CHAPTER TWO

The Institution of Diplomatic Protection

1 Introduction

In this chapter, the institution of diplomatic protection in international law will be examined.[371] Diplomatic protection has already been defined.[372] It consists of action taken by a state against another state in respect of an injury to the person or property of its national caused by an internationally wrongful act or omission attributable to the latter State.[373] Before the advent of international human rights law, diplomatic protection was the most effective means employed by states to obtain reparation for the treatment of aliens in contravention of international law.[374] The issues for discussion therefore are, first; how this institution operates, its nature, origin and characteristics, second; its legal basis, conditions for its exercise, current relevance and whether or not it is synonymous with human rights, third; it is intended to determine whether diplomatic protection can be used as an instrument for the protection of human rights.

The institution of diplomatic protection is a substantive as well as a procedural device in international law.[375] As substantive law, diplomatic protection is concerned with claims arising from any act or omission of a state in its own territory against an alien.[376] As a procedural device, diplomatic protection is the procedure employed by the state of nationality of the injured person to seek redress and obtain reparation for the internationally wrongful act.[377] It is therefore a hybrid device available to states for the breach of the legal responsibility owed to them by other states as subjects of

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371 See Geck *supra* n 10 1046 where he discusses diplomatic protection as an institution of international law. See also Crawford *supra* n 10 22.

372 Supra n 1. See also the ILC's Draft Articles on Diplomatic Protection (2006). *Official Records of the G A supra* n 1 24. See also Sen *supra* n 52 319.

373 See the *Report of the I LC on the work of its Fifty-second session,* 1 May to 9 June & 10 July to 18 August (2000). G A document, A/CN/.4/506 (Special Rapporteur's report) 11.

374 Geck *supra* n 10 1046.

375 Tiburcio *supra* n 26 36. Crawford *supra* n 10 41.

376 Geck *supra* n 10 1046.

377 See the *Official Records of the G A supra* n 1 24.

international law.[378] Over the years however, this institution has been influenced by some important changes in the international legal order.[379]

Since diplomatic protection deals with the treatment of individuals in international law, it is necessary to understand the position of the individual in terms of the capacity in which he or she can bring an action or claim before an international court or tribunal.

2 The status of the individual at international law

Although the individual occupies a unique position within the framework of municipal legal system,[380] international law traditionally took little notice of individuals.[381] It focussed primarily on states. Hence, international law was originally a system of rules governing the relationship between sovereign states only. The role of individuals was not contemplated under traditional international theory.[382] The individual was not regarded as a subject[383] of international law, and as a result, could not bring an international action or claim.[384]

The failure to recognise the individual as a subject of international law led some writers to express the view that the individual is an object of International Law.[385] Other writers have, however, opposed this contention by arguing that the individual

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378 Geck *supra* n 10 1046..

379 *Ibid.* These important influences include: (i) The ever growing interdependence between states; (ii) the development of human rights; and (iii) the attempts made at international law to raise the position of individuals more and more to the status of holders of international rights and duties.

380 I e the internal law of a state.

381 Except however in cases involving piracy eg. In *re Piracy Jure Gentium* [1934] A C 586 (Privy Council) following the arrest of Chinese nationals on the high seas, the Judical Committee of the Privy Council (JCPC) was asked to consider whether actual robbery was an element of the offence of piracy *jure gentium*. It was held that with regard to crimes as defined by international law, the law has no means of trying or punishing them. The recognition of piracy as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country.

382 See Cassese *supra* n 85 78.

383 The term “legal subject” means any being that can have rights, duties and status in law. A legal subject is any entity recognized by law as possessing such status. See Conje & Heaton *The South African Law of Persons* (1999) 1

384 *Ibid.*

385 A legal object is anything which has economic value, but upon which the law has not conferred the competence to have rights and duties, and therefore cannot participate in legal or commercial transactions. See Conje & Heaton *supra* n 382 Some of those writers who assert that the individual is an object of International Law are Triepel, Volkerrecht, Lauderrecht and Heilbron.

should rather be seen as a "beneficiary" of international law rather than as an object,[386] while others would rather prefer the individual to be referred to as a "participant" or "a non - state actor" in international law.[387]

Be that as it may, the fact is that over a long period of time,[388] human beings were under the exclusive control of states.[389] Therefore, individuals had no place or rights in the international legal order.[390] Traditional international law did not include general rules conferring rights on individuals, regardless of their nationality. An individual could therefore not sue or be sued in international law. On occasion, individuals acquired some relevance in international affairs, mostly as "beneficiaries" of treaties of commerce and navigation or of conventions on the treatment to be accorded to foreigners, not as subjects of international law.[391] Alternatively, individuals constituted a "reference point" to state powers.[392]

The general position of international law with regard to individuals was aptly set out by the Permanent Court of International Justice (PCIJ) in its advisory opinion in the *Dazing Railway Officials* case.[393] In that case, Poland contended that the agreement between her and Dazing regulating the conditions of employment of Dazing officials whom she had taken into her railway service was an international treaty that created rights and obligations between Poland and Dazing only; that, as the agreement had not been incorporated into Polish municipal law, it did not create rights and obligations for individuals; that Poland's responsibilities were limited to those owed to

386 See O'Connell *International Law* (1970) 106/107 who has pointed out that by such assertion, the individual is being relegated to the position of a mere "thing" in international law. See also Lauterpacht *Survey of International Law in relation to the work of Codification of International Law*. Com: Memorandum prepared for the UN Secretariat, UN Doc A/CN/4/1/Rev/1 February 1949, 19-20 in Lauterpacht, *International Law:* being the collected papers of Herseh Lauterpacht (1970) Vol 1 469-471. According to him, "…Practice has abandoned the doctrine that states are the exclusive subjects of international rights and duties"' See also Harris, *Cases and Materials on International Law* (2004)140. See also Wallace *supra* n 16 where she asserts that "it is misleading to characterize individuals as objects of international law simpliciter because the term 'object' implies passive as opposed to an active capacity."

387 See Dugard *supra* n 25 77. See also Gal-Or "Desirability of Enhanced Legal Position of Non-State Actors." *International Law Association – Research Seminar on Non-state Actors* Leiden Belgium 27 – 28 March (2009) 9.

388 As long ago as when nation states came into existence. See Cassese *supra* n 85 78.

389 *Ibid.*

390 See the *Official Records of the G A supra* n 1 25.

391 Cassese *supra* n 85 78.

392 *Ibid.* Customary international law rule granting states the right to exercise diplomatic protection of their nationals abroad is a good example of this.

Dazing and therefore, that Dazing courts had no jurisdiction. The court said, *inter alia,*

> It may be readily admitted that according to a well established principle of international law, the agreement being an international agreement, cannot as such create direct rights and obligations for private individuals. But it cannot be disputed that, the very object of an international agreement according to the intention of contracting parties, may be the adoption by the parties, of some definite rules creating individual rights and obligations, enforceable by the national courts. That there is such an intention in the present case may be established by reference to the terms of the agreement.[394]

3 The changing status of the individual in international law

As a result of the historical events,[395] and the spread of new ideologies, the status of the individual in international law is changing.[396] Although states have lost their exclusive monopoly over individuals and have gradually yielded their power to other entities such as international organisations,[397] the individual is yet to emerge as a generally recognised subject of international law.[398] The position of the individual in international criminal law has, however, recently developed into a separate discipline under international law.[399]

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393 *Jurisdiction of the Courts of Dazing (Advisory Opinion) (1928) P.C.T. Ser B, No 15* 17-18.

394 At 304. For other examples of treaties conferring benefits on individuals, see the VCDR (1961) and the VCCR (1963).

395 Particularly the Nazi atrocities of the Second World War. The enormity of these atrocities dramatically changed the nature of international law. This experience compelled statesmen to accept the need for a new world order in which the state was no longer free to treat its own nationals as it pleased. This new world order was proclaimed by the Charter of the UN, which recognized the promotion of human rights as a principal goal of the new world organization As a result, the UDHR was proclaimed in 1948.

396 Other factors responsible for this changing framework include globalization of the world economy, the privatization of public sectors and the fragmentation of states.These phenomena undeniably have had some impact on a State's grip on the individual. See the *Official Records of the General Assembly supra* n 1 25.

397 See the *Reparation* Case*. Reparations for Injuries suffered in the Service of the United Nations*, Advisory Opinion *ICJ Reports (*1949) 174 185-186.

398 This is based on the current perception of the status of the individual at international law. See eg the conclusions reached at the ILA NSAC seminar *supra* n 324.

399 Individuals have gradually come to be regarded not only as holders of internationally material interests, but also capable of infringing fundamental values of the world community. This was recognized by the ICJ in the case of *La Grand* (Germany v USA) *ICJ Report* 2001 466 and in the *Avena* cases. *Case Concerning Avena and other Mexican Nationals* (Mexico v USA) *ICJ Rep* par 40. In the sphere of duties imposed by international law, the principle that the obligations of international law bind individuals directly, regardless of the law of their state and of any contrary

Whether the individual is a "subject", a "beneficiary", a "participant" or "a non-state actor," on the international plane is, however, immaterial. [400] One thing is clear. While an individual may tend to have more rights today than ever before under international law, the remedies provided to the individual under international law are limited in scope.[401] The status of the individual in international law was the subject of investigation by a Committee of the International Law Association in Leuven, Belgium.[402] The aim was to study the rights and obligations of individuals and establish an integrated and comprehensive assessment of the status of non-state actors in international law.[403] At the conference, it was pointed out that since there is considerable disagreement as to the correct position or status of non-state actors (NSA)[404] under international law, there was a need to determine their status.[405]

It was iterated at the conference that a subject of international law is an entity capable of possessing international rights and duties and the capacity to bring international claims.[406] It was also accepted that the principal formal contexts in which questions of capacity or personality of individuals arose in international law

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order received from their superiors was affirmed in the judgement of the Nuremberg Tribunal, when the Tribunal said, *inter alia,*"crimes against international law are committed by men not abstract entities and only by punishing individuals who commit such crimes, can the provisions of international law be enforced." See the Judgment of Nuremberg Tribunal, International Military Tribunal, Nuremberg (1946) 41 *Am. J. Int. L*(1947) 172. This was reaffirmed in the Resolution of the GA of 11th Dec 1946 expressing adherence to the principles of the Nuremburg Charter and Judgement. Again in *Attorney – General of the Government of Israel v Eichmann* (1961) 36 ILR 5, Eichmann, former head of the Jewish Office in Germany during the Second World War, was abducted from Argentina in 1960 and brought to Israel to face charges of war crimes, crimes against humanity and crimes against the Jewish people. He was prosecuted in Isreal under the Nazi and Nazi Collaborators (Punishment) Law 1951. Defence counsel submitted, *inter alia*, that since Eichmann was a German national, he could not be subject to Israeli criminal jurisdiction. It was held that the abhorrent crimes defined in the Law are not crimes under Israeli law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the Law of Nations itself (*delicta juris gentium*) See Cassese, *supra* n 85 79.

400 Higgins *Problems and Process*: *International Law and How we Use It* (1994) 96 has eg argued that the notions of "subject", and "objects" has no "credible reality" and no "functional purpose." More recently, authors have advocated that participation in the international legal system should be the relevant criterion instead of relying solely on the existing categories of subjects and objects. See for instance McCorquodale "An Inclusive International Legal System." 17 *Leiden Journal of International Law* (2004) 477.

401 Dugard *supra* n 25 77.

402 The research seminar was held by the Committee of International Law Association on the topic of "Non State Actors " at Leuven Belgium on 2009-03- 27 - 28.

403 See eg Gal-Gore "Desirability of Enhanced Legal Position of Non-State Actor." (1999) 1

404 Including individuals.

405 Including individuals.

were in circumstances such as (a) Capacity to make claims in respect of breaches of International Law, (b) capacity to enter into treaties and agreements valid in international law; and (c) the capacity to enjoy certain privileges and immunities from its sovereign jurisdiction.[407] The conclusion reached at the conference was that since NSA[408] did not possess these capacities, the NSA could not be considered a subject of international law.[409]

4 The position of the individual in municipal law

In contrast to the approach of international law to the individual, most municipal legal systems regard the individual as a legal subject rather than their object.[410] This means that, unlike in international law, the individual is vested with legal personality and capacity under municipal law.[411] Municipal law also distinguishes between two classes of legal subjects - natural persons and juristic or artificial persons.[412] All human beings are natural persons irrespective of their age, mental condition or intellectual ability, but juristic or artificial personality may be bestowed on certain entities or associations of natural persons, making them legal persons, according to the demands of the legal system concerned.[413] Diplomatic protection can be exercised on behalf of either a natural or legal person.[414]

In relation to diplomatic protection, it is appropriate to assess the role played by municipal legal concepts in international law. What, if any, is the place of municipal

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406 I e the legal personality of NSA in international law.

407 See eg Gal-Gore *supra* n 402 4.

408 Including the individual.

409 See Gal-Gore *supra* n 402 10.

410 This is the position in Nigerian and South African legal systems. See Conje & Heaton *supra* n 382 1; and Okogwu *The Legal Status of Aliens in Nigeria* (1960) 15.

411 He or she can sue and be sued. See Conje & Heaton *supra* n 382 3. Legal personality is bestowed only upon such entities as the law deems fit. Since the legal systems of different countries naturally differ from each other, entities recognized as legal subjects in one country may not necessarily be recognized as such in another country See Conje & Heaton *ibid.* This personality is conferred on an entity only in terms of the legal norms of a particular community or country. It is governed by the Law of Persons, which forms part of Private Law. See Conje & Heaton *ibid.*The law of persons is that part of private law which determines which beings or entities are legal subjects or persons, the way in which legal personality begins and ends or terminated, the different classes of legal subjects that are distinguished, and the legal status of each of these classes of persons etc. Conje & Heaton *ibid.*

412 *Ibid*.

413 *Ibid,* Such an association is known as a “juristic person”.

414 See the ILC Draft Articles on Diplomatic Protection 2006 art 1.

legal concepts in International Law? Are they relevant or recognized in international law? As already indicated, diplomatic protection is regulated by international law norms. The individual, however, has little or no status in International Law. His or her status is paradoxically governed by municipal law.[415] The vital question therefore is whether municipal law concepts, such as the law of persons, for instance, are recognized in international law for purposes of diplomatic protection, and if so, to what extent?

A similar question fell for determination by the ICJ in the famous *Barcelona Traction* case.[416] In that case, Belgium brought an action for the diplomatic protection of a Canadian company the majority of whose shareholders were Belgians, based upon the injury inflicted on the company by Spain. The subject of the action, the Barcelona Traction and Power Company, was an entity recognized under municipal law, but not recognised at international law. The question for determination was whether the ICJ could invoke a municipal law concept to resolve an international law issue. In resolving the matter, the court said, *inter alia,*[417]

> turning now to the international legal aspects of the case, the court must … start from the fact that the present case essentially involves factors derived from municipal law – the distinction and the community between the company and the shareholders …If the court were to decide the case in disregard of the relevant institutions of municipal law, it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions in international law to which the court could resort. Thus the court has, as indicated, not only taken cognizance of municipal law, but also to refer to it.

It is submitted that based upon the principles laid down in *Barcelona Traction* case,[418] it can be argued that the municipal law concept of legal personality is applicable and is recognizable in international law for purposes of diplomatic

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415 See Conje & Heaton *supra* n 382 1.
416 *Supra* n 26.
417 Par 33.
418 *Supra* n 26. *A*rt 38(1)(C) of the statute of the ICJ specifically authorizes the court to apply "general principles of law recognized by civilized nations." This provision was inserted in the statute of the court in order to provide an additional basis for a decision in cases where other materials give no assistance to the court i.e cases of *non liquet* See Shearer *supra* n 117 29.

protection. This submission is supported by the fact that the *Barcelona Traction* case[419] in which the municipal legal concept of corporate personality was recognized and adopted, was itself a classic test case of diplomatic protection.

5 The law of diplomatic protection

The general rule is that when the person or property of a foreign national is injured by a state, the state of the injured foreigner can invoke diplomatic action or other means of peaceful settlement to protect its national with a view to obtaining reparation.[420] The defaulting state is said to incur responsibility, because of its failure to treat the foreign national according to the minimum standard of justice required for the treatment of aliens.[421] The basis for responsibility is that, by injuring its national, the defendant State has injured the plaintiff State itself.[422] Under customary international law, the plaintiff State was required to prove the following facts in order to succeed in its action: [423]

(a) That the injured person is its national;[424]
(b) That all local remedies have been exhausted in the respondent state;[425]
(c) That the conduct of the defendant state violates the rules of international law relating to the treatment of aliens;[426] and
(d) That the injured national has continuously been a national of that State from the date of injury to the date of the official presentation of the claim.

5.1 The origin of diplomatic protection

The origin of diplomatic protection in international law is uncertain. Sen however asserts that "the right to afford protection to its citizens in the country of their sojourn has been regarded throughout the ages as one of the important attributes of

419 *Supra* n 26.
420 ILC's Draft Articles on Diplomatic Protection 2006 art 1.
421 The minimum international standard of justice was the standard of treatment recognized by the international community to be acceptable for the treatment of foreigners. See *supra* p 10 and 111 *infra.*
422 This is the nationality of claims rule and is said to be a legal fiction. See the *Official Records of the G A supra* n 1 25. See also *Mavrommatis Palestine Concession* case *supra* n 36.
423 These conditions are now embodied in the ILC's Draft Articles on Diplomatic Protection 2006.
424 ILC's Draft Articles on Diplomatic Protection 2006 art 3.
425 *Ibid*, art 14.
426 *Ibid* art 1 See generally Dugard *supra* n 1 282.

sovereignty."[427] Other writers trace the origin of the practice specifically to the Middle Ages.[428] Borchard asserts that the practice was only firmly established after the French Revolution.[429] Tiburcio has urged, however, that the origin of the practice should be sought after the creation of nation-states in continental Europe, because

> "it makes no sense to look for its origins earlier than that. Only after that period, did definite practice arise and, as a consequence to that practice, did international law commentators start to develop its theoretical basis."[430]

5.2 Legal or theoretical basis of diplomatic protection

Just as the origin of diplomatic protection is uncertain, the legal or theoretical basis of diplomatic protection is likewise uncertain.[431] According to Tiburcio

> "One of the early widely accepted theories developed the idea that since a national is part of the State, and the national is the personal element of the state,[432] whoever ill-treats an individual harms the state." [433]

She submits further that

> "Another theory which justifies the existence of diplomatic protection is the objective theory. This theory subscribes to the view that every state has the duty to abide by the rules of the international community. Therefore, whoever breaks the law, has to be punished".[434]

Shaw however affirms that

> "The basic concept remains that in a state-oriented world system, it is only through the medium of his or her state of nationality, that the individual may

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427 Sen *supra* n 52 319.

428 De Visscher *cours General de Droit International Public,* 136 *Receil De Cours*, 9, 155 (1973). See Tiburcio *supra* n 26 36.

429 See Borchard *supra* n 1 988.See also *supra* p 45

430 Tiburcio *supra* n 26 36. To corroborate, Crawford *supra* n 10 22 maintains that the modern approach to diplomatic protection took shape in the 18th century and is reflected in the writings of Vattel, who expressed it as an obligation of the sending state to protect its citizens when they are injured abroad.

431 Tiburcio *idem* 63.

432 Some scholars such as Kelson (1926) 14 *Hague Recueil* 231 239 believe that the State and the individuals in it are one and the same entity.

433 This theory was based on the Vattelian principles.(Quiconque maltraite un citoyen offense indirectement *l'Etat*, qui doit proteger ce citoyen) See Vattel *supra* n 81 136.

434 See *Mavrommatis Palestine Concession Case supra* n 36. See also Tiburcio *supra* n 26 63.

obtain the full range of benefits available under international law, and nationality is the key." [435]

6 Nationality as a precondition for diplomatic protection

The basic condition for the exercise of diplomatic protection is nationality. In other words, the requirement is that a state can only assert a right of diplomatic protection in respect of its own nationals.[436] As already indicated, nationality is the relationship existing between the individual and the State, normally involving allegiance on the part of the individual to the State, and protection of the individual by the State.[437] It is usually the only link between an individual and the State, ensuring that effect is given to the individual's rights and obligations at international law.[438]

Nationality may also be defined as the legal status or membership of a collectivity of individuals whose acts, decisions and policies are safeguarded through the legal concept of the State representing them.[439]One of the cardinal requirements for the exercise of diplomatic protection is that the person seeking protection must be a national of the protecting state.[440]

Nationality must be distinguished from citizenship. Although the two terms are often used interchangeably,[441] they differ in conception as already pointed out.[442] Nationality is an international law term which denotes a legal connection between the individual and the State, whereas citizenship is a term of Constitutional Law, best used to describe the status of individuals nationally.[443] A national of a state is, therefore, an individual who, according to international law, is recognized by the law

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435 See Shaw *supra* n 175 722. Crawford *supra* n 10 22 maintains that diplomatic protection reconciled the need for protection of aliens abroad with the then-accepted proposition that only states could be actors and have rights and duties under international law. See also the ILC's Draft Arts on Diplomatic Protection 2006 art 3(1). This is, however, qualified by art 8, dealing with stateless persons & refugees.

436 See Crawford *supra* n 10 26.

437 Harvard Research in International Law Draft on Nationality, Harvard 1929 art 1(a).

438 Shearer *supra* n 117 307.

439 *Ibid.*

440 See the ILC Draft Arts on Diplomatic Protection art 3 and *Panevezys-Saldutiskiis Railways* case *supra* n 81. See also Wallace *supra* n 16 187; Tiburcio *supra* n 26 4 ; and Sen *supra* n 52 323.

441 See Dugard *supra* n 1 282.

442 See p 9 *supra* n 49.

of that state as its national,[444] whereas a citizen is a person who, according to the Constitution of that state, is, either by birth or naturalization, a member of that state, owing allegiance to that state, and entitled to all the rights, privileges and obligations attached thereto.[445]

6.1 The concept of nationality

The relationship existing between an individual and the state is governed by his or her nationality. This relationship was succinctly expressed in the judgment of British-Mexican Claims Commission in the leading case of
Re Lynch:[446]

> A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both – on the part of the citizen no less than on the part of the State.

Tiburcio maintains that the concept of nationality has a multi-dimensional content – political, sociological, legal and psychological.[447] The concept of nationality can also be viewed both from a vertical and horizontal perspectives.[448] The vertical perspective is lineal. It emphasizes the link between the individual and the State in which the individual belongs, and in which the individual has rights and duties,[449]

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443 Dugard *supra* n 1 283 particularly the aggregate of civil and political rights to which individuals are entitled.
444 Geck *supra* n 10 1050. See the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws (1930) *supra* n 45 art 1.
445 Dugard *supra* n 1 283. "On the question who is a national, there is an uneasy tension between the role of national and international law." Crawford *supra* n 10 27.
446 *Annual Digest of Public International Law Cases* (1929 – 1930) 221 223. See also the definition of the term by the ICJ in *Nottebohm's* case *supra* n 40 23.
447 Tiburcio *supra* n 26 4. See p 8 *supra.*
448 See Largarde *supra* n 46 210.
449 The duties include loyalty, military obligation, etc while the rights include diplomatic protection. *Ibid*.

whereas the horizontal perspective is more holistic. It regards the individual as a member of a community of the population which forms the state.[450]

6.2 Nationality of natural persons

Every state has the right to prescribe by law persons who are its nationals.Thus, the nationality of a natural person depends on the laws made by his or her state of nationality on that issue.[451] However, although every state is entitled to determine by law who its nationals are, the capacity of a state to protect its nationals diplomatically is governed by international law. [452] Under customary international law, states are entitled to protect only their nationals.[453] For the purposes of 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, naturalisation, succession of states, or in any other manner consistent with international law.[454]

The right to exercise diplomatic protection on behalf of its nationals is determined by the bond existing between the individual and the state of his or nationality, often referred to as the "bond of nationality".[455] This bond of nationality constitutes the genuine link between an individual and his or her country. A state is therefore entitled to exercise diplomatic protection on behalf of any individual against a defaulting state if it is proved that the bond of nationality exists and that the link is genuine.[456]

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450 *Ibid* See also Tiburcio *supra* n 26 4.

451 See the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *supra* n 45, arts 1 & 2. Crawford *supra* n 10 27 however maintains that this right is not absolute and that this position was modified by the statement of the PCIJ in the *Nationality Decree in Tunis and Morocco* case. (1923) PCIJ Ser B No 4 24.

452 Dugard *supra* n 1 284. See also ILC's Draft Arts on Diplomatic Protection art 4.

453 Dugard *idem* 283. See also *Panevesys-Saldutiskiis Railway case supra* n 81.

454 See ILC's Draft Articles on Diplomatic Protection art 4.

455 *Panevesys Saldutiskiis Railway case supra* n 81. See also *Nottebohm's case supra* n 40 *23* and Sen *supra* n 52 323.

456 Sen *ibid*.

6.3 Acquisition of nationality

Most states have laid down certain recognized grounds for the conferment of nationality on an individual. These grounds include; (a) Birth in the territory[457] (b) descent;[458] and (c) naturalization or marriage. On rare occasions, however, an individual may acquire nationality as a consequence of conquest, cession or other changes of circumstance in the nature of a state.[459] According to the principle of *jus soli,* the nationality of an individual is determined by the fact of his or her birth in the territory of a state.

As a result of this principle, some states provide in their laws that every individual born within their territory shall be its citizen.[460] Based on blood relationship, the principle of *jus sanguinis* is based on the fact of descent. Under this principle, any individual born in any territory is deemed to have acquired the nationality of the father,[461] whereas an illegitimate child acquires the nationality of the mother.[462]

Naturalisation is citizenship acquired subsequently by a person who was not a citizen of the state by birth. This includes persons who were nationals of some other states, as well as stateless persons.[463] According to the laws of some countries, foreign women married to their nationals automatically acquire the nationality of that state by reason of such marriage.[464] In most countries, however, marriage to a foreign national is regarded merely as a qualification for the subsequent acquisition of the nationality of that state by registration or naturalization.[465] People in a

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457 *Jus soli.* See Sen *idem* 324.
458 *Jus sanguinis.* Sen *ibid.*
459 Bishop *Cases and Materials in International Law (1961) 420.*
460 See Sen *supra* n 52 324. See e.g the Nigerian Constitution 1999 Ch 3 s 25. In South Africa nationality is governed by the South African Citizenship Act 88 of 1995. The 1996 Constitution s 3 provides that national legislation must provide for the acquisition, loss and restoration of Citizenship. See generally the *Encyclopaedia of Public International Law* vol 1 (1992) 106.
461 Sen *supra* n 52 324.
462 *Ibid* .
463 *Ibid.* Some countries establish a fundamental difference between these categories of nationals. Nationality by birth is regarded as complete nationality, whereas the naturalized national is often discriminated against.
464 Eg in France and Iraq See Sen *supra* n 52 326.
465 *Ibid*.

conquered or ceded territory may acquire the nationality of the victorious, posterior, or predecessor state.[466]

Under Nigerian law, citizenship is governed by the 1999 Constitution.[467] Chapter three provides that a person may become a Nigerian citizen either by birth,[468] registration,[469] or by naturalisation.[470] Thus, every person born in Nigeria before the date of independence, either of parents or grandparents who belong or belonged to a community indigenous to Nigeria, is a Nigerian citizen by birth.[471] A person may become a Nigerian citizen by registration if the President is satisfied that: (i) he or she is a person of good character, (b) he or she has shown a clear intention of his or her desire to be domiciled in Nigeria; and (c) he or she has taken the oath of Allegiance.[472]

A person becomes a citizen of Nigeria by naturalisation if he or she is granted a Certificate of Naturalisation.[473] In South Africa however, citizenship is governed by the South African Citizenship Act of 1995.[474] Subject to certain exceptions, the Act provides that a person becomes a South African citizen by birth,[475] descent,[476] or by naturalisation.[477]

6.4 Loss of nationality

It is possible that a person who was a citizen of a state at birth may subsequently lose that status by reason of some voluntary act on his or her part, or by reason of operation of law.[478] According to the practice of states, nationality is often lost or forfeited on the acquisition of a different nationality.[479] It may also be lost by

466 *Idem* 328. See also Tiburcio *supra* n 26 16.
467 See the Constitution of the Federal Republic of Nigeria 1999 *supra* n 459.
468 S 25.
469 S 26.
470 S 27.
471 S 25 (1).
472 S 26(1)(c).
473 S 27(1).
474 *Supra* n 459.
475 S 2.
476 S 3.
477 Ss 4 & 5.
478 Sen *supra* n 52 326.
479 See the Nigerian Constitution 1999 s 28 & the SA Citizen Act s 6.

renunciation,[480] specific state regulation,[481] marriage to an alien,[482] or by prolonged absence from the state.[483]

In this connection, it must be noted that a state has the right to denationalize an individual.[484] Denationalisation is normally caused by entry into foreign civil or military service, or by the acceptance of foreign honours or distinctions. Foreign naturalization, departure or sojourns abroad, conviction for certain crimes, are other grounds for the denationalization of an individual. Political attitudes or activities, as well as racial and national security grounds may also count in denationalization.[485] A person becomes stateless when he or she is deprived of his or her nationality, but so far as both international and municipal law are concerned, there is a presumption against the loss of nationality that has been held for some time.[486] A heavy burden of proof must be discharged before the loss is recognised.[487]

Nigerian law, for instance, permits the President to deprive a person other than a person who is a citizen of Nigeria by birth or registration, of his or her citizenship, if he is satisfied that such a person has, within a period of seven years after becoming naturalised, been sentenced to imprisonment for a term of not less than three years.[488] Under South African law, a South African citizen shall cease to be a South African citizen if:-

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480 I.e by Deed signed and registered at a consulate, or by declaration made upon coming of age: See eg Lisboa "50 Nigerians renounce citizenship" *The Punch* 1977- 08 -19 1.

481 See eg the Nigerian Constitution 1999 s 30.

482 The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *aupra* n 45 arts 8 – 11 and CEDAW art 9 deal with this problem.

483 See Weis *supra* n 52 123-124 & 133.

484 I e deprivation of nationality by special denationalisation laws, passed by the State of which the individual is a national. See Shearer *supra* n 117 311.

485 Weis *supra* n 52 124.

486 Shearer *supra* n 117 311.

487 *Ibid.* For instance, under the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) art 7, the mere grant of an expatriation permit is not enough to entail the loss of the nationality of the state issuing it. Under English Law, an individual seeking to establish loss of nationality of a particular state, must not merely satisfy the court by positive evidence as to the facts of the municipal law under which such loss was alleged, but also prove that nationality has been lost for all purposes. See Shearer *supra* n 117 311.

488 TheNigerian Constitution s 30(1). Section 30(2) stipulates *inter alia* that "The President shall deprive a person other than a person who is a citizen of Nigeria by birth of his citizenship if he is satisfied from the records of proceedings of a court of law or other tribunal, or after due inquiry in accordance with regulations made by him that (a) the person has shown himself by act or speech to be disloyal towards the Federal Republic of Nigeria; or (b) the person has during any war in which Nigeria was engaged unlawfully traded with the enemy …".

(a) he or she, whilst not being a minor, by some voluntary and formal act, other than marriage, acquires the citizenship or nationality of a country other than that of the Republic,[489] or,

(b) he or she, in terms of the laws of any other country, also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.[490]

6.5 Importance of nationality

The importance of nationality to both the individual and the state for purposes of diplomatic protection cannot be overemphasized.[491] The possession of nationality grants privileges and imposes corresponding duties on both the individual and the state.[492] In the first place, the motivation for the individual to ask for protection hinges on his or her nationality, and the *raison d' etre* for the state taking up the case of the injured individual is also based on the nationality of the individual concerned.[493] It is therefore of great importance to ensure that an individual who approaches any state for protection has the nationality of that state.[494] Nationality imports allegiance, and one of the principal incidents of loyalty is the duty to perform military service for the state to which such obedience is owed.[495] A person who has no nationality becomes a stateless person in international law.[496]

Nationality also determines the status of an individual in the international community.[497] It determines his or her right to enter, reside and work in his or her country or any other country. It also plays a vital role in his or her departure or exit because only aliens are subject to deportation, expulsion or extradition.[498] Generally

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489 S 6(a).
490 S 6(b).
491 See the *dicta* of the PCIJ in *Panevezys Saldutiskiis Railways* case *supra* n 81 16-17. See also *Nottebohm's* case *supra* n 40 23.
492 Sen *supra* n 52 323.
493 *Idem* 326.
494 *Ibid*.
495 Shearer *supra* n 117 312.
496 See Stateless persons & refugees p 88 *infra.*
497 Shearer *supra* n 117 308-309.
498 See the case of *Shugaba Darman* v *Minister of Internal Affairs* (1982) 3 NCLR 915. See also Tiburcio *supra* n 26 6.

however, a state does not refuse to receive its own nationals back into its territory [499] By the same token, a state has a general right, in the absence of a specific treaty obligation to the contrary, to refuse to extradite its own nationals to a requesting state.[500] Enemy status in time of war may be determined by the nationality of the person concerned, and, moreover, states may frequently exercise criminal or other jurisdiction on the basis of nationality.[501] Above all, since a person who has no nationality becomes a stateless person in international law he or she loses all the privileges associated with diplomatic protection because no state may be willing to protect him or her.[502]

7 Nationality and diplomatic protection

7.1 Nationality of claims rule

A state may only espouse a claim against another state on behalf of its national. In most cases, no conflict may arise between the right of a state to exercise diplomatic protection on behalf of its national and the legitimacy of the nationality concerned. In extraordinary cases, however the legitimacy of the nationality of an individual may be questioned and international law may refuse to recognize the nationality for the purposes of diplomatic protection.[503] Thus, a state's right to accord diplomatic protection may be challenged on the grounds that the link between it and its alleged national is only tenuous and not genuine.[504]

The extent to which a state may be restrained from protecting an individual on the bases of its municipal law was spelt out by the ICJ in *Nottebohm's case.*[505] In that case, Nottebohm was born in Germany in 1887 and was a German national by birth. In 1905, he immigrated to Guatemala where he lived and carried on business for several years. In 1939, at the start of the Second World War, Nottebohm acquired

499 See the ICCPR art 12 par 4 which provides that "No one shall arbitrarily be deprived of the right to enter his own country."
500 Shearer *supra* n 117 312.
501 This depends upon some quality attaching to the person involved, justifying a state to exercise jurisdiction over that person.
502 See *Notttebohm's case supra* n 40.
503 Dugard *supra* n 1 284.
504 See *Nottebohm's case supra* n 40 25.
505 *Ibid.* This case is the *locus classicus* on that point of law.

the nationality of Liechtenstein while still domiciled in Guatemala. In 1943, he was arrested in Guatemala and sent to the United States of America where he was incarcerated for two years without trial as a dangerous enemy alien.

After the war, Nottebohm returned to Liechtenstein, because all his assets in Guatemala had been seized. Liechtenstein brought an action against Guatemala before the ICJ in 1951 asking the Court to declare that the government of Guatemala had acted in breach of international law by arresting, detaining, expelling and refusing to readmit Nottebohm, and seizing and retaining his property without compensation.

The Court held that Liechtenstein had no title to act on behalf of Nottebohm as Nottebohm's purported acquisition of Liechtenstein nationality in 1939 was invalid at international law. The Court held that the purported nationalisation of Nottebohm was an act performed by Liechtenstein in the exercise of its domestic jurisdiction but could not be considered at international law. In determining the nationality question, different factors have to be taken into consideration, and their importance will vary from case to case. The habitual residence of the person concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachments shown by him for a given country, and inculcated in his children who must be taken into consideration.

The court further held that a person should be deemed to be a national of the state with which he or she is most closely and genuinely connected as could be gathered from the circumstances. The court analysed the bond of nationality thus:

> According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a 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.[506]

The court thus affirmed its preference for the test of real and effective nationality and denied international recognition to the nationality which was not based on stronger factuality between the person concerned and one of the states whose nationality was involved.

The decision in *Nottebohm's* case has attracted a lot of criticism.[507] The basic criticism is that the Court applied the rule of effective nationality, valid when there has to be a choice between two or more nationalities, in a situation where there was no dual nationality.[508] By applying this rule, the court rendered Nottebohm a stateless person on the international level. A further criticism of *Nottebohm* is that as a matter of law, the court erroneously applied article 5 of the 1930 Hague Convention on Nationality which provides that in cases of dual Nationality, the most effective one should be applied. In this case, *Nottebohm* did not have the nationality of Guatemala; he only had the nationality of Liechtenstein. Therefore, it was not a case of dual nationality.[509] Nevertheless, the decision in *Nottebohm's* case[510] is a clear message to states that for purposes of diplomatic protection, the decision whether nationality has been bestowed in the manner required by international law is

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506 At 23.

507 See Tiburcio *supra* n 26 70 - 72 for her criticism of the judgment. See also Geck *supra* n 10 1050. Dugard *supra* n 1 285 says that the court "left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a state with which he had no close connection." He however comes to the conclusion that the question should be answered in the affirmative because the court was determined to propound a relative test only. He goes on to explain that based on the judgment in *Nottebohm's* case, the ILC's Draft Articles on Diplomatic Protection art 4 does not require a state to prove an effective or genuine link between itself and its nationals along the lines suggested in that case. According to him the ILC took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Nottebohm and Liechtenstein were 'extremely tenuous' compared with the close ties between Nottebohm and Guatemala for over 34 years. Accordingly, the ILC concluded that the court did not intend to expound a general rule applicable to all states, but only a relative rule according to which a state in Liechtenstein's position was required to show a genuine link between itself and Nottebohm in order to permit it to claim on his behalf against Guatemala, with whom it had extremely close ties. Moreover, the ILC was mindful of the fact that if the genuine link requirement proposed by the *Nottebohm Case* was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection in today's world of globalization.

508 Tiburcio *supra* n 26 71.

509 See also Sen *supra* n 52 330.

510 *Supra* n 40.

entirely that of international law to make.[511]

7.2 Dual nationality

A person may sometimes qualify to be a national of two or more states and he or she may be claimed as a national of any of those states by virtue of the applicable municipal laws on citizenship.[512] Cases of dual nationality may also arise in relation to persons acquiring the nationality of a state by naturalisation.[513] It may result from an overlap of two countries' legislation on the subject, or from exceptional circumstances.[514] Although the laws of some states do not permit their nationals to be nationals of other states,[515] international law does not prohibit dual or multiple nationality. Indeed such nationality was approved by article 3 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides that:[516]

> a person having two or more nationalities may be regarded as it's national by each of the States whose nationality he possesses.

It is in the area of dual or plural nationality that the dilemma of not having a definite nationality for purposes of diplomatic protection is most felt.[517] As a result, attempts have been made to eliminate dual and multiple nationality, but those attempts have

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511 See Dugard *supra* n 1 286

512 Sen *supra* n 52 328. A person may be a citizen of one State by birth for instance, while he or she may be regarded as a citizen of another state by reason of his or her descent.

513 *Ibid.* Cases of dual or multiple nationality may also arise where legitimation of illegitimate children is involved. It may also arise where, in the case a married woman, she is allowed to retain the nationality of her ex- husband even if her marriage to a foreign national is dissolved. See Shearer *supra* n 117 311.See also Sen *supra* n 52 329.

514 *Ibid*. A change or acquisition of nationality may occur under exceptional circumstances, because of state succession, for instance. Thus, nationals of a predecessor state may acquire the nationality of the successor State, while people in conquered or ceded territories ultimately acquire the nationality of the victorious state.

515 See the Nigerian Constitution s 28, for instance, which provides that subject to certain exceptions, a person shall forfeit his or her Nigerian citizenship if, not being a citizen of Nigeria by birth, he or she acquires or retains the citizenship or nationality of a country other than Nigeria, The South African situation is the same as that of Nigeria. See the South African Citizen Act 88 of 1995 s 6.

516 *Supra* n 45.

517 See Sen *supra* n 52 It is gratifying that the ILC's Draft Articles on Diplomatic Protection has taken care of cases of people with dual nationality. See the ILC's Draft art 6 which provides (1) that "Any State of which a dual national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national," and (2) that "Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national."

failed.[518] This makes it all the more necessary to address diplomatic protection in cases of dual and multiple nationality. [519]

In the case of persons possessing dual or multiple nationality, two issues always arise for determination; namely: (a) which of the states can espouse his or her claim against a third state and (b) whether one of the states of which he or she is a national can represent him or her against the other state which also claims his or her nationality.

With reference to the first issue, the general rule is that where an individual possesses a dual or multiple nationality, any state of which he or she is a national may adopt his or her claim against a third state. In this regard, one view is that the state whose passport the person is carrying is the only state that can protect him or her. The other view is that the state of which he or she is an "active national" is the only state competent to afford diplomatic protection to him or her.[520]

As already stated, international law has moved beyond the active nationality theory laid down in *Nottebohm's c*ase.[521] Consequently, the ILC's Draft Article on Diplomatic Protection provides that:[522]

> 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, naturalisation, succession of states, or in any other manner, not inconsistent with International Law.

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518 See Crawford *supra* n 10 31. E.g the Hague Conference on the Codification of International Law set out to abolish or reduce dual and multiple nationality, but in the event recognised its existence in art 3 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws *supra* n 42. European States sought to abolish it in the European Convention on Reduction of Cases of Multiple Nationality and Military Obligation in Cases of Muliple Nationality of (1963) 05 6, UKTS No 88 (1971) ETS No 43) although this goal remained unachieved. See now the 1977 European Convention on Nationality which recognizes dual and multiple nationality (1977) 11 6, ETS No 166.

519 See Crawford *ibid.*. Dugard had noted this problem in his First Report *supra* n 9 par 121.

520 In the *Merge* case (1955) 22 ILR 443. It was emphasised 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 or active nationality, whenever such nationality is that of the claimant state.

521 *Supra* n 40.

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 *Nottebohm's* case as an additional factor for the exercise of diplomatic protection even where the individual possesses only one nationality.[523] Besides, article 6(1) of the Draft Articles provides that:

> 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.

While article 6(2) goes further to provide that

> Two or more states of nationality may jointly exercise diplomatic protection 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 in which the injured person is a national against a state of which that person is not a national. Similar to draft article 4, this does not require a genuine or effective link between the national and the claimant State. The weight of authority does not require such a link in cases of diplomatic protection against third states.[524] Crawford, however, asserts that this can only be true if *Nottebohm* is disregarded.[525] Article 6(2) recognises that diplomatic protection may be exercised jointly by two or more states of nationality. However, there may be circumstances where the responsible state may object on the basis of *locus standi.* [526]

The exercise of diplomatic protection by one state of nationality against another state of nationality is covered in draft article 7. In respect of claims brought against another state of nationality, draft article 7 provides that:

> 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

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522 Art 4.

523 See the *Official Records of the G A supra* n 1 32-3.

524 See the Commentary to draft art 6 par 3 in the *Official Records of the G A supra* n 1 42 citing, *inter alia Salem* (1932) 21 UNR I A A 1165 1188; *Merge supra* n 516 456; and *Daillal* v *Iran* (1983) 3 IUSCIR.

525 Crawford *supra* n 10 30. According to him, in *Nottebohm,* Guatemala was a third state and the court accepted that Nottebohm's new nationality had been granted in accordance with the law of Liechtenstein.

526 See commentary to draft art 6 par 4 *Official Records of the GA supra* n 1 43. See also *Barcelona Traction* case *supra* n 26 on the issue of objection.

nationality of the former State is predominant, both at the time of the injury and at the time of the official presentation of the claim.

The commentary on draft article 7 reveals that, historically, there was a strong support for the proposition that a state of nationality could not espouse a diplomatic protection claim in respect of a dual national against another state of nationality.[527] In 1949 the ICJ described the practice of states not to claim against another state of nationality as "the ordinary practice."[528]

There was however support for permitting a State of nationality to espouse a diplomatic protection claim in respect of a dual national against another state of nationality where the claiming State was the State of dominant or effective nationality.[529] This was endorsed by the ICJ in *Nottebohm's* case[530] and in *Merge* claim by the Italian-US Conciliation Commission.[531] The ILC therefore took the view that the principle of dominant or effective nationality reflects customary international law and incorporated it in Draft Article 7.[532]

The main objective of this formulation is to permit a state of nationality with which an individual has established a predominant nationality subsequent to the injury to bring a claim against the other state.[533]

8 Stateless persons and refugees

Can a stateless person or a refugee be diplomatically protected? A person becomes stateless when he or she is deprived of his or her nationality, while a refugee is a

527 This was stipulated in the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (1930) *supra* n 45 art 4 and was supported by other draft codification proposals eg the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens art 23(5) (1961) 55 *AJIL* 545, and arbital awards, e.g the *Alexander* case (1898) 3 Moore *International Arbitrations* 2529.

528 See Commentary to draft art 7 par 3 *Official Records of the GA supra* n 1 44 and references contained therein.

529 The *Reparation* case *supra* n 397.

530 *Supra* n 40.

531 *Italian-United States Conciliation Commission: Yanguas, Messia, Sorentino.* (1955) 22 ILR 443 455 (par 5).

532 See commentary on art 7 par 5 *Official Record of the GA supra* n 1 46.

533 See Crawford *supra* n 10 34.

displaced person.[534] Statelessness is a condition recognized both by municipal and international law.[535] It has indeed become a major problem in international law in recent years.[536] Statelessness may arise through conflict of municipal nationality laws, changes of sovereignty over a territory, and denationalisation by the state of nationality.[537]

Traditionally, individuals who are stateless may be left completely unprotected internationally because they may not have any state entitled to present a claim on their behalf. The ILC's Draft Articles on Diplomatic Protection, however, provides that 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.[538] Article 8(2) goes further and provides that a state may exercise diplomatic protection in respect of a person who is recognized as a refugee by that state.[539]

Thus, although nationality is a *sine qua non* for the exercise of diplomatic protection, the draft articles on diplomatic protection have tremendously enhanced the progressive development of international law, by making provision for the protection of stateless persons and refugees. Credit must be given to the ILC for this progressive innovation. It is a glowing testimony to the fact that its mandate to codify and progressively develop international law is bearing fruits.[540] Being *lex de lege*

534 For a detailed definition of a refugee, see the 1951 Refugee Convention and its Protocol which defines a refugee as a person who, alleging persecution by his or her government, seeks asylum in another country.

535 Shearer *supra* n 117 312.

536 The urgency and acuteness of the problem of statelessness prompted the insertion in the UDHR art 15 that "every one has right to nationality," and that "no one shall arbitrarily be deprived of his nationality". See also the Constitution of South Africa *supra* n 459 s 20.

537 Shearer *supra* n 117 312.

538 Art 8(1).The traditional position was that a state could only exercise diplomatic protection in respect of its nationals and that no state could intervene on behalf of stateless persons. See the decision of the US Mexican Claims Commission in *Dickson Car Wheel Co.* v *United Mexican States* 4 UNRIAA 669 678.

539 Art 8 is regarded as a progressive development of the law. The commentory notes the concern for refugees and stateless persons which is evidenced by the Convention on the Status of Refugees of 1951, and the Convention on the Reduction of Statelessness of 1961, although neither of them deals with diplomatic protection *per se.*

540 The ILC was established by the GA in 1947 to promote the codification and progressive development of International Law. See Dugard's comment on this issue in Dugard *supra* n 25 89.

ferenda, Crawford has drawn attention to several points that may be made out concerning Draft Article 8.[541]

9 Nationality of corporations and other legal persons

International law recognizes that diplomatic protection can be extended to corporations and other legal entities.[542] The Court in the *Barcelona Traction* case[543] remarked that customary rule gave the right of diplomatic protection of a corporation to the state under whose law the company is incorporated.[544]

It will be recalled that in that case, Belgium brought a claim on behalf of its nationals, who comprised the vast majority of shareholders in the Barcelona Traction, Light and Power Company Limited. The company was incorporated in Canada in 1911 in connection with the development of electricity supplies in Spain. In 1948, the company was declared bankrupt by a Spanish court, and about the same time, other steps were taken by Spanish authorities injuring it. Canada intervened on its behalf to begin with but later withdrew. At all relevant times, 88 per cent of the shares in the company were, as Belgium claimed, owned by Belgium nationals. Spain, however, objected that since the injury was to the company and not to shareholders, Belgium lacked the *locus standi* to bring the claim. The Court ruled by fifteen to one that since the right of diplomatic protection in respect of injury to a corporation belongs to the state under whose laws the corporation is incorporated and in whose territory it has

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541 See Crawford *supra* n 10 35.“First, the requirement of both lawful residence and habitual residence for the stateless person sets a high threshold because the provision is an exceptional measure introduced *de lege ferenda.* Secondly, the requirements as to continuous nationality are repeated in paragraphs 1 and 2, reflecting the principle in draft article 3. Thirdly, paragraph 1 does not define stateless persons. The commentary notes that a definition can be found in the Convention Relating to Stateless Persons of 1954. Fourthly, paragraph 2 does not limit the term “refugee” to those who meet the definition in the 1951 Refugee Convention and its Protocol. Finally paragraph 3 provides that the State of refuge may not exercise diplomatic protection in respect of a refugee where the claim is against the refugee’s State of nationality. According to the commentary, to allow such claims would contradict the basic approach of the Draft Articles that nationality is the basis for the exercise of diplomatic protection.. Moreover, to do so “would open the floodgates for international litigation.” The fear of demands for such action might deter states from accepting refugees.”

542 *Barcelona Traction case supra* n 26.

543 *Ibid.*

544 At 42. For purposes of diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. This is a general principle of international law. See *Barcelona Traction* case *supra* n 26 45.

its registered office, Belgium could not exercise diplomatic protection in its favour against Spain.[545]

Chapter III of the ILC's Daft Articles on Diplomatic Protection deals with the nationality of corporations and other legal persons. Two substantial issues arise. The first is whether a state is entitled to exercise diplomatic protection in respect of corporations, and the second is whether a state is entitled to exercise diplomatic protection in respect of its nationals who are shareholders in a corporation incorporated in another state.[546]

As to the first issue, it will be recalled that the claim in *Barcelona Traction* case[547] was denied, because Belgium had no *locus standi* to institute the action.[548] The company, Barcelona Traction, did not possess a Belgian nationality and the Court ruled that Belgium could not exercise diplomatic protection in its favour against Spain.[549] That was however an exception to the rule. The general rule is that a state may bring an action under international law to protect its corporation which is injured by the act of another state.

In *ELSI* case,[550] for instance, the Chamber of the ICJ allowed the US to bring a claim against Italy in respect of damage suffered by an Italian company whose shares were wholly owned by two American companies. Although Italy formally objected that the company the rights of which were affected was Italian, the Chamber avoided pronouncing on the compatibility of its decision with *Barcelona Traction* case.[551]

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545 Par 88. This rule has been subjected to criticism. In Dugard's fourth report to the UNILC for instance, he pointed out that the rule is derived from general principles of corporation law rather than from customary international law and that had the court had regard to State practice in bilateral and multilateral investment treaties and lump sum settlement agreements, it might have found evidence in favour of a right of the shareholders state of nationality. Dugard also argued that the *Barcelona Traction* rule established an "unworkable standard," since in practice States will not exercise diplomatic protection in the absence of some genuine connection arising from a substantial national shareholding: See Dugard's Fourth Report on Diplomatic Protection ILC 55th Session 2003 A/CN 4/530 & Addendum 1.

546 See Crawford *supra* n 10 36.

547 *Supra* n 26.

548 At par 92.

549 As already said, this rule has been subjected to criticism. See *supra* n 543.

550 *US* v *Italy* (1989) ICJ Rep 15.

551 The case no doubt was concerned with the interpretation of a specific treaty rather than general International Law; the case might also have been considered to involve the infringement of the rights of shareholders themselves. Additionally, it might have been argued that the company had ceased to exist because it had gone into liquidation, or that the State of nationality of

Following the decision in the *Barcelona Traction* case,[552] however, the ILC Draft Articles on Diplomatic Protection has provided that there is an exception to the nationality of claims rule.[553] Thus, where there is no significant link or connection between the state of incorporation and the corporation itself, and where certain significant connections exist with another state, then, that other state is to be regarded as the state of nationality for the purposes of diplomatic protection.[554] Hence, Draft Article 9 provides *inter alia* that:

> 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.

As explained by the commentary, Draft Article 9:[555]

> accepts the basic premise of *Barcelona Traction* while making an exception for the case where certain significant connection exists with another state.

In addressing the issue of protection of shareholders, it is not clear whether a diplomatic claim may be brought in respect of injury to the shareholders' own right.[556] In *BarcelonaTraction,* the ICJ said, *inter alia*:

> 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 shareholders 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

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shareholders was entitled to exercise diplomatic protection, because the company was injured by the State of incorporation. See Crawford *supra* n 10 37.

552 *Supra* n 26.

553 Art 9.

554 See the *Official Records of the G A supra* n 1 52.

555 Commentary to draft art 9 par 4 *ibid.*

556 See Crawford *supra* n 10 38.

liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action[557]

It must be stressed, however, that the Court in *Barcelona Traction* did not have to consider the matter further, because Belgium did not base its claim on an infringement of the rights of shareholders but on the economic harm they incurred as a result of Spain's treatment of the corporation. However, in the South African case of *Van Zyl* v *Government of RSA,*[558] the question was whether the government of South Africa could exercise diplomatic protection on behalf of a South African national who held majority shares in a company registered in Lesotho. The property of the company was confiscated without compensation. In a suit brought by the South African national for compensation, it was held that the *Barcelona Traction*[559] decision precluded diplomatic protection to be extended to a South African national by the government of South Africa against the government of Lesotho in respect of a company incorporated in Lesotho.[560]

Again, in *Swissborough Diamond Mines (Pty) Ltd* v *Government of the Republic of South Africa,*[561] as a result of an alleged conspiracy between the South African government and the government of Lesotho to disposes the applicant of its rights in the diamond lease, an application was brought by the applicant, a company registered in Lesotho but controlled by South African shareholders, to obtain recovery of documents relating to the alleged conspiracy. It was however held that the matter was non justiciable, based on the "true agreement" between South Africa and Lesotho.[562]

Although not strictly a diplomatic protection case, in the oft-cited case of *Trendtex Trading Corp.* v *Central Bank of Nigeria,*[563] it was held that the Nigerian government could not protect the Central Bank of Nigeria, a Nigerian corporation sued in the UK

557 At par 46 - 47.
558 2005 (4) SA 96 (T).
559 *Supra* n 26.
560 For further discussion of this case, see ch 6 *infra.*
561 1999 (2) SA 279 (T).
562 See Dugard *supra* n 1 78.
563 (1977) QB 529; [1977] 1 All ER 881.

for damages for breach of contract.[564] In that case, the Central Bank of Nigeria through a correspondent London Bank, issued a letter of credit in favour of the plaintiff, a Swiss company, to pay for cement which was to be used for the building of army barracks in Nigeria. The Central Bank refused to pay for the cement or for demurrage incurred by delay at the port of delivery. In a suit brought against the Central Bank of Nigeria for damages, the Central Bank claimed state immunity.

At the Court of Appeal in England, a distinction was drawn between *jure imperii*[565] and *jure gestionis.*[566] Lord Denning considered whether the Bank was an organ of the State of Nigeria and so entitled to immunity, and concluded that it was not.[567]

The question which arises for determination is therefore, in what circumstances may a claim be brought by the State of the shareholders' nationality for injury to the company? The matter is addressed by draft article 11, which provides that:

> The state of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection on behalf of such shareholders in the case of 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 time of the injury, the nationality of the State alleged to be responsible for causing injury and incorporation under the law of the latter State was required by it, as a precondition for doing business there.

Articles 11(a) and (b) are exceptions to the general rule that a State of nationality of shareholders cannot exercise diplomatic protection on their behalf in the case of injury to the corporation. In the light of these exceptions enumbrated by draft article 11, it is submitted that both *Van Zyl*[568] and *Swissborough*[569] were wrongly decided because in both cases, not only were the injury to the companies caused by the State of incorporation, but the Lesotho Government had made it a precondition that

564 Nigeria unsuccessfully pleaded as a defence, sovereign immunity, which was equivalent to diplomatic protection.
565 Public acts of government. At 554 G-H.
566 Commercial acts of government. At 556 B-C.
567 *Idem* at 890.
568 *Supra* n 556.
569 *Supra* n 559.

the companies must first be incorporated under the laws of Lesotho before they were granted mining licence.[570]

ILC's draft article 12 on Diplomatic Protection however provides that:

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

Crawford has submitted that the ILC's formulation of exceptions in draft article 11(b) has gained little support.[571]

> "Why should there be a general exception for cases where local incorporation is required by law?" he querries.

According to him,

> "This question is appropriate, because in certain strategic sectors,[572] it is common to require a local subsidiary as a guarantee.[573] Furthermore, in the majority of cases, although there is no legal requirement for local incorporation, there are good business reasons to use local investment vehicles.[574] In such cases, the effect of draft article 11 is to prevent any shareholders' actions for wrongs done to the company so long as the company itself continues to exist under local law – a matter over which the shareholders themselves have no control.[575] Finally, it is odd to limit the exception contained in draft article 11(a) to cases where the company has "ceased to exist for a reason unrelated to the injury." [576]

In conclusion, Crawford summarises the rationale behind the exceptions contained in Draft article 11. According to him

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570 See Schmulow "Diplomatic intervention in event of expropriation of a company without compensation." (1996) 21 *SAYIL* 73 74.
571 See Crawford *supra* n 10 40.
572 Eg banking, media, telecommunications,public service concessions etc.
573 Crawford *supra* n 10 40.
574 *Ibid.*
575 *Ibid.*
576 *Idem* 41.

"It may be said that the exceptions contained in Draft Article 11 do not implement the *dicta* in the *Barcelona Traction* case and are both under –and-over exclusive.[577] Thus, in cases where the wrongful act is implicated in the dissolution of the company, shareholders will have recourse under article 12, but there may be no direct injury. In cases where the company continues to exist and the law of the respondent state does not require local incorporation, diplomatic protection is excluded altogether.[578] By contrast however, where local incorporation is required by law, any foreign shareholder may be protected, irrespective of the amount of its holding or other measures being taken to vindicate the rights of the corporation." [579]

10 Other conditions for the exercise of diplomatic protection

10 1 Exhaustion of local remedies

Apart from the issue of nationality of claims as a *sine qua non* requirement for the exercise of diplomatic protection, another requirement is that all local remedies must first be exhausted in the State where the injury took place before the claim can be espoused at the international level.[580]

The need to exhaust local remedies has its origin in State practice concerning the protection of a State's subjects injured abroad.[581] By the 14th century, European sovereigns had accepted that their subjects should first seek redress for any grievance from the foreign State where they resided. Only in circumstances where this was not forthcoming should they turn to their governments for aid.[582]

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577 *Ibid.*

578 *Ibid.*

579 *Ibid.* Neither *Van Zyl supra* n 556 nor *Swissborough supra* n 559 was protected under this exception. Draft art 13 however provides that the rules applicable to corporations apply to the diplomatic protection of other legal persons as appropriate.

580 See the *Tinoco Concession case* (1924)*)* 1 UNRAA 18 A.J.I.L.(1924). P.147. *The North American Dredging Company Claim (United States* v *Mexico)* (1926) 4 UNRAA 26-30; *The Mexican Railway Union Claim (Great Britain* v *Mexico* (1930) 5 UNRAA. 155. See also Sen *supra* n 52 390 and the ILC Draft Articles on Diplomatic Protection 2006 art 14. The expression "exhaustion of domestic remedies" comprises not only resort to the judicial and administrative authorities, but also to other types of redress eg executive pardon etc.

581 See Crawford *supra* n 10 41.

582 Aid in early times meant reprisals and exhaustion of local remedies in its infancy meant determining when such unlawful acts were permitted. A sovereign adopting the claim of his or her

This rule has been justified on several grounds, but the main purpose for the rule is to afford the state concerned an opportunity to redress the wrong that has occurred within its own legal order, and to reduce the number of international claims that might be brought.[583] Article 44 of the ILC's Articles on State Responsibility provides that the responsibility of a state may not be invoked if local remedies have not been exhausted.[584] This rule was applied by the ICJ in the *Interhandel Case*[585] as a "well established rule of international law."[586]

The rule is set out in the ILC's Draft Article 14 on Diplomatic Protection as follows:

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

There is no doubt that the rule in respect of the exhaustion of local remedies is firmly established in international law based on the premise that diplomatic protection is an exceptional remedy available in respect of internationally wrongful conduct on the part of a state, for breach of its international obligations.[587] If, however, the state itself provides the appropriate remedies under its laws for the harm or injury suffered by the alien, no liability arises, because the state cannot be said to have failed in its duty.[588]

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subject obtained satisfaction by taking reprisals against the subjects of the offending sovereign who were in his territory or those who fell into his hands. See Crawford *supra* n 10 42.

583 *Ibid.*

584 This rule was well illustrated in the case of *Ambatielos Arbitration* 12 RIAA 83 (1956); 23 ILR, 306 where the matter was dismissed because of failure to exhaust local remedies.

585 1959 ICJ Reports 6 27*supra* n 110.

586 See also the case of *Elettronica Sicula (ELSI)Case supra* n 548 15 where a Chamber of the ICJ described the practise as "an important principle of customary international law."

587 Sen *supra* n 52 390.

588 *Ibid.*

There is however, a dispute as to whether this principle of exhaustion of local remedies is a substantive or procedural rule or some sort of hybrid rule.[589] What ever the case, it is trite that until local remedies are exhausted, the injury can still be considered a domestic problem which can be solved by the competent internal or local authorities.[590]

(a) When are local remedies exhausted?

It may be necessary to evaluate municipal law and procedure in order to determine whether a claimant has exhausted all available local remedies.[591] In *Interhandel,* [592] for example, the rule was applied to bar an international claim by a party which, after a decade of litigation, finally obtained *certiorari* from the US Supreme Court and was ready to start again. In *Ambatielos,*[593] the importance that arbitral tribunals attach to this rule generally was reflected in the attitude of that tribunal to an individual's failure to call a key witness at the trial. It was held that it amounted to failure to exhaust local remedies.[594]

In order to satisfy the requirement of exhausting local remedies, a state must allow foreigners access to courts of law within its territory for the purpose of redressing their grievances in order to fulfil this legal obligation. Failure to do so itself is an international wrong.[595] It is only after all such remedies are exhausted, including any appeal, that the question of diplomatic protection may arise.[596]

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589 See e. g. the discussion in the *Yearbook of the International Law Commission* 1977 vol 11 pt 2 30 ff and Report of the ILC on its 54th Session 2002 131. See also Shaw *supra* n 175 730.

590 Sen *supra* n 52 391.

591 Eg the determination may involve an international tribunal in applying national law to judge whether a claimant has tested or exhausted all available judicial mechanisms. See Crawford *supra* n 10 42.

592 *Supra* n 110.

593 *Supra* n 111.

594 At 336.

595 *Ibid.*

596 This is because, if the case has not been decided, or may still lead to redress and punishment by the determination of local authorities, then there is no defined situation in international law as yet, and there is no decision to be challenged. Only after a decision is reached, and only after there is *res judicata* on the merits of the case, or if the claim is said to be inadmissible, is the decision definite and final. Then and only then, does the issue of an international claim arise. See Tiburcio *supra* n 26 40.

As draft article 14(2) clearly states, the rule is limited to legal remedies. The European Commission on Human Rights said in *Neilson* v *Denmark*[597] that the rule requires "that recourse be had to all legal remedies available under the local law."[598] Be that as it may, while these formulations plainly include all judicial remedies, they leave open the extent to which a claimant must use administrative and executive remedies. The better view, however, is that those remedies of a judicial character, whether discharged by courts or not, are included in this rule, whereas remedies based on discretionary action of public organs are not.[599] Thus, remedies contemplated in the rule of exhaustion of local remedies do not include "remedies as of grace," such as "executive clemency or a request for pardon," as Mexico noted in its comments on the ILC draft articles on diplomatic protection.[600]

(b) Exceptions to the local remedies rule

Draft Article 15 on Diplomatic Protection has enumerated a number of well established exceptions to the exhaustion of local remedies rule. They are applicable where

(a) there are no reasonable available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
(b) there is undue delay in the remedies 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.

These exceptions will now be discussed *seratim*.

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597 Application No 343/57 (1961) 37; 28 ILR 210 230.
598 At 230. See also *Ambatielos* case *supra* n 111 where the court referred to the "whole system of legal protection." At 336.
599 Crawford *supra* n 10 44.
600 See Dugard Second Report to the ILC on Diplomatic Protection ILC 53rd Session 2001; A/CN 4/514.

(i) Where local remedies are not available or clearly futile

The requirement to exhaust local remedies does not apply where there are no local remedies to exhaust or where they are futile to pursue.[601] In the *Norwegian Loans Case,*[602] for example, France brought a claim on behalf of its nationals who were holders of Norwegian bonds. Norway objected to the action, *inter alia,* on the ground that France had not exhausted the local remedies available in Norway.

In a separate opinion, Lautpacht J warned that, the requirement of exhaustion of local remedies is not a purely technical or rigid rule, but a rule which international tribunals have applied with considerable elasticity.[603] They have refused to act upon it in cases where there are in fact no effective remedies available owing to the law of the state concerned, or the conditions prevailing in it.[604] Where the plaintiff state has suffered direct injury, the requirement to exhaust local remedies does not apply.[605] In cases of mixed claims,[606] however, exhaustion of local remedies is required, and the standard of proof is that of preponderance of evidence.[607]

If any local remedy is to be efficient, it must not be a sham but real.[608] A remedy which is practically or legally unavailable to the injured alien is not a real remedy within this context.[609] Draft article 15(b) expresses the requirement as follows:

> [Where] there are no reasonable local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.

A better provision, however, is the provision of the *Restatement (Second)* which stipulates that:[610]

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601 Where an appeal eg would not have affected the basic outcome of the case. See the *Finnish Ships Arbitration Case* 2 RIAA, 1479 (1934) 7 AD 231. See also *Interhandel Case supra* n 110 6 where the court declared that "the rule that local remedies must be exhausted is a well established principle of international law."

602 (*France* v *Norway*) ICJ Rep 1957 9.

603 At 39.

604 See the *Panevezys Saldutiskis Railway case supra* n 81 26-17.

605 See the *Iran Hostages Case supra* n 242 3 where the ICJ found that the claim was predominantly direct, and therefore there was no need to exhaust local remedies.

606 That is where the claim involves both the direct interests of the state and that of its national. See for instance the *Interhandel Case supra* n 110.

607 Dugard *supra* n 1 293.

608 Crawford *supra* n 10 44.

609 *Ibid.*

610 See the Restatement of the Foreign Relations Law of the United States(Third) *supra* n 58.

> [e]xhaustion of a remedy does not require the taking of every step that might conceivably result in a favourable determination, but the alien must take all steps that offer a reasonable possibility, even if not a likelihood of success.

As provided by Article 15(b), exhaustion of local remedies will not be required when "there is undue delay in the remedial process which is attributable to the state alleged to be responsible" for the injury. To determine whether a delay has been of such a length as to merit an exception to the rule, it is necessary to consider all the surrounding circumstances of the case.[611]

Another exception to the exhaustion of local remedies rule is where

> "the injured person is manifestly precluded from pursuing local remedies."[612]

The type of preclusion envisaged by draft article 15(d) may be either physical, mental, or psychological preclusion. It may include false imprisonment, refusal of legal representation, intimidation of lawyers and judges, *et cetera.*[613]

(ii) Connection between the injured party and respondent State

The exhaustion of local remedies rule will apply only where the claimant is subjected to or properly rooted in the jurisdiction where the injury occurred.[614] In other words, there must be a link between the injured individual and the state whose actions are impugned.[615] If there is no relevant connection between the injured person and the state alleged to be responsible for the injury, then, local remedies need not be exhausted.

However, the state alleged to be responsible for the injury to the alien may waive the requirement to exhaust local remedies.[616] That state may also be estopped from

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611 See *Interhandel* case *supra* n 110. In that case, although litigation had gone on for ten years, this did not justify an exception to the rule.
612 Art 15(d).
613 See Crawford *supra* n 10 46.
614 The Draft Arts on Diplomatic Protection art 15(c).
615 *Ibid.* See *Bankovic* v *Belgium (Preliminary Objections)* (2001) 123 ILR 94; 116-7 par 83.
616 The Draft Arts on Diplomatic Protection art 15(e)

raising the issue of failure to exhaust local remedies as a defence to any action for diplomatic protection, if it is not raised timeously.[617]

(iii) Waiver

Waiver may be express or implied.[618] The most obvious examples are cases of waiver between the forum state and the state of nationality. It is normal to waive local remedies in claims settlement agreements which aim at a swift and comprehensive settlement of a class of claims by a single commission or tribunal.[619]

In relation to the exhaustion of local remedies and waiver, a state and an alien may enter into an agreement stipulating how contractual disputes are to be resolved.[620] Although the effect of such agreements may pose a complex problem of capacity to contract, the better view is that both the host state and the private party enjoy contractual autonomy, and their stipulation as to the method of dispute settlement must be respected.[621]

Where there is a written agreement requesting for an international arbitration, that agreement is deemed to operate as a waiver of other remedies.[622] Finally, since the basic tenet of international law is that the provisions of municipal law can not justify the violation of international law and *vice versa,* then a waiver under a private law/contract cannot operate as a bar to oust the right of the state of nationality from taking advantage of such stipulation by invoking it.[623]

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617 *Ibid*.

618 The presumption against implied waiver is strong but not irrebutable. See *Steiner and Gross* v *Polish State* (1927-8) 4 ILR 472.

619 The Claims Settlement Declaration attached to the Algiers Accord of 1981- 01 -19 eg submitted all pending disputes between Iranian or US nationals and these two States to the Iran-US Claims Tribunal; Exhaustion of local remedies were not merely waived, but barred in some of the claims. See *American International Group Inc* v *Islamic Republic of Iran* (1983) 4 Iran-US CTR 96. See also Crawford *supra* n 10 47.

620 Eg by local courts, by international arbitration etc. See Crawford *supra* n 10 48.

621 See e.g *CAA and Vivendi* v *Argentina (*Decision on Annulment) (2002) 07 03 and *SGS* v *Philippines* (objection to Jurisdiction) 2004- 01- 29.

622 See Dugard Third Report on Diplomatic Protection ILC 54th Session 2002 A/CN/523 & Addendum par 59.

623 Crawford *supra* n 10 48.

Since diplomatic protection is an international remedy, a waiver cannot, operate *in future*.[624] It is also not clear whether it can be contractually waived by the host state in favour of a private party.[625] If the principles enunciated in the *Mavrommantis* case[626] are still good law, then the answer should be in the negative since the private party concerned, is merely a beneficiary and not the holder of the right at stake.[627]

(iv) Estoppel

Notwithstanding any express or implied waiver of the requirement to exhaust local remedies, the defendant state may be estopped from raising an objection to the effect that the claimant state has not exhausted the local remedies available in its territory.[628] In *ELSI's* case,[629] for instance, it was stated that:

> It cannot be excluded that an estoppel could in certain circumstances arise from silence when something ought to have been said

The importance attached to the time frame within which an objection based on the exhaustion of local remedy rule should be raised has been stressed in judicial decisions.[630] Hence an objection made out of time, is likely to be rejected on grounds of estoppel. The European Commission on Human Rights (ECHR), addressing an objection on exhaustion of local remedy made out of time, said *inter alia,* that

> The Court will take cognizance of preliminary objections of this kind in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; if this condition is not fulfilled, the Government is estopped from raising the objection before the Court.[631]

Again in *Castillo Petruzzi* v *Peru,*[632] the Inter-American Court of Human Rights put it thus:[633]

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624 *Ibid.*
625 *Ibid.*
626 *Supra* n 36.
627 Crawford *supra* n 10 48.
628 *Ibid.*
629 *Supra* n 546 .
630 See *Catillo Petruzzi* v *Peru* Preliminary objection (1988) 09 4 Inter Am Ct HR Ser C No 41.
631 At 340.
632 *Supra* n 626.

> the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived its means of defence that the Convention established in its favour and made a tacit admission of the non-existence of such remedies or their timely exhaustion.

It can therefore be safely said that if the exhaustion of local remedy rule is waived by the beneficiary, then it will not apply irrespective of the importance of the rule in diplomatic protection actions. In this connection, as already indicated, failure to raise an objection timeously by the respondent state can constitute a waiver.[634]

(v) Distinction between direct injury and diplomatic protection

Where there is a direct injury to the plaintiff state, it is not necessary to exhaust local remedies.[635] This rule enabled Mexico to argue in the *Avena* case,[636] that in breaching article 36(1) of the VCCR, the US had: [637]

> violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals.

In response, the court observed by pointing out first and foremost that the individual rights of Mexican nationals under the Convention

> are rights which to be asserted, at any rate, in the first place, within the domestic legal system of the United States, and that the exhaustion rule applied.

It was further argued by Mexico that "it had suffered directly, and through its nationals, as a result of the violation." Accepting this position, the court described the relation between state and individual claims as closely connected:[638]

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633 Par 56.
634 See *ELSI's* case *supra* n 548. See also *Castillo's* case *supra* n 628.
635 See Crawford *supra* n 10 50.
636 *Case Concerning Avena and other Mexican Nationals (Mexico* v *US) supra* n 398.
637 Par 30.
638 At 35-6 (par 40).It must be noted that the *Avena* case was a mixed claim. The problem of categorization presented by mixed claims also arose in the *Hostages* case (*Case Concerning US diplomatic and Consular staff in Iran supra* n 242 although it was more obvious that the claims, affecting diplomatic and consular personnel as such, were predominantly for direct injury to the sending state. However in ELSI *supra* n 548 & *Interhandel supra* n 110 cases the ICJ held that the State claims could not be separated from claims of the individuals injured. This made the rule of exhaustion of local remedies applicable.

> [V]iolations of the rights of the individual under [the Convention] may entail a violation of the rights of the sending state, and…violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under [the Convention]…The duty to exhaust local remedies does not apply to such a request.

An interesting question, however, is whether there is any easy formula to assist in distinguishing between mixed claims *per se* and claims that affect the State directly in terms of exhaustion of local remedies. This distinction is necessary since the boundaries between the two concepts may sometimes be very difficult to draw.

Draft article 14(3) on Diplomatic Protection articulates the test of preponderance as follows:

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

By implication therefore, a claim brought predominantly on the basis of a direct injury to the state is not subject to the requirement of exhaustion of local remedies.[639]

11 Existence of an international wrong

Apart from the exhaustion of local remedy rule, another condition for the exercise of diplomatic protection is the existence of an international wrong. Hence, it must be proved that the harm complained of is an international wrong, committed by the state itself or its agents by action or omission, and that the injury occurred within the jurisdiction of the state.[640] Thus, the injury must have been caused by the state itself – either by the executive**,** legislative or the judicial arm of government but not by a

[639] See the Iran *Hostages* case *supra* n 242.

private individual.[641] This condition involves the existence of an injury or wrong as defined by international law.[642] The term "international wrong" in this context refers to the breach of some duty which rests on a State in terms of international law and which is not a breach of a purely contractual obligation. The term "international delinquency" is often used to describe such wrongs.[643]

A state is only allowed to intervene if the wrongful act is contrary to international law. If the act or omission complained of is not contrary to international law, then the other state has no basis to interfere diplomatically, otherwise it will be regarded as an invalid interference in the domestic affairs of another state.[644] Despite the difficulty in establishing this rule however, it has been adopted by codification drafts,[645] court decisions,[646] and writers.[647]

The concept of wrong within this context covers situations in both public and private law.[648] Thus in the *Mavrommatis* case,[649] the PCIJ stated that the question whether the dispute originated in an injury to a private interest or not was irrelevant.[650] The law is that even an *ultra vires* act of a state, must be imputable to the state concerned.[651]

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640 Tiburcio *supra* n 26 37 & 42; Dugard *supra* n 1 282; Shaw *supra* n 175 696/7.

641 Tiburcio *Idem* 41.

642 This principle was reaffirmed in the *International Fisheries Co. Case (US v Mexico) 1931 4* UNRIAA, 71. Possible defences include force majore, consent, countermeasures in respect of an internationally wrongful act, fortuitous event, distress, state of necessity, and self defence. See the ILC draft on State Responsibility.

643 Shearer *supra* n 117 275.

644 Tiburcio *supra* n 26 44.

645 See the ILC Draft Art on Diplomatic Protection 2006 art 14.

646 See the case of *South Pacific Properties (Middle East) v Arab Republic of Egypt (*1993) 32 ILM 933.

647 Eg Wallace *supra* n 16 188; Tiburcio *supra* n 26 42; Dixon & McCorquodale, *Cases and Materials on International Law,* (2000) 429.

648 See Tiburcio *supra* n 26 42.

649 *Supra* n 79.

650 At 12.

651 See the case of *South Pacific Properties (Middle East) v Arab Republic of Egypt, supra* n 644 where the tribunal said *inter alia*:- 'the principle of international law which the tribunal is bound to apply is that which establishes the international responsibility of states. When unauthorized or *ultra vires* acts of officials have been performed by state agents under cover of their official character and if such an unauthorized or *ultra vires* acts could not be ascribed to the State, all State Responsibility would be rendered illusory.' See also *Youman's* claim (1926) 4 RIAA 110.

12 Continuous nationality

A further condition for the exercise of diplomatic protection is the rule of continuous nationality of the claimant. Traditionally, the rule's first requirement was that the individual must have the nationality of the protecting State at the time of the internationally wrongful act. The second requirement was continuity of that nationality either until the claim was presented by the protecting State, or settled on the international level.

Although some treaties for the protection of aliens make exceptions,[652] this rule has recurred in innumerable treaties,[653] and has come to be regarded as a rule of customary international law.[654] Hence, article 5(1) of the ILC Draft Articles on Diplomatic Protection provides that:

> A State is entitled to exercise diplomatic protection in respect of any 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.

This rule has been subjected to considerable criticism.[655] It has been said that, the rule of continuous nationality can leave an individual's claim unprotected if the claim has passed onto a holder of a different nationality between the time of the injury and the time of presentation of the claim.[656] This can occur *inter alia* through succession on death, an assignment of the claim to a non-national, or even as a consequence of change in the nationality of the injured individual.[657]

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652 Such as treaties of friendship, commerce and navigation.

653 This is the case for instance, in nearly all of the 200 lump sum agreements concluded after World War 11. See eg the September 10, 1952 Agreement between the Federal Republic of Germany and Israel (UNTS Vol 162 206).

654 Geck *supra* n 10 1055 See e.g the decision of the US International Claims Commission 1951-1954 in the *Kren* claim ILR vol 20 233 234.

655 See the comment of Judge Fitzmaurice in the *Barcelona Traction* case *supra* n 26 101-102; Wyler *La Regle Dite de la Continuite de la Nationalite dans le Contentieux International (*1990) and the *Official Records of the G A supra* n 1 36.

656 *Ibid.*

657 See however the ILC Draft Articles on Diplomatic Protection 2006 art 5 (3) which provides that "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".

Suggestions that this condition be abandoned have been resisted for fear of abuse that may lead to "nationality shopping" for the purposes of diplomatic protection.[658] Hence, draft article 5 retains the continuous nationality rule, but allows exceptions to accommodate cases in which unfairness might otherwise result.[659] State practice and judicial opinion, however, seem to favour the date of presentation of the claim over the date of settlement of the claim.[660] Thus article 5(2) of the ILC Draft Articles on Diplomatic Protection provides that:

> 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.[661]

Paragraph 2, therefore, makes an exception to the general rule in paragraph 1 provided three conditions are met. These are, first, the injured person has lost his or her former nationality; secondly, the new nationality was acquired for reasons unrelated to the bringing of the claim; and third, the new nationality was acquired in a manner not inconsistent with international law.

Paragraph 3 provides a further safeguard: A claim cannot be brought by the new state of nationality against a former state of nationality if the injury was incurred when the person was a national of the former state of nationality. Finally, in accordance with paragraph 4, a diplomatic protection claim lapses if the injured

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658 *Official Report of the General Assembly supra* n 1 36.

659 *Ibid.*

660 See Geck *supra* n 10 1055. This is in accordance with the 1965 Warsaw Resolution of the Institut de Droit International. Art 1(b) of that Resolution admits only one general exception to the continuous nationality rule; namely that for diplomatic protection given by states which have recently become independent to those of its nationals who before independence, had the nationality of the former colonial power. Geck *ibid*.

661 As noted by Dugard in his first report *supra* n 9, the traditional position had the potential to cause injustice where an individual had a *bona fide* change of nationality subsequent to the injury but unrelated to the bringing of the claim. Besides, the rule was difficult to reconcile with the Vattelian idea that an injury to the national is an injury to the State itself – if so, the claim would vest in the State of nationality at the time of the injury and could not be affected by the subsequent conduct or change of status of the individual concerned. See Crawford *supra* n 10 30.

person acquires the nationality of the respondent state after the date of the presentation of the claim.[662]

13 The nature of diplomatic protection

What is the nature of diplomatic protection and in what circumstances will it be exercised? State practice has shown that some states abuse rules relating to diplomatic protection with the adverse consequence that, diplomatic protection is often exercised in unsuitable situations.[663] It has, for instance, been exercised as a pretext for political gains or vendetta.[664] This has attracted criticism calling for its complete abolition.[665] While it is correct that on several occasions, states abuse the rules relating to diplomatic protection by wrongfully invading territories belonging to other nations or otherwise under the pretext of exercising diplomatic protection, the invasion does not invalidate the doctrine. [666]

The ideal situation where diplomatic protection should be exercised is when it is absolutely necessary. It should be exercised only as a last resort and as a legal duty imposed on a state to salvage the fortunes of its nationals abroad. It should be embarked upon only where local remedies are not available or where they are available, are not effective or are contrary to international law.[667] The idea is to protect. Hence the name - diplomatic protection. Diplomatic protection should therefore not be regarded as a possible remedy which is resorted to every time an individual is harmed in a foreign country.[668] If the event does not "shock the conscience of mankind"[669] and is settled fairly and squarely, then the other state

662 See *Loewen Group Inc.* v *USA* 7 ICSID Rep 442 485 par 225.
663 Tiburcio *supra* n. 26 45.
664 *Ibid.*
665 *Ibid*. See also Garcia-Amador, Sohn & Baxter, *supra* n. 26 3. The Argentine Jurist Carlos Calvo was one of the strongest critics of this doctrine. This gave birth to the "Calvo Doctrine." See Tiburcio *supra* n 26 45-46. Reference should also be made to the Declaration adopted by the Inter-American Conference on Problems of War and Peace (Mexico City 1945) decrying the misuse of diplomatic protection. See Tiburcio *supra* n 26 43.
666 Tiburcio *idem* 44.
667 According to the principles laid down in the *Mavrommatis Palestine Concession* case *supra* n 36 the State intervenes in order to uphold respect for international law.
668 Tiburcio *supra* n 26 44.
669 *Robert's Claim supra* n 55.

should not interfere. Otherwise the interference may be seen as invalid intrusion in the domestic affairs of another sovereign state.[670]

13.1 Is diplomatic protection a right or an obligation?

A right is a claim, an entitlement, a demand or a protected interest.[671] When a person claims that he or she has a right to something, it means that he or she is entitled to it.[672] Several judicial *dicta* from the PCIJ and the ICJ create the impression that diplomatic protection is a right.[673] Many writers also refer to diplomatic protection as a right. In *Mavrommatis Palestine Concession Case,*[674] for example, the PCIJ pointed out that:

> By taking up the case of one of its subjects, and by resorting to diplomatic action or international judicial proceedings, on his behalf, *a state is in reality asserting its own right, its right* to ensure in the person of its subject, respect for the rules of international law.[675]

In the *Barcelona Traction* case,[676] the ICJ, *inter alia,* said*:*

> 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 [emphasis supplied].[677]

In the *Panevezys-Saldutiskiis Railways* Case,[678] the same court decided in the following terms:

> This right is necessarily limited to intervention [by a state] on behalf of its own nationals because in the absence of a special agreement, it is the bond of

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670 See Tiburcio *supra* n 26 44.
671 See Dias *Jurisprudence* (1991) 305.
672 *Ibid.*
673 See cases cited *infra.Mavrommatis Concessions case supra* n 36 6; *Panevezys-Saldutiskiis Railway* case *supra* n 81 18; *Barcelona Traction* case *supra* n 26 45.
674 *Supra* n 36.
675 At 12. See also *Pannevezys-Saldutiskiis Railways* case (*Greece* v *UK*) *supra* n 81 308.
676 *Supra* n 26.
677 At 44.
678 *Supra* n 81.

> nationality between the State and the individual which alone confers upon *the state the right* of diplomatic protection [679]

Garcia-Amador states *inter alia* that:

> Traditional international law had recognised *a State's right* to bring a claim against another State in respect of the injury caused to the person or property of its nationals. The right of 'diplomatic protection,' which is the name usually given to this prerogative, therefore, proceeds from a State's right to protect its nationals abroad.[680]

If diplomatic protection is a right, why do contemporary thinking and draft codifications on the subject not reflect this idea? Neither the current nor the past Draft Articles on Diplomatic Protection refer to it as a right. Article 1 of the ILC Draft Articles on diplomatic protection 2006 simply defines diplomatic protection as

> 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

Draft Article 1 does not refer to it as a right.[681] If it is accepted that diplomatic protection is a right according to those judicial *dicta* and writers, it may be asked in whom is this right vested? Does the right belong to the State that espouses the claim of the individual, or in the national who is injured?

It appears to be of necessity to distinguish the right of the state from that of the individual.[682] On this point, two schools of thought have emerged among scholars

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679 At 16.

680 See Garcia-Amador *supra* n 26.

681 The Draft Articles on Diplomatic Protection 2006 art 1 makes no attempt to provide a complete and comprehensive definition of diplomatic protection. Instead it merely describes the salient features of diplomatic protection. See the commentary to art1 in the *Official Records of the G A supra* n 1 24. See also the Draft Articles on the International Responsibility of States for Injuries to Aliens art 1.

682 Dugard: First Report to the ILC on Diplomatic Protection ILC 52nd Session 2000 A/CN 4/506 and Addendum notes that the identity of the holder of the right of diplomatic protection has important consequences. According to him, "If the holder of the right is the state, it may enforce its rights irrespective of whether the individual himself has a remedy before an international forum. If on the other hand, the individual is the holder of the right, it becomes possible to argue that the State's right is purely residual and procedural, that is, a right that may only be exercised in the absence of a remedy pertaining to the individual."

and legal commentators.[683] The first school of thought maintains that since an individual has no standing in international law, and has no access to international courts or tribunals, the state, when exercising diplomatic protection, is merely representing the individual at the international level.[684] The second school is of the view that by protecting its nationals abroad, the State is merely defending its own right.[685] It would appear that the second view is more popular and is more widely accepted. As a result, the institution of diplomatic protection has been almost unanimously understood to be a right of the State of the injured national and not that of the national who has been injured.[686]

Thus the individual has no right to diplomatic protection in international law. This gives rise to an interesting question; namely, if diplomatic protection is a right, where is the correlative duty? The general rule of law and jurisprudence is that where there is a right there must be a corresponding duty. In whom is the corresponding duty vested?

13.2 Is there a duty or obligation to protect?

The correlative of a right is a duty. In terms of diplomatic protection, however, the general principle of customary international law is that a state has the right but not the duty to grant diplomatic protection to its nationals.[687] International law however leaves the decision whether to exercise diplomatic protection or not to the domestic

683 See Geck *supra* n 10 1056-7.

684 This understanding is espoused by Lauterpacht and apparently by Garcia Amador. See Tiburcio *supra* n 26 63.

685 Anziliotti *Corso Di Diritto Internazinale* (1955) 423 expresses the same view point in a very objective manner when he said "International responsibility does not derive from the fact that an alien has suffered injury, … The alien as such has no rights against the State, save in so far as the law confers them upon him. The reparation sought by the State in cases of this kind (denial of justice) is not therefore, reparation for the wrong suffered by individuals, but reparation of the wrong suffered by the State itself." It would appear that Brierly *The Law of Nations: An Introduction to The Law of Peace* (1955) 218 changed his view from the traditional concept as regards this subject when he argued that "A State has in general an interest in seeing that its nationals are fairly treated in a foreign state, but it is an exaggeration to say that whenever a national is injured in a foreign State his State as a whole is necessarily injured too."

686 See the cases cited above. 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 legal fiction reemphasizes the fact that an individual is not a subject of International Law. See the *Official Report of the G A supra* n 1 25.

687 *Barcelona Traction* Case *supra* n 26. See also Geck *supra* n 10 1051.

law of each state.[688] There are thus considerable differences in state practice.[689] In Nigeria for example, although there is no constitutional provision for diplomatic protection under the 1999 Constitution of the Federal Republic, nevertheless, when situations demanding diplomatic protection arise, the State responds to them. Similarly in South Africa, in the absence of any constitutional provision for diplomatic protection, some judicial pronouncements have held that it is not a constitutional duty. Nevertheless, some dissenting opinions have also been expressed to the contrary.[690]

In *Kaunda* v *President of the Republic,*[691] for instance, an order was sought to compel the South African government to intervene diplomatically on behalf of a group of South African nationals who were arrested in Zimbabwe *en route* to Equatorial Guinea allegedly to overthrow the government of that state, in a *coup d'état.* Chaskalson CJ, reading the majority judgment, held that the government could not be compelled because there was no constitutional duty on the part of the state to exercise diplomatic protection on behalf of the applicants.[692] In a dissenting judgment however, O'Regan J. proposed that the government be ordered "to take appropriate steps" to provide diplomatic protection to those affected, [693] because the government was bound to do so.[694]

Vattel was of the view that there is a general duty on the part of the state to exercise diplomatic protection on behalf of its nationals. According to him,

> Whoever ill treats a citizen indirectly injures the state which must protect the citizen. The sovereign of the injured citizen must avenge the dead and if possible, force the aggressor to give full satisfaction or punish them, since otherwise the citizen will not obtain the chief end of civil society which is protection.[695]

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688 Geck *ibid.*
689 *Ibid*.
690 See the case of *Kaunda* v *The President of Republic of South Africa* 2005 (4) SA 235 (CC), ILM vol 44 (2005) 173. and *Van Zyl v Government of the RSA supra* n 556 See also chapter 6 *infra* for detailed discussion of these and other cases.
691 *Supra* n 688.
692 Par 50.
693 *Idem* 271.
694 *Idem* 238.
695 Vattel *supra* n 82 136.

This duty–oriented concept of diplomatic protection is re-enforced by the social contract theory propounded by such political philosophers as Hobbes, Locke and Rousseau.[696]

Garcia-Amador is convinced that diplomatic protection should be a duty,[697] but regrets that "history and international practice show that it has never been treated as such." According to him,

> Except for a very few writers, the bulk of legal opinion has never considered diplomatic protection as a duty of the State of nationality. Borchard himself describes it rather as moral duty 'which is unenforceable by legal methods'…neither national nor international practice has recognized it as a duty'.[698]

Shaw, like Vattel, maintains that

> "A state is under a duty to protect its nationals, and it may take up their claims against other states"."[699]

However, according to him,

> "There is under international law no obligation for states to provide diplomatic protection for their nationals abroad".[700]

This contradiction in terms compels us to distinguish between duty and obligation. The dictionary defines duty as "what one is bound to do" while obligation is defined as "the binding power of a promise."[701] The two words are often used interchangeably. However, duty within this context can only mean legal obligation, while "no obligation" can only mean that the State has no legal duty, or has a discretion or liberty to exercise or not to exercise diplomatic protection.

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696 See p 4 *supra* n 19.
697 Garcia-Amador *supra* n 26 4.
698 *Ibid.*
699 Shaw *supra* n 175 722.
700 *Ibid.* See also *HMHK* v *Netherlands* 94 ILR 342, & *Commercial F SA* v *Council of Ministers* 88 ILR 691.
701 See the *Large Print English Dictionary supra* n 7 104 & 236 respectively.

14 Discretionary factors influencing diplomatic protection

In the *Barcelona Traction* case,[702] the ICJ held that diplomatic protection is a mere discretion. According to the court,

> 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 remains in this respect a discretionary power[703]

The court stated that such discretionary power may be determined by considerations of a political or other nature unrelated to the particular case.[704]

The question of discretion came up in that case because Canada, the country of nationality of Barcelona Traction Company had exercised diplomatic protection on behalf of the company to begin with, but had withdrawn from the case. According to the Court:[705]

> At a certain point the Canadian government ceased to act on behalf of Barcelona Traction for reasons not fully revealed

The Court noted further that Canada's refusal to continue the exercise of diplomatic protection was a deliberate choice.[706]

Canada's withdrawal notwithstanding, Belgium lacked the capacity to bring the action since the general rule on the subject did not entitle the Belgian government to

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702 *Supra* n 26.

703 At 44. Discretion is the freedom, liberty or privilege to act or not to act in a given situation. See Dias *supra* n 669 305. In contrast to the ICJ *dictum* in *Barcelona Traction* case, Dugard: First Report on Diplomatic Protection *supra* n 9 par 60, proposed a draft art 3 that reads as follows "The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right." Draft art 4 then qualified this by imposing a limited duty to the exercise of diplomatic protection where the injury resulted from a grave breach of a norm of *jus cogens.* See First Report (par 74). Draft art 4 was, however, rejected as going beyond the permissible limits of progressive development. For the debates see *Official Records of the G A Supplement* No 10 (A/55/10) pars 447-56. Consequently, references to a duty or discretion to exercise diplomatic protection were omitted from the Draft Articles. See Crawford *supra* n 10 26.

704 *Ibid* 44.

705 Par 77.

706 *Ibid.*

put forward a claim.[707] The ICJ then pronounced the well-known and oft-quoted rule governing the extent to which diplomatic protection may be exercised:[708]

> 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.

As was said by the Court, a State's discretionary power may be determined by "considerations of a political or other nature unrelated to the particular case."[709] Other factors that may influence the exercise of diplomatic protection include economic, social, ideological, or even military factors.[710] These may have either positive or negative effects.

The economic system, economic activities and the attitude of the State towards individual rights in general may influence its basic attitudes towards diplomatic protection.[711] A state which exports few goods, or services and little capital, will probably be more reserved towards the institution of diplomatic protection than a state which exports on a large scale because this may affect its trade relations.[712] A state which reserves economic activities abroad mainly or even exclusively for itself[713] may hardly exercise diplomatic protection for obvious reasons, in contrast to a state which leaves these activities to private individuals.[714]

Furthermore, it may be difficult to establish whether the defendant State has violated an international obligation against the plaintiff State. [715] The way to a peaceful and binding clarification may be long and stony. Even if a rule of international law has

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707 Par 92.
708 Par 78.
709 *Ibid* 44.
710 See Geck *supra* n 10 1047.
711 A state which restricts the individual rights of its nationals on the domestic front, including the right to travel abroad freely, may find it undesirable to have such rights granted to foreigners through international treaties and have these rights secured through diplomatic protection. *Geck ibid* 1048.
712 I*bid*.
713 Such as socialist States for instance.See Geck *ibid.*
714 I.e capitalist States. Diplomatic protection of nationals abroad developed and expanded in scope as a result of the increase in the number of nationals abroad as a consequence of increase in commercial activities. See Geck *supra* n 10 1047.
715 *Ibid*.

been violated, and all other prerequisites for diplomatic protection have been met,[716] it may still be very hard or even impossible to obtain reparation because the defendant state may refuse any settlement, and the protecting state may be too weak militarily, politically, or economically to use force in order to obtain reparation under the circumstances. [717]

Even if the prospect of success in the exercise of diplomatic protection appears likely in the individual case, the price required may be too high.[718] For instance, the defendant state may pay the demanded damages, but walk out of an alliance, prohibit business transactions, or refuse a loan, all detrimental to the vital interests of the protecting state. The defendant state may muster a majority in an international Organization against the protecting state in a decision of paramount importance to the latter.[719]

Discretionary factors influencing the exercise of diplomatic protection may have a positive or negative impact. On the positive side, the fear of adverse publicity at home may compel a state to exercise diplomatic protection at all costs. In the Iran Hostage case,[720] for instance, the detention of 52 US diplomatic and consular staff in Tehran in 1979 was a great embarrassment to the government and people of the US. The US government had to take action. The US did not only take the matter to the ICJ, but also embarked upon a failed attempt to rescue the diplomats.[721]

Another good example was the Israeli raid on Entebbe Airport in Uganda in 1976.[722] In that incident, the Israeli government undertook a rescue mission to save the lives

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716 Such as nationality, the exhaustion of local remedies, or the continuity of nationality conditions for instance.

717 Geck *supra* n 10 1047.

718 *Ibid*.

719 *Ibid*. Other factors in this connection are that the defendant state may accept diplomatic protection in principle, but believes that some prerequisite is missing in the specific case at hand. Worse still, the defendant state may view the exercise of diplomatic protection as an expression of political antagonism or of wholesale distrust of its legal system. Besides, a number of states view diplomatic protection as a possible pretext by stronger states for economic coercion, intervention, and intrusion into their domestic affairs. See Geck *ibid*.

720 *Supra* n 242.

721 On April 24th 1980, a commando raid to rescue the hostages was aborted. See Ferencz *Enforcing International Law- A way to World Peace* vol 2 (1983) 475. See also par 93 of the 1980 ICJ Judgment *supra* n 242.

722 "Operation Thunderbolt" See en.wikipedia.org/wiki/Operation_Thunderbolt (accessed 2010-03-30).

of 103 Israeli nationals who were hijacked by Palestinian and German militants. The adverse publicity generated by the incident at home compelled the Israeli government to act. Consequently, Israeli commandos stormed Entebbe Airport and released the hostages.[723]

On the negative side, the state exercising diplomatic protection can hardly overlook the possibility of reciprocity or *quid pro quo*. The protecting or claimant state of today may become the defendant state of tomorrow.[724] That notwithstanding, however, if its cause is just, the protecting state need not be intimidated by any fear of retaliation by the responsible State. The conclusion is, therefore, that diplomatic protection is a right which a state has a discretion *sui generis* [725] to exercise because an injury to a national is deemed to be an injury to the state itself.[726] There is, however, no duty on the part of the state to exercise it.[727.] Rather, the state reserves the discretion to exercise diplomatic protection on behalf of its nationals.[728]

In the *Barcelona Traction* case,[729] it was said that precisely what action to take, what form of diplomatic protection to extend, lay within the discretion of the claimant state. If it decides to intervene and thereby make the claim its own, it may espouse the claim through informal discussions with the respondent state, make a formal diplomatic protest, or exert various economic and political pressures to encourage a settlement.

It must, however, be borne in mind as Tiburcio has pointed out, that

> the exercise of diplomatic protection may involve resort to all forms of diplomatic intervention, both amicable and non-amicable, for the settlement of

723 *Ibid.*
724 See Geck *supra* n 10 1047.
725 *Panevezys-Saldutiskiis Railways* Case *supra* n 81; *Mavrommatis Palestine Concession* Case *supra* n 36. See also Tiburcio *supra* n 26 58/9; Dugard *supra* n 1 284*, Official Records of the General Assembly supra* n 1 25.
726 *Mavrommatis Palestine Concession* case *supra* n 36. See however Dugard *supra* n 1 290 who submits that there is growing support for the proposition that there is some duty on States to afford diplomatic protection to nationals who are subjected to serious human rights violations in foreign states under domestic administrative and constitutional rules rather than International Law.
727 *Barcelona Traction* case *supra* n 26.
728 *Ibid.*
729 *Supra* n 26.

disputes.[730] These may range from diplomatic negotiation, good offices, resort to an international tribunal or even to threats or actual use of force.[731.]

15 Treatment of aliens[732]

Although there is no obligation on the part of any state to admit aliens into its territory, international law demands that once they are admitted, they should be treated fairly in accordance with civilized standard of behaviour.[733] The standard of treatment to be accorded to aliens is however controversial among states.[734] While some states argue that the standard is a national one, requiring states to treat aliens as they treat their own nationals,[735] others maintain that aliens should be treated in accordance with the "international minimum standard."[736]

The national standard of treatment is the standard of treatment advocated by certain Latin American states for the treatment of foreigners.[737] This standard stipulates that aliens are entitled to the same treatment granted to nationals and nothing more.[738] The international minimum standard of treatment is the basic or barest minimum standard of human treatment that should not be violated in relation to foreigners.[739] To violate this international standard, however, a state's treatment of foreigners must

730 Tiburcio *supra* n 26 43.

731 *Ibid.* Examples of such threats or use of force include the threatened intervention by the UK in Iran in 1946 & 1951, the Cairo Riots of 1952 when the UK threatened to intervenue in Egypt; the Anglo-French intervention in Egypt in 1956; the Belgian intervention in the Congo in 1960; the evacuation of British citizens resident in Zanzibar in 1964, the US intervention in the Dominican Republic in 1965, the Mayaquez incident when Cambodia seized a US ship which was in Cambodian territorial waters on an espionage mission and the US sent armed forces in 1975; the evacuation of U.S citizens from Lebanon in 1976; the Israeli Raid on Entebbe in 1976 when Israelis entered Uganda on a military operation and freed its hostages; the US attempt to free American hostages held in Iran by military force in 1980 and the UK intervention in the Falkland Islands in 1982. Other examples include the U.S intervention in Grenada in 1983; the proclamation of the Turkish Republic of Northern Cyprus in 1983 and the U.S attack on Libya in 1986.

732 Or the treatment of foreign nationals.

733 *Barcelona Traction* Case *supra* n 26 par 33. This position was endorsed by the GA in 1985 in Res 40/144.

734 See Harris *supra* n 385 564 and Dugard (2005) *supra* n 1 297.

735 Ie Latin American & developing States.

736 Ie Western States.

737 See Harris *supra* n 385 734; Wallace *supra* n 16 199 & Tiburcio *supra* n 26 45.

738 Tiburcio *ibid*

739 See UN Res 40/144 of Dec 1985 and the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families 1990 *supra* n 65.

fall so short of established civilised behaviour that "every reasonable and impartial man would readily recognize its insufficiency."[740]

15.1 The national standard of treatment

The national standard of treatment was a concept brokered by Latin American countries during the last two centuries.[741] This concept is still in vogue today and is maintained by new and developing States.[742] It is based on absolute equality of treatment.[743] This concept would obviously be advantageous to the non-national if applied evenly. The problem however, is that international law does not regulate a state's treatment of non-nationals in all activities.[744]

Just as the national standard of treatment has its advantages, it also has its disadvantages. Its disadvantages are however obvious. One of the disadvantages of this concept is that a state could subject a non-national to inhuman treatment and justify such treatment on the grounds that its own nationals are similarly treated.[745] The argument is that a foreign national who seeks entry into the territory of another state must take things as he or she finds them in the country of his or her sojourn or residence.[746] It was accordingly argued that it would be sufficient if he or she was treated on the basis of equality with the citizen of that state in respect of his or her personal or property rights.[747]

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740 *Neer Claim supra* n 34 213.

741 I,e the 19th and early 20th centuries. See Wallace *supra* n 16 199. The Latin American States felt that the international minimum standard concept was used as a means of interference in internal affairs of other states. See e.g Roy, 'Law of Responsibility; Castaneda, "The Undeveloped Nations and the Development of International Law," 15 *International Organisations* (1961) 38 & Anand *New States and International Law* (1972) 38.

742 Wallace *Ibid.*

743 See Tiburcio *supra* n 26 45. The doctrine of absolute equality of treatment received serious criticism from writers like Borchard. See "The minimum standard of the treatment of Aliens" (1939) *Am Society of Int Law - Proceedings* 51 56. He argued that this equality was purely theoretical and did not work in practice, because no state grants absolute equality or is bound to grant it. But the doctrine was strongly supported by Calvo, an Argentinean jurist, who in a work *Le Droit International Theorique Pratique* 350-51 published in 1896, became known for questioning the concept of diplomatic protection.

744 Wallace *supra* n 16 199. Eg political activities.

745 *Ibid*.

746 Sen *supra* n 52 337.

747 *Ibid.*

This train of thought seemed to have gathered momentum in the years following the establishment of the UN and the emergence of new nations in Africa and Asia.[748] It was felt that in the context of the Charter of the UNO and the UDHR,[749] every state was expected to accord to its own citizens a certain standard of treatment consistent with a humane sense of justice, and that the national standard of treatment would therefore be appropriate even where foreign nationals were concerned.[750]

However, the adoption of a national standard without any guidance from international patterns as earlier pointed out, could possibly lead to absurd situations namely, that, if nationals can be expropriated without indemnity or compensation, then, the same could happen to aliens. Likewise, if nationals could be jailed without proper trials, then the same could also happen to aliens.[751]

15.2 The minimum international standard of treatment

The minimum international standard of treatment emerged in direct opposition to the national standard of treatment theory.[752] Though not easy to define, the gist of the theory [753] was based on the principle that a state was bound to grant a certain minimum standard of treatment to foreigners, irrespective of the manner in which that state treats its own nationals, in line with the international concept of justice. The interpretation of this concept was however, that, the host country was bound to ensure that certain minimum safeguards were put in place for the personal liberty and property rights of aliens. Failure to do so, would amount to negligence of duty towards the foreigners and the receiving state would be answerable to the home state of the aggrieved alien, which could exercise diplomatic protection on his or her

748 *Ibid*.

749 Although the UDHR was produced as a non- legally binding instrument, it is now universally acknowledged as constituting Customary International Law.

750 Sen *supra* n 52 337. Another view was that as long as certain fundamental human rights were observed, the receiving state would not incur responsibility to the home state of the alien.

751 See Tiburcio *supra* n 26 45.This theory can go as far as admitting that the State could kill the individual, torture him, proscribe him for any reason that the State believes right whether the individual is a national or not, as long as he is inside the State, and within its jurisdiction. As already said, this doctrine emanated from Latin American countries trying to encourage immigration and investment at the end of the 19th century and the beginning of the 20th century, promising aliens equality of treatment with their nationals.

752 Tiburcio *ibid* 50.

753 *Ibid.* See also Wallace *supra* n 16 199.

behalf.[754] It would be no excuse to plead that the the foreigner was treated in the same way as its own nationals.[755]

Traditional international law thus recognised a state's right to bring a claim against another State in respect of the injury caused to the person or property rights of its nationals in violation of the minimum international standard of treatment.[756] As the PCIJ stated in the *Mavrommatis* Case[757]

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[758]

The minimum international standard of treatment carried with it the expectation that the receiving state should take steps to safeguard both the personal and property rights of a foreigner not only against governmental actions but also against mob violence.[759] It was therefore understood that a state would be held vicariously responsible for any harm or injury inflicted on the person or property rights of an alien as a result of the application of state laws, or by ill-treatment at the hands of state organs, or when such harm or injury was suffered at the hands of private individuals in breach of this minimum international standard of treatment. If the receiving state failed to take action, then, the home state of the injured or aggrieved alien was entitled to exercise diplomatic protection and to demand for reparation from the offending state for the wrong or injury caused to its national.[760]

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754 Sen *supra* n 52 337.

755 *Idem* 334/5. For example, the rule of "minimum standard" contemplated that the property of an alien could not be nationalized or expropriated without payment of just and appropriate compensation even if a state does that to its own nationals. Again in the matter of personal liberty, it would be expected that a state should not act in a manner which may amount to a "denial of justice" to the alien such as by subjecting him to arbitrary arrest or detention or by denying him access to the court of justice. See for instance *Roberts Claim supra* n 55.

756 Garcia Amador *supra* n 26 1.

757 *Supra* n 36.

758 At 12.

759 Sen *supra* n 52 335.

760 *Ibid*. See *Neer* claim *supra* n 34. See also *Garcia case* (1926) 4 RIAA 199; & *Robert's* claim *supra* n 55 77. Sen *supra* n 52 335.

15.3 Human rights standard of treatment[761]

After the Second World War, the human rights standard for the treatment of aliens emerged.[762] The difference between the human rights standard and the previous standards[763] was that the human rights standard was based on the Charter of the UN, particularly articles 55 and 56, whereas the others were not. Article 55 of the UN Charter provides that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples, the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 56 stipulates that:

> All members [of the United Nations] pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in article 55.

As Wright has correctly pointed out, the word "pledge" as used in article 56 of the Charter of the UN, indicates the acceptance of an international legal obligation to protect human rights.[764] This view was confirmed by the ICJ in its Advisory Opinion on Namibia in 1971.[765]

Thus all members of the UN are legally bound to observe and respect human rights and fundamental freedoms, some of which are spelt out in the Charter of the UN itself [766] and others in subsequent instruments.[767]

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761 See p 10 n 59 *supra.*
762 See Lee *Consular Law and Practice* (1991) 130.
763 I.e the national standard, and the minimum international standard of treatment of aliens.
764 See Wright: "The Strengthening of International Law" 98 *Recueil des Courts* [1980] 111 1 182.
765 When it said *inter alia:*
Under the Charter of the UN, the former Mandatory had *pledged* itself to observe and respect in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. See Lee *supra* n 760 131.
766 Eg the treatment of "all" people without distinction as to race, sex, language or religion.

16 Synthesis of the standards

Both the "international standard of treatment" and the "national standard" of treatment of aliens have been reformulated and integrated into the new legal rule – the human rights standard, which incorporates the essential elements and serves the main purposes of both.[768] The basis of this synthesis is the "universal respect for, and observance of human rights and fundamental freedoms" referred to in the Charter of the UN and in other general, regional and bilateral instruments.[769]

In relation to diplomatic protection actions, however, a defendant state can no longer be heard to plead in mitigation of damages that it observed either the "national" or the "minimum international" standard of treatment with regards to the injured alien in any action brought for diplomatic protection.[770] The ultimate question is whether the human rights standard was observed.

The object of the "internationalization" of these rights and freedoms is to ensure the protection of the legitimate interests of the individual, irrespective of his or her nationality.[771] Whether the person concerned is a national or a foreigner is immaterial, since human beings as such, are under the direct protection of international law.[772]

Garcia-Amador has, however, warned that just because these two traditional principles have been synthesised does not necessarily imply that states must ignore their essential elements and their basic purposes.[773] On the contrary, the principles

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767 Although the Charter does not spell out all human rights in detail, subsequent instruments, principally the UDHR and the two International Covenants on Civil and Political Rights and that on Economic, Social, and Cultural Rights, have supplied greater legal precision to the general principles. See Steiner *et al supra* 19 138

768 Garcia-Amador *et al supra* n 26 4.

769 *Ibid.* On the point of the merger of the two standards, Dugard *supra* n 1 298 states that "in considering the question of whether an alien has been mistreated, international tribunals may accordingly turn to the jurisprudence of the European Court of Human Rights and similar human rights tribunals for guidance. In this way, the international minimum standard for the treatment of aliens and the human rights standards for the treatment of a state's own nationals have merged."

770 Garcia-Amador *et al supra* n 26 4.

771 *Ibid.*

772 *Ibid.*

773 *Idem* 5.

have only been synthesised and blended into one single standard – the human rights standard.[774] To press a case for either of these standards would be tantamount to ignoring one of the political and legal realities in the contemporary world situation.[775]

The human rights standard of treatment has thus brought greater precision to the treatment of aliens.[776] It is submitted that if this standard is respected and followed by states it will replace the two earlier standards.[777] Accordingly, the human rights standard of treatment has become the contemporary yardstick for measuring the treatment not only of aliens, but of all individuals in international law - nationals and non nationals alike.[778]

17 Codification of diplomatic protection

At its first session in 1949, the ILC included the topic of "State responsibility" in its provisional list of topics of international law, selected for codification.[779] In 1953, the General Assembly requested the Commission to undertake the codification of this body of law.[780] Garcia–Amador was appointed Special Rapporteur on the topic.[781] The drafting of articles on diplomatic protection was originally seen as belonging to the study of State Responsibility.[782]

State Responsibility is defined as the obligation imposed on a state by international law for the violation of international obligation by acts or omissions directed towards the nationals of another state, as reparation for injuries suffered by the State itself or

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774 *Ibid* From a study of Human Rights instruments in which these rights and freedoms have received international recognition, and of the two great declarations and other international instruments defining these rights and freedoms, it has become evident that all of them accord a measure of protection which go well beyond the *minimum international standard* of protection which the 'international standard of justice' was meant to ensure to foreigners. On the other hand the equality of treatment principle is also covered in this recognition.

775 *Ibid.*

776 The national standard was subjective, the minimum international standard was not easily ascertainable, whereas the human rights standard is objective.

777 *Ibid* 132.

778 See Dugard *supra* n 25 76. As already pointed out, the human rights standard is based on the Charter of the UN, the UDHR, and all subsequent international, regional and national human rights instruments. Garcia Amador *et al supra* n 26 6.

779 See *the Official Records of the G A 4th Sess Supp No 10 par 16 UN. Doc. A/925* (1949).

780 Res 799 (VIII) (1953) 12 07 *Official Records of the General Assembly 8th Sess Supp No 17 52.*

781 Garcia-Amador *et al supra* n 26 viii.

782 See the *Official Records of the G A supra* n 1 22.

its nationals.[783] The Law of State Responsibility for Injuries to Aliens was, therefore, the starting point for the codification of diplomatic protection.[784]

17.1 The Law of State Responsibility for injuries to Aliens

Garcia-Amador submitted six reports to the ILC.[785] In his reports, he incorporated a number of draft articles on "Responsibility of the State for Injuries Caused in its Territories to the Person or Property of Aliens."[786] Subsequent attempts at the codification of the Law of State Responsibility paid little attention to diplomatic protection, and the final draft articles on this subject expressly stated that the two topics central to diplomatic protection, that is to say, nationality of claims, and the exhaustion of local remedies – would be dealt with more extensively by the Commission in a separate undertaking.[787]

Consequently, Dugard of South Africa was appointed as a Special Rapporteur by the ILC to draft a set of articles on Diplomatic Protection along the lines indicated above – nationality of claims, and the exhaustion of local remedies.[788] The draft articles on Diplomatic protection by Dugard as adopted by the ILC in 2006, is now with the UNGA, pending its adoption as a treaty *via* an international Convention.[789]

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652 It should be noted that the definition of Diplomatic Protection resembles that of State Responsibility. But they are not the same. The concept and definition of State Responsibility is broader than the definition of Diplomatic Protection or State Responsibility for injuries to aliens.See Tiburcio *supra* n 26 37.

784 See Dugard *supra* n 1 282. See also Garcia-Amador *et al supra* n 26 5 and the *official Record of the G A supra* n 1 22-23.

785 Garcia Amador *et al supra* n 26.

786 See *Official Records of the G A supra* n 1 22. Garcia-Amador's *Draft Convention on the International Responsibility of States for Injuries to Aliens* has 40 articles divided into 9 sections A-I. Section A deals with General Principles and Scope; Section B deals with Wrongful Acts and Omissions; Section C deals with Injuries; Section D deals with Attribution; Section E deals with Exhaustion of local remedies; Section F deals with Presentation of claims by aliens; Section G deals with Espousal and presentation of claims by States; Section H deals with Delay, while Section I, deals with Reparation See *Recent Codification of the Law of State Responibility for Injuries to Aliens supra* n 26 240.

787 *Official Records of the G A Fifty-sixth Session, Supplement* No 10(A/61/10) 25.

788 *Ibid.* See also Dugard *supra* n 1 282.

789 They are nineteen in number. Art1 defines diplomatic protection. Art 2 deals with the right to exercise diplomatic protection. Art 3 deals with the question of nationality, and provides that the state entitled to exercise diplomatic protection is the state of nationality. Art 4 deals with natural persons; while art 5 deals with continuous nationality of a natural person. Multiple nationality and claims against a third State are stipulated in art 6, while the issue of multiple nationality against a State of nationality is dealt with in art 7. Art 8 deals with stateless persons and refugees, art 9 deals with the state of nationality of a corporation. Arts 10 & 11 provide for the continuous nationality of a corporation and the protection of shareholders. Art 12 makes provision for direct

18 Should diplomatic protection be used to protect human rights?

The answer to the question whether human rights should be protected by way of diplomatic protection is obviously in the affirmative. As earlier indicated, human rights are those rights which are inherent in human nature and without which man cannot live as human beings. The truth is that these rights are so vital and essential to the very existence of the individual in the society that all efforts must be mustered to protect them. In the absence of human rights, human beings cannot fully develop and use their human qualities, their intelligence, their talents and their conscience in order to satisfy both their spiritual as well as physical needs.

Quite apart from the fact that human rights are inherent in human nature, there is no doubt that human rights are a necessary component of any democratic society. The protection of human rights is therefore necessary for democracy. A nation's human rights record has become the yardstick by which its democratic status is measured as already pointed out. Accordingly, democracy is an ideal towards which all civilised nations are striving. In order to realise that ideal or make any recognisable progress in that direction, societies have to ensure protection of human rights of their members.

Fortunately, diplomatic protection has become an important legal tool for the protection of the rights of nationals of a state. Since foreign nationals are particularly vulnerable groups, it is submitted that one of the most important mechanisms that can be used to promote and protect their rights generally, is diplomatic protection.[790] Under the prevailing impact of globalisation, modern developments in technology, modern economic exigencies, and the glaring failure of multilateral human rights treaties to protect the rights of foreign nationals as was envisaged, the need arises for states to adopt as one of their cardinal national policies, the use of diplomatic

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injury to shareholders. Art 13 deals with other legal persons, art 14 deals with the exhaustion of local remedies. Art 15 provides exceptions to the local remedies rule, while art 16 deals with actions or procedures other than diplomatic protection. Art 17 deals with special rules of International Law relating to diplomatic protection, art 18 with the protection of a ships' crew, and art 19 stipulates the practice to be followed by States entitled to exercise diplomatic protection.

790 See the Judgment of O'Regan J in *Kaunda's* case *supra* n 688 par 216.

protection, for safeguarding the human rights of their nationals in foreign countries.[791]

Gracia Amador was the first to advocate for the use of diplomatic protection to protect human rights of aliens. Besides, in his first report to the ILC on diplomatic protection, Dugard also advocated for the use of diplomatic protection not only to protect human rights, but also for an obligation to be imposed on states to protect the human rights of their nationals abroad, particularly, where norms of *jus cogens* in international law are violated.[792]

> It is not unreasonable therefore to require a State to react by way of diplomatic protection to measures taken by a State against its nationals which constitute grave breach of a norm of *jus cogens.*

It is submitted that this clarion call by the Special Rapporteur deserves serious consideration. Although diplomatic protection has traditionally played a vital role in the protection of the rights of aliens, judicially, it has mostly been exercised for the protection of property rights.[793] It should also be employed more often for the protection of human rights, particularly, as submitted by the Special Rappoteur where norms of *jus cogens* are violated.[794] As has been propounded by different advocates, and accepted in judicial decisions,

> Whatever theoretical disputes may still exist about the basis of diplomatic protection, it cannot be doubted that in substance, the true beneficiary of the right that is protected is the individual.[795]

While it is true that since 1945, the protection of human rights under international law has witnessed some improvements, particularly in relation to the position of the

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791 Economic globalisation does have an impact on the protection of human rights and creates opportunities to end the absolute sovereignty of the state and further the realisation that how a state deals with those within its territory is no longer a matter exclusively within the domestic jurisdiction of a state.

792 See Dugard's first report to the ILC on Diplomatic Protection *supra* n 9 & Addendum 1.See also *supra* p 41. Other writers who have commented on the use of diplomatic protection for the protection of human rights include Olivier *supra* n 356 238; Pete & du Plessis *supra* n 356 439; & Erasmus & Davidson *supra* n 293 113 to name but a few.

793 See the cases such as *Barcelona Traction case supra* n 26*; Mavrommatis Palestine Concession case supra* n 36; *Panevezys- Saldutiskiis Railways Case supra* 81.

794 Erasmus & Davidson *supra* n 293 117 have made similar submission.

795 See the judgment of Chakalson CJ in *Kaunda's* case *supra* n 688 par 64.

individual, human rights abuses appear to be on the increase.[796] There is therefore a need for greater use of diplomatic protection to safeguard human rights of individuals against harmful acts by foreign states. This should be based on legal obligation and calls for a new approach to the exercise of diplomatic protection under international law. [797] The call is for the recognition of a state's legal obligation to exercise diplomatic protection in favour of its nationals beyond national boundaries under the circumstances where the life, liberty or property of the national is threatened abroad.[798] It is therefore necessary to revisit the issue of diplomatic protection and human rights in the light of changing times and needs.

The first step should be to reconsider the degree of protection that should be granted to aliens. Right now, it would appear that even violations that "shock the conscience of mankind,"[799] such as genocide or pogrom hardly invoke the urge to exercise diplomatic protection, let alone the violations of such "unimportant" rights as the right to personal liberty, non discrimination or to due process of law. It is submitted that this should not be the case. Violations of any basic right should be considered serious violations, and their denial should command enough sympathy to trigger the exercise of diplomatic protection.[800] This is because a state which hesitates to exercise diplomatic protection on behalf of its nationals in appropriate situations, runs the risk of failing in its basic duty towards its citizens.[801]

What part, therefore, can diplomacy play in the diplomatic protection of human rights in Nigeria and South Africa, for instance?[802] What strategy should be employed in

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796 The situation in the former Yugoslavia, Rwanda, Sudan, Zimbabwe, Somalia, DRC and other war-torn countries are good examples.See Steiner *et al supra n* 19 ch 14 "Massive Human Rights Tragedies."

797 Erasmus & Davidson *supra* n 293 117. The agument that diplomatic protection should focus on the human rights of individuals is not new or revolutionary.Garcia-Amador had muted this idea long ago. See Tiburcio *supra* n 26 73.

798 This is because the very justification of the existence and exercise of state power should be the acceptance of the duty to protect and promote the human rights of individuals, while the ultimate purpose of the state should be the protection not only of individual's human rights, but also the maintenance of a legal order consistent with the rule of law, and the creation of conditions condusive to the enhancement of human dignity.

799 *Neer* Claim *supra* n 34.

800 The need for a reconsideration of this issue is motivated by the changing international legal order through globalization, privatization of the public sector and the fragmentation of states.

801 Erasmus & Davidson *supra* n 293 122.

802 See for instance Shirley "The role of international human rights and the law of Diplomatic Protection in resolving Zimbabwe's land crises" in *Boston College International and Comparative Law Review* vol 27 no 1 (Winter 2004) 161 – 71.

the protection of the human rights of South Africans whose property has been expropriated in Zimbabwe or Lesotho without compensation?[803] What strategy should be employed to resolve the persistent spate of abductions and hostage taking of foreign nationals by militants in the Niger Delta region of Nigeria?[804] The answer is – diplomacy.

It is submitted that there are a number of reasons why states should continue to utilize diplomacy to influence their policies and those of other states with regard to respect for human rights.[805] These reasons include, first and foremost, that diplomacy has much to do with human rights. This is because the main motivation for the post World War II diplomacy and the formation of the UNO was the protection of human rights due to the massive human rights violations and threats to international peace and stability. [806] Therefore, governments should get involved not only in human rights dilemmas in neighbouring states, but also of states at some distance in the interest of their own nationals living there. Unfortunately, however, all too often, human rights diplomacy does not fit comfortably with other foreign policy priorities of most states.[807] Consequently, some states trample on the human rights of aliens in their territories.

Second, disinterest of states in the domestic and international human rights environment, may destabilize not only their own countries, but also those countries where human rights violations occur. This may consequently trigger a centrifugal force, dragging other states into the human rights quagmire. The human rights situations in Zimbabwe and Sudan for instance, have, in recent years, negatively impacted upon the social, as well as the economic position of South Africa and other neighbouring states.

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803 *Ibid*. See also the land mark judgment of the Pretoria High Court of South Africa in *Crawford von Abo* v T*he Govt.of the Republic of South Africa & Others[*2008] JOL 22219 (T) delivered by Judge Bill Prinslo on Tuesday July 29, 2008.See *LANDMARK WIN FOR FARMER* in the Pretoria News issue of 2008-07-30 1.

804 See Smith: *Shell in Nigeria and The Odoni People: Text and Materials – International Human Rights* (2007).

805 See Trimble "Human Rights and Foreign Policy" 46 *St. Louis U L J* (spring 2002) 465.

806 Forsythe *Human Rights in International Relations* (2006) 152.

807 Trimble *supra* n 803 465.

19 Diplomatic strategies for the protection of human rights

Basically, the technique for conflict resolution falls into two categories; diplomatic procedures and adjudication. The former involves an attempt to resolve differences either by the contending parties themselves, or with the aid of other entities by the use of the discussion and fact-finding method. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs.

Diplomatic methods of resolving human rights issues may take various forms. These include quiet diplomacy, formal protests, negotiations, mediation, conciliation, good offices, *et cetera.* Various diplomatic processes and procedures have evolved over the years for the diplomatic handling of human rights issues.[808] These include:

19.1 Quiet diplomacy

A potent strategy for the protection of human rights is the use of "quiet diplomacy."[809] This is the traditional or classical method of conflict resolution. It involves the holding of confidential talks behind close doors away from the public view.[810] However, the majority of interstate disputes involving human rights are settled by direct negotiation, good offices, mediation or conciliation.[811]

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808 A distinctive feature of Human Rights law is that unlike other branches of international law, e.g. Diplomatic Law, it was established primarily through multilateral treaties, signed at international diplomatic conferences. Participants in the diplomatic process are usually officials of states or international organizations, and may include heads of state or governments, ministers of foreign affairs and other ministers, diplomatic officials, as well as military officials.The San Francisco Conference of 1945 for instance, where the Charter of the UN was signed, was attended by top diplomats from Europe and America. The creation of the UN, was a mile stone in the determined effort of the international community to use diplomacy in the protection of human rights.

809 See Forsythe *supra* n 804 152. See also Winter "Human rights diplomacy: 'quiet' or totally mute?" (1982) ABA *Journal of Human Rights* 1202 and Derian "Quiet diplomacy is not silent diplomacy" (1980) *Human Rights Quarterly* 16.

810 This was the type of diplomacy adopted by President Thabo Mbeki of South Africa in trying to resolve the Zimbabwe crises.

811 See the case of *Kaunda* v *President of the RSA supra* n 688 pars 25-27 where the Constitutional Court of South Africa accepted the expert report of the Special Rapparteur on Diplomatic Protection that diplomatic protection includes consular action, negotiation, mediation, judicial and arbitration proceedings, etc.

19.2 Negotiation

Of all the procedures used to resolve differences between individuals, the simplest and most utilised form is negotiation. Understandably, negotiation is also the primary vehicle for settlement of international disputes.[812] It basically consists of discussions between the interested parties with a view of reconciling divergent opinions, or at least understanding the different positions maintained.[813] In negotiations, there are no established rules or procedures.[814] However, there are general principles and precedents which help define a course for such proceedings. Negotiations are as a rule conducted, through normal diplomatic channels involving only the parties to the dispute.[815] It is eminently suited to the clarification of, or resolution of complicated disagreements.[816]

19.3 Good offices and mediation

Good offices and mediation involve the participation of third parties. Technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiation process of the third party itself. In mediation, like negotiation, there are also no technical rules of procedure. The parties are generally expected to abide by general principles and protocols related to international law and justice.[817]

19.4 Conciliation

The process of conciliation involves a third party's investigation of the basis of the dispute, and the submission of a report embodying suggestions for settlement.[818] Conciliation reports are only proposals and as such do not constitute binding

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812 The obligation to enter into negotiation was endorsed in the *North Sea Continental Shelf* cases ICJ Rep 1969 3.
813 See Shaw *supra* n 175 918.
814 See Diplomacy (http://en.wikipedia.org/wiki/Diplomatic_relations 6.
815 Wallace *supra* n 16 314. E.g the Camp David Accord convened in 1978 by President Jimmy Carter of the US to broker peace between Egypt and Israel. See also Shaw *supra* n 175 918.
816 Shaw *idem* 919.
817 Wallace *supra* n 16.
818 *Ibid.*

decisions.[819] Nevertheless, conciliation processes do have a role to play in resolving human rights issues. They are extremely flexible and by clarifying the facts and discussing the proposals, may stimulate negotiation amongst the parties.[820] In modern times, however, much of this work is often carried out by the ICJ or other formal commissions, agencies and tribunals, working under the UN.[821]

Other methods often employed for the diplomatic protection of human rights include consular protection,[822] judicial and arbitral proceedings,[823] reprisals,[824] retortion,[825] severance of diplomatic relations[826] and economic pressure.[827]

19.5 Judicial and arbitral proceedings

As the name implies, judicial and arbitral proceedings involve the settlement of human rights problems by a court of law or by an arbitral tribunal. The ILC has defined arbitration as

> A procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.[828]

The main difference between arbitration and judicial settlement is that arbitration parties are more active in the decision-making process of the arbitral tribunal, whereas parties submitting to judicial settlement must accept an already constituted tribunal with its jurisdictional competence and procedure laid down in statute. Thus

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819 *Ibid.*

820 *Ibid.* A conciliation procedure was employed in the Iceland – Norway dispute over the continental shelf delimitation. See also the 1929 Chaco Conciliation Commission and the 1947 Franco-Siamese Commission.

821 Another method is that of "informal diplomacy." Informal diplomacy has sometimes been used to resolve human rights issues. This entails the recruitment of figures in other nations who might be able to gain and give access to a country's leadership. In some situations, this type of diplomacy is done through semi-formal channels using interlocutors such as academic members of think tanks. These non officials engage in dialogue with the aim of solving human rights problems.

822 See *Report of the International Commission on the work of its fifty-second session, 1 May to 9 June and 10 July to 18 August (2000*) A/55/10 (ILC report) 15. See also the case *of Kaunda and Others v The President RSA supra* n 688 par 27 See ch 3 *infra.*

823 See the Statute of the ICJ art 38(1)(c).

824 See Bowett "Reprisals Involving Recourse to Armed Force." (1972) 66 *AJIL,* 1.

825 See Wallace *supra* n 16 294.

826 See the VCDR art 45.

827 See *Report of the International Commission on the work of its fifty-second session,* 1 May to 9 June and 10 July to 18 August (2000) A/55/10 (ILC rep) 15.

828 *YBILC* 1953 11 202.

arbitration allows parties a degree of flexibility which is denied to them in judicial settlement.[829] While the ICJ is the principal judicial organ for states, arbitral tribunals have played a vital role in the settlement of disputes between states over the years.[830]

Although the diplomatic strategy [831] may be predominantly persuasive in its impact, it must be borne in mind that often the strategy employed may not be confined to a single instrument or strategy and may involve the use of force.[832] Such use of force as a diplomatic instrument may be in the form of reprisal or counter measure. They are discussed below.

19.6 Reprisals

A reprisal is something done by way of retaliation[833] and may be adopted by a State in response to harm suffered by it through the act or omission of another State. Reprisals are often invoked by way of self-help or defence. If for example a guerrilla group from state A attacks state B, state B may retaliate by attacking state A with the aim of destroying the guerrilla bases there. They are regarded as an exercise of diplomatic protection, because the international legal system has no central authority to enforce international law. States, therefore, arrogate to themselves the responsibility of enforcing the rules of international law by reacting to any illegal use of force with equally illegal display of force, so as to deter the aggressive state, ensure compliance with and create respect for international law.[834] Reprisals were defined in *Nauliliaa* case[835] as:

> acts of self help by the injured state, acts in retaliation for acts contrary to international law on the part of the offending state which have remained un-redressed after a demand for amends.

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829 See Wallace *supra* n 16 316.
830 See for instance the famous *Alabama Claims Arbitration,* Moore, 1 Int Arb 495 (1872) and the *Island of Palmas* case 2 RIAA 829 (1928).
831 Murty *The International law of diplomacy:The Diplomatic Instrument and World Public Order* (1989) 16 defines diplomatic strategy as “diplomatic”, “ideological, “economic” and “military” instruments employed by states to sustain power .
832 *Ibid.*
833 See Garner s*upra* n 12 659. More commonly referred to as counter- measures.
834 See Dugard *supra* n 1 279-80.
835 2 R I A A 1012 (1928).

Although acknowledged as a form of diplomatic protection, reprisals involving armed force are, however, prohibited as a means of settling international disputes, if such reprisals do not comply with the principles of international law on the use of force.[836]

19.7 Retortion

A countermeasure or reprisal must be distinguished from a retortion. A retortion is distinct from a reprisal or counter-measure in that it is an act which in itself, although unfriendly, is not unlawful. A retortion is therefore a lawful means of expressing displeasure at the conduct of another State.[837]

19.8 Severance of diplomatic relations

Diplomatic relations established by mutual consent may be severed by either party. The severance of diplomatic relations terminates all official communications between the two governments involved, and is generally effected either as a protest against the policies pursued by the other government, as a sanction against breaches of the law by the latter or abuse of the privileges and facilities associated with a diplomatic mission by its officials.[838] A severance may be express or tacit. It is effected expressly by notification or tacitly by actual termination by such acts as closure of one's own diplomatic mission and requiring the other to follow suit.[839]

19.9 Economic pressure

Economic pressure may also be applied on a state as a means of diplomatic protection, particularly during war time. Under such circumstances, the economic

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836 See the 1970 Declaration on Principles of International law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN GA Res. 2635 (XXV) 1970-10-24. The section on the Principle on the Use of Force par 6 expressly prohibits reprisals. See also the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* ICJ Rep (1996) 226 par 46 and the ILC's Draft Arts on Responsibility of States for Internationally Wrongful Acts 2001 Arts 49 - 52.

837 Retortion may take the form of severance of diplomatic relations or foreign aid. See Wallace *supra* n 16 294.

838 See Murty *supra* n 829 253.

839 *Ibid.*

pressure applied becomes an instrument of coercion. The main concern of a contestant who uses economic pressure in the settlement of disputes is to interrupt the flow of vital goods which might help the enemy war effort.[840] It may also be applied as a means of self defence in accordance with the provisions of article 51 of the UN Charter.[841]

During World War II,[842] for instance, Britain and the US adopted a new economic warfare theory. Under the new concept, economic pressure was not limited to the traditional expedients of contraband interruption and blockade, but was conducted by multifarious other methods and operations in order to effectively weaken the enemy's economic and financial sinews.[843] Similarly during the Nigerian civil war, economic blockade was imposed on the secessionist Biafran regime and this accelerated the war and brought a quick end to human sufferings.[844]

20 Appraisal and conclusion

From the foregoing, it is obvious that the legal institution of diplomatic protection serves very useful purposes in the international world order. First and foremost, it serves as a veritable instrument for the protection of rights which are vital and of immense benefit to individuals.[845] Thus, diplomatic protection has not only assisted in the spread of individual freedom, but has also helped in facilitating the smooth movement of people, goods, capital and services across state boundaries. [846]

In this way, diplomatic protection has also promoted international economic relations. The right of states to protect their nationals serves as a warning to states inclined to ignore their treaty or customary law obligations favouring individuals.[847] This has a beneficial effect on the treatment of individuals abroad. The preconditions to

840 *Idem* 221.
841 Art 51 of the UN Charter acknowledges the right of self defence as an inherent right of every state.
842 Res 3314 (XXIX) of 1974-12-14
843 Sheaerer *supra* n 117 530-31.
844 See Heyns *supra* n 256 1388.
845 Geck *supra* n 10 1063.
846 *Ibid*.
847 *Ibid.*

protection, especially the local remedies rule, serve as checks and balances, and help to prevent frequent use and abuse of the remedy by powerful states.[848]

The institution does have serious flaws. The nationality rule may, for instance, leave millions of persons without any protection; the rule of continuous nationality can also work great hardship on a considerable number of individuals.[849] Besides, few states are willing to undertake an internal legal obligation to protect their nationals abroad even if all the international requirements are met and no overwhelming interests of the state as a whole is at stake.

One can hardly overlook the reluctance of states to protect their nationals even in cases where no impediments exist.[850] It is submitted that the more determined and firm the diplomatic protection in any situation, the stronger the deterrent effect. But, even the greatest firmness and fairness may be to no avail against an obstinate opponent of greater political or economic strength. Needless to say, there have been and still are instances where the right to protect have been used as pretext for political intervention.

The greatest inherent weakness in the institution of diplomatic protection reflects the underlying weakness of international law in general - its lack of adequate sanction or enforcement mechanism.[851] There is often no simple answer to the question whether and to what extent diplomatic protection is justified, and how much reparation is adequate in a particular case.[852] Yet, there is no general obligation for all states to submit their relevant disputes to a peaceful settlement through the binding decision of an independent and neutral authority. Therefore, both the plaintiff and the defendant states often remain *judex in causa sua,* with the result that the outcome of the case, may depend on the relative strength of the parties.[853]

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848 *Ibid.*

849 *Idem* 1064. See also Dugard *supra* n 1 286.

850 Geck *idem* 10.

851 See Weil *supra* n 231 414.

852 *Ibid*.

853 Although states are required under art 2(3) of the UN Charter to "settle their international disputes by peaceful means," they are however reticent to submit disputes to independent, impartial adjudication and have been cautious in agreeing in advance to the compulsory jurisdiction of an independent judicial body like the ICJ. The same method of dispute settlement is stipulated in article 33(1) of the UN Charter. Apart from these Charter provisions, the 1970 Declaration on the

The general hope that diplomatic protection would become largely superfluous through human rights conventions has so far not materialised. From a realistic perspective, human rights conventions are fashioned in the form of multilateral treaties designed to compel the obligation of State Parties. These treaties establish new and far-reaching material rights for individuals, but not a corresponding basis for diplomatic protection by their home states. They rather give all state parties the right to grant a new kind of humanitarian assistance or protection to all individuals regardless of their nationality.[854] This right has proven almost ineffective for two reasons. In most treaties, the treaty machinery is inadequate,[855] compliance by States inconsistent and worse, State Parties are usually unwilling to use even the inadequate machinery at their disposal.[856]

Another problem with regard to diplomatic protection is to be found in its codification. The nagging question is why it is so difficult to codify the law of diplomatic protection?[857] Despite the various attempts made to codify the subject, no Convention has so far been summoned by the General Assembly for the adoption of a treaty on the subject. Tiburcio is of the opinion that the problem is with the vast and complex nature of the subject[858] but Dugard thinks otherwise.[859] In hind sight, could it be said that the reluctance of states to adopt a Convention on diplomatic protection is borne out of the fear of irrevocably committing themselves to the plight of their nationals living abroad? Are states not prepared to accept responsibility for their actions? Is the subject so complex that it can not be codified? Whatever is the case, diplomatic protection continues to be governed by customary international law.[860] The recent attempt to draft a set of articles on the subject by Dugard, has been

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Principles of International law Concerning Friendly Relations and Co-operation among States also require states to settle their disputes amicably.

854 Geck *supra* n 10 1064.

855 E.g the ICESCR and the International Convention on Refugees.

856 Geck *supra* n 10. Neither the inter-state complaint mechanism in the ICCPR nor that of the African Charter has ever been invoked by States.

857 As is the case with the law of Diplomatic Relations or that of Consular Relations.

858 Tiburcio *supra* n 26 37.

859 According to Dugard, states are not willing to take criminal responsibility for their actions, particularly in relation to the breach of peremptory norms of international law. See n 860 *infra*. See also Shaw *supra* n 175 720.

860 Since it is not codified.

applauded by the ILC[861] and it is therefore hoped that Dugard's draft will be adopted as a treaty.[862]

In spite of all its shortcomings, however, diplomatic protection remains an indispensable means for improving the legal position of most individuals against foreign state power. Today however, injury to aliens, be they natural or corporate persons, is generally covered by bilateral or multilateral investment treaties (BITs),[863] or by 'friendship, commerce and navigation' treaties, which often provide for international arbitration or adjudication of claims.[864] There are also a number of specialized multilateral treaties covering certain categories of aliens as well as some innovative examples of compensation schemes like the 'lump sum' payments schemes for large scale injuries to aliens.[865] A good example is the Iran–United States Claims Tribunal established to resolve claims related to the detention of 52 United States nationals in the U.S. Embassy in Tehran in 1979 and the freezing of Iranian assets by the United States.[866]

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861 See the *Official Records of the GA supra* n 1 15-16. Crawford *supra* n 10 51 says that "Dugard was fortunate to have a relatively confined topic, a relatively clean slate on which to write and time in plenary to debate his work. He responded – as anyone would have expected – with his combination of good sense and good humour, dealing with his topic efficiently, responsively and within a decent time frame. The result – whatever positions may be taken on individual issues – is a lucid and workable text, a real contribution to the field and to the ILC's continuing reputation."

862 Dugard is of the opinion that previous draft articles largely represent a codification of International Law. According to him, "there are some innovative features, particularly in respect of state responsibility for the violation of peremptory norms. Because of these innovations, there has been no rush to refer the draft articles to an international conference for translation into a multilateral treaty as occurred with similar drafts prepared by the ILC, e.g the articles on the law of treaties or diplomatic and consular relations. Instead, it has been considered wise to leave the draft articles as a restatement of the law until there is sufficient support for the draft articles as a whole to make their adoption in treaty form likely." See Dugard *supra* n 1 272 269 -270.

863 This was ackowledeged by the ICJ in the *Barcelona Traction case, supra* n 26. See Dugard (2005) *supra* n 1 306.

864 Eg art V(4) of the Treaty of Friendship, Commerce and Navigation between the US and the Federal Republic of Germany of 1954.

865 Dugard (2005) *supra* n.1 306; Harris *supra* n 383 614; Sen *supra* n 52 320; & Shaw *supra* n 175 749-50.

866 See *Case Concerning the US Diplomatic and Consular Staff in Teheran* (The *Iran* case) *supra* n 242 .3 See also *Iran* v *US* No A/18 (Iran – US Claims Tribunal) (1984) 5 Iran – USCTR 251 & *SEDCO* v *National Iranian Oil Co.* 10 Iran – USCTR 180 185; 80 AJIL 1986 969.