

Fresh hay from old fields: the continuing usefulness of diplomatic protection*

R. J. Blaise MacLean**

Introduction

When Mohammad Bennouna issued his Preliminary Report on Diplomatic Protection in 1998¹ it created a disturbance. In 1996 the International Law Commission (ILC) had identified the field of diplomatic protection as an area requiring “codification and progressive development”.² Towards this end, in 1997 the ILC appointed Mr. Bennouna as Special Rapporteur on Diplomatic Protection.³ To the surprise of many, Mr. Bennouna’s Preliminary Report concluded essentially that the doctrine of diplomatic protection had outlived its usefulness.⁴ His reasons will be elaborated upon elsewhere in this paper but, in summary, he asserted that the remedy of diplomatic protection had been founded upon a legal fiction⁵. He also took the view that international law had evolved newer and more accessible remedies against human rights violations since the Mavrommatis Palestine Concessions⁶ case of 1924.

* La bibliografía de este texto se encuentra en las notas de pie ubicadas a lo largo de este artículo

** Abogado canadiense; profesor de Common Law en la Universidad del Rosario. B.A. (Acadia, 1980), L.L.B. (Dalhousie, 1983), B.Ed. (York, 2003). Past member of the Nova Scotia and Ontario Bars, currently Professor of Law, Facultad de Jurisprudencia, Colegio Mayor de Nuestra Señora del Rosario, Bogotá, Colombia. ¹ U.N. Doc. A/CN.4, 484, 4 February 1998 (hereinafter “Preliminary Report”).

² Official Records of the General Assembly, Fifty-First Session, Supplement No. 10 (A/51/10) para. 249 and annex II, addendum 1.

³ See John R. Dugard, First Report on Diplomatic Protection UN Doc. A/CN.4/506, 7 Mar. 2000 (hereinafter “First Report”) at para. A2 for the sequence of events.

⁴ *Supra*, n. 1, para. 47 where Bennouna cites with approval a description by D. Carreau (Droit international public, Paris, Pedone, 1997) of diplomatic protection as “archaic”.

⁵ *Id.*, para. 21.

⁶ P.C.I.J., Judgement 30 August 1924.

The controversy did not end there. In 1999, Mr. Bennouna resigned from the ILC after his appointment as a judge of the International Criminal Court for the former Yugoslavia. In July 1999 Mr. John R. Dugard (hereinafter “Dugard”) was appointed as the new Special Rapporteur and in March 2000 he issued his First Report on Diplomatic Protection.⁷

This report stood the earlier report of Mr. Bennouna virtually on its head. Instead of endorsing the abandonment of diplomatic protection as a viable remedy at international law, Mr. Dugard advanced the view that, in fact, diplomatic protection was a highly valuable theory and did not hesitate to express his disagreement with the views of Mr. Bennouna.

The present Rapporteur does not share his predecessor’s disdain for fictions in law... We should not dismiss an institution, like diplomatic protection that serves a valuable service simply on the ground that it is premised on a fiction and cannot stand up to logical scrutiny.⁸

The report took the approach that, on the contrary, diplomatic protection could be a particularly useful tool in the effort to protect human rights.

Until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection.⁹

This led to a new debate. It was felt by many that Mr. Dugard had overemphasized the human rights perspective in his analysis of the role of diplomatic protection. The Report of the 52nd Session of the International Law Commission (2000)¹⁰ contained the following observation.

It was noted that the Special Rapporteur accorded great importance in his report to diplomatic protection as an instrument for ensuring that human rights were not infringed. However, it was suggested that this issue may have been overemphasized.¹¹

⁷ *Supra.*, n.3.

⁸ *Id.*, para. 21.

⁹ *Id.*, para. 29.

¹⁰ U.N. Doc. A/55/10,

Professor Dugard has not been deterred, however, and his subsequent reports have been robust in their efforts to advance the codification of the law regarding diplomatic protection.

Clearly, diplomatic protection is not dead. Although it is not dead, it is the position of this paper that there exist some logical deficiencies in it as a remedy, in particular in the area of nationality¹². The question addressed by this paper is whether there exists a logical rationale for the evolution of the law of diplomatic protection in the area of nationality while remaining true to the essence of the doctrine.

This paper will comprise three parts. The first will provide a short historical context about the essential components of diplomatic protection. This will include a brief discussion of a number of the “rules” which, despite six reports from the current Special Rapporteur, still require clarification. The second part will discuss the issue of nationality. It will examine whether some facets of the nationality precondition for the invocation of diplomatic protection could be rationalized so as to put them more in tune with twenty first century realities and at the same time enhance the efficacy of the remedy. The third part will refer to a case study as a means of illustrating why the suggested development of the rules would be valuable, just and would do no damage to the principles underlying the theory.

Diplomatic protection: the parameters

The principle of diplomatic protection is based on the historic right of states to take actions to protect their citizens. The idea of state intervention against other states to seek compensation for wrongs committed against their citizens is an old one.¹³ It was in the 20th century, however, that the analysis of the remedy and the principles underlying it became more regularized.

It is impossible to enter an analysis of diplomatic protection without referring as a starting point to the 1924 decision of the Permanent Court of

¹¹ Id. para. 422.

¹² As Ian Brownlie has pointed out in *Principles of Public International Law* 6th ed. (Oxford University Press, Oxford 2003) at p. 391, it is trite that States may only advance claims for diplomatic protection on behalf of their nationals. But, to paraphrase Huxley, when it comes to diplomatic protection, “Some nationals are more equal than others”.

¹³ Brownlie, *supra* n.11, p. 524.

International Justices (PCIJ) in the Mavrommatis Palestine Concessions case.¹⁴ In that case, the court set out a clear conception of diplomatic protection, and particularly noted that it was a remedy available only to states.

The court said:

It is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law by another State from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law.¹⁵

The conditions that must exist before the right to diplomatic protection may be invoked are that (a) an act contrary to international law must have been committed¹⁶ (b) the act must be attributable to a State, (c) the act must have been committed against a national of another State¹⁷, (d) the national must have been unable to obtain relief from the offending State through “ordinary means” (generally referred to as the exhaustion of local remedies requirement)¹⁸, (e) the victim must have been a national of the complaining State at the time the wrong was committed and also at the time the complaint was lodged (“continuous nationality” requirement)¹⁹, and (f) according to some sources, the victim cannot be a dual national of both the offending State and the complaining State²⁰.

¹⁴ *Supra*, n. 6.

¹⁵ *Id.*, p. 12. . As discussed elsewhere in this paper, this classic definition has been adopted and applied in jurisprudence and in the writings of publicists of international law.

¹⁶ The issue of what is an “international wrong” is a question of the Primary Rules, that is to say, what acts justify the invocation of diplomatic protection and when (and on what basis) is state responsibility engaged; this will be discussed below.

¹⁷ See Dugard, First Report, *supra*, n.3, para. 36. “...it is a widely accepted rule of customary international law that States have the right to protect their nationals abroad.”

¹⁸ Interhandel Case, 1959 ICJ Reports 27; Elettronica Sicula S.p.A. Case (ELSI) 1989 ICJ Reports 42. This rule is the subject matter of the Special Rapporteur’s Second Report on Diplomatic Protection UN. Doc. A/CN.4/514 (hereinafter “Second Report”).

¹⁹ See Guy I. F. Leigh “Nationality and Diplomatic Protection” 20 Int’l and Comp. L. Q 453 (1971) at p. 456. cf. Matthew S. Duchesne “The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes” 36 Geo. Wash. Int’l L. Rev 783 (2004) in which the author disputes whether continuous nationality is, in fact, a rule.

²⁰ Brownlie, *supra*, n.11, pp. 404-405. There is authority running both ways on this point, and the issue forms the subject matter of Part II of this paper.

Some sources contend that the injured national must come to court with “clean hands”, that is to say that the injured alien must himself not have caused the wrong by virtue of his own conduct. In his Sixth Report on Diplomatic Protection²¹, John R. Dugard concludes it is highly questionable whether “clean hands” constitutes a precondition before a State may invoke diplomatic protection²².

If these requirements are met, then diplomatic protection may be invoked by the State of which the victim is a national. It is important to note that the theory of diplomatic protection, as set out in 1924 in *Mavrommatis*, makes it clear that the remedy is invoked by the State, on its own *behalf*. It is the State that has, conceptually, been wronged and it is seeking the remedy because it has been harmed²³.

As International human rights law has evolved, debate arose as to whether, in fact the State invoking diplomatic protection was enforcing a right of its own, or whether it was now to be considered as enforcing a right of the injured national.²⁴ The debate is an important one because it impacts on whether the individual has a right to have a claim for diplomatic protection be advanced on his behalf.

While the idea that it is the individual’s injury and the individual’s right to have diplomatic protection may seem attractive at first glance, it is the classic view that prevails. This view holds that it is the State’s right that is being enforced, and that the victim has no right to have diplomatic protection enforced on his behalf.²⁵ Rather, it is entirely within the State’s own discretion and procedures to decide whether or not it will seek satisfaction as a result of the wrong committed against its national. This of course is the preferable position for a state, as it permits it to decide which cases it wishes to advance. Consequently, international law recognizes no human right to diplomatic protection.²⁶

²¹ UN Doc. A/CN.4/546.

²² *Id.*, para. 18.

²³ Because the injury is actually committed against a person (natural or legal) both Bennouna in his Preliminary Report and Dugard in his First Report regard this as a legal fiction.

²⁴ This was one of the clarifying questions that Mr. Bennouna left for the ILC in his Preliminary Report. See Preliminary Report, *supra*, n.1, para. 54.

²⁵ See, e.g. Dugard “First Report” *supra*, n.3, para 75 as to the traditional position, *Barcelona Traction Light and Power Company Ltd*, 1970 ICJ Reports 1 at p 44, and Colin Warbrick, “Protection of Nationals Abroad” 37 ICLQ1002 at p 1008, in reference to the British Rules.

²⁶ Warbrick, Colin, “Diplomatic Representations and Diplomatic Protection”, 51 ICLQ 723 (2000) (hereinafter “Diplomatic Representations”) at p 731. This does not, of course, preclude the right of States to grant this right to their citizens under domestic law.

The act that gives rise to a claim of diplomatic protection must be one that is a violation of a State's obligations at international law. The standard that must be attained has been a matter of some controversy. There are those who have propounded the view that states must accord to aliens inside their borders the same treatment as that accorded to their own nationals ("national treatment")²⁷.

The better view now appears to hold that States must meet an "international standard", that is to say, the treatment given foreign nationals within a State's borders must not such as to offend the international community at large.²⁸ The generally accepted statement of the standard provides:

The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency.²⁹

As Warbrick observes, this test is both precise and demanding and presents a strong contrast with various tests under human rights law.³⁰ The conduct giving rise to claims under this standard can include confiscation of property without compensation, deprivation of liberty without due process and denial of "justice".³¹

The requirement that the victim must first exhaust all locally available remedies is not absolute and has been the subject of a great deal of discussion.³² While the extent to which the victim must avail himself or itself of all local remedies remains undefined, it is clear that it is unnecessary to use all the local remedies when they are obviously biased, lack integrity or do not meet an international standard. The International Court of Justice held, in the *Electronica Sicula* case:

²⁷ See Brownlie, *supra*, n.11, p 526. The theory is that to grant an alien a higher standard than nationals would violate principles of national sovereignty because the alien would thereby be granted a kind of have special status.

²⁸ *Id.*, p. 527.

²⁹ *United States v. Mexico* (Neer) 1926 RIAA IV. 60 at pp 61-2.

³⁰ See Warbrick, "Diplomatic Representations", *supra*, n.25, p. 726.

³¹ See Brownlie, *supra*, n.11, pp. 526 – 531.

³² See e.g. Dugard, "Second Report" *supra*, n.17, the subject of which is "Exhaustion Of Local Remedies", and J.E.S. Fawcett, "The Exhaustion of Local Remedies: Substance or Procedure?", 31 B.Y.B. 452 (1954).

...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 procedure and without success.³³

The scope of the requirement to exhaust local remedies is beyond the reach of this paper, but it is worth noting that this requirement does not apply when it is futile. As Dugard states in his third report, "...a claimant is not required to exhaust justice in a foreign state 'when there is no justice to exhaust'".³⁴

An unresolved issue about exhaustion of local remedies is whether it is a part of the substantial law of diplomatic protection or merely a procedural requirement.³⁵ On the answer to this question turns the issue of whether or not the right to claim diplomatic protection exists independently of whether local remedies have been exhausted. If the requirement is a substantive part of the remedy then it is not only the "international wrong" that comprises the cause of action but also the proceedings in the court of the respondent state.³⁶ Under this view there are two components to the cause: the original wrong and the subsequent denial of justice (unless, of course, the denial of justice IS the wrong in question).³⁷ As Fawcett framed it, this approach draws no distinction between the cause of action and the right of action; they are merged.³⁸

The other view is that the exhaustion of local remedies issue is only procedural. Thus, the original international wrong provided the basis for diplomatic protection to be claimed and the right exists as of that moment. The exhaustion of local remedies is merely a procedural step that must be completed before the right arises to bring the matter before the ICJ.

This is a question of vital importance because, as Dugard points out in his Second report:

...the critical time at which international responsibility arises will differ according to the approach adopted. If the rule is substantive, international responsibility

³³ *Elettronica Sicula*, supra note 17 at para 59.

³⁴ John R. Dugard "Third Report on Diplomatic Protection", UN Doc. A/CN.4/523 at para 23. (Hereinafter "Third Report"). Also, Warbrick, supra note 24 in which the author cites the British Foreign Office's rules regarding the exercise of diplomatic protection, which are to the same effect.

³⁵ See Fawcett, supra, n. 32.

³⁶ *Id.*, p 453.

³⁷ Dugard, "Second Report", para. 32

³⁸ Fawcett, supra n.32, p 453.

will arise only after all local remedies have been exhausted, whereas international responsibility is incurred immediately on the commission of an internationally wrongful act if the rule is procedural.³⁹

When the ILC took the matter up, following the submission of Dugard's Second Report, the matter was left unresolved.⁴⁰ It is unfortunate that a clear answer to this issue remains outstanding. If the utilization of the offending State's legal process constitutes a component of the remedy, then this may well become a significant and even insurmountable hurdle for aliens to overcome if they seek to have their State exercise diplomatic protection on their behalf. This will be discussed in greater detail in Part III of this paper.

The "nationality issue"

As Brownlie has emphasized, it is trite to assert that diplomatic protection may only be exercised by a State in respect of its nationals.⁴¹ A more difficult issue, it is suggested, is in respect of which nationals may a State exercise diplomatic protection.

When the Permanent Court of International Justice dealt with the issue in the 1939 *Panevezys – Saldutiskis Railway case*⁴² it stated:

In the opinion of the court...by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection...⁴³

As Duchesne comments, strong evidence that this is, in reality, a legal fiction is provided by the fact that compensation, when awarded in such cases, is measured by reference to the damage sustained the victim/national and not by the State which has brought the claim.⁴⁴

³⁹ Dugard, "Second Report", supra, n. 17, para. 33.

⁴⁰ UN Doc. A/56/70, para. 199.

⁴¹ Brownlie, supra, n.11, p. 390.

⁴² 1939 P.C.I.J. (Ser A/B) No. 76 (1939)

⁴³ Id., p. 16.

⁴⁴ Duchesne, supra, n. 19, p 792 cited at note 43 therein.

What is clear is that nationality as a basis of diplomatic protection is not qualified by any words about how that nationality is attained. The rule makes no distinction between nationality by birth, and nationality by naturalization process. Nationality, however attained, creates a bond between the individual and the State which gives rise to the State's right of diplomatic protection.

Nationality became a problematic issue in the 20th century, because the world became an international community in which people moved between States with great ease. Human immigration, protection of refugees, asylum⁴⁵ the easy and practically instantaneous transfer of capital, and the evolution of transnational corporations created situations in which nationality became less clearly cut. States are, with increasing frequency, faced with dealing with non-nationals (both corporeal and incorporeal) within their borders.

The dual national can create a serious difficulty. In many cases people flee from States which have oppressive regimes and take up residence in States whose societies are characterized by the rule of law and respect for human and civil rights. In such cases, the people involved may become nationalized citizens of their new country while retaining citizenship in their former State. On occasion, the former State will not recognize the new nationality and, in fact, deem it illegal.⁴⁶ In such cases, if such a person for whatever reason returns to their "old country" and becomes a victim of State action that can be classified as an international wrong, the lack of clarity surrounding the rules of diplomatic protection could prevent the person's new country from intervening on his or her behalf.

The theory that when a national of a State is injured by an internationally wrongful act attributable to another state, then the State of the victim has suffered damage is widely referred to as a legal fiction.⁴⁷ Bennouna asserted the legal fiction as one ground for abandoning diplomatic protection as a remedy⁴⁸. Dugard, while

⁴⁵ See Brownlie, *supra* n.11, p. 405-6. In his discussion about "effective nationality" he opines that the results of accepting effective nationality may not be "radical". It is important to point out, however, that it will be in those few cases in which a State exercises diplomatic protection against a national's former State that the distinction between "equality" and effective nationality" will be most important.

⁴⁶ See Dugard, "First Report" *supra*, n. 3, para. 123. In such cases, the "equality" approach would permit the offending State to preclude the State of new nationality from exercising diplomatic protection by the mere expedient of disallowing a victim from renouncing nationality.

⁴⁷ Duchesne, *supra*, n. 18, p. 791. The fiction is referred to as "the Vattelian Fiction", arising from the theories of the 19th century publicist Emmerich De Vattel who stated "Whoever uses a citizen ill, indirectly offends the state...", cited at therein note 39.

⁴⁸ Bennouna, "Preliminary Report", *supra* n.1, para. 21 – 32.

defending the remedy in his first report, accepted that it was a fiction, but argued that legal fictions played a valuable role in legal theory, stating that “Most legal systems have their fictions.”⁴⁹

From this arises a troubling inconsistency. On the one hand the international legal system will accommodate a remedy, diplomatic protection, which is widely regarded as based on a legal fiction. On the other hand, the ability of a State to advance a claim for diplomatic protection on account of an international wrong committed against a person legitimately its national against a State of which the victim may also be a national is a matter of some doubt.

What is at issue here is not whether a State may grant nationality to a person. That is a power within the sovereign rights of every State⁵⁰. What is at issue is whether, once a State has naturalized an individual, international law will recognize that nationality for the purpose of exercising diplomatic protection against a State of which that person is also a national.

There are two views on the issue. One view, the more traditional view, is that the equality of States and the equality of nationality means that, necessarily, a State may not exercise diplomatic protection on behalf of a national against that person’s other State of nationality. This would appear to be the rule applied by States such as the United Kingdom⁵¹ and Switzerland⁵².

This theory is founded in the principle of the equality of States, and of their State processes. As Brownlie points out, the ability to enforce diplomatic protection in such circumstances could be seen to provide the individual in question a “privileged position” by comparison to other nationals of those States.⁵³ Further support for the “rule” appears to be found in the 1939 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.⁵⁴ Article 4 of the Convention provides as follows:

⁴⁹ Dugard, “First Report”, supra n. 3, para. 21.

⁵⁰ Nottebohm Case, 1955 ICJ Reports 1955, p. 23 “...international law leaves it to each State to lay down the rules governing the grant of its own nationality.” This was reflected in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Article 1.

⁵¹ Brownlie, supra n. 11, p. 389; Warbrick, “Diplomatic Representations”, supra n.26, pp. 725, 727.

⁵² This is the Statement of the law as set out on the website of the Swiss Government.

⁵³ Brownlie, supra n. 11, p. 390. The sentiment receives an early exposition in the Alexander case, in which a claim for diplomatic protection in regard to a dual British-United States national was rejected. The tribunal held that “To treat his grievances against that other sovereign as subject of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject.” Cited in Dugard, “First Report”, supra, n 3., cited therein at note 249.

⁵⁴ Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws

A State may not afford diplomatic protection to one of its nationals against a State whose nationality the person also possesses⁵⁵

Interestingly, however, this treaty has been ratified by fewer than twenty States.⁵⁶ The lack of widespread adoption of this treaty may suggest that, in the sixty five years since it was signed, there has been evolution in the thinking of the international community on some of the topics addressed therein, including diplomatic protection.

The second approach is that of “effective nationality”. Under this approach it is said that when an individual suffers an international wrong attributable to a State of which he is a national, diplomatic protection may be enforced against that State by another State provided that the person’s “effective nationality” is with the enforcing State.

Just as it is impossible to discuss diplomatic protection without mentioning *Mavrommatis*, the subject of “nationality” leads inevitably to the *Nottebohm Case*.⁵⁷ In that case Liechtenstein sought to enforce diplomatic protection against Guatemala in respect of alleged expropriations by the respondent State of assets belonging to one Mr. Friedrich Nottebohm. Nottebohm had been born in Germany, but had resided most of his life in Guatemala and maintained his business interests there. He became a naturalized citizen of Liechtenstein in 1939 in what had the appearance of a much abbreviated version of the normal naturalization process.⁵⁸

One of the issues raised by Guatemala was that Nottebohm did not possess “nationality” in Liechtenstein sufficient to found the remedy of diplomatic protection. The ICJ accepted that, while it is within each State’s sovereign right to grant nationality on such basis as it sees fit, the connection between Nottebohm and Liechtenstein in the particular case was not sufficient to require that Guatemala or

⁵⁵ *Ibid* Art. 4.

⁵⁶ See Leigh, *supra*, n. 19, p.464 cited therein at note 58, and Duchesne, *supra* n. 19, pp. 794 - 99. A number of other States have since acceded to it as Britain ratified in 1934 on behalf of all then members of the British Empire that did not have separate membership in the League of Nations. Canada ratified it in 1934, but registered a denunciation on 15 May 1996.

(<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/Treaty-4.asp>).

⁵⁷ *Nottebohm Case (Liechtenstein v. Guatemala) (second phase)*, 1955 ICJ Reports 6 Apr. 1955.

⁵⁸ The alacrity with which Mr. Nottebohm was able to receive his naturalization led to suspicions of fraud; however, this did not form the stated basis of the decision. Nonetheless, once he became a naturalized citizen of Liechtenstein, Nottebohm lost his German nationality by operation of German law. See Leigh; *supra* note 19 at p. 466.

the Court recognize it for purposes of diplomatic protection. While Liechtenstein had the right to grant citizenship in whatever manner it saw fit, this grant was a unilateral act. In order that this unilateral act might entitle Liechtenstein to claim diplomatic protection against Guatemala, a genuine link between them, would have to exist.

The Court said:

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred is in fact more closely connected with the population of the state conferring the 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 judicial terms of the individual's connection with the State that made him its national.⁵⁹

In assessing what comprises effective nationality, the court observed that, in addition to habitual residence (which it termed an “important factor”), indicia such as family ties, participation in public life, attachment to the adopted country and “inculcated” into the children would be useful indicia in determining “effective nationality”⁶⁰.

In the result of the case, the ICJ rejected the claim for diplomatic protection on the basis that, in the circumstances under which Nottebohm was naturalized, there was no genuine effective link between he and Liechtenstein. Accordingly, Liechtenstein was not permitted to enforce diplomatic protection against Guatemala.

Commentators have, since the decision, focussed on the concept of effective link and relied upon it as the basis for arguing that this is now the preferred lens through which to view claims for diplomatic protection of dual nationals.⁶¹

⁵⁹ Nottebohm, *supra*, n. 54, p 23.

⁶⁰ *Id.*, p 22.

⁶¹ *See* G.W. Leigh, *supra* note 19, where he states at p. 469:

“It is clear that the Nottebohm case has given renewed vigour to the principle of effectiveness. Further, it is clear, that this may have the effect of ensuring that a State may bring a claim on behalf of a national effectively connected with it, even when the claim is against another State of which the individual is formally a national.”

See also Jonathan Shirley, “The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe’s Land Crisis” 27 *B.C.Int. And Comp. L. Rev* 161 at p 170. There, the writer in discussing the availability of diplomatic protection for dual British-Zimbabwe white farmers. He asserts that the dual nationals “...must demonstrate that their dominant and effective nationality is that of the United Kingdom and not Zimbabwe.”

This was the approach adopted by the Iran – United States Claims Tribunal in settling the claims arising out of the Teheran Hostages case⁶². The Foreign Claims Settlement Commission charged with determining the amount and validity of claims was required to apply the applicable principles of international law, and equity⁶³. In resolving the claims, those individuals with dual United States – Iranian nationality were permitted to make a claim; provided they could establish that their dominant and effective nationality was that of the United States⁶⁴. The criteria for assessing nationality included “all relevant factors, including habitual residence, centre of interests, family ties, participation in public life, and other evidence of attachment.”⁶⁵

Dugard proposed, in his suggested Article 6, that the “effective nationality” approach be adopted⁶⁶. His proposed rule would permit the State of a dual national’s “effective” (or “dominant”) nationality to enforce diplomatic protection against another State of which the injured person is also a national⁶⁷. During the course of the ILC discussions regarding the proposed Article 6, there was significant disagreement as to whether it reflected the current state of the law or represented a “progressive” approach. In the end, the ILC failed to reach a conclusion on the issue⁶⁸.

Brownlie takes the view that there is no conflict between the two approaches. He suggests that, when there is no “effective” or dominant link, then, naturally, the equality principle will apply. When, however, there is an effective link between the individual and the State, diplomatic protection will be enforceable.⁶⁹

⁶² For a review of the jurisprudence, see Richard B. Lillich and David J. Bederman, “Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims” 91 A. J. Int. L. 436 (1997).

⁶³ Id., p 436.

⁶⁴ Id., p 441.

⁶⁵ Id., p 441, citing at note 49 the A18 Decision 5 Iran-US Cl. Trib. Rep. at 265. Of interest was their observation of Commission’s tendency to find dominant U.S. nationality when Iranian nationality was imposed involuntarily or by operation of Iranian law.

⁶⁶ See Dugard, “First Report”, supra n.3, paras. 121 – 160.

⁶⁷ Id. The exact wording of the proposed Article 6 is as follows:

Subject to Article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s [dominant] [effective] nationality is that of the former State.

⁶⁸ See Report of the ILC 52nd Sess. (2000) para 472 – 482. There was apparent consensus that when a dual national sought diplomatic protection against a third State, then the State of dominant nationality should pursue the remedy.

⁶⁹ Brownlie, supra n. 11, pp 404 - 405.

In light of the practice of countries such as the UK and Switzerland, however, and the non-committal response by the ILC on the issue, the question remains up in the air and awaits definitive judicial pronouncement. As will be shown in Part III, this confusion about the state of the law may be very consequential from a practical point of view.

It is clear that whether the victim of an international wrong is a national of a State by birth or by naturalization is irrelevant to the existence of the remedy per se. Obviously, a State may, in general, enforce diplomatic protection on behalf a nationalized citizen. It is only when victim happens to also be a national of the respondent State that controversy arises.

It is particularly in the area of human rights violations that the potential for unjust results arises. In frequently cited dicta the ICJ, in Barcelona Traction⁷⁰, acknowledged that certain types of wrongs fall into the category of ergo omnes obligations, that is to say, that all countries are harmed by their violation.

Included in this category are, as the court stated, matters such as genocide and human rights violations

...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis – a – vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. They are obligations erga omnes.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (emphasis added).⁷¹

Alain Pellet has pointed out that human rights rules are not “reciprocal”, in the sense that the obligation of a State to adhere to them does not arise from the adherence to them by other States.⁷² They are free standing obligations of all States.

⁷⁰ Case Concerning The Barcelona Traction, Light and Power Company Limited 1970 ICJ 3

⁷¹ *Ibid*, paras. 33-34.

⁷² Alain Pellet, “State Sovereignty And The Protection of Fundamental Human Rights: An International Law Perspective”, Pugwash Occasional Papers, <http://www.pugwash.org/reports/re/pettel.htm> (20 Sept. 2005).

Of course, as was made clear in the case of East Timor (Portugal v Australia)⁷³ the existence of an erga omnes obligation does not, of itself, provide the ICJ with jurisdiction⁷⁴. Even if the issue is genocide, which the ICJ has recognized as a jus cogens norm, the court cannot simply assume jurisdiction. Court jurisdiction is based upon the consent of the parties.⁷⁵

While jus cogens and erga omnes cannot found ICJ jurisdiction, this is a separate issue from the remedies that may be accessed once jurisdiction is assumed. As the court said in the East Timor case, "...the Court considers that the erga omnes nature of a norm and the rule of consent to jurisdiction are two different things."⁷⁶

There is no doubt that the ICJ, in Barcelona Traction⁷⁷, was speaking of diplomatic protection as something apart from human rights treaties. Further, the Court will not assume jurisdiction solely because human rights violations are the basis of the claim. But once jurisdiction exists, it does not seem logical or just that the Court would deny the remedy on the basis of the dual nationality issue.

Yet the cases leave us with an apparent inconsistency. If the Court views issues of basic human rights as erga omnes obligations, it would appear to run contrary to the underlying principle to obstruct a remedy highly useful for the protection of those same basic human rights by invoking an artificial, technical and essentially irrelevant issue relating to dual nationality. If there is a true and effective link between an individual and his State of nationalization, why should it matter in the face of an international wrong (particularly one relating to human rights violations) whether the person has or has not nationality in the offending State? If matters of human rights are as important as the ICJ holds out that they are, then should not the dual nationality issue be relegated to a historical oddity?

Context

The issue of whether a State may take up the case of a dual national against a State of which the individual is also a national is not of mere academic interest. It can have very practical implications in a world in which people depart their homelands in search of freedom and the rule of law.

⁷³ Judgement, I.C.J. Reports 1995 p 16 para 29, as regards the issue of national self-determination.

⁷⁴ Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) I.C.J. 3 February 2006 General List No. 126.

⁷⁵ Id., para 72.

⁷⁶ East Timor case, supra, n.73, para 29.

⁷⁷ *Supra*, n. 70.

One such person was Zahra Kazemi⁷⁸. Ms. Kazemi was an Iranian – Canadian photojournalist, living in Montreal with her son. She had fled Iran in 1973 and, after some years in France had moved to Canada where she had received her citizenship. Her career took her around the world and in June 2003 she entered Iran to cover student demonstrations then taking place.

She was arrested on 23 June 2003 by Iranian authorities (sometimes reported as Religious Police) while photographing detainees outside Evin Prison. She died 19 days later while still in custody. The first reports from the Iranian government were that she had died in hospital after a stroke. Some days later they claimed she died of head injuries after an “accident”.

On 23 March 2005 a former Staff physician of the Iranian Defence Ministry revealed that he had examined Ms. Kazemi’s body four days after her arrest and had observed signs of torture, including evidence of rape, skull fracture, two broken fingers, severe abdominal bruising, swelling behind the head and evidence of flogging.

Unfortunately, shortly after her death, Ms. Kazemi’s body was buried. The Iranian government has refused to return the body to her son, or to permit an independent autopsy to be performed.

On 30 July 2003 Iranian Vice-President Mohammad Ali Abtahi acknowledges that Ms. Kazemi had probably been murdered. In July 2004, the Iranian government offered her son \$12,000.00 as compensation.

Throughout the case, those involved on behalf of the family and the Canadian government have expressed strong suspicions that the fatal blows were inflicted by the prosecutor in charge of the investigation. The Iranians have, however, taken the position that they do not recognize the Canadian nationality of Ms. Kazemi, and will not permit any Canadian or independent investigation into the circumstances surrounding her death.

Local remedies have come under severe criticism on the basis that the Iranians charged a person not believed to be involved in the death (and he was acquitted). In November 2005 an Iranian court ordered the case reopened, however, in light of the political and religious interference in the Iranian judicial process

⁷⁸ This case has been well documented in the Canadian media. The short resume of the facts of this case have been drawn from the website of the Canadian Broadcasting Corporation Archives (<http://www.cbc.ca/news/background/kazemi/>), and the website of Reporters Without Frontiers (http://www.rsf.org/article.php3?id_article=14371). Reference to these sites will provide a thorough background to this tragic case.

Canadian and family members hold no faith that the true killer or killers will ever be brought to justice.

The Kazemi case raises at least two areas in which the unsettled nature of the law of diplomatic protection may prevent Canada from seeking justice at the ICJ as a result of the killing of one of her nationals.

The first is the issue of exhaustion of local remedies, and how this applies to the necessity of pursuing remedies inside Iran. If this is a component of the remedy, then it would appear logical that Canada must await a final ruling from the Iranian authorities before a claim could be made. Given the seemingly arbitrary nature of the system⁷⁹

If, however, it is merely a procedure, then the argument would appear to be much stronger that there is no need to exhaust local remedies, when such efforts would be futile.

The second issue relates to the dual nationality of Ms. Kazemi and her family members. The “equality” principle would in the Kazemi case, operate against the Canadian government claiming diplomatic protection on behalf of the Kazemi family and particularly her son who is also a nationalized Canadian citizen.

If, however, effective nationality is applied, in accordance with the law as posited by Dugard⁸⁰ then it is more likely that Canadian state to bring proceedings in the ICJ. If so, and if the other requisites for the enforcement of diplomatic protection exist, then perhaps the Iranian State could be held accountable.

It is clear, however, that the ability to hold Iran accountable turns on the state of the law of diplomatic protection. Thus, it is an issue of far more than academic interest.

In the end it is unclear what will happen in the Kazemi case. What is clear, however, is that the remedy of diplomatic protection can have a great effect to defend the rights of victims of international wrongs, for it is far preferable to enter into international legal proceedings with the strength of a persons State behind them, than to try and go it alone.

⁷⁹ For example, after the matter was apparently closed, a new official has just re-opened the case.

⁸⁰ *Supra*, n.3.