Chapter IV

DIPLOMATIC PROTECTION

A. Introduction

38. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[8] In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and of any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[9] The Working Group submitted a report at the same session which was endorsed by the Commission.[10] The Working Group attempted to: (*a*) clarify the scope of the topic to the extent possible; and (*b*) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[11]

39. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.[12]

40. The General Assembly in paragraph 8 of its resolution 52/156 of 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

41. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[13] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[14]

42. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John Robert Dugard Special Rapporteur for the topic,[15] after Mr. Bennouna was elected judge to the International Tribunal for the former Yugoslavia.

43. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report.[16] The Commission deferred its consideration of chapter III to the next session, owing to the lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[17] The Commission subsequently decided to refer draft articles 1, 3, 5, 6, 7 and 8 to the Drafting Committee, together with the report of the informal consultation.

44. At its fifty-third session, in 2001, the Commission had before it the remainder of the Special Rapporteur's first report, as well as his second report.[18] Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of the report, concerning draft articles 12 and 13, to the next session. At the same session, the Commission decided to refer draft articles 9, 10 and 11 to the Drafting Committee.

45. Also at the same session, the Commission established an open-ended informal consultation on article 9, chaired by the Special Rapporteur.

46. At its fifty-fourth session, in 2002, the Commission had before it the remainder of the second report of the Special Rapporteur, concerning draft articles 12 and 13, as well as his third report,[19] covering draft articles 14 to 16. At this session, the Commission decided to refer draft article 14, paragraphs *a*, *b*, *d* (to be considered in connection with paragraph *a*), and *e* to the Drafting Committee. It subsequently decided to refer draft article 14, paragraph *c* to the Drafting Committee to be considered in connection with paragraph *a*.

47. Also at this session, the Commission considered the report of the Drafting Committee on draft articles 1 to 7 [8]. It adopted articles 1 to 3 [5], 4 [9], 5 [7], 6 and 7 [8].

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[8] *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, p. 97, para. 248 and Annex II, addendum 1, p. 137.

[9] *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

[10] *Ibid.*, p. 60, para. 171.

[11] *Ibid.*, pp. 62–63, paras. 189–190.

[12] *Ibid.*, p. 63, para. 190.

[13] *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 309.

[14] The conclusions of the Working Group are contained in *ibid.*, vol. II (Part Two), p. 49, para. 108.

[15] *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 17, para. 19.

[16] *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Corr.1 and Add.1.

[17] The report of the informal consultations is contained in *ibid.*, vol. II (Part Two), pp. 85–86, para. 495.

[18] *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514, p. 97.

[19] *Yearbook … 2002*, vol. II (Part One), document A/CN.4/523 and Add.1, p. 19.

In addition, the Commission adopted the commentaries to the aforementioned draft articles.[20]

48. The Commission also established an open-ended informal consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

49. At its fifty-fifth session, in 2003, the Commission had before it the fourth report of the Special Rapporteur.[21] The Commission considered the first part of the report, concerning draft articles 17 to 20, at its 2757th to 2762nd, 2764th and 2768th meetings, held from 14 May to 23 May and on 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, held on 15, 16 and 18 July 2003.

50. At its 2762nd meeting, the Commission decided to establish an open-ended Working Group chaired by the Special Rapporteur, on article 17, paragraph 2.[22] The Commission considered the report of the Working Group at its 2764th meeting.

51. The Commission decided, at its 2764th meeting, to refer to the Drafting Committee article 17, as proposed by the Working Group,[23] and articles 18 to 20. Subsequently, at its 2777th meeting, it also decided to refer articles 21 and 22 to the Drafting Committee.

52. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.[24]

B. Consideration of the topic at the present session

53. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/538). The Commission considered the report at its 2791st to 2796th meetings, held from 3 to 11 May 2004.

54. During the consideration of the fifth report, the Commission requested the Special Rapporteur to consider whether the doctrine of "clean hands" is relevant to the topic of diplomatic protection and, if so, whether it should be reflected in the form of an article. The Special Rapporteur prepared a memorandum on this issue, but the Commission did not have time to consider it and decided to come back to this question at the next session.

55. At its 2794th meeting, held on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, that the Drafting Committee would consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

56. The Commission considered the report of the Drafting Committee (A/CN.4/L.647) at its 2806th meeting, held on 28 May 2004, and adopted on first reading a set of 19 draft articles on diplomatic protection (see sect. C below).

57. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles (*ibid.*), through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

58. At its 2827th meeting, held on 3 August 2004, the Commission expressed its deep appreciation for the outstanding contribution the two Special Rapporteurs, Mr. Mohamed Bennouna and Mr. John Dugard, had made to the treatment of the topic through their scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on diplomatic protection.

C. Text of the draft articles on diplomatic protection adopted by the Commission on first reading

1. Text of the draft articles

59. The text of the draft articles adopted by the Commission on first reading is reproduced below.

DIPLOMATIC PROTECTION

Part One

GENERAL PROVISIONS

Article 1. Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

Article 2. Right to exercise diplomatic protection

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

Part Two

NATIONALITY

Chapter I

GENERAL PRINCIPLES

Article 3. Protection by the State of nationality

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

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

[20] The text of the draft articles with the corresponding comments is in *ibid.*, vol. II (Part Two), chap. V, sect. C, pp. 67–76, paras. 280–281.

[21] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/530 and Add.1, p. 3.

[22] *Ibid.*, vol. II (Part Two), p. 27, paras. 90–92.

[23] *Ibid.*, para. 92.

[24] The text of the draft articles with the commentary is in *ibid.*, p. 35–41, para. 153.

Chapter II

NATURAL PERSONS

Article 4. State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 5. Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

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

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

Article 6. Multiple nationality and claim against a third State

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

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

Article 7. Multiple nationality and claim against a State of nationality

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

Article 8. Stateless persons and refugees

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

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

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

Chapter III

LEGAL PERSONS

Article 9. State of nationality of a corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

Article 10. Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.

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

Article 11. Protection of shareholders

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

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

(*b*) The corporation had, at the 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.

Article 12. Direct injury to shareholders

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

Article 13. Other legal persons

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

Part Three

LOCAL REMEDIES

Article 14. Exhaustion of local remedies

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 16, exhausted all local remedies.

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

Article 15. Category of claims

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

Article 16. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

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

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

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

PART FOUR

MISCELLANEOUS PROVISIONS

Article 17. Actions or procedures other than diplomatic protection

The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

Article 18. Special treaty provisions

The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

Article 19. Ships' crews

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

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

60. The texts of the draft articles on diplomatic protection with commentaries thereto adopted on first reading by the Commission at its fifty-sixth session are reproduced below.

DIPLOMATIC PROTECTION

(1) The drafting of articles on diplomatic protection was originally seen as belonging to the study on State responsibility. Indeed, the first Special Rapporteur on State responsibility, Mr. García Amador, included a number of draft articles on this subject in his reports presented from 1956 to 1961.[25] The subsequent codification of State responsibility paid little attention to diplomatic protection and the final draft articles on this subject expressly state that the two topics central to diplomatic protection—nationality of claims and the exhaustion of local remedies—would be dealt with more extensively by the Commission in a separate undertaking.[26] Nevertheless, there is a close connection between the draft articles on State responsibility and the present draft articles. Many of the principles contained in the draft articles on State responsibility are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. A State responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. All these matters are dealt with in the draft articles on State responsibility.[27] Some members of the Commission were of the view that the legal consequences of diplomatic protection should have been covered in the present draft articles and that the focus of attention should not have been the admissibility of claims.

(2) Diplomatic protection belongs to the subject of "Treatment of aliens". No attempt is made, however, to deal with the primary rules on this subject: the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person. Instead the present draft articles are confined to secondary rules only, that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. By and large this means rules governing the admissibility of claims. Article 44 of the draft articles on State responsibility provides:

> "The responsibility of a State may not be invoked if:
>
> (*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;
>
> (*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted."[28]

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

(3) The present draft articles do not deal with the protection of an agent by an international organization, generally described as "functional protection". Although there are similarities between functional protection and diplomatic protection, there are also important differences. Diplomatic protection is a mechanism designed to secure reparation for injury to the national of a State premised on the principle that an injury to a national is an injury to the State itself. Functional protection, on the other hand, is an institution for promoting the efficient functioning of an international organization by ensuring respect for its agents and their independence. Differences of this kind have led the Commission to conclude that protection of an agent by an international organization does not belong in a set of draft articles on diplomatic protection. The question whether a State may exercise diplomatic protection in respect of a national who is an agent of an international organization was answered by the ICJ in the *Reparation for injuries* case:

> In such a case, there is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim. The Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense.[29]

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[25] First report: *Yearbook ... 1956*, vol. II, document A/CN.4/96, p. 173; second report: *Yearbook ... 1957*, vol. II, document A/CN.4/106, p. 104; third report: *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 47; fourth report: *Yearbook ... 1959*, vol. II, document A/CN.4/119, p. 1; fifth report: *Yearbook ... 1960*, vol. II, document A/CN.4/125, p. 41; and sixth report: *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Add.1, p. 1.

[26] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 121 (commentary on article 44, foonotes 683 and 687).

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

[28] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29, para. 76.

[29] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at pp. 185–186.

Part One

GENERAL PROVISIONS

Article 1. Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

Commentary

(1) Article 1 defines diplomatic protection by describing its main elements and at the same time indicates the scope of this mechanism for the protection of nationals injured abroad.

(2) Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission. Diplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the responsibility of States for internationally wrongful acts, maintain the distinction between primary and secondary rules and deal only with the latter.[30]

(3) Article 1 makes it clear that the right of diplomatic protection belongs to the State. In exercising diplomatic protection, the State adopts in its own right the cause of its national arising from the internationally wrongful act of another State. This formulation follows the language of the ICJ in the *Interhandel* case when it stated that the applicant State had "adopted the cause of its national"[31] whose rights had been violated. The legal interest of the State in exercising diplomatic protection derives from the injury to a national resulting from the wrongful act of another State.

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

(5) Diplomatic protection must be exercised by lawful and peaceful means. Several judicial decisions draw a distinction between "diplomatic action" and "judicial proceedings" when describing the action that may be taken by a State when it resorts to diplomatic protection.[32] Article 1 retains this distinction but goes further by subsuming judicial proceedings under "other means of peaceful settlement". "Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest and request for an inquiry or for negotiations aimed at the settlement of disputes. "Other means of peaceful settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement. The use of force, prohibited by Article 2, paragraph 4 of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection.

(6) Article 1 makes clear the point, already raised in the General commentary,[33] that the present articles deal only with the exercise of diplomatic protection by a State and not with the protection afforded by an international organization to its agents, recognized by the ICJ in its advisory opinion on *Reparation for injuries*.[34]

(7) Diplomatic protection mainly covers the protection of nationals not engaged in official international business on behalf of the State. These officials are protected by other rules of international law and instruments, such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

Article 2. Right to exercise diplomatic protection

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

Commentary

(1) Article 2 stresses that the right of diplomatic protection belongs to or vests in the State. It gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State.[35] This view was formulated more carefully by the PCIJ in the *Mavrommatis* case when it stated:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.[36]

This view is frequently criticized as a fiction difficult to reconcile with the realities of diplomatic protection, which require continuous nationality for the assertion of a diplomatic claim,[37] the exhaustion of local remedies by the injured national and the assessment of damages

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[30] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 31 (General commentary, paras. (1) to (3)).

[31] *Interhandel Case, Preliminary objections, Judgment, I.C.J. Reports 1959*, p. 6, at p. 27. See also *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2.*

[32] *Mavrommatis Palestine Concessions* case (see footnote 31 above); *Panevezys-Saldutiskis Railway* case, *Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 4, at p. 16; and the *Nottebohm* case, *Second Phase, Judgment, I.C.J. Reports 1955*, p. 4, at p. 24.

[33] See above paragraph (3) of the General commentary.

[34] See footnote 29 above.

[35] "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen", E. de Vattel, *Le droit des gens, ou Principes de la loi naturelle* (1758), Washington D.C., Carnegie Institution, 1916, vol. I, book II, chap. VI, p. 136.

[36] *Mavrommatis Concessions in Palestine* (see footnote 31 above), p. 12.

[37] See the text of articles 5 and 10 above.

suffered to accord with the loss suffered by the individual. Nevertheless the "Mavrommatis principle" or the "Vattelian fiction", as the notion that an injury to a national is an injury to the State has come to be known, remains the cornerstone of diplomatic protection.[38]

(2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so. The internal law of a State may oblige a State to extend diplomatic protection to a national,[39] but international law imposes no such obligation. The position was clearly stated by the ICJ in the *Barcelona Traction* case:

> … within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. […] The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.[40]

A proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law.[41]

(3) The right of a State to exercise diplomatic protection may only be carried out within the parameters of the present articles.

Part Two

NATIONALITY

Chapter I

General principles

Article 3. Protection by the State of nationality

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

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

Commentary

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

(2) Paragraph 2 recognizes that there may be circumstances in which diplomatic protection may be exercised in respect of non-nationals. Article 8 provides for such protection in the case of stateless persons and refugees.

Chapter II

Natural Persons

Article 4. State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Commentary

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

(2) The principle that it is for each State to decide who are its nationals is backed by both judicial decisions and treaties. In 1923, the PCIJ stated in the *Nationality Decrees Issued in Tunis and Morocco* case that: "in the present state of international law, questions of nationality are […] in principle within the reserved domain".[42] This principle was confirmed by article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law: "It is for each State to determine under its own law who are its nationals." More recently, it has been endorsed by the 1997 European Convention on Nationality (art. 3).

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

[38] For a discussion of this notion, and the criticisms directed at it, see the first report of the Special Rapporteur on diplomatic protection (footnote 16 above), paras. 61–74.

[39] For an examination of domestic laws on this subject, see *ibid.*, paras. 80–87.

[40] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 3, at p. 44.

[41] See article 4 in the first report of the Special Rapporteur on diplomatic protection (footnote 16 above). For the debate in the Commission, see *Yearbook … 2002*, vol. II (Part Two), pp. 91–92, paras. 447–456.

[42] *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923, P.C.I.J., Series B, No. 4*, p. 6, at p. 24.

the consistency of such an acquisition of nationality with international law.[43] Nationality may also be acquired as a result of the succession of States.[44]

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

(5) Article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,[45] as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality. Despite divergent views as to the interpretation of the case, the Commission took the view that there were certain factors that served to limit *Nottebohm* to the facts of the case in question, particularly the fact that the ties between Mr. Nottebohm and Liechtenstein (the applicant State) were "extremely tenuous"[46] compared with the close ties between Mr. Nottebohm and Guatemala (the respondent State) for a period of over 34 years, which led the ICJ to repeatedly assert that Liechtenstein was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala".[47] This suggests that the Court did not intend to expound a general rule[48] applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, the Commission was mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection, as in today's world of economic globalization and migration there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.[49]

(6) The final phrase in article 4 stresses that the acquisition of nationality must not be inconsistent with international law. Although a State has the right to decide who its nationals are, this right is not absolute. Article 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law confirmed this by qualifying the provision that "[i]t is for each State to determine under its own law who are its nationals" with the proviso "[t]his law shall be recognised by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality".[50] Today, conventions, particularly in the field of human rights, require States to comply with international standards in the granting of nationality.[51] For example, article 9, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women provides that:

> States parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.[52]

(7) Article 4 therefore recognizes that a State against which a claim is made on behalf of an injured foreign national may challenge the nationality of such a person where his or her nationality has been acquired contrary to international law. Article 4 requires that nationality should be acquired in a manner "not inconsistent with international law". The double negative emphasizes the fact that the burden of proving that nationality has been acquired in violation of international law is upon the State challenging the nationality of the injured person. That the burden of proof falls upon the State challenging nationality follows from the recognition that the State conferring nationality must be given a "margin of appreciation" in deciding upon the conferment of nationality[53] and that there is a presumption in favour of the validity of a State's conferment of nationality.[54]

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[43] See, e.g., article 9 (1) of the Convention on the Elimination of All Forms of Discrimination against Women, which prohibits the acquisition of nationality in such circumstances. See also paragraph (6) of the commentary to this draft article below.

[44] See the draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), p. 20, para. 47.

[45] In the *Nottebohm* case the ICJ stated: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national" (see footnote 32 above), p. 23.

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

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

[48] This interpretation was placed on the *Nottebohm* case by the Italian–United States Conciliation Commission in *Flegenheimer, Decision No. 182 of 20 September 1958*, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327, at p. 376; or ILR (1958-I), vol. 25 (1963), p. 91, at p. 148.

[49] For a more comprehensive argument in favour of limiting the scope of the *Nottebohm* case, see the first report of the Special Rapporteur on diplomatic protection (footnote 16 above), paras. 106–120.

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

[51] This was stressed by the Inter-American Court of Human Rights in its advisory opinion on the *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica* case, in which it held that it was necessary to reconcile the principle that the conferment of nationality falls within the domestic jurisdiction of a State "with the further principle that international law imposes certain limits on the State's power, which limits are linked to the demands imposed by the international system for the protection of human rights" (ILR, vol. 79 (1989), p. 283, at p. 296).

[52] See also article 20 of the American Convention on Human Rights: "Pact of San José, Costa Rica" and article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination.

[53] See the advisory opinion of the Inter-American Court of Human Rights in the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (footnote 51 above), para. 62.

[54] See R. Y. Jennings and A. D. Watts (eds.), *Oppenheim's International Law*, 9th ed., Longman, 1992, vol. I, *Peace*, p. 856.

Article 5. Continuous nationality

1. A State is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

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

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

Commentary

(1) Although the continuous nationality rule is well established,[55] it has been subjected to considerable criticism[56] on the grounds that it may produce great hardship in cases in which an individual changes his or her nationality for reasons unrelated to the bringing of a diplomatic claim. Suggestions that it be abandoned have been resisted out of fear that this might be abused and lead to "nationality shopping" for the purpose of diplomatic protection.[57] The Commission is of the view that the continuous nationality rule should be retained but that exceptions should be allowed to accommodate cases in which unfairness might otherwise result.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises.[58] In these circumstances the Commission decided to leave open the question whether nationality has to be retained between the injury and the presentation of the claim.[59]

(3) The first requirement is that the injured national be a national of the claimant State at the time of the injury. Normally the date of the injury giving rise to the responsibility of the State for an internationally wrongful act will coincide with the date on which the injurious act occurred.

(4) The second temporal requirement contained in paragraph 1 is the date of the official presentation of the claim. There is some disagreement in judicial opinion over the date until which the continuous nationality of the claim is required. This uncertainty stems largely from the fact that conventions establishing mixed claims commissions have employed different language to identify the date of the claim.[60] The phrase "presentation of the claim" is that most frequently used in treaties, judicial decisions and doctrine to indicate the outer date or *dies ad quem* required for the exercise of diplomatic protection. The Commission has added the word "official" to this formulation to indicate that the date of the presentation of the claim is that on which the first official or formal demand is made by the State exercising diplomatic protection, in contrast to informal diplomatic contacts and enquiries on this subject.

(5) The entitlement of the State to exercise diplomatic protection begins at the date of the official presentation of the claim. There was, however, support for the view that if the individual should change his nationality between this date and the making of an award or a judgment he ceases to be a national for the purposes of diplomatic protection. According to this view, the continuous nationality rule requires the bond of nationality "from the time of the occurrence of the injury until the making of the award".[61] In light of the paucity of such cases in practice, the Commission preferred to maintain the position reflected in draft article 5.

(6) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take. This matter is dealt with more fully in article 43 of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, in 2001, and in the commentary thereto.[62]

(7) While the Commission decided that it was necessary to retain the continuous nationality rule, it agreed that there was a need for exceptions to this rule. Paragraph 2 accordingly provides that a State may exercise diplomatic protection in respect of a person who was a national at the date of the official presentation of the claim but not at the

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[55] See, for instance, the decision of the United States International Claims Commission 1951–1954 in the *Kren* claim, ILR (1953), vol. 20 (1957), p. 233, at p. 234.

[56] See the separate opinion of Judge Sir Gerald Fitzmaurice in *Barcelona Traction, Second Phase*, *Judgment* (footnote 40 above), pp. 101–102; see also E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, Presses universitaires de France, 1990.

[57] See the statement of Umpire Parker in the case *Administrative Decision No. V*: "Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency on behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal for their claims". *Decision of 31 October 1924*, United States–Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 119, at p. 141.

[58] See H. W. Briggs, "La protection diplomatique des individus en droit international: la nationalité des réclamations", *Annuaire de l'Institut de droit international*, vol. 51 (1965), tome I, p. 5, at pp. 72–73.

[59] The same approach was adopted by the Institute of International Law in its Warsaw Session, in September 1965 (*ibid.*, tome II, pp. 260–262).

[60] See the dictum of Umpire Parker in the case *Administrative Decision No. V* (footnote 57 above), p. 143.

[61] *Oppenheim's International Law* (see footnote 54 above), p. 512.

[62] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 127–129.

time of the injury, if three conditions are met: firstly, the person seeking diplomatic protection has lost his or her former nationality; secondly, that person has acquired the nationality of another State for a reason unrelated to the bringing of the claim; and thirdly, the acquisition of the new nationality has taken place in a manner not inconsistent with international law.

(8) Loss of nationality may occur voluntarily or involuntarily. In the case of the succession of States, and, possibly, adoption and marriage when a change of nationality is compulsory, nationality will be lost involuntarily. In the case of other changes of nationality the element of will is not so clear. For reasons of this kind, paragraph 2 does not require the loss of nationality to be involuntary.

(9) As discussed above,[63] fear that a person may deliberately change his or her nationality in order to acquire a State of nationality more willing and able to bring a diplomatic claim on his or her behalf is the basis for the rule of continuous nationality. The second condition contained in paragraph 2 addresses this fear by providing that the person in respect of whom diplomatic protection is exercised must have acquired his or her new nationality for a reason unrelated to the bringing of the claim. This condition is designed to limit exceptions to the continuous nationality rule to cases involving compulsory imposition of nationality, such as those in which the person has acquired a new nationality as a necessary consequence of factors such as marriage, adoption or the succession of States.

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

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

Article 6. Multiple nationality and claim against a third State

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

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

Commentary

(1) Dual or multiple nationality is a fact of international life. An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* or of the conferment of nationality by naturalization which does not result in the renunciation of a prior nationality. International law does not prohibit dual or multiple nationality: indeed such nationality was given approval by article 3 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, which provides that: "… a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses." It is therefore necessary to address the question of the exercise of diplomatic protection by a State of nationality in respect of a dual or multiple national. Article 6 is limited to the exercise of diplomatic protection by one of the States of which the injured person is a national against a State of which that person is not a national. The exercise of diplomatic protection by one State of nationality against another State of nationality is covered in article 7.

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

(3) Although there is support for the requirement of a genuine or effective link between the State of nationality and a dual or multiple national in the case of the exercise of diplomatic protection against a State of which the injured person is not a national, in both arbitral decisions[64] and codification endeavours,[65] the weight of authority does not require such a condition. In the *Salem* case, an arbitral tribunal held that Egypt could not raise the fact that the injured individual had effective Persian nationality against a claim from the United States, another State of nationality. It stated that:

> [T]he rule of international law [is] that in a case of dual nationality a third power is not entitled to contest the claim of one of the two powers whose national is interested in the case by referring to the nationality of the other power.[66]

This rule has been followed in other cases[67] and has more recently been upheld by the Iran–United States Claim

[63] See above paragraph (1) of commentary to the present draft article.

[64] See the decision of the Yugoslav–Hungarian Mixed Arbitral Tribunal in the *de Born* case, *Case No. 205 of 12 July 1926, Annual Digest of Public International Law Cases 1925 and 1926*, A. McNair and H. Lauterpacht (eds.), London, Longman, 1929, pp. 277–278.

[65] See article 5 of the Convention on Certain Questions Relating to the Conflict of Nationality Law; article 4 (*b*) of the Resolution on "the national character of an international claim presented by a State for injury suffered by an individual" adopted by the Institute of International Law at its Warsaw Session in 1965, *Tableau des résolutions adoptées (1957–1991)*, Paris, Pedone, 1992, p. 57, at p. 59 (reproduced in *Yearbook ... 1969*, vol. II, p. 142); article 23 (3) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", AJIL (Washington D.C.), vol. 55, No. 3 (July 1961), p. 548); and article 21 (4) of the draft on the international responsibility of the State for injuries caused in its territory to the person or property of aliens, including the third report on State responsibility of Special Rapporteur Garcia Amador, *Yearbook… 1958*, vol. II, document A/CN.4/111, p. 47.

[66] *Salem* case (Egypt/United States), *Award of 8 June 1932*, UNRIAA, vol. II (Sales No. 1949.V.1), p. 1161, at p. 1188.

[67] See the decisions of the Italian–United States Conciliation Commission in the *Mergé* claim, 10 June 1955, ILR (1955), vol. 22 (1958), p. 443, at p. 456, or UNRIAA, vol. XIV, p. 236; the *Vereano* case,

(Continued on next page.)

Tribunal.[68] The Commission's decision not to require a genuine or effective link in such circumstances is reasonable. Unlike the situation in which one State of nationality makes a claim against another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State.

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

Article 7. Multiple nationality and claim against a State of nationality

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

Commentary

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

(2) In the past there was strong support for the rule of non-responsibility according to which one State of nationality could not bring a claim in respect of a dual national against another State of nationality. The 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law declares in article 4 that: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses."[69] Later codification proposals adopted a similar approach[70] and there was also support for this position in arbitral awards.[71] In 1949 in its advisory opinion in the case concerning *Reparation for injuries*, the ICJ described the practice of States not to protect their nationals against another State of nationality as "the ordinary practice".[72]

(3) Even before 1930, however, there was support in arbitral decisions for another position, namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of nationality.[73] This jurisprudence was relied on by the ICJ in another context in the *Nottebohm* case[74] and was given explicit approval by Italian–United States Conciliation

(Footnote 67 continued.)

17 May 1957, UNRIAA, vol. XIV, p. 321, or ILR, vol. 24, pp. 464–465; and the *Stankovic* claim, *26 July 1963*, ILR, vol. 40 (1970), p. 153, at p. 155.

[68] See *Dallal* v. *Iran* (1983), *Iran–United States Claims Tribunal Reports*, vol. 3, Cambridge, Grotius, 1984, p. 23.

[69] See, too, article 16 (a) of the 1929 Harvard Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, AJIL (Washington D.C.), vol. 23, special supplement (vol. 2) (April 1929), p. 133, at p. 200 (reproduced in *Yearbook ... 1956*, vol. II, document A/CN.4/96, Annex 9, p. 229, at p. 230).

[70] See article 23 (5) of the 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (footnote 65 above); and article 4 (a) of the Resolution on "the national character of an international claim presented by a State for injury suffered by an individual" adopted by the Institute of International Law at its 1965 Warsaw Session (*ibid.*).

[71] See the *Executors of R.S.C.A. Alexander* v. *United States* case (1898) (United States–British Claims Commission), J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. III, Washington, D.C., United States Government Printing Office, 1898, p. 2529; the *Oldenbourg* case, *Decision No. 11 of 19 December 1929*, UNRIAA, vol. V (Sales No. 1952.V.3), pp. 74, or *Decisions and Opinions of the Commissioners, 5 October 1929 to 15 February 1930*, London, H. M. Stationery Office, 1931, p. 97; the *Honey* case (British–Mexican Claims Commission), *Decision No. 23 of 26 March 1931*, UNRIAA, vol. V, p. 133, or *Further Decisions and Opinions of the Commissioners, subsequent to 15 February 1930*, London, H. M. Stationery Office, 1933, p. 13; and the *Adams and Blackmore* case (British–Mexican Claims Commission), *Decision No. 69 of 3 July 1931*, UNRIAA, vol. V, p. 216–217.

[72] *Reparation for injuries suffered in the service of the United Nations* (see footnote 29 above), p. 186.

[73] *Drummond* case, 2 Knapp. Privy Council I, p. 295, *The English Reports*, vol. 12 Edinburgh/London, William Green and Sons/Stevens and Sons, 1901, p. 492; the *Mathison, Stevenson* (British–Venezuelan Mixed Claims Commission), *Brignone and Miliani* (Italian–Venezuelan Mixed Claims Commission) cases, UNRIAA, vol. IX (Sales No. 59.V.5), pp. 485 and 494, and vol. X (Sales No. 60.V.4), pp. 542 and 584 respectively, or J. H. Ralston (ed.), *Venezuelan Arbitrations of 1903*, Washington D.C., United States Government Printing Office, 1904, pp. 429–438, 710, 754–761, 438–455, 710–720 and 754–762 respectively; the *Canevaro* case (Italy *v.* Peru) (Permanent Court of Arbitration), *Decision of 3 May 1912*, UNRIAA, vol. XI (Sales No. 61.V.4), p. 397, or J. B. Scott (ed.), *The Hague Court Reports*, New York, Oxford University Press, 1916, p. 284; the *Hein* case, *Case No. 148* (1922) (Anglo–German Mixed Arbitral Tribunal), J. F. Williams and H. Lauterpacht (eds.), *Annual Digest of Public International Law Cases 1919 to 1922*, London, Longman, 1932, p. 216; the *Blumenthal* case (1923) (French–German Mixed Arbitral Tribunal), *Recueil des decisions des tribunaux arbitraux mixtes institués par les traités de paix*, tome 3, Paris, Sirey, 1924, p. 616; the *de Montfort* case, *Case No. 206* (1926) (French–German Mixed Arbitral Tribunal), *Annual Digest of Public International Law Cases 1925 to 1926* (footnote 64 above), p. 279; the *Pinson* cases, *Cases No. 194 and 195* (1928) (French–Mexican Mixed Claims Commission), *ibid.*, pp. 297–301, or UNRIAA, vol. V (Sales No. 1952.V.3), p. 327; and the *Tellech* case (1928) (United States–Austria–Hungary Tripartite Claims Commission), UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 248–249.

[74] See footnote 32 above, pp. 22 and 23. *Nottebohm* was not concerned with dual nationality but the Court found support for its finding that *Nottebohm* had no effective link with Liechtenstein. See also the judicial decisions referred to in footnote 73 above.

Commission in the *Mergé* claim in 1955. Here the Conciliation Commission stated that:

> The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practical application for the elimination of any possible uncertainty.[75]

In its opinion, the Conciliation Commission clearly held that the principle of effective nationality and the concept of dominant nationality were simply two sides of the same coin. The rule thus adopted was applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.[76] Relying on these cases, the Iran–United States Claims Tribunal has applied the principle of dominant and effective nationality in a number of cases.[77] Another institution which gives support to the dominant nationality principle is the United Nations Compensation Commission established by the Security Council to provide for compensation for damages caused by Iraq's occupation of Kuwait.[78] The condition applied by the Compensation Commission for considering claims of dual citizens possessing Iraqi nationality is that they must possess bona fide nationality of another State.[79] Recent codification proposals have given approval to this approach. In his third report on international responsibility to the Commission, Special Rapporteur Garcia Amador proposed that:

> In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal or other ties.[80]

A similar view was advanced by Orrego Vicuña in his report to the International Law Association at its sixty-ninth Conference.[81]

(4) The Commission is of the opinion that the principle which allows a State of dominant or effective nationality to bring a claim against another State of nationality reflects the present position in customary international law. This conclusion is given effect in article 7.

(5) The authorities use the term "effective" or "dominant" to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. The Commission decided not to use either of these words to describe the required link but instead to use the term "predominant" as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term "predominant" when applied to nationality than either "effective" or "dominant". It is moreover the term used by the Italian–United States Conciliation Commission in the *Mergé* claim which may be seen as the starting point for the development of the present customary rule.[82]

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

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

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

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[75] *Mergé* (see footnote 67 above), p. 247. See also the *De Leon* case, *Decisions Nos. 218 and 227*, 15 May 1962 and 8 April 1963, UNRIAA, vol. XVI (Sales No. E/F.69.V.1), p. 239, at p. 247.

[76] See, for example the *Spaulding* case (1956), UNRIAA, vol. XIV (Sales No. 65.V.4), p. 292, or ILR (1957), vol. 24 (1961), p. 452; the *Zangrilli* case (1956), UNRIAA, vol. XIV, p. 294, or ILR, vol. 24, p. 454; the *Cestra* case (1957), UNRIAA, vol. XIV, p. 307, or ILR, vol. 24, p. 454; the *Salvoni* case (1957), UNRIAA, vol. XIV, p. 311, or ILR, vol. 24, p. 455; the *Ruspoli-Droutzkoy* case (1957), UNRIAA, vol. XIV, p. 314, or ILR, vol. 24, p. 457; the *Puccini* case (1957), UNRIAA, vol. XIV, p. 323, or ILR, vol. 24, p. 454; the *Turri* case (1960), ILR, vol. 30 (1966), p. 371; the *Graniero* case (1959), UNRIAA, vol. XIV, p. 393, or ILR, vol. 30, p. 351; the *Ganapini* case (1959), UNRIAA, vol. XIV, p. 400, or ILR, vol. 30, p. 366; and the *Di Cicio* case (1962), ILR, vol. 40 (1970), p. 148.

[77] See, in particular, *Esphahanian* v. *Bank Tejarat* (1983), *Iran–United States Claims Tribunal Reports*, vol. 2, Cambridge, Grotius, 1984, p. 157, at p. 166; and *Case No. A/18* (1984), *ibid.*, vol. 5, p. 251.

[78] Security Council Resolution 692 (1991) of 20 May 1991.

[79] Decision 7 taken by the Governing Council of the United Nations Compensation Commission, of 16 March 1992, "Criteria for additional Categories of Claims" (S/AC.26/1991/7/Rev.1), para. 11.

[80] Draft on the international responsibility of the State for injuries caused in its territory to the person or property of aliens (see footnote 65 above), art. 21 (4).

[81] "The changing law of nationality of claims", Interim Report, *Report of the Sixty-ninth Conference of the International Law Association*, London, 2000, p. 646, para. 11.

[82] See footnote 67 above.

Article 8. Stateless persons and refugees

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

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

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

Commentary

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

> A State […] does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.[83]

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

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

(3) Paragraph 1 deals with the diplomatic protection of stateless persons. It gives no definition of stateless persons. Such a definition is, however, to be found in the Convention Relating to the status of Stateless Persons which defines a stateless person as "a person who is not considered as a national by any State under the operation of its law". This definition can no doubt be considered as having acquired a customary nature. A State may exercise diplomatic protection in respect of such a person, regardless of how he or she became stateless, provided that he or she was lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim.

(4) The requirement of both lawful residence and habitual residence sets a high threshold.[84] Whereas some members of the Commission believed that this threshold is too high and could lead to a situation of lack of effective protection for the individuals involved, the majority took the view that the combination of lawful residence and habitual residence is justified in the case of an exceptional measure introduced *de lege ferenda*.

(5) The temporal requirements for the bringing of a claim contained in article 5 are repeated in paragraph 1. The stateless person must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim. This ensures that non-nationals are subject to the same rules as nationals in respect of the temporal requirements for the bringing of a claim.

(6) Paragraph 2 deals with the diplomatic protection of refugees by their State of residence. Diplomatic protection by the State of residence is particularly important in the case of refugees as they are "unable or […] unwilling to avail [themselves] of the protection of [the State of nationality]"[85] and, if they do so, run the risk of losing refugee status in the State of residence. Paragraph 2 mirrors the language of paragraph 1. Important differences between stateless persons and refugees, as evidenced by paragraph 3, explain the decision of the Commission to allocate a separate paragraph to each category.

(7) The Commission decided to insist on lawful residence and habitual residence as preconditions for the exercise of diplomatic protection of refugees, as with stateless persons, despite the fact that article 28 of the Convention relating to the Status of Refugees sets the lower threshold of "lawfully staying"[86] for Contracting States in the issuing of travel documents to refugees. The Commission was influenced by two factors in reaching this decision: first, the fact that the issue of travel documents, in terms of the Convention, does not in any way entitle the holder to diplomatic protection;[87] secondly, the necessity to set a high threshold when introducing an exception to a traditional rule, *de lege ferenda*. Some members of the Commission argued that the threshold of lawful and habitual residence as preconditions for the exercise of diplomatic protection was too high also in case of refugees.[88]

(8) The term "refugee" in paragraph 2 is not limited to refugees as defined in the Convention relating to the

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[83] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States, Judgment of July 1931,* UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678.

[84] The terms "lawful and habitual" residence are based on the European Convention on Nationality, art. 6 (4) (*g*), where they are used in connection with the acquisition of nationality. See also the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (footnote 65 above), which includes for the purpose of protection under this Convention a "stateless person having his habitual residence in that State", art. 21 (3) (*c*).

[85] Art. 1 (A) (2) of the Convention relating to the Status of Refugees.

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

[87] See paragraph 16 of the Schedule to the Convention.

[88] See above paragraph (4) of the commentary to this draft article.

Status of Refugees and its Protocol relating to the Status of Refugees but is intended to cover, in addition, persons who do not strictly conform to this definition. The Commission considered using the term "recognized refugees", which appears in article 6 (4) (*g*) of the European Convention on Nationality, which would have extended the concept to include refugees recognized by regional instruments, such as the Organization of African Unity Convention governing the specific aspects of refugee problems in Africa,[89] widely seen as the model for the international protection of refugees,[90] and the Cartagena Declaration on Refugees.[91] However, the Commission preferred to set no limit to the term in order to allow a State to extend diplomatic protection to any person that it considered and treated as a refugee. This would be of particular importance for refugees in States not party to the existing international or regional instruments.

(9) The temporal requirements for the bringing of a claim contained in article 5 are repeated in paragraph 2. The refugee must be a lawful and habitual resident of the claimant State both at the time of the injury and at the date of the official presentation of the claim.

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

(11) Both paragraphs 1 and 2 provide that a State of refuge "*may* exercise diplomatic protection". This emphasizes the discretionary nature of the right. A State has discretion under international law whether to exercise diplomatic protection in respect of a national.[92] *A fortiori* it has discretion whether to extend such protection to a stateless person or refugee.

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

Chapter III

LEGAL PERSONS

Article 9. State of nationality of a corporation

For the purposes of diplomatic protection of corporations, the State of nationality means the State under whose law the corporation was formed and in whose territory it has its registered office or the seat of its management or some similar connection.

Commentary

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

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

(3) While the granting of nationality is "within the reserved domain"[93] of a State, international law, according to the ICJ in the *Barcelona Traction* case, "attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."[94] Two conditions are set for the acquisition of nationality by a corporation for the purposes of diplomatic protection: incorporation and the presence of the registered office of the company in the State of incorporation. In practice the laws of most States require a company incorporated under its laws to maintain a registered office in its territory, thus the additional requirement of registered office might seem superfluous. Nevertheless, the Court made it clear that both conditions should be met when it stated: "These two criteria have been confirmed by long prac-

[89] This Convention extends the definition of refugee to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality" (art. I.2).

[90] Note on International Protection submitted by the United Nations High Commissioner for Refugees (A/AC.96/830), p. 18, para. 35.

[91] Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19–22 November 1984; the text of the conclusions of the Declaration is reproduced in OEA/Ser.L/V/II.66 doc.10 rev.1. Organization of American States General Assembly, XV Regular Session (1985), resolution approved by the General Commission held at its fifth session on 7 December 1985.

[92] See article 2 and the commentary thereto.

[93] *Nationality Decrees Issued in Tunis and Morocco* (see footnote 42 above), p. 24.

[94] *Barcelona Traction, Second Phase, Decision* (see footnote 40 above), p. 43, para. 70.

tice and by numerous international instruments."[95] With the requirement of a registered office, the Court possibly sought to recognize the need for some tangible connection, however small, between State and company. This is confirmed by the emphasis it placed on the fact that Barcelona Traction's registered office was in Canada and that this created, together with other factors, a "close and permanent connection"[96] between Canada and Barcelona Traction.

(4) Article 9 uses the term "formed" instead of "incorporated", as "incorporated" is a technical term that is not known to all legal systems. Nevertheless, "formed" clearly includes the concept of incorporation, as well as that of registration, in addition to other means that might be employed by a State to create a corporation. The "formation" (or incorporation) of a corporation under the laws of a particular State does not suffice for the purposes of diplomatic protection. In addition, there must be some tangible connection with the State in which the corporation is formed, in the form of a registered office or seat of management (*siège social*) or a similar connection. This language seeks to give effect to the insistence of the ICJ in *Barcelona Traction* that there be some connecting factor between the State in which the company is formed and the company. "Close and permanent connection", the language employed by the Court to describe the link between the Barcelona Traction company and Canada, is not used, as this would set too high a threshold for the connecting factor. Instead, "registered office", the connecting factor required by the Court in addition to incorporation, is preferred. As some legal systems do not require registered offices, but some other connection, "seat of management or […] some similar connection" are used as alternatives. Generally, article 9 requires a relationship between the corporation and the State, which goes beyond mere formation or incorporation and is characterized by some additional connecting factor. This relationship, which is governed by the municipal law of the State that seeks to exercise diplomatic protection, may be described in different terms by different legal systems.[97]

(5) In *Barcelona Traction* the State of nationality of the majority shareholders (Belgium) argued that it was entitled to exercise diplomatic protection in respect of the corporation because its shareholding gave it a genuine link with the corporation of the kind recognized in the *Nottebohm* case.[98] In rejecting this argument, the ICJ declined to dismiss the application of the genuine link test to corporations and held that *in casu* there was "a close and permanent" link between Barcelona Traction and Canada, as it had its registered office there and had held its board meetings there for many years.[99] Article 9 does not require the existence of a genuine link between the corporation and protecting State of the kind advocated by Belgium in *Barcelona Traction*. Moreover, it rejects the notion of a genuine link as a necessary connecting factor in the context of the diplomatic protection of corporations, as this might result in the statelessness of corporations formed in one State with a majority shareholding in another State. It was the prevailing view in the Commission that the registered office, seat of management "or […] some similar connection" should not therefore be seen as forms of a genuine link, particularly insofar as this term is understood to require majority shareholding as a connecting factor.

(6) The phrase "or […] some similar connection" must be read in the context of the "registered office or the seat of its management", in accordance with the *ejusdem generis* rule of interpretation, which requires a general phrase of this kind to be interpreted narrowly to accord with the phrases that precede it. This means that the phrase is to have no life of its own. It must refer to some connection similar to that of "registered office" or "seat of management".

(7) In contrast with article 4, article 9 speaks of "the" State of nationality as meaning "the" State under whose law the corporation was formed. This language is used to avoid any suggestion that a corporation might have dual nationality. As multiple nationality is possible in the case of natural persons, article 4 speaks of "a" State of nationality. Some members of the Commission did not agree with the view that corporations can only have one nationality.

Article 10. Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation which was its national at the time of the injury and is its national at the date of the official presentation of the claim.

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

Commentary

(1) The general principles relating to the requirement of continuous nationality are discussed in the commentary to article 5. In practice, problems of continuous nationality arise less in the case of corporations than with natural persons. Whereas natural persons change nationality easily as a result of naturalization, voluntary and involuntary (as, possibly, in the case of marriage or adoption), and State succession, corporations may only change nationality by being re-formed or reincorporated in another State, in which case the corporation assumes a new personality, thereby breaking the continuity of nationality of the

[95] *Ibid.*

[96] *Ibid.*, para. 71.

[97] The ICJ in *Barcelona Traction* made it clear that there are no rules of international law on the incorporation of companies. Consequently, it was necessary to have recourse to the municipal law to ascertain whether the conditions for incorporation had been met. The Court stated: "All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law" (*ibid.*), pp. 34–35, para. 38.

[98] See footnote 32 above.

[99] See *Barcelona Traction, Second Phase, Decision* (footnote 40 above), p. 43, paras. 70–71.

corporation.[100] Only in one instance may a corporation, possibly, change nationality without changing legal personality, and that is in the case of State succession.

(2) Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a corporation that was its national both at the time of the injury and at the date of the official presentation of the claim. The first requirement, that the injured corporation be a national of the claimant State at the time of the presentation of the claim, presents no problem. Difficulties arise, however, in respect of the *dies ad quem*, the date until which nationality of the claim is required.[101] The corporation must clearly be a national of the claimant State when the official presentation of the claim is made. There is support for this proposition in treaties, judicial decisions and doctrine.[102] In this sense, the entitlement of the State to exercise diplomatic protection begins at the date of the official presentation of the claim. There was, however, support for the view that if the corporation should change its nationality between this date and the making of an award or a judgement it ceases to be a national for the purposes of diplomatic protection. According to this view, the continuous nationality rule requires the bond of nationality "from the time of the occurrence of the injury until the making of the award".[103] In the light of the paucity of such cases in practice, the Commission preferred to maintain the position reflected in draft article 10.[104]

(3) The word "claim" in paragraph 1 includes both a claim submitted through diplomatic channels and a claim filed before a judicial body. Such a claim may specify the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing, and the form reparation should take.[105]

(4) Difficulties arise in respect of the exercise of diplomatic protection of a corporation that has ceased to exist according to the law of the State in which it was formed and of which it was a national. If one takes the position that the State of nationality of such a corporation may not bring a claim as the corporation no longer exists at the time of presentation of the claim, then no State may exercise diplomatic protection in respect of an injury to the corporation. A State could not avail itself of the nationality of the shareholders in order to bring such a claim as it could not show that it had the necessary interest at the time the injury occurred to the corporation. This matter troubled several judges in the *Barcelona Traction* case[106] and it has troubled certain courts and arbitral tribunals[107] and scholars.[108] Paragraph 2 adopts a pragmatic approach and allows the State of nationality of a corporation to exercise diplomatic protection in respect of an injury suffered by the corporation when it was its national and has ceased to exist—and therefore ceased to be its national—as a result of the injury. In order to qualify, the claimant State must prove that it was because of the injury in respect of which the claim is brought that the corporation has ceased to exist. Paragraph 2 must be read in conjunction with article 11 (*a*), which makes it clear that the State of nationality of shareholders will not be entitled to exercise diplomatic protection in respect of an injury to a corporation that led to its demise.

Article 11. Protection of shareholders

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

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

(*b*) The corporation had, at the 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.

Commentary

(1) The most fundamental principle of the diplomatic protection of corporations is that a corporation is to be protected by the State of nationality of the corporation and *not* by the State or States of nationality of the shareholders in a corporation. This principle was strongly reaffirmed by the ICJ in *Barcelona Traction*. In this case the Court emphasized at the outset that it was concerned only with the question of the diplomatic protection of shareholders in "a limited liability company whose capital is

[100] See the *Orinoco Steamship Company* case, United States–Venezuela Mixed Claims Commission, constituted under the Protocol of 17 February 1903, UNRIAA, vol. IX (Sales No. 1959.V.5), p. 180. Here a company incorporated in the United Kingdom transferred its claim against the Government of the Bolivarian Republic of Venezuela to a successor company incorporated in the United States. As the treaty establishing the Commission permitted the United States to bring a claim on behalf of its national in such circumstances, the claim was allowed. However, Umpire Barge made it clear that, but for the treaty, the claim would not have been allowed (*ibid.*, at p. 192).

[101] This matter was left undecided by the PCIJ in the *Panevezys-Saldutiskis Railway* case (see footnote 32 above), at p. 17. See also the fourth report of the Special Rapporteur Václav Mikulka on nationality in relation to the succession of States, which highlights the difficulties surrounding the nationality of legal persons in relation to the succession of States, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/489, p. 301.

[102] See the *Kren* claim (footnote 55 above), at p. 234.

[103] *Oppenheim's International Law* (see footnote 54 above), p. 512.

[104] For a recent example of such a case, see *The Loewen Group Inc. and Raymond L. Loewen* v. *United States of America*, ICSID, No. ARB(AF)/98/3, ILM, vol. 42 (2003), p. 811.

[105] See, further, article 43 of the draft articles on the responsibility of States for internationally wrongful acts and the commentary thereto, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 119–120.

[106] Judges Jessup (see footnote 40 above, p. 193), Gros (*ibid.*, p. 277), and Fitzmaurice (*ibid.*, pp. 101–102), and Judge *ad hoc* Riphagen (*ibid.*, p. 345).

[107] See the *Kunhardt* claim (opinions in the American–Venezuelan Mixed Claims Commission of 1903, constituted in virtue of the Protocol of 17 February 1903), UNRIAA, vol. IX (Sales No. 1959.V.5), p. 171, and particularly the dissenting opinion of the Venezuelan Commissioner, Mr. Paúl, at p. 178; see also *F. W. Flack, on behalf of the Estate of the Late D.L. Flack (Great Britain)* v. *United Mexican States, Decision No. 10 of 6 December 1929, ibid.*, vol. V (Sales No. 1952.V.3), p. 61, at p. 63.

[108] See L. Caflisch, *La protection des sociétés commerciales et des intérêts indirects en droit international public*, The Hague, Martinus Nijhoff, 1969, pp. 206–207; W. E. Beckett, "Diplomatic claims in respect of injuries to companies", in *Transactions of the Grotius Society*, vol. 17, London, Sweet and Maxwell, 1932, p. 175; and E. Wyler, *La règle dite de la continuité de la nationalité dans le contentieux international*, Paris, Presses universitaires de France, 1990, pp. 197–202.

represented by shares".[109] Such companies are characterized by a clear distinction between company and shareholders.[110] Whenever a shareholder's interests are harmed by an injury to the company, it is to the company that the shareholder must look to take action, for "although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed".[111] Only where the act complained of is aimed at the direct rights of the shareholders does a shareholder have an independent right of action.[112] Such principles governing the distinction between company and shareholders, said the Court, are derived from municipal law and not international law.[113]

(2) In reaching its decision that the State of incorporation of a company and not the State(s) of nationality of the shareholders in the company is the appropriate State to exercise diplomatic protection in the event of injury to a company, the Court in *Barcelona Traction* was guided by a number of policy considerations. First, when shareholders invest in a corporation doing business abroad they undertake risks, including the risk that the State of nationality of the corporation may, in the exercise of its discretion, decline to exercise diplomatic protection on their behalf.[114] Secondly, if the State of nationality of shareholders is permitted to exercise diplomatic protection, this might lead to a multiplicity of claims by different States, as large corporations frequently comprise shareholders of many nationalities.[115] In this connection the Court indicated that if the shareholder's State of nationality was empowered to act on his behalf there was no reason why every individual shareholder should not enjoy such a right.[116] Thirdly, the Court was reluctant to apply by way of analogy rules relating to dual nationality to corporations and shareholders and to allow the States of nationality of both to exercise diplomatic protection.[117]

(3) The Court in *Barcelona Traction* accepted that the State(s) of nationality of shareholders *might* exercise diplomatic protection on their behalf in two situations: firstly, where the company had ceased to exist in its place of incorporation[118]—which was not the case with Barcelona Traction; and secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the foreign shareholders' sole means of protection on the international level was through their State(s) of nationality[119]—which was also not the case with Barcelona Traction. These two exceptions, which were not thoroughly examined by the Court in *Barcelona Traction* because they were not relevant to the case, are recognized in paragraphs (*a*) and (*b*) of article 11. It is important to stress that, as the shareholders in a company may be nationals of different States, several States of nationality may be able to exercise diplomatic protection in terms of these exceptions.

(4) Article 11 (*a*) requires that the corporation shall have "ceased to exist" before the State of nationality of the shareholders shall be entitled to intervene on their behalf. Before the *Barcelona Traction* case the weight of authority favoured a less stringent test, one that permitted intervention on behalf of shareholders when the company was "practically defunct".[120] The Court in *Barcelona Traction*, however, set a higher threshold for determining the demise of a company. The "paralysis" or "precarious financial situation" of a company was dismissed as inadequate.[121] The test of "practically defunct" was likewise rejected as one "which lacks all legal precision".[122] Only the "company's status in law" was considered relevant. The Court stated: "Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their Government could arise."[123] Subsequent support has been given to this test by the European Court of Human Rights.[124]

(5) The Court in *Barcelona Traction* did not expressly state that the company must have ceased to exist in *the place of incorporation* as a precondition to shareholders' intervention. Nevertheless, it seems clear in the context of the proceedings before it that the Court intended that the company should have ceased to exist in the State of incorporation and not in the State in which the company was injured. The Court was prepared to accept that the company was destroyed in Spain[125] but emphasized that this did not affect its continued existence in Canada, the State of incorporation: "In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist."[126] A company is "born" in the State of incorporation when it is formed or incorporated there. Conversely, it "dies" when it is wound up in its State of incorporation, the State which gave it its existence. It therefore seems logical that the question whether a company has ceased to exist, and is no longer able to function as a corporate entity, must be determined by the law of the State in which it is incorporated.

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[109] *Barcelona Traction, Second Phase, Decision* (see footnote 40 above), p. 34, para. 40.

[110] *Ibid.*, para. 41.

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

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

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

[114] *Ibid.*, p. 35 (para. 43), p. 46 (paras. 86–87), p. 50 (para. 99).

[115] *Ibid.*, pp. 48–49, paras. 94–96.

[116] *Ibid.*, p. 48, paras. 94–95.

[117] *Ibid.*, p. 38 (para. 53) and p. 50 (para. 98).

[118] *Ibid.*, pp. 40–41, paras. 65–68.

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

[120] *Delagoa Bay Railway Co.* case, J. B. Moore, *Digest of International Law*, vol. VI, Washington D.C., United States Government Printing Office, 1906, p. 648; *The Claims of Rosa Gelbtrunk and the "Salvador Commercial Company"*, et al. 10 *("El Triunfo Company")*, UNRIAA, vol. XV (Sales No. 1966.V.3), p. 455, at p. 479; and the *Baasch and Römer* claim, *ibid.*, vol. X (Sales No. 1960.V.4), p. 713, at 723.

[121] See *Barcelona Traction, Second Phase, Decision* (footnote 40 above), pp. 40–41, paras. 65–66.

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

[123] *Ibid.*; see also the separate opinions of Judges Padilla Nervo (*ibid.*, p. 256) and Ammoun (*ibid.*, pp. 319–320).

[124] See *Agrotexim and others* v. *Greece, Decision of 24 October 1995,* ECHR, Series A, No. 330-A, p. 25, para. 68.

[125] See *Barcelona Traction, Second Phase, Decision* (footnote 40 above), p. 40, para. 65. See also the separate opinions of Judges Fitzmaurice (*ibid.*, p. 75) and Jessup (*ibid.*, p. 194).

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

(6) The final phrase "for a reason unrelated to the injury" in article 11 (*a*) aims to ensure that the State of nationality of the shareholders will not be permitted to bring proceedings in respect of the injury to the corporation that is the cause of the corporation's demise. This, according to article 10, is the continuing right of the State of nationality of the corporation. The State of nationality of the shareholders will therefore only be able to exercise diplomatic protection in respect of shareholders who have suffered as a result of injuries sustained by the corporation unrelated to the injury that might have given rise to the demise of the corporation. The purpose of this qualification is to limit the circumstances in which the State of nationality of the shareholders may intervene on behalf of such shareholders for injury to the corporation.

(7) Article 11, paragraph (*b*) gives effect to the exception allowing the State of nationality of the shareholders in a corporation to exercise diplomatic protection on their behalf where the State of incorporation is itself responsible for inflicting injury on the corporation. The exception is, however, formulated in a restrictive manner so as to limit it to cases where incorporation was required by the State inflicting the injury on the corporation as a precondition for doing business there.

(8) There is tentative evidence in support of a broad exception, without the restrictive condition contained in paragraph (*b*), in State practice, arbitral awards[127] and doctrine. Significantly, however, the strongest support for intervention on the part of the State of nationality of the shareholders comes from three claims in which the injured corporation had been *compelled* to incorporate in the wrongdoing State: *Delagoa Bay Railway, Mexican Eagle* and *El Triunfo Company*. While there is no suggestion in the language of these claims that intervention is to be limited to such circumstances, there is no doubt that it is in such cases that intervention is most needed. As the Government of the United Kingdom replied to the Mexican argument in *Mexican Eagle* that a State might not intervene on behalf of its shareholders in a Mexican company:

> If the doctrine were admitted that a Government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign Governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.[128]

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

> It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.[129]

Judges Fitzmaurice,[130] Tanaka[131] and Jessup[132] expressed full support in their separate opinions in *Barcelona Traction* for the right of the State of nationality of the shareholders to intervene when the company was injured by the State of incorporation.[133] While both Judges Fitzmaurice[134] and Jessup[135] conceded that the need for such a rule was particularly strong where incorporation was required as a precondition for doing business in the State of incorporation, neither was prepared to limit the rule to such circumstances. Judges Padilla Nervo,[136] Morelli[137] and Ammoun,[138] on the other hand, were vigorously opposed to the exception.

(10) Developments relating to the proposed exception in the post-*Barcelona Traction* period have occurred mainly in the context of treaties. Nevertheless they do indicate support for the notion that the shareholders of a company may intervene against the State of incorporation of the company when it has been responsible for causing injury to the company.[139] In the *ELSI* case,[140] a Chamber of the ICJ allowed the United States to bring a claim against Italy in respect of damages suffered by an Italian company whose shares were wholly owned by two American companies. The Court avoided pronouncing on the compatibility of its finding with that of *Barcelona Traction* or on the proposed exception left open in *Barcelona Traction* despite the fact that Italy objected that the com-

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[127] See *Delagoa Bay Railway Company* (footnote 120 above); *Mexican Eagle (El Aguila)*, M. M. Whiteman, *Digest of International Law*, vol. 8, 1967, pp. 1272–1274; *Romano-Americana*, G. H. Hackworth, *Digest of International Law*, vol. V, Washington D.C., United States Government Printing Office, 1943, p. 841; *"Salvador Commercial Company"* et al. *("El Triunfo Company"), Award of 8 May 1902*, UNRIAA, vol. XV, p. 467, at p. 479; and *The Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers, Award of 5 August 1926, ibid.*, vol. II (Sales No. 1949.V.1), p. 777, at p. 790. For a comprehensive examination of the authorities, see Caflisch, *op. cit.* (footnote 108 above); and J. M. Jones, "Claims on behalf of nationals who are shareholders in foreign companies", BYIL, vol. 26, 1949, p. 225. See also E. Jiménez de Aréchaga, "International responsibility", in M. Sørensen (ed.), *Manual of International Law*, London, Macmillan, 1968, p. 531, at pp. 580–581.

[128] Whiteman, *op. cit.* (footnote 127 above), pp. 1273–1274.

[129] *Barcelona Traction, Second Phase, Decision* (see footnote 40 above), p. 48, para. 92.

[130] *Ibid.*, pp. 72–75.

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

[132] *Ibid.*, pp. 191–193.

[133] Judge Wellington Koo likewise supported this position in *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Decision, I.C.J. Reports 1964*, p. 6, at p. 58, para. 20.

[134] *Barcelona Traction* (see footnote 40 above), pp. 73–74, paras. 15 and 16.

[135] *Ibid.*, pp. 191–192.

[136] *Ibid.*, pp. 257–259.

[137] *Ibid.*, pp. 240–241.

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

[139] See *SEDCO Inc.* v. *National Iranian Oil Company and the Islamic Republic of Iran, Case No. 129 of 24 October 1985*, ILR, vol. 84 (1991), pp. 484 and 496 (interpreting article VII(2) of the Algiers Claims Settlement Declaration); and *Liberian Eastern Timber Corporation (LETCO)* v. *The Government of the Republic of Liberia,* ILM, vol. 26 (1987), pp. 647 and 652–654 (interpreting article 25 of the Convention on the settlement of investment disputes between States and Nationals of other States).

[140] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

pany whose rights were alleged to have been violated was incorporated in Italy and that the United States sought to protect the rights of shareholders in the company.[141] This silence might be explained on the ground that the Chamber was not concerned with the evaluation of customary international law but with the interpretation of a bilateral Treaty of Friendship, Commerce and Navigation[142] which provided for the protection of United States shareholders abroad. On the other hand, the proposed exception was clearly before the Chamber.[143] It is thus possible to infer support for the exception in favour of the right of the State of shareholders in a corporation to intervene against the State of incorporation when it is responsible for causing injury to the corporation.[144]

(11) Before *Barcelona Traction,* there was support for the proposed exception, although opinions were divided over whether, or to what extent, State practice and arbitral decisions recognized it. The *obiter dictum* in *Barcelona Traction* and the separate opinions of Judges Fitzmaurice, Jessup and Tanaka have undoubtedly added to the weight of authority in favour of the exception. Subsequent developments, albeit in the context of treaty interpretation, have confirmed this trend.[145] In these circumstances it would be possible to sustain a general exception on the basis of judicial opinion. However, article 11, paragraph (*b*) does not go this far. Instead it limits the exception to what has been described as a "Calvo corporation", a corporation whose incorporation, like the Calvo clause,[146] is designed to protect it from the rules of international law relating to diplomatic protection. It limits the exception to the situation in which the corporation had, *at the time of the injury* (a further restrictive feature), the nationality of the State alleged to be responsible for causing the injury and incorporation under the law of the latter State was required by it as a precondition for doing business there. No doubt there will be cases in which political pressure is brought to bear on foreign investors to incorporate a company in the State in which they wish to do business. In terms of the exception contained in paragraph (*b*) this is not sufficient: the law of the State must require incorporation as a precondition for doing business there.

Article 12. Direct injury to shareholders

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

Commentary

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

> … an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected. […] The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.[147]

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

(2) The issue of the protection of the direct rights of shareholders was before the Chamber of the ICJ in the *ELSI* case.[148] However, in that case, the rights in question, such as the rights of the shareholders to organize, control and manage the company, were to be found in the Treaty of Friendship, Commerce and Navigation[149] that the Chamber was called on to interpret, and the Chamber did not expound on the rules of customary international law on this subject. In *Agrotexim*,[150] the European Court of Human Rights, like the International Court of Justice in *Barcelona Traction*, acknowledged the right of shareholders to protection in respect of the direct violation of their rights, but held that *in casu* no such violation had occurred.[151]

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

(4) Article 12 does not specify the legal order that must determine which rights belong to the shareholder as distinct from the corporation. In most cases this is a

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[141] *Ibid.*, p. 64 (para. 106) and p. 79 (para. 132).

[142] Signed at Rome on 2 February 1948 (United Nations, *Treaty Series*, vol. 79, No. 1040, p. 171).

[143] This is clear from an exchange of opinions in *Elettronica Sicula S.p.A. (ELSI)* (see footnote 140 above) between Judges Oda (*ibid.*, pp. 87–88) and Schwebel (*ibid.*, p. 94) on the subject.

[144] This view is expressed by Y. Dinstein in "Diplomatic protection of companies under international law", in K. Wellens (ed.), *International Law: Theory and Practice—Essays in Honour of Eric Suy*, The Hague, Martinus Nijhoff, 1998, p. 505, at p. 512.

[145] According to the United Kingdom's 1985 Rules Applying to International Claims, "[w]here a [United Kingdom] national has an interest, as a shareholder or otherwise, in a company incorporated in another State and of which it is therefore a national, and that State injures the company, [Her Majesty's Government] may intervene to protect the interests of that [United Kingdom] national." Rule VI, reprinted in *International and Comparative Law Quarterly*, vol. 37 (1988), p. 1007.

[146] See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 203–204.

[147] *Barcelona Traction* (see footnote 40 above), p. 36, paras. 46–47.

[148] See footnote 140 above.

[149] See footnote 142 above.

[150] *Agrotexim and others* v. *Greece* (see footnote 124 above).

[151] *Ibid.*, p. 23–24, para. 62.

matter to be decided by the municipal law of the State of incorporation. Where the company is incorporated in the wrongdoing State, however, there may be a case for the invocation of general principles of company law in order to ensure that the rights of foreign shareholders are not subjected to discriminatory treatment.[152]

Article 13. Other legal persons

The principles contained in draft articles 9 and 10 in respect of corporations shall be applicable, as appropriate, to the diplomatic protection of other legal persons.

Commentary

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

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

(3) There is jurisprudential debate about the legal nature of legal personality and, in particular, about the manner in which a legal person comes into being. The "fiction" theory maintains that no legal person can come into being without a formal act of incorporation by the State. This means that a body other than a natural person may obtain the privileges of personality by an act of State, which by a fiction of law equates it to a natural person, subject to such limitations as the law may impose. According to the "realist" theory, on the other hand, corporate existence is a reality and does not depend on State recognition. If an association or body acts in fact as a separate legal entity, it becomes a legal person, with all its attributes, without requiring grant of legal personality by the State. Whatever the merits of the realist theory, it is clear that, to exist, a legal person must have some recognition by law, that is, by some municipal law system. This has been stressed by both the European Court of Justice[153] and the International Court of Justice.[154]

(4) Given the fact that legal persons are the creatures of municipal law, it follows that there are today a wide range of legal persons with different characteristics, including corporations, public enterprises, universities, schools, foundations, churches, municipalities, non-profit-making associations, non-governmental organizations and even partnerships (in some countries). The impossibility of finding common, uniform features in all these legal persons provides one explanation for the fact that writers on both public and private international law largely confine their consideration of legal persons in the context of international law to the corporation. Despite this, regard must be had to legal persons other than corporations in the context of diplomatic protection. The case law of the PCIJ shows that a commune[155] (municipality) or university[156] may in certain circumstances qualify as a legal person and as national of a State. There is no reason why such legal persons should not qualify for diplomatic protection if injured abroad, provided that they are autonomous entities not forming part of the apparatus of the protecting State.[157] Non-profit-making foundations, comprising assets set aside by a donor or testator for a charitable purpose, constitute legal persons without members. Today many foundations fund projects abroad to promote health, welfare, women's rights, human rights and the environment in developing countries. Should such a legal person be subjected to an internationally wrongful act by the host State, it is probable that it would be granted diplomatic protection by the State under whose laws it has been created. Non-governmental organizations engaged in worthy causes abroad would appear to fall into the same category as foundations.[158]

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[152] In his separate opinion in *ELSI*, Judge Oda spoke of "the general principles of law concerning companies" in the context of shareholders' rights (see footnote 140 above), pp. 87–88.

[153] *The Queen* v. *H. M. Treasury and Commissioners of Inland Revenue*, ex parte *Daily Mail and General Trust plc, Case 81/87, Judgment of the Court of 27 September 1988*, European Court of Justice, *European Court Reports 1988*, p. 5483, at para. 19.

[154] *Barcelona Traction, Second Phase, Decision* (see footnote 40 above), pp. 34–35, para. 38.

[155] In *Certain German Interests in Polish Upper Silesia*, the PCIJ held that the commune of Ratibor fell within the category of "German national" within the meaning of the German–Polish Convention concerning Upper Silesia (*Merits, Judgment No. 7, 1926, P.C.I.J. Reports, Series A, No. 7*, p. 19, at pp. 73–75). The Convention was signed in Geneva on 15 May 1922 (see G. Kaeckenbeeck, *The International Experiment of Upper Silesia*, London, Oxford University Press, 1942, p. 572).

[156] In the statement from the case *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, the PCIJ held that the Peter Pázmány University was a Hungarian national in terms of article 250 of the Treaty of Peace between the Allied and Associated Powers and Hungary (Treaty of Trianon) and therefore was entitled to the restitution of property belonging to it (*Judgment, 1933, P.C.I.J. Reports, Series A/B, No. 61,* p. 208, at pp. 227–232).

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

[158] See, further, K. Doehring, "Diplomatic protection of non-governmental organizations", in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación:* liber amicorum *en homenaje*

(Continued on next page.)

(5) The diversity of goals and structures in legal persons other than corporations makes it impossible to draft separate and distinct provisions to cover the diplomatic protection of different kinds of legal persons. The wisest, and only realistic, course is to draft a provision that extends the principles of diplomatic protection adopted for corporations to other legal persons—subject to the changes necessary to take account of the different features of each legal person. The proposed provision seeks to achieve this. It provides that the principles governing the State of nationality of corporations and the application of the principle of continuous nationality to corporations, contained in articles 9 and 10 respectively, will apply, "as appropriate", to the diplomatic protection of legal persons other than corporations. Initially the phrase "*mutatis mutandis*" was used, but the Commission decided not to employ a Latin maxim when "as appropriate" fully captured the meaning that the Commission sought to convey. No reference is made to articles 11 and 12 as they are concerned with shareholders' rights only.

Part Three

LOCAL REMEDIES

Article 14. Exhaustion of local remedies

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 16, exhausted all local remedies.

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

Commentary

(1) Article 14 seeks to codify the rule of customary international law requiring the exhaustion of local remedies as a prerequisite for the presentation of an international claim. This rule was recognized by the ICJ in the *Interhandel* case as "a well-established rule of customary international law"[159] and by a Chamber of the ICJ in the *ELSI* case as "an important principle of customary international law".[160] The exhaustion of local remedies rule ensures that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system".[161] The Commission has previously considered the exhaustion of local remedies in the context of its work on State responsibility and concluded that it is a "principle of general international law" supported by judicial decisions, State practice, treaties and the writings of jurists.[162]

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

(3) Paragraph 1 refers to the bringing of a claim rather than the presentation of the claim as the word "bring" more accurately reflects the process involved than the word "present", which suggests a formal act to which consequences are attached and is best used to identify the moment in time at which the claim is formally made.

(4) The phrase "all local remedies" must be read subject to article 16 which describes the exceptional circumstances in which local remedies need not be exhausted. Suggestions that reference be made in this provision to the need to exhaust only "adequate and effective" local remedies were not followed for two reasons. Firstly, because such a qualification of the requirement that local remedies be exhausted needs special attention in a separate provision. Secondly, the fact that the burden of proof is generally on the respondent State to show that local remedies are available, while the burden of proof is generally on the applicant State to show that there are no effective remedies open to the injured person,[163] requires that these two aspects of the local remedies rule be treated separately.

(5) The remedies available to an alien that must be exhausted before an international claim is brought will, inevitably, vary from State to State. No codification can therefore succeed in providing an absolute rule governing all situations. Paragraph 2 seeks to describe, in broad terms, the main kind of legal remedies that must be exhausted.[164] In the first instance it is clear that the foreign national must exhaust all the available judicial remedies provided for in the municipal law of the respondent State. If the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter. Even if there is no appeal as of right to a higher court, but such a court has the discretion to grant leave to appeal, the foreign national must still apply for

(Footnote 158 continued.)

al professor Eduardo Jiménez de Aréchaga, Montevideo, Fundación Cultura Universitaria, 1994, pp. 571–580.

[159] *Interhandel* (see footnote 31 above), p. 27.

[160] *Elettronica Sicula S.p.A.* (*ELSI*) (see footnote 140 above), p. 42, para. 50.

[161] *Interhandel* (see footnote 31 above), p. 27.

[162] See article 22 of the draft articles on State responsibility provisionally approved by the Commission on first reading, *Yearbook… 1996*, vol. II (Part Two), chap. III, sect. D.1 (draft article 22 was approved by the Commission at its twenty-ninth session and the text and the corresponding commentary are in *Yearbook… 1977*, vol. II (Part Two), chap. II, sect. B, pp. 30–50); and article 44 of the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 29); the commentary to this article is on pages 120–121.

[163] The question of burden of proof was considered by the Special Rapporteur in section C of his third report on diplomatic protection (see footnote 19 above). The Commission decided not to include a draft article on this subject (see *Yearbook… 2002*, vol. II (Part Two), pp. 62–64, paras. 240–252). See also the *Elettronica Sicula* (*ELSI*) case (footnote 140 above), pp. 46–48, paras. 59–63.

[164] In the *Ambatielos Claim*, the arbitral tribunal declared that "it is the whole system of legal protection, as provided by municipal law, which must have been put to the test" (*Judgment of 6 March 1956*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 120). See further on this subject, C. F. Amerasinghe, *Local Remedies in International Law*, 2nd ed., Cambridge University Press, 2004.

leave to appeal to that court.[165] Courts in this connection include both ordinary and special courts since "the crucial question is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress".[166]

(6) Administrative remedies must also be exhausted. The injured alien is, however, only required to exhaust such remedies which may result in a binding decision. He is not required to approach the executive for relief in the exercise of its discretionary powers. Local remedies do not include remedies as of grace[167] or those whose "purpose is to obtain a favour and not to vindicate a right".[168] Requests for clemency and resort to an ombudsman generally fall into this category.[169]

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

> for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[170]

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

> all the contentions of fact and propositions of law which are brought forward by the claimant Government […] must have been investigated and adjudicated upon by the municipal Courts.[171]

(8) The foreign litigant must therefore produce the evidence available to him to support the essence of his claim in the process of exhausting local remedies.[172] He cannot use the international remedy afforded by diplomatic protection to overcome faulty preparation or presentation of his claim at the municipal level.[173]

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

[166] *B. Schouw Nielsen* v. *Denmark, Application No. 343/57, Judgment of 2 September 1959*, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 438, referring to the consideration of the Institute of International Law in its resolution of 1954 (*Annuaire de l'Institut de droit international*, vol. 46, 1956, p. 364). See also *Lawless* v. *Ireland, Application No. 332/57, Judgment of 30 August 1958*, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 308, at pp. 318–322.

[167] *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war ("Finnish Ships Arbitration"), Award of 9 May 1934*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1479.

[168] *De Becker* v. *Belgium, Application No. 214/56, Decision of 9 June 1958,* European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 238.

[169] See *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment of 31 March 2004, I.C.J. Reports 2004*, p. 12, at pp. 63–66, paras. 135–143.

[170] *Elettronica Sicula S.p.A. (ELSI)* (see footnote 140 above), p. 46, para. 59.

[171] *Finnish Ships Arbitration* (see footnote 167 above), p. 1502.

[172] See the *Ambatielos Claim* (see footnote 164 above).

[173] See D. P. O'Connell, *International Law*, vol. 2, 2nd ed., London, Stevens, 1970, p. 1059.

Article 15. Category of claims

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

Commentary

(1) The exhaustion of local remedies rule applies only to cases in which the claimant State has been injured "indirectly", that is, through its national.[174] It does not apply where the claimant State is directly injured by the wrongful act of another State, as here the State has a distinct reason of its own for bringing an international claim.

(2) In practice it is difficult to decide whether the claim is "direct" or "indirect" where it is "mixed", in the sense that it contains elements of both injury to the State and injury to the nationals of the State. Many disputes before international courts have presented the phenomenon of the mixed claim. In the *United States Diplomatic and Consular Staff in Tehran* case,[175] there was a direct violation on the part of the Islamic Republic of Iran of the duty it owed to the United States of America to protect its diplomats and consuls, but at the same time there was injury to the person of the nationals (diplomats and consuls) held hostage, and in the *Interhandel* case,[176] there were claims brought by Switzerland relating to a direct wrong to itself arising out of breach of a treaty and to an indirect wrong resulting from an injury to a national corporation. In *United States Diplomatic and Consular Staff in Tehran* the ICJ treated the claim as a direct violation of international law; and in the *Interhandel* case the Court found that the claim was preponderantly indirect and that *Interhandel* had failed to exhaust local remedies.

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

> the Chamber has no doubt that the matter which colours and pervades the United States claim as a whole, is the alleged damage to Raytheon and Machlett [United States corporations].[177]

Closely related to the preponderance test is the *sine qua non* or "but for" test, which asks whether the claim

[174] This accords with the principle expounded by the PCIJ in the *Mavrommatis Palestine Concessions* case that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law" (see footnote 31 above), p. 12.

[175] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3. See, too, *Avena and Other Mexican Nationals* (see footnote 169 above), para. 40, in which the Court held that Mexico had suffered directly through injury to its nationals in terms of article 36 (1) of the Vienna Convention on Consular Relations.

[176] See footnote 31 above.

[177] *Elettronica Sicula S.p.A. (ELSI)* (see footnote 140 above), p. 43, para. 52. See also, the *Interhandel* case (footnote 31 above), p. 28.

comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national. If this question is answered negatively, the claim is an indirect one and local remedies must be exhausted. There is, however, little to distinguish the preponderance test from the "but for" test. If a claim is preponderantly based on injury to a national this is evidence of the fact that the claim would not have been brought but for the injury to the national. In these circumstances the Commission preferred to adopt one test only—that of preponderance.

(4) Other "tests" invoked to establish whether the claim is direct or indirect are not so much tests as factors that must be considered in deciding whether the claim is preponderantly weighted in favour of a direct or an indirect claim or whether the claim would not have been brought but for the injury to the national. The principal factors to be considered in making this assessment are the subject of the dispute, the nature of the claim and the remedy claimed. Thus where the subject of the dispute is a diplomatic official[178] or State property[179] the claim will normally be direct, and where the State seeks monetary relief on behalf of its national the claim will be indirect.

(5) Article 15 makes it clear that local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. Although there is support for the view that where a State makes no claim for damages for an injured national, but simply requests a decision on the interpretation and application of a treaty, there is no need for local remedies to be exhausted,[180] there are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.[181] Article 15 makes it clear that a request for a declaratory judgment *per se* is not exempt from the exhaustion of local remedies rule. Where the request for declaratory judgment is incidental to or related to a claim involving injury to a national—*whether linked to a claim for compensation or restitution on behalf of the injured national or not*—it is still possible for a tribunal to hold that in all the circumstances of the case the request for a declaratory judgment is preponderantly brought on the basis of an injury to the national. Such a decision would be fair and reasonable where there is evidence that the claimant State has deliberately requested a declaratory judgment in order to avoid compliance with the local remedies rule.

[178] See the *United States Diplomatic and Consular Staff in Tehran* case (footnote 175 above).

[179] See the *Corfu Channel* case (*United Kingdom* v. *Albania*), *Merits, Judgment, I.C.J. Reports 1949*, p. 4.

[180] See *Case concerning the Air Services Agreement of 27 March between the United States of America and France, Decision of 9 December 1978*, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at p. 29, para. 41.

[181] See *Interhandel* (footnote 31 above), pp. 28–29; and *Elettronica Sicula S.p.A. (ELSI)* (footnote 140 above), p. 43.

Article 16. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(*a*) The local remedies provide no reasonable possibility of effective redress;

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

(*c*) There is no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise make the exhaustion of local remedies unreasonable;

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

Commentary

(1) Article 16 deals with the exceptions to the exhaustion of local remedies rule. Paragraphs (*a*) to (*c*), which deal with circumstances which make it unfair or unreasonable that an injured alien should be required to exhaust local remedies as a precondition for the bringing of a claim, are clear exceptions to the exhaustion of local remedies rule. Paragraph (*d*) deals with a different situation—that which arises where the respondent State has waived compliance with the local remedies rule.

Paragraph a

(2) Paragraph (*a*) deals with the exception to the exhaustion of local remedies rule sometimes described, in broad terms, as the "futility" or "ineffectiveness" exception. The Commission considered three options for the formulation of a rule describing the circumstances in which local remedies need not be exhausted:

(i) The local remedies are obviously futile;

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

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

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

(3) The Commission considered the "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*,[182] but decided that it set too high a threshold. On the other hand, the Commission took the view that the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions,[183] was too generous to the claimant. It therefore

[182] *Finnish Ships Arbitration* (see footnote 167 above), p. 1504.

[183] See *Retimag S. A.* v. *Federal Republic of Germany, Application No. 712/60, Judgment of 16 December 1961*, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1961*, p. 385, at p. 400; and *X, Y and Z* v. *United Kingdom, Application Nos. 8022/77 and 8027/77, Decision of 8 December 1979*, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 18, p. 66, at p. 74. See also the commentary to article 22 of the draft articles on State responsibility adopted by the Commission at its twenty-ninth session (footnote 162 above).

preferred the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective redress. This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case[184] and is supported by the writings of jurists.[185] Moreover, it accords with judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question;[186] the national legislation justifying the acts of which the alien complains will not be reviewed by local courts;[187] the local courts are notoriously lacking in independence;[188] there is a consistent and well-established line of precedents adverse to the alien;[189] the local courts do not have the competence to grant an appropriate and adequate remedy to the alien;[190] or the respondent State does not have an adequate system of judicial protection.[191]

(4) The question whether local remedies do or do not offer the reasonable possibility of an effective redress must be determined with regard to the local law and cirumstances at the time at which they are to be used. This is a question to be decided by the competent international tribunal charged with the task of examining the exhaustion of local remedies. The decision on this matter must be made on the assumption that the claim is meritorious.[192]

Paragraph b

(5) That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts,[193] human rights instruments and practice,[194] judicial decisions[195] and scholarly opinion. The Commission was aware of the difficulty attached to giving an objective content or meaning to "undue delay", or to attempting to prescribe a fixed time limit within which local remedies are to be implemented. Each case must be judged on its own facts. As the British–Mexican Claims Commission stated in the *El Oro Mining and Railway Company* case:

> The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.[196]

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

Paragraph c

(7) The exception to the exhaustion of local remedies rule contained in article 16 (*a*), to the effect that local remedies do not need to be exhausted where "the local remedies provide no reasonable possibility of effective redress", does not cover situations where the local

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[184] See the *Case of Certain Norwegian Loans* (*France* v. *Norway*), *Judgment, I.C.J. Reports 1957*, p. 9, at p. 39.

[185] See the third report on diplomatic protection (footnote 19 above), para. 35.

[186] See the *Panevezys-Saldutiskis Railway* case (footnote 32 above), p. 18; and *Arbitration under Article 181 of the Treaty of Neuilly*, AJIL, vol. 28 (1934), p. 760, at p. 789; *El Triunfo Company* (footnote 127 above), pp. 476–477; *The "Lottie May" Incident, Arbitral award of 18 April 1899*, UNRIAA, vol. XV, p. 29, at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case (footnote 184 above), pp. 39–40; and *Finnish Ships Arbitration* (footnote 167 above), p. 1535.

[187] See *Arbitration under Article 181 of the Treaty of Neuilly* (footnote above). See also *Affaire des forêts du Rhodope central, Merits, Award of 29 March 1933*, UNRIAA, vol. III, p. 1405; *Ambatielos* (footnote 164 above), p. 119; and *Interhandel* (footnote 31 above), p. 28.

[188] See *Robert E. Brown (United States)* v. *Great Britain, Arbitral award of 23 November 1923*, UNRIAA, vol. VI, p. 120; and *Velásquez Rodríguez* v. *Honduras, Merits, Award of 29 July 1988*, ILM, vol. 28, 1989, p. 291, at pp. 304–309.

[189] See *Panevezys-Saldutiskis Railway* (footnote 32 above); "*S.S. Lisman*"*, Award of 5 October 1937*, UNRIAA, vol. III, p. 1767, at p. 1773; "*S.S. Seguranca*"*, Award of 27 September 1939, ibid.*, p. 1861, at p. 1868; *Finnish Ships Arbitration* (footnote 167 above), p. 1495; *X.* v. *Federal Republic of Germany, Application No. 27/55, Decision of 21 May 1956*, European Commission of Human Rights, *Documents and Decisions 1955–1956–1957*, p. 138; *X* v. *Federal Republic of Germany, Application No. 352/58, Decision of 4 September 1958*, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1958–1959*, p. 342, at p. 344; and *X* v. *Austria, Application No. 514/59, Decision of 5 January 1960*, European Commission and European Court of Human Rights, *Yearbook of the European Convention on Human Rights 1960*, p. 196, at p. 202.

[190] See *Finnish Ships Arbitration* (footnote 167 above), pp. 1496–1497; *Velásquez Rodríguez* v. *Honduras* (footnote 188 above); *Yağci and Sargin* v. *Turkey*, *Judgment of 8 June 1995*, ECHR, *Series A: Reports and Decisions*, vol. 319, p. 3, at p. 17, para. 42; and *Hornsby* v. *Greece*, *Judgment of 19 March 1997*, *ibid.*, ECHR, *Reports and Decisions 1997-II*, No. 33, p. 495, at p. 509, para. 37.

[191] See *Mushikiwabo and others* v. *Barayagwiza, Decision of 9 April 1996*, ILR, vol. 107 (1997), p. 457, at p. 460. During the military dictatorship in Chile, the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies (see *case 9755 (Chile), resolution 01a/88, case 9755, Annual Report of the Inter-American Commission on Human Rights 1987–1988*, OEA/Ser.L/V/II.74, document 10 rev. 1, pp. 136 *et seq.*).

[192] See *Finnish Ships Arbitration* (footnote 167 above), p. 1504; and *Ambatielos* (footnote 164 above), pp. 119–120.

[193] See the discussion of early codifications attempts by Special Rapporteur García Amador in his first report on State responsibility, *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 173–231, at pp. 223–226; and article 19 (2) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens prepared in 1960 by the Harvard School of Law, reproduced in Sohn and Baxter, *loc. cit.* (footnote 65 above), p. 577.

[194] International Covenant on Civil and Political Rights (art. 41 (1) (c)); American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 46 (2) (c)); *Weinberger* v. *Uruguay*, Communication No. 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57, at p. 59; *Las Palmeras, Preliminary Objections, Judgment of 4 February 2000*, Inter-American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38; *Erdoğan* v. *Turkey*, *Application No. 19807/92*, No. 84 A, ECHR, *Decisions and Reports*, 1996, p. 5, at p. 15.

[195] See *El Oro Mining and Railway Company (Limited) (Great Britain* v. *United Mexican States), Decision No. 55 of 18 June 1931*, UNRIAA, vol. V, p. 191, at p. 198; and *Prince von Pless Administration, Order of 4 February 1933*, P.C.I.J., Series A/B, No. 52, p. 11, at p. 16.

[196] See footnote 195 above.

remedies might offer the reasonable possibility of effective redress but it would be unreasonable or cause great hardship to the injured alien to exhaust local remedies. For instance, even where effective local remedies exist, it would be unreasonable and unfair to require an injured person to exhaust local remedies where his property has suffered environmental harm caused by pollution, radioactive fallout or a fallen space object emanating from a State in which his property is not situated; or where he is on board an aircraft that is shot down by a State whose airspace has been accidentally violated; or where serious obstacles are placed in the way of his using local remedies by the respondent State or some other body. In such cases it has been suggested that local remedies need not be exhausted because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State or because of the existence of a special hardship exception.

(8) There is support in the literature for the proposition that in all cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State.[197] Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. The early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that the national going abroad should normally be obliged to accept the local law as he finds it, including the means afforded for the redress of wrong. Today, however, an individual may be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Ukraine, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of an aircraft that has accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident of 27 July, 1955* case in which Bulgaria shot down an El Al flight that had accidentally entered its airspace[198]). The basis for such a voluntary link or territorial connection rule is the assumption of risk by the alien in a foreign State. It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

(9) Neither judicial authority nor State practice provides clear guidance on the existence of such an exception to the exhaustion of local remedies rule. While there are tentative dicta in support of the existence of such an exception in the *Interhandel*[199] and *Salem*[200] cases, in other cases[201] tribunals have upheld the applicability of the local remedies rule despite the absence of a voluntary link between the injured alien and the respondent State. In both the *Norwegian Loans* case[202] and the *Aerial Incident of July 27th, 1955* case[203] arguments in favour of the voluntary link requirement were forcefully advanced, but in neither case did the ICJ make a decision on this matter. In the *Trail Smelter* case,[204] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[205] in which, where there was no voluntary link, local remedies were dispensed with, have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule. The failure to insist on the application of the local remedies rule in these cases can, however, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

(10) While the Commission took the view that it is necessary to provide expressly for this exception to the local remedies rule, it preferred not to use the term "voluntary link" to describe this exception, as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. Moreover, it would be difficult to prove such a subjective criterion in practice, hence the decision of the Commission to require the existence of a "relevant connection" between the injured alien and the host State. This connection must be "relevant" in the sense that it must relate in some way to the injury suffered. A tribunal will be required to examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual, by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State. The word "relevant", it was decided, would best allow a tribunal to consider the essential elements governing the relationship between the injured alien and the host State in the context of the injury in order to determine whether

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[197] See C. F. Amerasinghe, *Local Remedies in International Law* (footnote 164 above), p. 169; and T. Meron, "The incidence of the rule of exhaustion of local remedies", BYIL, vol. 35 (1959), p. 83 *et seq*., at p. 94.

[198] *Case concerning the Aerial Incident of 27 July 1955* (*Israel* v. *Bulgaria*), *Judgment, I.C,J. Reports 1959*, p. 127.

[199] Here the ICJ stated: "it has been considered necessary that the *State where the violation occurred* should have an opportunity to redress it by its own means" (see footnote 31 above), p. 27 (emphasis added).

[200] In the *Salem* case an arbitral tribunal declared that "[a]s a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence" (see footnote 66 above), p. 1202.

[201] *Finnish Ships Arbitration* (footnote 167 above); and *Ambatielos* (see footnote 164 above).

[202] *Case of Certain Norwegian Loans* (*France* v. *Norway*), *Judgment of July 6th, 1957, Oral Pleadings of France, I.C.J. Pleadings*, vol. I, p. 408.

[203] *Case concerning the Aerial Incident of July 27th, 1955* (*Israel* v. *Bulgaria*), *Preliminary Objections, Oral Pleadings of Israel*, *I.C.J. Pleadings*, pp. 531–532.

[204] The *Trail Smelter* case *(United States* v. *Canada)*, UNRIAA, vol. III, p. 1905.

[205] The *Virginius* case (1873), reported in J. B. Moore, *A Digest of International Law* (footnote 120 above), vol. II, p. 895, at p. 903; and the *Jessie* case (1921), reported in AJIL, vol. 16 (1922), pp. 114–116.

there had been an assumption of risk on the part of the injured alien.

(11) The second part of paragraph *c* is designed to give a tribunal the power to dispense with the need for the exhaustion of local remedies where, in all the circumstances of the case, it would be unreasonable to expect compliance with this rule. Each case will obviously have to be considered on its own merits in making such a determination and it would be unwise to attempt to provide a comprehensive list of factors that might qualify for this exception. It is, however, suggested that the exception might be exercised where a State prevents an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory; or where criminal conspiracies in the host State obstruct the bringing of proceedings before local courts; or where the cost of exhausting local remedies is prohibitive.

Paragraph d

(12) A State may be prepared to waive the requirement that local remedies be exhausted. As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

> In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.[206]

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

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

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

It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien, are irrevocable, even if the contract is governed by the law of the host State.[207]

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

> unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.[208]

(16) Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[209] and the writings of jurists support such a conclusion. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption. Where the respondent State has agreed to submit disputes to arbitration that may arise in the future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the Contracting Parties espouses the claim of its national".[210] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the ICJ in the *ELSI* case.[211] A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.

(17) Although there is support for the proposition that the conduct of the respondent State during international proceedings may result in that State being estopped from

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[206] *Government of Costa Rica (In the Matter of Viviana Gallardo* et al.*), Award of 13 November 1981*, Inter-American Court of Human Rights, ILR, vol. 67 (1984), p. 578, at p. 587. See also *Elettronica Sicula S.p.A. (ELSI)* (footnote 140 above), p. 42, para. 50; and the *De Wilde, Ooms and Versyp* cases ("Belgian Vagrancy Cases"), ECHR, *Judgment of 18 June 1971*, ILR, vol. 56, p. 337, at p. 370, para. 55.

[207] See *Viviana Gallardo* et al. (footnote 206 above) and *De Wilde, Ooms and Versyp* cases ("Belgian Vagrancy Cases") (*ibid.*).

[208] *Elettronica Sicula S.p.A. (ELSI)* (see footnote 140 above), p. 42, para. 50.

[209] See, for example, *Steiner and Gross* v. *Polish State, Case No. 322 (1928), Annual Digest of Public International Law Cases 1927 and 1928*, A. McNair and H. Lauterpacht (eds.), London, Longman, 1931, p. 472; and *American International Group Inc.* v. *The Islamic Republic of Iran, Award No. 93-2-3 (1983), Iran-United States Claims Tribunal Reports*, Cambridge, Grotius, 1985, vol. 4, p. 96.

[210] F. A. Mann, "State contracts and international arbitration", BYIL, vol. 42 (1967), p. 32.

[211] See footnote 140 above. In the *Panevezys-Saldutiskis Railway* case (see footnote 32 above), the PCIJ held that acceptance of the Optional Clause under article 36 (2) of the Statute of the Court did not constitute implied waiver of the local remedies rule (as had been argued by Judge van Eysinga in a dissenting opinion, *ibid.*, pp. 35–36).

requiring that local remedies be exhausted,[212] the Commission preferred not to refer to estoppel in its formulation of the rule governing waiver on account of the uncertainty surrounding the doctrine of estoppel in international law. The Commission took the view that it was wiser to allow conduct from which a waiver of local remedies might be inferred to be treated as implied waiver.

Part four

MISCELLANEOUS PROVISIONS

Article 17. Actions or procedures other than diplomatic protection

The present draft articles are without prejudice to the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

Commentary

(1) The customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal: the protection of human rights.[213] The present articles are therefore not intended to exclude or to trump the rights of States, including both the State of nationality and States other than the State of nationality of an injured individual, to protect the individual under either customary international law or a multilateral or bilateral human rights treaty or other treaty. They are also not intended to interfere with the rights of natural persons or other entities, such as non-governmental organizations, to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act.

(2) A State may protect a non-national against the State of nationality of an injured individual or a third State in inter-State proceedings under the International Covenant on Civil and Political Rights (art. 41), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 11), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (art. 21), the European Convention on Human Rights (art. 24), the American Convention on Human Rights: "Pact of San José, Costa Rica" (art. 45), and the African Charter on Human and Peoples' Rights (arts. 47–54). The same conventions allow a State to protect its own nationals in inter-State proceedings. Moreover, customary international law allows States to protect the rights of non-nationals by protest, negotiation and, if a jurisdictional instrument so permits, legal proceedings. The decision of the ICJ in the 1966 *South West Africa cases*[214] holding that a State might not bring legal proceedings to protect the rights of non-nationals is today seen as bad law and was expressly repudiated by the Commission in its articles on State responsibility.[215] Moreover, article 48 of those articles permits a State other than the injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole.[216]

(3) The individual is also endowed with rights and remedies to protect itself against the injuring State, whether the individual's State of nationality or another State, in terms of international human rights conventions. This is most frequently achieved by the right to petition an international human rights monitoring body.[217] Individual rights under international law may also arise outside the framework of human rights. In the *La Grand* case the ICJ held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person";[218] and in the *Avena* case the Court further observed:

> that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual.[219]

A saving clause was inserted in the articles on State responsibility—article 33—to take account of this development in international law.[220]

(4) The actions or procedures referred to in article 17 include those available under both universal and regional human rights treaties as well as any other relevant treaty, for example, in a number of treaties on the protection of investment. Article 17 does not, however, deal with domestic remedies.

(5) This draft article is primarily concerned with the protection of human rights by means other than diplomatic protection. It does, however, also embrace the rights of States, natural persons and other entities conferred by treaties and customary rules on other subjects, such as the protection of foreign investment. The draft articles are likewise without prejudice to such rights that exist under procedures other than diplomatic protection.

(6) Article 17 makes it clear that the present draft articles are without prejudice to the rights that States, individuals or other entities may have to secure redress for injury

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[212] See *Elettronica Sicula S.p.A. (ELSI)* (footnote 140 above), p. 44, para. 54; *United States–United Kingdom Arbitration concerning Heathrow Airport User Charges, Award of 30 November 1992*, UNRIAA, vol. XXIV, p. 65, para. 6.33 (see also ILR, vol. 102, p. 216, at p. 285, para. 6.33); and *Foti and others, Merits, Judgment of 10 December 1982*, ILR, vol. 71, p. 366, at p. 380, para. 46.

[213] See the first report on diplomatic protection (footnote 16 above), particularly paras. 22–32.

[214] *South West Africa cases, Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966*, p. 6.

[215] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 127 (commentary to article 48, footnote 725).

[216] *Ibid.*, para. 76.

[217] See, for example, the Optional Protocol to the International Covenant on Civil and Political Rights, article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[218] *La Grand* (*Germany* v. *United States of America*), *Judgment, I.C.J. Reports 2001*, p. 466, at p. 494, para. 77.

[219] *Case Concerning Avena and Other Mexican Nationals* (see footnote 169 above), p. 36, para. 40.

[220] Paragraph 2 of this article reads: "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State" (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76).

suffered as a result of an internationally wrongful act by procedures other than diplomatic protection. Where, however, a State resorts to such procedures it does not abandon its right to exercise diplomatic protection in respect of an individual if that individual should be a national.[221]

(7) One member of the Commission considered the remedies sought pursuant to human rights treaties to be *lex specialis* with priority over remedies pursuant to diplomatic protection. Some members of the Commission also expressed the view that articles 17 and 18 should be merged.

Article 18. Special treaty provisions

The present draft articles do not apply where, and to the extent that, they are inconsistent with special treaty provisions, including those concerning the settlement of disputes between corporations or shareholders of a corporation and States.

Commentary

(1) Foreign investment is largely regulated and protected by bilateral investment treaties (BITs).[222] The number of BITs has grown considerably in recent years and it is currently estimated that there are nearly 2,000 such agreements in existence. An important feature of the BIT is its procedure for the settlement of investment disputes. Some BITs provide for the direct settlement of the investment dispute between the investor and the host State, before either an *ad hoc* tribunal or a tribunal established by the International Centre for Settlement of Investment Disputes (ICSID) under the Convention on the settlement of investment disputes between States and Nationals of other States (ICSID Convention). Other BITs provide for the settlement of investment disputes by means of arbitration between the State of nationality of the investor (corporation or shareholder) and the host State over the interpretation or application of the relevant provision of the BIT. The dispute settlement procedures provided for in BITs and the ICSID Convention offer greater advantages to the foreign investor than the customary international law system of diplomatic protection, as they give the investor direct access to international arbitration and they avoid the political uncertainty inherent in the discretionary nature of diplomatic protection.

(2) Where the dispute resolution procedures provided for in BITs or the ICSID Convention are invoked, diplomatic protection is in most cases excluded.[223]

(3) Article 18 makes it clear that the present draft articles do not apply to the alternative, special regime for the protection of foreign investors provided for in bilateral and multilateral investment treaties. However, it acknowledges that some treaties do not exclude recourse to diplomatic protection altogether. Hence the provision is formulated so that the draft articles do not apply "*where, and to the extent that*" they are inconsistent with the provisions of a BIT. To the extent that the draft articles remain consistent with the BIT in question, they continue to apply.

Article 19. Ships' crews

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

Commentary

(1) The purpose of draft article 19 is to affirm the right of the State or States of nationality of a ship's crew to exercise diplomatic protection on their behalf, while at the same time acknowledging that the State of nationality of the ship also has a right to seek redress on their behalf, irrespective of their nationality, when they have been injured in the course of an injury to a vessel resulting from an internationally wrongful act. It has become necessary to affirm the right of the State of nationality to exercise diplomatic protection on behalf of the members of a ship's crew in order to preclude any suggestion that this right has been replaced by that of the State of nationality of the ship. At the same time it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew. Although this cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew, there is nevertheless a close resemblance between this type of protection and diplomatic protection.

(2) There is support in the practice of States, in judicial decisions and in the writings of publicists,[224] for the position that the State of nationality of a ship (the flag State) may seek redress for members of the crew of the ship who do not have its nationality. There are also policy considerations in favour of such an approach.

(3) State practice emanates mainly from the United States. Under American law foreign seamen have traditionally been entitled to the protection of the United States while serving on American vessels. The American view was that once a seaman enlisted on a ship, the only relevant nationality was that of the flag State.[225] This unique status of foreigners serving on American vessels was tra-

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[221] In *Selmouni* v. *France, Application No. 25803/94, Judgment of 28 July 1999*, ECHR, *Reports of Judgments and Decisions 1999-V*, p. 149, the Netherlands intervened in support of a national's individual complaint against France before the European Court of Human Rights. This did not preclude the Netherlands from making a claim in the exercise of diplomatic protection on behalf of the injured individual, had it chosen to do so.

[222] This was acknowledged by the ICJ in *Barcelona Traction, Second Phase, Decision* (see footnote 40 above), p. 47, para. 90.

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

[224] See H. Meyers, *The Nationality of Ships*, The Hague, Martinus Nijhoff, 1967, pp. 90–107; R. Dolzer, "Diplomatic protection of foreign nationals", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1, Amsterdam, Elsevier, 1992, p. 1067; and I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford University Press, 2003, p. 460.

[225] See the *Ross* case, *United States Reports*, vol. 140 (1911), p. 453.

ditionally reaffirmed in diplomatic communications and consular regulations of the United States.[226] Doubts have, however, been raised as to whether this practice provides evidence of a customary rule by the United States itself in a communication to the Commission dated 20 May 2003.[227]

(4) International arbitral awards are inconclusive on the right of a State to extend protection to non-national seamen, but tend to lean in favour of such right rather than against it. In the *McCready* case, the umpire, Sir Edward Thornton, held that:

> seamen serving in the naval or mercantile marine under a flag not their own are entitled, for the duration of that service, to the protection of the flag under which they serve.[228]

In the *I'm Alone* case,[229] which arose from the sinking of a Canadian vessel by a United States coast guard ship, the Canadian Government successfully claimed compensation on behalf of three non-national crew members, asserting that where a claim was on behalf of a vessel, members of the crew were to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. In the *Reparation for injuries* advisory opinion two judges, in their separate opinions, accepted the right of a State to exercise protection on behalf of alien crew members.[230]

(5) In 1999, ITLOS handed down its decision in the *Saiga* case[231] which provides support, albeit not unambiguous, for the right of the flag State to seek redress for non-national crew members. The dispute in this case arose out of the arrest and detention of the *Saiga* by Guinea, while it was supplying oil to fishing vessels off the coast of Guinea. The *Saiga* was registered in Saint Vincent and the Grenadines ("St. Vincent") and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest. Following the arrest, Guinea detained the ship and crew. In proceedings before ITLOS, Guinea objected to the admissibility of St. Vincent's claim, *inter alia*, on the ground that the injured crew members were not nationals of St. Vincent. The Tribunal dismissed these challenges to the admissibility of the claim and held that Guinea had violated the rights of St. Vincent by arresting and detaining the ship and its crew. It ordered Guinea to pay compensation to St. Vincent for damages to the *Saiga* and for injury to the crew.

(6) Although the Tribunal treated the dispute mainly as one of direct injury to St. Vincent,[232] the Tribunal's reasoning suggests that it also saw the matter as a case involving something akin to diplomatic protection. Guinea clearly objected to the admissibility of the claim in respect of the crew, on the ground that it constituted a claim for diplomatic protection in respect of non-nationals of St. Vincent.[233] St. Vincent, equally clearly, insisted that it had the right to protect the crew of a ship flying its flag "irrespective of their nationality".[234] In dismissing Guinea's objection the Tribunal stated that the United Nations Convention on the Law of the Sea in a number of relevant provisions, including article 292, drew no distinction between nationals and non-nationals of the flag State.[235] It stressed that:

> the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.[236]

(7) There are cogent policy reasons for allowing the flag State to seek redress for the ship's crew. This was recognized by ITLOS in *Saiga* when it called attention to "the transient and multinational composition of ships' crews" and stated that large ships:

> could have a crew comprising persons of several nationalities. If each person sustaining damage were obliged to look for protection from the State of which such a person is a national, undue hardship would ensue.[237]

Practical considerations relating to the bringing of claims should not be overlooked. It is much easier and more efficient for one State to seek redress on behalf of all crew members than to require the States of nationality of all crew members to bring separate claims on behalf of their nationals.

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

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[226] See Hackworth, *op. cit.* (footnote 127 above), vol. III, p. 418, and vol. IV, pp. 883–884.

[227] This communication is on file with the Codification Division of the Office of Legal Affairs of the United Nations. The United States communication relies heavily on a critical article by A. Watts, "The protection of alien seamen", *International and Comparative Law Quarterly*, vol. 7 (1958), p. 691.

[228] *McCready (US)* v. *Mexico*, J. B. Moore, *International Arbitrations*, vol. 3, p. 2536.

[229] *S. S. "I'm Alone" (Canada* v. *United States)*, UNRIAA, vol. III, p. 1609.

[230] *Reparation for injuries suffered in the service of the United Nations* (see footnote 29 above), pp. 202–203 (Judge Hackworth) and pp. 206–207 (Judge Badawi Pasha).

[231] *The M/V "Saiga" (No. 2) case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, vol. 3, p. 10.

[232] *Ibid.*, pp. 45–46, para. 98.

[233] *Ibid.*, p. 47, para. 103.

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

[235] *Ibid.*, pp. 47–48, para. 105.

[236] *Ibid.*, p. 48, para. 106.

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