must be considered in order to decide whether it involves diplomatic protection or consular assistance.

(12) Draft article 1 makes clear the point, already raised in the general commentary,²⁸ that the present draft articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded to its agent by an international organization.²⁹

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961³⁰ and the Vienna Convention on Consular Relations of 1963.³¹ Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

(14) In most circumstances it is the link of nationality between the State and the injured person that gives rise to the exercise of diplomatic protection, a matter that is dealt with in draft articles 4 and 9. The term "national" in this article covers both natural and legal persons. Later in the draft articles a distinction is drawn between the rules governing natural and legal persons, and, where necessary, the two concepts are treated separately.

Article 2

Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

²⁸ See general commentary, para. (3).

²⁹ *Reparation for Injuries, I.C.J. Reports 1949*, p. 174.

³⁰ United Nations, *Treaty Series*, vol. 500, p. 95.

³¹ United Nations, *Treaty Series*, vol. 596, p. 261.

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1³² it is neutral on this subject.

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

"... within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress ... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".³³

(3) Today there is support in domestic legislation³⁴ and judicial decisions³⁵ for the view that there is some obligation, however limited, either under national law or international law, on the

³² See commentary to article 1, paras. (3) to (5).

³³ *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *Second Phase, Judgment, I.C.J. Reports 1970*, p. 4 at p. 44.

³⁴ See the First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, paras. 80-87.

³⁵ *Rudolf Hess* case, ILR vol. 90, p. 387; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM vol. 44 (2005), p. 173.

State to protect its nationals abroad when they have been subjected to serious violation of their human rights. Consequently, draft article 19 declares that a State entitled to exercise diplomatic protection “should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred” (emphasis added). The discretionary right of a State to exercise diplomatic protection should therefore be read with draft article 19 which recommends to States that they should exercise that right in appropriate cases.

(4) Draft article 2 deals with the right of the State to exercise diplomatic protection. It makes no attempt to describe the corresponding obligation on the respondent State to consider the assertion of diplomatic protection by a State in accordance with the present articles. This is, however, to be implied.

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

Commentary

(1) Whereas draft article 2 affirms the discretionary right of the State to exercise diplomatic protection, draft article 3 asserts the principle that it is the State of nationality of the injured person that is entitled, but not obliged, to exercise diplomatic protection on behalf of such a person. The emphasis in this draft article is on the bond of nationality between State and national which entitles the State to exercise diplomatic protection. This bond differs in the cases of natural persons and legal persons. Consequently separate chapters are devoted to these different types of persons.

- (2) Paragraph 2 refers to the exception contained in draft article 8 which provides for diplomatic protection in the case of stateless persons and refugees.

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

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

Commentary

(1) Draft article 4 defines the State of nationality for the purposes of diplomatic protection of natural persons. This definition is premised on two principles: first, that it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality; secondly, that there are limits imposed by international law on the grant of nationality. Draft article 4 also provides a non-exhaustive list of connecting factors that usually constitute good grounds for the grant of nationality.

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. 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”.³⁶

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

³⁶ *Nationality Decrees issued in Tunis and Morocco (French Zone)*, advisory opinion. P.C.I.J. Reports, Series B, No. 4, 1923, at p. 24.

“It is for each State to determine under its own law who are its nationals.”³⁷
More recently it has been endorsed by the 1997 European Convention on Nationality.³⁸

(3) The connecting factors for the conferment of nationality listed in draft article 4 are illustrative and not exhaustive. Nevertheless they include the connecting factors most commonly employed by States for the grant of nationality: birth (*ius soli*), descent (*ius sanguinis*) and naturalization. Marriage to a national is not included in this list as in most circumstances marriage per se is insufficient for the grant of nationality: it requires in addition a period of residence, following which nationality is conferred by naturalization. Where marriage to a national automatically results in the acquisition by a spouse of the nationality of the other spouse problems may arise in respect of the consistency of such an acquisition of nationality with international law.³⁹ Nationality may also be acquired as a result of the succession of States.⁴⁰

(4) The connecting factors listed in draft article 4 are those most frequently used by States to establish nationality. In some countries, where there are no clear birth records, it may be difficult to prove nationality. In such cases residence could provide proof of nationality although it may not constitute a basis for nationality itself. A State may, however, confer nationality on such persons by means of naturalization.

(5) Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,⁴¹ as an additional factor for the

exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were “extremely tenuous”⁴² compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”.⁴³ This suggests that the Court did not intend to expound a general rule⁴⁴ applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

(6) The final phrase in draft article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who are its nationals, this right is not absolute. Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws confirmed this by qualifying the provision that “it is for each State to determine under its own law who are its nationals” with the proviso “[t]his law shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality”.⁴⁵ Today, conventions, particularly in the field of human rights,

⁴² *Ibid.*, p. 25.

⁴³ *Ibid.*, p. 26.

⁴⁴ This interpretation was placed on the *Nottebohm* case by the Italian-United States Conciliation Commission in the *Flegenheimer* case, ILR vol. 25 (1958), p. 148.

⁴⁵ See also article 3 (2) of the 1997 European Convention on Nationality.

³⁷ League of Nations, *Treaty Series*, vol. 179, p. 89.

³⁸ United Nations, *Treaty Series*, vol. 2135, p. 213, article 3.

³⁹ See, e.g., article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, United Nations, *Treaty Series*, vol. 1249, p. 13, and article 1 of the Convention on the Nationality of Married Women, *ibid.*, vol. 309, p. 65, which prohibit the acquisition of nationality in such circumstances. See para. (6) below.

⁴⁰ See Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, *Yearbook ... 1999*, vol. II (Part Two), para. 47.

⁴¹ In the *Nottebohm* case 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”; *op. cit.* at p. 23.

require States to comply with international standards in the granting of nationality.⁴⁶ For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

“States parties shall grant women equal rights to men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”⁴⁷

(7) Draft article 4 recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Draft article 4 requires that nationality should be acquired in a manner “not inconsistent with international law”. The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a “margin of appreciation” in deciding upon the conferment of nationality,⁴⁸ and that there is a presumption in favour of the validity of a State’s conferment of nationality.⁴⁹

(8) Where a person acquires nationality involuntarily in a manner inconsistent with international law, as where a woman automatically acquires the nationality of her husband on marriage, that person should in principle be allowed to be protected diplomatically by her or his

⁴⁶ This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4, 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 power, which limits are linked to the demands imposed by the international system for the protection of human rights”, at para. 35. See also ILR vol. 79, p. 296.

⁴⁷ See also article 20 of the American Convention on Human Rights, United Nations, *Treaty Series*, vol. 1144, p. 123; article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195; and article 1 of the Convention on the Nationality of Married Women.

⁴⁸ See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, paras. 62-63.

⁴⁹ R.Y. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed. (London and New York: Longman, 1992), p. 856.

former State of nationality.⁵⁰ If, however, the acquisition of nationality in such circumstances results in the loss of the individual’s former nationality, equitable considerations require that the new State of nationality be entitled to exercise diplomatic protection. This would accord with the ruling of the International Court of Justice in its 1971 Opinion on *Namibia*⁵¹ that individual rights should not be affected by an illegal act on the part of the State with which the individual is associated.

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.
3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.
4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

⁵⁰ See article 2 of the Convention on the Nationality of Married Women.

⁵¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 56, para. 125.

Commentary

(1) Although the continuous nationality rule is well established,⁵² it has been subjected to considerable criticism⁵³ on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to “nationality shopping” for the purpose of diplomatic protection.⁵⁴ For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.⁵⁵ For these reasons the Institute of International Law in 1965 left open the question whether continuity of nationality was required between the two dates.⁵⁶ It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable.

⁵² See, for instance, the decision of the United States, International Claims Commission 1951-1954 in the *Kren* claim, ILR vol. 20, p. 233 at p. 234.

⁵³ See the comment of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case, at pp. 101-102; see, too, E. Wiyler, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990).

⁵⁴ See the statement of Umpire Parker in *Administrative Decision No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 141 (1925): “Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims.”

⁵⁵ H. Briggs, “La protection diplomatique des individus en droit international: La nationalité des Réclamations”, *Annuaire de l’Institut de Droit International*, vol. 51 (1965-I), p. 5 at pp. 72-73.

⁵⁶ Warsaw Session, 1965, *Annuaire de l’Institut de Droit International*, vol. 51 (1965-II), pp. 260-262.

(3) The first requirement is that the injured national be a national of the claimant State at the date of the injury. The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim.⁵⁷ The phrase “presentation of the claim” is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The word “official” has been added to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The *dies ad quem* for the exercise of diplomatic protection is the date of the official presentation of the claim. There is, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection.⁵⁸ In 2003 in *Loewen Group Inc. v. USA*⁵⁹ an ICSID arbitral tribunal held that “there must be continuous material identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through to the date of the resolution of the claim, which date is known as the *dies ad quem*”. On the facts, the Loewen case dealt with the situation in which the person sought to be protected changed nationality after the presentation of the claim to that of the respondent State, in which circumstances a claim for diplomatic protection can clearly not be upheld, as is made clear in draft article 5, paragraph (4). However, the Commission was not prepared to follow the Loewen tribunal in adopting a blanket

⁵⁷ See the dictum of Umpire Parker in *Administrative Decisions No. V (United States v. Germany)*, UNRIAA vol. VII, p. 119 at p. 143.

⁵⁸ R. Y. Jennings and A. Watts, *Oppenheim’s International Law, op. cit.* at p. 512. *Eschautzier* claim (*Great Britain v. Mexico*) UNRIAA vol. V, p. 207.

⁵⁹ ICSID Reports, vol. 7 (2005), p. 442 at para. 225.

rule that nationality must be maintained to the date of resolution of the claim.⁶⁰ Such a rule could be contrary to the interests of the individual, as many years may pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period. Instead, preference is given to the date of the official presentation of the claim as the *dies ad quem*. This date is significant as it is the date on which the State of nationality shows its clear intention to exercise diplomatic protection - a fact that was hitherto uncertain. Moreover, it is the date on which the admissibility of the claim must be judged. This determination could not be left to the later date of the resolution of the claim, the making of the award.

(6) The word "claim" in paragraphs 1, 2 and 4 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the articles on the Responsibility of States for Internationally Wrongful Acts of 2001 and the commentary thereto.

(7) While the Commission decided that it was necessary to retain the continuous nationality rule it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the time of the injury provided that three conditions are met: first, the person seeking diplomatic protection had the nationality of a predecessor State or has lost his or her previous nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Paragraph 2 is concerned with cases in which the injured person has lost his or her previous nationality, either voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality

will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) In the case of the succession of States this paragraph is limited to the question of the continuity of nationality for purposes of diplomatic protection. It makes no attempt to regulate succession to nationality, a subject that is covered by the Commission's articles on Nationality of Natural Persons in relation to the Succession of States.

(10) As stated above,⁶¹ fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule mainly to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States. The exception in paragraph 2 will not apply where the person has acquired a new nationality for commercial reasons connected with the bringing of the claim.

(11) The third condition that must be met for the rule of continuous nationality not to apply is that the new nationality has been acquired in a manner not inconsistent with international law. This condition must be read in conjunction with draft article 4.

(12) Paragraph 3 adds another safeguard against abuse of the lifting of the continuous nationality rule. Diplomatic protection may not be exercised by the new State of nationality against a former State of nationality of the injured person in respect of an injury incurred when that person was a national of the former State of nationality and not the present State of nationality.

⁶⁰ For criticism of the *Loewen* case, see J. Paulsson, *Denial of Justice in International Law* (New York: Cambridge University Press, 2005), pp. 183-4.

⁶¹ See para. (1) of commentary to the present draft article.

character.⁶⁶ Although considerations of equity might seem to endorse such a position, it has on occasion been repudiated.⁶⁷ The inconclusiveness of the authorities make it unwise to propose a rule on this subject.

Article 6

Multiple nationality and claim against a third State

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

Commentary

(1) 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* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

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

It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Draft article 6 is limited to the exercise of diplomatic protection by one or all of the States of which the injured person is a

⁶⁶ E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Law Publishing Co., 1915), p. 628; *Straub claim*.

⁶⁷ *Eschautzler claim (Great Britain v. Mexico)*, at p. 209.

(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loewen Group Inc v. USA* and a number of other cases⁶² in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Mavrommatis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national.⁶³ The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State.⁶⁴

Where the heir has the nationality of the respondent State it is clear that no such claim may be brought.⁶⁵ There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national

⁶² *Ebenezer Barston* in G.H. Hackworth, *Digest of International Law*, vol. 5 (1943), p. 805; *Executors of F. Lederer in Recueil des Décisions des Tribunaux Arbitraux Mixtes*, vol. 3, p. 763; *Hawaiian Claims* in F.K. Nielson, *America and British Claims Arbitration* (1926), p. 30; *Chopin in French and American Claims Commission, 1880-1884*, vol. 60, Records of Claims; *Gribble*, Report of Robert S. Hale Esq. [1873, Part II, vol. III], U.S. Foreign Relations 14 (1874).

⁶³ See commentary to art. 1, para. (3).

⁶⁴ *Eschautzler claim*, UNRIAA vol. IV, p. 207; *Kren claim*; *Gleadell claim (Great Britain v. Mexico)* UNRIAA vol. V, p. 44; *Sed contra, Straub claim*, ILR vol. 20, p. 228.

⁶⁵ *Stevenson claim (Great Britain v. Venezuela)*, 9 U.N.R.I.A.A. p. 494; *Bogovic claim*, ILR vol. 21, p. 156; *Executors of F. Lederer (deceased) v. German Government*.

national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in draft article 7.

(2) Paragraph 1 allows a State of nationality to exercise diplomatic protection in respect of its national even where that person is a national of one or more other States. Like draft article 4, it does not require a genuine or effective link between the national and the State exercising diplomatic protection.

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions⁶⁸ and codification endeavours,⁶⁹ the weight of authority does not require such a condition. In the *Salem* case an 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 stated 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.”⁷⁰

This rule has been followed in other cases⁷¹ and has more recently been upheld by the Iran-United States Claim Tribunal.⁷² The decision not to require a genuine or effective link in

⁶⁸ See the decision of the Yugoslav-Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 205 of 12 July 1926.

⁶⁹ See article 5 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws; resolution on “*Le Caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu*” adopted by the Institute of International Law at its Warsaw Session in 1965: *Résolutions de l'Institut de Droit International*, 1957-1991 (1992), p. 56 (art. 4 (b)); 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, article 23 (3), in L.B. Sohn and R.R. Baxter, “Responsibility of States for Injuries to the Economic Interests of Aliens”, *AJIL*, vol. 55 (1961), p. 548; Garcia Amador, *Third Report on State Responsibility*, in *Yearbook ... 1958*, vol. II, p. 61, document A/CN.4/111 (art. 21 (3)).

⁷⁰ Award of 8 June 1932, UNRIAA vol. II, p. 1165 at p. 1188.

⁷¹ See the decisions of the Italian-United States Conciliation Commission in the *Mergé* claim of 10 June 1955, ILR vol. 22 (1955), p. 443 at p. 456; the *Verzano* claim, decision No. 172 of 17 May 1957, ILR vol. 24 (1957), pp. 464-465; and the *Stankovic* claim of 26 July 1963, ILR vol. 40 (1963), p. 153 at p. 155.

⁷² See *Dallat v. Iran*, Iran-U.S. C.T.R., vol. 3 (1983), p. 23.

such circumstances accords with reason. Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

(4) In principle, there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. Paragraph 2 therefore recognizes that two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national against a State of which that person is not a national. While the responsible State cannot object to such a claim made by two or more States acting simultaneously and in concert, it may raise objections where the claimant States bring separate claims either before the same forum or different forums or where one State of nationality brings a claim after another State of nationality has already received satisfaction in respect to that claim. Problems may also arise where one State of nationality waives the right to diplomatic protection while another State of nationality continues with its claim. It is difficult to codify rules governing varied situations of this kind. They should be dealt with in accordance with the general principles of law recognized by international and national tribunals governing the satisfaction of joint claims.

Article 7

Multiple nationality and claim against a State of nationality

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

Commentary

(1) Draft article 7 deals with the exercise of diplomatic protection by one State of nationality against another State of nationality. Whereas draft article 6, dealing with a claim in respect of a dual or multiple national against a State of which the injured person is not a national, does not require an effective link between claimant State and national, draft article 7 requires the claimant State to show that its nationality is predominant, both at the time of the injury and at the date of the official presentation of the claim.

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares 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.”⁷³

Later codification proposals adopted a similar approach⁷⁴ and there was also support for this position in arbitral awards.⁷⁵ In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as “the ordinary practice”.⁷⁶

(3) Even before 1930 there was, however, support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.⁷⁷ This jurisprudence was relied on by the

International Court of Justice in another context in the *Nottebohm* case⁷⁸ and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation 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.”⁷⁹

In its opinion, the Conciliation Commission held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.⁸⁰ Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.⁸¹ Codification proposals have given approval to this approach. In his Third Report on State Responsibility to the Commission, Garcia Amador proposed that:

⁷³ *I.C.J. Reports* 1955, pp. 22-23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein in cases dealing with dual nationality. See also the judicial decisions referred to in footnote 65.

⁷⁴ ILR, vol. 22 (1955), p. 443 at p. 455 (para. V.5). See also *de Leon* case Nos. 218 and 227 of 15 May 1962 and 8 April 1963, UNRIAA, vol. XVI, p. 239 at p. 247.

⁷⁵ See, for example, *Spaulding* claim, decision No. 149, ILR, vol. 24 (1957), p. 452; *Zangrilli* claim of 21 December 1956, ILR, vol. 24 (1957), p. 454; *Cesira* claim, decision No. 165 of 28 February 1957, ILR, vol. 24 (1956), p. 454; *Piccini* claim, decision No. 173 of 17 May 1957, ILR, vol. 24 (1957), p. 454; *Salvani Estate* claim, decision No. 169 of 9 May 1957, ILR, vol. 24 (1957), p. 455; *Ruspoli* claim, decision No. 170 of 15 May 1957, ILR, vol. 24 (1957), p. 457; *Ganapini* claim, decision No. 196 of 30 April 1959, ILR, vol. 30 (1959), p. 366; *Turri* claim, decision No. 209 of 14 June 1960, ILR, vol. 30 (1960), p. 371; *Grantero* claim, decision No. 186 of 20 January 1959, ILR, vol. 30 (1959), p. 451; *Di Ciccio* claim, decision No. 226 of 9 November 1962, ILR, vol. 40 (1962), p. 148.

⁸¹ See, in particular, *Esfahanian v. Bank Tejarat, Iran-U.S.C.T.R.*, vol. 2 (1983), p. 166; case No. A/18, *Iran-U.S.C.T.R.*, vol. 5 (1984), p. 251; *Ataollah Golpira v. Government of the Islamic Republic of Iran, Iran-U.S.C.T.R.*, vol. 2 (1983), p. 174 and ILR, vol. 72, p. 493.

⁷³ See, too, art. 16 (a) of the 1929 Harvard Draft Convention of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL, vol. 23, Special Supplement (1929), pp. 133-139.

⁷⁴ See art. 23 (5) of the 1960 Harvard Draft Convention reproduced in AJIL, vol. 55 on the International Responsibility of States for Injuries to Aliens, reproduced in AJIL, vol. 55 (1961), p. 548; article 4 (a) of the resolution on “Le Caractère national d’une réclamation internationale présentée par un Etat en raison d’un dommage subi par un individu” adopted by the Institute of International Law at its 1965 Warsaw Session.

⁷⁵ See *Alexander* case (1898) 3 Moore, *International Arbitrations*, p. 2529 (United States-British Claims Commission); *Odenbourg* case, Decisions and Opinions of Commissioners, 5 October 1929 to 15 February 1930, p. 97, *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13 (British-Mexican Claims Commission), cited in Z.R. Rode “Dual Nationals and the Doctrine of Dominant Nationality” AJIL, vol. 53 (1959), p. 139 at pp. 140-141; *Adams and Blackmore* case, decision No. 64 of 3 July 1931, UNRIAA vol. V, pp. 216-217 (British-Mexican Claims Commission).

⁷⁶ *I.C.J. Reports* 1949, p. 186.

⁷⁷ *James Louis Drummond* case 2 Knapp, P.C. Rep., p. 295, 12 Eng. Rep., p. 492; *Brignone, Milani, Stevenson and Mathinson* cases (British-Venezuelan Mixed Claim Commission) reported in Ralston, *Venezuelan Arbitrations of 1903*, pp. 710, 754-761, 438-455 and 429-438 respectively; *Carnearo* case (Permanent Court of Arbitration, 1912) reported in Scott, *The Hague Court Reports*, vol. 1, at p. 284; *Hein* case of 26 April and 10 May 1922 (Anglo-German Mixed Arbitral Tribunal), *Annual Digest of Public International Law* cases, vol. 1, 1919-1922, case No. 148, p. 216; *Blumenthal* case (French-German Mixed Tribunal), *Recueil des Décisions des Tribunaux Mixtes*, vol. 3 (1924), p. 616; *de Montfort* case of 10 July 1926 (French-German Mixed Tribunal), *Annual Digest of Public International Law Cases*, vol. 3, 1925-1926, case No. 206, p. 279; *Pinson* case (French-Mexican Mixed Claims Commission), *Annual Digest of Public International Law Cases*, vol. 4, 1927-1928, case Nos. 194 and 195 of 19 October 1928, pp. 297-301; *Teltech* case of 25 May 1928 (United States-Austria and Hungary Tripartite Claim Commission), 6 UNRIAA, vol. VI, p. 248.

“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.”⁸²

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.⁸³

(4) Even though the two concepts are different the authorities use the term “effective” or “dominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “dominant”. It is moreover the term used by the Italian-United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.⁸⁴

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors 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 each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

⁸² Document A/CN.4/111, in *Yearbook ... 1958*, vol. II, p. 61, draft art. 21, para. 4.

⁸³ “Interim Report on the ‘The Changing Law of Nationality of Claims’” in *International Law Association (ILA) Report of the 69th Conference* (2000), pp. 646 (para. 11); confirmed in the final report adopted at the 2006 ILA Conference in Toronto.

⁸⁴ ILR, vol. 22 (1955), p. 455.

(6) Draft article 7 is framed in negative language: “A State of nationality may *not* exercise diplomatic protection ... *unless*” its nationality is predominant. This is intended to show that the circumstances envisaged by draft article 7 are to be regarded as exceptional. This also makes it clear that the burden of proof is on the claimant State to prove that its nationality is predominant.

(7) The main objection to a claim brought by one State of nationality against another State of nationality is that this might permit a State, with which the individual has established a predominant nationality subsequent to an injury inflicted by the other State of nationality, to bring a claim against that State. This objection is overcome by the requirement that the nationality of the claimant State must be predominant both at the date of the injury and at the date of the official presentation of the claim. Although this requirement echoes the principle affirmed in draft article 5, paragraph 1, on the subject of continuous nationality, it is not necessary in this case to prove continuity of predominant nationality between these two dates. The phrases “at the date of injury” and “at the date of the official presentation of the claim” are explained in the commentary on draft article 5. The exception to the continuous nationality rule contained in draft article 5, paragraph 2, is not applicable here as the injured person contemplated in draft article 7 will not have lost his or her other nationality.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Commentary

(1) The general rule was that a State might exercise diplomatic protection on behalf of its nationals only. In 1931 the United States-Mexican Claims Commission in *Dickson Car Wheel Company v. United Mexican States* held that a stateless person could not be the beneficiary of diplomatic protection when it 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.”⁸⁵

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961⁸⁶ and the Convention Relating to the Status of Refugees of 1951.⁸⁷

(2) Draft article 8, an exercise in progressive development of the law,⁸⁸ departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows a State to exercise diplomatic protection in respect of a non-national where that person is either a stateless person or a refugee. Although draft article 8 is to be seen within the framework of the rules governing statelessness and refugees, it has made no attempt to pronounce on the status of such persons. It is concerned only with the issue of the exercise of the diplomatic protection of such persons.

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954⁸⁹ which defines a stateless person “as a person

⁸⁵ UNRIIAA, vol. IV, p. 669 at p. 678.

⁸⁶ United Nations, *Treaty Series*, vol. 989, p. 175.

⁸⁷ *Ibid.*, vol. 189, p. 150.

⁸⁸ In *Al Rawi & Others, R (on the Application of) v. Secretary of State for Foreign Affairs and Another* [2006] EWHC (Admin) an English court held that draft article 8 was to be considered *lex ferenda* and “not yet part of international law” (para. 63).

⁸⁹ United Nations, *Treaty Series*, vol. 360, p. 117.

who is not considered as a national by any State under the operation of its law.”⁹⁰ This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim. Habitual residence in this context is intended to convey continuous residence.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.⁹¹ Although this threshold is high and leads to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim are contained in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are “unable or unwilling to avail [themselves] of the protection of [the State of Nationality]”⁹² and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain why a separate paragraph has been allocated to each category.

(7) Lawful residence and habitual residence are required as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons,⁹³ despite the fact that article 28 of the Convention Relating to the Status of Refugees sets the lower threshold of “lawfully

⁹⁰ Article 1.

⁹¹ The terms “lawful and habitual” residence are based on the 1997 European Convention on Nationality, article 6 (4) (g), where they are used in connection with the acquisition of nationality. See, too, the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which includes for the purpose of protection under this Convention a “stateless person having his habitual residence in that State”, article 21 (3) (c).

⁹² Article 1 (A) (2) of the Convention Relating to the Status of Refugees.

⁹³ Habitual residence in this context connotes continuous residence.

staying”⁹⁴ for Contracting States in the issuing of travel documents to refugees. Two factors justify this position. First, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection.⁹⁵ Secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*.⁹⁶

(8) The term “refugee” in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term “recognized refugees”, which appears in the 1997 European Convention on Nationality,⁹⁷ which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,⁹⁸ widely seen as the model for the international protection of refugees,⁹⁹ and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.¹⁰⁰ However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.¹⁰¹ Such recognition must, however, be based on “internationally accepted standards” relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

⁹⁴ The *travaux préparatoires* of the Convention make it clear that “stay” means less than habitual residence.

⁹⁵ See para. 16 of the Schedule to the Convention.

⁹⁶ See para. (4) of the commentary to this draft article.

⁹⁷ Article 6 (4) (g).

⁹⁸ United Nations, *Treaty Series*, vol. 1001, p. 45. This Convention extends the definition of refugee to include “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

⁹⁹ Note on International Protection submitted by the United Nations High Commissioner for Refugees, document A/AC.96/830, p. 17, para. 35.

¹⁰⁰ O.A.S. General Assembly, XV Regular Session (1985).

¹⁰¹ For instance, it may be possible for a State to exercise diplomatic protection on behalf of a person granted political asylum in terms of the 1954 Caracas Convention on Territorial Asylum, United Nations, *Treaty Series*, vol. 1438, p. 129.

(9) The temporal requirements for the bringing of a claim are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

(10) Paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee against the State of nationality of the refugee. To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.

(11) Both paragraphs 1 and 2 provide that a State of refuge “*may* exercise diplomatic protection”. This emphasizes the discretionary nature of the right. A State has a discretion under international law whether to exercise diplomatic protection in respect of a national.¹⁰² *A fortiori* it has a discretion whether to extend such protection to a stateless person or refugee.

(12) Draft article 8 is concerned only with the diplomatic protection of stateless persons and refugees. It is *not* concerned with the conferment of nationality upon such persons. The exercise of diplomatic protection in respect of a stateless person or refugee cannot and should not be seen as giving rise to a legitimate expectation of the conferment of nationality. Draft article 28 of the 1951 Convention Relating to the Status of Refugees, read with paragraph 15 of its Schedule, makes it clear that the issue of a travel document to a refugee does not affect the nationality of the holder. *A fortiori* the exercise of diplomatic protection in respect of a refugee, or a stateless person, should in no way be construed as affecting the nationality of the protected person.

¹⁰² See draft articles 2 and 19 and commentaries thereto.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

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

Commentary

- (1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.
- (2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

- (3) As with natural persons, the granting of nationality to a corporation is “within the reserved domain” of a State.¹⁰³ As the International Court of Justice stated in the *Barcelona Traction* case:

“... international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires

that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”¹⁰⁴

Although international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject, it is for international law to determine the circumstances in which a State may exercise diplomatic protection on behalf of a corporation or its shareholders. This matter was addressed by the International Court of Justice in *Barcelona Traction* when it stated that international law “attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office”.¹⁰⁵ Here the Court set two conditions for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. As the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, even if this is a mere fiction, incorporation is the most important criterion for the purposes of diplomatic protection. The Court in *Barcelona Traction* was not, however, satisfied with incorporation as the sole criterion for the exercise of diplomatic protection. Although it did not reiterate the requirement of a “genuine connection” as applied in the *Nottebohm* case,¹⁰⁶ and acknowledged that “in the particular field of the diplomatic protection of corporate entities, no absolute test of the ‘genuine connection’ has found general acceptance,”¹⁰⁷ it suggested that in addition to incorporation and a registered office, there was a need for some “permanent and close connection” between the State exercising diplomatic protection and the corporation.¹⁰⁸ On the facts of this case the Court found such a connection in the incorporation of the company in Canada for over 50 years, the maintenance of its registered office, accounts and share register there, the holding of board meetings there for many years, its listing in the records of the Canadian tax authorities and the general recognition by other States

¹⁰⁴ *Barcelona Traction* case, at pp. 33-34, para. 38.

¹⁰⁵ *Ibid.*, p. 42, para. 70.

¹⁰⁶ *Ibid.*, p. 42, para. 70. *Nottebohm* case.

¹⁰⁷ *I.C.J. Reports 1970*, p. 42, para. 70.

¹⁰⁸ *Ibid.*, p. 42, para. 71.

¹⁰³ *Nationality Decrees issued in Tunis and Morocco* case.

of the Canadian nationality of the company.¹⁰⁹ All of this meant, said the Court, that “Barcelona Traction’s links with Canada are thus manifold”.¹¹⁰ In *Barcelona Traction* the Court was not confronted with a situation in which a company was incorporated in one State but had a “close and permanent connection” with another State. One can only speculate what the Court might have decided in such a situation. Draft article 9 does, however, provide for such cases.

(4) Draft article 9 accepts the basic premise of *Barcelona Traction* that it is incorporation that confers nationality on a corporation for the purposes of diplomatic protection. However, it provides an exception in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where certain significant connections exist with another State, in which case that other State is to be regarded as the State of nationality for the purpose of diplomatic protection. Policy and fairness dictate such a solution. It is wrong to place the sole and exclusive right to exercise diplomatic protection in a State with which the corporation has the most tenuous connection as in practice such a State will seldom be prepared to protect such a corporation.

(5) Draft article 9 provides that in the first instance the State in which a corporation is incorporated is the State of nationality entitled to exercise diplomatic protection. When, however, the circumstances indicate that the corporation has a closer connection with another State, a State in which the seat of management and financial control are situated, that State shall be regarded as the State of nationality with the right to exercise diplomatic protection. Certain conditions must, however, be fulfilled before this occurs. First, the corporation must be controlled by nationals of another State. Secondly, it must have no substantial business activities in the State of incorporation. Thirdly, both the seat of management and the financial control of the corporation must be located in another State. Only where these conditions are cumulatively fulfilled does the State in which the corporation has its seat of management and in which it is financially controlled qualify as the State of nationality for the purposes of diplomatic protection.

¹⁰⁹ *Ibid.*, pp. 42-43, paras. 71-76.

¹¹⁰ *Ibid.*, p. 42, para. 71.

(6) In *Barcelona Traction* the International Court of Justice warned that the granting of the right of diplomatic protection to the States of nationality of shareholders might result in a multiplicity of actions which “could create an atmosphere of confusion and insecurity in international economic relations”.¹¹¹ The same confusion might result from the granting of the right to exercise diplomatic protection to several States with which a corporation enjoys a link or connection. Draft article 9 does not allow such multiple actions. The State of nationality with the right to exercise diplomatic protection is either the State of incorporation or, if the required conditions are met, the State of the seat of management and financial control of the corporation. If the seat of management and the place of financial control are located in different States, the State of incorporation remains the State entitled to exercise diplomatic protection.

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.
3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Commentary

- (1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to draft article 5. In practice problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, marriage or adoption, and State succession, corporations generally change nationality only by being re-formed or reincorporated in another State, in

¹¹¹ *Ibid.*, p. 49, para. 96.

which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the corporation.¹¹² The most frequent instance in which a corporation may change nationality without changing legal personality is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. It also requires continuity of nationality between the date of the injury and the date of the official presentation of the claim. These requirements, which apply to natural persons as well, are examined in the commentary to draft article 5. The date of the official presentation of the claim is preferred to that of the date of the award, for reasons explained in the commentary to draft article 5. An exception is, however, made in paragraph 2 to cover cases in which the Corporation acquires the nationality of the State against which the claim is brought after the presentation of the claim.

(3) The requirement of continuity of nationality is met where a corporation undergoes a change of nationality as a result of the succession of States.¹¹³ In effect, this is an exception to the continuity of nationality rule. This matter is covered by the reference to “predecessor State” in paragraph 1.

(4) The word “claim” in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take.¹¹⁴

¹¹² See Mixed Claims Commission, United States-Venezuela constituted under the Protocol of 17 February 1903, the *Orinoco Steamship Company Case*, UNRIIAA, vol. IX, p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Venezuelan Government to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Borge made it clear that, but for the treaty, the claim would not have been allowed; *ibid.*, at p. 192. See too *Loewen Group Inc v. U.S.A.*, at paragraph 220.

¹¹³ See further on this subject the *Puneryzys-Saldutiskis Railway case*, at p. 18. See also Fourth Report on Nationality in relation to the Succession of States, document A/CN.4/489, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States.

¹¹⁴ See, further, article 43 of the draft articles on the Responsibility of States for Internationally Wrongful Acts and the commentary thereto.

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the *Loewen case*¹¹⁵ in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.¹¹⁶

(6) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was incorporated and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction case*¹¹⁷ and it has troubled certain courts and arbitral tribunals,¹¹⁸ and scholars.¹¹⁹ Paragraph 3 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist - and therefore ceased to be its national - as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 3 must be read in conjunction with

¹¹⁵ *Op. cit.* at para. 220.

¹¹⁶ Paragraphs (5) and (13).

¹¹⁷ Judges Jessup, *I.C.J. Reports 1970*, at p. 193, Gros, *ibid.*, at p. 277, and Fitzmaurice, *ibid.*, at pp. 101-102, and Judge *ad hoc* Riphagen, *ibid.*, at p. 345.

¹¹⁸ See the *Kunhardt and co.*, case (Opinions in the American-Venezuelan Commission of 1903), UNRIIAA, vol. XII, p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 180; *F.W. Flück, on behalf of the Estate of the Late D.L. Flück (Great Britain) v. United Mexican States*, decision No. 10 of 6 December 1929, UNRIIAA, vol. V, p. 61 at p. 63.

¹¹⁹ L. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public* (The Hague: Martinus Nijhoff Publishers, 1969), pp. 206-7; W.E. Beckett, “Diplomatic Claims in Respect of Injuries to Companies”, *Transactions of the Grotius Society*, vol. 17 (1932), p. 158 at p. 191; E. Wylser, *La Règle Dite de la Continuité de la Nationalité dans le Contentieux International* (Paris: PUF, 1990), pp. 197-202.

draft article 11, paragraph (a), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11

Protection of shareholders

The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

- (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
- (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the International Court of Justice in the *Barcelona Traction* case. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in “a limited liability company whose capital is represented by shares”.¹²⁰ Such companies are characterized by a clear distinction between company and shareholders.¹²¹ Whenever a shareholder’s interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for “although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed”.¹²² Only where the act complained of is aimed at the direct rights of the shareholders

does a shareholder have an independent right of action.¹²³ Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.¹²⁴

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may in the exercise of its discretion decline to exercise diplomatic protection on their behalf.¹²⁵ Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as frequently large corporations comprise shareholders of many nationalities.¹²⁶ In this connection the Court indicated that if the shareholder’s State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right.¹²⁷ Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.¹²⁸

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation¹²⁹ - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders’ sole means of protection on the international level was through their State(s) of nationality¹³⁰ - which was not the case with

¹²³ *Ibid.*, p. 36, para. 47.

¹²⁴ *Ibid.*, p. 37, para. 50.

¹²⁵ *Ibid.*, p. 35, para. 43; p. 46, paras. 86-87; p. 50, para. 99.

¹²⁶ *Ibid.*, pp. 48-49, paras. 94-96.

¹²⁷ *Ibid.*, p. 48, paras. 94-95.

¹²⁸ *Ibid.*, p. 38, para. 53; p. 50, para. 98.

¹²⁹ *Ibid.*, pp. 40-41, paras. 65-68.

¹³⁰ *Ibid.*, p. 48, para. 92.

¹²⁰ *I.C.J. Reports 1970*, p. 34, para. 40.

¹²¹ *Ibid.*, p. 34, para. 41.

¹²² *Ibid.*, p. 35, para. 44.

Barcelona Traciton. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traciton* because they were not relevant to the case, are recognized in paragraphs (a) and (b) of draft article 11. As the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions. In practice, however, States will, and should, coordinate their claims and make sure that States whose nationals hold the bulk of the share capital are involved as claimants.

(4) Draft article 11 is restricted to the interests of shareholders in a corporation as judicial decisions on this subject, including *Barcelona Traciton*, have mainly addressed the question of shareholders. There is no clear authority on the right of the State of nationality to protect investors other than shareholders, such as debenture holders, nominees and trustees. In principle, however, there would seem to be no good reason why the State of nationality should not protect such persons.¹³¹

(5) Draft article 11, paragraph (a) requires that the corporation shall have “ceased to exist” before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traciton* case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was “practically defunct”.¹³² The Court in *Barcelona Traciton*, however, set a higher threshold for determining the demise of a company. The “paralysis” or “precarious financial situation” of a company was dismissed as inadequate.¹³³ The test of “practically defunct” was likewise rejected as one “which lacks all legal precision”.¹³⁴ Only the “company’s status in law” was considered relevant. The Court stated: “Only in the event of the legal demise of the company are the shareholders

deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise.”¹³⁵ Subsequent support has been given to this test by the European Court of Human Rights.¹³⁶

(6) The Court in *Barcelona Traciton* did not expressly state that the company must have ceased to exist in the *place of incorporation* as a precondition to shareholders’ intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain¹³⁷ but emphasized that this did not affect its continued existence in Canada, the State of incorporation: “In the present case, the *Barcelona Traciton* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist.”¹³⁸ A company is “born” in the State of incorporation when it is formed or incorporated there. Conversely, it “dies” when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

(7) The final phrase “for a reason unrelated to the injury” aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation’s demise. This, according to draft article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation

¹³¹ This is the approach adopted by the United Kingdom. See United Kingdom of Great Britain and Northern Ireland: “Rules Applying to International Claims” reproduced in document A/CN.4/561/Add.1, Annex.

¹³² *Delegosa Bay Railway Co.* case, B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 648; *El Triunfo* claim; B.J. Moore, *Digest of International Law*, vol. VI (1906), p. 649; *Bausch & Romer* case, Netherlands-Venezuelan Mixed Commission, 28 February 1903, UNRIIA, vol. X, p. 713 at p. 723.

¹³³ *I.C.J. Reports 1970*, pp. 40-41, paras. 65 and 66.

¹³⁴ *Ibid.*, p. 41, para. 66.

¹³⁵ *Ibid.*, see also, the separate opinions of Judges Nervo, *ibid.*, p. 256 and Ammoun, *ibid.*, pp. 319-320.

¹³⁶ *Agrotexim* case, ECHR., *Series A* (1995), No. 330-A, p. 25, para. 68.

¹³⁷ *I.C.J. Reports 1970*, p. 40, para. 65. See too the separate opinions of Judges Fitzmaurice, *ibid.*, p. 75 and Jessup, *ibid.*, p. 194.

¹³⁸ *Ibid.*, p. 41, para. 67.

unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(8) Draft article 11, paragraph (b), gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is limited to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(9) There is support for such an exception in State practice, arbitral awards¹³⁹ and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway*,¹⁴⁰ *Mexican Eagle*¹⁴¹ and *El Triunfo*.¹⁴² While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

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

intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.”¹⁴³

(10) In *Barcelona Traction*, Spain, the respondent State, was not the State of nationality of the injured company. Consequently, the exception under discussion was not before the Court. Nevertheless, the Court did make passing reference to this exception:

“It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.”¹⁴⁴

Judges Fitzmaurice,¹⁴⁵ Tanaka¹⁴⁶ and Jessup¹⁴⁷ expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.¹⁴⁸

While both Fitzmaurice¹⁴⁹ and Jessup¹⁵⁰ conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of

¹³⁹ *Delagoa Bay Railway Company; Mexican Eagle (El Aguila)*, M. Whiteman, *Digest of International Law*, vol. VIII, pp. 1272-1274; *Romano-Americano*, Hackworth, *Digest of International Law*, vol. V, p. 841; *El Triunfo* award of 8 May 1902, UNRIAA, vol. XV, p. 467; *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* award of 5 August 1926, UNRIAA, vol. II, p. 779 at p. 790. For a comprehensive examination of the authorities, see L. Caflisch, *La protection des sociétés commerciales ... op. cit.*; M. Jones, “Claims on Behalf of Nationals who are Shareholders in Foreign Companies”, BYBIL, vol. 26 (1949), p. 225. See, too, E. Jiménez de Aréchaga “International Responsibility”, in Max Sørensen (ed.), *Manual of International Law* (New York: St. Martin’s Press, 1968), p. 531 at pp. 580-581.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ M. Whiteman, *Digest of International Law*, vol. 8 (Washington D.C.: USA Department of State, 1967), pp. 1273-1274.

¹⁴⁴ *I.C.J. Reports 1970*, p. 48, para. 92.

¹⁴⁵ *Ibid.*, pp. 72-75.

¹⁴⁶ *Ibid.*, p. 134.

¹⁴⁷ *Ibid.*, pp. 191-193.

¹⁴⁸ Judge Wellington Koo likewise supported this position in the *Case concerning the Barcelona Traction, Light and Power Company Limited, Preliminary Objections*, *I.C.J. Reports 1964*, p. 58, para. 20.

¹⁴⁹ *I.C.J. Reports 1970*, p. 73, paras. 15 and 16.

¹⁵⁰ *Ibid.*, pp. 191-192.

incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,¹⁵¹ Morelli¹⁵² and Ammoun,¹⁵³ on the other hand, were vigorously opposed to the exception.

(11) Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.¹⁵⁴ In the *Case Concerning Elettronica Sicula S.p.A. (ELSI)*¹⁵⁵ a Chamber of the International Court of Justice allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* or on the proposed exception left open in *Barcelona Traction* despite the fact that Italy objected that the company whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.¹⁵⁶ This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.¹⁵⁷ It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a

¹⁵¹ *Ibid.*, pp. 257-259.

¹⁵² *Ibid.*, pp. 240-241.

¹⁵³ *Ibid.*, p. 318.

¹⁵⁴ See *SEDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* case No. 129, of 24 October 1985, ILR, vol. 84, pp. 484, 496 (interpreting article VII (2) of the Algiers Claims Settlement Declaration); *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia* ICSID Reports, vol. 2 (1994), p. 346 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 573, p. 159).

¹⁵⁵ *I.C.J. Reports*, 1989, p. 15.

¹⁵⁶ *Ibid.*, pp. 64 (para. 106), 79 (para. 132).

¹⁵⁷ This is clear from an exchange of opinions between Judges Oda, *ibid.*, pp. 87-88 and Schwebel, *ibid.*, p. 94 on the subject.

corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.¹⁵⁸

(12) Before *Barcelona Traction* there was support for the proposed exception, but opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. Although arbitral decisions affirmed the principle contained in the exception these decisions were often based on special agreements between States granting a right to shareholders to claim compensation and, as a consequence, were not necessarily indicative of a general rule of customary international law.¹⁵⁹ The *obiter dictum* in *Barcelona Traction* and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.¹⁶⁰ In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, draft article 11, paragraph (b), does not go this far. Instead it limits the exception to what has been described as a “Calvo corporation”, a corporation whose incorporation, like the Calvo Clause, is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, at the date of the injury (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation in that State was required by it as a precondition for doing business there. It is not necessary that the law of that State require incorporation. Other forms of compulsion might also result in a corporation being “required” to incorporate in that State.

¹⁵⁸ This view is expressed by Yoram Dinstein in “Diplomatic Protection of Companies under International Law”, in K. Wellens (ed.), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff Publishers, 1998), p. 505 at p. 512.

¹⁵⁹ See the submission to this effect by the United States in A/CN.4/561, pp. 34-35.

¹⁶⁰ According to the United Kingdom’s 1985 Rules Applying to International Claims, “where a United Kingdom national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, Her Majesty’s Government may intervene to protect the interests of the United Kingdom national” (Rule VI), reprinted in ICLQ, vol. 37 (1988), p. 1007 and reproduced in document A/CN.4/561/Add.1, Annex.

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Commentary

(1) That shareholders qualify for diplomatic protection when their own rights are affected was recognized by the Court in *Barcelona Traction* when it stated:

“... an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected. ... The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”¹⁶¹

The Court was not, however, called upon to consider this matter any further because Belgium made it clear that it did not base its claim on an infringement of the direct rights of the shareholders.

(2) The issue of the protection of the direct rights of shareholders came before the Chamber of the International Court of Justice in the *ELSI* case.¹⁶² However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation that the Chamber was called on to interpret and the Chamber failed to expound on the rules of customary international

law on this subject. In *Agrotexim*,¹⁶³ the European Court of Human Rights, like the Court in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.¹⁶⁴

(3) Draft article 12 makes no attempt to provide an exhaustive list of the rights of shareholders as distinct from those of the corporation itself. In *Barcelona Traction* the International Court mentioned the most obvious rights of shareholders - the right to a declared dividend, the right to attend and vote at general meetings and the right to share in the residual assets of the company on liquidation - but made it clear that this list is not exhaustive. This means that it is left to courts to determine, on the facts of individual cases, the limits of such rights. Care will, however, have to be taken to draw clear lines between shareholders’ rights and corporate rights, particularly in respect of the right to participate in the management of corporations. That draft article 12 is to be interpreted restrictively is emphasized by the phrases “the rights of the shareholders as such” and rights “as distinct from those of the corporation itself”.

(4) Draft article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.¹⁶⁵

Article 13

Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

¹⁶³ *Series A*, No. 330-A.

¹⁶⁴ *Ibid.*, p. 23, para. 62.

¹⁶⁵ In his separate opinion in *ELSI*, Judge Oda spoke of “the general principles of law concerning companies” in the context of shareholders’ rights; *I.C.J. Reports 1989*, at pp. 87-88.

¹⁶¹ *I.C.J. Reports 1970*, p. 36, paras. 46-47.

¹⁶² *I.C.J. Reports 1989*, p. 15.

Commentary

(1) The provisions of this Chapter have hitherto focused on a particular species of legal person, the corporation. There are two explanations for this. First, corporations, unlike other legal persons, have certain common, uniform features: they are profit-making enterprises whose capital is generally represented by shares, in which there is a firm distinction between the separate entity of the corporation and the shareholders, with limited liability attaching to the latter. Secondly, it is mainly the corporation, unlike the public enterprise, the university, the municipality, the foundation and other such legal persons, that engages in foreign trade and investment and whose activities fuel not only the engines of international economic life but also the machinery of international dispute settlement. Diplomatic protection in respect of legal persons is mainly about the protection of foreign investment. This is why the corporation is the legal person that occupies centre stage in the field of diplomatic protection and why the present set of draft articles do - and should - concern themselves largely with this entity.

(2) In the ordinary sense of the word, "person" is a human being. In the legal sense, however, a "person" is any being, object, association or institution which the law endows with the capacity of acquiring rights and incurring duties. A legal system may confer legal personality on whatever object or association it pleases. There is no consistency or uniformity among legal systems in the conferment of legal personality.

(3) There is jurisprudential debate about the legal nature of juristic personality and, in particular, about the manner in which a legal person comes into being. The fiction theory maintains that no juristic person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the realist theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a juristic person, with all its attributes,

without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice¹⁶⁶ and the International Court of Justice.¹⁶⁷

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune¹⁶⁸ (municipality) or university¹⁶⁹ may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.¹⁷⁰ Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

¹⁶⁶ *The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust ECJ*, Case 81/87 [1988] ECR 5483, at para. 19.

¹⁶⁷ *Barcelona Traction Case* (Judgment), at pp. 34-35, para. 38.

¹⁶⁸ In *Certain German Interests in Polish Upper Silesia* case (Merits) the Permanent Court held that the commune of Raibor fell within the category of "German national" within the meaning of the German-Polish Convention concerning Upper Silesia of 1922, *P.C.I.J. Reports, Series A*, No. 7, pp. 73-75.

¹⁶⁹ In *Appeal from a Judgment of the Hungarian-Czechoslovak Mixed Arbitral Tribunal (The Peter Pazmány University v. The State of Czechoslovakia)* (Judgment) the Permanent Court held that the Peter Pazmány University was a Hungarian national in terms of art. 250 of the Treaty of Trianon and therefore entitled to the restitution of property belonging to it, *P.C.I.J. Reports, Series A/B*, No. 61, pp. 208, 227-232.

¹⁷⁰ As diplomatic protection is a process reserved for the protection of natural or legal persons not forming part of the State, it follows that in most instances the municipality, as a local branch of government, and the university, funded and, in the final resort, controlled by the State, will not qualify for diplomatic protection, although it may be protected by other rules dealing with the problem of State organs. Private universities would, however, qualify for diplomatic protection; as would private schools, if they enjoyed legal personality under municipal law.

probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in causes abroad would appear to fall into the same category as foundations.¹⁷¹

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons - subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in the present Chapter, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. This will require the necessary competent authorities or courts to examine the nature and functions of the legal person in question in order to decide whether it would be "appropriate" to apply any of the provisions of the present Chapter to it. Most legal persons other than corporations do not have shareholders so only draft articles 9 and 10 may appropriately be applied to them. If, however, such a legal person does have shareholders draft articles 11 and 12 may also be applied to it.¹⁷²

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

¹⁷¹ See, further, K. Doehring, "Diplomatic Protection of Non-Governmental Organizations", in M. Rama-Montaldo (ed), *El derecho internacional en un mundo en transformación: liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga* (Montevideo: fundacióndecuita universitaria, 1994), pp. 571-580.

¹⁷² This would apply to the limited liability company known in civil law countries which is a hybrid between a corporation and a partnership.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Commentary

(1) Draft article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection. This rule was recognized by the International Court of Justice in the *Interhandel* case as "a well-established rule of customary international law"¹⁷³ and by a Chamber of the International Court in the *Eleftronica Sicula (ELSI)* case as "an important principle of customary international law".¹⁷⁴ The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".¹⁷⁵ The International Law Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.¹⁷⁶

(2) Both natural and legal persons are required to exhaust local remedies. A foreign company financed partly or mainly by public capital is also required to exhaust local remedies. Non-nationals of the State exercising protection, entitled to diplomatic protection in the exceptional circumstances provided for in draft article 8, are also required to exhaust local remedies.

(3) The phrase "all local remedies" must be read subject to draft article 15 which describes the exceptional circumstances in which local remedies need not be exhausted.

¹⁷³ *Interhandel* case (Switzerland v. United States of America) Preliminary objections, *I.C.J. Reports 1959*, p. 6 at p. 27.

¹⁷⁴ *I.C.J. Reports 1989*, p. 15 at p. 42, para. 50.

¹⁷⁵ *Interhandel* case, at p. 27.

¹⁷⁶ Article 22 on First Reading, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* and corrigendum (A/51/10 and Corr.1), chap. III D 1; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50; commentary to art. 44 on Second Reading, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10) pp. 304-307.

(4) The remedies available to an alien that must be exhausted before diplomatic protection can be exercised will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.¹⁷⁷ In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has a discretion to grant leave to appeal, the foreign national must still apply for leave to appeal to that court.¹⁷⁸ Courts in this connection include both ordinary and special courts since “the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress”.¹⁷⁹

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose “purpose is to obtain a favour and not to vindicate a right”¹⁸⁰ nor do they include remedies of grace¹⁸¹ unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.¹⁸²

¹⁷⁷ In the *Ambatielos Claim* of 6 March 1956 the arbitral tribunal declared that “[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test”, UNRIAA, vol. XII, p. 83 at p. 120. See further on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004), pp. 182-192.

¹⁷⁸ This would include the *certiorari* process before the United States Supreme Court.

¹⁷⁹ *B. Schouw Nielsen v. Denmark*, Application No. 343/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 412 at p. 438 (referring to the views of the Institute of International Law in its resolution of 1954 (*Annuaire*, 1956, vol. 46, p. 364)). See also *Lawless case*, Application No. 332/57 (European Commission of Human Rights) (1958-1959), *Yearbook of the European Convention on Human Rights*, vol. 2, p. 308 at pp. 318-322.

¹⁸⁰ *De Becker v. Belgium*, Application No. 214/56, 1958-1959, *Yearbook of the European Convention on Human Rights*, vol. 2, p. 214 at 238.

¹⁸¹ Claim of Finnish Shippers against Great Britain in respect of the Use of Certain Finnish Vessels During the War (“*Finnish Ships Arbitration*”) 1934, UNRIAA, vol. III, p. 14-79.

¹⁸² See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, at paras. 135-143.

(6) In order to satisfactorily lay the foundation for an international claim on the ground that local remedies have been exhausted, the foreign litigant must raise the basic arguments he intends to raise in international proceedings in the municipal proceedings. In the *ELSI* case the Chamber of the International Court of Justice stated that:

“for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success”.¹⁸³

This test is preferable to the stricter test enunciated in the *Finnish Ships Arbitration* that:

“all the contentions of fact and propositions of law which are brought forward by the claimant Government ... must have been investigated and adjudicated upon by the municipal courts”.¹⁸⁴

(7) The claimant State must therefore produce the evidence available to it to support the essence of its claim in the process of exhausting local remedies.¹⁸⁵ The international remedy afforded by diplomatic protection cannot be used to overcome faulty preparation or presentation of the claim at the municipal level.¹⁸⁶

(8) Draft article 14 does not take cognizance of the “Calvo Clause”,¹⁸⁷ a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States¹⁸⁸ on the ground that the alien has no right, in accordance with the rule in *Mavrommatis*, to waive a right that belongs to the State and not its national. Despite this, the “Calvo Clause” was viewed as a regional custom

¹⁸³ *I.C.J. Reports 1989*, p. 15 at para. 59.

¹⁸⁴ UNRIAA, vol. III., at p. 1502.

¹⁸⁵ *Ambatielos Claim*, at p. 120.

¹⁸⁶ D.P. O’Connell, *International Law*, vol. 2 (London: Stevens and Sons, 1970), p. 1059.

¹⁸⁷ Named after a distinguished Argentine jurist, Carlos Calvo (1824-1906).

¹⁸⁸ See, generally, D.R. Shea *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (Minneapolis: University of Minnesota Press, 1955).

in Latin-America and formed part of the national identity of many States. The “Calvo Clause” is difficult to reconcile with international law if it is to be interpreted as a complete waiver of recourse to international protection in respect of an action by the host State constituting an internationally wrongful act (such as denial of justice) or where the injury to the alien was of direct concern to the State of nationality of the alien.¹⁸⁹ The objection to the validity of the “Calvo Clause” in respect of general international law are certainly less convincing if one accepts that the right protected within the framework of diplomatic protection are those of the individual protected and not those of the protecting State.¹⁹⁰

(9) Paragraph 3 provides that the exhaustion of local remedies rule applies only to cases in which the claimant State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.¹⁹¹

(10) In practice it is difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”, in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before the International Court of Justice have presented the phenomenon of the mixed claim. In the *Hostages* case,¹⁹² there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage; and in the *Interhandel* case, there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In the *Hostages* case the Court treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies. In the *Arrest Warrant of 11 August 2000* case there was a direct injury to the Democratic Republic of the Congo (DRC) and its national (the Foreign Minister) but the Court held that the claim was not brought within the context of the protection of a national so it was

¹⁸⁹ *North American Dredging Company (U.S.A. v. Mexico)*, UNRIIA, vol. IV, p. 26.

¹⁹⁰ See paragraph (5) of commentary to draft article 1.

¹⁹¹ See generally on this subject, C.F. Amerasinghe, *Local Remedies in International Law*, op. cit., pp. 145-168.

¹⁹² *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3.

not necessary for the DRC to exhaust local remedies.¹⁹³ In the *Avena* case Mexico sought to protect its nationals on death row in the United States through the medium of the Vienna Convention on Consular Relations, arguing that it had “itself suffered, directly and through its nationals” as a result of the United States’ failure to grant consular access to its nationals under article 36 (1) of the Convention. The Court upheld this argument because of the “interdependence of the rights of the State and individual rights”.¹⁹⁴

(11) In the case of a mixed claim it is incumbent upon the tribunal to examine the different elements of the claim and to decide whether the direct or the indirect element is preponderant. In the *ELSI* case a Chamber of the International Court of Justice rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that:

“the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations]”.¹⁹⁵

Closely related to the preponderance test is the *sine qua non* or “but for” test, which asks whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the “but for” test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances one test only is provided for in paragraph 3, that of preponderance.

(12) Other “tests” invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment

¹⁹³ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3 at p. 18, para. 40.

¹⁹⁴ I.C.J. Reports 2004, p. 12, para. 40.

¹⁹⁵ I.C.J. Reports 1989, p. 15 at p. 43, para. 52. See, also, the *Interhandel* case, I.C.J. Reports 1959, at p. 28.

are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,¹⁹⁶ diplomatic official¹⁹⁷ or State property¹⁹⁸ the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

(13) Paragraph 3 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,¹⁹⁹ there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.²⁰⁰

(14) Draft article 14 requires that the injured person must himself have exhausted all local remedies. This does not preclude the possibility that the exhaustion of local remedies may result from the fact that another person has submitted the substance of the same claim before a court of the respondent State.²⁰¹

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

- (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

¹⁹⁶ *Arrest Warrant of 11 August 2000*, *I.C.J. Reports 2000*, p. 3, para. 40.

¹⁹⁷ *Hostages case*, *I.C.J. Reports 1980*, p. 3.

¹⁹⁸ *The Corfu Channel case (United Kingdom v. Albania)* Merits, *I.C.J. Reports 1949*, p. 4.

¹⁹⁹ *Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII, p. 415; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, of 26 June 1947, Advisory Opinion, *I.C.J. Reports 1988*, p. 11 at p. 29, para. 41.

²⁰⁰ See *The Interhandel*, at pp. 28-29; *ELSI case*, at p. 43.

²⁰¹ See *ELSI case*, at 46, para. 59.

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) The injured person is manifestly precluded from pursuing local remedies; or

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Commentary

- (1) Draft article 15 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (a) to (b), which cover circumstances in which local courts offer no prospect of redress, and paragraphs (c) to (d), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (e) deals with a different situation - that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph (a)

- (2) Paragraph (a) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the “futility” or “ineffectiveness” exception. Three options require consideration for the formulation of a rule describing the circumstances in which local remedies need not be exhausted because of failures in the administration of justice:

- (i) the local remedies are obviously futile;
- (ii) the local remedies offer no reasonable prospect of success;
- (iii) the local remedies provide no reasonable possibility of effective redress.

All three of these options enjoy some support among the authorities.

- (3) The “obvious futility” test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*, sets too high a threshold. On the other hand, the test of “no reasonable prospect of

success”, accepted by the European Commission of Human Rights in several decisions,²⁰² is too generous to the claimant. This leaves the third option which avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case²⁰³ and is supported by the writings of jurists.²⁰⁴ The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts²⁰⁵ and is sometimes considered as a component of this rule by courts²⁰⁶ and writers.²⁰⁷ For this reason the test in paragraph (a) is expanded to require that there are no “reasonably available local remedies” to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question,²⁰⁸ the national legislation justifying the acts of which the alien complains will not be

reviewed by local courts,²⁰⁹ the local courts are notoriously lacking in independence;²¹⁰ there is a consistent and well-established line of precedents adverse to the alien;²¹¹ the local courts do not have the competence to grant as appropriate and adequate remedy to the alien;²¹² or the respondent State does not have an adequate system of judicial protection.²¹³

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The decision on this matter must be made on the assumption that the claim is meritorious.²¹⁴

Paragraph (b)

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy

²⁰² *Reiting S.A. v. Federal Republic of Germany*, Application No. 712/60, *Yearbook of the European Convention on Human Rights*, vol. 4, p. 385 at p. 400; X, Y and Z v. UK, Application Nos. 8022/77, 8027/77, *European Commission of Human Rights, Decisions and Reports*, vol. 18, p. 66 at p. 74. See, too, the commentary to art. 22 of the draft articles on State Responsibility adopted by the Commission on first reading: *Yearbook ... 1977*, vol. II (Part Two), para. 48.

²⁰³ *Case of certain Norwegian Loans (France v. Norway)*, Judgment, *I.C.J. Reports 1957*, at p. 39.

²⁰⁴ G. Fitzmaurice “Hersch Lauterpacht - The Scholar a Judge”, *BYBIL*, vol. 37 (1961), p. 1 at pp. 60-61; M. Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen” in G. Ress and T. Stein, *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1966), p. 63 at p. 70.

²⁰⁵ Article 44 requires local remedies to be “available and effective”.

²⁰⁶ In *Loewen Group Inc v. USA*, the tribunal stated that the exhaustion of local remedies rule obliges the injured person “to exhaust remedies which are effective and adequate and are reasonably available” to him (at para. 168).

²⁰⁷ C.F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 181-2, 203-4.

²⁰⁸ *Panevezys-Saldutiskis Railway* case, at p. 18, *Arbitration under Article 181 of the Treaty of Neuilly*, reported in *AJIL*, vol.28, (1934), p. 760 at p. 789; Claims of R. Gelbrunk and “Salvador Commercial Co.” et al., UNRIAA, vol. XV, p. 467 at pp. 476-477; *The Lottie May*, “Incident, Arbitration between Honduras and the United Kingdom, of 18 April 1899, UNRIAA, vol. XV, p. 29 at p. 31; Judge Lauterpacht’s separate opinion in the *Norwegian Loans* case, *I.C.J. Reports 1957*, at pp. 39-40; *Finnish Ships Arbitration*, UNRIAA, vol. III, p. 1535.

²⁰⁹ *Arbitration under Article 181 of the Treaty of Neuilly*, *AJIL*, vol. 28 (1934), p. 789. See also *Affaire des Forêts du Rhodope Central (Fond)* 1933, UNRIAA, vol. III, p. 1405; *Ambatielos* claim, UNRIAA, vol XII, p. 119; *Interhandel* case, *I.C.J. Reports 1959*, at p. 28.

²¹⁰ *Robert E. Brown Claim* of 23 November 1923, UNRIAA, vol. VI, p. 120; *Vélasquez Rodríguez* case, Inter-American Court of Human Rights, Series C, No. 4, paras. 56-78, p. 291 at pp. 304-309.

²¹¹ *Panevezys-Saldutiskis Railway* case, at p. 18; S.S. “Lisman”, UNRIAA, vol. III, p. 1769 at p. 1773; S.S. “*Segurancá*”, UNRIAA, vol. III, p. 1861 at p. 1868; *Finnish Ships Arbitration*, at p. 1495; X v. *Federal Republic of Germany*, 1956, *Yearbook of the European Convention on Human Rights*, vol. I, p. 138; X v. *Federal Republic of Germany*, *Yearbook of the European Convention on Human Rights*, vol. 2, p. 342 at p. 344; X v. *Austria*, *Yearbook of the European Convention on Human Rights*, vol. 3, p. 196 at p. 202.

²¹² *Finnish Ships Arbitration*, at pp. 1496-1497, *Vélasquez Rodríguez* case; *Yağci and Sargin v. Turkey*, Judgment of 8 June 1995, *European Court of Human Rights, Reports and Decisions*, No. 319, p. 3 at p. 17, para. 42; *Hornby v. Greece*, Judgment of 19 March 1997, *European Court of Human Rights, Reports and Decisions*, 1997-11, No. 33, p. 495 at p. 509, para. 37.

²¹³ *Mushikwabo and others v. Baragwegwa*, 9 April 1996, ILR, vol. 107, p. 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 14/88, case 9755, *Ann. Rep Int. Am. Com HR 1987/88*.

²¹⁴ *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at pp. 119-120.

to be implemented is confirmed by codification attempts,²¹⁵ human rights instruments and practice,²¹⁶ judicial decisions²¹⁷ and scholarly opinion. It is difficult to give an objective content or meaning to “undue delay”, or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.”²¹⁸

(6) Paragraph (b) makes it clear that the delay in the remedial process is attributable to the State alleged to be responsible for an injury to an alien. The phrase “remedial process” is preferred to that of “local remedies” as it is meant to cover the entire process by which local remedies are invoked and implemented and through which local remedies are channelled.

Paragraph (c)

(7) The exception to the exhaustion of local remedies rule contained in draft article 15, paragraph (a), to the effect that local remedies do not need to be exhausted where they are not reasonably available or “provide no reasonable possibility of effective redress”, does not cover situations where local remedies are available and might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be

²¹⁵ See the discussion of early codifications attempts by *F.V. Garcia-Amador* in First Report, *Yearbook ... 1956*, vol. II, p. 173 at 223-226; art. 19 (2) of 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in AJIL, vol. 55 (1961), p. 545 at p. 577.

²¹⁶ International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, article 1 (c); American Convention on Human Rights (article 46 (2) (c)); *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57 at p. 59; *Las Palmeras*, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdogan v. Turkey*, Application No. 19807/92, No. 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5 at p. 15.

²¹⁷ *El Oro Mining and Railway Company (Limited) (Great Britain v. United Mexican States)*, decision No. 55 of 18 June 1931, UNRIIAA, vol. V, p. 191 at p. 198. See also *Case concerning the Administration of the Prince von Pleß*, Preliminary objections, *P.C.T.J. Series A/B*, 1933, No. 52, p. 4.

²¹⁸ *Ibid.*, at p. 198.

unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down while in overflight of another State’s territory. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.²¹⁹ Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong, an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine in 1986, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State’s airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provide clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in

²¹⁹ See Amerasinghe, *Local Remedies in International Law*, p. 169; T. Meron, “The Incidence of the Rule of Exhaustion of Local Remedies”, *BYBIL*, vol. 35, 1959, p. 83 at p. 94.

support of the existence of such an exception in the *Interhandel*²²⁰ and *Salem*²²¹ cases, in other cases²²² tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case²²³ and the *Aerial Incident case (Israel v. Bulgaria)*²²⁴ arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,²²⁵ involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others²²⁶ in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) Paragraph (c) does not use the term “voluntary link” to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a “relevant connection” between the injured alien and the host State and not a voluntary link. This connection must be “relevant” in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the

²²⁰ Here the International Court stated: “it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means”, *I.C.J. Reports 1959*, at p. 27. Emphasis added.

²²¹ In the *Salem* case an arbitral tribunal declared that “[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence”, UNRIAA, vol. II, p. 1165 at p. 1202.

²²² *Finnish Ships Arbitration*, at p. 1504; *Ambatielos Claim*, at p. 99.

²²³ *Case of certain Norwegian Loans (France v. Norway)*, Oral Pleadings of France, *I.C.J. Pleadings 1957*, vol. I, p. 408.

²²⁴ *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)* (Preliminary objections), Oral Pleadings of Israel, *I.C.J. Pleadings 1959*, pp. 531-532.

²²⁵ UNRIAA, vol. III, p. 1905.

²²⁶ *Virginias* case, reported in J.B. Moore, *A Digest of International Law*, vol. 2 (1906), p. 895 at p. 903; *Jessie* case, reported in AJIL, vol. 16 (1922), pp. 114-116.

injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word “relevant” best allows a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether there had been an assumption of risk on the part of the injured alien. There must be no “relevant connection” between the injured individual and the respondent State at the date of the injury.

Paragraph (d)

(11) Paragraph (d) is designed to give a tribunal the power to dispense with the requirement of exhaustion of local remedies where, in all the circumstances of the case, it would be manifestly unreasonable to expect compliance with the rule. This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies but that he is “manifestly” precluded from pursuing such remedies. No attempt is made to provide a comprehensive list of factors that might qualify for this exception. Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his or her personal safety, and thereby denying him the opportunity to bring proceedings in local courts. Or where criminal syndicates in the respondent State obstruct him from bringing such proceedings. Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State there may be circumstances in which such costs are prohibitively high and “manifestly preclude” compliance with the exhaustion of local remedies rule.²²⁷

Paragraph (e)

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it

²²⁷ On the implications of costs for the exhaustion of local remedies, see *Loewen Group Inc. v. United States of America*, at para. 166.

follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

“In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.”²²⁸

(13) Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

(14) An express waiver may be included in an *ad hoc* arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies is valid. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses. Probably the best-known example is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

²²⁸ *Government of Costa Rica* case (In the matter of Viviana Gallardo *et al.*) of 13 November 1981, Inter-American Court of Human Rights, ILR, vol. 67, p. 578 at p. 587, para. 26. See also ILM, vol. 20 (1981), p. 1057. See also *ELSI* case, ILR, vol. 67, at p. 42, para. 50; *De Wilde, Ooms and Versyp* cases (“Belgian Vagrancy Cases”), European Court of Human Rights, 1971, ILR, vol. 56, p. 337 at p. 370, para. 55.

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.²²⁹

(16) Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was:

“unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so”.²³⁰

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions²³¹ and the writings of jurists²³² support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national”.²³³ That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.²³⁴ A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

²²⁹ *Government of Costa Rica* case, at p. 587, para. 26; “Belgian Vagrancy cases”, at p. 370, para. 55.

²³⁰ *I.C.J. Reports* 1989, at p. 42, para. 50.

²³¹ See, for example, *Steiner and Gross v. Polish State 30 March 1928, 1927-1928, Annual Digest of Public International Law Cases*, vol. 4, p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3, *Iran-U.S.-C.T.R.*, vol. IV (1983), p. 96.

²³² See, for example, S. Schwebel *International Arbitration: Three Salient Problems* (Cambridge: Grotius Publishers, 1987), pp. 117-121.

²³³ F.A. Mann, “State contracts and international arbitration”, *BYBIL*, vol. 42 (1967), p. 1 at p. 32.

²³⁴ *I.C.J. Reports* 1989, p. 15. In the *Pantevezys-Saldutiskis Railway* case, the Permanent Court of International Justice held that acceptance of the Optional Clause under art. 36, para. 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule, *P.C.I.J. Series A/B*, 1939, No. 76, p. 19 (as had been argued by Judge van Eysinga in a dissenting opinion, *ibid.*, pp. 35-36).

State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted,²³⁵ paragraph (e) does not refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. It is wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Commentary

(1) The customary international law rules on diplomatic protection and the rules governing the protection of human rights are complementary. The present draft articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural and legal persons or other entities, involved in the protection of human rights, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

²³⁵ See *ELSI* case, at p. 44, para. 54; *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges*, award of 30 November 1992 (Arbitration Tribunal), ILR, vol. 102, p. 216 at p. 285, para. 6.33; *Foiti and others*, Judgment of 10 December 1982, Merits, ILR, vol. 71, p. 366 at p. 380, para. 46.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,²³⁶ the International Convention on the Elimination of All Forms of Racial Discrimination,²³⁷ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²³⁸ the European Convention on Human Rights,²³⁹ the American Convention on Human Rights,²⁴⁰ and the African Charter on Human and People's Rights.²⁴¹ The same conventions allow a State to protect its own nationals in inter-State proceedings.

Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 *South West Africa* cases²⁴² holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.²⁴³

Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,²⁴⁴ without complying with the requirements for the exercise of diplomatic protection.²⁴⁵

(3) The individual is also endowed with rights and remedies to protect him or herself against the injuring State, whether the individual's State of nationality or another State, in terms of

²³⁶ United Nations, *Treaty Series*, vol. 999, p. 171, art. 41.

²³⁷ Article 11.

²³⁸ United Nations, *Treaty Series*, vol. 1465, p. 85, art. 21.

²³⁹ Article 24.

²⁴⁰ Article 45.

²⁴¹ United Nations, *Treaty Series*, vol. 1520, p. 217, arts. 47-54.

²⁴² *Second Phase*, Judgment, *I.C.J. Reports 1966*, p. 6.

²⁴³ Commentary to article 48, footnote 766.

²⁴⁴ See further the separate opinion of Judge Simma in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, *I.C.J. Reports 2005*, paras. 35-41.

²⁴⁵ Article 48 (1) (b) is not subject to article 44 of the articles on Responsibility of States for internationally wrongful acts which requires a State invoking the responsibility of another State to comply with the rules relating to the nationality of claims and to exhaust local remedies. Nor is it subject to the present draft articles (cf. E. Milano "Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition", *Netherlands Yearbook of International Law*, vol. 35 (2005), p. 85 at pp. 103-108).

international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.²⁴⁶

(4) Individual rights under international law may also arise outside the framework of human rights. In the *La Grand* case the International Court of Justice held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person”,²⁴⁷ and in the *Avena* case the Court further observed “that violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.²⁴⁸ A saving clause was inserted in the articles on Responsibility of States for internationally wrongful acts - article 33 - to take account of this development in international law.²⁴⁹

(5) The actions or procedures referred to in draft article 16 include those available under both universal and regional human rights treaties as well as any other relevant treaty. Draft article 16 does not, however, deal with domestic remedies.

(6) The right to assert remedies other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act will normally vest in a State, natural or legal person, with the term “legal person” including both corporations and other legal persons of the kind contemplated in draft article 13. However, there may be “other legal entities” not enjoying legal personality that may be endowed with the right to bring claims for injuries suffered as a result of an internationally wrongful act. Loosely-formed victims’ associations

²⁴⁶ See, for example, the Optional Protocol to the International Covenant on Civil and Political Rights, *United Nations, Treaty Series*, vol. 999, p. 171; article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination; articles 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *United Nations, Treaty Series*, vol. 1465, p. 85; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, *United Nations, Treaty Series*, vol. 2131, p. 83.

²⁴⁷ *La Grand (Germany v. United States of America)*, at p. 494, para. 71.

²⁴⁸ *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, at p. 26, para. 40.

²⁴⁹ This article reads: “This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.

provide an example of such “another entity” which have on occasion been given standing before international bodies charged with the enforcement of human rights. Intergovernmental bodies may also in certain circumstances belong to this category; so too may national liberation movements.

(7) Draft article 16 makes it clear that the present draft articles are without prejudice to the rights that States, natural and legal persons or other entities may have to secure redress for injury suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not necessarily abandon its right to exercise diplomatic protection in respect of a person if that person should be a national or person referred to in draft article 8.

Article 17

Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Commentary

(1) Some treaties, particularly those dealing with the protection of foreign investment, contain special rules on the settlement of disputes which exclude or depart substantially from the rules governing diplomatic protection. Such treaties abandon or relax the conditions relating to the exercise of diplomatic protection, particularly the rules relating to the nationality of claims and the exhaustion of local remedies. Bilateral investment treaties (BITs) and the multilateral Convention on the Settlement of Investment Disputes between States and Nationals of Other States are the primary examples of such treaties.

(2) Today foreign investment is largely regulated and protected by BITs.²⁵⁰ The number of BITs has grown considerably in recent years and it is today estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established

²⁵⁰ This was acknowledged by the International Court of Justice in the *Barcelona Traction* case, at p. 47, para. 90.

by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and ICSID offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration, avoid the political uncertainty inherent in the discretionary nature of diplomatic protection and dispense with the conditions for the exercise of diplomatic protection.²⁵¹

(3) Draft article 17 makes it clear that the present draft articles do not apply to the alternative special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. The provision is formulated so that the draft articles do not apply “to the extent that” they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

(4) Draft article 17 refers to “treaty provisions” rather than to “treaties” as treaties other than those specifically designed for the protection of investments may regulate the protection of investments, such as treaties of Friendship, Commerce and Navigation.

Article 18

Protection of ships’ crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

²⁵¹ Article 27 (1) of the ICSID Convention provides: “No contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”

Commentary

(1) The purpose of draft article 18 is to affirm the right of the State or States of nationality of a ship’s crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship’s crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship’s crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship’s crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,²⁵² for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) The early practice of the United States, in particular, lends support to such a custom. Under American law foreign seamen were traditionally entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.²⁵³ This unique status of foreigners serving on American vessels was traditionally reaffirmed in diplomatic

²⁵² H. Myers, *The Nationality of Ships* (1967), pp. 90-108; R. Dolzer, “Diplomatic Protection of Foreign Nationals” in *Encyclopaedia of Public International Law* (1992), vol. 1, p. 1068; I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press 2003), p. 460.

²⁵³ *Ross v. McIntyre*, 140 U.S. 453 (1891).

communications and consular regulations of the United States.²⁵⁴ Doubts have, however, been raised, including by the United States,²⁵⁵ as to whether this practice provides evidence of a customary rule.²⁵⁶

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In *McCready (US) v. Mexico* the umpire, Sir Edward Thornton, held that “seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve”.²⁵⁷ In the “*Ym Alone*” case,²⁵⁸ which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for Injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.²⁵⁹

(5) In 1999, the International Tribunal for the Law of the Sea handed down its decision in *The M/V “Saiga” (No. 2) case (Saint Vincent and the Grenadines v. Guinea)*²⁶⁰ which provides support for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in St. Vincent and the Grenadines (“St. Vincent”) and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before the International Tribunal for the Law of the Sea, Guinea objected to the admissibility of St. Vincent’s claim, *inter alia*, on the ground

that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,²⁶¹ the Tribunal’s reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.²⁶² St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag “irrespective of their nationality”.²⁶³ In dismissing Guinea’s objection the Tribunal stated that the United Nations Convention on the Law of the Sea²⁶⁴ in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.²⁶⁵ It stressed that “the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant”.²⁶⁶

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship’s crew. This was recognized by the Law of the Sea Tribunal in *Saiga* when it called attention to “the transient and multinational composition of ships’ crews” and stated that large ships “could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue”.²⁶⁷ Practical considerations relating to the bringing of claims should not be

²⁵⁴ G.H. Hackworth, *Digest of International Law* (1942), vol. 3, p. 418, vol. 4, pp. 883-884.

²⁵⁵ Communication dated 20 May 2003 to the International Law Commission (on file with the Codification Division of the Office of Legal Affairs of the United Nations).

²⁵⁶ See Arthur Watts, “The Protection of Alien Seamen”, ICLO vol. 7 (1958), p. 691.

²⁵⁷ J.B. Moore, *International Arbitrations*, vol. 3, p. 2536.

²⁵⁸ AJIL vol. 29 (1935), 326.

²⁵⁹ *I.C.J. Reports 1949*, p. 174 at pp. 202-203, Judge Hackworth and pp. 206-207, Judge Badawai Pasha.

²⁶⁰ Judgment, *ITLOS Reports 1999*, p. 10.

²⁶¹ *Ibid.*, para. 98.

²⁶² *Ibid.*, para. 103.

²⁶³ *Ibid.*, para. 104.

²⁶⁴ United Nations, *Treaty Series*, vol. 1833, p. 3.

²⁶⁵ Judgment, *ITLOS Reports 1999*, para. 105.

²⁶⁶ *Ibid.*, para. 106.

²⁶⁷ *Ibid.*, para. 107.

overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

(8) Support for the right of the flag State to seek redress for the ship's crew is substantial and justified. It cannot, however, be categorized as diplomatic protection. Nor should it be seen as having replaced diplomatic protection. Both diplomatic protection by the State of nationality and the right of the flag State to seek redress for the crew should be recognized, without priority being accorded to either. Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer.

(9) The right of the flag State to seek redress for the ship's crew is not limited to redress for injuries sustained during or in the course of an injury to the vessel but extends also to injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself.

Article 19

Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
- (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Commentary

- (1) There are certain practices on the part of States in the field of diplomatic protection which have not yet acquired the status of customary rules and which are not susceptible to

transformation into rules of law in the exercise of progressive development of the law. Nevertheless they are desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment. These practices are recommended to States for their consideration in the exercise of diplomatic protection in draft article 19, which recommends that States "should" follow certain practices. The use of recommendatory, and not prescriptive, language of this kind is not unknown to treaties, although it cannot be described as a common feature of treaties.²⁶⁸

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.²⁶⁹ This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

(3) A State is not under international law obliged to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to

²⁶⁸ Article 36 (3) of the Charter of the United Nations, for instance, provides that in recommending appropriate procedures for the settlement of disputes, "the Security Council *should* also take into consideration that legal disputes *should* as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court" (emphasis added). Conventions on the law of the sea also employ the term "should" rather than "shall". Article 3 of the 1958 Geneva Convention on the High Seas, United Nations *Treaty Series*, vol. 450, p. 11, provides that "in order to enjoy freedom of the seas on equal terms with coastal States, States having no sea coast *should* have free access to the sea" (emphasis added). See, too, articles 27, 28, 43 and 123 of the 1982 United Nations Convention on the Law of the Sea.

²⁶⁹ A/RES/60/1, paras. 119-120, 138-140.

another State. The discretionary nature of the State's right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice²⁷⁰ and national courts,²⁷¹ as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad,²⁷² which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.²⁷³ In *Kaunda and Others v. President of the Republic of South Africa* the South Africa Constitutional Court stated that:

“There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.”²⁷⁴

In these circumstances it is possible to seriously suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising

diplomatic protection on behalf of a national who has suffered a significant injury abroad. If customary international law has not yet reached this stage of development then draft article 19, subparagraph (a), must be seen as an exercise in progressive development.

(4) Subparagraph (b), provides that a State “should”, in the exercise of diplomatic protection, “take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought”. In practice States exercising diplomatic protection do have regard to the moral and material consequences of an injury to an alien in assessing the damages to be claimed.²⁷⁵ In order to do this it is obviously necessary to consult with the injured person. So, too, with the decision whether to demand satisfaction, restitution or compensation by way of reparation. This has led some scholars to contend that the admonition contained in draft article 19, subparagraph (b), is already a rule of customary international law.²⁷⁶ If it is not, draft article 19, subparagraph (b), must also be seen as an exercise in progressive development.

(5) Subparagraph (c) provides that States should transfer any compensation received from the responsible State in respect of an injury to a national to the injured national. This recommendation is designed to encourage the widespread perception that States have an absolute discretion in such matters and are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national. This perception has its roots in the *Mavrommatis* rule and a number of judicial pronouncements. In terms of the *Mavrommatis Palestine Concessions* dictum a State asserts its own right in exercising diplomatic protection and becomes “the sole claimant”.²⁷⁷ Consequently, logic dictates that no restraints are placed on the State, in the interests of the individual, in the settlement of the claim or the payment of any compensation received. That the State has “complete freedom of action” in its exercise of diplomatic protection is confirmed by the *Barcelona Traction* case.²⁷⁸ Despite the fact that the logic of *Mavrommatis* is undermined by the practice of calculating the amount of damages

²⁷⁰ *Barcelona Traction* case, at p. 44.

²⁷¹ See, for example, *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598; *Kaunda v. President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM, vol. 44 (2005), p. 173.

²⁷² See First Report of the Special Rapporteur on Diplomatic Protection, document A/CN.4/506, p. 30.

²⁷³ *Rudolf Hess* case ILR vol. 90 p. 387 at pp. 392, 396; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598 and ILR vol. 125 p. 685, paras. 69, 79, 80, 82-83, 107-8. See, generally, A. Vermeer-Künzli “Restricting Discretion: Judicial Review of Diplomatic Protection” *Nordic Journal of International Law* vol. 75 (2006), p. 93.

²⁷⁴ 2005 (4) South African Law Reports 235 (CC); ILM vol. 44 (2005), p. 173, para. 69.

²⁷⁵ *Chorzow Factory* case (*Merits*), *P.C.I.J. Reports*, Series A, No. 17, p. 28; separate opinion of Judge Morelli in *Barcelona Traction* case, *I.C.J. Reports* 1970, p. 223.

²⁷⁶ B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale* (Paris: A. Pedone, 1973), p. 98; L. Dubois “La distinction entre le droit de l’Etat réclamant et le droit au ressortissant dans la protection diplomatique” *Revue critique de Droit International Privé*, (1978) pp. 615, 624.

²⁷⁷ *P.C.I.J. Reports* 1924, Series A, No. 2, p. 2.

²⁷⁸ *I.C.J. Reports* 1970, p. 3 at p. 44.

claimed on the basis of the injury suffered by the individual,²⁷⁹ which is claimed to be a rule of customary international law,²⁸⁰ the view persists that the State has an absolute discretion in the disposal of compensation received. This is illustrated by the dictum of Umpire Parker in the US-German Mixed Claims Commission in *Administrative Decision V*:

“In exercising such control [the nation] is governed not only by the interest of the particular claimant but by the larger interests of the whole people of the nation and must exercise an untrammelled discretion in determining when and how the claim will be presented and pressed, or withdrawn or compromised and the private owner will be bound by the action taken. *Even if payment is made to the espousing nation in pursuance of the award, it has complete control over the fund so paid to and held by it and may, to prevent fraud, correct a mistake or protect the national honour, at its election return the fund to the nation paying it or otherwise dispose of it.*”²⁸¹

Similar statements are to be found in a number of English judicial decisions,²⁸² which are seen by some to be an accurate statement of international law.²⁸³

(6) It is by no means clear that State practice accords with the above view. On the one hand, States agree to lump sum settlements in respect of multiple individual claims which in practice result in individual claims receiving considerably less than was claimed.²⁸⁴ On the other hand, some States have enacted legislation to ensure that compensation awards are fairly distributed to

individual claimants. Moreover, there is clear evidence that in practice States do pay moneys received in diplomatic claims to their injured nationals. In *Administrative Decision V*, Umpire Parker stated:

“... But where a demand is made on behalf of a designated national, and an award and payment is made on that specific demand, the fund so paid is not a national fund in the sense that the title vests in the nation receiving it entirely free from any obligation to account to the private claimant, on whose behalf the claim was asserted and paid and who is the real owner thereof. Broad and misleading statements susceptible of this construction are found in cases where lump-sum awards and payments have been made to the demanding nation covering numerous claims put forward by it and where the tribunal making the award did not undertake to adjudicate each claim or to allocate any specified amount to any designated claim. It is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation on behalf of its designated national in which the nation receiving payment of such award has, in the absence of fraud or mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received. So far as the United States is concerned it would seem that the Congress has treated funds paid the nation in satisfaction of specific claims as held ‘in trust for citizens of the United States or others.’”²⁸⁵

That this is the practice of States is confirmed by scholars.²⁸⁶ Further evidence of the erosion of the State’s discretion is to be found in the decisions of arbitral tribunals which prescribe how the award is to be divided.²⁸⁷ Moreover in 1994 the European Court of Human Rights decided in *Beaumarlin v. France*²⁸⁸ that an international agreement making provision for compensation could give rise to an enforceable right on the part of the injured persons to compensation.

²⁸⁵ UNRIIAA, vol. VII, p. 119, at p. 152.

²⁸⁶ W.K. Geck “Diplomatic Protection” in *Encyclopedia of Public International Law* (1992), vol. 1 at p. 1057; F.V. Garcia-Amador, Louis B. Sohn & R.R. Baxter, *Recent Codification of the Law of the State Responsibility for Injuries to Aliens* (Dobbs Ferry, N.Y.: Oceana Publishers, 1974), p. 151.

²⁸⁷ See B. Bollecker-Stern, *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 109.

²⁸⁸ Case No. 15287/89; [1994] ECHR 40.

²⁷⁹ *Chorzow Factory case* (Merits) *P.C.I.J. Reports 1928*, Series A, No. 17, at p. 28.

²⁸⁰ See the authors cited in footnote 276 above.

²⁸¹ UNRIIAA vol. VII, p. 119 at p. 152 (Emphasis added).

²⁸² *Civilian War Claimants Association v. R* [1932] AC p. 14; *Lonrho Exports Ltd. v. Export Credits Guarantee Department* [1996] 4 All E.R., p. 673; at p. 687.

²⁸³ American Law Institute, *Restatement of the Law, Third, Foreign Law of the United States* (1987) at §902, pp. 348-9; *Distribution of the Astor Award*, Opinion of J. Reuben Clark, Department of State, cited in Hackworth, *Digest of International Law*, vol. 5, p. 766; B. Bollecker-Stern *Le Préjudice dans la Théorie de la Responsabilité Internationale*, p. 108.

²⁸⁴ W.K. Geck “Diplomatic Protection” in *Encyclopedia of Public International Law* (1992), vol. 1 at p. 1058; D. Bederman “Interim Report on ‘Lump Sum Agreements and Diplomatic Protection’” International Law Association, Report of the Seventieth Conference, New Delhi (2002), p. 230; R. Lillich “The United States-Hungarian Claims Agreement of 1973” (1975), AJIL vol. 69, p. 534; R. Lillich & B. Weston *International Claims: Their Settlement by Lump-Sum Agreements* (Charlottesville: University Press of Virginia 1975).

- (7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.
- (8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.

**Responsibility of States for internationally wrongful acts;
Diplomatic protection**

United Nations General Assembly resolutions 56/83 of
12 December 2001, 59/35 of 2 December 2004, 62/61 and 62/67 of
6 December 2007, 65/19 and 65/27 of 6 December 2010, and
68/104 and 68/113 of 16 December 2013



General Assembly

Distr.: General
28 January 2002

Fifty-sixth session
Agenda item 162

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/56/589 and Corr.1)]

56/83. Responsibility of States for internationally wrongful acts

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-third session,¹ which contains the draft articles on responsibility of States for internationally wrongful acts,

Noting that the International Law Commission decided to recommend to the General Assembly that it should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution and annex the draft articles to that resolution, and that it should consider at a later stage, in the light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic,²

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States,

1. *Welcomes* the conclusion of the work of the International Law Commission on responsibility of States for internationally wrongful acts and its adoption of the draft articles and a detailed commentary on the subject;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action;

4. *Decides* to include in the provisional agenda of its fifty-ninth session an item entitled "Responsibility of States for internationally wrongful acts".

*85th plenary meeting
12 December 2001*

Annex

Responsibility of States for internationally wrongful acts

PART ONE THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Chapter I General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Chapter II Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

¹ *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 and corrigendum (A/56/10 and Corr.1).*

² *Ibid.*, paras. 72 and 73.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Chapter III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Chapter IV Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

- (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and
- (b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Chapter V Circumstances precluding wrongfulness

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

- (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

- (a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
- (b) The act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

- (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
- (b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

- (a) To cease that act, if it is continuing;
- (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

- 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33

Scope of international obligations set out in this part

- 1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
- 2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Chapter II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

- 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
- 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Chapter III
Serious breaches of obligations under peremptory norms of general international law

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Chapter I
Invocation of the responsibility of a State

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

- (a) That State individually; or
- (b) A group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (i) Specially affects that State; or
 - (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
2. The injured State may specify in particular:
 - (a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
 - (b) What form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:

- (a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
- (b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

- (a) The injured State has validly waived the claim;
- (b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

*Article 46**Plurality of injured States*

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

*Article 47**Plurality of responsible States*

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

- (a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;
- (b) Is without prejudice to any right of recourse against the other responsible States.

*Article 48**Invocation of responsibility by a State other than an injured State*

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

- (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
- (b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

- (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
- (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Chapter II Countermeasures

*Article 49**Object and limits of countermeasures*

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

*Article 50**Obligations not affected by countermeasures*

1. Countermeasures shall not affect:
 - (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
 - (b) Obligations for the protection of fundamental human rights;
 - (c) Obligations of a humanitarian character prohibiting reprisals;
 - (d) Other obligations under peremptory norms of general international law.
2. A State taking countermeasures is not relieved from fulfilling its obligations:
 - (a) Under any dispute settlement procedure applicable between it and the responsible State;
 - (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

*Article 51**Proportionality*

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

*Article 52**Conditions relating to resort to countermeasures*

1. Before taking countermeasures, an injured State shall:
 - (a) Call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.
3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:
 - (a) The internationally wrongful act has ceased; and
 - (b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.
4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

*Article 53**Termination of countermeasures*

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

**PART FOUR
GENERAL PROVISIONS**

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.



General Assembly

Distr.: General
16 December 2004

Fifty-ninth session
Agenda item 139

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/59/505)]

59/35. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

1. *Commends once again* the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to prepare an initial compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-second session;

4. *Decides* to include in the provisional agenda of its sixty-second session the item entitled "Responsibility of States for internationally wrongful acts".

65th plenary meeting
2 December 2004



General Assembly

Distr.: General
8 January 2008

Sixty-second session
Agenda item 78

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/62/446)]

62/61. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and further recalling its resolution 59/35 of 2 December 2004 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,¹

1. *Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit their written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-fifth session;

4. *Decides* to include in the provisional agenda of its sixty-fifth session the item entitled "Responsibility of States for internationally wrongful acts" and to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

¹ A/62/62 and Corr.1 and Add.1.

*62nd plenary meeting
6 December 2007*



General Assembly

Distr.: General
8 January 2008

Sixty-second session
Agenda item 83

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/62/451)]

62/67. Diplomatic protection

The General Assembly,

Having considered chapter IV of the report of the International Law Commission on the work of its fifty-eighth session,¹ which contains the draft articles on diplomatic protection,²

Noting that the Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles on diplomatic protection,³

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in the relations of States,

Taking into account the comments and observations of Governments⁴ and the discussion held in the Sixth Committee at the sixty-second session of the General Assembly on diplomatic protection,

1. *Welcomes* the conclusion of the work of the International Law Commission on diplomatic protection and its adoption of the draft articles and commentary on the topic;⁵
2. *Expresses its appreciation* to the Commission for its continuing contribution to the codification and progressive development of international law;
3. *Commends* the articles on diplomatic protection presented by the Commission, the text of which is annexed to the present resolution, to the attention of Governments, and invites them to submit in writing to the Secretary-General any

further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles;

4. *Decides* to include in the provisional agenda of its sixty-fifth session an item entitled "Diplomatic protection" and to further examine, within the framework of a working group of the Sixth Committee, in light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second session of the General Assembly, the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles.

62nd plenary meeting
6 December 2007

Annex

Diplomatic protection

Part one General provisions

Article 1 Definition and scope

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

Article 2 Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

Part two Nationality

Chapter I General principles

Article 3 Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.
2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).*

² *Ibid.*, para. 49.

³ *Ibid.*, para. 46.

⁴ A/62/118 and Add.1.

⁵ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, paras. 43 and 44.

Chapter II Natural persons

Article 4

State of nationality of a natural person

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

Article 5

Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationality and claim against a State of nationality

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

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

Chapter III Legal persons

Article 9

State of nationality of a corporation

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

Article 10

Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11

Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

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

Article 12

Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself,

the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13
Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

Part three
Local remedies

Article 14
Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
2. "Local remedies" means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.
3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15
Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

- (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
- (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;
- (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
- (d) The injured person is manifestly precluded from pursuing local remedies; or
- (e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

Part four
Miscellaneous provisions

Article 16
Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17
Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18
Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19
Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

- (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
- (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
- (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.



General Assembly

Distr.: General
10 January 2011

Sixty-fifth session
Agenda item 75

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/65/463)]

65/19. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution 56/83 of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and its resolutions 59/35 of 2 December 2004 and 62/61 of 6 December 2007 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Taking into account the comments and observations of Governments¹ and the discussions held in the Sixth Committee, at the fifty-sixth, fifty-ninth, sixty-second and sixty-fifth sessions of the General Assembly, on responsibility of States for internationally wrongful acts,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,²

1. *Acknowledges* the importance of the articles on responsibility of States for internationally wrongful acts, and commends them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

2. *Requests* the Secretary-General to invite Governments to submit further written comments on any future action regarding the articles;

3. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles

¹ See A/62/63 and Add.1 and A/65/96 and Add.1.

² See A/62/62 and Corr.1 and Add.1 and A/65/76.



and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its sixty-eighth session;

4. *Decides* to include in the provisional agenda of its sixty-eighth session the item entitled “Responsibility of States for internationally wrongful acts” and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

*57th plenary meeting
6 December 2010*



General Assembly

Distr.: General
10 January 2011

Sixty-fifth session
Agenda item 80

Resolution adopted by the General Assembly

[on the report of the Sixth Committee (A/65/468)]

65/27. Diplomatic protection

The General Assembly,

Recalling its resolution 62/67 of 6 December 2007, the annex to which contains the text of the articles on diplomatic protection, commending the articles to the attention of Governments,

Recalling also that the International Law Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the articles on diplomatic protection,¹

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in relations between States,

Taking into account the comments and observations of Governments² and the discussions held in the Sixth Committee, at the sixty-second and sixty-fifth sessions of the General Assembly, on diplomatic protection,

1. *Commends once again* the articles on diplomatic protection to the attention of Governments, and invites them to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles;¹

2. *Decides* to include in the provisional agenda of its sixty-eighth session the item entitled "Diplomatic protection" and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second and sixty-fifth sessions of the General Assembly, to further examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles and to also identify any difference of opinion on the articles.

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 46.

² See A/62/118 and Add.1 and A/65/182 and Add.1.



*57th plenary meeting
6 December 2010*



General Assembly

Distr.: General
18 December 2013

Sixty-eighth session
Agenda item 77

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/460)]

68/104. Responsibility of States for internationally wrongful acts

The General Assembly,

Recalling its resolution [56/83](#) of 12 December 2001, the annex to which contains the text of the articles on responsibility of States for internationally wrongful acts, and its resolutions [59/35](#) of 2 December 2004, [62/61](#) of 6 December 2007 and [65/19](#) of 6 December 2010 commending the articles to the attention of Governments,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of responsibility of States for internationally wrongful acts is of major importance in relations between States,

Taking into account the comments and observations of Governments¹ and the discussions held in the Sixth Committee, at the fifty-sixth, fifty-ninth, sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, on responsibility of States for internationally wrongful acts,

Noting with appreciation the compilation of decisions of international courts, tribunals and other bodies referring to the articles, prepared by the Secretary-General,²

1. *Acknowledges* that a growing number of decisions of international courts, tribunals and other bodies refer to the articles on responsibility of States for internationally wrongful acts;

2. *Continues to acknowledge* the importance and usefulness of the articles, and commends them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action;

3. *Requests* the Secretary-General to invite Governments to submit further written comments on any future action regarding the articles;

¹ See [A/62/63](#) and Add.1, [A/65/96](#) and Add.1 and [A/68/69](#) and Add.1.

² See [A/62/62](#) and Corr.1 and Add.1, [A/65/76](#) and [A/68/72](#).



4. *Also requests* the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in this regard, and further requests the Secretary-General to submit this material well in advance of its seventy-first session;

5. *Decides* to include in the provisional agenda of its seventy-first session the item entitled “Responsibility of States for internationally wrongful acts” and to further examine, within the framework of a working group of the Sixth Committee and with a view to taking a decision, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles.

*68th plenary meeting
16 December 2013*



General Assembly

Distr.: General
18 December 2013

Sixty-eighth session
Agenda item 82

Resolution adopted by the General Assembly on 16 December 2013

[on the report of the Sixth Committee (A/68/465)]

68/113. Diplomatic protection

The General Assembly,

Recalling its resolution [62/67](#) of 6 December 2007, the annex to which contains the text of the articles on diplomatic protection, commending the articles to the attention of Governments,

Recalling also that the International Law Commission decided to recommend to the General Assembly the elaboration of a convention on the basis of the articles on diplomatic protection,¹

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations,

Noting that the subject of diplomatic protection is of major importance in relations between States,

Taking into account the comments and observations of Governments² and the discussions held in the Sixth Committee, at the sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, on diplomatic protection,

1. *Commends once again* the articles on diplomatic protection³ to the attention of Governments, and invites them to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the International Law Commission to elaborate a convention on the basis of the articles;¹

2. *Decides* to include in the provisional agenda of its seventy-first session the item entitled “Diplomatic protection” and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments,

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 46.

² See [A/62/118](#) and Add.1, [A/65/182](#) and Add.1 and [A/68/115](#) and Add.1.

³ Resolution [62/67](#), annex.



as well as views expressed in the debates held at the sixty-second, sixty-fifth and sixty-eighth sessions of the General Assembly, to continue to examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles and to also identify any difference of opinion on the articles.

*68th plenary meeting
16 December 2013*

International Court of Justice

Ahmadou Sadio Diallo
(Republic of Guinea v. Democratic Republic of the Congo)
Preliminary Objections, Judgment

I.C.J. Reports 2007, p. 582

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**AFFAIRE
AHMADOU SADIO DIALLO**

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 24 MAI 2007

2007

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**CASE CONCERNING
AHMADOU SADIO DIALLO**

(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC
OF THE CONGO)

PRELIMINARY OBJECTIONS

JUDGMENT OF 24 MAY 2007

Mode officiel de citation :

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INTERNATIONAL COURT OF JUSTICE

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24 May
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24 May 2007

CASE CONCERNING
AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA v. DEMOCRATIC
REPUBLIC OF THE CONGO)

AHMADOU SADIO DIALLO
(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO)

PRELIMINARY OBJECTIONS

EXCEPTIONS PRÉLIMINAIRES

Facts underlying the case — Disputes between Africom-Zaire and Africotainers-Zaire, two sociétés privées à responsabilité limitée (SPRLs) incorporated under Zairean law, on the one hand, and the Zairean State and other business partners on the other — Arrest, detention and expulsion of Mr. Diallo, a Guinean citizen, associé and gérant of the companies, on the ground that his presence and conduct breached public order in Zaire — Disagreement between the Parties on the circumstances of Mr. Diallo's arrest, detention and expulsion.

AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v. DEMOCRATIC REPUBLIC
OF THE CONGO)

Object of the Application — Diplomatic protection on behalf of Mr. Diallo for the violation of three categories of rights — Mr. Diallo's individual personal rights — Mr. Diallo's direct rights as associé in Africom-Zaire and Africotainers-Zaire — Rights of the companies.

PRELIMINARY OBJECTIONS

* *

Basis of the Court's jurisdiction — Declarations made by the Parties under Article 36, paragraph 2, of the Statute.

* *

Preliminary objections raised by the DRC to the admissibility of the Application — Guinea's standing — Non-exhaustion of local remedies — Examination by the Court in respect of each of the three different categories of rights alleged by Guinea to have been violated.

24 MAY 2007

JUDGMENT

*

Mr. Diallo's individual personal rights.
DRC's contention that Guinea's Application is inadmissible on the ground that local remedies have not been exhausted — Scope ratione materiae of diplomatic protection — Conditions of exercise — Mr. Diallo's Guinean nationality — Burden of proof as regards local remedies — Guinea required to prove exhaustion by Mr. Diallo of local remedies available in the DRC or the existence of exceptional circumstances justifying the failure to exhaust them — DRC required to prove existence and non-exhaustion of available and effective local remedies — Examination by the Court confined to the question of local remedies in respect of Mr. Diallo's expulsion — Expulsion characterized as "refusal of entry" ("refoulement") when carried out — Refusals of entry not appealable under Congolese law — DRC cannot rely on error in designation — Request for reconsideration by the administrative authority having taken the decision not a local remedy to be exhausted — Objection based on failure to exhaust local remedies rejected.

*

Protection of Mr. Diallo's direct rights as associé in Africom-Zaire and Africontainers-Zaire.

DRC's contention that Guinea's Application is inadmissible for lack of standing, Mr. Diallo's expulsion not having injured his direct rights as associé — Guinea's contention that the effect of and motive for Mr. Diallo's expulsion was to prevent him from exercising his direct rights as associé in Africom-Zaire and Africontainers-Zaire and his rights as their gérant — Legal nature of the companies governed by Congolese law — Independent legal personality of SPRLs distinct from that of their associates — National State of associates entitled to exercise diplomatic protection in respect of infringements of their direct rights — Definition of rights appertaining to the status of associé and to the position of gérant of an SPRL under Congolese law and assessment of the effects on these rights of the actions taken against Mr. Diallo, being substantive matters — Objection based on Guinea's lack of standing rejected.

DRC's contention that Guinea's Application is inadmissible for failure to exhaust local remedies — Alleged violations of Mr. Diallo's direct rights as associé described by Guinea as a direct consequence of his expulsion — Court having found that the DRC has not proved the existence under Congolese law of effective remedies against Mr. Diallo's expulsion — DRC not having shown the existence of distinct remedies against the alleged violations of Mr. Diallo's direct rights as associé — Objection as to inadmissibility based on failure to exhaust local remedies rejected.

*

Diplomatic protection with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire.

DRC's contention that Guinea's Application is inadmissible for lack of standing — Guinea's argument that customary international law of diplomatic protection by a company by its State of nationality is subject to an exception allowing for diplomatic protection of shareholders by their national State "by

substitution" for the company when the State whose responsibility is at issue is the national State of the company — Exception not, at present, established in customary international law — Question whether customary international law contains a more limited rule of protection "by substitution", such as that proposed by the International Law Commission (ILC) in Article 11 (b) of its draft Articles on Diplomatic Protection — Does not arise for decision on present facts — Diplomatic protection of Africom-Zaire and Africontainers-Zaire governed by the normal rule of the nationality of the claims — Congolese nationality of the companies — Objection based on Guinea's lack of standing upheld.

DRC's objection based on failure to exhaust local remedies without object.

* * *

Application admissible in so far as it concerns protection of Mr. Diallo's rights as an individual and his direct rights as associé in Africom-Zaire and Africontainers-Zaire.

JUDGMENT

Present: President HIGGINS; Vice-President AL-KHASAWNEH; Judges RANJEVA, SHI, KOROMA, BUERGENTHAL, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV; Judges ad hoc MAHILOU, MAMPUYA; Registrar COUVREUR.

In the case concerning Ahmadou Sadio Diallo,
between

the Republic of Guinea,
 represented by

Mr. Mohamed Camara, Chargé d'affaires a.i. at the Embassy of the Republic of Guinea, Brussels,
 as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the International Law Commission of the United Nations,

as Deputy Agent, Counsel and Advocate;

Mr. Mathias Forteau, Professor at the University of Lille 2,
 Mr. Jean-Marc Thouvenin, Professor at the University of Paris X-Nanterre, member of the Paris Bar, Cabinet Sygna Partners,
 Mr. Samuel Wordsworth, member of the English Bar, Essex Court Chambers,
 as Counsel and Advocates;

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,
Mr. Luke Vidal, member of the Paris Bar, Cabinet Sygna Partners,
as Advisers,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Pierre Ilunga M'Bundu wa Biloba, Minister of Justice and Keeper of the Seals, Democratic Republic of the Congo,

as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands,

as Agent;

Maitre Tshibangu Kalala, Deputy, Congolese Parliament, member of the Kinshasa and Brussels Bars, Cabinet Tshibangu et Associés,

as Co-Agent, Counsel and Advocate;

Mr. André Mazvambo Makengo Kisala, Professor of International Law, University of Kinshasa,

as Counsel and Advocate;

Mr. Yenyi Olungu, Principal Advocate-General of the Republic, Directeur de cabinet of the Minister of Justice and Keeper of the Seals,

Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice and Keeper of the Seals,

Mr. Nsingi-zi-Mayemba, Minister-Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

Mr. Bamana Kalonji Jerry, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Netherlands,

Maitre Kikangala Ngote, member of the Brussels Bar,

as Advisers;

Maitre Kadima Mukadi, member of the Kinshasa Bar, Cabinet Tshibangu et Associés,

Maitre Lufuilwabo Tshimpangila, member of the Brussels Bar,

Maitre Tshibwabwa Mbuyi, member of the Brussels Bar,

as Research Assistants;

Ms Ngoya Tshibangu,

as Assistant,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter “Guinea”) filed in the Registry of the Court an Application instituting

proceedings against the Democratic Republic of the Congo (hereinafter the “DRC”) in respect of a dispute concerning “serious violations of international law” allegedly committed “upon the person of a Guinean national”. The Application consisted of two parts, each signed by Guinea’s Minister for Foreign Affairs. The first part, entitled “Application” (hereinafter the “Application (Part One)”), contained a succinct statement of the subject of the dispute, the basis of the Court’s jurisdiction and the legal grounds relied on. The second part, entitled “Memorial of the Republic of Guinea” (hereinafter the “Application (Part Two)”), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea’s claims. In the Application (Part One) Guinea maintained:

“Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled.”

Guinea added:

“[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the State and by oil companies established in its territory and of which the State is a shareholder”.

Mr. Diallo’s arrest, detention and expulsion are alleged to constitute, *inter alia*, violations of

“the principle that aliens should be treated in accordance with a minimum standard of civilization”, [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

To found the jurisdiction of the Court, Guinea invoked in the Application (Part One) the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the DRC by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 25 November 1999, the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the DRC. By an Order of 8 September 2000, the President of the Court, at Guinea’s request, extended the time-limit for the filing of the Memorial to 23 March 2001; in the same Order the time-limit for the filing of the Counter-Memorial was extended to 4 October 2002. Guinea duly filed its Memorial within the time-limit as thus extended.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each of them availed itself of its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Guinea chose Mr. Mohammed Bedjaoui and the DRC Mr. Auguste Mampuya Kanunk’a-Ishiabo. Following Mr. Bedjaoui’s resignation on 10 September 2002, Guinea chose Mr. Ahmed Mahiou.

5. On 3 October 2002, within the time-limit set in Article 79, paragraph 1, of the Rules of Court as adopted on 14 April 1978, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In accordance with Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were then suspended. By an Order of 7 November 2002, the Court, taking account of the particular circumstances of the case and of the agreement of the Parties, fixed 7 July 2003 as the time-limit for the presentation by Guinea of a written statement of its observations and submissions on the preliminary objections raised by the DRC. Guinea filed such a statement within the time-limit fixed and the case thus became ready for hearing on the preliminary objections.

6. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

7. Public sittings were held from 27 November 2006 to 1 December 2006, at which the Court heard the oral arguments and replies of:

For the DRC: H.E. Mr. Jacques Masangu-a-Mwanza,
Maître Tshibangu Kalala,
Mr. André Mazyambo Makengo Kisala.

For Guinea: Mr. Mohamed Camara,
Mr. Mathias Forteau,
Mr. Samuel Wordsworth,
Mr. Alain Pellet,
Mr. Jean-Marc Thouvenin.

8. A Member of the Court put a question at the hearing on 28 November 2006, which the Parties answered orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

9. By a letter dated 1 December 2006, the Court, acting pursuant to Article 62, paragraph 1, of the Rules of Court, asked the DRC to furnish it with certain additional documents.

*

10. In the Application (Part Two), the following requests were made by Guinea:

“As to the form: To admit the present Application.

As to the merits: To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that the Congolese State must assume responsibility for the payment of these debts, in accordance with the principles of State responsibility and civil liability;

To order the Congolese State to pay to the State of Guinea on behalf of its national Ahmadou Sadio Diallo the sums of US \$31,334,685,888.45 and Z 14,207,082,872.7 in respect of the financial loss suffered by him;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US \$4,700,202,883.26 and Z 2,131,062,430.9;

To award to the applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order the said State to return to the Applicant all the unvalued assets set out in the list of miscellaneous claims;

To order the Democratic Republic of the Congo to submit within one month an acceptable schedule for the repayment of the above sums;

In the event that the said schedule is not produced by the date indicated or is not respected, to authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

To order that the costs of the present proceedings be borne by the Congolese State.” (Emphasis in the original.)

11. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial on the merits:

“The Republic of Guinea has the honour to request that it may please the International Court of Justice to adjudge and declare:

(1) that, in arbitrarily arresting and expelling its national, Mr. Ahmadou Sadio Diallo; in not at that time respecting his right to the benefit of the provisions of the [1963] Vienna Convention on Consular Relations; in subjecting him to humiliating and degrading treatment; in depriving him of the exercise of his rights of ownership and management in respect of the companies founded by him in the DRC; in preventing him from pursuing recovery of the numerous debts owed to him — to himself personally and to the said companies — both by the DRC itself and by other contractual partners; in not paying its own debts to him and to his companies, the Democratic Republic of the Congo has committed internationally wrongful acts which engage its responsibility to the Republic of Guinea;

(2) that the Democratic Republic of the Congo is accordingly bound to make full reparation on account of the injury suffered by the Republic of Guinea in the person of its national;

(3) that such reparation shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest.

The Republic of Guinea further requests the Court kindly to authorize it to submit an assessment of the amount of the compensation due to it on this account from the Democratic Republic of the Congo in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the Judgment.”

On behalf of the Government of the DRC,
in the preliminary objections:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

- (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality;
- (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo.”

On behalf of the Government of Guinea,

in the written statement containing its observations and submissions on the preliminary objections raised by the DRC:

“For the reasons set out above, the Republic of Guinea kindly requests the Court to:

1. Reject the preliminary objections raised by the Democratic Republic of the Congo, and
2. Declare the Application of the Republic of Guinea admissible.”

12. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the DRC,

at the hearing of 29 November 2006:

“The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

- (1) on the ground that the Republic of Guinea lacks standing to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the violation of rights of companies not possessing its nationality;
- (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in the Democratic Republic of the Congo.”

On behalf of the Government of Guinea,

at the hearing of 1 December 2006:

“For the reasons set out in its Observations of 7 July 2003 and in oral argument, the Republic of Guinea kindly requests the International Court of Justice:

- (1) to reject the preliminary objections raised by the Democratic Republic of the Congo;
- (2) to declare the Application of the Republic of Guinea admissible; and

(3) to fix time-limits for the further proceedings.”

* * *

13. The Court will begin with a brief description of the factual background to the present case.

14. As set out in their written pleadings, the Parties are in agreement as to the following facts. Mr. Ahmadou Sadio Diallo, a Guinean citizen, settled in the DRC (called “Congo” between 1960 and 1971 and “Zaire” between 1971 and 1997) in 1964. There, in 1974, he founded an import-export company, Africom-Zaire, a *société privée à responsabilité limitée* (private limited liability company, hereinafter “SPRL”) incorporated under Zairean law and entered in the Trade Register of the city of Kinshasa, and he became its *gérant* (manager). In 1979 Mr. Diallo expanded his activities, taking part, as *gérant* of Africom-Zaire and with backing from two private partners, in the founding of another Zairean SPRL, specializing in the containerized transport of goods. The capital in the new company, Africontainers-Zaire, was held as follows: 40 per cent by Mr. Zala, a Zairean national; 30 per cent by Ms Dewast, a French national; and 30 per cent by Africom-Zaire. It too was entered in the Trade Register of the city of Kinshasa. In 1980 Africom-Zaire’s two partners in Africontainers-Zaire withdrew. The *parts sociales* (see paragraph 25 hereunder) in Africontainers-Zaire were then held as follows: 60 per cent by Africom-Zaire and 40 per cent by Mr. Diallo. At the same time Mr. Diallo became the *gérant* of Africontainers-Zaire. Towards the end of the 1980s, Africom-Zaire’s and Africontainers-Zaire’s relationships with their business partners started to deteriorate. The two companies, acting through their *gérant*, Mr. Diallo, then initiated various steps, including judicial ones, in an attempt to recover alleged debts. The various disputes between Africom-Zaire or Africontainers-Zaire, on the one hand, and their business partners, on the other, continued throughout the 1990s and for the most part remain unresolved today. Thus, Africom-Zaire claims payment from the DRC of a debt (acknowledged by the DRC) resulting from default in payment for deliveries of listing paper to the Zairean State between 1983 and 1986. Africom-Zaire is involved in another dispute, concerning arrears or overpayments of rent, with Planation Lever au Zaire (“PLZ”). Africontainers-Zaire is in dispute with the companies Zaire Fina, Zaire Shell and Zaire Mobil Oil, as well as with the Office National des Transports (“ONATRA”) and Générale des Carrières et des Mines (“Gécamines”). For the most part these differences concern alleged violations of contractual exclusivity clauses and the lay-up, improper use or destruction or loss of containers.

15. The Court considers the following facts also to be established. On 31 October 1995, the Prime Minister of Zaire issued an expulsion Order against Mr. Diallo. The Order gave the following reason for the expuls-

sion: Mr. Diallo's "presence and conduct have breached public order in Zaire, especially in the economic, financial and monetary areas, and continue to do so". On 31 January 1996, Mr. Diallo, already under arrest, was deported from Zaire and returned to Guinea by air. The removal from Zaire was formalized and served on Mr. Diallo in the shape of a notice of refusal of entry (*refoulement*) on account of "illegal residence" (*séjour irrégulier*) that had been drawn up at the Kinshasa airport on the same day.

*

16. Throughout the proceedings Guinea and the DRC have continued to differ on a number of other facts.

17. In respect of the specific circumstances of Mr. Diallo's arrest, detention and expulsion, Guinea maintains that Mr. Diallo was "secretly placed in detention, without any form of judicial process or even examination" on 5 November 1995. He allegedly remained imprisoned first for two months, before being released on 10 January 1996, "further to intervention by the [Zairean] President himself", only then to be "immediately rearrested and imprisoned for two [more] weeks" before being expelled. Mr. Diallo is thus said to have been detained for 75 days in all. Guinea adds that he was mistreated while in prison and was "deprived of the benefit of the 1963 Vienna Convention on Consular Relations". According to Guinea, Mr. Diallo has been without means of support since his expulsion and he has been unable to fulfil his functions as executive officer (*dirigeant*) of, or exercise his rights as shareholder in, Africom-Zaire and Africontainers-Zaire.

18. Guinea further maintains that Mr. Diallo's arrest, detention and expulsion were the culmination of a DRC policy to prevent him from recovering the debts owed to his companies, including judgment debts. Guinea claims that, before arresting Mr. Diallo and expelling him in January 1996, the Congolese authorities repeatedly interfered in the affairs of his companies. Guinea contends that Mr. Diallo had already suffered one year of imprisonment, in 1988, after trying to recover debts owed to Africom-Zaire by the Zairean State. Guinea also cites certain steps taken by the DRC in the course of 1995 "arbitrarily to stay the domestic proceedings for the enforcement of decisions handed down in favour of Mr. Diallo's companies". It thus explains:

"Enforcement of the judgment [by the Kinshasa *Tribunal de grande instance*] in the *Africontainers[-Zaire] v. Zaire Shell* case was stayed, on 13 September [1995], by order of the [Zairean Vice-] Minister of Justice, without any legal basis."

After the stay was lifted, property belonging to Zaire Shell was attached but "the attachments were once again revoked on 13 October [1995], this

time permanently, on 'oral instructions' from the Minister of Justice and outside the law". Guinea adds that Mr. Diallo's arrest, detention and expulsion took place just as Zaire Shell, for its part, and Zaire Fina and Zaire Mobil Oil, for theirs, approached Zaire's Minister of Justice, by letters dated 29 August 1995 and 15 November 1995, respectively, "seeking the intervention of the Government to warn the courts and tribunals about Mr. Ahmadou Sadio Diallo's conduct in his campaign to destabilize commercial companies".

19. The DRC rejects these allegations by Guinea and argues that the duration and conditions of Mr. Diallo's detention during the expulsion process were in conformity with Zairean law. In particular, it contends that the statutory maximum of eight days' detention was not exceeded. The DRC adds that the decision expelling Mr. Diallo was justified by his "manifestly groundless" and increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire and by the disinformation campaign he had launched there "aimed at the highest levels of the Zairean State, as well as very prominent figures abroad". The DRC notes that

"the total sum claimed by Mr. Diallo as owed to the companies run by him came to over 36 billion United States dollars . . . , which represents nearly three times the [DRC's] total foreign debt".

It adds: "the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery". Mr. Diallo's actions thus allegedly threatened seriously to compromise not only the operation of the undertakings concerned but also public order in Zaire.

20. The DRC further claims not to have interfered in the affairs of Africom-Zaire and Africontainers-Zaire or to have expelled Mr. Diallo with a view to preventing the companies from completing the legal proceedings they had brought to recover monies owed them. The DRC does not deny that in September 1995 the Minister of Justice ordered a stay of execution of the judgment rendered by the Kinshasa *Tribunal de grande instance* in the *Africontainers-Zaire v. Zaire Shell* case. It nevertheless explains that, "when the enforcement of a judicial decision is liable to . . . lead to serious public disorder", Zairean law allows the Minister of Justice to "stay its execution and request the *Inspectorat général des services judiciaires* (Inspectorate-General of Courts) to review it for legality". It adds that procedures of this type, "found . . . in a number of African States", are "in no way contrary to the principle of separation of powers, as it is understood in that part of the world". The DRC points out that the stay of execution of the judgment in question "was of very short

duration”, because a few days after the stay took effect the Minister of Justice “requested the president of the Court of Appeal to ‘take the necessary measures to execute’ the judgment . . . [on the ground that] ‘there had been no manifest error’”. The DRC moreover stresses that Mr. Diallo should not be confused with Africom-Zaire and Africontainers-Zaire, that the companies are separate legal entities and that the actions taken against Mr. Diallo cannot be equated with actions against the companies. Specifically, the companies remained completely free, after Mr. Diallo’s expulsion, to pursue any and all legal proceedings they had begun and did in fact do so, according to the DRC.

21. At the hearings the DRC made reference to various problems said to exist in connection with Africom-Zaire. Thus, in response to the question put by Judge Bennouna at the end of the first round of oral argument, seeking clarification from both Parties as to

“whether the legislation of the Democratic Republic of the Congo or the jurisprudence of the courts of the country authorizes the creation of a *société privée à responsabilité limitée* with a single shareholder and by one person” (see paragraph 8 above),

the DRC explained that “Congolese legislation in force does not permit the incorporation of a *société privée à responsabilité limitée* by just one person” and that, contrary to Guinea’s contention, Mr. Diallo could not therefore be the sole *associé* in Africom-Zaire.

22. The DRC next argued, for the first time, that in reality Mr. Diallo was not an *associé* at all in Africom-Zaire. In support it cited, and produced at the hearing, the articles of incorporation of a company called “Africom”, claiming to have discovered them just a few days earlier in the files of the Trade Register of the city of Kinshasa. After the oral proceedings had closed, the Court, acting pursuant to Article 62 of the Rules of Court, asked the DRC to provide it with the articles of incorporation of “Africom-Zaire”. In response, the DRC, by a letter of 20 December 2006, transmitted to the Registry a document identical to the one it had produced at the hearings, accompanied by a note stating that it had been unable to find any reference to Africom-Zaire in the Trade Register of the city of Kinshasa. After Guinea submitted observations on the letter and its annexes, the DRC communicated to the Court, by a letter of 31 January 2007, comments in reply, in which it acknowledged that Africom-Zaire had indeed existed and been registered in the Trade Register of the city of Kinshasa but explained that the company had ceased all activity in the mid-1980s. The DRC stated in that letter that “under Congolese law, a commercial company in such a situation [of inactivity] is automatically struck off the Trade Register as having ceased trading”, so that it was “highly possible that [the Africom-Zaire] file was removed from the files, lost or destroyed by the [Congolese] administrative staff”.

23. While admitting that Congolese legislation does not allow for the incorporation of an SPRL by one person, Guinea, in answering the question put by Judge Bennouna (see paragraphs 8 and 21 above), rejected the DRC’s argument that Mr. Diallo could not be the sole shareholder in Africom-Zaire. It maintained that “the fact of not being able to create a one-person company in no way prevents . . . a company becoming unipersonal subsequently” and in support cited the Decree of 6 March 1951 establishing Zaire’s trade register, which “does not mention a company’s becoming unipersonal as a case necessitating the cancellation of its registration in the trade register”.

24. Guinea further stated that the document referred to by the DRC at the hearing and provided to the Court concerns another company, one “not connected with Mr. Diallo’s company”. As proof thereof, it pointed out that the registered office addresses, registration numbers in the Trade Register and *gerants* of the two companies are different, as are their corporate purposes and dates of incorporation. Guinea argued that “the existence of [the] company [Africom-Zaire] and its articles of incorporation is beyond dispute”. In this connection it pointed out that the validity of the filing of the company’s articles of incorporation had been confirmed by the public prosecutor before the Supreme Court of Justice of the DRC, and it cited “many official documents issued by Zairean authorities” recognizing “Mr. Diallo to be the *gérant* of Africom-Zaire”. Finally, Guinea maintained that the DRC had acknowledged not only the existence of the two companies in question but also the fact that Mr. Diallo had “become, in fact, the sole executive officer of these two companies incorporated under the laws of Zaire”.

* * *

25. The Court notes at the outset that Africom-Zaire and Africontainers-Zaire are *sociétés privées à responsabilité limitée* (SPRLs) incorporated under Congolese law, i.e. companies

“which are formed by persons whose liability is limited to their capital contributions; which are not publicly held companies; and in which the *parts sociales* (shares), required to be uniform and in registered form, are not freely transferable” (Article 36 of the Decree of 27 February 1887 on commercial companies).

Under Congolese law, holders of *parts sociales* (“not freely transferable” shares) in SPRLs, like Mr. Diallo, are termed “*associés*” (see, for example, Articles 43, 44, 45, and 51 of the Decree of 27 February 1887). In their written pleadings and at the hearings, the Parties have however often employed the generic term “shareholder” in referring to Mr. Diallo’s status as *associé* in the two companies. In light of the foregoing,

“*associé*” will be the term primarily used by the Court in the present Judgment, except where it is referring to the Parties’ arguments and when they themselves used the generic term “shareholder”.

* * *

26. The Court observes that the dispute between Guinea and the DRC comprises many aspects and that the Parties have focused on the one or the other of these at different stages in the proceedings.

27. Thus, the greater part of Guinea’s Application concerns the disputes between Africom-Zaire and Africontainers-Zaire, on the one hand, and their public and private business partners, on the other. Specifically, Guinea devotes a lengthy part of its Application to describing the debts allegedly owed to the companies and Mr. Diallo, as well as to expounding the legal grounds on which the DRC is alleged to be liable for all these debts. The claims put forward by Guinea in its Application (Part Two) are also aimed for the most part at obtaining payment of the debts (see paragraph 10 above).

28. Guinea nevertheless also states in its Application that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo “with a view to obtaining [from the Court] a finding that the [DRC] is guilty of serious violations of international law committed upon [his] person”. It asserts that the DRC has violated

“the principle that aliens should be treated in accordance with ‘a minimum standard of civilization’, the obligation to respect the freedom and property of aliens, [and] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court”.

In support of these claims, Guinea cites “numerous international agreements concerning the treatment of aliens and the free movement of goods and persons”, including in particular the Universal Declaration of Human Rights of 10 December 1948 and the International Covenant on Civil and Political Rights of 19 December 1966. It states that “these various violations of human rights must be construed as breaches of norms of *jus cogens*”.

29. In its Memorial on the merits, Guinea continues to devote considerable attention to the issue of the debts allegedly owed to Africom-Zaire and Africontainers-Zaire and to Mr. Diallo. But Guinea also places renewed emphasis on the exercise of its diplomatic protection on behalf of Mr. Diallo and states that it

“is taking up the cause of one of its nationals, and is acting to enforce his direct rights as an individual and as shareholder and executive officer of companies which he founded . . . and of which he is the sole or principal owner, to the exclusion of distinct rights which these companies may have against the DRC”.

It divides Mr. Diallo’s rights which it seeks to protect into two separate categories, according to their nature. In the first, it places Mr. Diallo’s rights as an individual, including, in addition to those referred to in the Application, Mr. Diallo’s right not to be subjected to inhuman and degrading treatment and his right to the benefit of the provisions of the 1963 Vienna Convention on Consular Relations, both of which rights were allegedly violated at the time of his arrest, detention and expulsion. In the second category of rights which Guinea seeks to protect it places the “direct rights” allegedly enjoyed by Mr. Diallo as a shareholder (rights also sometimes called by Guinea “shareholder’s rights”) in Africom-Zaire and Africontainers-Zaire, specifically his right to oversee, control and manage the companies.

30. Guinea further states in its Application that it is seeking to protect, in addition to Mr. Diallo, “the companies which he founded and owns”. In its Memorial on the merits, it makes clear that it seeks to exercise its diplomatic protection on behalf of Mr. Diallo by “substitution” for Africom-Zaire and Africontainers-Zaire. Guinea explains that by “substitution” or “protection by substitution” it means the right of a State to exercise its diplomatic protection on behalf of nationals who are shareholders in a foreign company whenever the company has been a victim of wrongful acts committed by the State under whose law it has been incorporated. Thus Guinea does not confine itself to exercising protection of Mr. Diallo in respect of the violations of his direct rights as shareholder in Africom-Zaire and Africontainers-Zaire but seeks to protect him “in respect of the injuries suffered by [these] companies [themselves]”.

31. In sum, Guinea seeks through its action to exercise its diplomatic protection on behalf of Mr. Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire and the rights of those companies, by “substitution”.

* * *

32. To establish the jurisdiction of the Court, Guinea relies on the declarations made by the Parties under Article 36, paragraph 2, of the Statute. The DRC acknowledges that the declarations are sufficient to found the jurisdiction of the Court in the present case. The DRC nevertheless challenges the admissibility of Guinea’s Application and raises two preliminary objections in doing so. First of all, according to the DRC, Guinea lacks standing to act in the current proceedings since the rights which it seeks to protect belong to Africom-Zaire and Africontainers-Zaire, Congolese companies, not to Mr. Diallo. Guinea, it is argued, is further precluded from exercising its diplomatic protection on the ground that neither Mr. Diallo nor the companies have exhausted the remedies

available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.

* * *

33. The Court will now examine the preliminary objections to admissibility raised by the DRC, in respect of each of the various categories of rights alleged by Guinea to have been violated in the present case.

* * *

34. The Court will first address the question of the admissibility of Guinea's Application in so far as it concerns protection of Mr. Diallo's rights as an individual.

35. According to the DRC, Guinea's claims in respect of Mr. Diallo's rights as an individual are inadmissible because he "[has not] exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo". While this objection, presented by the DRC in its written pleadings and at the hearings, is very broadly worded, in the course of the present proceedings the DRC elaborated on only a single aspect of it: that concerning his expulsion from Congolese territory.

36. On this subject the DRC maintains that its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea. It first observes that, contrary to Guinea's contention, Mr. Diallo's expulsion from the territory was lawful. The DRC acknowledges that the notice signed by the immigration officer "inadvertently" refers to "refusal of entry" (*refoulement*) instead of "expulsion". Further, it does not challenge Guinea's assertion that Congolese law provides that refusals of entry are not appealable. The DRC nevertheless maintains that "despite this error, it is indisputable . . . that this was indeed an expulsion and not a refusal of entry". According to the DRC, calling the action a refusal of entry was therefore not intended to deprive Mr. Diallo of a remedy; on the contrary, "if Mr. Diallo had appealed to the Congolese authorities for permission to return to the DRC, that appeal would have had some prospect of success". The DRC cites the general principle of Congolese law that reconsideration of a decision can in all cases be requested from the authority having taken it and, if necessary, from that authority's superior. It maintains that Mr. Diallo never asked the competent authorities to reconsider their position and to allow him to return to the DRC. According to the DRC, such a request would have had a good chance of success, especially after the change in régime in the country in 1997. The effectiveness of requests for redress in respect of expulsion decisions in the DRC is alleged to be confirmed moreover by a substantial practice, the DRC citing in this regard two applications made by foreign nationals

appealing their removal from Zairean territory, each of which led to withdrawal of the removal Order.

37. Guinea responds that "[a]fter eight years of proceedings the DRC has shown itself to be incapable of invoking so much as a single real remedy that would have been available to Mr. Diallo" in respect of the violation of his rights as an individual. On the subject of Mr. Diallo's expulsion from the Congolese territory, Guinea states that there were no effective remedies first in Zaire, nor in the later DRC, against this measure, recalling in this regard that the expulsion Order against Mr. Diallo was carried out by way of an action denominated "refusal of entry" and that, "under Article 13 of the Legislative Order of 12 September 1983 concerning immigration control [in Zaire]: [a] measure refusing entry shall not be subject to appeal". Guinea adds that the possibility Mr. Diallo had to approach the Zairean authority having issued the expulsion Order "is not[, in any event,] a remedy within the meaning of the local remedies rule". It asserts that, on the contrary, this is merely an "extra-legal procedure that may be characterized as an appeal to the indulgence of the governmental authorities". And, according to Guinea, "[a]dministrative or other remedies which are neither judicial nor quasi-judicial and are discretionary in nature are not . . . taken into account by the local remedies rule". Guinea observes moreover that the two instances of remedies against expulsion cited by the DRC in support of its position are not germane since one case involved expulsion on grounds of illegal immigration, in respect of which a remedy of grace (*recours gracieux*) is available, and the other involved a "decision on grounds of undesirability" the reason for which is not specified in the Order revoking the decision.

38. Guinea further contends that, even though some remedies may in theory have been available to Mr. Diallo in the Congolese legal system, they would in any event have offered him no reasonable possibility of protection at the time. Guinea thus notes that the objective in expelling Mr. Diallo was precisely to prevent him from pursuing legal proceedings and argues that

"if a State deliberately chooses to remove an alien from its territory . . . because that alien is seeking local redress, that State can no longer reasonably demand that the alien seek redress only through legal avenues available in its territory".

Lastly, it notes that any action taken by Mr. Diallo would have been doomed to fail owing to the personal animosity towards him harboured by certain members of the Congolese Government.

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39. The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the “ILC”),

“diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility” (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.

40. In the present case Guinea seeks to exercise its diplomatic protection on behalf of Mr. Diallo in respect of the DRC’s alleged violation of his rights as a result of his arrest, detention and expulsion, that violation allegedly constituting an internationally wrongful act by the DRC giving rise to its responsibility. It therefore falls to the Court to ascertain whether the Applicant has met the requirements for the exercise of diplomatic protection, that is to say whether Mr. Diallo is a national of Guinea and whether he has exhausted the local remedies available in the DRC.

41. To begin with, the Court observes that it is not disputed by the DRC that Mr. Diallo’s sole nationality is that of Guinea and that he has continuously held that nationality from the date of the alleged injury to the date the proceedings were initiated. The Parties have however devoted much argument to the issue of exhaustion of local remedies.

42. As the Court stated in the *Interhandel (Switzerland v. United States of America)* case,

“[t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.” (*I.C.J. Reports 1959*, p. 27.)

43. The Parties do not question the local remedies rule; they do however differ as to whether the Congolese legal system actually offered local remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea before the Court.

44. In matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies (see *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, *I.C.J. Reports 1989*, pp. 43-44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see *ibid.*, p. 46, para. 59). Thus, in the present case, Guinea must establish that Mr. Diallo exhausted any available local remedies or, if not, must show that exceptional circumstances justified the fact that he did not do so; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove Mr. Diallo from the territory and that he did not exhaust them.

45. The Court will recall at this stage that, in its Memorial on the merits, Guinea described in detail the violations of international law allegedly committed by the DRC against Mr. Diallo. Among those cited is the claim that Mr. Diallo was arbitrarily arrested and detained on two occasions, first in 1988 and then in 1995. It states that he suffered inhuman and degrading treatment during those periods in detention and adds that his rights under the 1963 Vienna Convention on Consular Relations were not respected. The Court observes however that Guinea has not, in any way, developed the question of the admissibility of the claims concerning this inhuman and degrading treatment or relating to the 1963 Vienna Convention on Consular Relations. As the Court has already noted (see paragraph 36), the DRC has for its part endeavoured in the present proceedings to show that remedies to challenge the decision to remove Mr. Diallo from Zaire are institutionally provided for in its domestic legal system. By contrast, the DRC did not address the issue of exhaustion of local remedies in respect of Mr. Diallo’s arrest, his detention or the alleged violations of his other rights, as an individual, said to have resulted from those measures, and from his expulsion, or to have accompanied them. In view of the above, the Court will address the question of local remedies solely in respect of Mr. Diallo’s expulsion.

46. The Court notes that the expulsion was characterized as a “refusal of entry” when it was carried out, as both Parties have acknowledged and as is confirmed by the notice drawn up on 31 January 1996 by the national immigration service of Zaire. It is apparent that refusals of entry

are not appealable under Congolese law. Article 13 of Legislative Order No. 83-033 of 12 September 1983, concerning immigration control, expressly states that the “measure [refusing entry] shall not be subject to appeal”. The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was “refused entry” to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.

47. The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law. The DRC did, it is true, cite the possibility of requesting reconsideration by the competent administrative authority (see paragraph 36 above). The Court nevertheless recalls that, while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Thus, the possibility open to Mr. Diallo of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it, that is to say the Prime Minister, in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.

48. Having established that the DRC has not proved the existence in its domestic legal system of available and effective remedies allowing Mr. Diallo to challenge his expulsion, the Court concludes that the DRC’s objection to admissibility based on the failure to exhaust local remedies cannot be upheld in respect of that expulsion.

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49. The Court now turns to the question of the admissibility of Guinea’s Application in so far as it concerns protection of Mr. Diallo’s rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire. The DRC raises two objections to admissibility regarding this aspect of the Application: it contests Guinea’s standing, and it suggests that Mr. Diallo has not exhausted the local remedies that were available to him in the DRC to assert his rights. The Court will deal

with these objections in turn, beginning with that relating to Guinea’s standing.

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50. The DRC accepts that under international law the State of nationality has the right to exercise its diplomatic protection in favour of *associés* or shareholders when there is an injury to their direct rights as such. It nonetheless contends that “international law allows for [this] protection . . . only under very limited conditions which are not fulfilled in the present case”.

51. The DRC maintains first of all that Guinea is not seeking, in this case, to protect the direct rights of Mr. Diallo as *associé*. It takes the view that Guinea “identifies an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights” or, more specifically, that it identifies a violation of the rights of Africom-Zaire and Africontainers-Zaire with a violation of the rights of Mr. Diallo. The DRC states as proof that “in several passages in its written pleadings, Guinea considers claims held by Africom-Zaire and Africontainers-Zaire to be claims held by Mr. Diallo”. Such confusion between the rights of the companies and the rights of the shareholders is described by the DRC not only as “contrary to positive international law” but also as “contrary to the logic itself of the institution of diplomatic protection”; it is said to have been expressly “rejected by the Court in the *Barcelona Traction* case”.

52. The DRC further asserts that, in any event, action to protect the direct rights of shareholders as such applies to only very limited cases. Since shareholders “can claim to derive their shareholders rights [only from the company]”, “by definition, what is envisaged here can only be the rights of shareholders in their relations with the company”. According to the DRC:

“[t]his interpretation is confirmed by the list of examples provided by the Court [in the *Barcelona Traction* case]: the right to dividends, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation are rights which by definition the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company’s articles and in the commercial law of the legal order concerned”.

The only acts capable of violating the direct rights of shareholders would consequently be “acts of interference in relations between the company and its shareholders”. For the DRC, therefore, the arrest, detention and expulsion of Mr. Diallo could not constitute acts of interference on its part in relations between the *associé* Mr. Diallo and the companies Africom-Zaire and Africontainers-Zaire. As a result, they could not injure Mr. Diallo’s direct rights.

53. The DRC agrees, as suggested by Guinea, that

“the rights listed in the 1970 Judgment [in the *Barcelona Tracton* case] are no more than examples, and that the rights in question must be sought in the domestic legislation of the States concerned”.

The DRC also agrees with Guinea on the fact that, in terms of Congolese law, the direct rights of *associés* are determined by the Decree of the Independent State of Congo of 27 February 1887 on commercial corporations. The rights of Mr. Diallo as *associé* of the companies Africom-Zaire and Africontainers-Zaire are therefore theoretically as follows: “the right to dividends and to the proceeds of liquidation”, “the right to be appointed manager (*gérant*)”, “the right of the *associé* manager (*gérant*) not to be removed without cause”, “the right of the manager to represent the company”, “the right of oversight [of the management] and “the right to participate in general meetings”. However, the DRC notes that in practice, Mr. Diallo “was unable to exercise . . . the right of oversight of the two companies” since “the statutory oversight is oversight of the management [*(gérance)*]” and “such oversight cannot be entrusted to an individual who is already manager [*(gérant)*]”. The DRC further maintains that, contrary to what is claimed by Guinea, none of the other rights accorded to Mr. Diallo could have been affected by his expulsion. Hence it points out that the right of “being paid dividends and liquidation bonuses does not require as a condition of its enjoyment that the holder live in the Congo”. Likewise, “the functional rights [of the *associé*] . . . are not such as to be essentially affected by the physical absence of the holder from the headquarters of the company”. Mr. Diallo could very well have exercised them from foreign territory. He would have had every opportunity of “delegating executive tasks to local administrators, including through the appointment of a new manager”. The DRC also notes on this subject

“that Mr. Diallo himself continued to run Africontainers[-Zaire] and pursued recovery of the debts owed to that company well after his expulsion . . . [by appointing] representatives and lawyers to act on his behalf and on his instructions”.

54. In support of its diplomatic protection claim on behalf of Mr. Diallo as *associé*, Guinea refers to the Judgment in the *Barcelona Tracton* case, where, having ruled that “an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected” (*I.C.J. Reports 1970*, p. 36, para. 46), the Court added that “[t]he situation is different if the act complained of is aimed at the direct rights of the shareholder as such” (*ibid.*, p. 36, para. 47). Guinea further claims that this position of the Court was taken up in Article 12 of the ILC’s draft Articles on Diplomatic Protection, which provides that:

“To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.”

55. According to Guinea, the direct rights of Mr. Diallo as a shareholder of Africom-Zaire and Africontainers-Zaire are essentially determined by the Decree of 27 February 1887 on commercial corporations. This text is said to confer on him firstly a series of “property rights”, including the right to dividends from these companies, and secondly a series of “functional rights”, including the right to control, supervise and manage the companies. Guinea claims that the Congolese investment code also affords Mr. Diallo certain additional rights as shareholder, for example “the right to a share of the profits of his companies” and “a right of ownership in his companies, in particular in respect of his shares”. Guinea thus takes the view that it is confining itself, in its claim, to the violation of the rights enjoyed by Mr. Diallo in respect of the companies, including his rights of supervision, control and management, and that it is therefore not confusing his rights with those of the company.

56. Guinea also points out that, in SPRs, the *parts sociales* “are not freely transferable”, which “considerably accentuates the *intuitu personae* character of these companies, very different in this respect from public limited companies”. It argues that this character is seen as even more marked in the case of Africom-Zaire and Africontainers-Zaire, since Mr. Diallo was their “sole manager (*gérant*) and sole *associé* (directly or indirectly)”. According to Guinea, “in fact and in law it was virtually impossible to distinguish Mr. Diallo from his companies”.

57. Guinea considers that the arrest, detention and expulsion of Mr. Diallo not only had the effect “of preventing him from continuing to administer, manage and control any of the operations of the companies Africom-Zaire and Africontainers-Zaire”, but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts. Such intent is said to emerge from the text of the Order of 31 October 1995, which refers to “[Mr. Diallo.] whose presence and conduct have breached Zairean law and order, especially in the economic, financial and monetary areas, and continue to do so”. These measures, moreover, are said to have followed on from moves by the Zairean authorities seeking a stay of execution on a judgment of the *Tribunal de Grande Instance* of Kinshasa ordering Zaire Shell to pay compensation to Africontainers-Zaire.

58. Finally, Guinea maintains that, contrary to what is claimed by the DRC, Mr. Diallo could not validly exercise his direct rights as shareholder from his country of origin. Consequently,

“[e]ven if he had been in a position to appoint a new ‘gérant’ and a ‘commissaire’ — and he was not, given his lack of funds — he was still being deprived of the right to appoint the management of his choice in violation of . . . the 1887 Decree, and he could not be expected to confer or abandon the management to some third party”.

Guinea adds that it is unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings.

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59. The Court begins by noting the existence of a disagreement between the Parties on the circumstances surrounding the establishment of Africom-Zaire and the conduct of its activities, on the continuation of those activities after the 1980s, and on the consequences these questions may have under Congolese law. It nonetheless takes the view that this disagreement essentially relates to the merits and that it has no bearing on the question of the admissibility of Guinea’s Application as challenged in the Congo’s objections.

60. The Court notes that the Parties have referred frequently to the case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. This involved a public limited company whose capital was represented by shares. The present case concerns SPRLs whose capital is composed of *parts sociales* (see paragraph 25 above).

61. As the Court recalled in the *Barcelona Traction* case, “[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States” (*I.C.J. Reports 1970*, p. 34, para. 40). What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its own property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law.

62. The Court, in order to establish the precise legal nature of Africom-Zaire and Africontainers-Zaire, must refer to the domestic law of the DRC and, in particular, to the Decree of 27 February 1887 on commercial corporations. This text states, in Article 1, that “commercial corporations recognized by law in accordance with this Decree shall constitute legal persons having a personality distinct from that of their members”.

63. Congolese law accords an SPRL independent legal personality distinct from that of its *associés*, particularly in that the property of the *associés* is completely separate from that of the company, and in that the *associés* are responsible for the debts of the company only to the extent of the resources they have subscribed. Consequently, the company’s debts receivable from and owing to third parties relate to its respective rights and obligations. As the Court pointed out in the *Barcelona Traction* case: “So long as the company is in existence the shareholder has no right to the corporate assets.” (*I.C.J. Reports 1970*, p. 34, para. 41.) This remains the fundamental rule in this respect, whether for a SPRL or for a public limited company.

64. The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.

65. Having considered all of the arguments advanced by the Parties, the Court finds that Guinea does indeed have standing in this case in so far as its action involves a person of its nationality, Mr. Diallo, and is directed against the allegedly unlawful acts of the DRC which are said to have infringed his rights, particularly his direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire.

66. The Court notes that Mr. Diallo, who was *associé* in Africom-Zaire and Africontainers-Zaire, also held the position of *gérant* in each of them. An *associé* of an SPRL holds *parts sociales* in its capital, while the *gérant* is an organ of the company acting on its behalf. It is not for the Court to determine, at this stage in the proceedings, which specific rights appertain to the status of *associé* and which to the position of *gérant* of an SPRL under Congolese law. It is at the merits stage, as appropriate, that the Court will have to define the precise nature, content and limits of these rights. It is also at that stage of the proceedings that it will be for the Court, if need be, to assess the effects on these various rights of the action against Mr. Diallo. There is no need for the Court to rule on these substantive matters in order to be able to dispose of the preliminary objections raised by the Respondent.

67. In view of the foregoing, the Court concludes that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr. Diallo cannot be upheld in so far as it concerns his direct rights as *associé* of Africom-Zaire and Africontainers-Zaire.

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68. The DRC further claims that Guinea cannot exercise its diplomatic protection for the violation of Mr. Diallo's direct rights as *associé* of Africom-Zaire and Africontainers-Zaire in so far as he has not attempted to exhaust the local remedies available in Congolese law for the alleged breach of those specific rights.

69. The DRC points out that Guinea

“does not dispute . . . that there are procedures and machinery for redress, judicial or otherwise, within the legal system of the DRC which would have enabled the companies in question or Mr. Diallo himself to safeguard their rights”.

It adds that

“[i]n the circumstances of the present case, however, there is nothing . . . to warrant the conclusion that it was impossible for Mr. Diallo to avail himself of the machinery and procedures offered by Congolese law which would have enabled him to safeguard his rights”.

70. The DRC thus submits first that “Mr. Diallo's absence from Congolese territory was not an obstacle [in Congolese law] to the proceedings already initiated when Mr. Diallo was still in the Congo” or for him to bring other proceedings. Mr. Diallo could also have “giv[en] one or more representatives power of attorney to act in legal proceedings instituted” or to “institute fresh proceedings in other disputes”. In that connection, the DRC observes that in reality the

“proceedings already set in motion by Mr. Diallo on behalf of the companies of which he was managing director were not interrupted because of his removal from the national territory”.

It also notes that

“the alleged ‘extreme poverty’ of Mr. Diallo and his finding it ‘materially impossible to initiate further . . . proceedings’ [, as claimed by Guinea] . . . are affirmations lacking in credibility and quite without evidential value”.

In any event, poverty does not constitute “a new exception to the fundamental principle of the prior exhaustion of local remedies”.

71. The DRC also asserts that the existing remedies available in the Congolese legal system are effective. It emphasizes in that respect the fact that “the ‘effectiveness’ of a remedy in no way implies that the plaintiff wins the case”, adding that

“there can clearly be no question of contesting the effectiveness of local remedies simply because Mr. Diallo's initial claims were not upheld in full or were subsequently rejected”.

It also points out that in fact

“the local remedies available within the Congolese legal system have been shown to be effective with respect to the disputes submitted to the ordinary Congolese courts by the companies Africontainers-Zaire and Africom-Zaire”

in which those companies obtained rulings in their favour. Moreover, the DRC considers that, given “the particular situation in which the Democratic Republic of the Congo . . . found itself for some years”, it does not appear that the duration of proceedings before its domestic courts was unreasonable.

72. For its part, Guinea alleges that “the Congolese State deliberately chose to deny access to its territory to Mr. Diallo because of the legal proceedings that he had initiated on behalf of his companies”. It maintains that

“[i]n these circumstances, to accuse Mr. Diallo of not having exhausted the remedies would not only be manifestly ‘unreasonable’ and ‘unfair’, but also an abuse of the rule regarding the exhaustion of local remedies”.

Guinea adds that the circumstances of Mr. Diallo's expulsion also precluded him from pursuing local remedies on his own behalf or on that of his companies. It recalls that Mr. Diallo was first arrested and imprisoned in 1988, then in 1995 and finally expelled from the territory of the Congo for having “ventured . . . to bring administrative and legal claims”. The threat weighing on Mr. Diallo and his exclusion from Congolese territory constituted, according to Guinea, “a factual denial of access to local remedies”. The expulsion of Mr. Diallo from Congolese territory is also said to have put him in a financial position in which it was “materially impossible for him to pursue any remedy whatsoever in Zaire”. As for the possibility referred to by the DRC of appointing another *gérant* or giving someone else power of attorney to pursue the proceedings already initiated or institute fresh proceedings, Guinea points out that, in the circumstances of the case, “no one could be called upon to take over so dangerous a managerial post” and that “[t]he possible successor . . . would have had good reason to think that he was ‘manifestly precluded from pursuing local remedies’”.

73. Guinea further emphasizes that the existing remedies in the Con-

golese legal system must, in any event, be regarded as ineffective in view, *inter alia*, of the excessive delays of the Congolese judicial authorities in the settlement of the cases brought before them and the “unlawful administrative practices” allegedly inherent in the Congolese legal system, particularly the obstacles placed by the Government authorities to impede the enforcement of court rulings. Guinea notes in support of these arguments that there has still been no final ruling in two of the cases brought before the Congolese courts by Africom-Zaire and Africontainers-Zaire 14 and 13 years ago respectively. According to Guinea such “excessive lengths were general and probably not exceptional”; they demonstrate, it is claimed, “the futility of the remedies which Mr. Diallo’s companies, or indeed he himself, might have done their utmost to seek”. Guinea also recalls that, irrespective of the duration of proceedings before Congolese courts, “at the time of the events, the enforcement of legal decisions depended solely on the government’s goodwill”. It illustrates its argument by referring to “the interference by the Zairean Government in the legal proceedings brought by Mr. Diallo’s companies” and more particularly the repeated stays of execution on the ruling of the Kinshasa *Tribunal de Grande Instance* in the case between Africontainers-Zaire and Zaire Shell. According to Guinea,

“[t]he upshot of this is that any legal action that Mr. Diallo or his companies might have brought against the government could only result in a decision by that government based on political considerations”.

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74. The Court notes that the alleged violation of Mr. Diallo’s direct rights as *associé* was dealt with by Guinea as a direct consequence of his expulsion given the circumstances in which that expulsion occurred. The Court has already found above (see paragraph 48), that the DRC has not proved that there were effective remedies, under Congolese law, against the expulsion Order against Mr. Diallo. The Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo’s expulsion existed in the Congolese legal system against the alleged violations of his direct rights as *associé* and that he should have exhausted them. The Parties have indeed devoted discussion to the question of the effectiveness of local remedies in the DRC but have confined themselves in it to examining remedies open to Africom-Zaire and Africontainers-Zaire, without considering any which may have been open to Mr. Diallo as *associé* in the companies. Inasmuch as it has not been argued that there were remedies that Mr. Diallo should have exhausted in respect of his direct rights as *associé*, the question of the effectiveness of those remedies does not in any case arise.

75. The Court concludes from the foregoing that the objection as to inadmissibility raised by the DRC on the ground of the failure to exhaust the local remedies against the alleged violations of Mr. Diallo’s direct rights as *associé* of the two companies Africom-Zaire and Africontainers-Zaire cannot be upheld.

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76. The Court will now consider the question of the admissibility of Guinea’s Application as it relates to the exercise of diplomatic protection with respect to Mr. Diallo “by substitution” for Africom-Zaire and Africontainers-Zaire and in defence of their rights. Here too the DRC raises two objections to the admissibility of Guinea’s Application, derived respectively from Guinea’s lack of standing and the failure to exhaust local remedies. The Court will again address these issues in turn, beginning with Guinea’s standing.

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77. The DRC contends that Guinea cannot invoke, as it does in the present case,

“‘considerations of equity’ in order to justify ‘the right to exercise its diplomatic protection [in favour of Mr. Diallo and by substitution for Africom-Zaire and Africontainers-Zaire] independently of the violation of the direct rights [of Mr. Diallo]’”

on the ground that the State whose responsibility is at issue is also the State of nationality of the companies concerned. It recalls that the institution of diplomatic protection is based on the premise “whereby any violation of the rights of a foreign national is also a violation of the rights of his State of nationality”. “It is this circumstance, and this circumstance alone, which justifies recourse to diplomatic protection.” And the DRC emphasizes that “[c]onversely, if no right of its nationals is violated then no right of the State is violated and, in consequence, that State can in no circumstances have standing”. The diplomatic protection “by substitution” proposed by Guinea is thus said to go “far beyond what positive international law provides”.

78. The DRC adds that “contrary to what Guinea says, neither the Court’s jurisprudence nor State practice recognizes the possibility of diplomatic protection by substitution”. It explains that, although it touched upon this possibility in the *Barcelona Traction* case, the Court nevertheless did not “conclude that such a possibility existed under positive international law”. On the contrary, the DRC contends that certain judges were “fiercely opposed to it”. The DRC submits that

“Guinea vainly seeks acceptance of the notion of a customary basis for such protection [by substitution] by relying in turn on: arbitral

awards; decisions of the European Commission of Human Rights; the requirements of Article 25 of the Washington Convention; ICSID jurisprudence; and bilateral treaties for the promotion and protection of investments”.

According to the DRC, the arbitral awards to which Guinea refers are of no relevance, on the one hand, because of their age and, on the other, because, in each of the cases concerned, the issue of the right to claim on behalf of the shareholders had been settled in a convention enabling the arbitrators to adjudicate without limiting themselves to the application of general international law and which also contained a waiver by the respondent State of any right to raise an objection preventing the tribunal from ruling on the merits. The decisions of the European Commission of Human Rights, “given within a quite specific institutional and conventional framework, applicable at regional level, [are said to be no more] . . . relevant to the circumstances of the present case”. As for the ICSID Convention, bilateral and multilateral treaties for the promotion and protection of investments and, ICSID decisions, they are also said to lack relevance, as they “do not constitute the direct application of the principles and rules governing diplomatic protection”.

79. According to the DRC, Guinea is in reality asking the Court to authorize it to exercise its diplomatic protection in a manner contrary to international law. In this connection, the DRC referred to the Judgment delivered by a Chamber of the Court in the case concerning *Frontier Dispute (Burkina Faso/Republic of Mali)*, and observed that, since the Parties had not, in the present case, requested a decision *ex aequo et bono* under Article 38, paragraph 2, of the Statute, the Court must “also dismiss any possibility of resorting to equity *contra legem*” (*I.C.J. Reports 1986*, p. 567, para. 28). The DRC adds that none of the particular circumstances of the case warrants calling that conclusion into question.

80. The DRC further contends that, even supposing that the Court agreed to take account of the considerations of equity relied on by Guinea, Guinea has not demonstrated that protection of the shareholder “in substitution” for the company which possesses the nationality of the respondent State would be justified in the present case. In this connection, the DRC contends first that it has not been established that the solution advocated by Guinea is equitable in principle. On the contrary, the DRC suggests that such protection by substitution would in fact lead to a discriminatory régime of protection, resulting as it would in the unequal treatment of the shareholders. Some shareholders, such as Mr. Diallo in this case, might enjoy the protection of their national State by virtue of their alien status and of the good relations which they enjoy with their national authorities, whereas the other shareholders, either because they have the same nationality as the companies, or because their country of origin does not wish to exercise diplomatic protection in

respect of them, could have recourse only to domestic law and domestic courts to assert their rights. According to the DRC, such a difference in treatment lacks any objective and reasonable basis and thus constitutes true discrimination.

81. Lastly, the DRC maintains that “even assuming that ‘protection by substitution’ were accepted as justified, application of this principle to the case of Mr. Diallo would prove fundamentally inequitable”. According to the DRC, “Mr. Diallo’s personality and the conduct adopted by him since the start of this case are far from irreproachable”. Moreover, the DRC alleges that it was those “activities [of Mr. Diallo], fraudulent and detrimental to public order, which motivated his removal from Zairean territory”. It adds that Mr. Diallo’s refusal to exhaust the available local remedies would also render diplomatic protection by substitution inequitable in this case.

82. For its part, Guinea observes that it is not asking the Court to resort to equity *contra legem* to decide the present case when invoking Mr. Diallo’s protection by substitution for Africom-Zaire and Africontainers-Zaire. Rather, Guinea contends that, in the *Barcelona Traction* case, the Court referred, in a dictum, to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, “when the State whose responsibility is invoked is the national State of the company”. In this connection, it quotes the following passage from the Judgment, which it considers apposite:

“On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State.” (*I.C.J. Reports 1970*, p. 48, para. 93.)

According to Guinea, the equity concerned in this case is equity *infra legem*. The alleged purpose of such recourse is to permit “a reasonable application” . . . of the rules relating to diplomatic protection”, in order “not to deprive foreign shareholders in a company having the nationality of the State responsible for the internationally wrongful act of all possibility of protection”. Guinea recognizes that the Court did not definitively settle the question of the existence of diplomatic protection by substitution in the *Barcelona Traction* case. It nevertheless considers that the text of the Judgment, read in the light of the opinions of the Members of the Court appended to it, leads one “to believe that a majority of the Judges regarded the exception as established in law”.

83. Guinea contends that the existence of the rule of protection by substitution and its customary nature are confirmed by numerous arbitral awards establishing

“that the shareholders of a company can enjoy the diplomatic protection of their own national State as regards the national State of the company when that State is responsible for an internationally wrongful act against it”.

Further, according to Guinea, “[s]ubsequent practice [following *Barcelona Traction*], conventional or jurisprudential . . . has dispelled any uncertainty . . . on the positive nature of the ‘exception’”. Guinea thus refers to certain decisions of the European Commission of Human Rights, to the Washington Convention establishing the ICSID, to the latter’s jurisprudence and to the jurisprudence of the Iran-United States Claims Tribunal.

84. In Guinea’s view, the application of protection by substitution is particularly appropriate in this case. Guinea again emphasizes that Africa-Zaire and Africontainers-Zaire are SPRLs, which have a marked *intuitu personae* character and which, moreover, are statutorily controlled and managed by one and the same person. Further, it especially points out that Mr. Diallo was bound, under Zairean legislation, and in particular Article 1 of the Legislative Order of 7 June 1966 concerning the registered office and the administrative seat of companies “whose main centre of operations is situated in the Congo”, to incorporate the companies in Zaire. In this regard, Guinea refers to Article 11, paragraph (b), of the draft Articles on Diplomatic Protection adopted in 2006 by the ILC, providing that the rule of protection by substitution applies specifically in situations where the shareholders in a company have been required to form the company in the State having committed the alleged violation of international law. Under Article 11, paragraph (b):

“A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

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- (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.”

85. Guinea also submits that the accusations made by the DRC against Mr. Diallo are not supported by any facts. On the contrary, it describes Mr. Diallo as “a shrewd and serious investor and businessman”, who has never been accused of not honouring his own commitments to the Zairean State and private companies, and who has rendered great services to the economic development of Zaire by making substantial investments there. Lastly, Guinea rejects as not only inaccurate but also irrelevant in the present context the allegation that Mr. Diallo refused to exhaust all the remedies available in the DRC, this being a

claim concerning a condition for admissibility different from that which is here examined.

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86. The Court recalls that, as regards diplomatic protection, the principle as emphasized in the *Barcelona Traction* case, is that:

“Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.” (*I.C.J. Reports 1970*, p. 36, para. 46.)

87. Since its dictum in the *Barcelona Traction* case (*ibid.*, p. 48, para. 93) (see paragraph 82 above), the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule “that the right of diplomatic protection of a company belongs to its national State” (*ibid.*, p. 48, para. 93), which allows for protection of the shareholders by their own national State “by substitution”, and on the reach of any such exception. It is true that in the case concerning *Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), the Chamber of the Court allowed a claim by the United States of America on behalf of two United States corporations (who held 100 per cent of the shares in an Italian company), in relation to alleged acts by the Italian authorities injuring the rights of the latter company. However, in doing so, the Chamber based itself not on customary international law but on a Treaty of Friendship, Commerce and Navigation between the two countries directly granting to their nationals, corporations and associations certain rights in relation to their participation in corporations and associations having the nationality of the other State. The Court will now examine whether the exception invoked by Guinea is part of customary international law, as claimed by the latter.

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

substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by “substitution” would therefore appear to constitute the very last resort for the protection of foreign investments.

89. The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

90. The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal régimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary. The arbitrations relied on by Guinea are also special cases, whether based on specific international agreements between two or more States, including the one responsible for the allegedly unlawful acts regarding the companies concerned (see, for example, the special agreement concluded between the American, British and Portuguese Governments in the *Delagoa* case or the one concluded between El Salvador and the United States of America in the *Salvador Commercial Company* case) or based on agreements concluded directly between a company and the State allegedly responsible for the prejudice to it (see the *Biloume v. Ghana Investments Centre* case).

91. It is a separate question whether customary international law contains a more limited rule of protection by substitution, such as that set out by the ILC in its draft Articles on Diplomatic Protection, which would apply only where a company’s incorporation in the State having committed the alleged violation of international law “was required by it as a precondition for doing business there” (Art. 11, para. (b)).

92. However, this very special case does not seem to correspond to the one the Court is dealing with here. It is a fact that Mr. Diallo, a Guinean citizen, settled in Zaire in 1964, when he was 17 years of age, and that he did not set up his first company, Africom-Zaire, until ten years later, in 1974. In addition, when, in 1979, Mr. Diallo took part in the creation of Africontainers-Zaire, it was in fact only as manager (*gérant*) of Africom-

Zaire, a company under Congolese law. When Africontainers-Zaire was set up, 70 per cent of its capital was held by *associés* of Congolese nationality, and only in 1980, one year later, did Mr. Diallo become an *associé* in his own name of that company, holding 40 per cent of the capital, following the withdrawal of the other two *associés*, the company Africom-Zaire holding the remaining *parts sociales*. It appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the city of Kinshasa by Mr. Diallo, who was already engaged in commercial activities. Furthermore, and above all it has not satisfactorily been established before the Court that their incorporation in that country, as legal entities of Congolese nationality, would have been required of their founders to enable the founders to operate in the economic sectors concerned.

93. The Court concludes on the facts before it that the companies, Africom-Zaire and Africontainers-Zaire, were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea. Therefore, the question of whether or not this paragraph of Article 11 reflects customary international law does not arise in this case.

94. In view of the foregoing, the Court cannot accept Guinea’s claim to exercise diplomatic protection by substitution. It is therefore the normal rule of the nationality of the claims which governs the question of the diplomatic protection of Africom-Zaire and Africontainers-Zaire. The companies in question have Congolese nationality. The objection as to inadmissibility raised by the DRC owing to Guinea’s lack of standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the two companies Africom-Zaire and Africontainers-Zaire is consequently well founded and must be upheld.

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95. Having concluded that Guinea is without standing to offer Mr. Diallo diplomatic protection as regards the alleged unlawful acts of the DRC against the rights of the companies Africom-Zaire and Africontainers-Zaire, the Court need not further consider the DRC’s objection based on the non-exhaustion of local remedies.

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96. In view of all the foregoing, the Court concludes that Guinea’s Application is admissible in so far as it concerns protection of Mr. Diallo’s rights as an individual and his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.

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97. In accordance with Article 79, paragraph 7, of the Rules of Court as adopted on 14 April 1978, time-limits for the further proceedings shall subsequently be fixed by Order of the Court.

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98. For these reasons,

THE COURT,

(1) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo for lack of standing by the Republic of Guinea to exercise diplomatic protection in the present case:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

(b) by fourteen votes to one,

Upholds the objection in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;*

AGAINST: *Judge ad hoc Mahiou;*

(2) As regards the preliminary objection to admissibility raised by the Democratic Republic of the Congo on account of non-exhaustion by Mr. Diallo of local remedies:

(a) unanimously,

Rejects the objection in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Rejects the objection in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Mampuya;*

(3) In consequence:

(a) unanimously,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's rights as an individual;

(b) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be admissible in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire;

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mahiou;*

AGAINST: *Judge ad hoc Mampuya;*

(c) by fourteen votes to one,

Declares the Application of the Republic of Guinea to be inadmissible in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire.

IN FAVOUR: *President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Abraham, Keith, Bennouna, Skotnikov; Judge ad hoc Mampuya;*

AGAINST: *Judge ad hoc Mahiou.*

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Guinea and the Government of the Democratic Republic of the Congo, respectively.

(*Signed*) Rosalyn HIGGINS,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge *ad hoc* MAHIOU appends a declaration to the Judgment of the Court; Judge *ad hoc* MAMPUYA appends a separate opinion to the Judgment of the Court.

(*Initialed*) R.H.

(*Initialed*) Ph.C.

