Draft Articles on Diplomatic Protection with commentaries

2006

Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). The report, which also contains commentaries on the draft articles, will appear in *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

2. Text of the draft articles with commentaries thereto

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

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State Responsibility. Indeed the first Rapporteur on State Responsibility, Mr. F.V. Garcia Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.[16] The subsequent codification of State Responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection - nationality of claims and the exhaustion of local remedies - would be dealt with more extensively by the Commission in a separate undertaking.[17] Nevertheless, there is a close connection between the articles on Responsibility of States for internationally wrongful acts and the present draft articles. Many of the principles contained in the articles on Responsibility of States for internationally wrongful acts are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the articles on Responsibility of States for internationally wrongful acts.[18]

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

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

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

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

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

> "The responsibility of a State may not be invoked if:
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> "(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;
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> "(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."

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

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

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

PART ONE

GENERAL PROVISIONS

Article 1

Definition and scope

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

Commentary

(1) Draft article 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it describes the salient features of diplomatic protection in the sense in which the term is used in the present draft articles.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the Responsibility of States for internationally wrongful acts,[20] maintain the distinction between primary and secondary rules and deal only with the latter.

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

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

(3) Diplomatic protection has traditionally been seen as an exclusive State right in the sense that a State exercises diplomatic protection in its own right because an injury to a national is deemed to be an injury to the State itself. This approach has its roots, first in a statement by the Swiss jurist Emmerich de Vattel in 1758 that "whoever ill-treats a citizen indirectly injures the State, which must protect that citizen,"[21] and, secondly in a dictum of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law".[22] Obviously it is a fiction - and an exaggeration[23] - to say that an injury to a national is an injury to the State itself. Many of the rules of diplomatic protection contradict the correctness of this fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim. A State does not "in reality" - to quote *Mavrommatis* - assert its own right only. "In reality" it also asserts the right of its injured national.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments such as the Vienna Convention on Diplomatic Relations of 1961[30] and the Vienna Convention on Consular Relations of 1963.[31] Where, however, diplomats or consuls are injured in respect of activities outside their functions they are covered by the rules relating to diplomatic protection, as, for instance, in the case of the expropriation without compensation of property privately owned by a diplomatic official in the country to which he or she is accredited.

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

Article 2

Right to exercise diplomatic protection

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

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[28] See general commentary, para. (3).

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

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

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

Commentary

(1) Draft article 2 is founded on the notion that diplomatic protection involves an invocation - at the State level - by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. It recognizes that it is the State that initiates and exercises diplomatic protection; that it is the entity in which the right to bring a claim vests. It is without prejudice to the question of whose rights the State seeks to assert in the process, that is its own right or the rights of the injured national on whose behalf it acts. Like article 1[32] it is neutral on this subject.

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

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

(3) Today there is support in domestic legislation[34] and judicial decisions[35] for the view that there is some obligation, however limited, either under national law or international law, on the

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

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

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

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

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

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

PART TWO

NATIONALITY

CHAPTER I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

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

Commentary

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

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

CHAPTER II

NATURAL PERSONS

Article 4

State of nationality of a natural person

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

Commentary

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

(2) The principle that it is for each State to decide in accordance with its law who are its nationals is backed by both judicial decisions and treaties. In 1923, the Permanent Court of International Justice stated in the *Nationality Decrees in Tunis and Morocco* case that:

> "in the present state of international law, questions of nationality are … in principle within the reserved domain".[36]

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

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

"It is for each State to determine under its own law who are its nationals."[37]

More recently it has been endorsed by the 1997 European Convention on Nationality.[38]

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

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

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

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

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

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

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

[41] In the *Nottebohm* case the International Court of Justice stated: "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection which has made him its national", *op. cit.* at p. 23.

exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the Applicant State) were "extremely tenuous"[42] compared with the close ties between Mr. Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[43] This suggests that the Court did not intend to expound a general rule[44] applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.

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

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[42] *Ibid*., p. 25.

[43] *Ibid*., p. 26.

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

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

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

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

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

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

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[46] This was stressed by the Inter-American Court of Human Rights in its advisory opinion on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica,* Advisory Opinion OC-4/84 of 19 January 1984, Series A, No. 4, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights", at para. 35. See also ILR vol. 79, p. 296.

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

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

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

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

Article 5

Continuous nationality of a natural person

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

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

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

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

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

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

Commentary

(1) Although the continuous nationality rule is well established,[52] it has been subjected to considerable criticism[53] on the ground that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to "nationality shopping" for the purpose of diplomatic protection.[54] For this reason draft article 5 retains the continuous nationality rule but allows exceptions to accommodate cases in which unfairness might otherwise result.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) Paragraph 4 provides that if a person in respect of whom a claim is brought becomes a national of the respondent State after the presentation of the claim, the applicant State loses its right to proceed with the claim as in such a case the respondent State would in effect be required to pay compensation to its own national. This was the situation in *Loewen Group Inc v. USA* and a number of other cases[62] in which a change in nationality after presentation of the claim was held to preclude its continuation. In practice, in most cases of this kind, the applicant State will withdraw its claim, despite the fact that in terms of the fiction proclaimed in *Mavrommatis* the claim is that of the State and the purpose of the claim is to seek reparation for injury caused to itself through the person of its national.[63] The applicant State may likewise decide to withdraw its claim when the injured person becomes a national of a third State after the presentation of the claim. If the injured person has in bad faith retained the nationality of the claimant State until the date of presentation and thereafter acquired the nationality of a third State, equity would require that the claim be terminated, but the burden of proof will be upon the respondent State.

(14) Draft article 5 leaves open the question whether the heirs of an injured national, who dies as a consequence of the injury or thereafter, but before the official presentation of the claim, may be protected by the State of nationality of the injured person if he or she has the nationality of another State. Judicial decisions on this subject, while inconclusive as most deal with the interpretation of particular treaties, tend to support the position that no claim may be brought by the State of nationality of the deceased person if the heir has the nationality of a third State.[64] Where the heir has the nationality of the respondent State it is clear that no such claim may be brought.[65] There is some support for the view that where the injured national dies before the official presentation of the claim, the claim may be continued because it has assumed a national

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

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

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

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

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

Article 6

Multiple nationality and claim against a third State

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

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

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization or any other manner as envisaged in draft article 4, which does not result in the renunciation of a prior nationality. Although the laws of some States do not permit their nationals to be nationals of other States, international law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides:

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

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

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

[67] *Eschauzier* claim (*Great Britain v. Mexico*), at p. 209.

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

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

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions[68] and codification endeavours,[69] the weight of authority does not require such a condition. In the *Salem* case an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

> "the rule of International Law [is] that in a case of dual nationality a third Power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power."[70]

This rule has been followed in other cases[71] and has more recently been upheld by the Iran-United States Claim Tribunal.[72] The decision not to require a genuine or effective link in

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

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

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

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

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

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

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

Article 7

Multiple nationality and claim against a State of nationality

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

Commentary

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

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality might not bring a claim in respect of a dual national against another State of nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws declares in article 4 that:

> "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[73]

Later codification proposals adopted a similar approach[74] and there was also support for this position in arbitral awards.[75] In 1949 in its advisory opinion in the case concerning *Reparation for Injuries*, the International Court of Justice described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[76]

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

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

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

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

[76] *I.C.J. Reports 1949*, p. 186.

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

International Court of Justice in another context in the *Nottebohm* case[78] and was given explicit approval by Italian-United States Conciliation Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated that:

> "The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty."[79]

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

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

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

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

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

> "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties."[82]

A similar view was advanced by Orrego Vicuña in his report to the International Law Association in 2000.[83]

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

(5) No attempt is made to describe the factors to be taken into account in deciding which nationality is predominant. The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.

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

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

[84] ILR, vol. 22 (1955), p. 455.

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

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

Article 8

Stateless persons and refugees

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

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

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

Commentary

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

> "A State … does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury."[85]

This dictum no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons. This is evidenced by such conventions as the Convention on the Reduction of Statelessness of 1961[86] and the Convention Relating to the Status of Refugees of 1951.[87]

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

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the Status of Stateless Persons of 1954[89] which defines a stateless person "as a person

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[85] UNRIAA, vol. IV, p. 669 at p. 678.

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

[87] *Ibid*., vol. 189, p. 150.

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

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

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

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

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

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

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

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[90] Article 1.

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

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

[93] Habitual residence in this context connotes continuous residence.

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

(8) The term "refugee" in paragraph 2 is not limited to refugees as defined in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term "recognized refugees", which appears in the 1997 European Convention on Nationality,[97] which would have extended the concept to include refugees recognized by regional instruments, such as the 1969 O.A.U. Convention Governing the Specific Aspects of Refugee Problems in Africa,[98] widely seen as the model for the international protection of refugees,[99] and the 1984 Cartagena Declaration on the International Protection of Refugees in Central America, approved by the General Assembly of the O.A.S. in 1985.[100] However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it recognized and treated as a refugee.[101] Such recognition must, however, be based on "internationally accepted standards" relating to the recognition of refugees. This term emphasizes that the standards expounded in different conventions and other international instruments are to apply as well as the legal rules contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

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[94] The *travaux préparatoires* of the Convention make it clear that "stay" means less than habitual residence.

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

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

[97] Article 6 (4) (g).

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

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

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

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

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

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

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

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

[102] See draft articles 2 and 19 and commentaries thereto.

CHAPTER III

LEGAL PERSONS

Article 9

State of nationality of a corporation

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

Commentary

(1) Draft article 9 recognizes that diplomatic protection may be extended to corporations. The first part of the article follows the same formula adopted in draft article 4 on the subject of the diplomatic protection of natural persons. The provision makes it clear that in order to qualify as the State of nationality for the purposes of diplomatic protection of a corporation certain conditions must be met, as is the case with the diplomatic protection of natural persons.

(2) State practice is largely concerned with the diplomatic protection of corporations, that is profit-making enterprises with limited liability whose capital is generally represented by shares, and not other legal persons. This explains why the present article, and those that follow, are concerned with the diplomatic protection of corporations and shareholders in corporations. Draft article 13 is devoted to the position of legal persons other than corporations.

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

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

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

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

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

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

[105] *Ibid*., p. 42, para. 70.

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

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

[108] *Ibid*., p. 42, para. 71.

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

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

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

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[109] *Ibid*., pp. 42-43, paras. 71-76.

[110] *Ibid*., p. 42, para. 71.

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

Article 10

Continuous nationality of a corporation

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

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

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

Commentary

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

[111] *Ibid.*, p. 49, para. 96.

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

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

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

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

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

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

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

(5) In terms of paragraph 2, a State is not entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim. This paragraph is designed to cater for the type of situation that arose in the *Loewen* case[115] in which a corporation ceased to exist in the State in which the claim was initiated (Canada) and was reorganized in the respondent State (the United States). This matter is further considered in the commentary to draft article 5.[116]

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

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[115] *Op. cit.* at para. 220.

[116] Paragraphs (5) and (13).

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

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

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

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

Article 11

Protection of shareholders

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

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

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

Commentary

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

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

[121] *Ibid.*, p. 34, para. 41.

[122] *Ibid.*, p. 35, para. 44.

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

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

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders might exercise diplomatic protection on their behalf in two situations: first, where the company had ceased to exist in its place of incorporation[129] - which was not the case with the *Barcelona Traction*; secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality[130] - which was not the case with

[123] *Ibid.*, p. 36, para. 47.

[124] *Ibid.*, p. 37, para. 50.

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

[126] *Ibid.*, pp. 48-49, paras. 94-96.

[127] *Ibid.*, p. 48, paras. 94-95.

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

[129] *Ibid.*, pp. 40-41, paras. 65-68.

[130] *Ibid.*, p. 48, para. 92.

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

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

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

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

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

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

[134] *Ibid.*, p. 41, para. 66.

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

(6) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in *the place of incorporation* as a precondition to shareholders' intervention. Nevertheless it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain[137] but emphasized that this did not affect its continued existence in Canada, the State of incorporation: "In the present case, the *Barcelona Traction* is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist."[138] A company is "born" in the State of incorporation when it is formed or incorporated there. Conversely, it "dies" when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

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

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

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

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

[138] *Ibid.*, p. 41, para. 67.

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

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

(9) There is support for such an exception in State practice, arbitral awards[139] and doctrine. Significantly the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway*,[140] *Mexican Eagle*[141] and *El Triunfo*.[142] While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

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

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

[140] *Ibid.*

[141] *Ibid.*

[142] *Ibid.*

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

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

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

Judges Fitzmaurice,[145] Tanaka[146] and Jessup[147] expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.[148]

While both Fitzmaurice[149] and Jessup[150] conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of

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

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

[145] *Ibid.*, pp. 72-75.

[146] *Ibid.*, p. 134.

[147] *Ibid.*, pp. 191-193.

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

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

[150] *Ibid.*, pp. 191-192.

incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,[151] Morelli[152] and Ammoun,[153] on the other hand, were vigorously opposed to the exception.

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

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[151] *Ibid.*, pp. 257-259.

[152] *Ibid.*, pp. 240-241.

[153] *Ibid.*, p. 318.

[154] See *SEDCO Inc. v. National Iranian Oil Company and the Islamic Republic of Iran* case No. 129, of 24 October 1985, ILR, vol. 84, pp. 484, 496 (interpreting article VII (2) of the Algiers Claims Settlement Declaration); *Liberian Eastern Timber Corporation* (*LETCO*) *v. The Government of the Republic of Liberia* ICSID Reports, vol. 2 (1994), p. 346 (interpreting art. 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series*, vol. 575, p. 159).

[155] *I.C.J. Reports*, 1989, p. 15.

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

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

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

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

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

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

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

Article 12

Direct injury to shareholders

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

Commentary

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

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

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

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

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

[162] *I.C.J. Reports 1989*, p. 15.

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

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

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

Article 13

Other legal persons

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

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[163] *Series A*, No. 330-A.

[164] *Ibid.*, p. 23, para. 62.

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

Commentary

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

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

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

without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice[166] and the International Court of Justice.[167]

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the Permanent Court of International Justice shows that a commune[168] (municipality) or university[169] may in certain circumstances qualify as legal persons and as nationals of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.[170] Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is

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

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

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

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

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

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

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

PART THREE

LOCAL REMEDIES

Article 14

Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

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

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

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

Commentary

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

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

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

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

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

[175] *Interhandel* case, at p. 27.

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

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

(5) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies whose "purpose is to obtain a favour and not to vindicate a right"[180] nor do they include remedies of grace[181] unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. Requests for clemency and resort to an ombudsman generally fall into this category.[182]

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

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

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

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

[181] Claim of Finnish Shipowners against Great Britain in respect of the Use of Certain Finnish Vessels During the War ("*Finnish Ships Arbitration*") 1934, UNRIAA, vol. III, p. 1479.

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

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

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

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

> "all the contentions of fact and propositions of law which are brought forward by the claimant Government … must have been investigated and adjudicated upon by the municipal courts".[184]

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

(8) Draft article 14 does not take cognizance of the "Calvo Clause",[187] a device employed mainly by Latin-American States in the late nineteenth century and early twentieth century, to confine an alien to local remedies by compelling him to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a clause has been vigorously disputed by capital-exporting States[188] on the ground that the alien has no right, in accordance with the rule in *Mavrommatis,* to waive a right that belongs to the State and not its national. Despite this, the "Calvo Clause" was viewed as a regional custom

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

[184] UNRIAA, vol. III., at p. 1502.

[185] *Ambatielos Claim*, at p. 120.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a Government official,[196] diplomatic official[197] or State property[198] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national as a private individual the claim will be indirect.

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

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

Article 15

Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

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

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

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

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

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

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

[201] See *ELSI* case, at 46, para. 59.

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

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

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

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

Commentary

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

Paragraph (a)

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

(i) the local remedies are obviously futile;

(ii) the local remedies offer no reasonable prospect of success;

(iii) the local remedies provide no reasonable possibility of effective redress.

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

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

success", accepted by the European Commission of Human Rights in several decisions,[202] is too generous to the claimant. This leaves the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[203] and is supported by the writings of jurists.[204] The test, however, fails to include the element of availability of local remedies which was endorsed by the Commission in its articles on Responsibility of States for Internationally Wrongful Acts[205] and is sometimes considered as a component of this rule by courts[206] and writers.[207] For this reason the test in paragraph (a) is expanded to require that there are no "reasonably available local remedies" to provide effective redress or that the local remedies provide no reasonable possibility of such redress. In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[208] the national legislation justifying the acts of which the alien complains will not be

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

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

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

[205] Article 44 requires local remedies to be "available and effective".

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

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

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

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

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

Paragraph (b)

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

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

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

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

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

[213] *Mushikiwabo and others v. Barayagwiza*, 9 April 1996, ILR, vol. 107, p. 457 at 460. During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies; resolution 1a/88, case 9755, *Ann.Rep Int. Am. Com HR* 1987/88.

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

to be implemented is confirmed by codification attempts,[215] human rights instruments and practice,[216] judicial decisions[217] and scholarly opinion. It is difficult to give an objective content or meaning to "undue delay", or to attempt to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British Mexican Claims Commission stated in the *El Oro Mining* case:

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

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

Paragraph (c)

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

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

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

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

[218] *Ibid.*, at p. 198.

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

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

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

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

support of the existence of such an exception in the *Interhandel*[220] and *Salem*[221] cases, in other cases[222] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[223] and the *Aerial Incident* case (*Israel v. Bulgaria*)[224] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the International Court make a decision on this matter. In the *Trail Smelter* case,[225] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[226] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained on the basis that they provide examples of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

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

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

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

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

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

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

[225] UNRIAA, vol. III, p. 1905.

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

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

Paragraph (d)

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

Paragraph (e)

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

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

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

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

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

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

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

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

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

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

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

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[231] and the writings of jurists[232]support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[233] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.[234] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant

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

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

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

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

[233] F.A. Mann, "State contracts and international arbitration", BYBIL, vol. 42 (1967), p. 1 at p. 32.

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

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

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

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16

Actions or procedures other than diplomatic protection

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

Commentary

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

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

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights,[236] the International Convention on the Elimination of All Forms of Racial Discrimination,[237] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[238] the European Convention on Human Rights,[239] the American Convention on Human Rights,[240] and the African Charter on Human and People's Rights.[241] The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The view taken by the International Court of Justice in the 1966 *South West Africa* cases[242] holding that a State may not bring legal proceedings to protect the rights of non-nationals has to be qualified in the light of the articles on Responsibility of States for internationally wrongful acts.[243] Article 48 (1) (b) of the articles on Responsibility of States for Internationally Wrongful Acts permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole,[244] without complying with the requirements for the exercise of diplomatic protection.[245]

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

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

[237] Article 11.

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

[239] Article 24.

[240] Article 45.

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

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

[243] Commentary to article 48, footnote 766.

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

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

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

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

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

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

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

[247] *La Grand* (*Germany v. United States of America*), at p. 494, para. 77.

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

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

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

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

Article 17

Special rules of international law

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

Commentary

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

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

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

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

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

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

Article 18

Protection of ships' crews

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

[256] See Arthur Watts, "The Protection of Alien Seamen", ICLQ vol. 7 (1958), p. 691.

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

[258] AJIL vol. 29 (1935), 326.

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

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

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

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,[261] the Tribunal's reasoning suggests that it also saw the matter as a case involving the protection of the crew something akin to, but different from, diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.[262] St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[263] In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea[264] in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.[265] It stressed that "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[266]

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

[261] *Ibid*., para. 98.

[262] *Ibid*., para. 103.

[263] *Ibid*., para. 104.

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

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

[266] *Ibid*., para. 106.

[267] *Ibid*., para. 107.

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

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

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

Article 19

Recommended practice

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

(*a*) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(*b*) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(*c*) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

Commentary

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

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

(2) Subparagraph (a), recommends to States that they should give consideration to the possibility of exercising diplomatic protection on behalf of a national who suffers significant injury. The protection of human beings by means of international law is today one of the principal goals of the international legal order, as was reaffirmed by the 2005 World Summit Outcome resolution adopted by the General Assembly on 24 October 2005.[269] This protection may be achieved by many means, including consular protection, resort to international human rights treaties mechanisms, criminal prosecution or action by the Security Council or other international bodies - and diplomatic protection. Which procedure or remedy is most likely to achieve the goal of effective protection will, inevitably, depend on the circumstances of each case. When the protection of foreign nationals is in issue, diplomatic protection is an obvious remedy to which States should give serious consideration. After all it is the remedy with the longest history and has a proven record of effectiveness. Draft article 19, subparagraph (a), serves as a reminder to States that they should consider the possibility of resorting to this remedial procedure.

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

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

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

another State. The discretionary nature of the State's right to exercise diplomatic protection is affirmed by draft article 2 of the present draft articles and has been asserted by the International Court of Justice[270] and national courts,[271] as shown in the commentary to draft article 2. Despite this there is growing support for the view that there is some obligation, however imperfect, on States, either under international law or national law, to protect their nationals abroad when they are subjected to significant human rights violations. The Constitutions of many States recognize the right of the individual to receive diplomatic protection for injuries suffered abroad,[272] which must carry with it the corresponding duty of the State to exercise protection. Moreover, a number of national court decisions indicate that although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.[273] In *Kaunda and Others v. President of the Republic of South Africa* the South Africa Constitutional Court stated that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[280] See the authors cited in footnote 276 above.

[281] UNRIAA vol. VII., p. 119 at p. 152 (Emphasis added).

[282] *Civilian War Claimants Association v. R* [1932] AC p. 14; *Lonrho Exports Ltd. v. Export Credits Guarantee Department* [1996] 4 A11 E.R., p. 673; at p. 687.

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

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

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

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

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

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[285] UNRIAA, vol. VII, p. 119, at p. 152.

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

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

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

(7) Subparagraph (c) acknowledges that it would not be inappropriate for a State to make reasonable deductions from the compensation transferred to injured persons. The most obvious justification for such deductions would be to recoup the costs of State efforts to obtain compensation for its nationals, or to recover the cost of goods or services provided by the State to them.

(8) Although there is some support for curtailing the absolute right of the State to withhold payment of compensation received to the injured national in national legislation, judicial decisions and doctrine, this probably does not constitute a settled practice. Nor is there any sense of obligation on the part of States to limit their freedom of disposal of compensation awards. On the other hand, public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation. It is against this background that draft article 19, subparagraph (c), has been adopted. While it is an exercise in progressive development it is supported by State practice and equity.