

# DIPLOMATIC PROTECTION

[Agenda item 6]

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### First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur

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\* Incorporating A/CN.4/506/Corr.1.

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Convention respecting the limitation of the employment of force for the recovery of contract debts (Porter Convention) (The Hague, 18 October 1907)	J. B. Scott, ed., <i>The Hague Conventions and Declarations of 1899 and 1907</i> , 3rd ed. (New York, Oxford University Press, 1918), p. 89.
Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague, 12 April 1930)	League of Nations, <i>Treaty Series</i> , vol. 179, No. 4137, p. 89.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	United Nations, <i>Treaty Series</i> , vol. 213, No. 2889, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, No. 2545, p. 137.
Nationality Agreement between the Arab League States (Cairo, 5 April 1954)	<i>British and Foreign State Papers, 1954</i> , vol. 161 (London, HM Stationery Office, 1963), p. 635.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	United Nations, <i>Treaty Series</i> , vol. 360, No. 5158, p. 117.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	Ibid., vol. 500, No. 7310, p. 95.
Convention on the reduction of statelessness (New York, 30 August 1961)	Ibid., vol. 989, No. 14458, p. 175.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	Ibid., vol. 596, No. 8638, p. 261.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	Ibid., vol. 634, No. 9065, p. 221.
Convention on the settlement of investment disputes between States and nationals of other States (Washington, 18 March 1965)	Ibid., vol. 575, No. 8359, p. 159.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 99, No. 14668, p. 171.
European Convention on Consular Functions (Paris, 11 December 1967)	Council of Europe, <i>European Treaty Series</i> , No. 61.
Protocol to the European Convention on Consular Functions concerning the Protection of Refugees (Paris, 11 December 1967)	Ibid., No. 61 A.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, <i>Treaty Series</i> , vol. 1155, No. 18232, p. 331.
American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	Ibid., vol. 1144, No. 17955, p. 123.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	Ibid., vol. 1520, No. 26363, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	Ibid., vol. 1833, No. 31363, p. 3.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	Ibid., vol. 1465, No. 24841, p. 85.
United Nations Convention on Conditions for Registration of Ships (Geneva, 7 February 1986)	TD/RS/CONF/19/Add.1.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (New York, 18 December 1990)	Ibid., vol. 2220, No. 39481, p. 93.
Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Rome, 24 November 1993)	<i>International Legal Materials</i> (Washington, D.C.), vol. 33, No. 4 (July 1994), p. 968.
European Convention on Nationality (Strasbourg, 6 November 1997)	Council of Europe, <i>European Treaty Series</i> , No. 166.

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## Introduction<sup>1</sup>

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>2</sup> In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.<sup>3</sup> At the same session the Working Group submitted a report which was endorsed by the Commission.<sup>4</sup> The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.<sup>5</sup> The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the current quinquennium.

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

3. The Commission considered the preliminary report (*Yearbook ... 1998*, vol. II (Part One), p. 309, document A/CN.4/484) of the Special Rapporteur at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended Working Group, chaired by Mr. Bennouna, Special Rapporteur of the topic,<sup>6</sup> to consider possible conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission in 1999. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following:

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

<sup>1</sup> The Special Rapporteur wishes to acknowledge the invaluable contribution made to the preparation of the report by Ms. Zsuzsanna Deen-Racsmany, a research assistant funded by the Cornelis van Vollenhoven Stichting of the University of Leiden, the Netherlands.

<sup>2</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 248, and p. 137, annex II, addendum 1.

<sup>3</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

<sup>4</sup> Ibid. para. 171.

<sup>5</sup> Ibid., pp. 62–63, paras. 189–190.

<sup>6</sup> *Yearbook ... 1998*, vol. I, 2534th meeting, p. 115, para. 90.

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

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

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

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

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

(g) The Working Group recalled the decision by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the current quinquennium.<sup>7</sup>

5. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in chapter I, “Basis for diplomatic protection”, of the outline proposed by the previous year’s Working Group.<sup>8</sup>

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

7. In 1999, Mr. Bennouna was elected as a judge to the International Tribunal for the Former Yugoslavia and resigned from the Commission. In July 1999, the Commission elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.<sup>9</sup>

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

<sup>7</sup> Ibid., vol. II (Part Two), p. 49, para. 108.

<sup>8</sup> *Yearbook ... 1997* (see footnote 3 above), p. 62, para. 189.

<sup>9</sup> *Yearbook ... 1999*, vol. II (Part Two), p. 17, para. 19.

## CHAPTER I

### Structure of the report

9. The present report consists of three parts:

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

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

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

#### *Introduction*

10. There is much practice and precedent on diplomatic protection. Despite this, it remains one of the most controversial subjects in international law.<sup>10</sup>

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

12. To aggravate matters for non-Western States, diplomatic protection or intervention was exalted by the fiction that an injury to a national constituted an injury to the State itself. In 1924, PCIJ gave this fiction judicial blessing when it declared in the *Mavrommatis* 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—its right to ensure, in the person of its subjects, respect for the rules of international law.<sup>12</sup>

<sup>10</sup> Lillich, *The Human Rights of Aliens in Contemporary International Law*.

<sup>11</sup> Harry Roberts (U.S.A.) v. United Mexican States (UNRIAA, vol. IV (Sales No. 1951.V.1)), p. 77; see also L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, ibid., p. 60.

<sup>12</sup> *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12. This dictum was repeated by PCIJ in

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

14. The diplomatic protection of aliens has been greatly abused. The Anglo-Boer war (1899–1902) was justified by the United Kingdom as an intervention to protect its nationals who owned the gold mines of the Witwatersrand. United States military intervention, on the pretext of defending their nationals in Latin America, has continued until recent times, as shown by the interventions in Grenada in 1983<sup>14</sup> and Panama in 1989.<sup>15</sup> Non-military intervention, in the form of demands for compensation for injuries inflicted on the persons or property of aliens, has also been abused,<sup>16</sup> although one writer has suggested that the settlement of claims by arbitration often saved Latin American States from military intervention to enforce such claims.<sup>17</sup>

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

16. The foreigner who does business abroad also has new remedies available to him. The Convention on the settlement of investment disputes between States and nationals of other States permits companies to bring proceedings against a State before ICSID, provided the defendant State and the national State of the company have consented to this procedure. Bilateral investment treaties offer similar remedies to companies doing business

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*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.

<sup>13</sup> For a full account of the dispute over such a waiver or Calvo clause, see Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*.

<sup>14</sup> Nash Leich, "Contemporary practice of the United States relating to international law" (1984), p. 200.

<sup>15</sup> Ibid. (1990), p. 545.

<sup>16</sup> See the separate opinion of Judge Padilla Nervo, *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 246.

<sup>17</sup> Dunn, *The Protection of Nationals: A Study in the Application of International Law*, p. 58.

abroad.<sup>18</sup> Undoubtedly the end of the cold war and the acceptance of market economy principles throughout the world have made both the life and the investment of the foreign investor more secure.

17. These developments have led some to argue that diplomatic protection is obsolete. Roughly the argument runs as follows: the equality-of-treatment-with-nationals-standard and the international minimum standard of treatment of aliens have been replaced by an international human rights standard, which accords to national and alien the same standard of treatment—a standard incorporating the core provisions of the Universal Declaration of Human Rights.<sup>19</sup> The individual is now a subject of international law with standing to enforce his or her human rights at the international level. The right of a State to claim on behalf of its national should be restricted to cases where there is no other method of settlement agreed on by the alien and the injuring State. In such a case the claimant State acts as agent for the individual and not in its own right. The right of a State to assert its own right when it acts on behalf of its national is an outdated fiction which should be discarded—except, perhaps, in cases in which the real *national* interest of the State is affected.<sup>20</sup>

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

19. In some situations the violation of an alien's human rights will engage the interests of the national State.<sup>21</sup> This is particularly true where the violations are systematic and demonstrate a policy on the part of the injuring State to discriminate against all nationals of the State in question. However, in the case of an isolated injury to an alien, it is true that the intervening State in effect acts as the agent of the individual in asserting his or her claim. Here the notion of injury to the State itself is indeed a fiction. This is borne out by two rules in particular: first, the rule that requires the individual to exhaust local remedies before the alien's State may intervene; and, secondly, the rule of continuous nationality that requires the individual to be a national of the protecting State both at the time of injury and at the time of presentation of the claim.<sup>22</sup> Moreover, judicial decisions make it clear that in assessing the quan-

<sup>18</sup> See Lavie, *Protection et promotion des investissements: étude de droit international économique*.

<sup>19</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. See García Amador, "State responsibility: some new problems", pp. 421 and 437–439; and *Yearbook ... 1957*, vol. II, document A/CN.4/106, pp. 112–116. See also the preliminary report on diplomatic protection by Mr. Mohamed Bennouna, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 319, paras. 34–37.

<sup>20</sup> García Amador, loc. cit., p. 472.

<sup>21</sup> Brierly, "The theory of implied State complicity in international claims", p. 48. See also McDougal, Lasswell and Chen, "The protection of aliens from discrimination and world public order: responsibility of States conjoined with human rights", p. 442: "Like other 'fictions feigned', however, this identification of state and individual interests has been found, by disinterested observers as well as by claimant parties, to represent in many contexts a close approximation to social reality. People always have been, and remain, important bases of power for territorial communities."

<sup>22</sup> Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*.

tum of damages suffered by the State, regard will be had to the damages suffered by the individual national.<sup>23</sup>

20. The fictitious nature of diplomatic protection was a prominent feature of Mr. Bennouna's preliminary report in which he asked the Commission for guidance on the question whether a State in bringing an international claim was "enforcing its own right or the right of its injured national."<sup>24</sup>

21. The present Special Rapporteur does not share his predecessor's disdain for fictions in law. Most legal systems have their fictions. Indeed Roman law relied heavily on procedural fictions in order to achieve equity.<sup>25</sup> "The life of the law is not logic, but experience", in the words of Oliver Wendell Holmes, the late Supreme Court Justice of the United States.<sup>26</sup> An institution, like diplomatic protection, that serves a valuable purpose should not be dismissed simply on the ground that it is premised on a fiction and cannot stand up to logical scrutiny.

22. The suggestion that developments in the field of international human rights law have rendered diplomatic protection obsolete requires more attention. García Amador, the first Special Rapporteur of the Commission on the subject of State responsibility, states that the traditional view of diplomatic protection that allowed the State to claim on behalf of its injured national belongs to an age in which the rights of the individual and the rights of the State were inseparable. Today the position is "completely different". Aliens, like nationals, enjoy rights simply as human beings and not by virtue of their nationality. "This means", he continues, "that the alien has been internationally recognized as a legal person independently of his State: he is a true *subject\** of international rights."<sup>27</sup> A necessary implication of this reasoning is that the individual, now a subject of international law, with rights and duties under international law, should, other than in exceptional cases, fend for himself when he ventures abroad.

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

24. The debate over the question whether the individual is a mere "object" of international law (the traditional view) or a "subject" of international law is unhelpful. It is better to view the individual as a *participant* in the international legal order.<sup>28</sup> As such the individual may participate in the international legal order by exercising her rights under human rights treaties or bilateral investment agreements. At the same time it is necessary to recognize that while the individual may have rights under interna-

<sup>23</sup> *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 28.

<sup>24</sup> *Yearbook ... 1998* (see footnote 19 above), p. 316, para. 54.

<sup>25</sup> See, on the *actio ficticia* in Roman law, Sohm, *The Institutes*, pp. 259–260.

<sup>26</sup> *Yearbook ... 1972*, vol. I, 1167th meeting, p. 97, para. 53.

<sup>27</sup> García Amador, loc. cit., p. 421.

<sup>28</sup> Higgins, *Problems and Process: International Law and How We Use It*, pp. 48–55.

tional law, her remedies are limited—a fact that García Amador overlooks.<sup>29</sup>

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

26. The position of the alien abroad is no better. Universal and regional human rights conventions do extend protection to all individuals—national and alien alike—within the territory of States parties. But there is no multi-lateral convention that seeks to provide the alien with remedies for the protection of her rights outside the field of foreign investment.<sup>30</sup>

27. In 1990, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>31</sup> was adopted. The Convention expounds a charter of rights for migrant workers, with a monitoring body similar to the United Nations Human Rights Committee and an optional right of individual petition. That these remedies are not intended to replace the right of diplomatic protection is emphasized by article 23, which provides:

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

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

<sup>29</sup> The following comment of McDougal, Lasswell and Chen, loc. cit., p. 456, on Special Rapporteur Mr. García Amador's "noble 'synthesis' of the newer emerging law of human rights and the older law designed for the protection of aliens" (*ibid.*, p. 454) best captures the differing responses to this "synthesis":

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

<sup>30</sup> Para. 14 above.

<sup>31</sup> See further on this Convention, Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*.

28. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live,<sup>32</sup> which seeks to extend the rights contained in the Universal Declaration of Human Rights to aliens. The Declaration provides no machinery for its enforcement, but it does reiterate the right of the alien to contact his consulate or diplomatic mission for the purpose of protection. This starkly illustrates the current position: that aliens may have rights under international law as human beings, but they have no remedies under international law—in the absence of a human rights treaty—except through the intervention of their national State.<sup>33</sup>

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

[P]ending the establishment of international machinery guaranteeing third-party determination of disputes between alien claimants and states, it is in the interest of all international lawyers not only to support the doctrine [of diplomatic protection], but to oppose vigorously any effort to cripple or destroy it.<sup>34</sup>

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

One may admit that this criticism is partially justified, but it contains some exaggeration and deliberate generalization. It cannot be denied, however, that diplomatic protection has often been abused, and that the stronger states are in a better position in the performance of diplomatic protection. Thus, the fault lies primarily in too harsh practices and not in the institution itself.

...

As far as human rights are developed and strengthened, diplomatic protection may lose some of its significance. However, human rights will probably not be able to supersede diplomatic protection in its entirety.

As long as diplomatic protection cannot be replaced by any better remedies, it is necessary to keep it, because it is badly needed, and its advantages outweigh its disadvantages in any case.<sup>35</sup>

31. International human rights law does not consist of human rights conventions only. There is a whole body of conventions and customs, including diplomatic protection, that together comprise international human rights law. The International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights and other universal and regional human rights instruments are important, particularly as they extend protection to both alien and national in the territory of States parties.<sup>36</sup> But their remedies are weak.

<sup>32</sup> General Assembly resolution 40/144 of 13 December 1985, annex.

<sup>33</sup> Geck, "Diplomatic protection", pp. 1059–1060.

<sup>34</sup> "The diplomatic protection of nationals abroad: an elementary principle of international law under attack", p. 359. See also Amerasinghe, *State Responsibility for Injuries to Aliens*, pp. 4–7.

<sup>35</sup> "The protection of individual persons in traditional international law (diplomatic and consular protection)", p. 113.

<sup>36</sup> For example, article 2, paragraph 1, of the International Covenant on Civil and Political Rights requires parties "to respect and to ensure to all individuals within its territory" the rights recognized in the Covenant. See also article 1 of the European Convention on Human

Diplomatic protection, albeit only available to protect individuals against a foreign Government, on the other hand, is a customary rule of international law that applies universally and, potentially, offers a more effective remedy. Most States will treat a claim of diplomatic protection from another State more seriously than a complaint against its conduct to a human rights monitoring body.<sup>37</sup>

32. Contemporary international human rights law accords to nationals and aliens the same protection, which far exceeds the international minimum standard of treatment;

Rights; and article 2 of the African Charter on Human and Peoples' Rights.

<sup>37</sup> A complaint from an individual under the European Convention on Human Rights backed by a foreign Government is likewise likely to carry more weight. See *Soering v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, *Judgment of 7 July 1989* (Council of Europe, Strasbourg, 1989) (Federal Republic of Germany intervening); *Selmouni v. France*, Application No. 25803/94, *Judgment of 28 July 1999* (the Netherlands intervening); and *Denmark v. Turkey*, Application No. 34382/97, *Decision of 8 June 1999*.

ment for aliens set by Western Powers in an earlier era. It does not follow that these developments have rendered obsolete the traditional procedures recognized by customary international law for the treatment of aliens.<sup>38</sup> Although individuals today enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights. Instead of seeking to weaken this remedy by dismissing it as an obsolete fiction that has outlived its usefulness, every effort should be made to strengthen the rules that comprise the right of diplomatic protection.

<sup>38</sup> In the *Barcelona Traction* case (see footnote 16 above), p. 165, Judge Jessup declared: "The institution of the right to give diplomatic protection is surely not obsolete although new procedures are emerging."

## CHAPTER II

### Draft articles

#### *Article 1. Scope*

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

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

#### Comment

##### A. DIPLOMATIC PROTECTION

33. The doctrine of diplomatic protection is closely related to that of State responsibility for injury to aliens. The idea that internationally wrongful acts or omissions causing injury to aliens engage the responsibility of the State to which such acts and omissions are attributable had gained widespread acceptance in the international community by the late 1920s. It was generally accepted that although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien's State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment for aliens.<sup>39</sup>

34. Several attempts have been made to codify this principle. In 1927, the Institute of International Law adopted a resolution on international responsibility of States for

injuries on their territory to the person or property of foreigners, which declared that:

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations.<sup>40</sup>

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

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.<sup>41</sup>

Later the 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School, proposed that:

A State is internationally responsible for an act or omission which, under international law, is wrongful, is attributable to that State, and causes an injury to an alien.<sup>42</sup>

This principle has been accepted as a rule of customary international law and applied in a great number of judicial and arbitral decisions. During the period of decolonization, some rejected its universal applicability on the grounds that it was open to abuse by the imperialist Powers, that it was an essentially Western invention and that aliens should not enjoy more extensive protection than a

<sup>39</sup> Joseph, *Diplomatic Protection and Nationality: The Commonwealth of Nations*, p. 3; and Jennings and Watts, eds., *Oppenheim's International Law*, pp. 897 and 910–911.

<sup>40</sup> Art. 1 of the draft, reproduced in the first report on international responsibility by Mr. García Amador, *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 227.

<sup>41</sup> Art. 1, League of Nations publication, *V. Legal, 1930.V.17* (document C.351(c)M.145(c).1930.V), reproduced in *Yearbook ... 1956* (see footnote 40 above), p. 225.

<sup>42</sup> Art. 1, para. 1, of the draft Convention reproduced in Sohn and Baxter, "Responsibility of States for injuries to the economic interests of aliens", p. 548.

State's own nationals.<sup>43</sup> Despite such criticism, State responsibility for injuries to aliens is generally accepted today.<sup>44</sup> It is also accepted that responsibility of this kind is accompanied by a duty to make reparation.<sup>45</sup> Thus in his revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens (art. 2, para. 1), presented to the Commission in 1961, the Special Rapporteur, Mr. García Amador, proposed that:

For the purposes of this draft, the “international responsibility of the State for injuries caused in its territory to the person or property of aliens” involves the duty to make reparation for such injuries ...<sup>46</sup>

35. The present set of draft articles are essentially secondary rules. For this reason no attempt is made to present a provision incorporating a primary rule describing the circumstances in which the responsibility of a State is engaged for a wrongful act or omission to an alien. No attempt is made to formulate a provision on reparation either, as this is a matter dealt with in the draft articles on State responsibility.<sup>47</sup>

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

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.<sup>48</sup>

Although this traditional doctrine of diplomatic protection has given rise to considerable debate, especially with regard to the question of whose rights are asserted when the State exercises diplomatic protection on behalf of its national,<sup>49</sup> it is a widely accepted rule of customary international law that States have the right to protect their nationals abroad. Although the State of residence has territorial jurisdiction over the alien, the State of nationality retains its personal jurisdiction over its national even while he or she is residing in another State.<sup>50</sup> The classical formulation of this position concerning the consequences of the personal jurisdiction of the State of nationality was stated by PCIJ in the *Mavrommatis* case:

<sup>43</sup> See, for example, Guha Roy, “Is the law of responsibility of States for injuries to aliens a part of universal international law?”.

<sup>44</sup> See García Amador, *The Changing Law of International Claims*, pp. 74–76. This is also indicated by the fact that many authors deal with the treatment of aliens under the general topic of State responsibility. See, for example, Jennings and Watts, op. cit.; Brownlie, *Principles of Public International Law*; Harris, *Cases and Materials on International Law*; and Shaw, *International Law*.

<sup>45</sup> For further expressions of this principle, see García Amador, loc. cit., pp. 393–394.

<sup>46</sup> *Yearbook ... 1961*, vol. II, document A/CN.4/134 & Add.1, addendum, p. 46.

<sup>47</sup> See article 42, provisionally adopted by the Commission on first reading, *Yearbook ... 1996* (footnote 2 above), p. 63.

<sup>48</sup> *The Law of Nations or the Principles of Natural Law*, chap. VI, p. 136.

<sup>49</sup> This is discussed in more detail in the commentary to article 3, below.

<sup>50</sup> Leigh, “Nationality and diplomatic protection”, p. 453.

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.<sup>51</sup>

The right of the State of nationality to exercise protection in this way has been confirmed by judicial decisions<sup>52</sup> and the writings of scholars.<sup>53</sup> Furthermore, it has been codified in article 3 of the Vienna Convention on Diplomatic Relations and in article 5 of the Vienna Convention on Consular Relations, which lists as a function of diplomatic and consular missions:

Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.<sup>54</sup>

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

Diplomatic protection is in its nature an international proceeding, constituting “an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties”.<sup>55</sup>

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

[D]iplomatic protection can be defined as a procedure for giving effect to State responsibility involving breaches of international law arising out of legal injuries to the person or property of the citizen of a State.<sup>56</sup>

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

a procedure by which States assert the right of their citizens to a treatment in accordance with international law.<sup>57</sup>

38. Geck, writing in the *Encyclopedia of Public International Law*, presents a definition that takes account of

<sup>51</sup> See footnote 12 above.

<sup>52</sup> *Panevezys-Saldutiskis Railway* case (see footnote 12 above), pp. 16–17, and *Notebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 24.

<sup>53</sup> See, for example, Joseph, op. cit., p. 1; Leigh, loc. cit., p. 453; Geck, loc. cit., p. 1046; and Jennings and Watts, op. cit., p. 512.

<sup>54</sup> Art. 3, para. 1 (b), of the Vienna Convention on Diplomatic Relations. The Vienna Convention on Consular Relations, in turn, contains a very similar, but somewhat more specific provision in article 5:

“Consular functions consist in:

“(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

“...

“(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State.”

The European Convention on Consular Functions endorses this principle in its article 2, paragraph 1.

<sup>55</sup> Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 354, citing Blaine, Secretary of State. See also page 357 (*ibid.*).

<sup>56</sup> Joseph, op. cit., p. 1. See also Leigh, loc. cit., p. 453.

<sup>57</sup> “Cours général de principes de droit international public”, p. 507. García Amador quotes this definition in support of the idea that existing definitions emphasize the right of States to act. He himself did not offer any original definition. Instead, he quoted other authors and judicial decisions with similar emphasis (loc. cit., pp. 426–427).

developments relating to functional protection providing for agents of an international organization:

Diplomatic protection is ... the protection given by a subject of international law to individuals, i.e. natural or legal persons, against a violation of international law by another subject of international law.<sup>58</sup>

Functional protection, by an international organization, first expounded in the *Reparation* case<sup>59</sup> in 1949, provides an important institution for the protection of the rights of individuals employed by an international organization.<sup>60</sup> Inevitably there are important differences between traditional diplomatic protection by a State and functional protection exercised by an international organization. For this reason the present set of articles makes no attempt to deal with functional protection.<sup>61</sup>

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

a mechanism or a procedure for invoking the international responsibility of the host State.<sup>62</sup>

He did, however, acknowledge that

diplomatic protection has been regarded from the outset as the corollary of the personal jurisdiction of the State over its population, when elements of that population, while in foreign territory, have suffered injury in violation of international law.<sup>63</sup>

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

On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State ...<sup>64</sup>

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

#### B. MEANING OF THE TERM "ACTION"

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

<sup>58</sup> Loc. cit., p. 1046.

<sup>59</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174.

<sup>60</sup> The ICJ advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (I.C.J. Reports 1999, p. 62) provides an illustration of how the right of functional protection may be used.

<sup>61</sup> The 1997 Working Group on diplomatic protection took "no position on whether the topic of diplomatic protection should include protection claimed by international organizations for the benefit of their agents" (*Yearbook ... 1997* (see footnote 3 above), p. 61, para. 187).

<sup>62</sup> *Yearbook ... 1998* (see footnote 19 above), p. 311, para. 10.

<sup>63</sup> Ibid.

<sup>64</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 182.

42. In the *Panvezys-Saldutiskis Railway* case, PCIJ appeared to distinguish between "diplomatic action" and "judicial proceedings"<sup>65</sup>—a distinction repeated by ICJ in the *Nottebohm* case<sup>66</sup> and by the Iran-United States Claim Tribunal in case No. A/18.<sup>67</sup>

43. In contrast, legal scholars draw no such distinction and use the term "diplomatic protection" to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force.<sup>68</sup> Dunn, in his 1932 study, stated in respect of the term diplomatic action that:

It embraces generally all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, either of preventing some threatened injury in violation of international law, or of obtaining redress for such injuries after they have been sustained.

...

What ordinarily happens in a case of protection is that the government of an injured alien calls the attention of the delinquent government to the facts of the complaint and requests that appropriate steps be taken to redress the grievance.

...

[T]he term "diplomatic protection" is here used as a generic term covering the general subject of protection of citizens ... abroad, including those cases in which other than diplomatic means may be resorted to in the enforcement of obligations ... [I]t should be noted that we are here concerned only with representations or demands that are made (expressly or impliedly) under a *claim of right*. Governments often take action in behalf of their citizens abroad which is not based on any assertion of international obligation and does not fall within the category of protection in a technical sense.<sup>69</sup>

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

The State retains, in principle, the choice of means of action to defend its nationals, while respecting its international commitments and the peremptory norms of international law. In particular, it may not resort to the threat or use of force in the exercise of diplomatic protection.<sup>70</sup>

45. The choice of means of diplomatic action open to a State is limited by the restrictions imposed on countermeasures by international law, now reflected in the draft

<sup>65</sup> See footnote 12 above.

<sup>66</sup> See footnote 52 above.

<sup>67</sup> *Iran-United States*, case No. A/18, Decision of 6 April 1984, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 5, p. 261.

<sup>68</sup> Borchard, op. cit., pp. 439–447; Geck, loc. cit., pp. 1061–1063; and Weis, "Diplomatic protection of nationals and international protection of human rights", p. 645.

<sup>69</sup> Op. cit., pp. 18–20. Geck, loc. cit., p. 1046, likewise makes it clear that demands not made under a claim of right do not constitute diplomatic protection:

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

See *Yearbook ... 1998* (see footnote 19 above), p. 312, para. 12.

<sup>70</sup> *Yearbook ... 1998* (see footnote 19 above), p. 312, para. 11.

articles on State responsibility.<sup>71</sup> Whether the right to the use of force in the exercise of diplomatic protection is completely excluded is dealt with in article 2.

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

### *Article 2*

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

- (a) **The protecting State has failed to secure the safety of its nationals by peaceful means;**
- (b) **The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;**
- (c) **The nationals of the protecting State are exposed to immediate danger to their persons;**
- (d) **The use of force is proportionate in the circumstances of the situation;**
- (e) **The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.**

### **Comment**

47. As explained in article 1, the restrictions on the means of diplomatic action open to the protecting State are governed by general rules of international law, particularly those relating to countermeasures as defined in the draft articles on State responsibility.<sup>72</sup> The use of force as the ultimate means of diplomatic protection is frequently considered part of the topic of diplomatic protection and therefore requires special attention in the present draft articles.

48. History, both past and present,<sup>73</sup> is replete with examples of cases in which the pretext of protecting nationals has been used as a justification for military intervention. The writings of the Argentine jurist, Carlos Calvo, which sought to restrict the right of diplomatic protection, were a response to military interventions in Latin America.<sup>74</sup> The Drago doctrine of 1903,<sup>75</sup> which sought to outlaw military intervention for the recovery of contract debts owed to foreign nationals, was a response to

<sup>71</sup> See articles 47–50, *Yearbook ... 1996* (footnote 2 above), pp. 63–64; and *Yearbook ... 1999*, vol. II (Part One), p. 3, document A/CN.4/498 and Add.1–4.

<sup>72</sup> Arts. 47–50 (see footnote 71 above).

<sup>73</sup> Perhaps the best-known interventions of this kind in recent times are those of the United States in Grenada in 1983 (footnote 14 above) and Panama in 1989 (footnote 15 above).

<sup>74</sup> See footnote 13 above.

<sup>75</sup> See *Yearbook ... 1956* (footnote 40 above), p. 217, para. 230; and *Papers relating to the Foreign Relations of the United States, with the annual message of the President transmitted to Congress: December 7, 1903* (Washington, Government Printing Office, 1904), pp. 1–5.

the action taken by Italy, Germany and the United Kingdom against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those States. This resulted in the Convention respecting the limitation of the employment of force for the recovery of contract debts (Porter Convention) (Convention II signed at the 1907 Peace Conference at The Hague), which in article 1 obliged States “not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals”. That this prohibition on the use of force was not absolute was made clear by the qualification to the article that:

[T]his undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any  *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.<sup>76</sup>

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

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

In no event shall the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or any other form of intervention in the domestic or external affairs of the respondent State.<sup>77</sup>

Although the records of the discussions in the Commission do not indicate any objections to those paragraphs, the only views expressed in favour of the provisions were short notes of approval by Mr. Krylov and Mr. Spiropoulos.<sup>78</sup> In spite of this, the provision was omitted from all subsequent reports.

51. In his preliminary report, Mr. Bennouna declared, without qualification, that States “may not resort to the threat or use of force in the exercise of diplomatic protection”<sup>79</sup>

52. The wish to prohibit the threat or use of force in the exercise of diplomatic protection is laudable, but it takes little account of contemporary international law, as evidenced by interpretations of the Charter of the United Nations and the practice of States. The current dilemma facing international law is reflected in Nguyen Quoc Dinh, Daillier and Pellet, who boldly state that the use of force is prohibited in the case of diplomatic protection but then consider as “delicate” the legality of cases in which States have intervened militarily to protect their nationals.<sup>80</sup> The present report, in contrast with previous reports, seeks to describe the present state of international law and to pro-

<sup>76</sup> *Yearbook ... 1956* (footnote 40 above), p. 217.

<sup>77</sup> *Ibid.*, Basis of discussion No. VII, para. (3), p. 221. See also pages 216–219 (*ibid.*).

<sup>78</sup> *Yearbook ... 1956*, vol. I, 371st meeting, pp. 234–235.

<sup>79</sup> *Yearbook ... 1998* (see footnote 19 above), p. 312, para. 11.

<sup>80</sup> *Droit International Public*, pp. 777 and 908. See also Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 905, para. 1338.

pose limits to the use of force which reflect current State practice.

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

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

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

54. The use of force to recover contract debts is clearly prohibited by Article 2, paragraph 4.<sup>81</sup> So too is any threat or use of force by way of reprisal action aimed at the protection of nationals. This is not the appropriate place for a discourse on reprisals and the use of force. Suffice it to say that forcible reprisals are condemned as contrary to the Charter of the United Nations by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>82</sup> a conclusion confirmed by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>83</sup> and academic writings.<sup>84</sup> Suggestions by scholars that “reasonable” forcible reprisal action is tolerated by international law<sup>85</sup> are premised on the difficulties inherent in distinguishing between reprisal action taken some time after an armed attack designed to deter future armed attacks and self-defence. However important this debate may be, it has no relevance to the use of force to protect nationals, which involves an immediate response to secure the safety of the nationals and not subsequent punitive action.

55. The threat or use of force in the exercise of diplomatic protection can only be justified if it can be characterized as self-defence. It is this question that must be addressed in the present study of diplomatic protection. There is no suggestion that defence of nationals may be categorized as humanitarian intervention, despite the fact

that some writers<sup>86</sup> fail to draw a clear distinction between humanitarian intervention to protect the nationality of the injuring State and intervention by a State to protect its own nationals.

56. The right of self-defence in international law was formulated well before 1945. It required action taken in self-defence to be an immediate and necessary response to a situation threatening a State’s security and vital interests. The response was to be kept within the bounds of proportionality. The scope of the right was wide and included both anticipatory self-defence and intervention to protect nationals.<sup>87</sup>

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

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

Some writers<sup>88</sup> argue that Article 51 contains a complete and exclusive formulation of the right of self-defence, which limits it to cases in which an armed attack has occurred against a State, while others maintain that the phrase “inherent right” in Article 51 preserves the pre-Charter customary right.<sup>89</sup> In the *Military and Paramilitary Activities in and against Nicaragua* case ICJ gave support to the latter view when it held that “Article 51 of the Charter is only meaningful on the basis that there is a ‘natural’ or ‘inherent’ right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter”.<sup>90</sup> The Court confirmed this approach in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* when it declared that some of the constraints on the resort to self-defence “are inherent in the very concept of self-defence” while others “are specified in Article 51”. Moreover, said the Court,

The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.<sup>91</sup>

58. If Article 51 preserves the customary law right of self-defence, it is difficult to contend that the Charter’s

<sup>81</sup> Jennings and Watts, op. cit., p. 441.

<sup>82</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex. In the Declaration the General Assembly proclaims that “States have a duty to refrain from acts of reprisal involving the use of force” (part 1).

<sup>83</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 246, para. 46.

<sup>84</sup> Tomuschat, “Article 2(3)”, p. 105; Bowett, “Reprisals involving recourse to armed force”, p. 1; Partsch, “Reprisals”, p. 200; García Amador, first report, *Yearbook ... 1956* (see footnote 40 above), p. 217; Harvard Law School, *Research in International Law*, II, pp. 217–218, cited by García Amador, ibid., p. 216; Higgins, *The Development of International Law through the Political Organs of the United Nations*, pp. 216–217; Brownlie, *International Law and the Use of Force by States*, p. 281; Verdross and Simma, op. cit., pp. 294–295, para. 480; Schachter, *International Law in Theory and Practice*, pp. 128–129; Bryde, “Self-defence”, pp. 361–363; Partsch, “Self-preservation”, p. 218, referring to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (see footnote 82 above) and the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975; and Barsotti, “Armed reprisals”, pp. 79–80.

<sup>85</sup> See Bowett, loc. cit., p. 3; Shaw, op. cit., p. 786; Dinstein, *War, Aggression and Self-Defence*, p. 222; and Partsch, “Reprisals”, p. 332, and “Self-preservation”, pp. 218–219.

<sup>86</sup> Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*; Verwey, “Humanitarian intervention”, p. 57; Nguyen Quoc Dinh, Daillier and Pellet, op. cit., pp. 908–909.

<sup>87</sup> Bowett, *Self-Defence in International Law*, pp. 96–105.

<sup>88</sup> Brownlie, *International Law ...*, pp. 272–275; Verdross and Simma, op. cit., p. 288, para. 470; and Kelsen, *The Law of the United Nations: a Critical Analysis of its Fundamental Problems*, p. 791.

<sup>89</sup> Bowett, op. cit., pp. 184–186; Waldoch, “The regulation of the use of force by individual States in international law”, pp. 496–497; and Franzke, “Die militärische Abwehr von Angriffen auf Staatsangehörige im Ausland: insbesondere ihre Zulässigkeit nach der Satzung der Vereinten Nationen”, pp. 169–170.

<sup>90</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 94.

<sup>91</sup> *I.C.J. Reports 1996* (see footnote 83 above), pp. 244–245, paras. 40–41.

prohibition on the use of force extends to the protection of nationals abroad.<sup>92</sup> Such contention is made more difficult by the amount of State practice since 1945 in support of military intervention to protect nationals abroad in time of emergency<sup>93</sup> and the failure of courts<sup>94</sup> and political organs<sup>95</sup> of the United Nations to condemn such action. In the words of Jennings and Watts, “there has been little disposition on the part of states to deny that intervention properly restricted to the protection of nationals is, in emergencies, justified”.<sup>96</sup>

59. There is, however, general agreement that the right to use force in the protection of nationals has been greatly abused<sup>97</sup> in the past and that it is a right that lends itself to abuse.<sup>98</sup> The right must therefore be narrowly formulated to make it clear, first, that it may not be invoked to protect the property of a State’s nationals abroad<sup>99</sup> and, secondly, that it may only be invoked in emergencies to justify the rescue of foreign nationals. The 1976 forcible intervention by Israeli commandos at Entebbe airport,<sup>100</sup> Uganda, may serve as a model for such a rescue operation. The present article, formulated on the basis of that precedent, aims to limit the right to use force to protect nationals to emergencies in which they are exposed to immediate danger and the territorial State lacks the capacity or willingness to protect them. This seems to reflect State practice

<sup>92</sup> Bowett, op. cit., pp. 87–105; Dinstein, op. cit., p. 213; Barrie, “Forcible intervention and international law: legal theory and realities”, p. 800; and Dahm, *Völkerrecht*, p. 209. But *contra*, see Brownlie, *International Law* ..., pp. 289–301; *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 35; Ronzitti, op. cit.; Tunkin, “Politics, law and force in the interstate system”, pp. 337–338; and Menzhinsky, *Neprimenenie sily v mezhdunarodnyh otnosheniiah*, pp. 97–98. It is not clear what inference should be drawn from the ICJ judgment in the *Military and Paramilitary Activities in and against Nicaragua* case on this subject. While the Court expressly left open the question of the lawfulness of anticipatory self-defence (see footnote 90 above), p. 103, para. 194, it made no mention of the current status of defence of nationals as a form of self-defence.

<sup>93</sup> Jennings and Watts, op. cit., pp. 440–442.

<sup>94</sup> In the case of *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 18, ICJ declined to pronounce the legality of the unsuccessful United States attempt to rescue hostages “in exercise of its inherent right of self-defence”. Judges Morozov (p. 57) and Tarazi (p. 64) did, however, reject the United States argument and concluded that the rescue operation was not justified by Article 51. See D’Angelo, “Resort to force by States to protect nationals: the U.S. rescue mission to Iran and its legality under international law”, p. 485.

<sup>95</sup> In all instances in which force has been used to rescue or protect nationals the Security Council has been unable to reach a decision in favour or against the intervention. Following the Entebbe raid in 1976 a resolution condemning Israel was not put to the vote (draft resolution S/12139 of 12 July 1976, reproduced in *ILM*, vol. 15 (1976), p. 1227).

<sup>96</sup> Op. cit., p. 440.

<sup>97</sup> See, for example, the criticisms of the military interventions of the United States in Grenada and Panama (footnotes 14–15 above); Joyner, “Reflections on the lawfulness of invasion”, p. 131; and Nanda, “The validity of United States intervention in Panama under international law”, p. 494.

<sup>98</sup> See Borchard, op. cit., pp. 331 and 447; García Amador, first report (footnote 40 above), p. 216, para. 227; Guha Roy, loc. cit., pp. 880 and 887; García Amador, op. cit., p. 79; Lillich, op. cit., pp. 14–15; and Orrego Vicuña, “The changing law of nationality of claims”. For views denying that diplomatic protection presents a real danger of abuse, see Dunn, op. cit., p. 19.

<sup>99</sup> Jennings and Watts, op. cit., p. 441; Shaw, op. cit., p. 793; and Franzke, loc. cit., p. 171.

<sup>100</sup> See Margo, “The legality of the Entebbe raid in international law”, p. 306; Boyle, “The Entebbe hostages crisis”, p. 32; *Yearbook of the United Nations 1976* (United Nations publication, Sales No. E.76.I.1), vol. 30, pp. 315–320; and *ILM* (footnote 95 above), p. 1224.

more accurately than an absolute prohibition on the use of force (which is impossible to reconcile with actual State practice) or a broad right to intervene (which is impossible to reconcile with the protests that have been made by the injured State and third States on the occasion of such interventions). From a policy perspective it is wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which will permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse.

60. In practice the right to use force in the protection of nationals has been invoked to protect non-nationals where they are threatened, together with nationals of the protecting State.<sup>101</sup> In an emergency situation it will be both difficult and unwise to distinguish sharply between nationals and non-nationals. There should be no objection to the protecting State rescuing non-nationals exposed to the same immediate danger as its nationals, provided the preponderance of threatened persons are nationals of that State. Where the preponderance of threatened persons are non-nationals the use of force might conceivably be justified as a humanitarian action but not as self-defence in the protection of nationals. Whether international law recognizes a forcible right of humanitarian intervention falls outside the scope of the present study.

### Article 3

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

### Comment

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

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

Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen.<sup>102</sup>

This claimed indirect injury has been considered the basis of diplomatic protection for centuries. The thesis that the State has a general interest in the treatment of its nationals abroad and in ensuring respect for international law, and as a necessary corollary that it asserts its *own* right when it brings an international claim arising out of an injury to

<sup>101</sup> Jennings and Watts, op. cit., p. 442.

<sup>102</sup> Vattel, op. cit., p. 136.

a national, has repeatedly been confirmed by international tribunals. The classical formulation of the doctrine is to be found in the judgment of PCIJ in the *Mavrommatis* case, where the Court made the following statement:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.<sup>103</sup>

This doctrine was endorsed by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (Guerrero report)<sup>104</sup> and the Harvard Law School draft of 1929.<sup>105</sup> The principle was also restated by ICJ in the *Nottebohm* case in 1955 after criticism of the traditional conception had been voiced by writers:<sup>106</sup>

Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State.<sup>107</sup>

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

An international claim presented in respect of an injury suffered by an individual possesses the national character of a State when the individual is a national of that State or a person which that State is entitled under international law to assimilate to its own nationals for purposes of diplomatic protection.<sup>108</sup>

63. The basis of the State's right to ensure respect for international law in the person of its nationals has been claimed to lie in the “right of self-preservation, the right of equality, and the right of intercourse”.<sup>109</sup> A more satisfactory explanation was given by Brierly in 1928 in his comment on the assertion that an injury to a national is an injury to the State of nationality:

Such a view does not, as is sometimes suggested, introduce any fiction of law; nor does it rest ... on anything so intangible as the “wounding of national honour”; rather it merely expresses the plain truth that the injurious results of a denial of justice are not, or at any rate are not necessarily, confined to the individual sufferer or his family, but include such consequences as the “mistrust and lack of safety” felt by other foreigners similarly situated ... Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case ...<sup>110</sup>

Brierly's view is premised on the inability of the individual to present an international claim himself,<sup>111</sup> a premise

<sup>103</sup> Fifteen years later the Court made the same statement in the *Paneyevezs-Saldutiskis Railway* case (see footnote 12 above).

<sup>104</sup> *Yearbook ... 1956* (see footnote 40 above), p. 192.

<sup>105</sup> Harvard Law School, Draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners, Supplement to the *American Journal of International Law*, vol. 23, special number (April 1929), art. 1, p. 133.

<sup>106</sup> For an example of such early criticism, see Jessup, *A Modern Law of Nations*, p. 116.

<sup>107</sup> See footnote 52 above.

<sup>108</sup> *Tableau des résolutions adoptées (1957-1991)* (Paris, Pedone, 1992), art. 3, p. 59.

<sup>109</sup> Borchard, op. cit., p. 353, citing Hall, Rivier, Despagnet, Pomeroy and Oppenheim.

<sup>110</sup> Loc. cit., p. 48.

<sup>111</sup> Ibid. p. 47.

emphasized by Geck in the *Encyclopedia of Public International Law* when he asserts that the traditional doctrine of diplomatic protection is a “necessary consequence of the lack of an international material right” on the part of the injured individual.<sup>112</sup>

64. The notion that an injury to the individual is an injury to the State itself is not consistently maintained in judicial proceedings. When States bring proceedings on behalf of their nationals they seldom claim that they assert their own right and often refer to the injured individual as the “claimant”.<sup>113</sup> In the *Interhandel* case ICJ speaks of the applicant State having “adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law”.<sup>114</sup>

65. In these circumstances it is not surprising that some writers<sup>115</sup> argue that when it exercises diplomatic protection a State acts as agent on behalf of the injured individual and enforces the right of the individual rather than that of the State. Logical inconsistencies in the traditional doctrine, such as the requirement of continuous nationality, the exhaustion of local remedies rule and the practice of fixing the quantum of damages suffered to accord with the loss suffered by the individual, lend support to this view. Some writers seek to overcome the flaws in the traditional doctrine by explaining that the material right is vested in the individual, but that the State maintains the procedural right to enforce it.<sup>116</sup> Other writers are less patient with the traditional doctrine and prefer to dismiss it as a fiction that has no place in the modern law of diplomatic protection.<sup>117</sup>

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

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

<sup>112</sup> Loc. cit., p. 1057. See also García Amador, loc. cit., p. 471.

<sup>113</sup> This approach was followed by the drafters of the 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School (Sohn and Baxter, loc. cit., art. 21, para. 5, p. 578). Writing in 1915, Borchard described diplomatic protection as an “extraordinary legal remedy granted to the citizen, within the discretion of the state”, op. cit., p. 353.

<sup>114</sup> *Interhandel, Judgment, I.C.J. Reports 1959*, p. 27.

<sup>115</sup> For a detailed presentation of these arguments, see Mr. García Amador's first report (footnote 40 above), pp. 192–193; García Amador, loc. cit., pp. 413–428; and op. cit., pp. 497–501; *Yearbook ... 1998* (footnote 19 above), pp. 312–314, paras. 15–37, and p. 316, paras. 49–54; Orrego Vicuña, loc. cit., pp. 1–6; Geck, loc. cit., pp. 1057–1059; and Guha Roy, loc. cit., pp. 877–878.

<sup>116</sup> Geck, loc. cit., p. 1058; and Guha Roy, loc. cit., p. 878.

<sup>117</sup> *Yearbook ... 1998* (footnote 19 above), p. 313. See also Bennouna, “La Protection diplomatique, un droit de l'État?”, p. 245.

it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too.<sup>118</sup>

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

68. The present report is more concerned with the utility of the traditional view than its soundness in logic. As shown in the introduction,<sup>119</sup> diplomatic protection, albeit premised on a fiction, is an accepted institution of customary international law, and one which continues to serve as a valuable instrument for the protection of human rights. It provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and it provides a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments.

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

A residuary role for diplomatic protection seems more adequate to the extent that this mechanism might only intervene when there are no international procedures directly available to the affected individual. It should be noted, however, that if direct access is available diplomatic protection would be excluded altogether, except perhaps in order to ensure the enforcement of an award or secure compliance with a decision favoring that individual; in particular there would be no question of diplomatic protection after the individual has resorted to international procedures or in lieu thereof.

There is still the possibility of a parallel operation in which a State may spouse a claim at the same time that the individual pursues direct remedies, but this alternative would result in various kinds of interference with the orderly conduct of the procedures and eventually the outcome of the decision.<sup>120</sup>

This view reflects the position advocated by Mr. García Amador in his reports to the Commission.<sup>121</sup>

70. A compromise solution is that proposed by Jessup<sup>122</sup> and Sohn and Baxter in the 1960 draft Convention on the International Responsibility of States for Injuries to

Aliens,<sup>123</sup> which would allow both the injured individual and the State of nationality to pursue claims against the injuring State, but to give priority to the State claim. Article 3 is compatible with such a solution: it does not preclude the possibility of a claim being pursued by the individual on the international plane—*where there is a remedy available*. At the same time it places no restraint on the State of nationality to intervene itself.

71. Another solution offered by Doehring is that the State may bring the claim when its own rights are affected, which would also apply in the case of the expropriation of the property of a national. On the other hand, where the personal fundamental rights of the individual are affected, both the individual and the State may bring claims. This suggestion is also compatible with the proposal contained in article 3.<sup>124</sup>

72. Another argument that seeks to "cure" diplomatic protection of its fictitious character, but which substantially reduces the scope of diplomatic protection, runs as follows: the doctrine that an injury to the individual is an injury to the State is only a fiction when the State intervenes to protect an isolated individual or small group of individuals whose human rights, including property rights, have been violated by the territorial State. Where the injury is systematic and directed at a substantial number of nationals, thereby providing evidence of a policy of discrimination against a particular State's nationals, the State of nationality is in fact injured as the conduct of the territorial State constitutes an affront to the State itself.<sup>125</sup> In the latter case, and the latter case only, the State of nationality may intervene.

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

<sup>123</sup> Sohn and Baxter, loc. cit., pp. 578–580. Article 22 permits the injured individual to present his own claim directly to the injuring State; and article 23 provides for claims by the State. Article 23, paragraph 1, provides that:

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

<sup>124</sup> Doehring, "Handelt es sich bei einem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protektion ausübenden Staat zusteht, oder geht es um die Erzwingung von Rechten des betroffenen Individuums?", *Der diplomatische Schutz im Völker und Europarecht: Aktuelle Probleme und Entwicklungstendenzen*, pp. 18–20. See also similar comments by Ress and Stein, ibid., pp. 22–23.

<sup>125</sup> See García Amador:

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

(Loc. cit., p. 422). See also pages 466–467 and 473–474 (*ibid.*); *Yearbook ... 1956* (footnote 40 above), pp. 215–217; third report, *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 61–63; fifth report, *Yearbook ... 1960*, vol. II, document A/CN.4/125, pp. 51–55; and loc. cit., pp. 462–473.

<sup>122</sup> Op. cit., pp. 116–117. Jessup argues that the individual should be free to resort to international procedures only after the State has decided not to intervene.

<sup>118</sup> *The Law of Nations*, p. 276.

<sup>119</sup> Paras. 17–31 above.

<sup>120</sup> "The changing law ...", pp. 7–8.

<sup>121</sup> First report, *Yearbook ... 1956* (footnote 40 above), pp. 215–217; third report, *Yearbook ... 1958*, vol. II, document A/CN.4/111, pp. 61–63; fifth report, *Yearbook ... 1960*, vol. II, document A/CN.4/125, pp. 51–55; and loc. cit., pp. 462–473.

<sup>122</sup> Op. cit., pp. 116–117. Jessup argues that the individual should be free to resort to international procedures only after the State has decided not to intervene.

intervention to instances of large-scale and systematic human rights violations. Nor is it obliged to abstain from exercising that right when the individual enjoys a remedy under a human rights or foreign investment treaty. In practice a State will no doubt refrain from asserting its right of diplomatic protection while the injured national pursues his international remedy. Or it may, where possible,<sup>126</sup> join the individual in the assertion of his right under the treaty in question. But in principle a State is not obliged to exercise such restraint as its own right is violated when its national is unlawfully injured.

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

#### **Article 4**

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

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

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

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

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

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

#### **Comment**

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

Many writers<sup>127</sup> consider diplomatic protection a duty of the state, as well as a right. If it is a duty internationally, it is only a moral and not a legal duty, for there is no means of enforcing its fulfillment. Inasmuch as the state may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf,—for the interests of the majority cannot be sacrificed—it is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection. Whether such a duty exists toward the citizen is a matter of municipal law of his own country, the general rule

<sup>126</sup> See, for example, *Soering v. The United Kingdom* and *Selmouni v. France* (footnote 37 above).

<sup>127</sup> Writers cited by Borchard include Grotius, book II, chap. XXV, paras. 1–2, and Vattel, vol. I, chap. II, paras. 13–16.

being that even under municipal law the state is under no legal duty to extend diplomatic protection.<sup>128</sup>

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

It is hardly correct ... to speak of the citizen's power to invoke the diplomatic protection of the government as a "right" of protection ... his call upon the government's interposition is addressed to its discretion. At best, therefore, it is an imperfect right ... Being devoid of any compulsion, it resolves itself merely into a privilege to ask for protection. Such duty of protection as the government may be assumed to owe to the citizen in such cases is a political and not a legal one, responsibility for the proper execution of which is incurred to the people as a whole, and not to the citizen as an individual.<sup>129</sup>

This position was reaffirmed by ICJ in the *Barcelona Traction* case in 1970:

[W]ithin 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 persons 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 to 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.<sup>130</sup>

76. While most writers accept the traditional position,<sup>131</sup> voices have been raised against it. Charles De Visscher stated that "the absolute political discretion left to the State in the exercise of protection goes ill with the principle that the treatment due to aliens is a matter of international law".<sup>132</sup> Orrego Vicuña in his report to the International Law Association has described this aspect as one of the principal "disadvantages" of the current system.<sup>133</sup>

77. While the institution of diplomatic protection may be seen as an instrument for the furtherance of the international protection of human rights, it is not possible to describe diplomatic protection as an individual human right.<sup>134</sup> This is confirmed by the two international human rights instruments concerned with the right of aliens—the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live<sup>135</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>136</sup>—which reaffirm the right of the alien to have recourse to his diplomatic or consular mission for protection but place no duty on the State of nationality to protect him.<sup>137</sup>

<sup>128</sup> Op. cit. p. 29.

<sup>129</sup> Ibid., p. 356.

<sup>130</sup> *I.C.J. Reports 1970* (see footnote 16 above), p. 44, paras. 78–79.

<sup>131</sup> Greig, *International Law*, p. 523; Jennings and Watts, op. cit. p. 934; Geck, loc. cit., pp. 1051–1052; García Amador, loc. cit., p. 427; and van Panhuys, *The Role of Nationality in International Law: an Outline*, pp. 103 and 221.

<sup>132</sup> Charles De Visscher, *Theory and Reality in Public International Law*, p. 275.

<sup>133</sup> "The changing law ...", p. 7. See also *Yearbook ... 1998* (footnote 19 above), p. 316, paras. 47–48.

<sup>134</sup> Skubiszewski, "Introduction", p. 10.

<sup>135</sup> Art. 10 (see footnote 32 above).

<sup>136</sup> Art. 23.

<sup>137</sup> Warbrick, "Protection of nationals abroad", p. 1004.

78. Recent discussions in the Sixth Committee of the General Assembly illustrate the divergence of views on this issue. Most speakers considered that the decision whether or not to exercise diplomatic protection was the sovereign prerogative of the State with a full discretion.<sup>138</sup> Mr. Baker (Israel) stated that States might be influenced by overriding foreign policy concerns in declining the exercise of that right. Moreover, as the individual's claim might be wrong or unfounded in international law, the exercise of diplomatic protection should remain within the discretion of the State in order to prevent the individual from putting the State in a "an unnecessary position".<sup>139</sup> In contrast, while agreeing that diplomatic protection was primarily the prerogative of States, Mr. Skrk (Slovenia) proposed an examination of the legislative practice of States that afforded the right of diplomatic protection to their nationals.<sup>140</sup>

79. There was also a discussion of whether diplomatic protection should be considered a human right. Mr. Cede (Austria) expressed doubts about such a possibility, maintaining that such a view was not supported by existing international law and could not be expected to become part of the legal order in the near future.<sup>141</sup> In a somewhat more liberal manner, Mr. Gray (Australia) called for the examination of the legal basis (in the views and practice of States) of the right possessed by the individual and pointed to the necessity of considering whether it could be categorized as a human right.<sup>142</sup> Mr. Pérez Giralda (Spain) appeared to support the view that the right to diplomatic protection was a human right as he contended that the individual had a right to compensation for violations of his rights, as well as for the lack of diplomatic protection.<sup>143</sup>

80. Discussions in the Sixth Committee revealed that some members of the international legal community believed that the individual should be entitled to diplomatic protection as a matter of right. Although limited, there is in fact some State practice to support this view. Constitutional provisions in a number of States, mainly those belonging to the former communist bloc, recognize the right of the individual to receive diplomatic protec-

tion for injuries suffered abroad. These include: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia. Usually the relevant article of the Constitution contains formulations such as the "the State shall protect the legitimate rights of X nationals abroad" or "nationals of Y shall enjoy protection while residing abroad". The Italian, Spanish and Turkish constitutional provisions contain very vague and loose formulations, providing for the protection of certain rights of workers abroad, or in the case of Spain, state that the State "shall try to safeguard the economic and social rights" of its nationals working abroad.<sup>144</sup> The Constitution of the former Yugoslav Republic of Macedonia is even more limited, stating that the State "cares for" the well-being of its nationals abroad. At the other end of the spectrum, the Constitutions of the Republic of Korea and Guyana establish the "duty" of those States to protect their nationals abroad. Ukraine "guarantees" protection and the Polish Constitution talks about the right of the individual national to protection abroad, whereas the Hungarian Constitution states that "every Hungarian citizen is entitled to protection by the Republic of Hungary" while residing abroad.<sup>145</sup> It is uncertain whether and to what extent those rights are enforceable under the municipal law of those countries, and whether they go beyond the right of access to consular officials abroad.<sup>146</sup> On the other hand, they suggest that certain States consider diplomatic protection for their nationals abroad to be desirable.

81. State practice on this matter is difficult to trace. In his report on diplomatic protection to the International Law Association, Orrego Vicuña<sup>147</sup> refers to a nineteenth century Chilean law according to which the Ministry of Foreign Affairs was required to send any request for diplomatic protection to the Advocate General of the Supreme Court for a binding legal opinion as to whether the Government should exercise protection in the case. Geck, in turn, refers to unwritten constitutional rights to protection given to individuals by certain countries, and to an unwritten constitutional duty in other States to grant diplomatic protection.<sup>148</sup> He describes the constitutional tradition of Germany developed under the Constitutions of 1866, 1871 and 1919, and applied without constitutional provision to that effect since 1949 in the Federal Republic of Germany. According to this tradition, the German State has a constitutional duty to provide diplomatic protection if certain prerequisites have been met. The Federal Constitutional Court (Bundesverfassungsgericht) and other German courts have in their decisions confirmed this

<sup>138</sup> Mr. Sepulveda (Mexico), *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting (A/C.6/53/SR.16); Mr. Patriota (Brazil), *ibid.*; Mr. Benítez Saénz (Uruguay), *ibid.*; Mrs. Reza (Indonesia), *ibid.*, 15th meeting (A/C.6/53/SR.15); Mr. O'Hara (Malaysia), *ibid.*; Mr. Gray (Australia), *ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23); Mr. Longva (Norway), *ibid.*, *Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14); Sir Franklin Berman (United Kingdom), *ibid.*; Mr. Orrego Vicuña (Chile), *ibid.*; Mr. Fomba (Mali), arguing, however, that the development of human rights should be taken into account, *ibid.*, 13th meeting (A/C.6/53/SR.13); Mr. Caflisch (Observer for Switzerland), *ibid.*; Mr. Tomka (Slovakia), *ibid.*, 22nd meeting (A/C.6/53/SR.22); Mr. Omotosho (Nigeria), *ibid.*, 17th meeting (A/C.6/53/SR.17); and Mr. Al-Baharna (Bahrain), *ibid.*, 21st meeting (A/C.6/53/SR.21).

<sup>139</sup> *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15). On the first part of the argument, see also the statement by Mr. Abraham (France), *ibid.*, 14th meeting (A/C.6/53/SR.14).

<sup>140</sup> *Ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23).

<sup>141</sup> *Ibid.*, *Fifty-third Session, Sixth Committee*, 15th meeting (A/C.6/53/SR.15).

<sup>142</sup> *Ibid.*, *Fifty-second Session, Sixth Committee*, 23rd meeting (A/C.6/52/SR.23).

<sup>143</sup> *Ibid.*, *Fifty-third Session, Sixth Committee*, 18th meeting (A/C.6/53/SR.18).

<sup>144</sup> 1992 Constitution of Spain, art. 42.

<sup>145</sup> 1949 Constitution of the Republic of Hungary with amendments up to 1997, art. 69.

<sup>146</sup> Lee, *Consular Law and Practice*, chap. 8, pp. 124 et seq. Lee doubts whether the duty imposed on consular officials by many national statutes to safeguard the interests of nationals is justiciable (*ibid.*, pp. 125–127).

<sup>147</sup> Orrego Vicuña, "The changing law ...", p. 8. See also Orrego Vicuña, "Chile", pp. 138–141.

<sup>148</sup> Geck, loc. cit., p. 1052.

obligation on the part of the German authorities.<sup>149</sup> Besides conditions imposed by international law, diplomatic protection must be granted only if it “does not run counter to truly overriding interests of the Federal Republic”.<sup>150</sup> This condition has been interpreted by the courts to give the political authorities a discretion to determine whether overriding interests of the State and the people as a whole preclude diplomatic protection.

82. Although Israel lacks any formal legal provisions requiring the State to protect Israeli nationals abroad and the exercise of such protection is usually seen to fall within the discretion of the Government, the Supreme Court held in 1952 that the State has a duty to protect a national in an enemy country “insofar as it is able to defend him through the good offices of a friendly government”.<sup>151</sup> A similar decision was reached by the Haifa District Court in 1954.<sup>152</sup>

83. In Switzerland, the Government does not have a duty to exercise diplomatic protection on behalf of its nationals<sup>153</sup> but, as pointed out by Caflisch, certain provisions of the Constitution and the 1967 Consular Regulations recognize a limited duty on the part of Swiss consular missions to protect Swiss nationals unless it would prejudice the interests of the Confederation.<sup>154</sup>

84. The United Kingdom of Great Britain and Northern Ireland does not recognize the right of individuals to enforce the Crown's duty of diplomatic protection before domestic courts.<sup>155</sup> However, according to Warbrick, it is possible to argue today that British citizens have at least a “legitimate expectation” that they will be afforded diplomatic protection if the conditions stated in the rules of the United Kingdom applying to international claims (continuous nationality, exhaustion of local remedies, etc.) are fulfilled.<sup>156</sup>

85. In France, the right to exercise diplomatic protection is an *acte de gouvernement*—which is not subject to review by administrative bodies.<sup>157</sup> Although there is no general duty on the part of the executive to exercise diplomatic protection on behalf of nationals in the United States, the so-called Hostage Act of 27 July 1868 requires

<sup>149</sup> *Rudolf Hess* case, ILR, vol. 90 (1992), p. 387; and the *Eastern Treaties Constitutionality* case, ibid., vol. 78 (1988), p. 177. See also E. Klein, “Anspruch auf diplomatischen Schutz?”, p. 125, and related discussion.

<sup>150</sup> Geck, loc. cit., p. 1052.

<sup>151</sup> Blum, “Israel”, p. 314, citing *Hakim v. Minister of the Interior* (Piskei-Din, vol. 6 (1952), p. 642).

<sup>152</sup> Ibid., referring to *Attorney-General v. Steiner* (Pesakim Mehoziim, vol. 9 (1954), p. 489).

<sup>153</sup> This has been established in *Heirs Oswald v. Swiss Confederation* (1926), *Arrêts du Tribunal fédéral* 52 II 235; *Gschwind v. Swiss Confederation* (1932), ibid. 58 II 463; *Schoenemann v. Swiss Confederation* (1955), ibid. 81 I 159, cited by Caflisch, “Switzerland”, pp. 504–505.

<sup>154</sup> Caflisch “Switzerland”, pp. 506–508.

<sup>155</sup> *Mutasa v. Attorney-General*, *The All England Law Reports* 1979, vol. 3 (London, Butterworths, 1979), pp. 257 and 261–262; ILR, vol. 78 (1988), p. 490; *R v. Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Ferhut Butt*, unreported judgment of the Court of Appeal (9 July 1999), ibid., vol. 116 (2000), p. 608. See also the response of the United Kingdom to the Commission (July 1999), para. 3.

<sup>156</sup> Loc. cit., p. 1009.

<sup>157</sup> Nguyen Quoc Dinh, Daillier and Pellet, op. cit., p. 777.

the President to intervene whenever a United States citizen has been “unjustly deprived of his liberty by or under the authority of any foreign government”. In such a case the “President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release”.<sup>158</sup>

86. In a number of cases, British, Dutch, Spanish, Austrian, Belgian and French claimants have attempted to assert a right to diplomatic protection.<sup>159</sup> Although the cases were not decided in their favour, the submission of the claims indicates that the claimants had reasons to believe that they had such a right.

87. In sum, there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad. This approach is clearly in conflict with the traditional view. It cannot, however, be dismissed out of hand as it accords with the principal goal of contemporary international law—the advancement of the human rights of the individual rather than the sovereign powers of the State. This issue is therefore one that needs to be considered, if necessary by way of progressive development. This would accord with the suggestion by Orrego Vicuña in his 2000 report to the International Law Association Committee on diplomatic protection that:

The discretion exercised by a government in refusing to spouse a claim on behalf of the individual should be subject to judicial review in the context of due process.<sup>160</sup>

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

89. Today there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection.<sup>161</sup> It is not unreasonable therefore

<sup>158</sup> *United States Code*, 1994 edition, vol. 11, title 22, sect. 1732, p. 755 (Washington, D.C., United States Government Printing Office). See further Young, “Torture and inhumane punishment of United States citizens in Saudi Arabia and the United States Government's failure to act”, p. 663; and Hughes, “Hostages' rights: the unhappy legal predicament of an American held in foreign captivity”, p. 555. In *Redpath v. Kissinger* the Court held that the discretion of the President to enter into diplomatic negotiations to secure the release of an American national was not subject to judicial control (415 F. Supp. 566 (W.D. Tex. 1976), aff'd., 545 F.2d 167 (5th Cir. 1976)).

<sup>159</sup> *United States Code* (see footnote 158 above), sect. 1004, p. 648; *Mutasa v. Attorney-General* (see footnote 155 above); *R v. Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Ferhut Butt* (ditto); *Van Damme* case, *NRC Handelsblad* (5 January 2000); *HMHK v. Netherlands*, ILR vol. 94, p. 342; *Comercial F v. Council of Ministers*, ibid., vol. 88 (1992), p. 694; cases cited in Seidl-Hohenveldern, “Austria”, p. 31; *Manderlier* (1966), *Journal des tribunaux*, vol. 81, p. 721 and (1969) *Pasircrise belge* (II) 246, cited in Waelbroeck, “Belgium”, p. 59; and cases cited in Weil, “France”, pp. 278–279.

<sup>160</sup> “The changing law ...”, p. 26, rule 2.

<sup>161</sup> See article 53 of the 1969 Vienna Convention. Article 19 of the Commission's draft articles on State responsibility adopted on first reading (*Yearbook ... 1996* (see footnote 2 above), p. 60) characterizes the

to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*.<sup>162</sup> If a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress,<sup>163</sup> there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad.

90. Obviously a State should be given a wide margin of appreciation in the exercise of this duty. Article 4, paragraph 2 (a), permits a State to refuse to exercise diplomatic protection where to do so would jeopardize both its national and its international interests. Article 4, paragraph 3, however, subjects the decision of the State to review by a court or other independent national authority. This accords with the proposal made by Orrego Vicuña in his report to the International Law Association.<sup>164</sup>

91. Article 4, paragraph 1, relieves the State of the obligation to protect if the national has a remedy himself or herself before a competent international body. Thus where the injuring State is a party to a human rights instrument which provides for access on the part of the injured individual to a court or other body, the State of nationality is under no obligation to exercise diplomatic protection.

92. In certain circumstances the injured national may be protected by another State. This would occur where the individual is a multiple national and another State of nationality has extended diplomatic protection to the individual. Another State of which the injured individual is not a national might also decide to extend diplomatic protection to the individual.<sup>165</sup> In these circumstances the State of nationality will be under no duty to extend diplomatic protection.

(Footnote 161 continued.)

breaches of norms protecting the most fundamental interests of the international community as international crimes. Although that provision makes no reference to *jus cogens* there is a clear correlation between norms of *jus cogens* and the examples cited, namely aggression, denial of the right of self-determination, slavery, genocide, apartheid and massive environmental pollution.

<sup>162</sup> Doebring distinguishes between fundamental human rights norms and other norms for the purpose of diplomatic protection and claims:

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

(Loc. cit., p. 19. See also pages 14–15). Moreover, while submitting that international law neither prohibits nor establishes an obligation on the part of the State to protect or a corresponding right on the part of the individual under municipal law, he claims that such an obligation may be derived from the application of the principle of *pacta sunt servanda* in municipal law (Doebring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes*, p. 15).

<sup>163</sup> See article 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; and articles 13–14 of the Convention against torture and other cruel and inhuman or degrading treatment or punishment.

<sup>164</sup> See paragraph 87 above.

<sup>165</sup> See article 10 (this article will deal with the controversial question of whether a State may protect a non-national in the case of the violation of an obligation *erga omnes*).

93. Finally the State will be under no obligation to protect a national who has no effective or genuine link with the State of nationality. Although this requirement proclaimed in the *Nottebohm* case<sup>166</sup> is rejected where the State of nationality chooses to exercise its *right* to intervene on behalf of an injured national (see article 5 below) with whom it has a bona fide link, it seems justified to accept this requirement in respect of the *duty* to exercise diplomatic protection.

## Article 5

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

### Comment

94. According to traditional doctrine, as shown in the commentary on article 3, the State’s right to exercise diplomatic protection is based on the link of nationality between the injured individual and the State. Consequently, except in extraordinary circumstances, a State may not extend its protection to or espouse claims of non-nationals.<sup>167</sup>

95. In 1923, PCIJ stated in the *Nationality Decrees Issued in Tunis and Morocco* case that:

[I]n the present state of international law, questions of nationality are ... in principle within this reserved domain.<sup>168</sup>

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

It is for each State to determine under its own law who are its nationals.

96. More recently it has been endorsed by the European Convention on Nationality<sup>169</sup> and it is difficult to resist the conclusion that it has acquired the status of customary law.<sup>170</sup>

<sup>166</sup> See footnote 52 above.

<sup>167</sup> Van Panhuys, op. cit., pp. 59–73; Jessup, op. cit., p. 99; Orrego Vicuña, “The changing law ...”, p. 8; third report of Mr. García Amador, *Yearbook ... 1958* (see footnote 121 above), p. 66, para. 22; Geck, loc. cit., p. 1049; Ohly, “A functional analysis of claimant eligibility”, p. 284; García Amador, op. cit., p. 501; Jennings and Watts, op. cit., p. 512; *Nottebohm* case (see footnote 52 above), p. 23; Harvard Law School, draft Convention (footnote 105 above), art. 15 (a); Basis of Discussion No. 28, Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), League of Nations publication, V. Legal, 1929.V.3 (document C.75.M.69.1929. V), reproduced in *Yearbook ... 1956* (see footnote 40 above), p. 225; 1960 draft Convention prepared by the Harvard Law School, arts. 2 (b) and 23, para. 3, in Sohn and Baxter, loc. cit., pp. 548 and 579; and 1965 Institute of International Law resolution on the national character of an international claim presented by a State for injury suffered by an individual, art. 1(a) (see footnote 108 above), p. 57.

<sup>168</sup> *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 24.

<sup>169</sup> Art. 3, para. 1.

<sup>170</sup> Bar-Yaacov, *Dual Nationality*, p. 2.

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

It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes.<sup>171</sup>

98. The State's right to determine the nationality of the individual is not, however, absolute. This was made clear by PCIJ in the *Nationality Decrees Issued in Tunis and Morocco* case when it stated that the question whether a matter was "solely within the jurisdiction of a State"—such as the conferment of nationality—"is an essentially relative question; it depends upon the development of international relations".<sup>172</sup> Moreover, even if a State in principle has an absolute right to determine nationality, other States may challenge this determination where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred.<sup>173</sup>

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

This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.<sup>174</sup>

100. Today, conventions, particularly in the field of human rights,<sup>175</sup> require States to comply with international standards in the granting of nationality. This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights".<sup>176</sup>

101. International custom and general principles of law likewise set limits on the conferment of nationality by describing the linkages between State and individual that will result in the nationality conferred by a State being recognized by international law for the purpose of diplomatic protection. Birth, descent and naturalization are the connections generally recognized by international law. Whether in addition to one of these connecting factors,

and particularly in the case of naturalization, there must be a "genuine" or "effective" link between State and individual, as held in the *Nottebohm* case,<sup>177</sup> is a matter that requires serious consideration.

102. Birth (*jus soli*) and descent (*jus sanguinis*) are recognized by international law as satisfactory connecting factors for the conferment of nationality. Some writers describe this recognition as a customary rule,<sup>178</sup> others as a general principle of law.<sup>179</sup> Treaties<sup>180</sup> and judicial decisions<sup>181</sup> confirm this recognition.

103. Naturalization is, in principle, also recognized as a satisfactory link for the conferment of nationality for purposes of diplomatic protection. The circumstances in which States confer nationality by means of naturalization vary considerably from State to State.<sup>182</sup> Some confer nationality automatically (without the consent of the individual) by operation of law,<sup>183</sup> for example in the cases of marriage and adoption. Others confer nationality by naturalization only on application by the individual after a prescribed period of residence or on marriage to a national.<sup>184</sup>

104. International law will not recognize naturalizations in all circumstances. Fraudulently acquired naturalization<sup>185</sup> and naturalization conferred in a manner that discriminates<sup>186</sup> on grounds of race or sex provide examples of naturalization that may not be recognized. Probably naturalization would not be recognized for the purpose of diplomatic protection if it was conferred in the absence of any link whatsoever, or, possibly, a very tenuous link. Here the refusal to recognize would be based on the abuse of right on the part of the State conferring nationality, which would render the naturalization process *mala fide*.<sup>187</sup> Recognition would be withheld also in the case of forced naturalization, whether or not it reflected a substantial connection between State and individual.<sup>188</sup>

<sup>177</sup> See footnote 52 above.

<sup>178</sup> Brownlie, *Principles* ..., pp. 390–391; and van Panhuys, op. cit., pp. 160–161.

<sup>179</sup> Brownlie, "The relations of nationality in public international law", pp. 302 and 314.

<sup>180</sup> Article 20 of the American Convention on Human Rights: "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."

<sup>181</sup> *Flegenheimer* case, decision No. 182 of 20 September 1958 (UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327).

<sup>182</sup> For circumstances in which nationality may be acquired by naturalization, see article 6 of the European Convention on Nationality.

<sup>183</sup> See *Yearbook* ... 1952 (footnote 173 above), p. 8.

<sup>184</sup> See generally, Brownlie, *Principles* ..., pp. 394–397; and O'Connell, *International Law*, p. 682.

<sup>185</sup> Brownlie, *Principles* ..., p. 402; Weis, *Nationality and Statelessness in International Law*, pp. 218–220 and 244; Bar-Yaacov, op. cit., p. 143; *Flegenheimer* case (see footnote 181 above), pp. 338–340; *Salem* case (1932), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1184; and *Eshphanian v. Bank Tejarat*, Award No. 157 (29 March 1983), *Iran–United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 2, p. 166.

<sup>186</sup> *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (see footnote 176 above), p. 304.

<sup>187</sup> Jennings and Watts, p. 855. See also van Panhuys, op. cit., pp. 158–165.

<sup>188</sup> Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", pp. 196–201; and Jones, *British Nationality Law*, p. 15.

<sup>171</sup> Op. cit., p. 856.

<sup>172</sup> See footnote 168 above.

<sup>173</sup> *Yearbook* ... 1952, vol. II, document A/CN.4/50, report by Mr. Manley O. Hudson on nationality, including statelessness, p. 10; and Verdross and Simma, op. cit., pp. 788–789, paras. 1192 and 1194.

<sup>174</sup> See also article 3, paragraph 2, of the European Convention on Nationality.

<sup>175</sup> See article 20 of the American Convention on Human Rights; article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 9 of the Convention on the Elimination of All Forms of Discrimination against Women. See also the Commission's draft articles on nationality of natural persons in relation to the succession of States, *Yearbook* ... 1999, vol. II (Part Two), p. 20.

<sup>176</sup> *Advisory Opinion OC-4/84*, ILR, vol. 79 (1989), p. 296.

105. There is, however, a presumption in favour of good faith on the part of the State.<sup>189</sup> Moreover, as the Inter-American Court of Human Rights stressed in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, the State conferring nationality must be given a “margin of appreciation” in deciding upon the connecting factors that it considers necessary for the granting of nationality.<sup>190</sup>

106. The *Nottebohm* case<sup>191</sup> is seen as authority for the position that there should be an “effective” or “genuine” link between the individual and the State of nationality, not only in the case of dual or plural nationality (where such a requirement is generally accepted<sup>192</sup>), but also where the national possesses only one nationality. Here ICJ stated:

According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a 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 with the State which has made him its national.<sup>193</sup>

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

108. First, it seems that ICJ was concerned about the manner in which Liechtenstein conferred nationality upon Nottebohm as, in order to accommodate the urgency of his application for naturalization, Liechtenstein had waived some of its own rules relating to the length of residence required. Faced with the choice between finding that Liechtenstein had acted in bad faith in conferring nationality on Nottebohm and finding that he lacked a “genuine” link of attachment with Liechtenstein, the Court preferred the latter course as it did not involve condemnation of the conduct of a sovereign State. This view, which draws some support from the dissenting opinions,<sup>194</sup> relies heavily on the operation of an inarticulate judicial premise on the part of the majority and is insufficient to provide a satisfactory basis for limiting the scope of the Court's judgment. Nevertheless, it does suggest that the judgment should not too readily be applied in different situations in which there is no hint of irregularity on the part of the State of nationality.

109. Secondly, ICJ was clearly concerned about the “extremely tenuous”<sup>195</sup> links between Nottebohm and Liechtenstein compared with the close ties between Nottebohm

and Guatemala over a period of 34 years. It therefore found it unfair to allow Liechtenstein to protect Nottebohm in a claim against Guatemala. This explains its repeated assertion that Liechtenstein was “not entitled to extend its protection to Nottebohm vis-à-vis Guatemala”.<sup>196</sup> The crucial dictum in this case is not therefore that referred to above on the “genuine” link<sup>197</sup> but the following:

[The] facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.<sup>198</sup>

110. ICJ did not purport to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala. It therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State with which he had no close connection.<sup>199</sup> This question is probably best answered in the affirmative as the Court was determined to propound a relative test only,<sup>200</sup> i.e. that Nottebohm's close ties with Guatemala trumped the weaker nationality link with Liechtenstein. In these circumstances the *Nottebohm* requirement of a “genuine” link should be confined to the peculiar facts of the case and not seen as a general principle applicable to all cases of diplomatic protection.

111. The suggestion that the *Nottebohm* principle of an effective and genuine link be seen as a rule of customary international law in cases not involving dual or plural nationality enjoys little support. The dissenting opinion of Judge Read that the principle found no support outside the field of dual nationality<sup>201</sup> was shortly thereafter endorsed by the Italian–United States Conciliation Commission in the *Flegenheimer* case. In that decision the Commission limited the applicability of the principle to cases involving dual nationals, stating that:

[W]hen a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law.<sup>202</sup>

The Commission furthermore stated that it was “doubtful that the International Court of Justice intended to establish a rule of general international law” in the *Nottebohm* case.<sup>203</sup> That States are unwilling to support such a principle is evidenced by the failure in practice of the attempt

<sup>189</sup> Brownlie, *Principles ...*, pp. 402–403.

<sup>190</sup> *Advisory Opinion OC-4/84* (see footnote 176 above), p. 303.

<sup>191</sup> See footnote 52 above.

<sup>192</sup> See articles 6–7 below.

<sup>193</sup> *I.C.J. Reports 1955* (see footnote 52 above), p. 23.

<sup>194</sup> Ibid., dissenting opinions of Judges Read, pp. 37–39, and Klaested, pp. 29–33. See also Kunz, “The *Nottebohm* judgment (second phase)”, pp. 548–560; and Parry, “Some considerations upon the protection of individuals in international law”, pp. 707–708.

<sup>195</sup> *I.C.J. Reports 1955* (see footnote 52 above), p. 25.

<sup>196</sup> *Ibid.* p. 26.

<sup>197</sup> See paragraph 106 above.

<sup>198</sup> *I.C.J. Reports 1955* (see footnote 52 above), p. 26.

<sup>199</sup> See Leigh, loc. cit., p. 468; and van Panhuys, op. cit., p. 99.

<sup>200</sup> See the *Flegenheimer* case (footnote 181 above); and the *Barcelona Traction* case (footnote 16 above), p. 42.

<sup>201</sup> *I.C.J. Reports 1955* (see footnote 52 above), pp. 41–42.

<sup>202</sup> *Flegenheimer* case (footnote 181 above), p. 377.

<sup>203</sup> *Ibid.*, p. 376.

to apply the genuine link principle to ships,<sup>204</sup> a field in which social and economic considerations probably justify such a rule. Available State practice also shows little support for the *Nottebohm* principle.<sup>205</sup>

112. Academic opinion is divided on this issue. Geck,<sup>206</sup> Ranelzhofer,<sup>207</sup> Parry,<sup>208</sup> Kunz<sup>209</sup> and Jones<sup>210</sup> do not accept the genuine link requirement as a rule of customary international law. Many of these scholars have pointed out that there is often little connection between the individual upon whom nationality has been conferred *jure soli* or *jure sanguinis* and that it is difficult to limit the genuine link requirement to cases of naturalization. Other scholars<sup>211</sup> are well disposed towards the genuine link requirement. Brownlie contends that it is supported by pre-*Nottebohm* literature and national judicial decisions and that it has a “role as a general principle with a variety of possible applications”<sup>212</sup> outside the context of dual nationality. He does, however, suggest that the principle should not be applied in “too exacting” a manner.<sup>213</sup>

113. Support for the principle of effectiveness is to be found in other quarters. Several members of the Commission gave it their support in the fifth session debate on nationality, including statelessness.<sup>214</sup> Mr. García Amador proposed the codification of a similar rule in article 23, paragraph 3, of his last report to the Commission in 1961:

A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two.<sup>215</sup>

More recently one of the Rapporteurs for the International Law Association Committee on Diplomatic Protection of Persons and Property, Orrego Vicuña, has proposed the following rule as one that reflects “contemporary realities and trends”:

<sup>204</sup> See article 91 of the United Nations Convention on the Law of the Sea; and the United Nations Convention on Conditions for Registration of Ships. Cf. article III, paragraph 3, of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

<sup>205</sup> The rules regarding international claims made by the British Government make no mention of the “genuine link requirement” in relation to individuals (rule I) (Warbrick, loc. cit., p. 1006). Cf. rule IV in which this principle is applied to corporations (p. 1007).

<sup>206</sup> Loc. cit., p. 1050.

<sup>207</sup> “Nationality”, p. 507.

<sup>208</sup> Loc. cit., p. 707.

<sup>209</sup> Loc. cit., p. 536.

<sup>210</sup> “The Nottebohm case”, pp. 239–240 and 243–244.

<sup>211</sup> Van Panhuys, op. cit., pp. 158 and 161; Fitzmaurice, loc. cit., pp. 206–207; Ruzié, “Nationalité, effectivité et droit communautaire”, p. 113; de Castro, “La nationalité, la double nationalité et la supra-nationalité”, p. 582; and Bojars, *Grazhdanstvo gosudarstv mira*, pp. 308–310.

<sup>212</sup> Brownlie, “The relations of nationality ...”, p. 349. See also page 364. See further Brownlie, *Principles ...*, p. 412. See also page 415.

<sup>213</sup> Ibid., “Principles ...”, p. 423. Other writers also stress the need to limit the scope of application of the effective link test: Combacau and Sur, *Droit international public*, p. 325.

<sup>214</sup> *Yearbook ... 1953*, vol. I, p. 180, para. 24; p. 186, paras. 5 and 7; p. 239, paras. 45–46 (Mr. Yépes); p. 181, paras. 32–33; p. 218, para. 63 (Mr. Zourek); p. 184, para. 57; p. 237, para. 24 (Mr. François); p. 239, para. 50 (Mr. Amado).

<sup>215</sup> *Yearbook ... 1961* (see footnote 46 above), p. 49.

The link of nationality to the claimant State must be genuine and effective.<sup>216</sup>

He does, however, recognize that the rule will have to be applied with “greater flexibility and adaptation to changing needs”.<sup>217</sup>

114. The Commission’s draft articles on nationality of natural persons in relation to the succession of States,<sup>218</sup> in article 19, recognize the concept of effective link in relation to nationality but make no judgement as to its current status in the context of diplomatic protection.

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

An international claim presented by a State for injury suffered by an individual may be rejected by the respondent State or declared inadmissible when, in the particular circumstances of the case, it appears that naturalization has been conferred on that individual in the absence of any link of attachment.<sup>219</sup>

116. The *Nottebohm* case featured prominently in the arguments before ICJ in the *Barcelona Traction* case.<sup>220</sup> Although the Court distinguished *Nottebohm* on the facts and in law, it did find that there was a “permanent connection” between the Company and Canada.<sup>221</sup> The Court, however, carefully refrained from asserting that the principle expounded in *Nottebohm* reflected a principle of customary international law.

117. The genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire.<sup>222</sup> Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection. Even supporters of *Nottebohm*, like Brownlie and van Panhuys, accept the need for a liberal application of *Nottebohm*.<sup>223</sup>

118. Customary international law recognizes that a nationality acquired by fraud, negligence or serious error may not be recognized<sup>224</sup> and that it is the function of

<sup>216</sup> “The changing law ...”, p. 27, rule 6.

<sup>217</sup> Ibid. p. 12.

<sup>218</sup> *Yearbook ... 1999* (see footnote 175 above). Article 19 reads:

“Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.” (p. 22)

<sup>219</sup> Art. 4 (c) (see footnote 108 above).

<sup>220</sup> *I.C.J. Reports 1970* (see footnote 16 above), p. 42.

<sup>221</sup> Ibid.

<sup>222</sup> See Hailbronner, “Diplomatischer Schutz bei mehrfacher Staatsangehörigkeit”, p. 36.

<sup>223</sup> Brownlie, *Principles ...*, p. 423; and van Panhuys, op. cit., pp. 99 and 158.

<sup>224</sup> *Flegenheimer* case (see footnote 181 above), pp. 348–349 and 379–380; *Salem* case (see footnote 185 above), p. 1185; Brownlie,

an international tribunal, with due regard to the presumption in favour of the validity of a State's conferment of nationality<sup>225</sup> and allowance for a margin of appreciation on the part of the State of nationality,<sup>226</sup> to investigate and, if necessary, set aside a conferment of nationality.<sup>227</sup> This principle may be consolidated into a requirement of good faith. A conferment of nationality will be recognized for the purpose of diplomatic protection provided it is not made in bad faith, the onus of proof being on the respondent State to produce evidence of such bad faith.<sup>228</sup>

119. In effect the Institute of International Law's 1965 resolution supports such a rule, as nationality conferred in the absence of "any link of attachment"<sup>229</sup> is *prima facie* conferred in bad faith.

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

### *Article 6*

**Subject to article 9, paragraph 4,<sup>230</sup> the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.**

### **Comment**

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

(Footnote 224 continued.)

*Principles ...*, p. 422; and Jennings, "General course on principles of international law", p. 458. See also footnote 185 above; and Bar-Yaacov, op. cit., pp. 150–152 and 158.

<sup>225</sup> See footnotes 174 and 189 above; and Jennings, loc. cit., p. 459.

<sup>226</sup> See footnote 190 above.

<sup>227</sup> *Flegenheimer* case (footnote 181 above), pp. 336–349, especially pp. 338, 341–342 and 344; *Flutie* cases in Ralston and Doyle, *Venezuelan Arbitrations of 1903*, p. 34; and van Panhuys, op. cit., pp. 153–155.

<sup>228</sup> *Flegenheimer* case (see footnote 181), pp. 338–339, 344 and 347.

<sup>229</sup> Art. 4 (c) (see footnote 108 above).

<sup>230</sup> This will read: "Diplomatic protection may not be exercised by a new State of nationality against a previous State of nationality for injury incurred during the period when the person was a national only of the latter State." (*Yearbook ... 2000*, vol. II (Part Two), p. 86.) See also Fitzmaurice, loc. cit., p. 193.

122. The Conference for the Codification of International Law, held at The Hague in 1930, set out to reduce or abolish dual and multiple nationality,<sup>231</sup> but ended up recognizing its existence in article 3 of the 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.

Subsequent international attempts to eliminate dual and multiple nationality have likewise failed. The European States attempted to abolish it in the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality,<sup>232</sup> whose preamble declares "that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe". However, once again, the Convention stopped short of achieving its goal. Discussions on the issue continued throughout the following decades, and in the end resulted in the European Convention on Nationality,<sup>233</sup> which deals with dual nationality in a more liberal manner, reflecting the division of interests within the Council, with many members increasingly accepting the phenomenon.

123. Although many national laws prohibit their nationals from holding the nationality (passports?) of other countries, international law contains no such prohibition. It is therefore necessary to address the question whether one State of nationality may exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings are divided on this subject, but the weight of authority seems to support the rule advocated in article 6.

124. The 1929 Draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners declared that:

A state is not responsible if the person injured or the person on behalf of whom the claim is made was or is its own national.<sup>234</sup>

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

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

Differences of opinion, however, were apparent at the Conference for the Codification of International Law. A suggestion qualifying the above provision with the inclusion of the expression "if he is habitually resident in the latter state" was rejected by the majority. Some delegations would have preferred the provision omitted altogether. There were also suggestions which, if adopted, would

<sup>231</sup> Hudson, "The First Conference for the Codification of International Law", pp. 450–451.

<sup>232</sup> Similar attempts have been made in the League of Arab States in the framework of the Nationality Agreement between them. See Brownlie, "The relations of nationality ...", p. 351.

<sup>233</sup> Chap. V on multiple nationality.

<sup>234</sup> Art. 16 (a) (see footnote 105 above), p. 135.

have made the exercise of diplomatic protection in such cases possible if humanitarian concerns justified such intervention. Therefore, the rule represented a difficult compromise.<sup>235</sup>

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

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

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

126. The 1960 draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,<sup>236</sup> does not clearly permit or deny the right of a State of nationality to make a claim on behalf of a dual national against another State of nationality.<sup>237</sup> However, it leans against such a claim by providing that:

A State is entitled to present a claim of its national arising out of the death of another person only if that person was not a national of the State alleged to be responsible.<sup>238</sup>

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

An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim.<sup>239</sup>

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

128. Before 1930, there was considerable support for the application of the principle of dominant nationality in arbitration proceedings involving dual nationals.<sup>240</sup> The

<sup>235</sup> Flounoy, Jr., "Nationality convention, protocols and recommendations adopted by the First Conference on the Codification of International Law", p. 471; and *American Journal of International Law*, vol. 24 (1930), pp. 192–233.

<sup>236</sup> Sohn and Baxter, loc. cit., p. 548.

<sup>237</sup> The definition of "national" in article 21, paragraph 3 (a), is wide enough to include multiple and dual nationals and article 23, paragraph 1, which deals with State claims, is silent on the question of claims on behalf of dual nationals against a State of nationality (ibid., pp. 578–579).

<sup>238</sup> Ibid., p. 579, art. 23, para. 5.

<sup>239</sup> See footnote 108 above.

<sup>240</sup> See Joseph, op. cit., pp. 19–21; Leigh, loc. cit., pp. 462–464; Brownlie, *Principles ...*, pp. 403–404; Rode, "Dual nationals and the

first claim decided on the basis of dominant nationality was the case of *James Louis Drummond*, a French-British dual national whose property was expropriated by the French Government in 1792. In its decision of 1834, the British Privy Council rejected Drummond's claim, holding that:

Drummond was technically a British subject, but in substance, a French subject, domiciled (at the time of seizure) in France, with all the marks and attributes of French character ... The act of violence that was done towards him was done by the French Government in the exercise of its municipal authority over its own subjects.<sup>241</sup>

129. Another often cited case, that of *de Hammer and de Brissot*, concerned reparation to the widows and children of two United States nationals killed by Venezuelan rebels. The claims of the widows (Venezuelan nationals by birth and United States nationals by marriage) and their children (dual nationals by birth to an American father and to a Venezuelan mother in Venezuela) were rejected by the United States-Venezuelan Claims Commission in 1885 on the ground that in case of conflict between several nationalities, the nationality acquired by birth in the territory and domicile should be considered decisive.<sup>242</sup>

130. The *Miliani, Brignone, Stevenson and Mathison* cases decided by the Venezuelan Arbitral Commissions between 1903 and 1905 also support the dominant nationality principle. The last of these concerned a claim brought by a British-Venezuelan national before the British-Venezuelan Mixed Claims Commission for loss caused by the Venezuelan Government. Umpire Plumley, having established the fact that Mathison was a British national, declared that:

It is admitted that if he is also a Venezuelan by the laws of Venezuela, then the law of the domicile prevails and the claimant has no place before this Mixed Commission.<sup>243</sup>

131. The *Canevaro* case,<sup>244</sup> decided by the Permanent Court of Arbitration in 1912, may also be cited in support of the principle of dominant nationality. Here the question before the Court was whether the Italian Government could bring a monetary claim on behalf of Rafael Canevaro, a dual Italian-Peruvian national, for damages suffered due to non-payment of cheques by the Peruvian Government. Having reviewed the life of Canevaro and found that he had repeatedly acted as a Peruvian national, even running for the Senate, and having been Peru's Consul General for the Netherlands, the Court concluded that the Peruvian Government was entitled to reject the claim of the Italian Government.

132. The *Hein* case concerned a claim for reparation for damage suffered by Hein, a British, but formerly German national. In response to the German contention that Hein was a German national and therefore Germany was not

doctrine of dominant nationality", pp. 140–141; and Weis, op. cit., pp. 160–176.

<sup>241</sup> 2 Knapp, P. C. Rep. p. 295, 12 Eng. Rep. p. 492, cited in Rode, loc. cit., p. 140.

<sup>242</sup> Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, pp. 2456–2459.

<sup>243</sup> *Mathison* case, in Ralston and Doyle, op. cit., p. 433. See also the *Brignone, Miliani* and *Stevenson* cases, ibid., pp. 710, 754, 438, respectively.

<sup>244</sup> *Canevaro* case (Italy v. Peru), award of 3 May 1912 (UNRIAA, vol. XI (Sales No. 61.V.4), p. 397).

internationally responsible for damage caused to him, the Anglo-German Mixed Arbitral Tribunal held that whether or not Hein was still formally a German national had no relevance for the claim, as:

He had become a British national, and as he was residing in Great Britain at the time of the entrance into force of the Treaty he had acquired the right to claim ...<sup>245</sup>

133. In 1923, the question arose again, this time before the French-German Mixed Arbitral Tribunal in the *Blumenthal* case, in which the Tribunal reached a similar conclusion.<sup>246</sup> In 1925, the Tribunal was called upon to decide whether a State could claim for damage to its national who was also a national of the respondent State. That case concerned a claim by Madame Barthez de Montfort, a French national by birth who became a German subject as a result of her marriage to a German national. The Commission considered that it had jurisdiction to hear the claim as the claimant had "never abandoned her French domicile", and as

the principle of active nationality, *i.e.* the determination of nationality by a combination of elements of fact and of law, must be followed by an international tribunal, and ... the claimant was accordingly a French national and was entitled to judgment accordingly.<sup>247</sup>

134. The French-Mexican Mixed Claims Commission dealt with the right of the Mexican Government to claim on behalf of Georges Pinson, born in Mexico but subsequently naturalized in France. As the evidence showed that prior to the claim the Mexican Government had consistently treated Pinson as a French national, the Commission concluded that even if the dual nationality of Pinson could be established, the Mexican Government would not be entitled to bring a case on his behalf.<sup>248</sup>

135. In *Tellech*, decided by the Tripartite Claims Commission (United States, Austria and Hungary) in 1928, the United States brought a claim on behalf of Alexander Tellech for compensation for having subjected him to compulsory military service in Austria. The claim was rejected on the ground that Tellech had spent 28 of his 33 years in Austria and by voluntarily residing in Austria, being a dual national, he had taken the risk of having to comply with his obligations under Austrian laws.<sup>249</sup>

136. The interpretation of the above decisions has been questioned by Iranian judges in the Iran-United States Claims Tribunal, who have concluded that the correct interpretation of some of these cases (even those commonly interpreted in support of the dominant nationality doctrine) supports the doctrine of the non-responsibility of States for claims of dual nationals. In addition, the rest are, in their opinion, simply irrelevant as they were decided by commissions and tribunals established between a victori-

<sup>245</sup> *Annual Digest of Public International Law Cases 1919 to 1922*, Sir John Fischer Williams and H. Lauterpacht, eds. (London, Longmans, Green, 1932), case No. 148, p. 216.

<sup>246</sup> *Recueil des décisions des tribunaux mixtes institués par les traités de paix*, vol. III (Paris, Sirey, 1924), p. 616.

<sup>247</sup> *Annual Digest of Public International Law Cases 1925 and 1926*, Arnold D. McNair and H. Lauterpacht, eds. (London, Longmans, Green, 1929), case No. 206, p. 279.

<sup>248</sup> *Annual Digest of Public International Law Cases 1927 and 1928*, Arnold D. McNair and H. Lauterpacht, eds. (London, Longmans, Green, 1931), cases Nos. 194–195, pp. 297–301.

<sup>249</sup> *Alexander Tellech (United States) v. Austria and Hungary* (1928), UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 248–249.

ous Power and a defeated State based on treaties, leading to a basic asymmetry in their jurisdiction.<sup>250</sup> However, it is undeniable that, as the *de Hammer and de Brissot* case<sup>251</sup> demonstrates, there are decisions that adopt the dominant nationality principle which rejects the claims of nationals of the victorious Powers.

137. There was, however, also judicial support for the rule of non-responsibility of States for claims of dual nationals in judicial decisions before *Nottebohm*.<sup>252</sup>

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

To treat his grievances against that other sovereign as subject of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own.<sup>253</sup>

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

accepted rule of international law that such a person (a dual national) cannot make one of the countries to which he owes allegiance a defendant before an international tribunal.<sup>254</sup>

The British agent accepted this view and withdrew all claims on behalf of dual-national claimants.<sup>255</sup> The same Commission reached similar conclusions in the *Adams* and *Blackmore* case in 1931.<sup>256</sup>

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

The principle of the so-called "effective nationality" the Egyptian Government referred to does not seem to be sufficiently established in international law. It was used in the famous *Canevaro* case; but the decision of the Arbitral Tribunal appointed at that time has remained isolated ... Accordingly the Egyptian Government need not refer to the rule of

<sup>250</sup> Dissenting opinion of Dr. Shafie Shafeiei on the issue of dual nationality, cases Nos. 157 and 211, *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 2, p. 194. This view is shared by Bar-Yaacov, op. cit., pp. 214, 226, and 233–235.

<sup>251</sup> See footnote 242 above.

<sup>252</sup> See footnote 52 above.

<sup>253</sup> *Executors of R. S. C. A. Alexander v. The United States*, in Moore, *History and Digest* ...., p. 2531.

<sup>254</sup> Cited in Rode, loc. cit., p. 141: *Oldenbourg* case, Decisions and Opinions of the Commissioners, 5 October 1929 to 15 February 1930, p. 97; and *Honey* case, Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930, p. 13.

<sup>255</sup> Bar-Yaacov, op. cit., p. 212.

<sup>256</sup> *Frederick Adams and Charles Thomas Blackmore (Great Britain) v. United Mexican States*, UNRIAA, vol. V (Sales No. 1952.V.3), pp. 216–217.

“effective nationality” to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject ...<sup>257</sup>

141. In 1949 in its advisory opinion in the case concerning *Reparation*, ICJ described the practice of States not to protect their nationals against another State of nationality as the “ordinary practice”.<sup>258</sup>

142. The strongest support for the application of the dominant or effective nationality principle in claims involving dual nationals is to be found in *Nottebohm*<sup>259</sup> and the *Mergé Claim*.<sup>260</sup>

143. The *Nottebohm* case, which held that the nationality of the claimant State should be effective and reflect a “social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”,<sup>261</sup> is fully considered in the commentary to article 5. Although ICJ was concerned with a case of single nationality, the judgment was premised largely on precedents in the field of dual nationality. Thus the Court stated:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of diplomatic protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.<sup>262</sup>

Indeed Judge Read in his dissenting opinion contended that the requirement of genuine or effective link was limited to claims involving dual nationals.<sup>263</sup>

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

<sup>257</sup> UNRIAA (see footnote 185 above), p. 1187.

<sup>258</sup> *I.C.J. Reports* 1949 (see footnote 59 above), p. 186.

<sup>259</sup> See footnote 52 above.

<sup>260</sup> *Mergé Claim*, Italian-United States Conciliation Commission (10 June 1955), ILR, vol. 22 (1958), p. 443. According to P. De Visscher, “Cours général de droit international public”, p. 161:

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

See also P. Klein, “La protection diplomatique des doubles nationaux: reconsideration des fondements de la règle de non-responsabilité”, p. 184; and Tunkin, ed., *Mezhdunarodnoye pravo*, p. 221.

According to Leigh, the *Nottebohm* decision

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

(Loc. cit., p. 469)

<sup>261</sup> *I.C.J. Reports* 1955 (see footnote 52 above), p. 23.

<sup>262</sup> Ibid. p. 22.

<sup>263</sup> Ibid., pp. 41–42.

attributable to Italy. 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.<sup>264</sup>

In its opinion the Conciliation Commission made it clear that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted, together with the criteria cited above, was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals. In each case the Conciliation Commission referred to its decision in the *Mergé Claim* case.<sup>265</sup>

145. Relying on these cases, the Iran-United States Claims Tribunal has applied the principle of dominant and effective nationality to a great number of cases concerning claims of dual Iran-United States nationals against Iran. In its first dual national case, the *Eshphahanian* case,<sup>266</sup> in which it was established for the first time that the Tribunal had jurisdiction over such claims, the decision of Chamber Two of the Tribunal was based on the above jurisprudence and support in doctrine for the principle of dominant nationality. The authorities referred to in the majority opinion, namely Basdevant,<sup>267</sup> Maury<sup>268</sup> and Paul De Visscher, confirmed the validity and prevalence of the dominant and effective nationality theory.<sup>269</sup> The following passage of De Visscher was quoted with approval:

The effective link or dominant attachment doctrine was applied consistently in the nineteenth century; however, because it was usually applied in order to reject claims, ... it came to be seen as indicating that claims on behalf of dual nationals were generally inadmissible ... [T]he idea established itself that any claim for protection on behalf of a dual national should be declared inadmissible.

That rule ... which the Institute of International Law considered it necessary to reaffirm in 1965, does not accurately reflect current law ... in rendering the *Nottebohm* judgment, the International Court really did intend to state a general principle.<sup>270</sup>

<sup>264</sup> *Mergé Claim* (see footnote 260 above), p. 455, para V (5). See also UNRIAA, vol. XIV (Sales No. 65.V.4), p. 247.

<sup>265</sup> See, for example, the *Spaulding* claim (1956), ILR, vol. 24 (1957), p. 452; the *Zangrilli Claim*, ibid., p. 454; the *Cestra Claim* (1957), ibid., p. 454; the *Puccini Claim*, ibid.; the *Salvoni Estate* claim, ibid., p. 455; the *Ruspoli* claim, ibid., p. 457; the *Ganapini* claim (1959), ILR, vol. 30 (1966), p. 366; the *Turri* claim (1960), ibid., p. 371; the *Graniero* claim (1959), ibid., p. 451; and the *Di Ciccio* claim (1962), ibid., vol. 40 (1970), p. 148. See also Verdross and Simma, op. cit., p. 791, para. 1197.

<sup>266</sup> *Eshphahanian* case (see footnote 185), pp. 157–170, see also the dissenting opinion of Dr. Shafiq Shafeiei (footnote 250 above), pp. 178–225. For a criticism of this decision, see Khan, *The Iran-United States Claims Tribunal: Controversies, Cases and Contribution*, p. 120; and Rezek, “Le droit international de la nationalité”, p. 368.

<sup>267</sup> “Conflits de nationalités dans les arbitrages vénézuéliens de 1903–1905”, pp. 41–63, cited in Verwilghen, “Conflits de nationalités”, p. 459.

<sup>268</sup> “Du conflit de nationalités et en particulier du conflit de deux nationalités étrangères devant les autorités et les juridictions françaises”, p. 365.

<sup>269</sup> *Eshphahanian* case (see footnote 185 above), p. 164.

<sup>270</sup> “Cours général de droit international public”, p. 162.

Turning to the most recent literature, the majority (i.e. Judges Bellet and Aldrich) found support for the effective nationality theory also in the works of Rousseau,<sup>271</sup> Batifol and Lagarde,<sup>272</sup> Chappez,<sup>273</sup> Rode<sup>274</sup> and the Commission.<sup>275</sup> The majority furthermore held that tribunals had generally only held that one State of nationality might not claim on behalf of a dual national where the dual national was physically present in the respondent State of nationality.

146. That jurists are divided on the applicability of the principle of dominant nationality to cases involving dual nationals was emphasized by Judge Shafeiei<sup>276</sup> in dissent when he cited Borchard<sup>277</sup> and the 1965 discussion on the issue at the Institute of International Law,<sup>278</sup> Oppenheim,<sup>279</sup> Bar-Yaacov,<sup>280</sup> Nguyen Quoc Dinh, Daillier and Pellet,<sup>281</sup> and von Glahn<sup>282</sup> in support of the principle of non-responsibility.

147. *Espahanian* was confirmed by the Full Tribunal in *Iran-United States, case No. A/18*.<sup>283</sup> Again, the majority<sup>284</sup> comprising non-Iranian judges, and the minority<sup>285</sup> claimed the preponderance of academic writings to support their respective positions.

148. The Iran-United States Claims Tribunal, established by the Algiers Declarations of 1981,<sup>286</sup> does not provide for inter-State claims on behalf of nationals. It is

not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals.<sup>287</sup>

Despite this institutional peculiarity there is no doubt that the jurisprudence of the Tribunal has added considerably to the support for the dominant nationality principle.<sup>288</sup> Some 130 cases involving dual nationals have been brought before the Tribunal.<sup>289</sup>

149. Another institution which gives support to the dominant nationality principle is UNCC, established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait. The condition applied by UNCC for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.<sup>290</sup>

150. The principle of dominant nationality was adopted in Mr. García Amador's reports to the Commission. Article 21, paragraph 4, of his third report states:

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.<sup>291</sup>

It is also supported by Orrego Vicuña in his 2000 report to the International Law Association.<sup>292</sup>

151. The European Convention on Nationality fails to take sides on this issue. In article 17, paragraph 2, it provides that its provisions on multiple nationality do not affect

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

152. As demonstrated by the decisions of the Iran-United States Claims Tribunal, academic opinion is divided on the dominant nationality test in claims involving dual nationals. However, even writers<sup>293</sup> who are cited against such a test accept its utility. The latest edition of *Oppenheim's International Law*, which endorses the rule contained in article 4 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (which

<sup>271</sup> *Droit international public*, p. 112.

<sup>272</sup> *Droit international privé*.

<sup>273</sup> "Protection diplomatique", part 250-B.

<sup>274</sup> Loc. cit., p. 139.

<sup>275</sup> *Yearbook ... 1961* (see footnote 46 above), pp. 46 and 49.

<sup>276</sup> Dissenting opinion of Dr. Shafie Shafeiei (see footnote 250 above), pp. 199–201 and 207.

<sup>277</sup> "Protection diplomatique des nationaux à l'étranger", p. 289; and "La protection diplomatique des nationaux à l'étranger" (supplementary report), p. 278.

<sup>278</sup> *Annuaire de l'Institut de Droit International* (Basel, 1965), vol. 51, parts I–II (Warsaw session, September 1965).

<sup>279</sup> *International Law: A Treatise*, p. 348.

<sup>280</sup> Op. cit., p. 238.

<sup>281</sup> Op. cit., p. 774. Combacau and Sur also doubt whether the traditional rule expounded in the Convention on Certain Questions relating to the Conflict of Nationality Laws has been reversed by the *Mergé Claim*, op. cit., pp. 327–328.

<sup>282</sup> *Law Among Nations : an Introduction to Public International Law*, p. 207.

<sup>283</sup> See footnote 67 above.

<sup>284</sup> The majority added the following authors to those who support the dominant nationality principle: Reuter, *Droit international public*, p. 236; Yanguas Messia, "La protection diplomatique en cas de double nationalité", p. 556; Donner, *The Regulation of Nationality in International Law*, p. 94; Leigh, loc. cit., pp. 453 and 475; and Griffin, "International claims of nationals of both the claimant and respondent States: the case history of a myth", pp. 400–402.

<sup>285</sup> The voluminous dissent of the Iranian judges relied on the authors cited in Judge Shafeiei's dissenting opinion in *Espahanian* (see footnote 250 above), adding Fitzmaurice, loc. cit., p. 193, and Jessup, op. cit., p. 100. (See *Iran-United States, case No. A/18* (footnote 67 above), pp. 327–328.)

<sup>286</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria, ILM, vol. 20 (1981), pp. 224–229; and Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, ibid., pp. 230–233.

<sup>287</sup> *Espahanian* (see footnote 185 above), p. 165.

<sup>288</sup> See, generally, Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, pp. 44–79; and Brower and Brueschke, *The Iran-United States Claims Tribunal*, pp. 32–42 and 288–323.

<sup>289</sup> Aghahosseini, "The claims of dual nationals before the Iran United States Claims Tribunal: some reflections", p. 22.

<sup>290</sup> Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992: criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para. 11.

<sup>291</sup> *Yearbook ... 1958* (see footnote 121 above), p. 61.

<sup>292</sup> Orrego Vicuña proposed the following rule:

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

("The changing law ...", p. 27, rule 11)

<sup>293</sup> Brownlie, *Principles ...*, p. 404; Geck, loc. cit., p. 1051; and Parry, loc. cit., p. 699.

it states is “probably” a rule of customary international law), concedes that the conflict between articles 4 and 5 of the Convention is often settled in favour of article 5 in cases involving one State of nationality against the other, provided the dominant nationality of the individual is that of the claimant State.<sup>294</sup>

153. One of the principal objections to the dominant or effective nationality principle is its indeterminacy. While some authorities stress domicile<sup>295</sup> or residence<sup>296</sup> as evidence of an effective link, others point to the importance of allegiance<sup>297</sup> or the voluntary act of naturalization.<sup>298</sup> The jurisprudence of the Iran-United States Claims Tribunal has made a major contribution to the elucidation of the factors to be considered in determining the effectiveness of the individual’s link with his or her State of nationality. Factors it has considered in a large number of cases include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e. the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country, the nationality of the family and the registration of birth and marriage at the embassy of the other State of nationality; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality and other ties with it; possession and use of passport of the other State; renunciation of one nationality; and military service in one State. None of these factors was given a decisive role, and the weight attributed to each factor varied according to the circumstances of the case.<sup>299</sup> The Tribunal has also had regard to factors indicating mala fide acquisition or use of nationality.<sup>300</sup>

154. Records of current State practice concerning diplomatic protection of dual nationals against another State of which they are also nationals are rare. However, available

<sup>294</sup> Jennings and Watts, op. cit., p. 516.

<sup>295</sup> Borchard, op. cit., p. 589; and Parry, loc. cit., p. 711.

<sup>296</sup> Art. 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws; Bar-Yaacov, op. cit., pp. 136–137 and 260; and Fitzmaurice, loc. cit., p. 193.

<sup>297</sup> Judge Read in his dissenting opinion in the *Nottebohm* case (see footnote 52 above), pp. 44–45; and Brownlie, *Principles* ..., p. 422.

<sup>298</sup> Jennings, loc. cit., p. 459; and Randelzhofer, loc. cit., p. 507.

<sup>299</sup> Brower and Brueschke, op. cit., pp. 32–42.

<sup>300</sup> For the treatment of these factors and the caveat concerning fraudulent acquisition or use of nationality, see, for example, the *Esphahanian* case (footnote 185 above), p. 166; *Golpira v. Iran* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1985), vol. 2, p. 174; *Danielpour (M.) v. Iran* (1989), ibid. (1990), vol. 22, p. 121; *Danielpour (S. J.) v. Iran*, ibid., p. 126; *Beroohim v. Iran* (1990), ibid. (1992), vol. 25, p. 285; *Nemazee v. Iran*, ibid., p. 159; *Golshani v. Iran* (1989), ibid. (1990), vol. 22, p. 159; *Etezadi v. Iran* (1990), ibid. (1992), vol. 25, p. 270; *Hemmat v. Iran* (1989), ibid. (1990), vol. 22, p. 136; *Ebrahimi v. Iran*, ibid., p. 144; *Perry-Rohani v. Iran*, ibid., p. 198; *Abrahamian v. Iran*, ibid. (1991), vol. 23, p. 287; *Ghaffari v. NIOC* (1990), ibid. (1992), vol. 25, p. 184; *Mahmoud v. Iran* (1985), ibid. (1987), vol. 9, p. 350; *Malek v. Iran* (1988), ibid. (1989), vol. 19, p. 52; *Nourafchan v. Iran* (1989), ibid. (1991), vol. 23, p. 310; etc. See also Aldrich, op. cit., pp. 61–80; Brower and Brueschke, op. cit., pp. 298–305 and 315–316; and Bederman, “Nationality of individual claimants before the Iran-United States Claims Tribunal”, p. 129.

records suggest change in favour of the acceptance of the principle of dominant or effective nationality.<sup>301</sup>

155. In his treatise on dual nationality, Bar-Yaacov states that contemporary United States practice rejects diplomatic protection for dual nationals against the other State of nationality, especially if they have taken up residence in that State. No protection was given to nationals who did not express a preference for United States nationality upon election, or when the individual elected United States nationality but subsequently took up residence in the other State of nationality. Concerning naturalized citizens, the original United States position was not to afford protection against the State of origin. However, in 1859, the policy was reversed. Denying the non-responsibility doctrine, the Department of State claimed that once an individual became a United States citizen, its alliance to the United States was exclusive. Based on that argument the Government of the United States attempted on several occasions to exercise diplomatic protection on behalf of naturalized Americans against their State of other nationality, even when they had returned to that country.<sup>302</sup> British practice demonstrated similar patterns. Protection was denied against the other State of nationality as long as the person was residing there. In contrast to United States policy, the United Kingdom did not expand protection to British nationals who were naturalized in the United Kingdom if they decided to return to their State of origin.<sup>303</sup>

156. However, owing to changes of policy in both States, Bar-Yaacov’s conclusions have become outdated. Currently the United States Department of State applies the principle of effective nationality<sup>304</sup> and, according to the 1985 rules of the British Government,

HMG will not normally take up [a dual national’s] claim as a UK national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which gave rise to the injury, treated the claimant as a UN [*sic* U.K.] national.<sup>305</sup>

157. In the 1970s, the Chilean Government refused diplomatic protection against another State of nationality.<sup>306</sup> At the same time, the Federal Republic of Germany was not opposed to the informal exercise of such protection,<sup>307</sup> whereas Switzerland, although considering non-responsibility to be the general rule, did not deny the possibility of protection against another State of nationality in exceptional cases.<sup>308</sup>

158. Inevitably the application of the principle of effective or dominant nationality in cases of dual nationality

<sup>301</sup> Hailbronner has argued, with reference to contemporary State practice and legal developments in the field of human rights law granting protection also against the State of nationality, that although there is not yet a clear uniform practice in this field and although the majority of States may be opposed to protection in such cases, there is at least a slow change towards acceptance of the principle of effectiveness in this context (loc. cit., pp. 30–36). But contra Lee, op. cit., p. 159.

<sup>302</sup> Bar-Yaacov, op. cit., pp. 64–72 and 147–155.

<sup>303</sup> Ibid. pp. 72–75 and 155–157.

<sup>304</sup> Brownlie, *Principles* ..., p. 404, citing the *Digest of US Practice* (1979). See also Lee, op. cit., p. 160. The Netherlands follows the same principle, ibid. p. 161.

<sup>305</sup> Rule III of the rules applying to international claims, quoted in Warbrick, loc. cit., p. 1007.

<sup>306</sup> Orrego Vicuña, “Chile”, p. 141.

<sup>307</sup> Seidl-Hohenfeldern, “Federal Republic of Germany”, p. 247.

<sup>308</sup> Caflisch, “Switzerland”, p. 499.

will invoke a balancing of the strengths of competing nationalities. A tribunal should be cautious in applying the principle of preponderance of effectiveness where the links between the dual national and the two States are fairly evenly matched, as this would seriously undermine the equality of the two States of nationality.<sup>309</sup>

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

In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.<sup>310</sup>

According to this rule the Tribunal must examine the circumstances of the case at the merits stage. If it finds that the dual national used the nationality of the respondent State to secure benefits available only to nationals of the respondent State, it may refuse to make an award in favour of the claimant State.<sup>311</sup>

160. The weight of authority supports the dominant nationality principle in matters involving dual nationals. Moreover, both judicial decisions and scholarly writings have provided clarity on the factors to be considered in making such a determination. The principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the State of which they are nationals.<sup>312</sup>

## Article 7

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

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

### Comment

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

<sup>309</sup> Rezek, loc. cit., pp. 266–267. See also P. Klein, loc. cit., p. 184. This is the way the *Mergé Claim* (footnote 260 above), p. 455, para. V (5), quoted above in the commentary to article 6 (para. 144) has been interpreted: see van Panhuys, op. cit., p. 78; Verdross and Simma, op. cit., p. 905, para. 1338; Jürgens, *Diplomaticischer Schutz und Staatenlose*, p. 206; and Leigh, loc. cit., p. 472.

<sup>310</sup> Decision of 6 April 1984 (see footnote 67 above), pp. 265–266.

<sup>311</sup> See *Khosrowshahi v. Iran* (1990), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1991), vol. 24, p. 45; and *James M. Saghi v. Iran* (1993), Award No. 544–298–2. See further, Aldrich, op. cit., pp. 76–79; and Brower and Brueschke, op. cit., pp. 296–322.

<sup>312</sup> See Hailbronner, loc. cit., p. 35.

Tribunal declared that it had jurisdiction, having established that:

[I]t was the duty of the tribunal to examine in which of the two countries existed the elements essential in law and in fact for the purpose of creating an effective link of nationality and not merely a theoretical one ...

It was the duty of a tribunal charged with international jurisdiction to solve conflicts of nationalities. For that purpose it ought to consider where the claimant was domiciled, where he conducted his business, and where he exercised his political rights. The nationality of the country determined by the application of the above test ought to prevail.<sup>313</sup>

162. This principle received some support from article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, which provides:

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

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

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

An international claim presented by a State for injury suffered by a individual who, in addition to possessing the nationality of the claimant State, also possesses the nationality of a State other than the respondent State may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim unless it can be established that the interested person possesses a closer (*prépondérant*) link of attachment with the claimant State.<sup>314</sup>

164. The draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,<sup>315</sup> gave implicit support to this rule as its general support for the principle of effective nationality may be interpreted to apply to all cases involving the diplomatic protection of dual nationals. Mr. García Amador adopted a similar approach in his third report, which contained a proposal to the effect that no diplomatic protection should be possible on behalf of dual or multiple nationals unless it can be demonstrated that the individual has “stronger and more genuine legal and other ties” with the State offering such protection than with any other States.<sup>316</sup>

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

166. In the *Salem* case the Arbitral Tribunal held that Egypt could not raise the fact that the injured individual

<sup>313</sup> *Baron Frédéric de Born v. Yugoslavian State, Annual Digest of Public International Law Cases 1925 and 1926* (see footnote 247 above), case No. 205, p. 278.

<sup>314</sup> See footnote 108 above.

<sup>315</sup> Art. 23, para. 3, in Sohn and Baxter, loc. cit., p. 579.

<sup>316</sup> *Yearbook ... 1958* (see footnote 121 above), p. 61, art. 21, para. 4.

had effective Persian nationality against a claim from the United States, another State of nationality. It held that:

[T]he 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.<sup>317</sup>

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

United States nationals who did not possess Italian nationality but the nationality of a third State can be considered "United Nations nationals" under the Treaty, even if their prevalent nationality was the nationality of a third State.<sup>318</sup>

168. This rule was confirmed in 1958 by the Italian-United States Conciliation Commission in the *Flegenheimer* claim.<sup>319</sup>

169. In the *Stankovic* claim, the same Commission dealt with a claim brought by the United States on behalf of a Yugoslavian national who had emigrated to Switzerland after the establishment of the Federal Republic of Yugoslavia and obtained a stateless passport there in 1948. In 1956, he became a naturalized citizen of the United States. Following objection by the Italian authorities, the Commission stated that the United States was entitled to espouse Stankovic's claim even if he was also a national of another State. In their opinion a change from the nationality of one United Nations member to that of another member would not affect the jurisdiction of the Commission.<sup>320</sup>

170. The above conflict over the requirement of an effective link in cases of dual nationality involving third States is best resolved by a compromise which requires the claimant State only to show that there exists a bona fide link of nationality between it and the injured person. This rule has been followed by the Iran-United States Claims Tribunal in a number of cases concerning claimants who were at the same time nationals of the United States and a third State.<sup>321</sup> Even where the issue of dominant nationality was raised in such cases, the required proof was often considerably less strict than in cases concerning Iran-United States dual nationals.<sup>322</sup> However, in some cases the Tribunal indicated that if it could be proved that the claimant also possessed the nationality of a third State, it would be necessary to determine his or her dominant nationality.<sup>323</sup>

<sup>317</sup> *Salem* case (see footnote 185 above), p. 1188.

<sup>318</sup> *Mergé Claim* (see footnote 260 above), p. 456, para. V (8), cited in the *Vereano* claim (1957), ILR, vol. 24, p. 465.

<sup>319</sup> *Flegenheimer* case (see footnote 181 above), p. 149.

<sup>320</sup> *Stankovic* claim (1963), ILR, vol. 40 (1970), p. 155.

<sup>321</sup> See, for example, *Dallal v. Iran* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 3, p. 23; and Bederman, loc. cit., pp. 123–124.

<sup>322</sup> See, for example, *Saghi v. Iran* (1987), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1988), vol. 14, pp. 4 and 6; and *McHarg, Roberts, Wallace and Todd v. Iran* (1986), ibid., vol. 13, p. 289. See further Aldrich, op. cit., pp. 56–57.

<sup>323</sup> *Uiterwyk Corporation v. Iran* (1988), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1989), vol. 19, p. 118 (Aldrich considers that this case supports the view that less strict evidence was

171. UNCC follows the same approach, as it will not consider claims "on behalf of Iraqi nationals who do not have bona fide nationality of any other State" while there is no restriction on claims by dual nationals of States other than Iraq.<sup>324</sup>

172. Where the State of nationality claims from another State of nationality on behalf of a dual national there is a clear conflict of laws.<sup>325</sup> No such problem arises, however, where one State of nationality seeks to protect a dual national against a third State. Consequently there is no reason to apply the dominant or effective nationality principle.<sup>326</sup> This approach is adopted in British State practice.<sup>327</sup>

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

174. In principle there is no reason why two States of nationality may not jointly exercise a right that attaches to each State of nationality. The joint exercise of diplomatic protection by two or more States with which the injured individual has a bona fide link should therefore be permissible.<sup>328</sup>

## Article 8

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

required in these types of cases, op. cit., p. 57); *Asghar v. Iran* (1990), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1991), vol. 24, pp. 242–243; and *Daley v. Iran* (1988), ibid. (1989), vol. 18, pp. 236–237.

<sup>324</sup> See footnote 290 above.

<sup>325</sup> Parry, loc. cit., p. 707.

<sup>326</sup> See, for example, Jennings and Watts, op. cit., p. 883. See also Chernichenko, *Mezhdunarodno-pravovye voprosy grazhdanstva*, pp. 110–112; Ushakov, ed., *Kurs mezhdunarodnogo Prava*, pp. 80–82; and Hailbronner, loc. cit., p. 36. According to Lee, consular protection is usually rendered in such cases without the objection of the host State (op. cit., p. 159).

<sup>327</sup> The first sentence of rule III of the British Government's rules applying to international claims, cited in Warbrick, loc. cit., pp. 1006–1007, states that:

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

<sup>328</sup> Van Panhuys, op. cit., p. 80; Ohly, loc. cit., p. 289; and Warbrick, loc. cit., pp. 1006–1007.

## Comment

175. As shown in article 1, paragraph 1, and the commentary thereto, diplomatic protection is traditionally limited to nationals.<sup>329</sup> That it did not extend to stateless persons was made clear in the *Dickson Car Wheel Company* case, when the Tribunal stated:

A State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.<sup>330</sup>

The traditional rule fails to take account of the position of both stateless persons and refugees and accordingly is out of step with contemporary international law, which reflects a concern for the status of both these categories of persons.<sup>331</sup> This is evidenced by such conventions as the Convention on the reduction of statelessness and the Convention relating to the Status of Refugees.

176. Refugees present a particular problem as they are “unable or ... unwilling to avail [themselves] of the protection of [the State of nationality].”<sup>332</sup> If a refugee requests and enjoys the protection of her State of nationality, she loses her refugee status.<sup>333</sup> Moreover, it is argued by Grahl-Madsen that the State of nationality loses its right to exercise diplomatic protection on behalf of the refugee.<sup>334</sup>

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

178. Conventions on refugees and statelessness fail to address the question of diplomatic protection satisfactorily. The Schedule to the Convention relating to the Status of Refugees provides for the issue of travel documents,<sup>335</sup> but makes it clear that “the issue of the document does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not confer on these authorities a right of protection”.<sup>336</sup> On the other hand, Goodwin-Gill states that “[i]n practice ... diplomatic assistance falling short of full protection is often accorded by issuing States”.<sup>337</sup> The

<sup>329</sup> At the Conference for the Codification of International Law in 1930 the Netherlands proposed that the right of the host State to protect refugees should be recognized. This proposal was not adopted. See van Panhuys, op. cit., p. 72.

<sup>330</sup> *Dickson Car Wheel Company (U.S.A. v. United Mexican States)*, decision of July 1931 (UNRIAA, vol. IV (Sales No. 1951.V.1), p. 678).

<sup>331</sup> See Jennings and Watts, op. cit., pp. 886–887 and 890–896.

<sup>332</sup> Art. 1 A (2) of the Convention relating to the Status of Refugees.

<sup>333</sup> Grahl-Madsen, “Protection of refugees by their country of origin”, p. 392.

<sup>334</sup> Ibid., pp. 389, 391 and 394. For a discussion of this issue, see Lee, op. cit., pp. 352–359.

<sup>335</sup> In terms of article 28.

<sup>336</sup> Para. 16.

<sup>337</sup> *The Refugee in International Law*, p. 305. Switzerland takes the position that it will protect refugees who are no longer attached de facto to their home State, with the consent of the State against which the claim is presented: see Caflisch, “Pratique suisse en matière de droit international public”, note of 26 January 1978, p. 113. Belgium provides administrative and consular protection abroad to non-Belgian nationals who have refugee status in Belgium (Lee, op. cit., p. 358).

Convention relating to the Status of Stateless Persons suggests that stateless persons might be considered by the State of residence as “having the rights and obligations which are attached to the possession of the nationality of that country”.<sup>338</sup> It further provides in the context of administrative assistance that:

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

In contrast, the Convention on the reduction of statelessness is silent on the subject of protection.

179. In these circumstances it has been suggested that the State in which the refugee or stateless person has been resident for a substantial period of time and with which that person has an effective link should be entitled to exercise diplomatic protection on his or her behalf.<sup>340</sup> This would accord with the view expressed by Grahl-Madsen that:

[A]n application for asylum or refugee status is not merely an expression of a desire, but is a definite legal step that may result in the granting of asylum or refugee status. If granted, such status resembles acquisition of a new nationality.<sup>341</sup>

This view is supported by Lee, who states:

Indeed, there are grounds for supporting the analogy of the status of a refugee with that of a national of the state of asylum. For, from the standpoint of the refugee, his application for political asylum demonstrates his intent to sever his relationship with the country of origin, on the one hand, and his willingness to avail himself of the protection of the State of asylum, on the other. The State of asylum by granting asylum to a refugee and issuing identity and travel documents to him demonstrates its willingness to accept and protect him.<sup>342</sup>

180. Residence is an important feature of the effective link requirement, as demonstrated by the jurisprudence of the Iran–United States Claims Tribunal.<sup>343</sup> It is also recognized as a basis for the bringing of a claim before UNCC.<sup>344</sup>

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

A consular officer of the State where a stateless person has his habitual residence, may protect such a person as if Article 2, paragraph 1, of the present Convention applied, provided that the person concerned is not a former national of the receiving State.<sup>345</sup>

<sup>338</sup> Art. 1, para. 2 (ii).

<sup>339</sup> Art. 25, para. 1. See also article 14 with regard to artistic rights and industrial property.

<sup>340</sup> Brownlie, *Principles ...*, p. 423; and Ohly, loc. cit., p. 313, footnote 81. See also Jennings and Watts, op. cit., pp. 886–887; and Jürgens, op. cit., p. 218.

<sup>341</sup> Loc. cit., p. 381.

<sup>342</sup> Op. cit., p. 358. See also decision No. 60 VIII 59 of 4 August 1959 of the Verwaltungsgerichtshof Munich, cited by Lee, ibid.

<sup>343</sup> See the discussion of effective link in paragraph 145 above.

<sup>344</sup> Article 51 (a) of the UNCC Provisional Rules for Claims Procedure provides that: “A Government may submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory.” (S/AC.26/1992/10, annex).

<sup>345</sup> Art. 46, para. 1.

The Protocol to the European Convention on Consular Functions concerning the Protection of Refugees lays down a similar rule:

The consular officer of the State where the refugee has his habitual residence shall be entitled to protect such a refugee and to defend his rights and interests in conformity with the Convention, in consultation, whenever possible, with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it.<sup>346</sup>

182. Article 8 is therefore in line with contemporary developments relating to the protection of refugees and stateless persons. It is furthermore supported by the draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School,<sup>347</sup> which defines a “national” for the purposes of the Convention as “a stateless person having his habitual residence in that State”. Orrego Vicuña in his 2000 report to the International Law Association<sup>348</sup> also recommends that it should be possible for claims to be brought on behalf of non-nationals in case of “humanitarian concerns or where the individual would have no other alternative to claim for his rights”.

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

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

against a State of prior nationality applies *a fortiori* to the protection of refugees. This subject is discussed in the article dealing with continuous nationality.

### Future reports (and articles)

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

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

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

186. Subsequent reports will deal with:

(a) The exhaustion of local remedies;

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

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

(d) Protection of corporations.

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

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

## CHAPTER III

### Continuous nationality and the transferability of claims

#### Article 9

**1. Where an injured person has undergone a bona fide change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.**

**2. This rule applies where the claim has been transferred bona fide to a person or persons possessing the nationality of another State.**

**3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.**

<sup>346</sup> Art. 2, para. 2.

<sup>347</sup> See Sohn and Baxter, loc. cit., p. 578, art. 21, para. 3 (c).

<sup>348</sup> “The changing law ...”, p. 27, rule 7.

**4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.**

**Comment**

189. The rule relating to the continuity of nationality is stated by Oppenheim as follows:

[F]rom the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.<sup>349</sup>

Although this rule is well established in State practice and has received support in many judicial decisions, it may cause great injustice where the injured individual has undergone a bona fide change of nationality, unrelated to the bringing of an international claim, after the occurrence of the injury, as a result, *inter alia*, of voluntary or involuntary naturalization (e.g. marriage), cession of territory or succession of States. Doctrinally it is difficult to reconcile the rule with the Vattelian fiction that an injury to a national is an injury to the State itself, as this would vest the claim in the State of nationality once the injury to a national had occurred. The rule is also in conflict with the modern tendency to view the individual as a subject of international law. There is therefore a need for a reassessment of the continuity of nationality rule, which this article 9 seeks to achieve.

**A. The classical formulation of the rule and its justification**

190. The rule of continuous nationality is seen as a “corollary of the principle that diplomatic protection depends on the individual’s nationality”.<sup>350</sup> It was explained by Umpire Parker in Administrative Decision No. V in the following terms:

It is no doubt the general practice of nations not to espouse a private claim against another nation unless in point of origin it possesses the nationality of the claimant nation. The reason of the rule is that the nation is injured through injury to its national and it alone may demand reparation as no other nation is injured. As between nations the one inflicting the injury will ordinarily listen to the complaint only of the nation injured. A third nation is not injured through the assignment of the claim to one of its nationals or through the claimant becoming its national by naturalization. While naturalization transfers allegiance, it does not carry with it existing state obligations.<sup>351</sup>

191. The rule is primarily justified on the ground that it prevents abuse by individuals (who might otherwise engage in protection shopping) and States (which might otherwise acquire old claims for the purpose of putting political pressure on the respondent State).<sup>352</sup> In Administrative Decision No. V, Umpire Parker stated that:

<sup>349</sup> Jennings and Watts, op. cit., p. 512.

<sup>350</sup> Geck, loc. cit., p. 1055; and Leigh, loc. cit., p. 456. See also the *Panevezys-Saldutiskis Railway* case (footnote 12 above).

<sup>351</sup> *American Journal of International Law*, vol. 19 (Washington, D.C., 1925), pp. 613–614.

<sup>352</sup> See Borchard, “The protection of citizens abroad and change of original nationality”, pp. 377–380; Brownlie, *Principles ...*, p. 483; Wyler, op. cit., pp. 35–36 and 253–259; and Geck, loc. cit., p. 1056.

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 of their claims.<sup>353</sup>

To this Moore adds the exaggerated comment that the absence of the continuous nationality requirement

would allow [a person] to call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim. Under such a rule the government supposed to be indebted could never know when the discussion of a claim would cease. All governments are, therefore, interested in resisting such pretensions.<sup>354</sup>

192. Another explanation for the origin of the rule is that mixed claims commissions set up to adjudicate on injuries to aliens were limited in their jurisdiction by the terms of the ad hoc convention under which they were established and a “strict interpretation of the terms of the convention in question generally resulted in dismissal of the claim unless the claimant was able to prove that he possessed the nationality of the demanding state at the time of the presentation of the claim”.<sup>355</sup> There was no need to insert in the terms of the convention any clause relating to the requirement of continuous nationality because the ordinary rules of treaty interpretation ensured that the nationality of the injured person was required both at the time of injury and at the time the claim was presented for adjudication.<sup>356</sup>

**B. Status of the rule**

193. The assertion is often made that the continuity of nationality rule has become a customary rule as a result of its endorsement by treaties, State practice, judicial decisions, attempted codifications and restatements and the writings of publicists.

194. The “rule has recurred in innumerable treaties, for instance, in nearly all of the 200 lump sum agreements concluded after World War II”.<sup>357</sup> It is to be found in the Declaration establishing the Iran–United States Claims Tribunal, which provides that:

“Claims of nationals” of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that State ...<sup>358</sup>

<sup>353</sup> *American Journal of International Law* (see footnote 351 above), p. 614. See also *Albino Abbiatti v. Venezuela*, in Moore, *History and Digest ...*, p. 2348.

<sup>354</sup> *A Digest of International Law*, p. 637. See also Ohly, loc. cit., p. 285.

<sup>355</sup> Sinclair, “Nationality of claims: British practice”, p. 127. See also Jennings, loc. cit., pp. 476–477. Jennings, relying on Sinclair, says that there are good grounds for holding that the rule of continuous nationality of claims is “procedural and not substantive”.

<sup>356</sup> Wyler, op. cit., pp. 259–262; and O’Connell, op. cit., p. 1037.

<sup>357</sup> Geck, loc. cit., p. 1055. See also Sinclair, loc. cit., p. 142; and Wyler, op. cit., pp. 43–48.

<sup>358</sup> Art. VII, para. 2 (see footnote 286 above), p. 230.

It features in the practice rules of both the United States<sup>359</sup> and the United Kingdom.<sup>360</sup> And it has been confirmed by the decisions of mixed claims commissions, arbitral tribunals and international courts.<sup>361</sup> In the *Kren* claim, for example, the United States-Yugoslavia Claims Commission held, in 1953, that:

It is a well settled principle of international law that to justify diplomatic espousal, a claim must be national in origin; that it must, in its inception, belong to those to whom the state owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 666). Further, although the national character will attach to a claim belonging to a citizen of a state at its inception, the claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is a general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission*, p. 96).<sup>362</sup>

<sup>359</sup> In 1982, the Assistant Secretary of State for Congressional Relations, Powell A. Moore, wrote a letter to the Chairman of the House Committee on Foreign Affairs, in which he stated that:

“Under the long-established rule of international law of continuous nationality, no claimant is entitled to diplomatic protection of the state whose assistance is invoked unless such claimant was a national of that state at the time when the claim arose and continuously thereafter until the claim is presented. In effect, a claim must be a national claim not only at the time of its presentation, but also at the time when the injury or loss was sustained”.

(Nash Leich, “Contemporary practice of the United States relating to international law” (1982), p. 836)

<sup>360</sup> In 1985, the British Government published its rules applying to international claims. These include the following rules:

#### “Rule I

“HMG will not take up the claim unless the claimant is a United Kingdom national and was so at the date of the injury.

“Comment International law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of injury and of presentation of the claim (see “Nationality of Claims: British Practice”, by I. M. Sinclair: (1950) XXVII B.Y.B.I.L. 125–144).

“...

#### “Rule II

“Where the claimant has become or ceases to be a UK national after the date of the injury, HMG may in an appropriate case take up his claim in concert with the government of the country of his former or subsequent nationality.

“...

#### “Rule XI

“Where the claimant has died since the date of the injury to him or his property, his personal representatives may seek to obtain relief or compensation for the injury on behalf of his estate. Such a claim is not to be confused with a claim by a dependant of a deceased person for damages for his death.

“Comment Where the personal representatives are of a different nationality from that of the original claimant, the rules set out above would probably be applied as if it were a single claimant who had changed his national status.”

(Warbrick, loc. cit., pp. 1006–1008). See further on British practice, Sinclair, loc. cit., pp. 131–144.

<sup>361</sup> *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States*, UNRIAA, vol. V (Sales No. 1952.V.3), p. 209; the *Gleadell* case, ibid., p. 44; the *Stevenson* case, ibid., vol. IX (Sales No. 59.V.5), p. 494; the *Miliani* case, ibid., vol. X (Sales No. 60.V.4), p. 591; and the *Bogovic* claim, ILR, vol. 21 (1954), p. 156.

<sup>362</sup> ILR, vol. 20 (1953), p. 234.

PCIJ was less explicit in its support for the rule in the *Panvezys-Saldutiskis Railway* case, but it made it clear in a matter involving the rule of continuity of nationality that diplomatic protection was limited to the protection of nationals and that “[w]here the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection ...”<sup>363</sup> More recently the rule has been reaffirmed by the Iran-United States Claims Tribunal.<sup>364</sup>

195. Many attempts have been made to codify the rule of continuity of nationality. One of the earliest of such attempts was Project No. 16 on diplomatic protection, prepared by the American Institute of International Law, which in 1925 proposed that:

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.<sup>365</sup>

In 1929, the draft Convention on the responsibility of States for damage done in their territory to the person or property of foreigners, prepared by the Harvard Law School, provided that:

(a) A state is responsible to another state which claims in behalf of one of its nationals only insofar as a beneficial interest in the claim has been continuously in one of its nationals down to the time of the presentation of the claim.

(b) A state is responsible to another State which claims in behalf of one who is not its national only if

- (1) the beneficiary has lost its nationality by operation of law, or
- (2) the interest in the claim has passed from a national to the beneficiary by operation of law.<sup>366</sup>

A year later, the Preparatory Committee of the Conference for the Codification of International Law formulated a more restrictive rule in Basis of discussion No. 28:

A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

...

<sup>363</sup> *Panvezys-Saldutiskis Railway* (see footnote 12 above), p. 16. In this case the Court declined to rule on the preliminary objection relating to continuous nationality on the ground that it belonged to the merits.

<sup>364</sup> The requirement has been imposed on the claim rather than the claimant. Where the nationality of the claim changed between the jurisdictional cut-off date mentioned in the Algiers Declarations (i.e. 19 January 1981, the date of the entry into force of the Declaration concerning the Settlement of Claims (see footnote 286 above)) and the date of filing, proof of nationality on the cut-off date has been held to be sufficient for purposes of jurisdiction (*Gruen Associates, Inc. v. Iran Housing Company* (1983), *Iran-United States Claims Tribunal Reports* (Cambridge, Grotius, 1984), vol. 3, p. 97; and *Sedco, Inc. v. National Iranian Oil Company* (1985), ibid. (1987), vol. 9, p. 248). The Tribunal has held that the date of injury rather than the date of signature of the contract which was violated is the starting date required for jurisdiction (*Phelps Dodge Corp. and Overseas Private Investment Corp. v. The Islamic Republic of Iran* (1986), ibid., vol. 10, pp. 121 and 126). If these requirements have not been fulfilled the Tribunal dismissed the claim for lack of jurisdiction (e.g. *Jonathan Ainsworth v. The Islamic Republic of Iran* (1988), ibid. (1989), vol. 18, p. 95; and *International Systems & Controls Corporation v. Industrial Development and Renovation Organization of Iran* (1986), ibid. (1988), vol. 12, p. 259). On the relevant jurisprudence of the Tribunal, see Aldrich, op. cit., pp. 45–46, and Brower and Brueschke, op. cit., pp. 76–80.

<sup>365</sup> Art. VIII, *Yearbook ... 1956*, vol. II, p. 227.

<sup>366</sup> Art. 15, ibid., p. 229.

In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested.<sup>367</sup>

The continuity requirement appeared again in Mr. García Amador's third report presented to the Commission, which set out the following rule:

1. A State may exercise the right to bring a claim referred to in the previous article on condition that the alien possessed its nationality at the time of suffering the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the right of the State to bring a claim on behalf of the heirs or successors in interest shall be subject to the same conditions.<sup>368</sup>

In 1932, the Institute of International Law refused, by a small majority, to approve the traditional rule on continuity of nationality.<sup>369</sup> In 1965, however, it adopted a resolution which reaffirmed the traditional rule by stressing that the claim must possess the national character of the claimant State both at the date of its presentation and at the date of injury. On the other hand, it abandoned the requirement of continuity between the two dates. The resolution provided:

#### *First Article*

(a) An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State both at the date of its presentation and at the date of the injury. Before a court (*jurisdiction*) seised of such a claim, absence of such national character is a ground for inadmissibility.

(b) An international claim presented by a new State for injury suffered by one of its nationals prior to the attainment of independence by that State, may not be rejected or declared inadmissible in application of the preceding paragraph merely on the ground that the national was previously a national of the former State.

#### *Article 2*

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seised of it unless it possessed the national character of the claimant State both at the date of injury and at the date of its presentation.

#### *Article 3*

(a) ...

(b) By date of injury is meant the date of the loss or detriment suffered by the individual.

(c) By date of presentation is meant, in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.<sup>370</sup>

<sup>367</sup> Basis of discussion No. 28, *ibid.*, p. 225.

<sup>368</sup> *Yearbook ... 1958* (see footnote 121 above), p. 61, art. 21.

<sup>369</sup> *Annuaire de l'Institut de Droit International* (Brussels, 1932), vol. 37 (Oslo session, August 1932), p. 278. See further Wyler, *op. cit.*, p. 41. Cf. Borchard, "The protection of citizens abroad ...". Borchard was the Special Rapporteur whose proposal that the traditional rule be reaffirmed was rejected.

<sup>370</sup> Resolution on the national character of an international claim presented by a State for injury suffered by an individual (see footnote 108 above), pp. 57 and 59.

196. Most writers are at best equivocal in their support for the continuity rule. Few display the unqualified enthusiasm for the rule manifested by Borchard, who saw the reasons to sustain it to be "of fundamental and impregnable validity".<sup>371</sup> Instead opinions range from a questioning of the customary status of the rule<sup>372</sup> to criticism of its fairness from the perspective of both the State and the individual.<sup>373</sup> Wyler, in his comprehensive study, rightly concluded that few jurists are prepared to defend the rule without qualification.<sup>374</sup>

197. The continuity of nationality rule is supported by *some* judicial decisions, *some* State practice, *some* codification attempts and *some* academic writers. On the other hand, there is strong opposition to it.

198. In Administrative Decision No. V, Umpire Parker repeatedly stated that the requirement of continuous nationality was not a general principle of international law. He declared:

The general practice of nations not to espouse a private claim against another nation that does not in point of origin possess the nationality of the claimant nation has not always been followed. And that phase of the alleged rule invoked by the German Agent which requires the claim to possess continuously the nationality of the nation asserting it, from its origin to the time of its presentation or even to the time of its final adjudication by the authorized tribunal, is by no means so clearly established as that which deals with its original nationality. Some tribunals have declined to follow it. Others, while following it, have challenged its soundness.<sup>375</sup>

In 1932, the Institute of International Law was unable to reach agreement on the continuity rule. Special Rapporteur Borchard's proposal that the rule be endorsed was powerfully challenged by Politis, who stated:

The Rapporteur relies on the practice of diplomacy and jurisprudence in order to state the rule that protection ought not to be given or can no longer be exercised when the injured person has changed his nationality since the date of injury. The real situation is entirely different. A great number of cases apply a contrary theory. In truth, protection ought to be exercised in favour of the individual, despite his change of nationality, except in those cases in which he makes a claim against the government of his origin, or decides to acquire a new nationality only for a fraudulent purpose, in seeking the protection of a strong government, capable of giving more influence to his claim. The objection raised by the Rapporteur of the difficulty of proving this fraud is not conclusive. Diplomatic practice shows numerous cases in which it has been possible to offer similar proof; there are celebrated cases, chiefly in the field of divorce, in which fraud has been held established and as a result no

<sup>371</sup> *Loc. cit.*, p. 373. See also pages 300 and 377–380. See further Borchard, *op. cit.*, pp. 660–667.

<sup>372</sup> O'Connell, *op. cit.*, p. 1036.

<sup>373</sup> Balladore Pallieri, "La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica", p. 123; Geck, *loc. cit.*, pp. 1055–1056; van Panhuys, *op. cit.*, p. 90; Joseph, *op. cit.*, p. 29; Ohly, *loc. cit.*, p. 72; and Brownlie, *Principles ...*, p. 483. Only has contended that

"by leaving such claims uncompensated, strict application of the continuous nationality doctrine allows wrongful international conduct to remain unretributed, rewarding the State whose actions gave rise to the claim with additional incentive to conduct itself in a similarly wrong manner in the future".

(*Loc. cit.*, p. 286)

<sup>374</sup> *Op. cit.*, pp. 228–231. See also Joseph, *op. cit.*, pp. 26–29.

<sup>375</sup> *American Journal of International Law* (see footnote 351 above), p. 614.

account has been taken of the change of nationality, which had been effected.<sup>376</sup>

This failure to reach consensus influenced van Eysinga to find in his dissenting opinion in the *Panvezys-Saldutiskis Railway* case that the continuity practice had not “crystallized” into a general rule.<sup>377</sup>

199. Codification proposals are likewise inconsistent in support for the rule. The draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by Harvard Law School, proposed that:

A State has the right to present or maintain a claim on behalf of a person only while that person is a national of that State. A State shall not be precluded from presenting a claim on behalf of a person by reason of the fact that that person became a national of that State subsequent to the injury.

The right of a State to present or maintain a claim terminates, if, at any time during the period between the original injury and the final award or settlement, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State against which the claim is made.<sup>378</sup>

More recently Orrego Vicuña, Rapporteur to the International Law Association Committee on Diplomatic Protection of Persons and Property, has advanced the following proposal:

8. Continuance of nationality may be dispensed within the context of global financial and service markets and operations related thereto or other special circumstances. In such context the wrong follows the individual in spite of changes of nationality and so does his entitlement to claim.

9. Transferability of claims should be facilitated so as to comply with the standard set out under 8 above.

10. Only the State of the latest nationality should be able to bring a claim under the rule set out in 8 above. This claim shall not be made against the former State of nationality. It is a requirement that changes of nationality and transferability of claims be made *bona fide*.<sup>379</sup>

### C. Uncertainty about the content of the rule

200. The dubious status of the requirement of continuity of nationality as a customary rule is emphasized by the uncertainties surrounding the content of the alleged rule. There is no clarity on the meaning of the date of injury, nationality, continuity and the *dies ad quem* (the date until which continuity of the claim is required).

<sup>376</sup> *Annuaire de l'Institut de Droit International* (see footnote 369 above), p. 488. For the Rapporteur's response, see Borchard, “The protection of citizens abroad ...”. For an account of this matter, see Briggs's report to the 1965 session of the Institute of International Law, “La protection diplomatique des individus en droit international: la nationalité des réclamations”, pp. 157–178.

<sup>377</sup> *Panvezys-Saldutiskis Railway* (see footnote 12 above), p. 35.

<sup>378</sup> Art. 23, paras. 6–7, in Sohn and Baxter, loc. cit., p. 579. See also article 24, paragraph 2, which provides:

“A State is not relieved of its responsibility by having imposed its nationality, in whole or in part, on the injured alien or any other holder of the beneficial interest in the claim, except when the person concerned consented thereto or nationality was imposed in connection with a transfer of territory. Such consent need not be express ...”

(Ibid., p. 580)

<sup>379</sup> “The changing law ...”, p. 27, rules 8–10.

201. The “date of injury”<sup>380</sup> is usually construed to mean the date on which the alleged injurious act or omission of the respondent which caused damage to a national of the claimant State took place. Article 3 (b) of the 1965 resolution of the Institute of International Law confirmed this interpretation.<sup>381</sup> However, the argument has been advanced that the *dies a quo* is that on which the international delict occurred, that is, the date on which the respondent State failed to pay compensation or the date of the denial of justice.<sup>382</sup> International tribunals have, however, refused to draw such a distinction.<sup>383</sup>

202. Another issue which has been raised with regard to the requirement of nationality at the time of injury is the definition of national. It has been contended before various claims commissions that a declaration of intention to become a national filed at the time of the injury should be sufficient to satisfy the continuous nationality rule. Although the United States-Mexican General Claims Commission on occasion accepted such a declaration of intention supported by residence in the new State of nationality as equivalent to nationality at the origin of the claim, this contention has not been seen as satisfactory by subsequent international claims commissions.<sup>384</sup>

203. The term “continuity of nationality” is misleading as in practice little attempt is made to trace the continuity of nationality from the date of injury to the date of presentation of the claim. Instead only these two dates are considered.<sup>385</sup> Consequently the 1925 American Institute of International Law<sup>386</sup> and the 1965 Institute of International Law<sup>387</sup> proposals require that the holder of the claim be a national of the claimant State at the time of injury and presentation only. Thus a claim could be espoused by the original State of nationality if, after subsequent changes of nationality by its holder or its transfer to nationals of other States, the claim ends up in the hands of a national of the State whose national the injured person was at the time of the injury. The practical relevance of this rule is, however, questionable. This was stressed by Briggs in his report to the Institute of International Law:

If the judicial decisions of international tribunals have thus established the rule that, in order to be admissible, a claim must possess the nationality of the State asserting it not only at the origin but also on the date of its presentation to an international tribunal, is there an additional requirement, namely: that such a claim must have been *continuously* national during the period between those two dates? Tribunals are seldom confronted by such a problem. In most instances where a tribunal has stated, *in expressis verbis*, that a claim must be “continuously” national, from the origin to its presentation, what the tribunal has actually had to decide was whether or not a claim possessed the nationality of the claimant State on one or both of the two crucial dates. (See the *Gleadell* and *Flack* cases, above; and the *Benchitton* case, below.) Cases where a tribunal has had to deal with a claim that possessed the required nationality on both of the crucial dates, but lost or re-acquired that nationality in the period between those two dates have seldom arisen and have been controversial.<sup>388</sup>

<sup>380</sup> See generally on this subject, Wyler, op. cit., p. 53.

<sup>381</sup> See footnote 108 above.

<sup>382</sup> Joseph, op. cit., p. 25.

<sup>383</sup> Borchard, op. cit., p. 663.

<sup>384</sup> Ibid., pp. 662–663; and Wyler, op. cit., p. 91.

<sup>385</sup> Cf. Joseph, op. cit., pp. 24–26, who sees continuity as a third and separate requirement.

<sup>386</sup> *Yearbook ... 1956* (see footnote 365 above).

<sup>387</sup> See footnote 108 above.

<sup>388</sup> Loc. cit., pp. 72–73.

204. The absence of agreement over the content of the continuity rule is nowhere more apparent than in the dispute over the meaning to be given to the *dies ad quem*, the date until which continuous nationality of the claim is required. The following dates have been suggested and employed as the *dies ad quem*: the date on which the Government endorses the claim of its national, the date of the initiation of diplomatic negotiations on the claim, the date of filing of the claim, the date of the signature, ratification or entry into force of the treaty referring the dispute to arbitration, the date of presentation of the claim, the date of conclusion of the oral hearing, the date of judgement and the date of settlement.<sup>389</sup> The practical significance of the dispute over the *dies ad quem* is illustrated by the case of *Minnie Stevens Eschauzier*, whose claim was rejected because she lost her British nationality when she married an American national between the presentation of the claim and the award.<sup>390</sup> The disagreement over the *dies ad quem* can largely be explained on the grounds that different conventions have been interpreted to set different dates. This was made clear by Umpire Parker in Administrative Decision No. V:

When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them, which language limited their jurisdiction to claims possessing the nationality of the nation asserting them not only in origin but continuously—in some instances to the date of the *filing* of the claim, in others to the date of its *presentation* to the tribunal, in others to the date of the *judgment* rendered, and in still others to the date of the *settlement*. This lack of uniformity with respect to the period of continuity of nationality required for jurisdictional purposes results from each case being controlled by the language of the particular convention governing.<sup>391</sup>

However satisfactory this explanation may be, it hardly succeeds in providing evidence of clear State practice to found a customary rule.

205. The element of the continuous nationality rule that has attracted least contention is the requirement that the claim must have originated in an injury to a national of the claimant State. According to Borchard:

Few principles of international law are more firmly settled than the rule that a claim, in order to justify diplomatic support, must *when it accrued* have belonged to a citizen. This principle that a claim must be national in origin arises out of the reciprocal relation between the government and its citizens, the one owing protection and the other allegiance ... To support a claim, originally foreign, because it happened to come into the hands of a citizen would make of the government a claim agent.<sup>392</sup>

<sup>389</sup> Wyler, op. cit., pp. 75–80; Briggs, loc. cit., pp. 24 et seq.; Sinclair, loc. cit., pp. 128–130; Brownlie, *Principles ...*, pp. 483–484; Schwarzenberger, *International Law*, pp. 597–598; and García Amador, op. cit., p. 504.

<sup>390</sup> See footnote 361 above.

<sup>391</sup> *American Journal of International Law* (see footnote 351 above), pp. 616–617.

<sup>392</sup> Op. cit., p. 660. See also pages 462, 627–629 and 637–638 (*ibid.*); Geck, loc. cit., p. 1055; Shaw, op. cit., p. 565; Brownlie, *Principles ...*, p. 483; Joseph, op. cit., pp. 24–25; Parry, loc. cit., p. 702; Sinclair, loc. cit., p. 126; and the *Benchitor* case, *Annual Digest and Public International Law Cases 1923 to 1924*, Sir John Fischer Williams and H. Lauterpacht, eds. (London, Longmans, Green, 1933), p. 189. On this issue Schwarzenberger states:

“Unless the governing instrument calls for a different interpretation, the individual, corporation or ship must possess the nationality of the claimant State at the time of the injury (*dies a quo*). The reason is that the claim is that of the subject of international law which puts forward its claim. If, at the time of the injury, the individual

Thus a State may not claim on behalf of an individual who became its national by naturalization after the date of injury. To allow this, several decisions assert, would permit the new State of nationality to act as a claim agent.<sup>393</sup> Naturalization is not retroactive, it transfers allegiance, it does not transfer existing obligations. However, where the injury is a continuing one the new State of nationality may institute a claim.<sup>394</sup> The same principle has been applied to the claim of foreign heirs to deceased nationals, the assignment of claims to foreign assignees<sup>395</sup> and insurance subrogation.<sup>396</sup> Inevitably this leads to inequities in individual cases.

#### D. Jurisprudential and policy challenges to the continuity rule

206. The objections to the continuity rule are not confined to its uncertain content and unfairness. From a theoretical perspective it is out of line with both the Vattelian fiction that an injury to the individual is an injury to the State itself and the growing tendency to see the individual as a subject of international law. Moreover, there are strong policy objections to it. For these reasons it is a rule ripe for reassessment.

207. Diplomatic protection is premised on the Vattelian notion that an injury to a national is an injury to the State.<sup>397</sup> Logic would seem to dictate that an injury to an alien accrues to the State of nationality immediately at the time of injury and that subsequent changes to the person or nationality of the individual are irrelevant for the purposes of the claim.<sup>398</sup> Yet in the *Stevenson* case<sup>399</sup> this argument was dismissed by the British-Venezuelan Claim Commission of 1903. Here a British subject, long resident in Venezuela, had suffered an injury at the hands of the Venezuelan authorities. Before the claim was arbitrated, the injured national died, and his claim passed by operation of law to his widow, a Venezuelan national according to Venezuelan law, and his 12 children, 10 of whom were also Venezuelan nationals according to Venezuelan law. The British agent argued that in a claim brought by one State against another, the claimant State seeks redress for an injury to itself and does not merely act as representative for its injured national. Thus the fact that the injured national has since acquired the nationality of the respondent State should not bar the claim, which is founded on an injury to the claimant State through its national. Umpire Plumley rejected this argument:

concerned had another nationality or was stateless, the claimant State has received no injury.”

(Op. cit., p. 597)

<sup>393</sup> Administrative Decision No. V (see footnote 351 above), p. 614; and the *Albino Abbiati* case (see footnote 353 above).

<sup>394</sup> Borchard, op. cit., p. 661. The notion of “continuous wrong” was raised by Austria to allow it to protect “Czech-Germans” naturalized in Austria after the Second World War, arising from confiscatory measures against their property taken by Czechoslovakia (van Panhuys, op. cit., p. 95).

<sup>395</sup> *Stevenson* case (see footnote 361 above).

<sup>396</sup> Borchard, op. cit., pp. 627–629 and 636–638; and Brownlie, *Principles ...*, pp. 484–485.

<sup>397</sup> See the commentary to article 3 above, para. 62.

<sup>398</sup> O’Connell, op. cit., p. 1034; Geck, loc. cit., p. 1056; and Jennings, loc. cit., pp. 475–476.

<sup>399</sup> *Stevenson* (see footnote 361 above).

The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the nation through its national by the respondent government, there is always in Commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent government. In all of the cases which have come under the notice of the umpire—and he has made diligent search for precedents—the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorizing and providing for the international tribunal before which the claim is to appear.<sup>400</sup>

Other claims commissions have endorsed this approach.<sup>401</sup>

208. There are sound logical reasons for rejecting the continuity rule and simply recognizing as the claimant State the State of nationality at the time of injury to the national. Indeed this is the solution advocated by Wyler.<sup>402</sup> Nevertheless, such a solution is not without its weaknesses, which is conceded by Wyler.<sup>403</sup> In particular, it fails to take account of the new role of the individual in the international legal order.

209. While the individual person may not yet qualify as a subject of international law,<sup>404</sup> the individual's basic rights are today recognized in both conventional and customary international law. Neither the continuity of nationality rule nor the Vattelian notion that gives the State of nationality at the time of injury the sole right to claim, acknowledge the place of the individual in the contemporary international legal order. This was stressed as early as 1932 by Politis when he successfully challenged Borchard's proposal that the Institute of International Law adopt the traditional rule on continuity of nationality.<sup>405</sup> Subsequently jurists such as Geck,<sup>406</sup> O'Connell<sup>407</sup> and Jennings<sup>408</sup> have criticized the rule on similar grounds. It therefore seems preferable to reject the doctrine of continuous nationality as a substantive rule of customary international law. Although the doctrine of continuous nationality creates particular hardships in the case of involuntary change of nationality, as in the case of State succession, it would be wrong to reject it in this case only. Marriage, for instance, may involve a change of nationality which is involuntary, but there seems to be no good reason why it should affect the

<sup>400</sup> Ibid., p. 506.

<sup>401</sup> In the *Miliani* case the Italian-Venezuelan Commission stated:

"While it remains true that an offense to a citizen is an offense to the nation, nevertheless the claimant before an international tribunal is ordinarily the nation on behalf of its citizen. Rarely ever can the nation be said to have a right which survives when its citizen no longer belongs to it."

(See footnote 361 above). See also the *Studer* case discussed by Hurst, "Nationality of claims", p. 168.

<sup>402</sup> Op. cit., p. 264.

<sup>403</sup> Ibid.

<sup>404</sup> See paragraph 189 above.

<sup>405</sup> *Annuaire de l'Institut de Droit International* (see footnote 369 above), pp. 487–488. See also Mr. García Amador's first report, *Yearbook ... 1956* (footnote 40 above), p. 194.

<sup>406</sup> Loc. cit., p. 1055.

<sup>407</sup> Op. cit., pp. 1034–1036.

<sup>408</sup> Loc. cit., pp. 476–477.

operation of the rule of nationality of claims differently from cases of State succession.<sup>409</sup>

210. Article 3 of the present draft articles affirms the right of the State of nationality alone to exercise diplomatic protection on behalf of an injured individual, principally on the grounds that this affords the most effective protection to the individual. Article 9 does not depart from this principle in allowing the new State of nationality to institute proceedings on behalf of the individual. By permitting the claim to follow the changed circumstances of the individual it does, however, introduce an element of flexibility into the bringing of claims which accords greater recognition to the rights of the individual while at the same time recognizing that the State is likely to be the most effective protector of individual rights.

211. The principal policy reason for the rule of continuous nationality is that it prevents abuse of diplomatic protection.<sup>410</sup> Today the suggestion made by Moore that without this rule an injured person could "call upon a dozen governments in succession, to each of which he might transfer his allegiance, to urge his claim"<sup>411</sup> is rightly seen as fanciful. Modern States are cautious in their conferment of nationality and generally require prolonged periods of residence before naturalization will be considered. It is ridiculous to presume or even to suggest that the powerful industrialized nations, which are most able to assert an effective claim of diplomatic protection, would fraudulently grant naturalization in order to "buy" a claim.<sup>412</sup> Even if this was done the defendant State would in most instances successfully be able to raise the absence of a genuine link, as required in the *Nottebohm* case,<sup>413</sup> as a bar to the action.<sup>414</sup> In his separate opinion in the *Barcelona Traction* case, Sir Gerald Fitzmaurice stated:

[T]oo rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule (and even sometimes thought to be its *real fons et origo*), namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of powerful States whose governments would compel acceptance of them by the defendant State, has largely lost its validity.<sup>415</sup>

## E. Conclusion

212. The traditional "rule" of continuous nationality has outlived its usefulness. It has no place in a world in which individual rights are recognized by international law and in which nationality is not easily changed. It is difficult not to agree with Wyler's concluding comment that:

<sup>409</sup> O'Connell, op. cit., p. 1036; and van Panhuys, op. cit., pp. 92–94.

<sup>410</sup> See paragraph 192 above.

<sup>411</sup> See footnote 354 above.

<sup>412</sup> Van Panhuys, op. cit., p. 92.

<sup>413</sup> I.C.J. Reports 1955 (see footnote 52 above), p. 23.

<sup>414</sup> See Ohly, loc. cit., pp. 288–289.

<sup>415</sup> *Barcelona Traction* case (see footnote 16 above), pp. 101–102. See also Ohly, loc. cit., p. 286.

Anyway, the effectiveness of diplomatic protection would be appreciably enhanced if it were freed from the continuity rule.<sup>416</sup>

Article 9 seeks to free the institution of diplomatic protection from the chains of the continuity rule and to establish a flexible regime that accords with contemporary international law but at the same time takes account of the fears of the potential abuse that inspired the rule.

213. Article 9, paragraph 1, allows a State to bring a claim on behalf of a person who has acquired its nationality bona fide after suffering an injury attributable to a State other than the person's previous State of nationality, provided that the original State of nationality has not exercised or is not exercising diplomatic protection in respect of the injury.

214. A number of factors ensure that the rule will not lead to instability and abuse. First, it recognizes, in accordance with the Vattelian fiction, that priority should be given to a claim brought by the original State of nationality. Only when this is not done and the individual changes her/his nationality does the claim follow the individual. Secondly, the injured individual who changes nationality is not able to choose which State may claim on his/her behalf: the original State of nationality or the new State of nationality. Only the new State of nationality may institute a claim and only when it—the State—elects to do so.

215. Thirdly, the new nationality must have been acquired in good faith.<sup>417</sup> Where a new nationality is acquired for the sole purpose of obtaining a new State protector, this will normally provide evidence of a mala fide naturalization.<sup>418</sup> Borchard's criticism, made in 1934, that this "confuses motive with illegality or bad faith"<sup>419</sup>

is not without substance. However, in the post-*Nottebohm* world no State is likely to initiate proceedings on behalf of a naturalized national where there is any suggestion that naturalization has not been obtained in good faith and where there is no connecting factor between the individual and the State.

216. Article 9, paragraph 2, extends the above principle to the transfer of claims.

217. Article 9, paragraph 3, ensures the right of the State of original nationality to bring a claim where its own national interest has been affected by the injury to its national. The proviso to paragraph 1 also recognizes the special rights of the State of original nationality. This reaffirms the principle contained in article 3 of the present draft articles.

218. The abolition of the continuity rule must not result in the State of new nationality being allowed to bring a claim on behalf of its new national against the State of previous nationality in respect of an injury attributable to that State while the person in question was still a national of that State. The hostile response to the Helms-Burton legislation,<sup>420</sup> which purports to permit Cubans naturalized in the United States to institute proceedings for the recovery of loss caused to them by the Government of Cuba at the time when they were still Cuban nationals,<sup>421</sup> illustrates the unacceptability of such a consequence. Article 9, paragraph 4, which ensures that this may not happen, draws support from the proposal of Orrego Vicuña to the International Law Association.<sup>422</sup>

<sup>416</sup> Op. cit., p. 268.

<sup>417</sup> This requirement is included in Orrego Vicuña's proposal to the International Law Association, "The changing law ...", rule 10.

<sup>418</sup> See *Annuaire de l'Institut de Droit International* (footnote 369 above), pp. 487–488.

<sup>419</sup> "The protection of citizens abroad ...", p. 384.

<sup>420</sup> Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, ILM, vol. XXXV, No. 1 (January 1996), p. 357.

<sup>421</sup> See Lowe, "US extraterritorial jurisdiction: the Helms-Burton and D'Amato acts", pp. 386–388.

<sup>422</sup> "The changing law ...", rule 10. See also the statement by Politis to the Institute of International Law, *Annuaire de l'Institut de Droit International* (footnote 369 above), pp. 487–488.