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# Decentralizing Diplomatic Protection in Judicial Practice

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## ABSTRACT

This article aims to examine the evolution of diplomatic protection and the judicial practice governing it, with an emphasis on the exclusive right of the state versus the individual right. The research method is descriptive–analytical and is based on library sources, drawing on legal materials and international instruments in the fields of diplomatic protection and human rights. In response to the question of how international developments have influenced the scope and nature of diplomatic protection from the standpoint of an individual right, as well as what transformations have occurred at the international level regarding the state's exclusive right to exercise diplomatic protection or the possibility of recognizing an individual entitlement to this institution for natural or legal persons, the findings indicate that among the most significant effects of international developments on the scope and nature of diplomatic protection is the enhanced status of the individual as a right-holder. This shift challenges the traditional, state-centered conception of the exclusivity of states' rights in diplomatic protection and aligns with recent judicial and legal decisions issued by international courts and tribunals. It appears that the exercise of diplomatic protection in the past was solely the state's prerogative and a discretionary right, which states invoked based on their own assessment of interests, with no legal obligation to do so. However, at present, given the elevated role and status of the individual in the international legal order, diplomatic protection has increasingly been conceptualized as a mechanism for the protection of human rights and has been elaborated and expanded through institutional and judicial practices.

**Keywords:** *diplomatic protection, human rights, judicial practice, individual right.*

## Introduction

Diplomatic protection is one of the traditional and enduring concepts of classical international law that has developed over centuries. Diplomatic protection is, in fact, a form of protection extended by a state to its nationals vis-à-vis another state for the purpose of securing reparation for potential injuries arising from the commission of an internationally wrongful act against its nationals, whether natural or legal persons, and is exercised solely as a legal safeguard (1). Under customary rules, diplomatic protection historically did not impose any mandatory or obligatory character on states, and its invocation fell exclusively within the discretionary authority of states to defend their injured nationals (2). However, the evolution of international law—including the referral of certain disputes to the International Court of Justice (ICJ) and the work of the International Law Commission (ILC), such as the adoption of the Draft Articles on Diplomatic Protection in 2006—together with the advancement of human rights concepts, has not only underscored the necessity of diplomatic protection as a mechanism for safeguarding human rights, but has also, in some cases, modified the traditional sovereignty-based perception of the institution (3). In reality, diplomatic protection and human rights constitute two interwoven concepts that pursue common objectives in various contexts (4).

Accordingly, individuals whose international human rights are violated outside their state of nationality often possess extremely limited avenues for redress and legal follow-up. For example, foreign nationals detained by the United States at Guantánamo Bay were unable to claim or pursue their neglected individual rights on their own behalf. Nonetheless, in such circumstances, the nationality of these persons may allow them to be protected through diplomatic protection, enabling the invocation of the international responsibility of the detaining state for violations of international law (5). This mechanism has, in recent years, been the subject of debate and criticism due to its state-centered character and the discretionary nature of diplomatic protection, which traditionally positioned it as an exclusive prerogative of states (6). For this reason, new mechanisms have emerged to protect individuals more generally, and the individual has acquired certain rights under international law as a result (7).

In this regard, the Permanent Court of International Justice and its successor, the International Court of Justice, as the most important judicial authorities addressing diplomatic protection claims, did not adopt a clear and unequivocal approach to the complex and controversial issues surrounding diplomatic protection in their examination of numerous cases. This lack of clarity prevented decisive and transparent transformation within the institution of diplomatic protection. Nevertheless, following World War II, two major developments significantly influenced diplomatic protection. The first was the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1965, together with the proliferation of bilateral investment treaties aimed at protecting foreign investment. The second was the emergence of various human rights treaties designed to protect individuals in their claims against their own state or other states in cases of violations of individual rights (8).

The ICJ initially ascribed an exclusive role to the state in diplomatic protection; however, within the contemporary process of the globalization of human rights, this exclusivity has diminished, and greater emphasis has been placed on the individual, particularly given that human rights organizations exercise extensive oversight over such matters (9). Moreover, the transformation of international law following the 1990s, along with the entrance of human rights into the substantive domain of international legal practice, has altered both the meaning and scope of this institution to such an extent that diplomatic protection today is understood in a manner distinct from its traditional formulation (10).

The core issue is that within the international legal system, the state holds an exclusive right to decide whether to exercise diplomatic protection. Yet the question arises: what obligations, if any, does the state bear in deciding to exercise or to abstain from exercising such protection? Furthermore, if the state chooses to initiate diplomatic protection, under which head of international claim does this action fall? Most importantly, if, during the process of diplomatic protection, the wrongdoing state is found internationally responsible and required to provide reparation, what corresponding obligations fall upon the state of nationality regarding the compensation owed to the injured individual (10)?

In this regard, several instances of gradual development within international and regional institutions and tribunals—including the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, and the Office of the United Nations High Commissioner for Human Rights—demonstrate increasing recognition of the individual right as a counterbalance to the state's exclusive authority in diplomatic protection. These developments have contributed to the strengthening and expansion of the concept of the individual right in this field (11). The process of foundation-building, formation, and subsequent evolution of this human-rights-oriented transformation will therefore be examined. Thus, in view of the stated necessity, the purpose of the present study is to examine developments in the doctrine of diplomatic protection and to address the question of whether such protection constitutes an individual (human) right or remains an exclusive prerogative of the state.

## Findings

### *Judicial Practice and Diplomatic Protection*

The exercise of diplomatic protection in the international legal system is subject to conditions identified in the jurisprudence and doctrine of international law scholars. These conditions include:

1. nationality (the existence of a meaningful political and legal link between the claimant state and the injured person);
2. exhaustion of local remedies; and
3. the claimant's clean hands.

The first two conditions—nationality and the rule of exhausting local remedies—have secured distinct standing in judicial practice and legal doctrine. However, the third condition, the clean hands requirement, has been the subject of debate and scholarly disagreement. Accordingly, it is necessary for these three conditions to be examined and analyzed in detail (12).

The subject of nationality concerns the set of rules by which the nationality status of an individual vis-à-vis a particular state is determined. Each state regulates this status independently. As a result, if a person does not qualify as a national under the legal rules of a given state, he or she is considered an alien, regardless of whether another nationality may be attributable. Thus, one of the principal outcomes of nationality rules in every state is distinguishing nationals from non-nationals (12).

Etymologically, nationality signifies "following and obeying." In Persian usage over the past two centuries, the term has become associated with membership in a nation or state beyond mere territorial belonging. Through nationality, a state distinguishes its members from those of other states, making nationality the most prominent marker of the geographic classification of individuals. Nationality is a political relationship because it derives from the sovereign authority of the state. The strongest form of allegiance arises from nationality, which allows a political community—namely, the state—to maintain authority over its population and the scope of its personal jurisdiction. The state determines, based on political aims, who qualifies as its nationals and under what conditions individuals may obtain this status (4).

Nationality carries legal consequences in both the international and domestic spheres. Having the nationality of a state signifies that the individual is counted among the population constituting that state and is subject to the legal conditions of nationality. According to Batiffol, nationality is among the defining elements of an individual's legal status within society and shapes rights and obligations. Nationality expresses a legal affiliation between an individual and the state's population. Ultimately, nationality is also a spiritual bond, connecting individuals to the state through shared objectives, customs, and traditions, independent of location and time. A change of residence does not sever this intangible bond between a national and the state that considers him or her its own (4).

The significance of nationality for legal persons in establishing a state's personal jurisdiction is no less significant than for natural persons. Legal entities can also hold nationality and, like natural persons, be linked to a state through a nationality bond defined by the state itself. Although a uniform definition of corporate nationality is not possible, it is undeniable that a political and legal link exists between a commercial company and the state under whose laws it is incorporated. According to the International Court of Justice, this link is analogous to the nationality bond between a state and its natural persons, though manifested through different legal forms.

In some cases, certain movable property with propulsion capacities—such as ships, aircraft, and spacecraft—may also be attributed nationality owing to the practical benefits associated with such classification (7). In determining nationality for legal persons, states enjoy full discretion. Because of this immunity of action, solutions vary widely. National legal systems typically establish criteria for identifying corporate nationality. In international doctrine and practice, these criteria include the company's siège social (administrative and legal headquarters), its domicile, the law of incorporation, the location of its principal business interests, and the control test. For natural persons, rules governing nationality vary according to the conditions giving rise to the legal bond between the individual and the state, encompassing both original and acquired nationality (7).

States generally consider as their original nationals those who either descend from parents possessing that nationality or are born within the state's territory. These two bases are known respectively as jus sanguinis (right of blood) and jus soli (right of soil). States may adopt either principle independently or a combination of both for determining original nationality. The contemporary value of these two principles lies not only in their historical foundations but also in the social benefits that flow from them. For example, jus soli helps prevent statelessness for children of unknown or stateless parents, while jus sanguinis ensures greater alignment between nationality and the cultural identity of nationals. The importance of jus sanguinis becomes particularly evident when considering the intergenerational transmission of national identity and cultural heritage that may persist beyond territorial limits (13).

An individual may acquire multiple nationalities or, conversely, find themselves without any nationality. Such situations typically result from the interaction of different domestic legal systems governing nationality and do not necessarily involve any legal violation. In these circumstances, the issue becomes one of conflicting nationalities.

Negative conflicts of nationality arise when national laws collectively prevent an individual from qualifying as a national anywhere. A stateless person is someone who has never possessed a nationality or has lost it without acquiring a new one. The term, derived from French, means "without a homeland." Statelessness occurs when individuals fall outside the scope of nationality laws of all states—an outcome resulting from the exclusively national character of nationality legislation. One common cause is renunciation of nationality with state approval, combined with failure to obtain a new nationality (13).

In legal texts and doctrinal analyses, nationality is treated as a political–legal concept, whereas "nation" is understood sociologically, describing a group of individuals bound by shared environmental, cultural, social, and geographic factors. These groups may be heterogeneous, comprising distinct linguistic, religious, traditional, or ethnic communities. In this sense, as John Locke observed, what matters is the specific type of bond that connects individuals to their community—a bond that the individual cannot unilaterally renounce. Through this bond, individuals acquire particular entitlements while also assuming corresponding responsibilities toward their social group, so long as the group regards them as members. Locke argued that this bond arises through consent—when an individual explicitly accepts participation in a civil society. On this basis, citizenship rights can be defined as expressions of membership in the nation (9).

The conclusion is that the term "nationality" possesses legal and political significance, whereas "nation" holds sociological value. Accordingly, in matters concerning the individual's legal relationship with the state and their attachment to the state's political community, the term nationality applies; whereas in matters concerning an individual's belonging to the broader sociological community, the term nationhood is appropriate.

## *Diplomatic Protection in Judicial Practice (Exclusive State Right or Individual Right?)*

### Diplomatic Protection in International Judicial Practice

An examination of the jurisprudence of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) shows that diplomatic protection is not confined to judicial action. In the *Mavrommatis* case, the PCIJ stated that states, in protecting their nationals, may resort either to diplomatic measures or to judicial forums. The Court reiterated the same principle in the *Panevezys–Saldutiskis Railway* case, explicitly referencing *Mavrommatis*. In the *Serbian Loans* case, the PCIJ further noted that "the exercise of diplomatic protection by the French Government began at the moment it initiated negotiations with the Serb–Croat–Slovene State, not when the claim was later filed before the Court."

In ICJ practice, although the Court distinguished diplomatic protection from judicial protection in the *Nottebohm* case, its earlier advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations* nevertheless affirmed that various methods—including formal protest and negotiation—are available for the exercise of diplomatic protection, despite the fact that the claim concerned protection of international organizations rather than states (3).

In *Barcelona Traction*, the ICJ declared that "despite existing limitations under international law, states may exercise diplomatic protection through any means they deem appropriate," reaffirming state discretion in choosing the method of action (1). In the *L.C.* case, the Court impliedly recognized the discretionary authority of states to determine how diplomatic protection should be exercised when it stated that a dispute is brought before the Court only when the parties fail to reach agreement through any other diplomatic means.

In the *LaGrand* and *Avena* cases, although the Court did not directly address the nature of diplomatic measures, the cases nevertheless reveal traces of recourse to judicial forums and consular assistance as mechanisms employed within the broader framework of diplomatic protection (5). The consistent pattern in international jurisprudence confirms the principle that the exercise of diplomatic protection is not confined to judicial proceedings; rather, states maintain discretion under international law to select the most appropriate means of action.

### Diplomatic Protection in Domestic Judicial Practice

Domestic judicial practice, serving as an indicator of state conduct, does not reflect a uniform approach to the forms of diplomatic protection. While some judicial decisions affirm the openness of diplomatic protection to a wide range of measures—including negotiation, protest, and mediation—in addition to judicial action, the courts of several states have shown preference for judicial measures over non-judicial ones.

For example, in the case of Kuwait v. The Netherlands, although the Dutch Government undertook multiple steps concerning its national who had been detained in Thailand on drug charges for six months without trial, the Ministry of Foreign Affairs declared that these measures did not constitute diplomatic protection but merely consular assistance (14). Likewise, in the *Furhout Butt* case, British authorities asserted that diplomatic protection could only be exercised through formal judicial action (14).

In contrast, the German Constitutional Court, in the *Rudolf Hess* case, when interpreting the constitutional right of German nationals to receive protection from their government, stated that Germany's actions in defending Hess constituted fulfillment of the state's obligations, without limiting such protection to judicial measures.

Similarly, in the *Abbasi* case, the English Court of Appeal affirmed that the United Kingdom had exercised the necessary diplomatic protection by engaging in diplomatic negotiations with the United States (14). In the *Kaunda* case, the South African court confirmed the state's authority to choose methods of diplomatic protection. Justice Sandile Ngcobo, chief justice of the Constitutional Court, held that South Africa had indeed exercised diplomatic protection by requesting Zimbabwean authorities to allow consular access and attendance at trial proceedings; he emphasized that even a formal request, irrespective of its success, amounted to the exercise of diplomatic protection (2).

In another decision by the South African High Court concerning *Mr. Khozius Vanzyl*, a wide range of measures—including consular assistance, negotiation, mediation, judicial action, arbitration, countermeasures, economic pressure, and retaliatory action—were recognized as permissible methods of diplomatic protection.

Thus, it is evident that states possess discretion in selecting the methods for exercising diplomatic protection; however, this discretion is not absolute and is constrained by international law, most notably by the prohibition on the use of force. Accordingly, the International Law Commission has permitted only diplomatic measures and other peaceful methods of dispute settlement. Across domestic and international judicial practice, as well as legal doctrine, various forms of action have been accepted for the exercise of diplomatic protection. Regardless of outcomes, expanding the available methods facilitates the application of diplomatic protection and encourages states to make broader use of it in safeguarding individuals (15).

### *Developments in the Right to Diplomatic Protection in Domestic Judicial Practice*

In the domestic judicial practice of some states, the state's obligation to act in situations involving serious violations of peremptory norms and obligations erga omnes has been recognized, which in turn confirms the competence of domestic courts to review the legality of governmental decisions to exercise or not to exercise diplomatic protection and strengthens the idea of limiting state discretion in this field (3). In this regard, extensive case law has emerged in the domestic courts of certain countries, supporting the restriction of states' discretion in deciding whether to resort to diplomatic protection. The most important of these decisions will be examined below. It should be noted that in the documentation of some of these cases, the names of the individual or corporate claimants are not disclosed; in such instances, only their initials are mentioned.

**The Abbasi v. Secretary of State for Foreign and Commonwealth Affairs case (United Kingdom)**

Mr. Abbasi, a British national who had been detained for some time in Guantánamo Bay, brought an action before the domestic courts of the United Kingdom against the Secretary of State for Foreign and Commonwealth Affairs. He argued that, in view of the incompatibility of his detention with international law and fundamental human rights—particularly the prohibition of arbitrary detention, which is recognized as a peremptory norm of international law—the United Kingdom was under an obligation to exercise diplomatic protection on his behalf, and he requested the court to pronounce on whether the government's decision not to exercise diplomatic protection could be subjected to judicial review.

In this case, the court concluded that, although under international law states are not generally obliged to exercise diplomatic protection, the legality of a government decision not to exercise such protection in respect of nationals who have suffered serious human rights violations may nonetheless be subject to judicial scrutiny (14). The judgment was grounded in the well-known doctrine of “legitimate expectations,” according to which every national has certain legitimate expectations vis-à-vis his or her state, which the state may not disregard lightly. This doctrine functions as a flexible legal tool that constrains the exercise of executive discretion by a government.

It must be emphasized, however, that this doctrine merely limits the scope of state discretion and does not, in itself, impose a direct obligation on the state to exercise diplomatic protection. On this basis, the court held that whenever the government makes a decision in reliance on its discretionary powers, such a decision—regardless of its substance—may be subject to judicial review. Thus, while the judgment affirms the link between diplomatic protection and state sovereignty, it simultaneously attempts to restrict state discretion in this area when serious human rights violations are at stake. In effect, the possibility of judicial review of the government’s decision to exercise or not to exercise diplomatic protection reinforces the notion that diplomatic protection may, in such cases, take on a duty-like character.

**The Samuel Kaunda and Others v. President of the Republic of South Africa case**

In August 2004, Mr. Kaunda, a South African national, together with a number of other South Africans, was arrested in Zimbabwe on charges of involvement in a coup d’état aimed at overthrowing the government of Equatorial Guinea. The applicants claimed that their detention in Zimbabwe was contrary to international law and that, if they were extradited to Equatorial Guinea, they would be sentenced to death without enjoying a fair trial. Accordingly, they requested the South African Government to exercise diplomatic protection and to ensure that their rights to liberty, security, and a fair trial were respected.

They also petitioned the Constitutional Court of South Africa to issue an interpretative ruling on the existence of an individual right to diplomatic protection. The Court noted that no human rights instrument explicitly recognizes diplomatic protection as a human right, and therefore sought to assess the nature of the right from the standpoint of customary international law and the South African Constitution (5).

The applicants argued that, under Article 7(2) of the South African Constitution, the state is obliged to respect, protect, and promote the rights enshrined in the African Charter on Human and Peoples’ Rights, and that this obligation has extraterritorial effect, extending to situations in which South African nationals are outside the territory of their state of nationality (2). However, the Court held that an obligation on the South African Government to take all necessary measures to ensure that a foreign state respects the rights of South African nationals would amount to interference with the sovereignty of that foreign state and would be incompatible with international law.

Nonetheless, in the specific circumstances of the case, because South Africa, Zimbabwe, and Equatorial Guinea were all parties to the African Charter on Human and Peoples’ Rights and the obligations of the Charter were applicable to them, the Court found that South Africa’s efforts to ensure respect for the human rights of its nationals in those states did not amount to an extraterritorial application of the South African Constitution. While the Court ruled that any constitutional or treaty-based obligation to exercise diplomatic protection in response to human rights violations must not infringe the territorial sovereignty of another state, this does not negate the entitlement of nationals to request diplomatic protection from their state; rather, it means that the state is obliged, at a minimum, to consider such requests in good faith (5).

The Court emphasized that the government’s decision whether or not to exercise diplomatic protection is influenced by a variety of factors, particularly political considerations, which may justify its conduct. Nonetheless, it underlined that, given the individual’s inability to invoke international law directly, nationals have no recourse other than to seek protection from their state of nationality—in the sense that their request must be properly examined and answered. The state's discretionary authority to decide whether to exercise diplomatic protection cannot preclude judicial review of the legality of that decision on the basis of the doctrine of legitimate expectations (5).

In the end, the Court considered the applicants' claim that they faced imminent extradition to Equatorial Guinea, where they would be denied a fair trial and sentenced to death, to be premature and unsupported by sufficient evidence. It further held that South Africa's diplomatic interventions to ensure a fair trial in Equatorial Guinea fell within the scope of legitimate state action and did not indicate any failure to exercise diplomatic protection (5).

Although the government was acquitted of wrongdoing in this case, the Court nonetheless affirmed that states may be obliged to take certain measures to protect their nationals against abuses of international human rights norms. The judgment suggests that diplomatic protection is a valuable mechanism for the promotion and protection of human rights and that, while states remain free to choose the modalities of its exercise, the legality of a decision to exercise or not to exercise diplomatic protection can be reviewed by domestic courts. Thus, the doctrine of legitimate expectations functions as a standard for assessing the lawfulness of governmental decisions and may serve as a deterrent to arbitrary decision-making. Where a state fails to protect its nationals abroad, particularly in cases of human rights violations, domestic courts may issue binding rulings requiring the state to adopt appropriate measures.

**The Kwiet v. The Netherlands case**

Mr. Kwiet, a Dutch national who had been sentenced in Bangkok to six years' imprisonment on drug trafficking charges, brought an action against the Netherlands in 2003, claiming that his right to a fair trial and fundamental human rights—classified among states' erga omnes obligations—had been violated. He argued that the Dutch Government was obliged to take all necessary measures to prevent such a situation and that the Dutch Embassy in Thailand should have undertaken steps to visit him, ascertain the legality of his detention, seek reparation from Thailand, and even secure his release.

The court, after examining the facts, found that, unlike its usual practice toward other Dutch nationals imprisoned abroad on drug charges, the Netherlands had attempted, through quiet diplomacy, to influence the course of the proceedings and the treatment of Mr. Kwiet by the Thai authorities, and that it could not reasonably have gone further without unduly interfering in the internal affairs of another state. Nonetheless, the court acknowledged that the Netherlands was expected to make every effort to assist the claimant and to take all possible measures to secure his early release (1).

On the basis of this judgment, actions such as diplomatic interventions by the Dutch ambassador and foreign minister, and the use of quiet diplomacy through correspondence with Thai officials, particularly the foreign minister, were characterized as instances of diplomatic protection. Although both consular assistance and diplomatic protection were at issue, and the claimant alleged that the Netherlands had failed to meet its obligations under both frameworks, the court—without expressly distinguishing between diplomatic protection and consular assistance—implicitly accepted that the state is obliged to employ all available means to protect its nationals in cases involving human rights violations (1).

### *Developments in the Right to Diplomatic Protection in International Judicial Practice*

In the past century, diplomatic protection has undergone significant developments with the establishment of international judicial bodies, both permanent—such as the Permanent Court of International Justice (PCIJ) and the

International Court of Justice (ICJ)—and ad hoc, such as the Iran–United States Claims Tribunal. Beyond these judicial developments, the creation and expansion of international human rights standards, especially after the collapse of communism and the elevation of human rights to the mainstream of international legal developments, have also influenced this field. Although international case law, and in other words, positive international law, still largely adheres to a classical reading of the right to resort to diplomatic protection, influential doctrinal views have emerged that conceptualize diplomatic protection as a human right (9). Among the judicial bodies that have frequently engaged with rules on diplomatic protection and taken important steps in this area is the ICJ, notably in the *LaGrand*, *Avena and Other Mexican Nationals*, and *Barcelona Traction* cases, which hold particular importance for international law and the institution of diplomatic protection. Furthermore, in the *Ahmadou Sadio Diallo* case, the Court emphasized that, due to the substantive development of international law in recent decades concerning rights conferred on individuals, the material scope of diplomatic protection—originally confined to claims of violations of the minimum standard of treatment of aliens—has subsequently expanded to encompass internationally guaranteed human rights (16).

The PCIJ and its successor, the ICJ, have on multiple occasions confronted issues of diplomatic protection and, whenever possible, clarified many of the ambiguities surrounding this institution. Among the cases illustrating this practice are *Ambatielos* (dispute between the United Kingdom and Greece), *Acquisition of Polish Nationality* (dispute between Germany and Poland), the advisory opinions on *Nationality Decrees in Tunis and Morocco* (dispute between France and the United Kingdom), *Mavrommatis* (dispute between Greece and the United Kingdom), *Chorzów Factory* (dispute between Germany and Poland), *Phosphates in Morocco* (dispute between Italy and France), *Electricity Company of Sofia* (dispute between Belgium and Bulgaria), *Anglo-Iranian Oil Co.* (dispute between Iran and the United Kingdom), *Interhandel* (dispute between Switzerland and the United States), *Nottebohm* (dispute between Guatemala and Liechtenstein), *Barcelona Traction* (dispute between Spain and Belgium), *Diallo* (dispute between Guinea and the Democratic Republic of the Congo), as well as *LaGrand* and *Avena*, where Article 36 of the 1963 Vienna Convention on Consular Relations was invoked as a vehicle to protect nationals. One may also mention the 1949 advisory opinion on *Reparations for Injuries Suffered in the Service of the United Nations*. In some disputes, however—such as the case brought by Paraguay against the United States in April 1998—no opportunity arose for the Court to pronounce on the merits due to prior settlement between the parties (9).

In the first part, the classical conditions of diplomatic protection were discussed, namely nationality, exhaustion of local remedies, and the clean hands of the claimant. These conditions will now be examined in practice in two leading cases, *Nottebohm* and *Barcelona Traction*. The central question is whether these conditions must be continuously fulfilled throughout the proceedings, or whether their presence is required only at the initial stage.

Continuity of Classical Conditions for Natural Persons: The *Nottebohm* Case: In the *Nottebohm* case, the Court stressed the importance of the nationality bond, stating that the acquisition of a new nationality should not be treated as a superficial or frivolous act. Obtaining a new nationality in reality entails severing an old bond and creating a new one, an act that has major consequences for an individual's life. It would be unreasonable to consider only the effects of nationality on a person's property and assets while ignoring its implications at the international level. The Court held that nationality is a legal status that must be strengthened over time. A nationality that rests solely on the observance of formal and administrative procedures, and around which no genuine and effective link has developed, cannot be relied upon in international relations. In the Court's view, there must be a genuine and effective connection between an individual and the state whose nationality he or she acquires; otherwise, the exercise of this power amounts to an abuse of right. The judgment of 6 April 1955 provoked extensive reaction in legal circles. Some commentators praised it, while others strongly criticized it. Supporters argued that by applying the notion of a genuine and effective link—one aspect of the general principle of international law that gives precedence to the factual and practical situation—the Court effectively confirmed this principle as a rule of international law, thereby contributing to the stabilization of situations and the maintenance of peace in international political and legal relations (17).

Opponents of the *Nottebohm* judgment, such as Eagleton, Brierly, and Gros, maintained that the Court had complicated the future functioning of diplomatic protection and, through this decision, effectively added a new category of individuals to the already problematic group of stateless persons. In their view, the clearest evidence of the unjust nature of the judgment was that Nottebohm was unable to recover his lost rights either at the international level or before domestic courts. They further contended that the theory of a genuine and effective link can only become fully operational if domestic nationality laws across all states are reshaped in accordance with it, something that is, under current conditions of international law, highly unlikely (17).

Continuity of Classical Conditions for Legal Persons: The *Barcelona Traction* Case: In *Barcelona Traction*, the Court stated that, within the limits laid down by international law, a state may exercise diplomatic protection by any means it deems appropriate, to the extent necessary to assert its right. This is because the individuals for whom the state exercises diplomatic protection have no direct standing under international law; their only avenue for reparation is typically to resort to the domestic law of the state where the violation occurs. For this reason, the state of nationality may, in its internal legal order, impose an obligation on itself to protect its nationals abroad and confer on them a right to request the performance of this obligation, backed by appropriate remedies. However, these rights and duties remain confined to the domestic legal sphere and do not, as such, have an international dimension (Barcelona Traction, 1970: 7–11).

In this case, the Court explained that, in such circumstances, states enjoy a margin of appreciation, and it found that Belgium lacked standing to exercise diplomatic protection on behalf of Belgian shareholders. It held that both *Barcelona Traction* and its shareholders were, in fact, victims of a denial of justice. The Court added that the protection of shareholders would require recourse to special agreements or explicit clauses in treaties between private investors and the host state (Barcelona Traction, 1970: 345–346). In the Court's view, the existence of a state of nationality is a fundamental requirement in matters of nationality. In paragraphs 33 and 34 of the judgment, the Court treated fundamental human rights as the basis of obligations erga omnes; however, notably, it did not place diplomatic protection within the realm of fundamental human rights (11). This omission has raised serious doubts about the consistency of the Court's reasoning with contemporary realities, and it may provide a basis for potential misuse by states.

On the basis of the foregoing, when the unlawful acts of a state cause injury to the rights of a foreign company, only the company's state of nationality is entitled, as a matter of principle, to bring a claim and seek reparation. With respect to the diplomatic protection of foreign shareholders, the Court held that, under current international law, such protection is only possible where special contractual arrangements exist between the investor and the host state. Practice shows that states increasingly safeguard such rights through specific agreements. The Court further reasoned that recognizing an unconditional right of diplomatic protection for shareholders of a foreign company would create instability in international economic relations, particularly given that bearer shares frequently change hands and become widely dispersed across several countries.

The Court concluded that the situation of *Barcelona Traction* was not such as to prevent it from seeking diplomatic protection from its state of nationality, Canada, and that there was no legal impediment to Canadian protection of the company. It therefore rejected the argument that considerations of equity and justice required Belgium to exercise diplomatic protection on behalf of *Barcelona Traction* and its shareholders. The Court acknowledged the serious evidence presented by Belgium regarding the harm suffered by Belgian shareholders as a result of the acts of Spanish authorities, but emphasized that a fundamental precondition for seising the Court is the existence of a jurisdictional basis for the claimant state, which Belgium had failed to establish. By ten votes to one, the Court dismissed the application. Some judges nonetheless emphasized the right of the shareholders' state of nationality to exercise diplomatic protection (7).

Judge Tanaka, for instance, argued that customary international law does not prohibit the protection of shareholders by their state of nationality where the company's state of nationality also has the right to exercise diplomatic protection. He noted that, while there is no rule in international law explicitly authorizing dual protection of both the company and its shareholders, there is likewise no rule prohibiting such dual protection. Although other judges, such as Fitzmaurice, Jessup, and Gros, did not go as far as Tanaka, they disagreed with the majority's reasoning and maintained that, in exceptional circumstances—especially where the company's state of nationality is itself the wrongdoing state—the shareholders' state of nationality may exercise diplomatic protection. Judge Gros, who criticized the Court for ignoring the realities of modern investment, stressed that the foundations of international economic law must rest on economic realities and that a state whose national economy suffers serious harm should have access to legal remedies. For this reason, many critics regard the *Barcelona Traction* judgment as establishing a standard that is impractical in contemporary economic relations (11).

Nevertheless, the report of the Special Rapporteur of the International Law Commission on diplomatic protection of corporations and shareholders highlights the broad support of states for the *Barcelona Traction* judgment, and the draft articles on diplomatic protection follow its approach. Under these draft provisions, the state in which the company operates or the company's state of nationality may exercise diplomatic protection, while the shareholders' state of nationality may do so only in exceptional circumstances, such as when the company has been wound up or when it possesses the nationality of the state responsible for the injury.

What has changed since the *Barcelona Traction* judgment is the perception of the state's exclusive competence in the field of diplomatic protection. Based on the traditional doctrine, the Court emphasized the exclusive competence and discretion of the injured national's state in exercising diplomatic protection of its nationals—whether natural or legal persons. Today, however, in the process of globalization of human rights norms, this exclusivity has been somewhat attenuated. Thus, the *Barcelona Traction* judgment illustrates that the ICJ has treated diplomatic protection as an exclusive right of states while also attempting to clarify the core concepts and foundations of diplomatic protection, including effective nationality, exhaustion of local remedies, and the protection of corporations (15).

Some judges in the case reaffirmed the right of the shareholders' state of nationality to exercise diplomatic protection; Judge Tanaka, for example, observed that customary international law does not prohibit shareholder protection by their state of nationality where the company's state of nationality retains its own right to exercise diplomatic protection, and reiterated that although no rule explicitly permits concurrent protection of both the company and its shareholders, no rule explicitly forbids such dual protection either (11). Other judges disagreed with the majority but did not fully articulate an alternative standard. In any event, the Court accorded an exclusive role to the state in diplomatic protection. By contrast, in today's environment of human rights globalization, this exclusivity has become less pronounced and greater focus has shifted to the individual, not least because human rights organizations exercise extensive oversight in this area.

In the *Nottebohm* and *Barcelona Traction* cases, diplomatic protection was treated as an exclusive prerogative of the state. Although Nottebohm was a natural person, he could not himself initiate diplomatic protection; only his state of nationality could act on his behalf. In what follows, by examining the *LaGrand* and *Avena* cases, the question is raised whether the injured individual can also, in effect, set in motion or independently rely on what is functionally equivalent to diplomatic protection (15).

## The *LaGrand* Case

In its counter-memorial, the United States admitted that the competent authorities had failed to comply with the United States' international obligations toward Germany. It accepted that the U.S. authorities had not informed the LaGrand brothers in due time of their rights and had not notified the German consular authorities of their detention. The United States formally apologized to Germany for violating its rights and undertook to adopt important measures to prevent similar violations in the future. Nonetheless, the United States challenged the ICJ's jurisdiction over other claims brought by Germany, arguing, inter alia, that Germany's allegation of a violation of its right of diplomatic protection did not fall within the scope of the Optional Protocol and therefore did not come within the Court's jurisdiction, since that issue did not concern the interpretation or application of the Vienna Convention. In the view of the United States, a distinction had to be drawn between the Court's jurisdiction over treaty-based disputes and its jurisdiction over disputes arising under customary international law: the 1963 Vienna Convention on Consular Relations governs consular assistance, not diplomatic protection. Under Article I of the Optional Protocol, the Court's jurisdiction extends only to disputes concerning the interpretation or application of the Convention, whereas Germany's claim that its right of diplomatic protection had been violated was grounded in customary international law. Consequently, Germany's contention that a right of diplomatic protection could be derived from the Vienna Convention was, according to the United States, unfounded (3).

The Court rejected this argument and held that, in such situations, the bringing of a claim by a state on behalf of its nationals is permissible under the general jurisdictional clause contained in the treaty. Germany also maintained that the breach of Article 36 had not only infringed its rights as a party to the Convention, but had also violated the individual rights of the LaGrand brothers. Germany interpreted the right to be informed, as set out in Article 36(1)(b), as an individual right of all nationals of the States Parties, elevated to the level of "human rights of aliens" (11, 18).

The United States, by contrast, argued that the right of access to consular assistance under the Vienna Convention was a right of the state, not an individual right, even though, in practice, this state right benefits individuals by enabling their state to provide consular assistance. The Court, however, rejected the U.S. position and affirmed that Article 36 contains obligations owed by the receiving state both to the detained individual and to the sending state. Various paragraphs of Article 36 condition the intervention of consular authorities on the express consent of the detained individual, thereby underscoring the individual dimension of the rights at stake.

After examining Germany's application, the U.S. counter-memorial, and the oral pleadings presented at several stages of the proceedings, the Court delivered its final judgment on 27 June 2001 in the case concerning *Germany* *v. United States of America*. It held that, under Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes relating to the 1963 Vienna Convention on Consular Relations, it had jurisdiction over the case and that all of Germany's claims were admissible.

In light of the claims and the judgment, it becomes clear that *LaGrand* underscores the importance of diplomatic protection within the framework of modern international law, particularly human rights law. Article 36 of the 1963 Convention on Consular Relations not only creates inter-state rights and obligations, but also recognizes rights for the foreign national vis-à-vis the receiving state, the violation of which harms not only the state but the individual as well (11, 18).

According to Dugard, the *LaGrand* case illustrates that when an individual acquires rights under international law, the violation of those rights does not automatically grant that person direct access to remedies at the international level. He further notes that customary international law rules on diplomatic protection and contemporary human rights norms are mutually reinforcing and ultimately serve a common purpose: the protection of human rights (3). The *LaGrand* judgment thus confirms that the institution of diplomatic protection can play a crucial role in safeguarding human rights globally and can provide redress in situations where international human rights law alone cannot secure an effective remedy (19).

## The Avena and Other Mexican Nationals Case

The *Avena* case constitutes the ICJ's most recent major pronouncement on diplomatic protection-related issues, involving a dispute between the United States and Mexico. The United States had arrested and sentenced to death 52 Mexican nationals on various charges. Mexico filed an application with the ICJ, alleging that the United States, by failing to inform these Mexican nationals of their rights to consular assistance, had violated Articles 5 and 36 of the Vienna Convention on Consular Relations and had mistreated its nationals. Mexico also requested provisional measures, which the Court granted (20).

A point of particular interest in this case was that many of the individuals concerned were dual nationals of both Mexico and the United States. The United States argued that Mexico erred in seeking protection for these dual nationals. The case therefore raised complex questions about the interplay between dual nationality, consular rights, and the reach of diplomatic or quasi-diplomatic protection (20).

Taken together, the relevant judgments indicate that, in parallel with the enhanced status of the individual in international relations and the gradual removal of human rights issues from the exclusive domain of state sovereignty, the ICJ, as the principal judicial organ of the international community, has played a constructive role in transforming the concept of diplomatic protection in a manner that elevates the position of human rights. Diplomatic protection has thus evolved from a purely inter-state remedial device, applicable in limited circumstances, into a mechanism capable of serving as an instrument for the protection of human rights.

In *Barcelona Traction*, the Court had already stated that fundamental human rights obligations bind states vis-à-vis the international community as a whole. Building on this premise, Germany argued in *LaGrand* that it was acting not only on its own behalf but also on behalf of the international community, contending that diplomatic protection itself constitutes a human right or belongs within the catalogue of human rights (9). Similarly, in *Avena*, Mexico argued that the right to consular information and communication under the Vienna Convention is a fundamental human right, the violation of which nullifies the entire criminal process.

As previously noted with respect to the Court's case law—particularly *Barcelona Traction*—the ICJ originally treated diplomatic protection as an exclusive right of states. However, in light of its later decisions, especially in *LaGrand* and *Avena*, which are strongly oriented toward the protection of human rights, it appears that the state's exclusive prerogative in this field has been significantly weakened. Diplomatic protection now displays a dual character: it remains, on the one hand, a right of the state under traditional international law, but it is increasingly perceived, on the other hand, as an individual right and a human-rights-related entitlement (21).

In *Avena*, the Court, given the acute risk faced by the Mexican nationals and the particular circumstances of the case, held that exhaustion of local remedies was not required. Moreover, under instruments such as the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture, and the European Convention on Human Rights, states may, in certain situations, act on behalf of non-nationals against the state of nationality of the injured person or against a third state in inter-state proceedings. This practice reflects a customary international law rule permitting states to protect non-nationals through protest, negotiation, or judicial procedures (11).

## Conclusion

With respect to violations of human rights obligations, the Draft Articles on Diplomatic Protection regard the rules of customary international law governing diplomatic protection and the rules on the protection of human rights as complementary. In seeking reparation for damage caused by an internationally wrongful act, it is possible to resort to a range of mechanisms in addition to diplomatic protection, in the sense that these two legal regimes can operate in parallel and the exercise of one does not preclude the operation of the other. The International Court of Justice in the *Diallo* case confirmed that, in recent decades, international law has undergone a substantive evolution in relation to the rights conferred upon individuals and that the substantive scope of diplomatic protection, which was initially confined to claims alleging violations of the minimum standard of treatment of aliens, has now expanded so as to encompass internationally guaranteed human rights. This confirms that diplomatic protection can go beyond the traditional minimal standards of treatment for aliens and can be employed as an instrument for ensuring respect for human rights.

Developments in international jurisprudence show, on the one hand, that diplomatic protection of dual nationals is accepted, provided that the nationality of the protecting state is predominant, and, on the other hand, that, with the increasing emphasis on human rights and individual entitlements in international relations, human rights have become one of the principal normative foundations for the exercise of diplomatic protection. In the past, the exercise of diplomatic protection was solely a right of the state and a matter of discretion, used by governments to defend what they considered to be their own interests vis-à-vis other states, with no obligation to act and with the right of diplomatic protection belonging to the state, not the individual. Today, however, such a purely discretionary conception is no longer acceptable in light of the enhanced status of the individual in the international legal order. The rules governing diplomatic protection are increasingly interpreted in a manner that allows individuals to derive greater benefit from the mechanisms associated with diplomatic protection.

Within this international environment, the judgments of the International Court of Justice in *LaGrand*, *Avena*, *Diallo*, and other cases reveal that, in parallel with the rising status of the individual in international relations and the progressive removal of human rights from the exclusive domain of state sovereignty, the Court, as the principal judicial organ of the United Nations, has played a constructive role in transforming the concept of diplomatic protection in a direction that strengthens the position of human rights. Diplomatic protection has thus moved beyond the confines of a purely judicial remedy available in limited circumstances and has acquired the potential to function as a broader mechanism for the protection of human rights.

The United Nations International Law Commission, taking into account the fundamental changes in the status of the individual as a subject of international law and the evolving international practice on diplomatic protection, has undertaken the codification and progressive development of the rules on diplomatic protection. Examination of the draft it has produced shows that the Commission has sought, in light of these developments, to offer an expansive interpretation of diplomatic protection with a view to maximizing the protection of individuals. It has also proposed new interpretations of the rules relating to the two classic conditions of diplomatic protection—nationality of claims and exhaustion of local remedies—in order to afford the broadest possible protection. In this regard, one may point specifically to the weakening of the nationality link requirement in cases involving stateless persons, dual or multiple nationals, and refugees, as well as the establishment of new thresholds for the application of the rule of exhaustion of local remedies.

Taken together, these developments indicate a movement away from the notion of absolute state sovereignty and toward the universalization of human rights at the global level, reflecting an implicit collective will among states to protect such rights. The view that placed state sovereignty at the center of international law has gradually given way to a perspective in which the human person is the focal point. This shift has led to the emergence of a new theory of diplomatic protection that conceives the institution primarily as a means of enforcing the rights of the individual national and removes it, at least in part, from the sphere of exclusive state prerogatives.

Despite the fact that states still play a major and essential role in the machinery of international responsibility and in the protection and defense of the rights of their injured nationals, the continuous expansion of international relations—and, more specifically, of international law—has progressively narrowed the scope of state freedom of action. Every step forward in international cooperation imposes a corresponding limitation on state discretion. Against this background, it appears that the direction of change in international law has been to accord greater weight to the individual and to his or her human rights in disputes of this kind.

In light of the heightened role of the individual in international law, and in view of the criticism voiced by scholars such as van Panhuis and Dupuy of the traditional theory of the "exclusive right of the state to exercise diplomatic protection," a new theory of "mandatory diplomatic protection" has been advanced. Under this theory, where the lawful and legitimate rights of an individual are infringed in a foreign country, the state of nationality has a legal duty to exercise diplomatic protection, and political considerations should not preclude such action. From this perspective, access to diplomatic protection is conceived as an absolute right of individuals. Article 19(1) of the Draft Articles on Diplomatic Protection also recalls the necessity and desirability of such an obligation, particularly where the injury suffered by the national is serious and substantial. In such circumstances, the state is not only obliged to exercise diplomatic protection in order to secure reparation for its national but is also required to transfer any compensation received from the responsible state to the injured individual.

Given that it is difficult for states to relinquish any prerogative that falls within the core of their sovereignty—especially their traditional authority over persons subject to their jurisdiction—and in view of the current structure of the international community, in which states still control most of the power, even the limited exceptions that have been recognized in the foundations and conditions of diplomatic protection constitute significant progress. Over the long term, such exceptions are likely to lead to further developments favorable to human rights.

In this context, the International Law Commission, which has a central mandate in the codification and progressive development of international law, is prepared to consolidate these developments in its draft articles on diplomatic protection. The Commission has articulated a clear concept of a universal obligation of states to respect rules governing the protection of their nationals. Under this evolving understanding, first, the enjoyment of diplomatic protection is regarded as an absolute right of individuals, and the state of nationality has a legal obligation to exercise diplomatic protection on behalf of the injured person; and second, the national is entitled to participate in and be present during the relevant proceedings and defenses.

In the Commission's nineteen draft articles, "human rights" replace "state rights" as the normative foundation for the protection of injured persons, encompassing nationals, stateless persons, and refugees alike. Human rights treaties and the growing body of practice aimed at ensuring stronger guarantees of human dignity consistently speak of "fundamental rights"—rights that form the hard core of human rights and are not subject to derogation. All of this points to a clear movement by the international community toward the progressive humanization of international law and the internationalization of human rights.

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All authors equally contributed to this study.

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