Diplomatic Protection in Contemporary International Law

A Thesis Submitted for the Degree of Doctor of Philosophy

by

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Abstract

This dissertation examines international law on the protection of citizens abroad. Recent developments in international law and jurisprudence beg the question whether the twin doctrines of diplomatic protection and human rights protection can be relied upon to protect citizens abroad, particularly in view of increasing globalization. The study shows that urgent effort is required to transform strategies for the protection of citizens abroad from the discretionary diplomatic protection approach to a more robust obligatory approach that is capable of guaranteeing protection of citizens abroad from potential abuse of host States. Consequently, it approaches diplomatic protection from a dual perspective which takes into consideration the traditional State responsibility perspective in addition to a much-needed human right perspective. Indeed, the latter will continuously be at the heart of the discussion in an attempt to demonstrate how the infiltration of human rights considerations into almost every aspect of diplomatic protection has prevented the demise of an ancient doctrine of international law and confirmed its continued usefulness.

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List of Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
ACommHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples Rights
ACHR	American Convention on Human Rights
ADP	Articles on Diplomatic Protection
ADPC	Articles on Diplomatic Protection with Commentaries
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ARSIWAC	Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRS	Convention on the Reduction of Statelessness
D2R	Duty to Repair
Doc.	Document
DP	Diplomatic Protection
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EWCA	England & Wales Court of Appeal

EWHC	England & Wales High Court
FI	Foreign Investment
HR	Human Rights
IACommHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IMST	International Minimum Standard of Treatment
ITLOS	International Tribunal for the Law of the Sea
IUSCT	Iran-United States Claims Tribunal
LRs	Local Remedies
OPtCCPR	Optional Protocol to the International Covenant on Civil and Political Rights
NST	National Standard of Treatment
PCIJ	Permanent Court of International Justice
SR	State Responsibility
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Basic Principles	Basic Principles and Guidelines on the Right to a Remedy and

	Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UNC	United Nations Charter
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNRIAA	United Nations Reports of International Arbitral Awards
UNTS	United Nations Treaty Series
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

Introduction

1. Preamble

The doctrine of Diplomatic Protection (DP) has a long history that began with the creation of nation States and the resultant regulation of nationality as a legal and political link between the State and its nationals.[1] Theoretically, Vattel is deemed to be the father of the doctrine as a consequence of his claim in the 18th century that "Whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen".[2] In the 20th century, the doctrine was significantly strengthened when its main features were sketched out by the contributions of a number of eminent publicists such as Root,[3] Borchard,[4] Dunn[5] and Lauterpacht.[6] In recent times, the writings of Dugard,[7] Vermeer-Künzli[8] and Amerasinghe[9] have also been valuable.

In practice, it is a fundamental element of international law that a State is responsible for injuries to foreigners, who live or conduct business abroad, that result from its illegal act or omission.[10] For this responsibility to be invoked, DP is considered as an exemplary device that can be utilized by the State of the injured persons, either natural or legal persons, with

[1] Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 36.

[2] Emmerich de Vattel, *The Law of Nations* [Edited and with an Introduction by Bela Kapossy and Richard Whatmore], (Liberty Fund, Inc. 2008) 298.

[3] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 (3) American Journal of International Law 517.

[4] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Banks Law Publishing Company 1915).

[5] Frederick Dunn, *The protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press 1932).

[6] Hersch Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1947) 9 (3) Cambridge Law Journal 330.

[7] In addition to his reports to the ILC, Dugard has published a journal article and two chapters in two edited collections. The whole work of Dugard on DP will be referred to at the proper time through this study.

[8] Vermeer-Künzli's work on DP constitutes of more than 10 journal articles and two chapters in edited books. All these productions will be mentioned and discussed where appropriate.

[9] Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008).

[10] Articles on Diplomatic Protection with Commentaries (ADPC), Report of the International Law Commission, Fifty-Eighth Session [2006] Doc. (A/61/10) 24.

the aim of safeguarding them and obtaining appropriate reparation for wrongs inflicted.[11] As early as 1924, the Permanent Court of International Justice (PCIJ) considered the Greek claim that the British authority in Palestine treated its national Mavrommatis in a way that was inconsistent with its international obligations.[12] In responding to this request, the PCIJ famously announced that "it is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from which they have been unable to obtain satisfaction through ordinary channels".[13]

On the other side of the spectrum, the movement towards codification and development of international law is not of recent origin.[14] The Vienna Congress (1814–1815) is habitually cited as the first intergovernmental effort to promote the codification of international law.[15] The end of the 19th and the beginning of the 20th century was marked by the two Hague Peace Conferences of 1899 and 1907.[16] However, what was more important is the establishment of special bodies concerned with the process of codification.[17] The first steps were taken in the 1870s with the foundation of the International Law Association[18] and the Institute of

[11] ibid 24.

[12] *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924 (1924) PCIJ, Serie A, No 2. 12.

[13] ibid.

[14] In the 17th century, Jeremy Bentham was of the view that a clearly identifiable code of international law is an indispensable tool in the architecture of international peace and security. Therefore, He called for an international code that to be based upon a detailed application of the principle of utility in the relations between nations in order to provide a scheme for an everlasting peace. See, Documents on the Development and Codification of International Law (UN Publications 1947) 138.

[15] This Congress resulted in the adoption of rules on the navigation of international rivers, condemnation of the slave trade and ranks of diplomatic representatives. The Work of the International Law Commission (8th edn, UN Publications 2012) 1.

[16] The first conference signalled agreement on several important treaties concerning international humanitarian law and the law on the settlement of disputes and therefore significantly encouraged movement in the codification of international law, whereas the second was less successful and only achieved slight improvement was made at the conference. ibid, 2.

[17] See e.g. Yuen-li Liang, 'The Progressive Development of International Law and Its Codification under the United Nations' (1947) 41 American Journal of International Law 24; Ramaa Dhokalia, *The Codification of Public International Law* (Manchester University Press 1970) 37-38

[18] See http://www.ila-hq.org (accessed 15/06/2019).

International Law,[19] both of which remain active. Also, prior to World War II, there were efforts to codify and develop some fields of international law.[20] For this purpose, the Assembly of the League Nations created a special committee of experts in 1924.[21]

After 1945, the notion of codification re-emerged and occupied a significant place in the legal discourse, which resulted in the establishment of the International Law Commission (ILC) under the auspices of the United Nations (UN) in 1947.[22] In doing so, the UN General Assembly (UNGA) took an important step by establishing a permanent body with strong links to the UN.[23] The ILC was established to fulfil one of the main tasks assigned to the UN, namely the task of "encouraging the progressive development of international law and its codification".[24]

In addition to other topics, the ILC has identified the topic of DP as appropriate for codification and progressive development.[25] A preliminary report on the topic was produced by the first Special Rapporteur Mohamed Bennouna, who later resigned from the

[19] See http://www.idi-iil.org/en/a-propos (accessed 15/06/2019).

[20] UN, Documents on the Development and Codification of International Law (n 14) 138.

[21] The Committee of Experts for the Progressive Codification of International Law prepared a list of topics the regulation of which by international agreement was most desirable and realizable. In 1927, the decision was made to convene a diplomatic conference with a view to focus on three subjects out of five which had been considered to be ripe for international agreement by the Committee relating to; (a) nationality (b) territorial waters and (c) the responsibility of States for damage done in their territory to the person or property of foreigners. The diplomatic conference was convened at the Huge in 1930. However, the only international instrument that the conference generated was the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. The Work of the International Law Commission (n 15) 3-4.

[22] UNGA Res. 147 (II) (1947).

[23] See e.g. Robert Jennings, 'Progressive Development of International law and its Codification' (1947) 24 British Yearbook of International law 301; Julius Stone, 'On the Vocation of the International Law Commission' (1957) 57 (1) Columbia Law Review 16; Carl-August Fleischhauer and Bruno Simma, 'Article 13' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary: Vol 1* (3rd edn, Oxford University Press 2012) 525.

[24] Article 13 (1) of the UNC.

[25] At its forty-eighth session, in 1996, the ILC identified DP as one of three topics appropriate for codification and progressive development. In the same year, the GA, in resolution 51/160 of 16 December, invited the ILC to further examine the topic and to indicate, in the light of the comments and observations made during the debate in the sixth committee, its scope and content. See http://legal.un.org/ilc/summaries/9_8.shtml (accessed 15/06/2019).

Commission.[26] Subsequently, Dugard was chosen as Special Rapporteur and took the responsibility of completing the work.[27] In 2006, the work was completed and came to the attention of UNGA, which, in accordance with its recent practice, annexed Articles on Diplomatic Protection (ADP) to its resolution of 8 January 2008.[28]

2. Significance of the Study

Although 10 years have elapsed since the adoption of the ADP, the importance of this study still lies in its timing. This is due to the fact that the passing of this period of time enables an exploration of the extent to which this product has entered the fabric of international law. In this sense, the adoption of the ADP by the UNGA will be used as a starting point to investigate what has happened to the institution of DP in the last 10 years and where it stands today. Moreover, this time period provides this study with the advantage of overcoming the shortcomings of the previous studies. These studies, particularly those done simultaneously with the completion of the ILC's work on DP, generally tend to over-praise the product of the ILC[29] or to reproduce its conclusions and commentaries without taking a critical stance.[30] To avoid these shortcomings, this study devotes considerable attention to crucial inquiries about the recognition and acceptance of the ADP in State practice and their application in the jurisprudence of the relevant judicial institutions at all levels.

Equally, the significance of this study stems from the fact that it crosses the boundaries between two areas of international law, the area of State Responsibility (SR) and the field of Human Rights (HR) protection. Hence, instead of seeing DP exclusively through the prism of

[26] Mohamed Bennouna, Preliminary Report on Diplomatic Protection [1998] Doc. (A/CN.4/484).
[27] Official Records of the General Assembly, [1999] Doc. (A/54/10), Supplement No. 10, para. 19.
[28] G.A Res. 62/67 (8 January 2008)
[29] This is the main feature of Vermeer-Künzli's writings on DP, which will be critically analysed at the right time.
[30] Chittharanjan Amerasinghe (n 9) 103-106, and 132-138.

the law of SR, this research sets up a combined theoretical framework that takes account of the traditional SR-based perspective in addition to a much-needed HR-based approach.

On one hand, this combination does not undervalue a well-established premise that the doctrine of DP has long been associated with SR for injuries to foreigners.[31] Several examples of this connection are to be found in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[32] For example, Article 44 of the ARSIWA refers to the requirements of nationality and exhaustion of Local Remedies (LRs) as essential admissibility conditions for the invocation of SR in cases where they are applicable.[33] It is evident that the invocation of DP is at the heart of the claims to which these conditions relate.[34] In addition to this, it is worth mentioning that the rules related to DP that were previously dealt with by the ARSIWA are not repeated in the ADP. Specifically, this applies to provisions concerning the consequences of international wrongs.[35] On the other hand, this combination pays great attention to the infiltration of HR considerations into DP. While this infiltration is an inevitable corollary to the impact of international HR law on general international law,[36] how it has given rise to significant alterations in many aspects of DP will be explored throughout this study.

3. Research Question

This study seeks to answer the following main question:

Does DP still have the capability to contribute to the protection of nationals abroad?

This question opens up two further sub-questions, which are:

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[31] ADPC (n 10) 22.

[32] UNGA Res. 56/83 (28 January 2002).

[33] Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries (ARSIWAC), Report of the International Law Commission, Fifty-Third Session [2001] Doc (A/56/10) 121, para 2.

[34] Chapters 4 and 5 of this study are devoted to examining these conditions.

[35] Chapters I & II of the ARSIWA deal with the issue in detail. see, ARSIWA [2001] Doc. (A/CN.4/L.602/Rev.10) 8-10.

[36] Final Report on the Impact of International Human Rights Law on General International Law, in International Law Association Report of the 73rd Conference (Rio De Janeiro2008) 11.

1. To what extent has the ILC succeeded in codifying and developing the rules of DP to cope with the standards of contemporary international law?
2. To what degree have the considerations of HR protection been infiltrated into the institution of DP?

4. Research Method

In order to answer these questions, this research undertakes a detailed textual analysis of a substantial body of primary and secondary sources.[37] The primary sources consist principally of treaties, statutes, resolutions, judicial pronouncements and the relevant UN documents. The scrutiny of these sources will be supplemented with a careful, in-depth examination of multiple secondary sources, including monographs, chapters in edited books, journal articles, green papers, news reports and press releases.

As doctrinal legal research,[38] this study analyses the current law of DP in order to reveal discrepancies, inconsistencies and ambiguities within its rules.[39] In doing so, this study intends to offer an original piece of research that fills several gaps in the existing literature. Since some of these gaps result from the unreserved embracing of the ILC's approach and conclusions, this study will attempt to take a more critical position. That is to say that, while acknowledging that the work of the ILC is central to this research, it departs from the assumption that the ILC's differentiation between primary and secondary rules of

[37] Textual analysis is a technique of interpretation that was originally devised by theologians for the study of religious scriptures. As a result of law's dependence on texts, legal scholars have adopted and developed this technique of interpretation. Reza Banakar and Max Travers, 'Studying Legal Texts' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Hart Publishing 2005) 136.

[38] See e.g. Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell Publishing Ltd 2008) 29; Woodrow Wilson, 'Doctrinal and Non-Doctrinal Legal Research' in Khushal Vibhute and Filipos Aynalem (eds), *Legal Research Methods: Teaching Material* (Prepared under the Sponsorship of the Justice and Legal System Research Institute 2009) 69; Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in reforming the Law' (2015) 8 (3) Erasmus Law Review 130.

[39] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to The Conduct of Legal Research* (Pearson Education Limited Publishing 2007)100.

international law[40] should not be followed unquestioningly. Similarly, as the conclusions of the ILC are not always defensible, they will be subject to further investigation, particularly in light of the relevant judicial decisions delivered following the espousal of the ADP.

5. Structure and Outline of the Thesis

In addition to the current introduction and the final conclusion, the thesis consists of six chapters, as follows:

Chapter 1 looks at the ILC as a permanent body to which the task of codifying and developing international law is assigned. The purpose of this chapter is to pave the way for commenting upon the legal status and reception of the ILC's output on DP. To that end, it will primarily deal with initial issues pertaining to the ILC's efficiency, its membership, its modus operandi and its relationship with the UN organs connected with the work of the ILC. More importantly, the chapter will shed light on the forms in which the ILC produces its work and will analyse the legal value of these outcomes.

Chapter 2 addresses several essential issues pertaining to the doctrine of DP. The aim of this chapter is to consider DP in a manner that reflects the reality of contemporary international law. Additionally, the chapter will emphasize the continuing usefulness of DP by illustrating how the developments in international HR law have had a positive influence on DP. The

[40] In short, the primary rules of international law are substantive rules, or rules of conduct, that stipulate the substantial rights and obligations of legal subjects in a given situation, whereas the secondary rules are rules about rules concerning how primary rules are made, changed, enforced and remedied. See e.g. Jean Combacau and Denis Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 Netherlands Yearbook of International Law 81,109; Daniel Bodansky and John Crook, 'The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 (4) American Journal of International Law 778; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 247; Chen Yifeng, 'Structural Limitations and Possible Future of the Work of the International Law Commission' (2010) 9 (2) Chinese Journal of International Law 473, 479; Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 (4) European Journal of International Law 993.

legal charter of DP will also be subjected to a detailed analysis to find out the extent to which the discretionary power of States to take up the claims of their nationals can be restricted.

Chapter 3 explores the area of primary rules of international law with the aim of articulating the wrongs that trigger DP. This chapter interrogates the ILC's distinction between primary and secondary rules in an attempt to establish a new criterion for characterising the nature of State conduct and assessing when it amounts to an international wrong. This criterion challenges the traditional position that assumes that deviations from the International Minimum Standard of Treatment (IMST) were used to determine the wrongfulness of the given conduct. By so doing, the chapter seeks to create an up-to-date criterion that is more capable of accommodating the on-going developments in the field of HR protection into the institution of DP.

Chapter 4 reflects on the requirement of nationality as an essential condition of DP. The purpose of this chapter is to assess the soundness of the contentions that the recent emergence of a new set of principles on the nationality of claims has led to increased flexibility in the application of the nationality requirement. In addition, this chapter will explain how the necessity of possessing the nationality of the protecting State and the present use of DP are reconciled. Further, it will consider the phenomenon of multiple nationality from the perspective of DP with the aim of clarifying the principles by which the phenomenon is ruled.

Chapter 5 deals with the exhaustion of LRs as a second admissibility condition of DP claims. The argument in this chapter revolves around the hypothesis that the rule of LRs should be considered as a single rule, the application of which has been stretched over two intertwined areas of international law, namely the area of HR protection and the realm of DP. Thus, the goal of this chapter is to consider the distinction between the areas in which the rule of LRs is applied. To this end, this chapter highlights several areas where there is a

uniformity in the rule's application, such as the consistencies in the rationales of the rule and the characteristics of the exhaustion required. In addition, the chapter will explain why the rule of LRs is subject to notable exceptions, despite the fact of its equal to the nationality condition.

Chapter 6 builds upon the conclusions of the previous chapters in order to demonstrate the outcome of successful DP claims. Although the ADP do not cover the issue, this chapter explores it, taking into account two realities. The first is related to the difference in the nature of the injured parties under the law of SR and the law of DP. The second is connected to the potential impact of HR considerations on the outcome of DP. This chapter determines an outcome that is more capable of repairing damages because of which DP was exercised. In addition, it will consider the influence of HR on the standards of reparation provided under DP.

Finally, the conclusion of the study will provide a summary of the analysis of the thesis.

Chapter One

The Meaning of Codification and Development of International Law: ILC Practice (1949-2018)

1.1 Introduction

The purpose of this chapter is to pave the way for a detailed investigation of the legal status and reception of the ILC's output on DP. Section (1.2) begins by considering a number of primary questions related to the ILC's efficacy, membership and its previous and potential contributions to the codification and progressive development of international law. Section (1.3) highlights the modus operandi of the ILC and the influence of Special Rapporteurs on its work. Section (1.4) examines the relationship between the ILC and the UNGA, and its relationship with the ICJ respectively. Section (1.5) discusses the reasons behind the alteration in the form of the ILC's outcomes. Section (1.6) analyses the authority of the ILC's products and their legal value before the respective judicial bodies, particularly the ICJ.

1.2 Preliminary Observations

1.2.1 The Question of the ILC's Efficiency

In terms of areas of controversy surrounding the effectiveness of the ILC, it is necessary to note that there are those who are frustrated with the outcomes of the ILC, claiming that it is failing to exercise an effective role in the process of progressively developing and codifying international law.[1] Paolillo, for instance, observes that the small number of conventions produced since 1949 by leading academics, of which only a few have entered into force and

[1] See e.g. Donald McRae, 'The International Law Commission: Codification and Progressive Development after Forty Years' (1987) 25 Canadian Yearbook of International Law 355; Felipe Paolillo, 'An Overview of the International Law-Making Process and the Role of the International Law Commission' in *Making Better International Law: The International Law Commission at 50* (UN Publications 1998) 79; Aslan Abashidze and Alexander Solntsev, 'International Law Commission of the United Nations: Question of Efficiency' (2014) 31 (9) World Applied Sciences Journal 1565.

two or three approached a universal extent, leaves "a certain sense of dissatisfaction".[2] Similarly, Sturma is of the view that the task of the ILC is largely exhausted "as a result of covering most areas of international law which were ripe for codification and progressive development".[3] As a consequence, it has been suggested that there is no need in today's world "for a body of experts that was created in the historical conditions when there were no other international law organizations involved in the codification of international law".[4]

On the other hand, there are those who praise the ILC and highlight that it has made, and continues to make, a vital contribution to the codification and development of international law.[5] For example, Wood emphasizes the centrality of its work to the discipline of international law,[6] saying that:

> Without its painstaking efforts, there would have been no Vienna Convention on Diplomatic Relations, no Vienna Convention of the Law of Treaties, [….] and without its careful working method any instruments on these subjects would surely not have been technically so sound and achieved such widespread acceptance.[7]

Likewise, Pellet thinks that if the ILC had not existed, it, or some comparable body, would have had to be created.[8] Moreover, some go so far as to compare the ILC with the ICJ,

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[2] Felipe Paolillo (n 1) 79.

[3] Pavel Sturma, 'The International Law Commission and the Perspectives of its Codification Activities' (2011) 1 (3) Lawyer Quarterly 145, 155.

[4] Aslan Abashidze and Alexander Solntsev (n 1) 1567.

[5] See e.g. Robert Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law' (1964) 13 (2) International and Comparative Law Quarterly 385; Allain Pellet, 'Responding to New Needs through Codification and Progressive Development' in Vera Gowland-Debbas (ed), *Multilateral Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process* (Martinus Nijhoff Publishers 2000) 23.

[6] Michael Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008) 387.

[7] ibid.

[8] Allain Pellet, 'Responding to New Needs through Codification and Progressive Development' (n 5) 23.

arguing, "it would be no exaggeration to say that it has come to be regarded as rivalling in importance the work of the ICJ".[9]

In summary, whether the ILC has performed adequately since its inception is contested. Yet, it should be kept in mind that merely counting the number of treaties prepared by the ILC is not an inappropriate measure of its effectiveness.[10] Indeed, an accurate assessment of the ILC's efficiency requires paying attention to the quality and the authority that lies in its outputs, which have been "influential in consolidating the rules of international law",[11] and also to the fact that the ILC's "intellectual approach towards establishing coherent bodies of rules in different areas has given an overall solidity to international law".[12]

1.2.2 The Concepts of Codification and Progressive Development

Article 15 of the ILC Statute suggests "codification is a convenient term used to mean the precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". On the other hand, progressive development is used to refer to "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States".[13] At first glance, the distinction between the two activities seems to be lucid and sensible. Nevertheless, there has been an active debate over the distinction between the two functions since the inception of the ILC.[14]

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[9] Allan Gotlieb, 'The International Law Commission' (1966) 4 Canadian Yearbook of International law 64, 64.
[10] Arthur Watts, *The International Law Commission 1949-1998*: *Vol One: The Treaties* (Oxford University Press 1999) 7.
[11] ibid.
[12] ibid.
[13] Likewise, the African Union Commission on International Law adopts similar distinction between codification and progressive development in Articles 5 (1) and Article 6 (1) of its Statute. Available at: https://au.int/en/treaties/statute-african-union-commission-international-law-aucil (accessed 15/06/2019).
[14] Ramaa Dhokalia, *The Codification of Public International Law* (Manchester University Press 1970) 203-216; Alain Pellet, 'Between Codification and Progressive Development of the Law: Some Reflections from the ILC' (2004) 6 (1) International Law Forum du droit International 15, 15.

Jennings writes that "codification means any systematic statement of the whole or part of the law in written form […] that does not necessarily imply a process which leaves the main substance of the law unchanged, even though this may be true of some cases". [15] This means that codification is a method by which the law can be progressively developed.[16] Owada, for his part, suggests that:

> Codification, in its pure form and as an ideal type, can only mean the putting into written form a code of what already exists in the form of unwritten, customary law. This is codification in the strict sense of the word. It is clear, however, that codification does not exist in reality in this pure form, since any exercise involving the putting into form of what exists in unwritten form will inevitably involve an exercise in defining the exact contents of the rules in question and defining their precise parameters.[17]

In much the same way, Koskenniemi argues that:

> The phrase (for convenience) in Article 15 seems to be an odd statement but reflects the almost unanimously shared view in the profession that codification and progressive development are not, despite the importance of that distinction from a conceptual perspective, after all, that different and cannot, in practice, be kept separate.[18]

It is true that Article 16 of the ILC Statute identifies special procedures that should be followed in dealing with topics for the purpose of progressive development. However, in its work on the law of treaties, the ILC stated that "the work constituted both codification and progressive development of international law, and as in the case of several previous drafts, it is not practicable to determine into which category each provision falls".[19] Having said that,

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[15] Robert Jennings, 'The Progressive Development of International Law and its Codification' (1974) 24 British Yearbook of International Law 301,302.

[16] ibid.

[17] Hisashi Owada, 'The International Law Commission and the Process of Law Formation' in *Making Better International law: The International Law Commission at 50* (UN Publications 1998) 167.

[18] Martti Koskenniemi, 'International Legislation Today: Limits and Possibilities' (2005) 23 Wisconsin International Law Journal 61, 65.

[19] Yearbook of the International Law Commission, Vol II [1966] Doc. (A/CN.4/SER.A/1966/Add.l) 177.

the fine, and often blurred, line between codification and progressive development has been identified by the ILC in its later practice by distinguishing between provisions that codify and others that progressively develop international law. Thus, references are being made to the progressive development of international law with regard to specific provisions. By doing so, the ILC appears to be, tacitly at least, drawing a distinction between the two activities.[20]

For example, the progressive development of international law has been referred to as a reason behind the proposal of Article 41 of the ARSIWA concerning the duty to collaborate to end any serious violation of international law. It was stated in the commentary to the same Article that "it may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law".[21] Similarly, with regard to Article 48 on the invocation of responsibility by a non-injured State, the ILC has provided a rationale for engaging in progressive development by stating that "[t]his aspect of Article 48 (2), involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake".[22]

More recently, there have been occasions when the ILC has emphasised the importance of the progressive development of international law. For instance, during its work on the Responsibility of International Organizations in 2011, the ILC confirmed the fact that:

> Several of the present draft articles are based on limited State practice moves the border between codification and progressive development in the direction of the latter. It may occur that a provision in the articles on State responsibility could be regarded

[20] Donald McRae, 'The Interrelationship of Codification and Progressive Development in the Work of the International Law Commission' (2013) 4 International Diplomatic Law Journal 75, 82.
[21] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 249.
[22] ARSIWAC, Report of the International Law Commission, Fifty-Third Session, Doc. A/56/10 [2001] 144.

> as representing codification, while the corresponding provision on the responsibility of international organizations is more in the nature of progressive development.[23]

Thus, the ILC has traditionally adopted the position that the codification and progressive development of international law are inseparable. According to Harris, however, the vast majority of the ILC's work now consists of the progressive development.[24] The inference here is that the ILC is moving away from concentrating mainly on the *lex lata* to the progressive development, which focuses on the *de lege ferenda.* This shift in focus comes as a consequence of covering the entirety of accepted general international law by the ILC .[25]

1.2.3 Membership of the ILC

Here, it is useful to emphasise that the composition of the thirty-four member ILC[26] shows a desire to be inclusive of all regions, cultures and "the main forms of civilization and the principal systems of the world".[27] This has come to mean securing fair geographical representation,[28] even though the permanent members of the United Nations Security Council have usually ensured the election of their own candidates to the ILC.[29] As a universal body, the composition of the ILC is vital in establishing both its expertise and its authority.[30] In addition to this, the most important characteristic of the ILC is that its members serve in a

[23] Report of the International Law Commission, Sixty-Third Session, [2011] Doc. (A/66/10) 70.
[24] David Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell Publishing 2004) 63.
[25] Sbahtai Rosenne, 'Codification Revisited after 50 Years' in Jochen Frowin and Rudiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law: Vol 2* (Kluwer Law International 1998) 20.
[26] The size of the membership of the ILC has been enlarged three times: from 15 to 21 in 1956, under UNGA/Res 1103 (XI) of 18 December 1956; to 25 in 1961, under UNGA/Res Resolution 1647 (XVI) of 6 November 1961; and to the present 34 in 1981, under UNGA/Res 36/39 of 18 November 1981. See http://legal.un.org/ilc/ilcmembe.htm (accessed 15/06/2019).
[27] Article (8) of the ILC Statute.
[28] The seats of the ILC are distributed as follows: "8 seats for Africa, 7 seats for Asia, 6 for Latin America, 8 for Western European and other States, and 3 for the so-called Eastern European States. Additionally, one seat rotates between Eastern Europe and Africa and one seat does so between Asia and Latin America". See http://legal.un.org/ilc/ilcmembe.shtml (accessed 15/06/2019).
[29] In 2006, however, the American candidate Michael Matheson was left behind the other candidates. Likewise, Mathias Forteau of French was not re-elected to the Commission Membership in 2016. See http://legal.un.org/ilc/elections/2016election_outcome.shtml (accessed 15/06/2019).
[30] Michael Anderson and others, *The International Law Commission and the Future of International Law* (British Institute of International & Comparative law 1998) 22.

personal capacity as independent experts of "recognized competence in international law",[31] and not as delegates of their governments. They are "elect[ed] for the period of five years and eligible for re-election".[32]

As a matter of practice, the ILC consists of members from different backgrounds: academics, governmental officers, judges and ambassadors. The mixed professional composition has proven to be useful.[33] Academics are involved in ensuring scholarly coherence and lucidity, whereas politicians are more concerned with the possible responses of the UNGA.[34] In this regard, some have praised the ILC for "the interaction, throughout the development of a codification draft, between professional expertise and governmental responsibility, between independent vision and realities of international life".[35]

As stated above, it is acknowledged that the ILC's members are legal experts and not representatives of their respective governments.[36] The consequence of this is that "the ILC behaves more often as a group of jurists than as a group of statesmen intent on ensuring the maintenance of the vital interests of their countries".[37] Yet, Jeffery argues that "the nature of appointments to the ILC, independent from governments or government representatives, is that the Statute of the ILC clearly supports the former while the process by which the ILC members are selected leaves room for the possibility of the latter".[38] He has taken this argument even further by stating that "the ILC does not function in a legal vacuum. Instead,

[31] Article 2 (1) of the ILC Statute.
[32] Article 10 of the ILC Statute.
[33] Mohamed El Baradei, Thomas Frank and Robert Trachtenberg, 'The International Law Commission: The Need for A New Direction' (1981) (1) United Nations Institute for Training and Research 1, 29.
[34] Christian Tomuschat, 'The International Law Commission: An Outdated Institution?' (2006) 49 German Yearbook of International Law 77,81.
[35] Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 173.
[36] Article 8 of the ILC Statue
[37] Taslim Elias, *New Horizons in International Law* (Martinus Nijhoff Publishers 1992) 385.
[38] Jeffery Morton, 'The International Law Commission of the United Nations: Legal Vacuum or Microcosm of the World Politics?' (1997) 23 (1) International Interaction Journal 37, 40.

its members are greatly influenced by politics outside the ILC, including the regional blocs that their home states belong". [39]

As a result, several commentators highlight the influence of political factors on the election of the ILC's members by the UNGA. According to Dhokalia "the system of nomination and elections has a tendency towards undue emphasis on political factors".[40] Likewise, Schachter says that "the election process in the UNGA has become more politicised and it appears that governments nominate candidates with little regard to their standing in the field".[41] Yet, this argument is flawed in two ways: firstly, the suggestion that the politicisation of elections leads to the election of less qualified candidates on political grounds is very difficult to quantify and, if it is the case, it applies only to a small number of members.[42] Secondly, guaranteeing more "equitable geographical representation has resulted in increased participation by developing countries and in this sense gives the work of the ILC greater legitimacy".[43]

1.3 Modus Operandi: The Issues

1.3.1 The Methods of the ILC and its Approach

With due regard to the UNGA, the ILC is free to select the topics of its work programme. These topics centre on "those areas in which the law is in particular need of codification and progressive development".[44] In practice, the ILC's investigations involve a comprehensive

[39] ibid.
[40] Ramaa Dhokalia (n 14) 166.
[41] Oscar Schachter, 'Recent Trends in International Law Making' (1988) 12 Australian Yearbook of International law 1, 4.
[42] Bertrand Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (Martinus Nijhoff Publishers 1977) 34.
[43] Alan Boyle and Christine Chinkin (n 35) 173.
[44] Stephen Schwebel, 'The Influence of the International Court of Justice on the Work of the International Law Commission and the Influence of the Commission on the Work of the Court' in *Making Better International Law: The International Law Commission at 50* (UN Publications 1998) 161.

examination of State practice, jurisprudence and doctrines, and a wide range of scholarly outputs.[45] In the selection of topics, the ILC is guided by the following criteria:

> (a) The topic should reflect the needs of States in respect of the progressive development and codification of international law; (b)The topic should be sufficiently advanced in terms of State practice to permit progressive development and codification; (c) The topic is concrete and feasible for progressive development and codification; (d) The ILC should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[46]

Questions have been raised regarding the criteria that are used to determine the needs of States or the international community. It is said that while the ILC has contributed to the development of international Criminal law,[47] it has played no part in the drafting of several substantial conventions adopted since 1949. Undoubtedly, topics such as the use of force, human rights and international trade, which have been absent from the ILC's agenda, are cornerstones of international law. However, this absence could be justified by the fact that the ILC is not a suitable body for every legal subject, especially those that are highly politically sensitive and more suited to development in a political forum.[48] Likewise, when the matter under consideration is a mixture of political, technical, and legal issues then something like the Third United Nations Conference on the Law of the Sea might be needed.[49]

As a consequence, the picture that emerges is that the ILC has a duty to respond to the needs of the international community.[50] However, it is not a body that is designed to be responsive

[45] ibid.
[46] The Work of the International Law Commission (8th edn, UN Publications 2012) 45.
[47] See e.g. James Crawford, 'The ILC adopts a Statute for an International Criminal Court' (1995) 89 (2) American Journal of International Law 404.
[48] Alan Boyle and Christine Chinkin (n 35) 175.
[49] Allain Pellet, 'Responding to New Needs through Codification and Progressive Development (n 5) 18.
[50] ibid, 23.

to the development of all new needs, rather it responds to the international community's "constant needs and its renewed and developing need for uniform transversal rules".[51]

In general, the ILC commences its work on a particular topic by establishing a working group to outline the scope of the topic and give some guidance to the Special Rapporteur who produces a number of annual reports; these are then debated by the ILC in public sessions.[52] When an adequate degree of agreement between the ILC's members is achieved, the outcome is referred to a Drafting Committee, which, for its part, "exercises a vital role in harmonizing the various viewpoints and finding out generally agreeable solutions".[53] Once the outcome and the attached commentaries are completed, the ILC adopts them on first reading and call on States to comment. After receiving the comments and further revision, if necessary, the ILC adopts the output on second reading and submits them the UNGA with a recommendation for further action.[54]

However, the issue is not as straightforward as explained above. The ILC has often been criticised for taking a long time to complete its work on some topics such as the law of treaties,[55] the Draft Articles on Non-Navigational uses of International Watercourse,[56] and the law of SR.[57] Sinclair justifies this saying that "[t]he progressive development and codification of international law is a slow and painstaking process requiring patience, determination and

[51] ibid.
[52] The Work of the International Law Commission (n 46) 28-32.
[53] Ibid, 49.
[54] Stephen McCaffrey, 'Is Codification in Decline' (1996) 20 Hastings International & Comparative Law Review 641,642.
[55] See. e.g. Mark Villiger, *The 1969 Vienna Convention on the Law of Treaties: 40 Years After* (Martinus Nijhoff Publishers 2011).
[56] Stephen McCaffrey, 'The International Law Commission adopts Draft Articles on International Watercourses' (1995) 89 (2) American Journal of International Law 395.
[57] See e.g. Philip Allott, 'State Responsibility and the Unmaking of International law' (1988) 29 (1) Harvard International Law Journal 1; Katia Creutz, 'International Responsibility and Problematic Law-Making' in Rain Liivoja and Jarna Petman, (eds), *International Law-Making: Essays in Honora of Jan Klabbers* (Routledge Press 2014) 171.

an ability to reconcile varying viewpoints".[58] On the other hand, Graefrath suggests "the accuracy of Sinclair's observation does not obviate the need to speed up the function of the ILC by means such as improving the working methods of the ILC, and distinguishing clearly between long-term tasks and short-term demands".[59] Likewise, since the ILC works no more than three months each year, it has been suggested that it should work as a full-time body or, at least, have full-time Special Rapporteurs.[60]

1.3.2 The Impact of Special Rapporteurs on the Work of the ILC

Article 16 (a) of the ILC Statute outlines the selection of the Special Rapporteurs with respect to the progressive development of international law. In practice, however, the ILC selects them at the beginning of its work on each topic without having to identify whether the topic belongs to the codification or the progressive development of international law. The Special Rapporteurs, who are described as "a motor of the ILC",[61] carry out a central element of its work.[62] Hence, their capacity and experience, as well as their readiness to serve, are primary considerations within the selection process.[63] The task of the Special Rapporteurs involves preparing reports for consideration by the ILC, submitting draft articles to the ILC, preparing commentaries to draft articles on a specific topic under discussion, introducing reports in plenary, answering questions raised by members and summing up debate, and assisting the drafting committee and working groups.[64]

Certainly, the efforts of the Special Rapporteurs are central to the work of the ILC, constituting a decisive part of its strategies and mechanisms. Therefore, a successful

[58] Ian Sinclair, *The International Law Commission* (Cambridge University Press 1987) 32.
[59] Bernhard Graefrath, 'The International Law Commission Tomorrow: Improving its Organization and Methods of Work' (1991) 85 (4) American Journal of International Law 595, 603.
[60] Mohamed El Baradei, Thomas Frank and Robert Trachtenberg (n 33) 17.
[61] Arnold Pronto and Michael Wood, *The International Law Commission 1999-2009: Vol IV: Treaties, Final Draft Articles, and Other Materials* (Oxford University Press 2010) 7.
[62] ibid.
[63] Herbert Briggs, *International Law Commission* (Cornell University Press 1965) 240.
[64] The Work of the International Law Commission (n 46) 24-27.

Rapporteur needs not only the mastery of their topic but sound judgment, drafting skills, and persuasive ability.[65] As such, it has been suggested that the "Special Rapporteurs specify the nature and scope of the work planned for the next session to ensure that future reports meet the needs of the ILC as a whole and that reports be available to members sufficiently in advance of the session to enable study and reflection".[66] In reality, they work alone, relying on their own sources to complete their tasks and are required to produce their work within a particular time frame.[67]

One commentator suggests that "the ILC nowadays is composed mainly of diplomats and officials, with very few generally recognised authorities".[68] Yet, the recent history of the ILC demonstrates that leading scholars have been selected as Special Rapporteurs and have exercised a significant impact on its work. For example, the efforts of Crawford, the last Special Rapporteur on SR, were crucial to the work of the ILC and greatly impacted the "content and integrity of the ILC's outcome through streamlining the rules and making them more coherent".[69] No doubt, the accomplishment of the work on SR required a Special Rapporteur as skilled as Crawford to complete the topic after nearly five decades of labour. The adoption of the ARSIWA has been described as "a major achievement [which] testifies to the unwieldy nature of the ILC and the controversial nature of some articles".[70] Similarly, the work of Dugard has had a key impact on the institution of DP, and the development of the topic in the ILC reflects his initial work.[71]

[65] Herbert Briggs (n 63) 240.
[66] The Work of the International Law Commission (n 46) 26.
[67] James Kateka, 'John Dugard's Contribution to the Topic of Diplomatic Protection' (2007) 20 (4) Leiden Journal of International Law 921, 924.
[68] Oscar Schachter, 'Recent Trends in International Law Making' (n 41) 4.
[69] David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 (4) American Journal of International Law 857, 857.
[70] ibid.
[71] James Kateka (n 67) 924.

1.4 The Relationship between the ILC and the UN Organs

1.4.1 The UNGA

The theory of principal-agent has been applied to understand the relation between the UNGA and the ILC.[72] This is because the ILC is delegated by the UNGA to assist it in the task of "the promotion of the progressive development of international law and its codification".[73] Yet, the approval of the UNGA is a key stage in the work of the ILC. At the outset, the ILC is required to seek and take an account of the views of the UNGA when selecting the subjects of its work.[74] Additionally, the final output of the ILC is reported to the UNGA, which has the power to approve, disapprove, reject or halt the work of the ILC whenever it wishes.[75]

In exercising its supervision over the ILC work, the UNGA has, in many cases, given its approval to the ILC's outcomes by providing positive responses throughout the 6th Committee's consideration of the ILC's annual report.[76] The UNGA normally accepts the draft articles and other legal texts prepared by the ILC with relatively little modification.[77] On very limited occasions, however, the UNGA has rejected the proposals of the ILC, such as its draft articles on Model Rules on Arbitration Procedures in 1958, when the UNGA took note of those Model Rules that have never been implemented.[78]

The ILC Statute contains some provisions that aim at providing States with an opportunity to express their opinions at every stage of its work. The ILC is requested to (a) "circulate a

[72] This theory posits that self-interested actors involved in governance and law-making such States may delegate power to other actors such as agencies or international organizations to provide benefits that the principals could not achieve on their own. Laurence Helfer and Timothy Meyer, 'The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence' in Curtis Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press 2015) 308.
[73] Article 1 of the ILC Statute.
[74] Articles 18 (2), 21, and 22 of the ILC Statute. See also, Edwin Hoyt, 'The Contribution of the International Law Commission' (1965) 59 American Journal of International Law 3.
[75] Herbert Briggs (n 63) 318.
[76] Franklin Berman, 'The ILC within the UN's Legal Framework: Its Relationship with the Sixth Committee' (2006) 49 German Yearbook of International Law 107.
[77] Laurence Helfer and Timothy Meyer (n 72) 310.
[78] ibid.

questionnaire to the Governments, and […] invite them to supply, within a fixed period of time, data and information relevant to items included in the plan of work";[79] and (b) "to address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the ILC deems necessary".[80]

The ILC is also obliged to "invite or ask governments to submit comments on the ILC's documents"[81] and, furthermore, to "take into consideration such comments in preparing the final draft and explanatory report".[82] In practice, however, the difficulty of obtaining information or representative responses from States is the most significant issue concerning the ILC work.[83] The ILC usually complains that calls for States' comments on its work only generate answers from a limited number of States and the willingness to respond to its work is often less than enthusiastic.[84]

1.4.2 The ICJ

Whilst the ILC works at the legislative level as an organ of the UN, the ICJ works at the judicial level as "a principal judicial organ of the United Nations".[85] Institutionally, therefore, there are some commonalities between the ICJ and the ILC.

Regarding the Statutes, the Statute of the ILC is reconciled with articles and provisions in the ICJ Statute. In terms of the composition of the two bodies, for example, "the representation of the main forms of civilization of the principal legal systems of the world is required". By the

[79] Article 16 (c) of the ILC Statute.
[80] Article 19 (2) of the ILC Statute.
[81] Article 21 of the ILC Statute.
[82] Article 22 of the ILC Statute.
[83] Lucius Caflisch, *The International Law Commission Fifty Years After: An Evaluation* (UN Publications 2000) 67; Gerhard Hafner, 'Codification and Progressive Development of International Law' in Franz Cede and Lilly Sucharipa-Behrmann (eds), *The United Nations: Law and Practice* (Kluwer Law International 2001) 153.
[84] Ferdinand Trautttmandorff, 'The Rule of law, Codification and the Role of Gerhard Hafner' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008) 366.
[85] Article 92 of the UN Charter.

same token, the required qualifications of their members are also similar because "the members of the Court shall possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurist consults of recognized competence in international law".[86] Likewise, "the members of the ILC shall be persons of recognized competence in international law".[87] The members of the ILC are elected only by the UNGA, whereas the election of the judges of the ICJ is seen as a matter of sufficient significance to require the participation of both the UNGA and the Security Council.[88]

The relationship between the ICJ and the ILC has witnessed a constant movement of scholars of recognized competence in international law from the ILC to the ICJ.[89] Throughout the history of the two bodies, nearly a third of the ICJ's members have also been members of the ILC. As a result, the work of the ILC has been deeply affected by the brain drain from the ILC to the ICJ because what is an advantage for the ICJ might be a disadvantage for the ILC, particularly when the publicists elected to the ICJ are effective Special Rapporteurs.[90]

It is a drawback to the work of the ILC if a Special Rapporteur is changed in the middle of their work. Firstly, the alteration takes time and delays the completion of the work. Second, each Special Rapporteur usually brings their own approach to the topic, which often cannot be reconciled with the work already done.[91] For instance, the work of the ILC on the law of treaties was delayed as a result of the election of the ILC's members to the ICJ.[92] Also, the

[86] Article 2 of the ICJ Statute.
[87] Article 2 of the ILC Statute.
[88] Article 3 of ILC Statute and Article 4 of the ICJ Statute.
[89] Sompong Sucharitkul, 'The Role of the International Law Commission in the Decade of International Law' (1990) 3 (3) Leiden Journal of International Law15, 25.
[90] ibid.
[91] Bernhard Graefrath (n 59) 605.
[92] The work of the ILC on the law of treaties started with Brierly as Special Rapporteur from 1949 to 1951 following by Lauterpacht in 1952 who was succeeded by Fitzmaurice in 1955 when Lauterpacht was elected to the membership of the ICJ. In 1961, Fitzmaurice was also elected to the ICJ and replaced by the fourth Special Rapporteur Waldock who led the work to accomplishment in 1966. Mark Villiger, *The 1969 Vienna Convention on the Law of Treaties: 40 Years After* (n 55) 28.

form of the ILC's output was changed from a non-treaty form to a treaty form by the fourth Special Rapporteur on the topic.[93]

Regarding the functions of the two bodies, while the ICJ is concerned with the implementation of the law in specific cases and the ILC is concerned with international law in general, the fact is that both are concerned with the development of international law.[94] On several occasions, the most reliable guide for the ILC is found in the jurisprudence of the ICJ which makes the decisions of the Court the first and most crucial stage in the ILC's reasoning.[95] As such, there have been some instances in which the decisions of the ICJ have strongly influenced the work of the ILC. In 1948, for example, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UNGA without any provision governing the issue of the reservations to the Convention.[96] A number of States tried to attach reservations to this Convention that were refused by other States, which gave rise to the question of the legal effect of such objections.[97]

This question was put to the ICJ by the UNGA; the Court provided the following answer in the 1951 advisory opinion. Leaving aside the previous prevalent test of consensus, the Court held that:

> A State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and

[93] James Hogg 'The International Law Commission and the Law of Treaties' (1965) 59 American Society of International Law 8, 11.

[94] James Crawford, 'The International Court of Justice and the Law of State Responsibility' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 86.

[95] See e.g. Arthur Watts (n 10) 13; Michael Wood, Formation and Evidence of Customary International law [2012] Doc (A/CN.4/653) 4.

[96] Bert Vierdag, 'The International Court of Justice and the Law of Treaties' in Vaughan Low and Malgosia Fitzmaurice (eds), *Fifty Years of International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996)145-166.

[97] Stephen Schwebel (n 44) 162.

purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.[98]

At the same time, as the issue was under its examination, the ILC was moving in the opposite direction. In its 1951 report, the ILC "recommended reinstatement of the traditional rule of unanimous consent of the parties where multilateral treaties were concerned". In 1962, however, the ILC changed its direction, acknowledging "the Court's principle of compatibility with the object and purpose of the treaty is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them".[99] More recently, the ILC has postponed its final determination of the state of the law in anticipation of the final judgement of the ICJ in *LaGrand* case.[100] As a result, in its final outcome on SR, adopted shortly after this judgment, the ILC endorsed the Court's decision on guarantees and assurances of non-repetition.[101]

In short, it can be concluded that the work of the ILC is reliant on the jurisprudence of the ICJ and vice versa. Therefore, it is appropriate to suggest that the interaction between the ILC and the Court is based on, and should be interpreted in the light of, the simultaneous indication to the judicial decisions and the teachings of publicists in Article 38 (1) (d) of the ICJ Statute.

1.5 Forms of the ILC's Products

There are a variety of possible forms of the ILC's outputs consisting mainly of treaty and non-treaty forms. The former includes draft conventions or draft articles, while the latter involves principles, guidelines, reports, studies, model rules, principles, declarations,

[98] *Reservations to the Convention on Genocide,* Advisory Opinion of 28 May 1951(1951) ICJ Rep15, p 29.
[99] Yearbook of the International Law Commission, Vol II [1962] Doc. (A/CN.4/SER.A/1962/Add.1)178.
[100] Santiago Villalpando, 'On the International Court of Justice and the Determination of Rules of Law' (2013) 26 (2) Leiden Journal of International Law 243, 246.
[101] Christian Tams, 'Recognizing Guarantees and Assurances of Non-Repetition: LaGrand and the Law of State Responsibility' (2002) 27 Yale Journal of International Law 441, 444.

conclusions and so forth.[102] Article 23 of its Statute leaves broad room for the ILC in dealing with the form of its work by recommending to the UNGA that it is able: "(a) to take no action, the report having already been published; (b) to take note of or adopt the report by resolution; (c) to recommend the draft to Members with a view to the conclusion of a convention; (d) to convoke a conference to conclude a convention". Traditionally, it is often held that the most successful output of the drafting exercise is the convention form.[103] In recent times, however, other forms are more common. The reasons behind this change in the forms of the ILC's outputs are explained in this section.

1.5.1 Treaty Form

Historically, the multilateral treaty form has been seen as the preferable outcome for the codification of international law in the ILC's dogma. In 1973, for example, the ILC anticipated that "in the years ahead the codification of conventions will continue to be considered as the most effective means of carrying on the work of codification".[104] As a result, the work of the ILC was originally undertaken on the assumption that the ultimate output will constitute the basis for a convention.[105]

Accordingly, Reuter writes that "among the various kinds of work that the ILC has undertaken or might undertake the most important and useful, and has established the authority of the ILC more effectively than any other, was the preparation of draft articles to provide the raw material for international conventions".[106] Similarly, Jennings and Watts

[102] Sean Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in Maurizio Ragazzi (ed), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Martinus Nijhoff Publishers 2013) 29.

[103] See e.g. Robert Jennings, 'Recent Developments in the International Law Commission: Its Relation to the Sources of International Law' (n 5) 385; Luke Lee, 'International Law Commission Re-Examined' (1965) 59 American Journal of International law 546.

[104] Yearbook of the International Law Commission, Report of the International Law Commission, Twenty-Fifth Session [1973] Doc. (A/9010/Rev.1), 230.

[105] Laurence Helfer and Timothy Meyer (n 72) 313.

[106] As quoted by Bertrand Ramcharan (n 42) 75.

describe the treaties produced by the ILC as "a major contribution to the development of a significant portion of international law, therefore, for that alone the work of the ILC can be regarded as successful".[107] Thus, it is often said in respect of the ILC that "any output short of the treaty form has been seen as a failure".[108]

In this regard, one can observe many examples that confirm the aforesaid view. In 1951, for example, the ILC started its work on the codification of the law of the sea, which culminated in a diplomatic conference convened in Geneva in 1958, resulting in the adoption of the 1958 Geneva Conventions on the Law of the Sea.[109] In the 1960s, the ILC completed its work on the Vienna Convention on Diplomatic Relations (VCDR) 1961, the Vienna Convention on Consular Relations (VCCR) 1963 and the Vienna Convention on the Law of Treaties (VCLT) 1969.[110]

According to Cassese, during the period from the 1960s to the 1980s "the natural preference for treaties became more pronounced, because new States began actively to participate in international relations and insisted that the old law be changed in order to take account of their needs and concerns".[111]In his view, therefore, "most members of the international community have tended to prefer treaties to custom for the former are more certain and result from the willing participation of contracting parties in the negotiation process".[112] In Crawford's words, "the advantage of a treaty is that States would have full input into the

[107] Robert Jennings and Arthur Watts*, Oppenheim's International Law: Vol 1, Peace: Introduction and Part 1* (9th edn, Longman 1992) 30.

[108] Michael Wood, 'The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?' (n 6) 376.

[109] Needless to say, the 1958 Geneva Conventions on the law of the sea are nowadays superseded by the 1982 UN Convention of the Law of the Sea. See e.g. Hugo Caminos and Michael Molitor, 'Progressive Development of International law and the Package Deal' (1985) 79 (4) American Journal of International Law 871; James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University press 2011) 37-48.

[110] David Anderson, 'Law-Making Processes in the UN System–Some Impressions' in Jochen Frowin and Rudiger Wolfrum (eds), *The Max Planck Yearbook of United Nations Law: Vol 2* (Kluwer Law International 1998) 47.

[111] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 167.

[112] ibid.

eventual text. Thus, the adoption of the articles in the form of a multilateral treaty would give them durability and authority".[113]

Nonetheless, despite the potential advantages of treaties, the fact remains that multilateral conventions are slow to be concluded and slower to enter into force. Ramcharan notes that the codification of a convention "takes a long time to hammer out in the ILC and a codification conference which means that only a few conventions can be concluded over a twenty-five-year period".[114] In addition, and perhaps more importantly, the international community does not always agree with the ILC about the necessity or feasibility of concluding a multilateral treaty on a particular subject.[115] The following are significant examples of conventions that failed to enter into force: the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,[116] the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986[117]and The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004.[118]

Other Conventions have entered into force after a long period of consideration. There is no doubt that the 1969 VCLT is one of the outstanding achievements of the ILC. Nonetheless, it must be pointed out that the Convention concluded and opened for signature on 23 May

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[113] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 21) 58.

[114] Bertrand Ramcharan (n 42) 21.

[115] Mohamed El Baradei, Thomas Frank and Robert Trachtenberg (n 33) 27.

[116] The Convention has been ratified by seven States, whereas 15 ratifications are required. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-12&chapter=3&clang=_en (accessed 15/06/2019).

[117] Article 85 (1) of the Convention reads as follows: "the present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification……". Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en (accessed 15/06/2019).

[118] Article 30 of this Convention requires 30 ratifications for its entering into force. However, 22 States have ratified it. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en (accessed 15/06/2019).

1969, but did not enter into force until 1980.[119] More recently, the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses was on the ILC's agenda since the beginning of the 1970s but entered into force on the 17th of August 2014. [120]

1.5.2 Non-Treaty Form

In the past few years, there has been a marked change in the form that the ILC's products may take. In fact, what was an exception in the previous years is the rule nowadays, and what was seen as a failure is now considered a legitimate outcome.[121] This shift has led to the emergence of the so-called soft law instruments amongst the ILC's products.[122] These instruments include, *inter alia*, reports such as the report of the ILC on fragmentation of international law: difficulties arising from the diversification and expansion of international law.[123] Guidelines: the work of the ILC on identification of customary international law.[124] Studies: the work on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[125] Conclusions: the work on the protection of the environment in

[119] Available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (accessed 15/06/2019).

[120] Article 36 (1) of this Convention states that "the present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations". See; https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en (accessed 15/06/2019).

[121] Jacob Cogan, 'The Changing Form of the International Law Commission's Work' in Robert Virzo and Ivan Ingravallo (eds), *Evolutions in the Law of International Organization* (Brill Nijhoff 2015) 8.

[122] See e.g. Hanspeter Neuhold, 'Variations on the Theme of Soft International Law' in Isabelle Buffard and others (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publisher 2008) 343-360; Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 (3) European Journal of International Law 499; Gregory Shaffer and Mark Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706.

[123] See Doc. (A/CN.4/L.682) 13 April [2006].

[124] Michael Wood, First Report on Formation and Evidence of Customary International Law [2013] Doc. (A/CN.4/663) 6, para 14.

[125] Georg Nolte, First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation [2013] Doc (A/CN.4/660) 5, para 6.

relation to armed conflicts.[126] Principles: the work on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[127]

Definitely, the work of the ILC on SR is amongst the most well-known instances of the shift mentioned above.[128] In 2001, the ILC completed and sent its product on SR to the UNGA, which, in accordance with its recent practice, annexed the ARSIWA to its resolution of 28 January 2002.[129] It appears that disagreements between States made the adoption and entry into force of a treaty on SR unlikely. Positively, the avoidance of the treaty-making process means that the formal, and sometimes very difficult, approval of States is averted. In other words, when dealing with the ILC's proposals, the UNGA can "avoid the protracted negotiations that would have ensued in a diplomatic conference which might result in a reopening of the topic and the repetition or renewal of the discussion of complex issues and could endanger the balance of the text found by the ILC".[130]

Seen from a technical perspective, the use of soft law instruments is a compromise between those States that do not want any regulatory body and those that tend to prefer conventions.[131] In fact, there are a number of reasons why soft law is now seen as a valid alternative to the making of law by treaties. Firstly, the flexibility of soft law gives it the advantage of allowing for a persistent process of legal development, which leaves space for the law to improve and

[126] Marie Jacobsson, Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts [2014] Doc. (A/CN.4/6) 4, para 5 (d).

[127] UNGA Res 61/36 (18 December 2006). See also; Caroline Foster, 'The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?' (2005) 14 (3) Review of European Community & International Environmental Law 265.

[128] James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 (4) International and Comparative Law Quarterly 959.

[129] UNGA Res 56/83 (28 January 2002).

[130] Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order' (2002) 72 (1) British Yearbook of International Law 337, 341.

[131] Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 (4) International and Comparative Law Quarterly 850.

be reconciled with future requirements.[132] In this sense, the amendment, supplement and replacement of soft law instruments is easier than it is with conventions.[133] Secondly, in contrast to treaties "soft tools can provide more immediate evidence of international support and consensus than a treaty whose impact is heavily qualified by reservations and the need to wait for ratification and entry into force".[134] Lastly, soft forms leave much room for lawmakers to be more progressive in the development of international law rules.[135]

It is true that the main advantage of conventions lies in securing a relatively high level of commitment. Thus, it requires States to rely upon promises made by its treaty partners. Nevertheless, as mentioned above, some treaties produced on the basis of the work of the ILC have received a small number of ratifications and, therefore, have not entered into force.[136] To a large extent, this confirms the fact that States are inclined to circumvent hard commitments by a wide use of soft instruments in their international relations.[137] On this basis, Tomuschat says that "the codification in the form of the soft law instrument may prove as effective as or, even more, effective than the treaty which after its launching receives only a hesitant response from the international community".[138] Likewise, Crawford concludes that:

> An unsuccessful convention may even have a decodifying effect. A more realistic and potentially more effective option would be to rely on international courts and tribunals, on State practice and doctrine. These will have more influence on

[132] Santiago Villalpando, 'Codification Light: A New Trend in the Codification of International Law at the United Nations' (2013) 2 (15) Brazilin Yearbook of International law 117, 150.
[133] See e.g. Kenneth Abbott and Duncan Snidal, 'Hard and Soft law in International Governance' (2000) 54 (3) International Organization 421; Alan Bolye, 'Soft Law in International Law-Making' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 141-158.
[134] Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 (4) International and Comparative Law Quarterly 901, 903.
[135] Jacob Cogan (n 122) 17.
[136] Sbahtai Rosenne (n 25) 15.
[137] Chen Yifeng, 'Structural Limitations and Possible Future of the Work of the International Law Commission' (2010) 9 (2) Chinese Journal of International Law 473, 481.
[138] Christian Tomuschat, 'The International Law Commission: An Outdated Institution?' (n 34) 105.

> international law in the form of a declaration or other approved statement than they would if included in an unratified and possibly controversial treaty.[139]

As a matter of fact, the impact of the ILC's outputs does not depend on the conclusion of a treaty and this has been proven by the effect of the ARSIWA.[140] The British Government describes this effect as follows:

> The draft articles are already proving their worth and entering the fabric of international law through State practise, decisions of courts and tribunal and writings. They are referred to consistently in the work of foreign ministries and other government departments. The impact of the draft Articles on international law will only increase with time, as is demonstrated by the growing number of references to the draft articles in recent years.[141]

Thus, although there are some positive elements associated with treaties as a codification tool, these are arguably outweighed by the negatives. Hence, the ILC has taken a positive step by changing the form of its outputs from treaties to other, more flexible, forms. By so doing, the ILC has adopted "a softer law-making process [that] depends not only on the approval of States but also on the endorsement of a wide range of international actors".[142] In his first report on formation and evidence of customary international law, Wood, writes, *inter alia*, that:

> In the view of the Special Rapporteur, the aim of the topic is to offer some guidance to those called upon to apply rules of customary international law on how to identify such rules in concrete cases. This includes, but is not limited to, judges in domestic courts, and judges and arbitrators in specialized international courts and tribunals.[143]

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[139] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 21) 58-59.

[140] Alain Pellet, 'The ILC's Articles on State Responsibility for International Wrongful Acts and Related Texts', in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 87.

[141] Comments and Observations Received from Governments, Doc. (A/CN.4/515) [2001] 45.

[142] Jacob Cogan (n 122) 9.

[143] Michael Wood, First Report on Formation and Evidence of Customary International Law (n 125) 6, para 14.

1.6 Analysing the Legal Value of the ILC's Outputs

1.6.1 The Dilemma of comparing the Products of the ILC with the Teaching of the most Highly Qualified Publicists

Several eminent scholars of international law[144]compare the ILC's products with "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".[145] Parry, for example, argues that the outcomes of the ILC "represent the teaching of the most highly qualified publicists".[146] A similar point of view is expressed by Brownlie, who suggests that "sources analogous to the writings of publicists, and at least as authoritative, are the draft articles prepared by the ILC".[147]

However, it is not difficult to observe that the ICJ hardly ever refers in its judgments and opinions to the teachings of publicists.[148] Meanwhile, the products of the ILC are increasingly used by the ICJ as a way of ensuring that it is applying the rules of international law.[149] In effect, the approval of the Court was given, without hesitation, to some provisional conclusions achieved by the ILC independent of any treaties or resolutions.[150] By doing so, the Court admits, implicitly at least, that the ILC's outcomes possess the properties of rule-legitimacy: "determinacy, symbolic validation, coherence, and adherence", which Franck has identified.[151]

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[144] See e.g. Clive Parry, *The Sources and Evidences of International Law* (Manchester University Press 1965) 114; Louis Henkin, *How Nations Behave* (2nd edn, Columbia University Press 1979) 32-33; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008)24.

[145] Article 38 (1) (d) of the ICJ Statute.

[146] Clive Parry (n 145) 114.

[147] Ian Brownlie (n 145) 24.

[148] Michael Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law: Vol II* (Oxford University Press 2012) 783.

[149] Alain Pellet, 'Article 38 of the Statute of the International Court of Justice' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 792.

[150] Benedict Chigara, 'The Administration of International Law in National Courts and the Legitimacy of International Law' (2017) 17 (5) International Criminal Law Review 909, 930.

[151] Thomas Frank, *The Power of Legitimacy Among Nations* (Oxford University Press 1990).

Interestingly, the reliance upon the outputs of the ILC has led Bordin to say that seeing the ILC's products "as an instance of the work of the law professors does not fully account for the role that these texts play in international argument".[152] Similarly, Villiger thinks that "the close ties between the ILC and States give drafts and other materials of the ILC a special status going beyond that of studies of learned writers.[153] Therefore, the question that should be raised here is under which rubric can these outputs be classified?

1.6.2 The Products of the ILC as a Probable Reflection of International Custom

There have been cases in which the ICJ cited the work of the ILC when it interpreted and defined the position of some provisions within conventions that prepared by the ILC. In other cases, the ICJ has directly relied on the ILC's products in order to support its findings that the alleged rules are of customary nature.[154] Traditionally, the ICJ used to refer to the work of the ILC in the course of its examination of the preparatory works of conventions. Under a strict inductive approach, the ICJ proclaimed in *the North Sea Continental Shelf* cases that:

> For a new customary rule to be formed, not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by

[152] Fernando Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (2014) 63 (3) International and Comparative Law Quarterly 535, 573.

[153] Mark Villiger, *Customary International Law and Treaties: A Study of their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 1985) 79.

[154] Alain Pellet, 'Article 38 of the Statute of the International Court of Justice'(n 150) 792.

considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[155]

Hence, in order to infer the rules of international custom from the behaviour of States, it is important to examine not only what States do, but also why they do it. That is to say that, "there is a psychological element in formation of customary law. State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation".[156] The potential justification for this approach is that pronouncement of rules as customary international law means that "all States have to comply with the relevant rules, regardless of whether or not they have participated in the creation and development of the given State practice and regardless of its impact on their interests".[157]

Therefore, after examining the work of the ILC from 1950 to 1956, the Court held that "there is no indication at all that any members supposed that it was incumbent on the ILC to adopt a rule of equidistance".[158] On the contrary, "the principle was proposed by the ILC with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law".[159] In light of this, the Court came to the conclusion that claims that West Germany was obligated by Article 6[160]of the Geneva Convention on the Continental Shelf were unacceptable.[161]

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[155] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969 (1969) ICJ Rep 3, para 77.

[156] See e.g. Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge Press 2002) 44; Edward Swaine, 'Rational Custom' (2002) 52 (3) Duke Law Journal 559; Patrick Kelly, 'Twilight of Customary International Law' (1999) 4 Virginia Journal of International Law 449; Roozbeh Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates' (2010) 21 (1) European Journal of International Law 173, 204.

[157] Alberto Alvarez-Jimenez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 (3) International and Comparative Law Quarterly 681, 686

[158] *North Sea Continental Shelf Cases* (n 156) para 49.

[159] ibid, para 62.

[160] Article 6 of the 1958 Geneva Convention on the Continental Shelf regulates the boundary of continental shelf which is adjacent to the territories of two or more States. Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf(accessed15/06/2019).

Undoubtedly, the work of the ILC was a useful place to look for evidence of international customary law because when the Court pointed to the ILC's work as evidence of general international law's existence, care had been taken to ensure that Article 38 (1) (b) of the ICJ Statute was not circumvented.[162] However, the existence of the two classical constitutive elements of custom required by Article 38 (1) (b) is difficult in some cases.[163] Therefore, the ICJ adopted a flexible deductive method with regard to the recognition of the rules of customary international law in the case of *Nicaragua*. This judgment of the ICJ contains two essential elements. First, the complete uniformity in State practice is not necessary for a customary rule of international law to emerge.[164] Secondly, the existence of *opinio juris* may not only be deduced from States' beliefs that they are complying with a mandatory precept, but also from the resolutions of the UNGA.[165]

D'Amato has severely criticised the Court's pronouncement by saying that "the judgment is a failure of legal scholarship. It reveals the august judges of the international court of justice as collectively naive about the nature of custom as a primary source of international law".[166] For his part, Chigara states "the ICJ gave no explanation as to why state practice relative to the

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[161] *North Sea Continental Shelf Cases* (n 156) para 101.

[162] Benedict Chigara, 'International Tribunal for the Law of the Sea and Customary International law' (1999) 22 Loyola of Los Angeles International and Comparative Law Review 433, 451.

[163] See e.g. Frederic Kirgis, 'Custom on a Sliding Scale' (1987) 81 (1) American Journal of International Law 146; Oscar Schachter, 'New Custom: Power, Opinio Juris and Contrary Practice' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubieszewski* (Kluwer Law 1996) 531; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 (4) American Journal of International Law 757; Rudolf Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal'' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 692.

[164] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986 (1986) ICJ Rep14, para 186.

[165] ibid, para 188.

[166] Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 (1) American Journal of International Law 101, 103; See also, Thomas Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' (1987) 81 (1) American Journal of International Law 116; Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International law and Some of its Problems' (2004) 15 (3) European Journal of International Law 523.

use of force since 1945 reflected customary law and not the States' compliance with Article 2 (4) of the United Nations Charter (UNC), which prohibits the use of force against a sovereign state".[167] In his view, therefore, "the legitimacy of custom as a source of international law may further be aggravated".[168]

Having said that, the recent jurisprudence of the ICJ demonstrates a remarkable continuity in its reliance on the work of the ILC as an authority on international custom without undertaking any further investigation into State practice;[169] the ARSIWA represent a clear instance of this reliance.[170] Here, the turning point was the 1997 decision concerning the *Gabcíkovo-Nagymaros Project*. The case arose from a controversy about a convention between Hungary and Czechoslovakia, according to which the parties had agreed to jointly construct a system of locks on the Danube, which formed their boundary.[171] At issue, was the principle of "the state of necessity" enshrined in Article 33 (currently Article 25) of the ARSIWA as adopted on first reading by the ILC.[172] The ICJ affirmed that:

> In the present case, the parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law ILC in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading.[173]

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[167] Benedict Chigara, 'International Tribunal for the Law of the Sea and Customary International law' (n 163) 446.
[168] ibid, 438.
[169] See e.g. *Legal Consequences for States of the Continued Presences of South Africa in Namibia*, Advisory Opinion of 21 June 1971 (1971) ICJ Rep 47, para 94; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999 (1999) ICJ Rep 62, para 87; *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion of 9 July 2004 (2004) ICJ Rep 136, paras 140, 194 and 195; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening),* Judgment of 3 February 2012 (2012) ICJ Rep 99, paras 66, 117 and 129.
[170] See e.g. Responsibility of States for internationally wrongful acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies (Report of the Secretary-General) 20 June 2017, Doc. A/71/80/Add.1.
[171] *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997 (1997) ICJ Rep 7, paras 51–52
[172] Report of the International Law Commission, Forty-Eight Session, Doc. (A/51/10. 1996) 125-151.
[173] *Gabcíkovo-Nagymaros Project* (n 172) para 50.

Furthermore, the Court referred to the ILC's commentaries to the ARSIWA with respect to "the definition of the circumstance precluding wrongfulness, its basis in the general theory of law, its exceptional character in international law, and the enumeration and interpretation of the conditions applicable thereto".[174] Likewise, in the case of *Diallo,* the ICJ referred to the definition of DP formulated in Article 1 of the APD as a reflection of customary international law.[175] Commenting on this judgment Vermeer-Künzli says that it "shows the Court's appreciation for the work of the ILC on DP, which in turn reflects its appreciation for Dugard's contribution to the development of this field of law".[176] Weisburd, on the other hand, states that this case puts weight on the absence of State practice, which may support the applicant.[177]

Indeed, what seems more important is the question of whether Article 1 of the ADP constitutes a rule of customary international law. The answer to this question is fully explained in the next chapter. Initially, however, it might be said that even if this provision is not customary and/or contains elements of progressive development of international law, its classification as a rule of customary international law is not an unprecedented innovation. This is mainly because, despite the ICJ's contention that specific rules of customary international law that it needs to apply should be focused equally on *opinio juris* and widespread State practice, the reality, which is rightly observed by Chigara, is that:

> The slogan, State practice+ *opinio juris*= norms of customary international law creates the impression that rules of customary international law emerge as a result of careful calculation on the part of their instigators. This is often a far cry from the evidence left

[174] ibid.

[175] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment of 24 May 2007 (2007) ICJ Rep 582, para 39.

[176] Annemarieke Vermeer-Künzli, 'Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case' (2007) 20 (4) Leiden Journal of International Law 941,942.

[177] Arthur Weisburd, 'The International Court of Justice and the Concept of State Practice' (2009) 31 University of Pennsylvania Journal of International Law 295, 309.

for us to consider by the ICJ after it has considered whether or not a new norm of customary international law has emerged.[178]

1.7 Conclusion

In conclusion, the purpose of this chapter was to evaluate the contribution of the ILC to the codification and progressive development of international law from a contemporary international legal perspective. It analysed scholarly efforts to address the work of the ILC and showed there are two main schools of thought. The first endorses the view that the ILC has ceased to contribute to the process of codifying and developing international law. However, the second school approaches the work of the ILC from a positive angle by confirming the importance of its outcomes. It has been illustrated that the ILC plays a decisive role in framing the grounds of international law, which is proven by the influence and authority of its products.

The chapter has also investigated the different forms of the ILC's outputs. The investigation shows that the time of significant codifications and codification conferences seem to belong to the past. It has been observed that the work of the ILC now tends more towards the soft law forms that give the ILC, first, an opportunity to be more progressive in responding to the new needs of the international community and, second, require nothing more than time to become incorporated into the international rules applied by international actors and international courts.

This chapter identified the legal value of the ILC's products by examining the jurisprudence of the ICJ. The interaction between the ILC and international courts and tribunals, especially the ICJ, shows that its outcomes appear to have been regarded as authoritative. From this perspective, the ILC's products had traditionally contributed to the main source of

[178] Benedict Chigara, *Legitimacy Deficit in Custom: A Deconstructionist Critique* (Ashgate Publishing Limited 2001) 320.

international law by preparing a number of treaties, whereas now they might be classified or dealt with as possible customary rules of international law subject to their acceptance in State practice and relevant jurisprudence.

The next chapters of this thesis will discuss the extent to which the ILC has succeeded in the task of codifying and developing the rules of DP to cope with the standards of contemporary international law.

Chapter Two

The Doctrine of DP: Its Essentials and Controversies

2.1 Introduction

The central objective of this chapter is to examine a number of fundamental and controversial issues pertaining to the doctrine of DP. These issues are related to the nature of DP, its legal character and its potential usage. Section (2.2) begins by shedding light on the foundation of DP. It reveals that while the doctrine is firmly rooted in the doctrines of international law and supported by widespread State practice and case law, the basis upon which it is premised requires further clarification. Section (2.3) scrutinises the concept of DP and how it has developed to its present status. It demonstrates that the current conceptualisation, as adopted by the ILC and the ICJ, can be described as incomplete due to its ineffectiveness on specific issues.

The following section (2.4) explores the status quo of DP, making a comparison between two domains in which the usage of DP is noticeably inconsistent. The first is the field of the protection of individuals' rights where the persistent developments in HR protection exercise an advantageous impact on DP, whereas the second is related to the protection of foreign investment (FI) where the role of DP has faded into insignificance. Finally, (2.5) addresses the question of the legal character of DP by examining the issue from both the international and national perspectives.

2.2 The Basis of DP

DP is premised on the assumption that an injury to a citizen, resulting from a violation or infringement of international law, is an injury to its State of nationality.[1] It was on this

[1] The use of legal assumptions is widely accepted in international law. See e.g. Jean Salmon, 'Device of Fiction in Public International Law' (1974) 4 (2) Georgia Journal of International and Comparative Law 251, 261; John Mansell, *Flag State Responsibility: Historical Development and Contemporary Issues* (Springer Publishing 2009) 13-23.

presumption that the PCIJ built its decisions in the case of *Mavrommatis*[2] and the case of *Panevezys-Saldutiskis Railway*.[3] In the latter, the PCIJ literally repeated what had already been held in the former, stating that:

> In taking up the case of one of its subjects, by resorting to diplomatic action or international judicial proceeding on his behalf, a State is in reality asserting its own rights, the right to ensure in the person of its subjects, respect for the rules of international law.[4]

Similarly, the ICJ has accepted and reaffirmed this understanding of DP in some of its earlier decisions, such as the case of *Barcelona Traction,* by holding that "within the limits prescribed by international law, a State may exercise DP by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting".[5] Notwithstanding, the basis of DP has continued to be subject to debate and criticism.[6]

Borchard argues "the State is not actually, or even theoretically, injured when its citizen is injured".[7] According to him, the presumption that "alleges an organic unity between the State and its citizens abroad may indeed be tenuous, especially at a time when business abroad is done largely by corporations with an infinite number of stockholders".[8] Likewise, Brierly says that the State has a general interest in securing fair treatment for its nationals in foreign

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[2] *Mavrommatis Palestine Concessions (Greece v. United Kingdom),* Judgment of 30 August 1924 (1924) PCIJ, Serie A, No 2.

[3] *Panevezyz-Saldutiskis Railway case (Estonia v Lithuania),* Merits, Judgment of 28 February 1939 (1939) PCIJ Rep Series A/B No 76.

[4] ibid, p16.

[5] See e.g. *Nottebohm Case (Liechtenstein v. Guatemala),* (second phase), Judgment of 6 April 1955 (1955) ICJ Rep 4, p 24; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase), Judgment of 5 February 1970 (1970) ICJ Rep 3, para 78.

[6] See e.g. John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (2005) 24 Australian Yearbook of International Law 75, 78; Annemarieke Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18 (1) European Journal of International Law 37; Alain Pellet, 'The Second Death of Euripide Mavrommatis?: Notes on the International Law Commission's Draft Articles on Diplomatic Protection' (2008) 7 (1) Law and Practice of International Courts and Tribunals 33, 34

[7] Edwin Borchard, 'The Protection of Citizens Abroad and Change of Original Nationality' (1934) 43 (3) Yale Law Journal 359,362.

[8] ibid.

countries.[9] Nevertheless, "it is an exaggeration to say that whenever a national is injured in a foreign State, his State as a whole is necessarily injured too".[10]

More critically, there are in practice a few key contradictions associated with the above-mentioned basis of DP.[11] Whilst the right of DP belongs to the State, its exercise relies upon many features of the injured individual's behaviour.[12] For instance, DP can only be exercised by the State of nationality if the injured person has exhausted all LRs available in the respondent State.[13] Furthermore, it is implausible to consider the State as the holder of the right and at the same time to prevent it from pursuing the claim as a result of breaking or breaching the continuous nationality condition, or through changing the nationality of the injured person.[14]

In any case, there are some facts that should be kept in mind while discussing the basis of DP. First, though the factual harm is that committed against the individual, the legal harm is still that committed against the State. Second, the individual does not have an international personality and enjoys a limited ability to internationalize their claims. As a matter of law, therefore, it remains an injury to the State that gives rise to a claim for DP. Indeed, this makes the espousal of the individuals' claims by the States of nationality, which are the dominant actors in international law, very useful.[15]

In addition to this, one may add that the position of the individual in international law has positively developed as a result of possessing several rights such as the hearing and defence of their rights before bodies and committees founded mainly by international HR instruments

[9] James Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th edn, edited by Humphrey Waldock, 1963) 276.
[10] ibid.
[11] Mohamed Bennouna, Preliminary Report on Diplomatic Protection [1998] Doc (A/CN.4/484) paras 24-26.
[12] ibid.
[13] ibid.
[14] ibid.
[15] John Dugard, First Report on Diplomatic Protection [2000] Doc. (A/CN.4/514, 10) para 32.

such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (ACtHPR).[16] Nevertheless, these changes have not led to the creation of a new type of international person.[17] In other words, although the individual has not come to be a subject of international law, they can be classified as a participant in the international community.[18]

That is to say, the individual may contribute to the international system by exercising their rights, particularly under HR instruments, but it is important to bear in mind that having rights under international law does not mean the individual's remedies are not limited. As such, it may correctly be said that some instruments of HR protection have achieved a considerable degree of success, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which displays a genuine regional treatment to millions of Europeans.[19] However, the same cannot be said for other instruments such as the African Charter on Human and Peoples' Rights (ACHPR) a region in which there are failed and unstable countries, which are often the weakest places for HR protection.[20] In addition to this, the direct access to the ACtHPR by individuals is strongly obstructed by the optional jurisdiction clause.[21]

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[16] Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 280.

[17] Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31 California Western International Law Journal 241, 276.

[18] Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Oxford University Press 1995) 48.

[19] John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (n 6) 78.

[20] Benedict Chigara, 'Tentative Reflections on the African Charter on Human and Pepoles' Rights' in Manisuli Ssenyonjo (ed), *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers 2011) 412.

[21] See e.g. Manisuli Ssenyonjo, 'Direct Access to the African Court on Human and Peoples' Rights by Individuals and Non-Governmental Organisations: An Overview of the Emerging Jurisprudence of the African Court 2008-2012' (2013) 2 (1) International Human Rights Law Review 17; Annika Rudman, 'The Optional Jurisdiction Clause and the Legitimacy of the African Court on Human and Peoples' Rights under the Broader Human Rights Mandate of the African Union' (2016) 3 State Practice & International Law Journal 41.

2.3 Questioning the Present Concept of DP

As indicated earlier, the current concept of DP was proposed by the ILC in Article 1 of the ADP and considered by the ICJ in *Diallo*.[22] According to this concept:

> Diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[23]

Before going further, it should be said that DP has historically been associated with unjustifiable incidents of the use of force, summarized by the evocative phrase "gunboat diplomacy".[24] The use of force to support the claims of the power countries' nationals residing or conducting business abroad has unfortunately transformed DP into a tool associated with abuses.[25] Despite this, numerous jurists of international law such as Borchard,[26] Dunn[27] and Lillich[28] have traditionally considered the use of force as a final stage of DP. Likewise, in an attempt to provide an alternative basis upon which to justify the use of force in the exercise of DP, Dugard proposes the following provision:

> The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:
>
> (a) The protecting State has failed to secure the safety of its nationals by peaceful means;

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[22] See above, p 39.

[23] ADP, [2006] Doc. (A/CN.4/L. 684) 1.

[24] Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 14.

[25] Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2009) 36.

[26] "The modes of redress may be either amicable or non-amicable, and may range from diplomatic negotiations, the use of good offices, mediation, arbitration, suspension of diplomatic relations, a display of force, reprisals, or armed intervention, to full war in the full sense of the word". Edwin Borchard (n 6) 439.

[27] "It is only occasionally, when aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place". Frederick Dunn, *The protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press 1932) 19.

[28] Richard Lillich, 'Forcible Self-Help by States to Protect Human Rights' (1967) 53 Iowa Law Review 325.

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.[29]

Dugard argues that his approach reflects the current status of the use of force in international law, claiming that the rescue of nationals in danger should be categorized as self-defence,[30] and so the use of force as a means of DP can also be justified in this context.[31] This reflects the view that "an absolute prohibition on the use of force […] is impossible to reconcile with actual State practice".[32] The Israeli's armed intervention at Entebbe Airport in 1976 was the precedent upon which his proposal is built.[33] This operation rescued a number of Israeli hostages who were subject to "immediate danger and the territorial State lack[ed] the capacity or willingness to protect them".[34]

Dugard's view is based on the fact that admitting the existence of such a right and limiting it by severe constraints is better than ignoring it, which may give States an opportunity to use the traditional argument to support their interventions, potentially leading to further abuse.[35] Having placed a number of constraints on the use of force, the reference to self-defence

[29] Johan Dugard, First Report on Diplomatic Protection (n 15) para 46.
[30] Article 51 of the UNC, which contains a complete and exclusive formulation of the right of self-defence in international law, states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security [……]."
[31] Johan Dugard, First Report on Diplomatic Protection (n 15) para 55.
[32] ibid, 21, para 59.
[33] David Gordon, 'Use of Force for the Protection of Nationals Abroad: The Entebbe Incident' (1977) (9) Case Western Reserve Journal of International Law 117.
[34] One Day in Entebbe, BBC 4 Radio. Available at: https://www.bbc.co.uk/programmes/b07hg4vg (accessed 15/06/2019).
[35] Johan Dugard, First Report on Diplomatic Protection (n 15) para 59.

caused much debate between the members of the ILC and the proposal was rejected.[36] Kabatsi argues that:

> Article 2 (4) of the UNC[37] unequivocally prohibits the use of force, the sole exception being the right to self-defence set forth in Article 51. However, the right to self-defence could not include the right to military intervention on the pretext of exercising diplomatic protection. Even in putative emergency situations or in rescue operations conducted by an attacking State in another State on behalf of its nationals, it would be dangerous to give States the latitude to take unilateral decisions about the existence of an emergency or the need for a rescue operation.[38]

Hafner, for his part, emphasizes that:

> It is inconceivable that States should be given a legal basis within the framework of DP that would allow them to use force other than for self-defence, as provided for in Article 51 of the UNC. The notion of self-defence could not be stretched to cover also the protection of the nationals of a State in a foreign country. [39]

Consequently, there has been an explicit agreement that DP can only be exercised "through diplomatic action or other means of peaceful settlement" which makes the use of force an unacceptable way of implementing the right of DP.[40] The emphasis on the necessity of exercising DP through peaceful means has led some writers to consider Article 1 of the ADP as an adequate identification of the essential parameters of DP.[41] However, it is apparent that Article 1 of the ADP is incomplete as it is surrounded by various uncertainties. Firstly, it mingles DP with other State activities. Secondly, it is unclear about the real holder of the

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[36] Tom Ruys, 'The Protection of Nationals: Doctrine Revisited' (2008) 13 (2) Journal of Conflict and Security Law 233,259.

[37] Article 2 (4) of the UNC obviously postulates that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

[38] Meeting 2618, Yearbook of the International Law Commission [2000] Vo I, Doc. (A/CN.4/SER.A/2000), paras 17-18.

[39] ibid, para75.

[40] ADPC, Report of the International Law Commission, Fifty-Eighth Session [2006] Doc. (A/61/10) 27.

[41] See e.g. Annemarieke Vermeer-Künzli, 'Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case' (2007) 20 (4) Leiden Journal of International Law 941,941; Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 25.

right of DP. Thirdly, it neglects to specify what constitutes an internationally wrongful act. This section considers the first two disadvantages, the third is discussed in the following chapter.

2.3.1 The Relationship between DP and Other State Activities

Here, the question concerns which activities can be classified as DP or, alternatively, what are the appropriate criteria for classifying the activities that fall within the scope of DP. Incorrectly, the commentary to Article 1 of the ADP states that DP covers, in its broad sense, a variety of legal procedures taken by the State so as to "inform another State of its views and concerns, including protest or request for an inquiry or for negotiations aimed at the settlement of disputes".[42] This reference, which mingles DP with other activities, has led to a great deal of confusion.

Pergantis suggests that this reference "constitutes an illustrative example of the agonizing effort of some international law scholars to defy the allegations that diplomatic protection is becoming obsolete".[43] Nevertheless, it is possibly more accurate to suggest that the ILC paid no attention to the difference between DP and diplomatic representation. The latter covers a wide variety of communications from one government to another in which one expresses its disapproval of some action or inaction; it differs from DP in its function and uses in the following aspects.[44]

Firstly, there is no DP except when a State has brought a formal claim, even though DP is often prefaced by informal complaints by the protecting State. If the informal representation fails, then the acting State can exercise its protection through any formal method of international disputes settlement such as negotiation and mediation or by resorting to a

[42] ADPC (n 40) 27.
[43] Vasileios Pergantis, 'Towards a 'Humanization' of Diplomatic Protection?' (2006) 66 Heidelberg Journal of International Law 351, 361.
[44] Colin Warbrick, 'Diplomatic Representations and Diplomatic Protection' (2002) 51 (3) International and Comparative Law Quarterly 723,724.

judicial body.[45] Here, it is worth mentioning that the failure of informal communication between Iran and Britain led the latter to grant DP to Mrs. Nazanin Zaghari-Ratcliffe, a British citizen who was jailed for five years in Iran in 2016 after being convicted of spying, which she denies.[46] According to Mr. Hunt, this decision means that the case will now be treated as a formal, legal dispute between Britain and Iran.[47] Secondly, the application of DP depends on the fulfilment of its pre-conditions, that the alleged violation is one for which the defendant State can be held responsible, that LRs have been exhausted, and that there is a link of nationality between the injured person and the protecting State.[48]

Likewise, DP varies from consular assistance which is a preventive procedure that protects the citizen from being subjected to an internationally wrongful act, whereas DP is a remedial instrument that is intended to deal with the consequences of an internationally wrongful act that has already been committed.[49] In addition to this, the claim of the injured person cannot be internationalized by consular assistance, which merely includes a request by consular officials, working under the terms of the 1963 VCCR, before the domestic authority of the State where the interests of the individual were infringed.[50]

2.3.2 The Holder of the Right of DP

Instead of giving a precise answer to the question of the real holder of the right of DP,[51] Article 1 of the ADP was deliberately "formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of

[45] John Dugard, *International Law: A South African Perspective* (4th edn, Juta & Co Ltd 2012) 298.
[46] Available at: https://www.bbc.co.uk/news/uk-politics-42252741 (accessed 15/06/2019).
[47] Available at: https://www.bbc.co.uk/news/uk-47490689 (accessed 15/06/2019).
[48] Annemarieke Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 Heidelberg Journal of International Law 321, 323.
[49] ADPC (n 40) 27.
[50] ibid.
[51] The traditional concept of DP was adopted on first reading by stating in Article 1 that DP "consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right". This reference, however, was no longer kept at the last stage of the work. ADP, [first reading], Report of the International Law Commission, Fifty-Sixth Session [2004] Doc. (A/CN.4//L.653 + Corr.1 + Add.1) 18.

its national".[52] In fact, this uncertainty sheds light on a device that has traditionally been employed to refuse the exercise of DP: the so-called Calvo Clause.[53] The clause emerged as a reaction against developed countries' intervention in the domestic affairs of developing countries, especially in Latin American, under the guise of DP.[54] The rationale of the clause was founded on "the concepts of non-intervention and absolute equality of foreigners with nationals".[55] In this sense, the core of the clause revolves around the claim that foreigners should not be granted or given more extensive rights than nationals, and that national law should be applied to disputes by the local courts.[56]

The employment of the clause, which has often taken a contractual form, aims at resolving "disputes and controversies concerning the interpretation or execution of the contract through domestic remedies".[57] By so doing, foreigners renounce the right to resort to their State of nationality for protection.[58] Such a process was traditionally rejected, especially by developed countries, on the grounds that DP was considered to be a right of the State, which means that the individual has no authority to forego the right that belongs to the country. In D'Amato's words, "the Clause is without legal effect if it pretends to cause a surrender of the right of the

[52] ADPC (n 40) 26.

[53] The distinguished Argentine historian, diplomat, and jurist Carlos Calvo (1824-1906) propounded the clause. See John Grant and Craig Barker, *Parry and Grant Encyclopaedic Dictionary of International Law* (3rd edn, Oxford University Press 2009) 77.

[54] Lionel Summers, 'The Calvo clause' (1933) 19 (5) Virginia Law Review 459,459.

[55] Wenhua Shan, 'Is Calvo Dead?' (2007) 55 (1) American Journal of Comparative Law 123,163.

[56] See e.g. David Graham, 'Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection' (1970) 6 Texas International Forum 289; Christopher Dalrymple, 'Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause' (1996) 29 Cornell International Journal 161.

[57] See e.g. Denise Manning-Cabrol, 'Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors' (1995) 26 Law and Policy of International Business 1169, 1173; Ibrahim Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA' (1986) 1(1) ICSID Review 1, 2.

[58] Alwyn Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 American Journal of International Law 121,130.

claimant's State".[59] In addition to this, it was argued that the local courts in developing countries could not be relied upon to dispense justice to foreigners.[60]

Now, however, such an objection to the validity of the clause is less persuasive and can be challenged as long as its application is mostly concerned with FI and not an alien person suffering a violation of their personal rights.[61] In this regard, it could be argued that the rights protected within the framework of DP belong to the injured person, not to the protecting State, which may still have the procedural right to pursue the claim as an agent or on behalf of an individual, but no longer monopolises the individual's substantive right.[62] Hence, it seems incorrect to say that the clause is obsolete or of little importance.[63] As early as 1955, Shea rightly expected that "the developments either in diplomacy or in jurisprudence might someday result in the validation of the Calvo Clause in its full sense".[64] Indeed, this expectation should be realised as a consequence of the development in the legal nature of DP, which has begun to move towards a greater focus on the rights of the injured persons.

2.4 The Status quo of DP: Is DP an Outdated Tool?

2.4.1 The Impact of the Development of International HR Protection on DP: An Interaction Approach

In recent times, much has changed with regard to the protection of HR as a result of the remarkable proliferation of HR protection instruments that enable individuals to pursue claims, before both universal and regional bodies, against the infringements of their HR. Consequently, the question that arises is whether or not the developments in the field of international HR protection have made DP obsolete.

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[59] Anthony D'Amato, *International Law Anthology* (Anderson Publishing 1994) 313.
[60] Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 22.
[61] ADPC (n 40) 73.
[62] Committee on Diplomatic Protection of Persons and Property, 'Final Report on Diplomatic Protection of Persons and Property' in International Law Association Report of the 72nd Conference (Toronto 2006) 1-2.
[63] John O'Brien, *International Law* (Cavendish Publishing Limited 2001) 389.
[64] Donald Shea, *The Calvo Clause: A Problem of Inter-American and international Law Diplomacy* (University of Minnesota Press 1955) 259.

In answer to this question, there is a split among scholars some of whom are extremely enthusiastic about the growth of HR protection.[65] They reason that the evolution of HR protection has made DP an old-fashioned instrument.[66] For example, Bennouna argues that the institution of DP has certainly outlived its usefulness as a result of evolving newer and more accessible remedies against HR violations in international law since the *Mavrommatis* case of 1924.[67] In fact, such an argument is misleading, if not wholly inaccurate for a number of reasons.

First, the individuals have not until now held comprehensive and actual instruments to protect their rights at the international level.[68] In addition to this, DP offers "a possible remedy for the protection of millions of aliens who have no access to remedies before international bodies".[69] Thus, it would be significant damage to international law if States abandon a suitable, if not pivotal, device for treating the infringements of citizens' rights abroad.[70] Brownlie has eloquently emphasized this, stating that:

> In the fairly rough contemporary world, it would be irresponsible to throw away any of the protective mechanisms now available. An orchestra of instruments is needed

[65] See e.g. Mohamed Bennouna (n 11) 10; Giorgio Gaja, 'Is a State Specially Affected When Its Nationals' Human Rights Are Infringed?' in Lal Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Martinus Nijhoff Publishers 2003) 373.

[66] Projecting into the future, Judge Alvarez expected that DP "will disappear when the new international law clearly establishes the international rights of the individual, i.e. those rights which he will be entitled to invoke directly against a State without resorting to the diplomatic protection of the country of which he is a national". *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, Judgment of 22 July 1952 (1952) ICJ Rep 93, Dissenting Opinion of Judge Alejandro Alvarez, p 41.

[67] Mohamed Bennouna (n 11) 10.

[68] In 1975, Lillich wrote that "waiting for the establishment of a comprehensive body of instruments for protecting the individual's rights at international level should be in the interest of "all international lawyers not only to support the doctrine of diplomatic protection, but to oppose vigorously any effort to cripple or destroy it". Richard Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack' (1975) 69 (2) American Journal of International Law 359, 359.

[69] Johan Dugard, First Report on Diplomatic Protection (n 15) para 68.

[70] See e.g. Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006) 302; Natalie Klein and Barry Lise, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality' (2007) 13(1) Australian Journal of Human Rights 1; Max Plessis, 'John Dugard and the Continuing Struggle for International Human Rights' (2010) 26 (2) South African Journal on Human Rights 292.

> and DP, with all its faults and difficulties of application, remained part of that orchestra. The institution could be refurbished, but it should not be damaged.[71]

Second, it should be kept in mind that international law is based on "accretion and assimilation",[72] which implies that its new rules and principles might come into presence side by side with the older ones, but not as a substitute for them.[73] As a consequence, the developments in HR protection do not and could not eradicate the traditional institution of DP.[74] As such, the recent jurisprudence of the ICJ has witnessed a robust interaction between DP and HR protection. This trend commenced in *LaGrand* case, in which Germany took up the case of its citizens Walter and Karl LaGrand who were detained for committing murder and other crimes in connection with an attempted bank robbery in 1982 in the State of Arizona. [75]

The LaGrand brothers were sentenced to the death penalty. Karl was executed on the 24th of February 1999, while Walter's execution was scheduled for the 3rd of March 1999. On the 2nd of March 1999, the Federal Republic of Germany filed a motion with the ICJ for provisional measures. The following day, the ICJ issued an order asking the American authorities to "take all measures at its disposal" to postpone the execution until the case before the Court has been decided. Despite that order, Walter was executed as scheduled.[76] Among other things, Germany contended that:

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[71] Meeting 2617, Yearbook of the International Law Commission [2000] Vol VI (n 38) 42, para 48.

[72] James Crawford, 'The International Law Commission's Articles on Diplomatic Protection Revisited' in Tiyanjana Maluwa, Max de Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff 2017) 138.

[73] ibid.

[74] Article 16 of the ADP postulates that "the rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles". ADP (n 23) 8.

[75] *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001 (2001) ICJ Rep 466.

[76] ibid, para 11.

> The breach of Article 36[77] of the 1963 VCCR by the United States did not only infringe upon the rights of Germany as a State party to the Convention but also entailed a violation of the individual rights of the LaGrand brothers, invoking on this basis its right of diplomatic protection.[78]

On the other hand, the United States argued that "the rights of consular notification and access under the VCCR are the rights of States, and not of individuals, even though these rights may benefit individuals by permitting States to offer them consular assistance".[79] In its decision, the ICJ held that "Article 36 (1) creates individual rights, which […] may be invoked in this Court by the national State of the detained person. […] These rights were violated in the present case".[80] By referring to the creation of "individual rights", the Court intends to give a signal that the traditional approach to DP, under which the rights of individuals were neglected, had begun to change.

Nevertheless, Vasileios writes, in his comment on this judgement, that the employment of DP in the furtherance of HR protection shows "a utopian vision of international law inspired by humanistic ideals that cannot be transferred to the institution of DP".[81] According to this point of view, the HR perspective, which was highlighted in the *LaGrand* case, can be questioned on the grounds that the two legal regimes are separate and do not have any reciprocal effect on each other.[82] In other words, although DP and HR instruments work together towards the goal of securing compensation for damages experienced as a result of committing an internationally wrongful act, the fact still remains that DP does so within the traditional State-to-State framework, whereas HR instruments do so through the State-

[77] Article 36 of the 1963 VCCR regulates communication and contact with nationals of the sending State. Available at; http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf (accessed 15/06/2019).
[78] *LaGrand Case* (n 75) para 75.
[79] ibid, para 76.
[80] ibid, para77.
[81] Vasileios Pergantis (n 43) 361.
[82] Phoebe Okowa, 'Issues of Admissibility and the Law on International Responsibility' in Malcolm Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 484.

individual framework.[83] Yet, it appears that this understanding is based on an erroneous assumption. In the following chapter, it will be explored how the protection of the rights of individuals, has become the essence of DP.

2.4.2 The Complementary Role of DP in FI Protection

First and foremost, it should be stressed that DP was traditionally the most efficient mechanism for resolving FI disputes.[84] Nowadays, the situation is different and FI is principally controlled and protected by the presence of a considerable number of bilateral and multilateral investment treaties.[85] The main achievement of these treaties is that they give foreign investors the ability to resolve disputes with the host State through direct access to an international remedy, namely international arbitration.[86] In this regard, an *ad hoc* tribunal can grant the direct settlement of the disputes between the host State and the foreign investor. Likewise, a settlement can be granted by a tribunal instituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[87] In addition, some bilateral conventions provide for the resolution of

[83] See e.g. Nobuyuki Kato, 'The Role of Diplomatic Protection in the Implementation Process of Public Interests' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Ashgate Publishing Limited 2009) 193; Riccardo Mazzeschi, 'Impact on the Law of Diplomatic Protection' in Menno Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 211; Eirjk Bjorge, 'Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)' (2011) 105 (3) American Journal of International Law 534, 539; David Leys, 'Diplomatic Protection and Individual Rights: A Complementary Approach' (2016) 57 Harvard International Law Journal 1, 14.

[84] See e.g. Sachet Singh and Sooraj Sharma, 'Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap' (2013) 29 (76) Utrecht Journal of International and European Law 88, 90; Gabrielle Kaufmann-Kohler, 'Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection?' in Laurence de Chazournes, Marcelo Kohen and Jorge Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 307; Greg Lourie, 'Diplomatic Protection under the State-to-State Arbitration Clauses of Investment Treaties' (2015) Austrian Yearbook on International Arbitration 511,511.

[85] Martin Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute' (2011) 26 (1) ICSID Review 34, 37.

[86] Wolfgang Alschner, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration' in Shaheeza Lalani and Rodrigo Lazo (eds), *The Role of the State in Investor-State Arbitration: Introductory Remarks* (Brill Nijhoff 2014) 192.

[87] ADPC (n 40) 89.

investment disputes through State to State arbitration between the investor's State of nationality and the host State with regard to the interpretation or application of the relevant provisions.[88]

Here, the arbitration process as regulated by bilateral investment treaties and the International Centre for Settlement of Investment Disputes (ICSID) provides considerable advantages. First, the investor does not need to rely upon the uncertainties of DP, which means that the process of dispute settlement is de-politicized and subject to impartial legal standards.[89] Second, the host State is not faced with the potential of an international claim by the investor's State of nationality.[90] With this in mind, Article 17 of the ADP makes it clear that "the present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments".[91] Likewise, the ICJ affirmed in *Diallo* that:

> In contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments.[92]

In light of this shift, a question should be asked about the potential reduction of the role of DP in the field of FI protection. Is it obsolete, or are there situations in which DP continues to be useful? In response to this question, one can say that there are at least two situations in which DP remains useful.[93]

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[88] ibid, 90.

[89] Christoph Schreuer, 'Commentary on the ICSID Convention: Article 27' (1997) 12 (1) ICSID Review 205, 207.

[90] ibid.

[91] ADP (n 23) 8.

[92] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment of 24 May 2007 (2007) ICJ Rep 582, para 88.

[93] See e.g. Kate Parlett, 'The Role of Diplomatic Protection in the Protection of Foreign Investments' (2007) 66 (3) Cambridge Law Journal 533, 535; Ben Juratowitch, 'The Relationship between Diplomatic Protection and

The first concerns situations in which there is no investment treaty that a foreign investor can rely upon in resolving a dispute with the host State.[94] Such an absence led Guinea, in *Diallo* case, to invoke the responsibility of the Democratic Republic of the Congo (DRC) for causing injury to Diallo's direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire, and the rights of the two corporations Africom-Zaire and Africontainers-Zaire, which Diallo owned and controlled.[95] Although this portion of the claim was refused for reasons related to the nationality of the corporations,[96] the ICJ emphasized that there is a role for DP with regard to FI protection in cases where treaty regimes do not exist.[97]

The second situation is related to inoperative treaty systems in areas where treaties do exist. This situation has its roots in Article 27 (1) of the ICSID Convention, which points out that:

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

This means that the utility of DP is restricted to situations where the host State fails to pay the awarded compensation.[98] In other words, the goal of DP is to secure the payment of the awarded compensation and to gain indemnity against any other wrongs committed by the host State.[99] This means that after awarding the compensation, DP is available exclusively for

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Investment Treaties' (2008) 23 (1) ICSID Review 10, 12; Christian Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: the ICJ as an Agent of Legal Development' (2010) 23 (4) Leiden Journal of International Law 781, 800.

[94] Catharine Titi, 'Are Investment Tribunals Adjudicating Political Disputes? Some Reflections on the Repoliticization of Investment Disputes and (New) Forms of Diplomatic Protection' (2015) 32 (3) Journal of International Arbitration 261, 263.

[95] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 92) para 31.

[96] ibid, paras 93-94.

[97] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 92) para 88.

[98] See e.g. Ben Juratowitch (n 93) 33; Martins Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2008) 79 British Yearbook of International Law 264.

[99] Victorino Tejera, 'Diplomatic Protection Revival for Failure to comply with Investment Arbitration Awards' (2012) 3 (2) Journal of International Dispute Settlement 445, 455.

the purpose of its enforcement, but not as a separate remedy. Thus, if the arbitration tribunal already refused the claim of the investor, then it cannot be pursued through a subsequent claim for DP.[100]

2.5 An Analysis of the Legal Character of DP

2.5.1 Under International Law

From an international law perspective, DP has traditionally been regarded as an unshared State right, which means that a State was seen to have a broad discretionary power to take up the claims of its nationals or not.[101] As a consequence, the State can waive, compromise or discontinue the right regardless of the desire of the individual who has suffered damage.[102] This characteristic was established by the ICJ in *Barcelona* case when the Court stated that "the State must be seen as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease".[103] However, it is important to bear in mind that citizens will receive greater protection if their national governments are obliged to grant them DP, especially with regard to the violations of their personal rights.[104] Moreover, the discretionary nature of DP is not reconciled with the current emphasis on the protection of individual's rights.[105]

Dugard consistently stresses that the main problem of DP lies in leaving it entirely to the State to decide whether or not to grant it.[106] Thus, he tried to improve the efficacy of DP by

[100] ibid.
[101] Massimo Iovane, 'The Activity of the International Law Commission during Its 58th Session' 2006' (2006) 16 (1) Italian Yearbook of International Law 245, 246.
[102] ibid.
[103] *Barcelona Traction* (n 5) para 78.
[104] Gerhard Erasmus and Lyle Davidson, 'Do South African Have a Right to Diplomatic Protection' (2000) 25 South African Yearbook of International law 112,121.
[105] Sandy Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' (2011) 11 (3) Human Rights Law Review 527, 553.
[106] See e.g. Johan Dugard, First Report on Diplomatic Protection (n 15) paras 74-93; John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (n 6) 80; John Dugard, *International Law: A South African Perspective* (n 45) 298.

suggesting a provision aimed at imposing a duty on States to exercise DP in certain circumstances. The proposed provision reads as follows:

> 1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.
> 2. The State of nationality is relieved of this obligation if:
> (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;
> (b) Another State exercised diplomatic protection on behalf of the injured person;
> (c) The injured person does not have the effective and dominant nationality of the State.
> 3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.[107]

From a technical perspective, there are a number of possible responses to this line of thinking. In the first place, the proposed duty can only be exercised upon the request of the injured person. However, if the exercise of DP is a duty, then the State has to perform it and there is no need for the request of the injured person to trigger DP.[108] Secondly, Dugard's intention was perhaps that his proposal could have a greater impact through focusing on "the grave breach of the peremptory norms".[109] Nevertheless, this view might be challenged on

[107] Johan Dugard, First Report on Diplomatic Protection (n 15) para 74.
[108] Sreenivasa Rao, Meeting 2619, Yearbook of the International Law Commission [2000] Vol I (n 38), para70.
[109] It goes beyond the scope of this thesis to enquire into the origin, theory and the definition of the peremptory rules. However, it should be said that this concept was firstly mentioned in Article 53 of the 1969 VCLT which states that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*".*

the basis that the peremptory norms remain a controversial concept in international law.[110] This fact has led the ILC to place the topic in its work programme.[111]

Thirdly, Dugard's proposal is restricted by a number of conditions that made the whole idea appear more idealistic than realistic.[112] In this regard, one commenter accurately notes that Dugard reintroduced the discretionary power of the State "through the back door"[113] by giving States the authority to reject exercising the right if it "would seriously endanger the overriding interests of the State and/or its people".[114] Finally, it is accepted on all sides that the nationality of the injured person is an essential condition for exercising DP,[115] whereas violations of the peremptory norms give the international community as a whole the right to intervene in order to protect the victims regardless of their nationalities.[116]

As a result, the ILC refused the proposal because it exceeds "the permissible limits of the progressive development of the law".[117] Yet, the rejection of Dugard's proposal did not end the debate. In 2005, Dugard described the rejection of his proposal as a missed opportunity and one that could have significantly enhanced the efficacy of DP.[118] This view is shared and

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[110] See e.g. Gennady Danilenko, 'International Jus Cogens: Issues of Law-Making' (1991) 2 (1) European Journal of International Law 42; Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences?' (2007) 18 (5) European Journal of International Law 853; Ulf Linderfalk, 'The Creation of Jus Cogens: Making Sense of Article 53 of the Vienna Convention' (2011) 71 (2) Heidelberg Journal of International Law 359.

[111] In 2015, the ILC decided to include the topic in its programme of work and appointed Dire Tladi as Special Rapporteur. Until June 2019, Tladi has submitted four reports on the topic. Available at; http://legal.un.org/ilc/sessions/71/docs.shtml (accessed 15/06/2019).

[112] Marjoleine Zieck, 'Codification of the Law on Diplomatic Protection: The First Eight Draft Articles' (2001) 14 (1) Leiden Journal of International Law 209, 221.

[113] Vasileios Pergantis (n 43) 378.

[114] ibid.

[115] Chapter 4 of this thesis is devoted to discussing this issue.

[116] Annemarieke Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes'* (2007) 56 (3) International and Comparative Law Quarterly 553, 557.

[117] Yearbook of the International Law Commission [2002] Vol II, Part 2, Doc. (A/CN.4/SER.A/2002/Add.1 (Part 2) 69, para 2.

[118] John Dugard, 'Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission' (n 6) 80.

supported by several scholars.[119] Milano, for instance, argues that the proposal of the Special Rapporteur would have, if adopted, represented a radical change that would have led to "the creation of a comprehensive system of accountability for the responsibility of States to take up the cases of the victims of the gravest violations of human rights".[120]

Be that as it may, the non-obligatory nature of DP is plainly affirmed in Article 2 of the ADP, which states that "a State has the right to exercise diplomatic protection".[121] Yet, DP is regarded as a recommended practice in Article 19, which calls on the State that is entitled to exercise DP to:

> (a) Give due consideration to the possibility of exercising it, especially when a significant injury has occurred;
>
> (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought;
>
> (c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.[122]

Although this provision is not formulated in compulsory language, it is hoped that it might encourage States to exercise DP, particularly when flagrant damage has occurred. On the whole, such a development seems positive and may contribute to the eventual acceptance that the State is under a limited duty to protect its nationals.[123]

2.5.2 DP at Domestic Level

As mentioned above, international law is cautiously shifting towards changing the legal character of DP. At the very least, therefore, States might be placed under a limited obligation

[119] See e.g. Gerhard Erasmus and Lyle Davidson (n 104) 112; Craig Forcese, 'The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad' (2007) 57 University of New Brunswick law Journal 102.
[120] Enrico Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?' (2004) 35 Netherlands Yearbook of International Law 85, 97.
[121] ADP (n 23) 2.
[122] ibid, 9.
[123] ADPC (n 40) 95; Compare, David Bederman, 'State-to-State Espousal of Human Rights Claims' (2011) 1 Virginia Journal of International Law 5, 8.

to protect their citizens. On the other hand, national courts have already begun to restrict the discretionary power of the State not to protect the individual by giving them the right of petition through judicial review. That is to say that, these courts have become involved in reviewing the executive's failure to respond to the individuals' requests for protection.

Therefore, the legal character of DP has occasionally come under the consideration of national courts.[124] At this point, however, it is not useful to discuss all civil and common law systems in-depth but, rather, to articulate the essential features of an emerging trend in States' absolute discretion not to assert DP. Without neglecting decisions of civil law courts,[125] attention will be paid to the most significant and most recent developments in this area, which come from the common law system.

As a starting point, it should be noted that national courts have traditionally refused to hear cases that may affect the foreign relations of the State.[126] These cases were classified as falling outside the scope of judicial review and therefore should be left to the executive and not to the courts.[127] However, it is no longer possible to dismiss these claims on the basis of non-justiciability.[128] In this regard, different precedents suggest a departure for a careful examination of the actions taken by the competent authority.[129] In addition to this common ground, there are other significant features that are discussed below.

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[124] See e.g. Chris Horan, 'Judicial Review of Non-Statutory Executive Powers' (2003) 31 Federal Law Review 551; David Law, 'A Theory of Judicial Power and Judicial Review' (2009) 97 Georgetown Law Journal 723.

[125] In the civil law systems, there are occasions where decisions not to exercise diplomatic protection have been under consideration. Among them, *Rudolf Hess case*, ILR vol 90, 387 (1980) *Germany, HMHK v Netherlands* 94 ILR 342 (1983) The Netherlands, and *Comercial F SA v. Council of Ministers* (Case No. 516) Supreme Court (Third Chamber), 6 February (1987) 88 ILR (Spain). See the detailed study of Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2007) 75 (2) Nordic Journal of International Law 279.

[126] Philippe Sands, 'The 'Political' and the 'Legal': Comments on Professor Tushnet's Paper' (2007) 3 (4) International Journal of Law in Context 319,321.

[127] See e.g. Chris Horan (n 124) 551; David Law (n 124) 723.

[128] David Mullan, 'Judicial Review of the Executive: Principled Exasperation' (2010) 8 (2) New Zealand Journal of Public and International Law 145, 157.

[129] Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (n 125) 306.

2.5.2.1 DP as a Legitimate Expectation

In 2002, the England & Wales Court of Appeal (EWCA) handed down its decision in *Abbasi case*,[130] which concerned a British citizen, named Feroz Abbasi, who was captured by the United States forces in Afghanis and transported to Guantanamo Bay where he "held captive eight months without access to a court or any other form of tribunal or even to a lawyer".[131]Mr. Abbasi's mother brought the case before the EWCA on his behalf claiming that the American's proceedings should be considered a breach of one of his fundamental human rights: "the right not to be arbitrarily detained".[132] Further, the applicant sought, by judicial review, to compel the British government to make representations on behalf of Mr. Abbasi to the United States authorities or to take other appropriate action.[133]

In its decision, the Court agreed that the behaviour of the United States authorities had breached the fundamental HR of Mr. Abbasi.[134] Furthermore, the Court accepted the assumption that there is room for a judicial review of the government's rejection to protect its nationals.[135] The Court held that all citizens have a legitimate expectation[136] that the authorities would not simply wash their hands of the matter and abandon them to their fate.[137] The questions that then arise here are: what does legitimate expectation mean? And what is its consequence?

Writing with regard to *Abbasi*, one commentator observed that this case "put the British Government on the back foot, particularly in its relations with the media, which was starting

[130] *Abbasi and Anor v Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1958.
[131] ibid, para 1.
[132] ibid.
[133] ibid.
[134] ibid, para 107.
[135] ibid, para 104.
[136] The Canadian Federal Court reached a similar conclusion in *Smith v Canada (Attorney General)* 2009 FC 228, paras 44-25.
[137] *Abbasi and Anor v Secretary of State for Foreign and Commonwealth Affairs* (n 130) para 98.

to cover the story".[138]Another writer suggested that legitimate expectation is a legal expectation that should lead to granting substantive protection to the injured individual.[139] However, the EWCA held that the expectation is very limited and requires no more than giving consideration to making diplomatic representation on behalf of the injured citizen.[140] On this basis, the application was dismissed because the State met the legitimate expectation of the applicant by discussing and conducting diplomatic negotiations with the United States authorities.[141] According to the Court:

> The expectations are limited, and the discretion is a very wide one, but there is no reason why its [the Foreign and Commonwealth Office] decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation".[142]

Furthermore, the Court considered it unsuitable to force the Secretary of State to make any particular representation to the United States, as it is clear that "this would have an impact on the conduct of foreign policy, and an impact on such policy at a particularly delicate time".[143] Notwithstanding, it has become evident that the exclusive right of the State to exercise DP experienced significant erosion in this case. The legitimacy of the expectation of DP affirmed through the enforcing of a judicial review, led to an acknowledgement that the competent authority cannot simply ignore the individual's request.

2.5.2.2 Considering DP Requests

Although the State of the injured person remains under no obligation to protect the individual mistreated by a foreign State, it is surely obliged to pay adequate attention to their request to

[138] Philippe Sands (n 126) 321.
[139] Daphne Barak-Erez, 'The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests' (2005) 11 (4) European Public Law 583,585. See also, Christopher Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47 (2) Cambridge Law Journal 238; Christopher Forsyth, 'Legitimate Expectations Revisited' (2011) 16 (4) Judicial Review 429.
[140] *Abbasi and Anor v Secretary of State for Foreign and Commonwealth Affairs* (n 130) para 106 (V).
[141] ibid, para 107.
[142] ibid, para 106 (III).
[143] ibid, para 107 (II).

do so. The plea of the individual cannot simply be ignored, but if it is, then the competent court can order the government to consider the request fully and in good faith. The Constitutional Court of South Africa reached this conclusion in the case of *Kaunda and others*[144] where a number of South African citizens who were arrested by the Zimbabwean authorities at Harare International Airport on a variety of charges.[145]

It was alleged that they were a part of a mercenary force going to Equatorial Guinea in an attempted coup against its president.[146] The defendants' issue came from the possibility of being subject to mistreatment in Zimbabwe or being extradited to Equatorial Guinea.[147] They asserted that "if this happens they will not get a fair trial and, if convicted, that they stand the risk of being sentenced to death".[148] Consequently, the claimants firstly approached the High Court in Pretoria requesting orders aimed at:

> Compelling the government to make certain representations on their behalf to the governments of Zimbabwe and Equatorial Guinea and to take steps to ensure that their rights to dignity, freedom, and security of the person, and fair conditions of detention, and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.[149]

The High Court dismissed this application. Then, the applicants applied for leave to appeal directly to the Constitutional Court against the decision of the High Court. The Constitutional Court also dismissed the appeal against the judgment of the High Court, pointing out that "such a request would never be refused by the government, but if it were, the decision would

[144] *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [Judgment of 4 August 2004], para 80.
[145] ibid, para 1.
[146] ibid, para 2.
[147] ibid.
[148] ibid.
[149] ibid, 3.

be justiciable, and the Court would order the government to take appropriate action".[150] Despite this,

> A decision as to whether, and if so, what protection is given, is an aspect of foreign policy which is essentially the function of the executive [….] These are matters of great sensitivity, calling for government evaluation and expertise [….] Courts required to deal with such matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion in deciding how best to deal with such matters.[151]

Writing in regard to *Kaunda*, Pete and Du Plessis state that "the decision does little more than underline that a South African citizen is entitled to write a letter or in some other manner ask his or her government for assistance".[152] Likewise, Olivier argues that the judgment was vague due to the political.[153] However, Tladi observes that the decision was "coherent and clear".[154] On one hand, it confirms the discretion of the executive regarding its foreign relations, and on the other, it expresses the idea that "even in the conduct of foreign relations the executive is obliged to obey the commands of the Constitution".[155]

It is reasonable that, in this case and others, political interests have a part to play in the executive's decision to support DP requests, these interests cannot preclude the executive from considering requests appropriately. If this were the case then a question could be raised concerning whether a sufficient level of consideration had been given to the aggrieved individual's request and whether this put the State in the position of being obliged to reconsider such a request or to compensate the injured individual.

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[150] ibid, para 69.
[151] ibid, paras 77 and 144.
[152] Stephen Pete and Max Du Plessis, 'South African Nationals Abroad and Their Right to Diplomatic Protection: Lessons from the Mercenaries Case' (2006) 22 South African Journal on Human Rights 439,439.
[153] Michele Olivier, 'Diplomatic Protection: Right or Privilege?' (2005) 30 South African Yearbook of International law 238, 246.
[154] Dire Tladi, 'Right to Diplomatic Protection, the Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (2009) 20 Stellenbosch Law Review 14, 21.
[155] ibid, 19.

The High Court of South Africa was faced by this question in the case of *Von Abo* who was subject to Zimbabwe's nationalisation of land policy,[156] and therefore an important part of his farming interests had been expropriated without compensation.[157] As a result of his failure to obtain any response from the Zimbabwean government, he petitioned his own government for protection.[158] However, after several futile attempts at encouraging the South African Government to help him, he approached the High Court in order to "enforce the government to protect his farming interests".[159] The Court declared, *among other things*, that:

1- The failure of the respondents to rationally, appropriately and in good faith consider, decide and deal with the applicant's application for diplomatic protection.
2- The applicant has the right to diplomatic protection from the respondents in respect of the violation of his rights by the Government of Zimbabwe.
3- The respondents have a constitutional obligation to provide diplomatic protection.
4- The respondents are ordered to [……..] take all necessary steps to have the applicant's violations of his rights by the Government of Zimbabwe remedied.[160]

Tladi argues that the Court made a significant error in promoting the right of citizens to DP and the corresponding duty on the government to provide it without, as he saw it, appropriate justification.[161] The South African Government was dissatisfied with the decision and appealed it before the Supreme Court of Appeal.[162] The Supreme Court reversed paragraphs 2

[156] For more details about the Zimbabwe's nationalisation land policy, Jonathan Shirley, 'The Role of International Human Rights and the Law of Diplomatic Protection in Resolving Zimbabwe's Land Crisis' (2004) 27 (1) Boston College International and Comparative Law Review 161,171.
[157] *Von Abo v Government of the Republic of South Africa and Others* [2008] ZAGPHC 226, para 3.
[158] ibid.
[159] ibid, para 18.
[160] ibid, para 161.
[161] Dire Tladi, 'Right to Diplomatic Protection, the Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda' (n 154) 25. See also, Sandhiya Singh, 'Constitutional and International law at a Crossroads: Diplomatic Protection in the Light of the *Von Abo* Judgment' (2011) 36 South African Yearbook of International law 298,301.
[162] *The Government of the Republic of South Africa v Von Abo* (283/10) [2011] ZASCA 65.

and 3 of the High Court's order on the grounds outlined in *Kaunda* and classified paragraph 4 as an extraordinary instruction because:

> It orders the appellants to remedy the violation of the respondent's rights perpetrated by the Zimbabwean Government. The ordinary grammatical meaning of this order is that the appellant was expected to restore all the respondent's losses in Zimbabwe. The order ignores several vital considerations. First, that on a practical level it is unrealistic to expect any government to act so expeditiously. Second, it ignores the fact that the nature and essence of diplomatic protection is a process the result of which is necessarily dependant on the responses of another state, which is not bound by the order.[163]

On the other hand, the Supreme Court admitted that the response to Mr. Von Abo's request was inappropriate. Hence, paragraph 1 of the High Court's order should stand because "the appellants' response does not conform to what is demanded of them".[164]

In summary, it is apparent that there is a trend emerging from the cases outlined above. Although it cannot be concluded that States are under a duty to offer protection, domestic case law confirms that there is no longer a place for the exclusivity of the State. The decisions of the executive have already begun to be challenged by the individual. Hence, when deciding not to offer its protection, the competent authority should be cautious in order to avoid taking a decision that does not meet the requirements of the individual's legitimate expectation.

2.6 Conclusion

This chapter investigated several key issues concerning the doctrine of DP. This chapter commenced by situating DP on a basis that reflects the reality of contemporary international law. This takes into account the individual's position in international law in addition to the weakness of some HR instruments. Furthermore, this chapter has highlighted areas of

[163] ibid, para 26.
[164] ibid, para 42.

weakness in the present concept of DP and has suggested some criteria for distinguishing between DP and other activities. In addition, this chapter examined the position of DP in contemporary international law in light of recent development in the field of HR law. It has been established that the doctrine of DP had not and could not become obsolete as long as it is associated with international HR protection. However, it has been shown that the role of DP in field of FI has largely faded.

This chapter has also examined the legal charter of DP under international and domestic laws. It showed that the legal character of DP is slowly switching from being an entirely discretionary right of the State to a recommended practice under international law. On the other hand, national courts have begun to instigate the transformation of DP from a discretionary right of States to a requirement to protect the individual, which in some jurisdictions has given the individual the right of petition through judicial review.

Having identified the main controversies pertaining to DP, the next chapter will investigate the content of wrongful act as an initial requirement for DP.

Chapter Three

Deciphering the Content of Wrongful Act

3.1 Introduction

The violation of an international obligation is a general requirement for international responsibility.[1] Article 1 of the ARSIWA confirms this axiom by stating that "every internationally wrongful act of a State entails international responsibility of that State".[2] In practice, the occurrence of a wrongful act usually takes place when the conduct of the State "constitutes a breach of an international obligation of the State".[3]

As an instrument for invoking the international responsibility of States, DP cannot be triggered without wrongdoing against a foreigner. This makes understanding what constitutes wrongful act a crucial matter. Nevertheless, the ILC avoided this area in its work on both SR and DP.[4] The reason behind this is that the attention of the ILC was only given to the related secondary rules of international law. However, this chapter departs from the assumption that the ILC's distinction between primary and secondary rules should not be used as a pretext to avoid deciphering the content of the wrongful act as a prerequisite for DP.

In performing this task, this chapter is organised as follows: section (3.2) will briefly sketch the background and clarify when the wrongful act is committed and then it will answer the question of why the determination of its content matters. Having done this, the following part of the chapter will endeavour to establish a suitable criterion for determining the occurrence of the wrongful act, particularly when the conduct of the State injuries the person of a foreign

[1] Simon Olleson, *The Impact of the ILC's Articles on Responsibility of States for internationally Wrongful Acts* (British Institute of International and Comparative Law 2007) 1-5.
[2] ARSIWA, [2001] Doc. (A/CN.4/L.602/Rev.1.) 2.
[3] Article 2 of the ARSIWA.
[4] Likewise, the determination of the content of the wrongful act has also been avoided by the ILA in its conclusions on DP. See, Committee on Diplomatic Protection of Persons and Property, 'Final Report on Diplomatic Protection of Persons and Property' in International Law Association Report of the 72nd Conference (Toronto 2006).

national. To do so, section (3.3) will evaluate the idea of the International Minimum Standard of Treatment (IMST) with a view to exploring its present status and highlighting the uncertainty of its content. Section (3.4) will attempt to offer a new understanding of the content of the wrongful act taking into account the influence of HR considerations on DP.

Section (3.5) will highlight other forms of wrongs that may be committed against property and other economic interests of aliens. Finally, section (3.6) will analyse the likely influence of the initial fault of the injured person on the admissibility of a claim for DP and the possibility of regarding this fault as a means of precluding the wrongfulness of the host State's conduct.

3.2 A Definitional Framework

3.2.1 The Occurrence of an Internationally Wrongful act

It was mentioned above that the rules of DP and those governing the law of SR overlap at several points.[5] As a consequence of this overlap, several provisions related to DP, which were dealt with by the ILC's work on SR, are not repeated in its work on DP.[6] At this point, particular attention is given to two specific elements. The first pertains to the occurrence of an internationally wrongful act, and the second is related to the source of the obligation a breach of which may lead to the exercise of DP. Regarding the former, international wrongs occur or take place when "an act or omission" by the State amounts to a violation of an international duty incumbent upon that State.[7] With regard to the latter, the obligations under international law can be derived from a wide variety of sources such as treaties, custom and

[5] See above, p 5.

[6] ADPC, Report of the International Law Commission, Fifty-Eighth Session [2006] Doc. (A/61/10) 22.

[7] By and large, there is no difference between actions and omissions under international law. See e.g. Frank Latty, 'Actions and Omissions' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University press 2010) 355.

general principle, however, the provenance of the obligation has no impact on the existence of the wrongful act.[8]

Brownlie states that "an act or omission which produces a result which is on its face a breach of a legal obligation gives rise to responsibility in international law, whether the obligation rests on treaty, custom, or some other basis".[9] Likewise, Article 12 of the ARSIWA emphasises that "there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character".[10] Accordingly, once an international commitment has been violated, which depends mainly on an inconsistency between the required conduct and the real conduct of the State, the basis of the obligation has no effect on its classification as a wrongful act. This implies that "a breach is a breach, whatever the source of the obligation".[11]

With this in mind, it has been held that "in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to SR and consequently, to the duty of reparation".[12] In *Gabcíkovo-Nagymaros* case, Slovakia contended that the state of necessity, as determined under the law of international responsibility, cannot be utilized by Hungary to justify the breach of the treaty.[13] Yet, the ICJ responded in the following terms: "it is well established that, when a State has committed an internationally wrongful act, its international

[8] ARSIWAC, Report of the International Law Commission, Fifty-Third Session [2001] Doc. (A/56/10) 32.
[9] Ian Brownlie, *Principles of Public International Law (*7th edn, Oxford University Press 2008) 36.
[10] ARSIWA (n 2) 4.
[11] Yumi Nishimura, 'Source of Obligation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University press 2010) 366.
[12] *Case Concerning the Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded On 9 July 1986 Between the two States and which related to the Problems arising from the Rainbow Warrior Affair (New Zealand v France)* (1990), UNRIAA, Vol XX, para 75.
[13] *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997 (1997) ICJ Rep 7, para 46.

responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[14]

Since the obligations of States under international law are derived from several sources, this chapter discusses the potential use of DP in a variety of contexts to address a wide range of violations. These violations can be divided into two categories. The first category relates to wrongs committed against the person of foreigners. The second category includes wrongs committed against property and other economic or commercial interests of aliens in addition to those committed against foreign legal persons. Although the impact of HR law on the second category is less evident, the law on DP, though a unified body of law, is more affected by HR law in relation to personal injuries to natural persons abroad. Indeed, the unification of the law on DP is supported by the fact the requirements of nationality and exhaustion of LRs must be met by natural and legal persons alike.[15]

3.2.2 Why the Content of the Wrongful Act Matters

First of all, it is important to stress again that the work of the ILC on SR focused fundamentally on secondary rules of international law.[16] Under the influence of Hart's distinction between primary and secondary rules of law,[17] Ago directed the ILC to concentrate exclusively on the secondary rules of international law.[18] For his part, the last Special Rapporteur on SR confirmed the importance of this distinction by stating that:

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[14] ibid, para 47.

[15] See Chapters Four and Five.

[16] In 2001, the ILC referred again to the general trend in its work by stating that the ARSIWA "do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility because this is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law". ARSIWAC (n 8) 31.

[17] Herbert Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) 94.

[18] In 1970, the ILC confirmed that its work "concentrates on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility". Yearbook of the International Law Commission, [1970], Vol II, Doc. (A/CN.4/SER.A/1970/Add.I) 306.

> This distinction was indispensable [and] without it there was the constant danger of trying to do too much, in effect, of telling States what kinds of obligation they can have. It allows the framework law of State responsibility to be set out without going into the content of these obligations which would be an impossible task.[19]

For the same reason, Dugard has used an identical method and justified it by saying that:

> The draft articles on diplomatic protection like those on State responsibility are confined to secondary rules only, that is, the rules that relate to the conditions that must be met for the bringing of a claim for diplomatic protection. Consequently, no attempt was made to deal with the primary rules on this subject, that is, the rules governing the treatment of the person and property of aliens, breach of which gives rise to responsibility to the State of nationality of the injured person.[20]

Several commentators have expressed support for the above distinction because it has greatly contributed to the completion of a number of difficult codification projects by the ILC.[21] Yifeng, for instance, argues that the success of the codification efforts lies mainly in the ILC basing its work on the secondary rules of international law.[22] In the same manner, Hafner says that the justification of this approach stems from the necessity of putting considerable emphasis on "the elaboration of the secondary rules concerning the creation, change, ascertainment of rules, and control of their compliance".[23] Nevertheless, there are reasons for inquiring into the soundness of such an approach.

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[19] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 58 -59.

[20] ADPC (n 6) 22-23

[21] See e.g. Jean Combacau and Denis Alland, 'Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 Netherlands Yearbook of International Law 81,109; Daniel Bodansky and John Crook, 'The ILC's State Responsibility Articles: Introduction and Overview' (2002) 96 (4) American Journal of International Law 778; Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of HLA Hart' (2010) 21 (4) European Journal of International Law 967; Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 (4) European Journal of International Law 993; Stephan Wittich, 'State Responsibility' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 35-36.

[22] Chen Yifeng, 'Structural Limitations and Possible Future of the Work of the International Law Commission' (2010) 9 (2) Chinese Journal of International Law 473, 479.

[23] Gerhard Hafner, 'The International Law Commission and the Future Codification of International Law' (1995) 2 International Law Students Association Journal of Intentional and Comparative Law 671, 674.

Firstly, the work of the ILC on SR is habitually used as an example of the efficacy of drawing attention only to secondary rules, but a close analysis reveals that the ILC does not strictly follow this distinction during its work.[24] Breau points out that the content of some Articles on SR tends "to stray into consideration of primary rules of State conduct".[25] For example, the purpose of the formulation of the rules regarding circumstances precluding wrongfulness by Articles 20 to 27 is to exclude "the wrongfulness of State's conduct and not its responsibility which mean that they should be seen as forming an element of the primary rule in question".[26] Hence, it appears correct to say that the difficulty of categorising some rules as neither primary nor secondary rules means "the complete distinction is still theoretical".[27]

Secondly, the categorisation of the ADP as a group of secondary rules creates a spurious impression that they are completely separated from the primary rules of international law.[28] Ostensibly, there is something unsound in Dugard's assertion that the scope of the ADP is limited to "the rules that relate to the conditions that must be met for the bringing of a claim for DP".[29] This would suggest that the perpetration of a wrongful act is not a constituent condition for DP, whereas, in fact, it is a basic requirement.

Thirdly, and more fundamentally, the substantive content of the primary rules on the treatment of foreign nationals has noticeably improved in recent times. Hence, it seems illogical to deal with the law of DP without deciphering the content of the wrongful act, which, in turn, cannot be achieved without analysing the conduct of the responsible State in

[24] Crawford himself has conceded the fact of going "beyond the statement of the secondary rules to lay down particular primary rules by some provisions". James Crawford, First Report on State Responsibility [1998] Doc. (A/CN.4/490) 7, para 18.
[25] Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge Press 2016) 62.
[26] Eric David, 'Primary and Secondary Rules' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 29.
[27] Oriol Casanovas, *Unity and Pluralism in Public International Law* (Martinus Nijhoff Publishers 2001) 17.
[28] Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology: The Role of Language for an Understanding of the International Legal System' (2009) 78 (1) Nordic Journal of International Law 53.
[29] ADPC (n 6) 23.

the context of a given primary rule of international law. Hence, the following two sections are dedicated to highlighting some controversial issues associated with the determination of suitable criterion for defining the occurrence of the wrongful act when the conduct of the responsible State injures the person of a foreigner.

3.3 Problematising the Utilisation of IMST as the Sole Criterion of Characterisation

The use of the IMST to characterize the nature of a State's conduct in order to determine whether or not it amounts to an international wrong that requires the exercise of DP is a complicated issue. Firstly, the historical context of its existence shows a clear conflict of interests between the members of the international community.[30] Secondly, its content has, from the beginning, been unclear.

3.3.1 The Difficulty of inferring an International Rule

The notion of the IMST has historically been used by developed countries in opposition to the concept of National Standard of Treatment (NST), which is advocated by developing countries taking, *inter alia*, the form of the Calvo Clause.[31] The NST is a customary notion, which restricts the rights of aliens by equating them with those of nationals.[32] In other words, the NST revolves around the idea of preventing foreigners from being privileged in comparison to the nationals of the host State.[33] This means that aliens are entitled to enjoy

[30] See e.g. Francisco García-Amador, 'State Responsibility in the Light of the New Trends of International Law' (1955) 49 (3) American Journal of International Law 339; Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?' (1961) 55 (4) American Journal of International Law 863,889; Myres McDougal, Harold Lasswell and Lung-chu Chen, 'Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 American Journal of International Law 432,464; Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28 (1) Georgetown Immigration Law Journal 225, 231.

[31] See above, pp 51-52.

[32] See e.g. Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 17; Alireza Falsafi, 'International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard' (2006) 30 Suffolk Transnational Law Review 317, 326.

[33] Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (3rd edn, Oxford University Press 2015) 244-246.

rights equal to those accorded to nationals, and must request reparation for any wrongdoing through domestic methods.[34]

In this sense, the NST varies from treaty-based national treatment, which seeks to broaden the rights of foreigners by likening them with those accorded to nationals.[35] As such, the clear majority of international investment agreements, both bilateral and multilateral, refer to national treatment by containing a general provision requiring that investors and investments from another contracting State should be provided treatment "no less favourable than" that conferred upon national investors and investments.[36]

Traditionally, the NST has been seen as a shield against external interferences.[37] Yet, the crucial challenge to this standard lies in the fact that the responsibility of the respondent State cannot be averted, in all circumstances, by arguing that aliens and nationals have been subject to equal treatment in conformity with the provisions of domestic law.[38] In other words, the characterization of the State's conduct as an international wrong does not necessarily mean that it will be classified as such in the domestic law of the State concerned. Article 3 of the ARSIWA explicitly confirms this fact pointing out that "the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law".[39]

Consequently, many of the leading figures in international law are of the view that States are under an obligation to ensure that foreigners' treatment is in line with the habitual levels of

[34] Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 45.
[35] Alireza Falsafi (n 32) 326.
[36] August Reinisch, 'National Treatment' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 847.
[37] Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 623.
[38] Ian Brownlie (n 9) 526.
[39] The ARSIWA (n 2) 2.

civilisation.[40] According to Root, this standard is "very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world".[41] Borchard makes a similar point when he states that the standard "is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal State would repudiate it".[42] However, such an approach seems misleading, if not wholly inaccurate, for two reasons.

Firstly, it is widely accepted that coherence plays an intrinsic role in assessing the legitimacy of international rules.[43] In Frank's words, international law places significant emphasis on coherence by demanding that for a rule to be regarded as legitimate it must be derived from "principles of general application".[44] It follows therefore that the rules in the international community can only be deduced from "the persistent patterns of its members' conduct, and each action is judged by all states in terms of its projected effect".[45] Notwithstanding, Guzman severely criticises Franck's theory because of its failure to illustrate why legitimacy leads to compliance, and why determinacy, symbolic validation, coherence, and adherence are importunate.[46] However, the view expressed by Guzman does not seem to be correct since

[40] See e.g. Clyde Eagleton, 'Denial of Justice in International Law' (1928) 22 (3) American Journal of International Law 538; Louis Sohn and Robert Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 American Journal of International Law 545, 547; Alwyn Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Company 1970).

[41] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 American Journal of International Law 16, 21.

[42] Edwin Borchard, 'The Minimum Standard of the Treatment of Aliens' (1940) 38 (4) Michigan Law Review 445, 458.

[43] Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University 1990) 152.

[44] ibid

[45] ibid.

[46] Andrew Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 (6) California Law Review 1823, 1835.

international law is largely based on a consensus, which cannot be achieved in the absence of worldwide acceptance of the IMST.[47]

Secondly, the persistent rejection of the presence of the IMST by developing countries, as a significant part of the international community, raises a serious issue as to whether it has ever been recognised as a rule of international law.[48] It appears that drawing an analogy between the refusal to recognise the IMST and the persistent objector rule may assist in clearing such a suspicion.[49] In its essence, this rule is founded upon the fact that the continuous rejection of the States to the emergence of a particular rule of customary international law, and maintain their objection after its crystallization, release them from being tied by such a rule.[50] In this connection, the rejection of the IMST resulted in the passing of several resolutions by the UNGA, especially during the 1960s and 1970s.[51] The common point between these instruments was an alliance between developing countries in supporting the adoption of the NST over the IMST.[52]

From the foregoing, it is evident that there are some essential requirements that the IMST does not adequately satisfy. Therefore, it can be said that it did not reach, and is unlikely to reach, beyond the field of international investment law,[53] either in terms of the position of the

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[47] Wolfrum Rudiger, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations' in Wolfrum Rudiger and Volker Röben (eds), *Legitimacy in International Law* (Springer Publishing 2008) 7.

[48] See e.g. Arghyrios Fatouros, 'International Law and the Third World' (1964) 50 (5) Virginia Law Review 810; Antonio Cassese, *International Law in a Divided World* (Oxford University Press 1987) 115-125; Hussein Haeri, 'A Tale of Two Standards: Fair and Equitable Treatment and the Minimum Standard in International Law' (2011) 27 (1) Arbitration International 32.

[49] See e.g. James Green, *The Persistent Objector Rule in International Law* (Oxford University Press 2016).

[50] Michael Wood, Third Report on Identification of Customary International Law [2015] Doc. (A/CN.5/682) paras 85-94.

[51] Particularly, the UNGA Resolution 1803(XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources, and the UNGA Resolution 3201 (S-VI) of 1 May 1974. Declaration on the Establishment of a New International Economic Order.

[52] Alireza Falsafi (n 32) 329.

[53] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press 2016) 96-110.

general principles of international law or the situation of its customary rules.[54] Notwithstanding, Amerasinghe emphasizes the importance of the use of the IMST as an appropriate measure for determining the occurrence of a wrongful act that might trigger DP.[55] Likewise, Pesch has recently asserted that the presence of the wrongful act "requires proof that the State has violated a primary rule of international law relating to the treatment of aliens, the so-called minimum standard".[56] This line of thinking is seemingly illogical because it gives no answer to the questions of the legal nature of the IMST and its position in international law. In addition, it supposes the existence of a general consensus as to what constitutes the IMST under customary international law.[57] The reality, however, is that the IMST lacks clearly defined content.[58]

3.3.2 Indeterminacy of the Content of the IMST

Even assuming that a breach of the IMST is a suitable criterion for determining the occurrence of the wrongful act, the content of the IMST appears unclear and problematic at both theoretical and judicial levels.[59] Theoretically, the classic writings differ on the content of the standard. In this respect, "the very simple, very fundamental standard" described by Root has never included specific content and has caused much "confusion and vagueness".[60]

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[54] Alberto Alvarez-Jimenez, 'Minimum Standard of Treatment of Aliens, Fair and Equitable Treatment of Foreign Investors, Customary International Law and the Diallo Case before the International Court of Justice' (2008) 9 (1) The Journal of World Investment and Trade 56,57.

[55] Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 37.

[56] Sebastian tho Pesch, 'The Influence of Human Rights on Diplomatic Protection: Reviving an Old Instrument of Public International Law' in Norman Weiss and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer Publishing 2015) 57.

[57] Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, Doc. (UNCTAD/DIAE/IA/2011/5) (UN Publications 2012) 28.

[58] ibid.

[59] See e.g. Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57 (2) International and Comparative Law Quarterly 361, 366; Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (3rd edn, Cambridge University Press 2010) 128.

[60] Frederick Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press 1932) 141.

D'Amato, for example, links the IMST to the idea of denial of justice, claiming that the standard should be applied when there is evidence of "denying the accused the right to defend himself, not allowing him/her to call witnesses, double jeopardy, and control of the tribunal by executive".[61] Borchard, on the other hand, focuses on the HR perspective of the IMST suggesting that it should include rights such as "the right to personal security, to personal liberty".[62] Clearly, neither the first nor the second view has much importance nowadays as the right to a fair trial is regarded as an essential HR.[63] In addition, the other fundamental HR are guaranteed and protected by international and regional instruments of HR protection.[64]

At the judicial level, it is important to note that the most eminent case law regarding the implementation of the IMST is dated back to the 1920s,[65] when the Mexico-United States Mixed Claims Commission applied the standard on several occasions.[66] For example, in the claim of *Neer,* which was instituted by the USA on behalf of Paul Neer's successors, it was alleged that "the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the murder of Mr Neer; and that therefore the Mexican Government ought to pay to the claimants the said amount of

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[61] Anthony D'Amato, *International Law and Political Reality: Collected Papers* (Kluwer Law International 1995) 274.

[62] Edwin Borchard (n 42) 458.

[63] Article 14 (1) of the ICCPR states that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". Likewise, Article 6 (1) of the ECHR reads as follows "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

[64] Nobuyuki Kato, 'The Role of Diplomatic Protection in the Implementation Process of Public Interests' in Teruo Komori and Karel Wellens (eds), *Public Interest Rules of International Law: Towards Effective Implementation* (Ashgate Publishing Limited 2009) 195.

[65] The ICJ has briefly referred to the standard in *Barcelona Case* but said nothing about its content. The Court stated that "the real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case". *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase), Judgment of 5 February 1970 (1970) ICJ Rep 3, para 87.

[66] See e.g. Joseph Fehr, 'International Law as Applied by US-Mexico Claims Commission' (1928) 14 American Bar Association Journal 312; Philip Alston and Ryan Goodman. *International Human Rights in Context: Law Politics and Morals (*Oxford University Press 2013) 90.

reparation".[67] Although the claim was dismissed due to the consistency of the acts of the Mexican authorities with the obligations concerned, the Commission held that:

> The propriety of governmental acts should be put to the test of international standards, and (second) that 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 readily recognise its insufficiency.[68]

While this remains the most precise description of the IMST, it reveals that the application of the standard was "to show that foreigners have certain rights that the violation of which by the host State will incur its responsibility".[69] In other words, the standard "is not a standard with absolute obligations, but one that will be applied when the injury reaches a certain level of seriousness".[70] Thus, the question that arises concerns the potential role of the IMST in the modern legal landscape. It is to this issue that the next section of this chapter now turns.

3.4 From Ambiguity to Clarity: The Violations of Internationally Guaranteed HR as an Appropriate Criterion

3.4.1 The Inevitability of Alteration

The above-mentioned issues associated with the existence and the content of the IMST have strongly affected its employment in determining the occurrence of the wrongful act in the context of DP. Thus, questions have been raised about the necessity of its replacement with another up-to-date and uncontroversial measure.

Indeed, one of the earliest steps towards this replacement was taken by Garcia-Amador during the work of the ILC on the law of international responsibility in the 1950s and

[67] *Case concerning L. F. H. Neer and Pauline Neer (USA v. United Mexican States)* (1926), UNRIAA, Vol IV, para 1.
[68] ibid, para 4.
[69] Francisco Garcia-Amador, Frist Report on State Responsibility [1956] Doc. (A/CN.4/96) 194.
[70] Annemarieke Vermeer-Künzli, 'Diplomatic Protection as a Source of Human Rights Law' in Dinah Shelton (ed), *The Oxford Handbook of International* Law (Oxford University Press 2013) 269-270.

1960s.[71] He suggested eradicating the conflict between the NST and the IMST by dealing with them as having been replaced by international HR norms.[72] At the time, this proposal was seen as a revolutionary, but one that "came too early and wanted to go too far, changing the underlying structure rather that working through them".[73] Hence, it was rejected because international HR law was ambiguous and insufficient "to offer practical assistance in the elucidation of the international standard".[74]

Notwithstanding, recent times have witnessed a dramatic increase in the impact of international HR law on the traditional institutions of international law.[75] The corollary result of this impact is that the old doctrine of DP has started to move towards leaving aside traditional principles, such as the IMST, in order to take account of the developments in international HR law. [76] This has led to an important consequence, as explored below.

3.4.2 The Consequence of the Shift

In *Diallo,* the dispute arose because the Guinean businessman had allegedly been "mistreated, unlawfully arrested, detained on several occasions, and lastly expelled from the country by the Congolese authorities".[77] Guinea brought the case before the ICJ, exercising its right of DP on behalf of its citizen and claimed, among other things, that the DRC was responsible for

[71] See http://legal.un.org/ilc/summaries/9_6.shtml (accessed 15/06/2019).
[72] Francisco Garcia-Amador, Frist Report on State Responsibility (n 69) 203.
[73] Daniel Muller, 'The Work of Garcia-Amador on State Responsibility for Injury Caused to Aliens' in James Crawford, Allen Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 72. See also, Richard Lillich, The Current Status of the Law of State Responsibility for Injuries to Aliens' in Richard Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University of Virginia Press 1983) 26.
[74] Thomas Carbonneau, 'Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement' (1984) 25 Virgin Journal of International Law 99, 109.
[75] Committee on International Human Rights Law and Practice, 'Final Report on the Impact of International Human Rights Law on General International Law' in International Law Association Report of the 73rd Conference (Rio De Janeiro2008) 11.
[76] Michael Addo, 'Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations' (1999) 10 (4) European Journal of International Law 1713,1721.
[77] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment of 24 May 2007 (2007) ICJ Rep 582, para1.

causing direct damages to Mr. Diallo as a consequence of breaching his personal rights.[78] Specifically, Guinea contended that Mr. Diallo was subjected to arbitrary deprivation of his right to liberty and to unlawful expulsion measures.[79] Additionally, he was subjected to mistreatment during his detention in breach of Article 10 (1) of the International Covenant on Civil and Political Rights (ICCPR).[80]

After assessing these allegations according to Articles 7[81] and 10 (1)[82] of the ICCPR and Article 5[83] of the ACHPR, the ICJ concluded that "Guinea had failed to demonstrate convincingly that Mr. Diallo had been subjected to such treatment during his detention".[84] On the other hand, however, the Court accepted the first portion of Guinea's argument, concluding that Articles 9[85] and 13[86] of the ICCPR, and Articles 6[87] and 12 (4)[88] of the ACHPR were violated and that these violations gave rise to the right to compensation.[89]

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[78] ibid, para 28.

[79] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo),* Merits, Judgment of 30 November 2010 (2010) ICJ Rep 639, para 21.

[80] ibid, paras 86-87.

[81] Article 7 of the ICCPR states that "no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment".

[82] Article 10 (1) of the ICCPR points out that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

[83] Article 5 of the ACHPR confirms that "every individual shall have the right to the respect of the dignity inherent in a human being".

[84] *Ahmadou Sadio Diallo,* Merits, (n 79) para 88.

[85] Article 9 of the ICCPR stipulates that (1) "everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. (2) "anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of the charges against him".

[86] Article 13 of the ICCPR provides that "an alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

[87] Article 6 of the ACHPR stipulates that "every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

[88] Article 12 (4) of the ACHPR reads as follows: "a non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law".

[89] *Ahmadou Sadio Diallo,* Merits, (n 79) para 161.

To reach this conclusion, the Court tested the legality of the measures taken by the DRC against Mr. Diallo through the lenses of the ICCPR and the ACHPR. With respect to the arrest and detention of Mr. Diallo between October 1995 and January 1996, Guinea contended that:

> First, the deprivations of liberty suffered by Mr. Diallo did not take place in accordance with such procedures as are established by law within the meaning of Article 9 (1) of the Covenant, or on the basis of conditions laid down by law within the meaning of Article (6) of the African Charter. Second, the deprivations of liberty were arbitrary within the meaning of both of these provisions; and third Mr Diallo was not informed, at the time of his arrests of, the reasons for those arrests; nor was he informed of the charges against him, which constituted a violation of Article 9 (2) of the Covenant.[90]

After a comprehensive investigation of the facts, the Court found that "the arrest and detention were no in accordance with Article 9 (1) of the ICCPR and Article 6 of the Charter".[91] It therefore characterized them "as arbitrary within the meaning of Article 9 (2) of the Covenant and Article 6 of the Charter".[92] As regards the expulsion of Mr. Diallo,[93] after referring to Article 13 of the Covenant, and Article 12 (4) of the Charter, the ICJ held that:

> It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with the law,[94] […] On this ground, the Court concluded that Article (13) of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.[95]

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[90] *Ahmadou Sadio Diallo*, Merits, (n 79) para 76.
[91] ibid, para 79.
[92] ibid, para 82.
[93] Article 2 (a) of the ILC's Articles on expulsion of aliens defines the expulsion of alien as "a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State". Articles on the Expulsion of Aliens [2014] Doc. (A/CN.4/L.832) 1.
[94] *Ahmadou Sadio Diallo*, Merits, (n 79) para 65.
[95] ibid, para 74.

By doing so, the ICJ relieved itself of the ideological limitations of DP by referring to Mr. Diallo's HR without any attempt to translate them back into the rights of his State of nationality.[96] Interestingly, the employment of HR violations to determine the existence of the wrongful act provides DP with the advantage of relying upon several HR instruments to determine the nature of the responsible State's conduct. Judge Trindade highlighted this fact in his separate opinion, where he pointed out that:

> This is the first time in its history that the international court of justice has established violations of the human rights treaties at issue, together, namely, at universal level, the 1966 UN Covenant on Civil and Political Rights and, at regional level, the 1981 African Charter on Human and Peoples' Rights, both in the framework of the universality human rights.[97]

It was briefly mentioned in the preceding chapter that the doctrine of DP had not become obsolete mainly due to its interaction with the doctrine of HR protection, which is growing increasingly strong in international law.[98] Indeed, this interaction paves the way for renewing the presumptions upon which DP is traditionally based. The ICJ refers to this fact by stating in *Diallo* that:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[99]

Commenting on this passage of the ICJ's decision, Paparinskis maintains that "the Court dispelled any doubts, human rights have not replaced or synthesized with the international

[96] Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 (1) Journal of International Dispute Settlement 7, 20; Mads Andenas, 'International Court of Justice, Case Concerning Ahmadou Diallo (Republic of Guinea V Democratic Republic of the Congo) Judgment of 30 November 2010' (2010) 6 (3) International and Comparative Law Quarterly 810, 812.
[97] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 77) Separate Opinion of Judge Cançado Trindade, para 1.
[98] See above, pp 52-55.
[99] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 77) para 39.

standard [...] they are acting as a parallel but conceptually distinct regime".[100] By saying so, he confirms the view that DP is "a typical inter-state mechanism [...] that tends by its own nature to resist the incentives to change that exercised by human rights protection".[101] In fact, the above-quoted passage can be interpreted as a rejection of Guinea's argument that "the DRC has not treated Mr. Diallo in accordance with a minimum standard of civilization".[102] In other words, the Court aimed to inform Guinea that the scope of the protected rights within the realm of DP has largely exceeded the IMST.

As a result, the core of the *Diallo* case was transferred from concerning the DP of nationals governed by the law of SR to one involving HR infringements.[103] That is to say that, although this case reached the Court by the means of DP, it was dealt with as a pure HR case. This means that international HR law is destined to have an impact on the substantive content of the primary rules in the field of DP. It also means that the violations of HR of individuals who live or conduct business abroad are the current criterion for characterising the lawfulness of the respondent State's conduct and the occurrence of the wrongful act thereafter.

In a positive sense, this criterion establishes what could be described as a safety net that includes the classical idea of the IMST and widens the scope of the protected rights to cover wrongs done against aliens whose rights are guaranteed and protected by international and regional HR instruments. However, it should be remembered that DP is essentially related to the protection of foreign individuals who live or conduct business abroad and, therefore, not all HR are applicable. For example, political rights that are exclusively afforded or limited to

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[100] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 80.

[101] Riccardo Mazzeschi, 'Impact on the Law of Diplomatic Protection' in Menno Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 211.

[102] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 77) para 29.

[103] Sandy Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' (2011) 11 (3) Human Rights Law Review 527, 528; Annemarieke Vermeer-Künzli, 'Diallo between Diplomatic Protection and Human Rights' (2013) 4 (3) Journal of International Dispute Settlement 487,488.

citizens of a country lie outside the domain of DP. Nevertheless, DP does cover violations of other rights that are accorded to citizens and foreigners alike, such as the right to liberty and security of person. In addition to this, DP covers violations of rights that are accorded to foreigners only, such as their right not to be arbitrarily expelled.[104]

Given that some States have already opposed the IMST, one needs to consider the possibility of resistance to the expansion of the law on DP. It seems that such resistance is not likely for two reasons.

First, as described above, during the development of the IMST there was a vigorous disagreement on whether it should exist at all and on what exactly constitutes the IMST under international law. This disagreement does not exist with regard to internationally guaranteed HR. For example, the right to liberty and security of a person enjoys general and substantive acceptance in international and regional HR instruments. The resemblance between Articles 9 (1) of the ICCPR, 5 (1) of ECHR and 7 (1) of the ACHR reflects a clear harmonization between these instruments regarding the adoption of the right.

Second, this extensive and general acceptance that runs counter to the IMST, which has never had a clear and lucid content, plays a crucial role in defining what constitutes the substantive content of the violated rights. This fact is mirrored in the simultaneous reliance of the ICJ upon the ACHR and ICCPR in *Diallo* so as to assert the arbitrariness of Mr. Diallo's detention.[105]

3.5 Wrongs concerning Property and Economic Interests of Non-nationals

Having established the appropriate criterion for determining the occurrence of the wrongful act in relation to the violation of foreigners' personal rights, it is now useful to consider DP in

[104] Article 31 of the ILC's Articles on Expulsion of Aliens confirms the right of "the State of nationality of an alien subject to expulsion to exercise diplomatic protection in respect of the alien in question". Articles on the Expulsion of Aliens [2014] Doc. (A/CN.4/L.832) 7.

[105] *Ahmadou Sadio Diallo,* Merits, (n 79) para 82.

the context of other violations that are related to the property and to other economic or commercial interests. Before going further, there are two facts that should be highlighted. First, it is true that these interests are generally covered and protected by investment treaties and other special agreements. Yet, the absence of these instruments means that DP might be used to protect against damages and wrongs committed by the host State.[106] Second, and more importantly, the HR standard for identifying injuries cannot apply in outside cases involving physical/mental harm to a national abroad, or economic injuries rising to the level of a HR violation, which can include procedurally or substantively flawed expropriations. In such cases the traditional law remains in place.

3.5.1 Taking of Property

As a starting point, it should be clear that the incorporation of the right to property within the international law of HR has often been a contentious issue.[108] For this reason, it was not dealt with in the preceding section, which focused on the protection of the foreigners' HR.[109] However, this fact does not affect the possibility of protecting the property of a non-national through the means of DP by relying upon a well-established rule of customary international law that prohibits any unlawful or arbitrary taking of foreign property.[110]

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[106] Abby Smutny, 'Claims of Shareholders in International Investment Law' in Christina Binder and other (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 363.

[108] See e.g. Ting Xu, and Jean Allain (eds), *Property and Human Rights in a Global Context* (Hart Publishing 2016) 1; Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited Publishing 2010) 319; Nicolas Klein, 'Human Rights and International Investment Law: Investment Protection as Human Right' (2012) 4 (1) Goettingen Journal of International Law 199, 211; John Sprankling, 'The Emergence of International Property Law' (2011) 90 North Carolina Law Review 461.

[109] It would go beyond the scope of this study to engage into the debate about the definition, content and the nature of the right to property . Yet, it is worth mention that Article 17 of the Universal Declaration of Human Rights classifies the right to property as a HR by pointing out that "(1) everyone has the right to own property alone as well as in association with others (2) no one shall be arbitrarily deprived of his property". However, the right to property did not appear neither in the International Covenant on Economic, Social and Cultural Rights nor in the ICCPR.

[110] See e.g. Francis Nicholson, 'The Protection of Foreign Property under Customary International Law' (1965) 6 (3) Boston College Law Review 391,397; Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 48-49.

From the international law perspective, the expropriation of foreign property has never been banned, but its legality is subject to a number of conditions that have to be respected.[111] In this regard, it is widely acknowledged that the following three conditions are demanded; (1) "the taking or expropriation must take place in order to serve a public purpose",[112] (2) "it shall not have any discriminatory charter",[113] and (3) "it must be accompanied by the payment of prompt, adequate and effective compensation".[114] Generally, the failure or the refusal of the expropriating State to pay compensation upon the taking of the property is the main rationale behind the exercise of DP in this regard.

In *Nottebohm*, for instance, the Government of the Principality of Liechtenstein asked the ICJ to proclaim that "the Government of Guatemala [...] in seizing and retaining Mr. Nottebohm property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation".[115] Likewise, the claimant in the case of *Von Abo* has been subject to Zimbabwe's nationalisation of land policy.[116] When the Zimbabwean Government refused to pay any compensation for taking a large part of his farming interests, the claimant approached the Government of South Africa for protection.[117]

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[111] See e.g. Malcolm Shaw (n 37) 627; Jan Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff Publishers 2011) 180; Ursula Kriebaum, 'Expropriation' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 962.

[112] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Judgment of 25 May 1926 (1926) PCIJ Serie A, No 7, p 22.

[113] Abul Maniruzzaman, 'Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview' (1998) 8 (1) Journal of Transnational Law and Policy, 57, 58.

[114] See e.g. Taking of Property, UNCTAD Series on Issues in International Investment Agreements [2000] Doc. (UNCTAD/ITE/IIT/1), (UN Publication 2000) 5;Stephan Hobe, 'The Development of the Law of Aliens and the Emergence of General Principle of Protection under International Law' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 22; Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd edn, Hart Publishing 2008) 15.

[115] *Nottebohm Case (Liechtenstein v. Guatemala)*, (second phase), Judgment of 6 April 1955 (1955) ICJ Rep 4. pp 6-7.

[116] *Von Abo v Government of the Republic of South Africa and Others* [2008] ZAGPHC 226.

[117] ibid, para 3.

3.5.2 Damages to Shareholders in Foreign Companies

The ownership of shares in a foreign company is a clear example of where the protection of individuals' economic interests is no less important than the protection of their personal rights.[118] This fact was approved in *Diallo* in which the priority was given, at the early stages at least, to the protection of the victim's economic interests, namely his "direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire, and the rights of the two corporations Africom-Zaire and Africontainers-Zaire, which he owned and controlled".[119]

With regard to the protection of the shareholders in foreign companies, differentiation must be made between two situations. In the first situation, the wrongful act of the responsible State constitutes a direct breach of one of the shareholders' rights such as "the right to any declared dividend, the right to attend and vote at general meetings, and the right to share in the residual assets of the company on liquidation".[120] The deprivation of these rights provides the shareholder's State of nationality with the ability to sue the responsible State, through the medium of DP, autonomously from the action of the company's home State. Article 12 of the ADP states that:

> To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.[121]

Conversely, the question in the second situation is whether the shareholders have the same ability when the wrongful act affects their interests indirectly as a result of action against the

[118] Francisco Vicuña, 'The Protection of Shareholders under International Law: Making State Responsibility More Accessible' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 163.
[119] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 77) para 31.
[120] *Barcelona Traction* (n 65) paras 46-47.
[121] ADP (n 6) 6.

company in which they hold shares.[122] In this regard, the ability of the shareholders to pursue and protect their interests independently from the action of the company's home State is still ruled by the announcement of the ICJ in *Barcelona Traction* that:

> The mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation […] In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus, whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.[123]

Although this decision has continuously been subject to criticism because of rendering the Swiss shareholders in the company not eligible to receive any protection independently of that received by the company,[124] the ILC has adopted the Court's view by stating in Article 11 of the ADP that:

> The State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
> (a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or
> (b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.[125]

For its part, the ICJ referred to Article 11 (b) of the ADP to refuse the endowment of the Guinean protection to the two corporations, Africom-Zaire and Africontainers-Zaire, because

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[122] Abby Smutny, 'Claims of Shareholders in International Investment Law' in Christina Binder and other (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 363.
[123] *Barcelona Traction* (n 65), paras 47-56.
[124] See e.g. Martin Valasek and Patrick Dumberry, 'Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute' (2010) 26 (1) ICSID Review 34, 36; Francisco Vicuña (n 118) 165.
[125] ADP (n 6) 5.

"the companies' incorporation in the State that committed the alleged violation was not required as a precondition for doing business there".[126] By doing so, the Court rejected the Guinean argument that "the customary international law has evolved to permit a shareholder to present claims on behalf of the companies in which they own shares",[127] and added that:

> The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in customary rules of diplomatic protection; it could equally show the contrary.[128]

It is true that the Court's holding on this issue frustrated some commentators.[129] Notwithstanding, it should not be forgotten, as mentioned above, that the role of DP as a means of protecting the economic and commercial interests of nationals abroad has significantly reduced in recent times.[130] In this regard, it may be useful to say that the existence of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic, has led the ICJ to accept the protection afforded by the USA to shareholders despite the fact that the wrongful act was committed against the company and not against the shareholders themselves.[131]

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[126] *Ahmadou Sadio Diallo,* Preliminary Objections, (n 77) para 91.
[127] ibid.
[128] ibid, para 90.
[129] See e.g. Ben Juratowitch, 'Diplomatic Protection of Shareholders' (2011) 81 (1) British Yearbook of International Law 281; Rupert Coldwell, 'The Limited Protection of Corporations and Shareholders at International Law' (2011) 14 International Trade and Business Law Review 358.
[130] See e.g. Christoph Schreuer, 'Shareholder Protection in International Investment Law' (2005) 2 (3) Transnational Dispute Management 1, 2; Peter Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution' In Christina Binder and other (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 341.
[131] *Elettronica Sicula S.P.A (ELSI) case, (United States of America v. Italy),* Judgment of 20 July 1989 (1989) ICJ Rep 15.

More fundamentally, investment treaties are currently the dominant mechanism that governs the relationship between foreign investors and host States.[132] Undoubtedly, these treaties have greatly exceeded the customary system of DP. As such, the practice of the arbitration tribunals "has made plain evident that the right of shareholders to claim for their affected interest independently from the corporate entity is now upheld as a matter of law".[133]

3.6 The Relationship between the Fault of the Injured Person and the Exercise of DP

The last point that needs to be illustrated concerns the employment of the defence of 'unclean hands' to prevent the claimant State from offering its protection when a national it aims to protect suffers an injury because of their own wrong conduct. The implementation of this defence is generally accepted in internal legal systems under which it is understood as "demanding that a plaintiff seeking equitable relief come into court having acted equitably in that matter for which he seeks remedy".[134]

At the international level, however, the existence of the so-called "clean hands doctrine" as a part of international law is controversial; for example, Brownlie strongly doubts the existence of the doctrine within international law.[135] Schwebel, on the other hand, confirms that it has its place under international law.[136] Shapovalov links the doctrine to the principle of good faith, saying that:

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[132] See above, pp 56-59.

[133] Francisco Vicuña (n 118) 166.

[134] See e.g. William Lawrence, 'Application of the Clean Hands Doctrine in Damage Actions' (1981) 57 Notre Dame Law 673, 674; Ori Herstein, 'A Normative Theory of the Clean Hands Defense' (2011) Cornell Law Faculty Publications 1.

[135] Meeting 2793, Yearbook of the International Law Commission [2004] Vol I, Doc. (A/CN.4/SER.A/2004) 16, para 42.

[136] The view of Judge Stephen Schwebel in *Nicaragua* case was that "Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible—but ultimately responsible—for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus, both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail". *Military and Paramilitary Activities in and*

> The doctrine is indeed very close, if not identical, to the principle of good faith, which is an established general principle of law, and to the rule prohibiting one from benefiting from his/her own wrongful conduct, which is also considered by some scholars to be a general principle of law.[137]

Be that as it may, the significant issue which worth investigation here concerns the contribution of the injured person to the existence of the alleged wrong and its impact on the exercise of DP. Therefore, the question of whether clean hands should be considered as a condition of DP requires an answer, and the possibility of using the initial wrong of the injured person as a circumstance capable of precluding the wrongfulness of the defendant State's conduct should be explained.

3.6.1 The Impact of the Injured Person's Fault on the Admissibility of DP Claims

First of all, it should be stressed that the question of unclean hands has been occasionally raised before the ICJ and in no case considered unrelated to inter-State claims.[138] In the *Israeli Wall advisory opinion*, the ICJ did not reject the Israeli argument that:

> Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel

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against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986 (1986) ICJ Rep14, Dissenting Opinion of Judge Stephen Schwebel, para 268.
Likewise, judge Van Den Wyngaert stated that "The Congo did not come to the Court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith". *The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002 (2002) ICJ Rep 3, Dissenting Opinion of judge Van Den Wyngaert), p160, para 35.

[137] Aleksandr Shapovalov, 'Should a Requirement of Clean Hands be a Prerequisite to the Exercise of Diplomatic Protection: Human Rights Implications of the International Law Commission's Debate' (2004) 20 American University International Law Review 829, 840.

[138] In *Oil Platforms*, the ICJ did not respond to the argument of the Islamic Republic of Iran that "the plaintiff's own wrongful conduct as a ground for inadmissibility of a claim relates to claims arising in the context of diplomatic protection and concerns only a foreign individual's clean hands". *Oil Platforms (Islamic Republic of Iran v. United States of America),* Merits, Judgment of 6 November 2003 (2003) IC J Rep 161, para 28.

> concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.[139]

More recently, the United States has raised the issue of unclean hands as a preliminary objection to the admissibility of *Certain Iranian Assets* case.[140] The American view was that the ICJ should not proceed with the case because Iran has come before the Court with unclean hands.[141] It was alleged, among other things, that "Iran has sponsored and supported international terrorism, as well as taken destabilizing actions in contravention of nuclear non-proliferation, ballistic missile, arms trafficking, and counter-terrorism obligations".[142]

The United States recognized that in the past the Court has not upheld an objection based on the clean hands doctrine, but argued that it had not rejected the doctrine either, and that, in any event, the time is ripe for the Court to acknowledge it and apply it.[143] The ICJ, however, did not take a position on the clean hands doctrine and stated that "even if it were shown that the Applicant's conduct was not beyond reproach, this would not be sufficient per se to uphold the objection to admissibility raised by the Respondent on the basis of the clean hands doctrine".[144]

In effect, it seems difficult "to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-State relations".[145] On the other hand, the applicability of the doctrine as a necessary condition for the admissibility of DP claims was subject to much debate when the ILC discussed the possibility of disapproving the exercise of DP on

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[139] *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion of 9 July 2004 (2004) ICJ Rep 136, para. 63.
[140] *Certain Iranian Assets (Islamic Republic of Iran V. United States of America)*, Preliminary Objections, Judgment of 13 February 2019 (2019) ICJ Rep 1.
[141] ibid, para 116.
[142] ibid.
[143] ibid, para 117.
[144] ibid, para 122.
[145] John Dugard, Sixth Report on Diplomatic Protection [2004] Doc. (A/CN.4/546) para 6.

the grounds of the initial fault of the injured foreigner.[146] Some consider the defence of unclean hands to be a crucial question of admissibility that can be used to preclude the exercise of DP.[147] In Pellet's words, the violation of internal or international law by a foreigner should prevent the State called upon to offer its protection from doing so.[148] According to this point of view, therefore, the perpetration of the initial wrong by the alien renders the intervention of their State of nationality unlikely, particularly when any restrictions of personal rights or economic interests have taken place according to law.[149]

It is true, at first glance, that this view seems sensible and logical. Yet, the argument that it should be considered a valid bar to the admissibility of DP claims lacks the authority supported in the writings of international law scholars and relevant jurisprudence.[150] Therefore, the clear majority of the ILC's members accepted the conclusion that:

> There is no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection.[151]

3.6.2 Does the Clean Hands Defence Constitute a Circumstance Precluding Wrongfulness?

While the employment of the clean hands defence to have a claim of DP ruled inadmissible or dismissed is generally refused. However, the clean hands defence may have an impact on DP claims if it is evoked during the consideration of the merits of the claim.

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[146] Meeting 2793, Yearbook of the International Law Commission [2004] (n 135) 16-21.
[147] ibid.
[148] Pellet has expressed the position of the proponents of the applicability of the clean hands doctrine to DP during the work of ILC. Meeting 2793, Yearbook of the International Law Commission [2004] (n 135) 16.
[149] ibid.
[150] See e.g. Rahim Moloo, 'A Comment on the Clean Hands Doctrine in International Law' (2010) Inter Alia – Student Law Journal 39; Aleksandr Shapovalov (n 137) 845; Chittharanjan Amerasinghe (n 55) 221.
[151] John Dugard, Sixth Report on Diplomatic Protection (n 145) para 18.

Ostensibly, it seems that the use of the clean hands defence at the stage of considering the merits of the case may preclude the wrongfulness of the host State's conduct.[152] Nevertheless, Crawford refutes this view by excluding the defence from being "a circumstance precluding wrongfulness or responsibility".[153] For his part, Shapovalov openly supports the applicability of this defence at the merits stage,[154] but without considering the possibility of its classification as a circumstance capable of preventing the application of the international responsibility of the State.[155]

As a matter of international law, it should be remembered that the existence of the circumstances excluding responsibility "does not annul or terminate the obligation itself; rather it provides a justification or excuse for non-performance while the circumstance in question subsists".[156] In other words, they operate as "a shield against an otherwise well-founded claim for the breach of an international obligation".[157] However, in *LaGrand* case murder and other crimes in the United States did not prevent Germany from trying to offer it protection to Walter LaGrand.[158] This means that although the hands of the German national were certainly unclean, the ICJ did not consider it to have an impact on the admissibility of the claim or to be a circumstance that precluded the responsibility of the host State.

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[152] See e.g. Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses' (1999) 10 (20) European Journal of International Law 405; Sandra Szurek, 'The Nation of Circumstances Precluding Wrongfulness' in James Crawford and Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 429; Patrick Dumberry, 'State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award' (2016) 17 (2) Journal of World Investment & Trade 229; Martins Paparinskis, 'Circumstances Precluding Wrongfulness in International Investment Law' (2016) 31 (20) ICSID Review 484.

[153] Jams Crawford, Second Report on State Responsibility [1999] Doc. (A/CN.4/498) para 333.

[154] Aleksandr Shapovalov (n 137) 845.

[155] Chapter V in part one of the ARSIWA deals with circumstances precluding wrongfulness. Articles from 20 to 26 specify these circumstances as follows: Article 20 Consent, Article 21 Self-defence, Article 22 Countermeasures in respect of an internationally wrongful act, Article 23 *Force majeure*, Article 24 Distress, Article 25 Necessity, Article 26 Compliance with peremptory norms, and Article 27 shows the Consequences of invoking a circumstance precluding wrongfulness.

[156] ARSIWAC (n 8) 71.

[157] ibid.

[158] *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001 (2001) ICJ Rep 466.

Accordingly, it may appear difficult to classify the defence of clean hands as a circumstance capable of preventing the responsibility of the State. However, the contribution of the injured party to the occurrence of the wrongful act "may operate as an extenuating circumstance".[159] The general rule in this respect is mentioned in Article 39 of the ARSIWA according to which the determination of reparation requires taking into account "the contribution to the injury by [...] any person or entity in relation to whom reparation is sought".[160] This rule covers, among others, the situation where a claim on behalf of one national is diplomatically adopted by its State of nationality.[161]

3.7 Conclusion

This chapter has deciphered the content of the wrongful act as an initial requirement for DP. The main rationale behind this was the considerable changes in the substantive content of the related primary rules. This change necessitated the establishment of new criteria for determining what constitutes an internationally wrongful act, the occurrence of which may entail the exercise of DP.

To that end, it was important to differentiate between two categories of wrongs. The first category covers violations committed against the person of a foreigner. In this respect, the establishment of the appropriate criterion required dispensing with the controversial idea of the IMST. The new criterion is centred on the assumption that any violation of particular HR, as guaranteed by the whole body of international HR law, constitutes a wrongful act that might lead to the exercise of DP.

The second category is one in which the economic interests of aliens have been targeted. As such, the possibility of deriving the obligations of States under international law from a wide variety of sources has been used to establish the appropriate criterion of characterisation. In

[159]Francisco Garcia-Amador, Third Report on State Responsibility [1958] Doc (A/CN.4/111) para 16.
[160] ARSIWA (n 2) 10.
[161]ARSIWAC (n 8) 110.

this regard, the violations of the settled rules of costmary international law on the expropriation of a foreigner's property have been used to determine the existence of a wrong. Likewise, the breaches of the traditional rules that prohibit any arbitrary deprivation of shareholders in foreign companies from enjoying their rights were used to determine the legality of the respondent State's behaviour. This meant that outside cases involving physical/mental harm to a national abroad; or economic injuries rising to the level of a HR violation; the HR standard for identifying injuries cannot apply, and therefore the traditional law remains in place.

The final section of this chapter highlighted the influence of the initial fault of the injured person on the exercise of DP. It has been confirmed that such a fault has no impact on the admissibility of the claims, but it could be raised as a matter of substantive law at the merits stage. Even at this stage, however, it was excluded from being a circumstance capable of precluding the wrongfulness of the respondent State's conduct and classified as a mitigating circumstance.

Needless to say, the occurrence of a wrongful act, according to the criteria established in this chapter, will not automatically render DP claims admissible. This is because there are two other requirements that need to be fulfilled. These requirements are discussed in the next two chapters respectively.

Chapter Four

Reflections on the Requirement of Nationality

4.1 Introduction

This chapter concentrates on the requirement of nationality as a *sine qua non* for DP.[1] In general, the argument aims at illustrating the distinctive features of this requirement in order to assess the reliability of the assumption that its application has become increasingly flexible.[2] In addition, the soundness of the allegation that a set of new principles on the rule of the nationality of claims has recently begun to emerge will be evaluated.[3]

To meet these aims this chapter is divided into three sections. Section (4.2) commences by exploring the existence of the link of nationality between the protecting State and the protected person. In addition, it will discuss the criticisms and justifications of the rule of continuous nationality. Finally, the question of whether this rule is reflected in the ILC's output will be addressed.

Section (4.3) is devoted to investigating the probability of subjecting the condition of nationality to some exceptions. To do so, it will first evaluate the ILC's attempt to extend the scope of DP in order to cover particular categories of non-citizens. Secondly, it will clarify the confusion associated with the exercising of DP for the sake of non-nationals in some regional conventions. Thirdly, it will examine the correctness of listing the protection of seamen by the flag State under the ambit of DP.

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[1] See e.g. Ian Brownlie, 'The Relations of Nationality in Public International Law' (1963) British Yearbook of International Law 284; Arthur Watts, 'Nationality of Claims: Some Relevant Concepts' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 424.

[2] Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection: A Reappraisal' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge Press 2013) 76.

[3] Francisco Vicuna, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000) 15 (2) ICSID Review 340, 361.

Section (4.4) considers the growing phenomenon of dual or multiple nationality from a DP perspective. Firstly, it highlights the possibility of exercising DP by one State of nationality against another State of nationality, taking into consideration the dilemma of the simultaneous existence of two competing principles. Secondly, it will raise the question of why the principle of effective nationality is not embraced in situations where DP of a dual national is exercised by one State of nationality against a third State.

4.2 The Existence of a Bond of Nationality between the Protecting State and the Protected Person

4.2.1 Why is the Existence of the Nationality Bond Necessary?

Nationality is an inherent HR of all human beings,[4] constituting "a political and legal bond that connects a person to a specific State".[5] The importance of this bond is assured by various international instruments.[6] In a practical sense, nationality forms the source of a wide variety of duties and rights that are exclusively imposed upon or afforded to citizens.[7] At the international level, one of the most important rights lies in providing the State with the right to intervene, by means of DP, on behalf of its nationals in cases where they suffer an illegal injury at the hands of a foreign State.[8] To this end, claims for protection individuals should be brought "in accordance with any applicable rule relating to the nationality of claims".[9] This

[4] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, IACtHR, Advisory Opinion OC-4/84, (1984), para. 32.

[5] *Girls Yean and Bosico v Dominican Republic, (Preliminary Objections, Merits, Reparations and Costs)*, Judgment of 8 September 2005, para. 137.

[6] See e.g. Article 15 of the UDHR, Article (24/3) of the ICCPR, and Article 20 of the ACHR.

[7] Gerhard Casper, The Concept of National and Citizenship in the Contemporary World: Identity or Volition? (2008) Bucerius Law School, Hamburg. Available at: https://gcasper.stanford.edu/pdf/National-Citizenship-Identity.pdf (accessed 15/06/2019).

[8] See e.g. Chittharanjan Amerasinghe, *State Responsibility for Injuries to Aliens* (Clarendon Press 1967) 56; Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff International Publishers 1979) 33; Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 8-21; Anthony Aust, *Handbook of International Law* (Cambridge University Press 2010) 163; Arjana Llano, 'Citizenship as a Constitutional Right and a Fundamental Condition for Exercising Diplomatic Protection' (2014) 5 (2) Mediterranean Journal of Social Sciences 417.

[9] Article 44 (a) of the ARSIWA.

makes the nationality of the claimant a necessary requirement for the invocation of SR in cases where it is applicable.[10] As such, the applicability of the nationality condition to DP claims is undeniable, since the grant of DP is contingent upon the existence of the link of nationality between the protecting State and the aggrieved person.[11]

In defining the protecting State or the State of nationality, Article 4 of the ADP states that:

> For the purpose of the diplomatic protection of a natural person, a State of nationality means a State whose nationality person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of State or any other manner, not inconsistent with international law.[12]

This provision confirms the fundamental principles that regulate the field of nationality. The first is that domestic laws are given the power to decide who is, and who is not, to be considered a national of each State.[13] The second is that this authority is not absolute but restricted by a number of limitations imposed either through international conventions or by customary international law and the principles of law generally recognised with regard to nationality.[14]

As a matter of practice, the imposition of these limitations enables international law to play a supervisory function aimed at eradicating "the consequences of the exaggerated or abusive exercise by the States of their legislative competence with respect to nationality".[15] Many

[10] ARSIWAC, Report of the International Law Commission, Fifty-Third Session [2001] Doc. (A/56/10) 32.

[11]Article 3 (1) of the ADP states that "the State entitled to exercise diplomatic protection is the State of nationality"

[12] ADP [2006] Doc. (A/CN.4/L. 684) 6.

[13] The PCIJ held that "in the present state of international law, questions of nationality are […] in principle within the reserved domain". *Nationality Decrees Issued in Tunis and Morocco (French Zone),* Advisory Opinion of 8 November 1923 (1923) PCIJ Rep, Series B, No. 4, p 24. Likewise, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws states that "it is for each State to determine under its own law who are its nationals", and Article 3 (1) of the European Convection on Nationality stipulates that "each State shall determine under its own law who are its nationals".

[14] Article 3 (2) of the European Convection on Nationality.

[15] See e.g. Vaclav Mikulka, First Report on Nationality of Natural Persons in Relation to the Succession of States [1995] Doc. (A/CN.4/467) 69; Gerard-René de Groot and Olivier Vonk, *International Standards on Nationality Law: Texts, Cases and Materials* (Wolf Legal Publishers 2016) 41-45.

signs of this supervisory function are evident in the impact that international HR law exercises upon the law pertaining to acquisition, loss and removal of nationality.[16] Historically, the emergence of a HR to nationality started with the Universal Declaration of Human Rights (UDHR), which guarantees in Article 15 (1) the right of everyone to a nationality.[17] Subsequently, the right to acquire a nationality has been incorporated into a number of instruments adopted at international and regional levels. For example, Article 4 (a) of the European Convention on Nationality considers this right as a principle upon which the rules on nationality of each State party shall be based. Other instruments, such as the ICCPR, and the Convention on the Rights of the Child (CRC) establish a child's right to nationality.[18]

Regarding the acquisition of nationality, the right of a child to acquire a nationality at birth is explicitly set down in Article 24 (3) of the ICCPR and Article 7 (1) of the CRC. In practice, the acquisition of nationality at this phase of life is often linked to the phenomenon of statelessness.[19] The need to avoid this phenomenon was the essence of the 1961 Convention on the Reduction of Statelessness (CRS), Article 1 of which compels every contracting State to grant its nationality to a person born in its territory who would otherwise be Stateless.

Likewise, naturalization as a process where a noncitizen becomes a citizen after birth is also influenced by the law of HR.[20] This is to say that, States retain wide discretion to lay down rules and requirements governing the process of naturalization, provided that such provisions

[16] Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 (3) Netherlands International Law Review 269, 281.

[17] See e.g. Mónika Ganczer, 'The Right to Nationality as a Human Right' (2014) Hungarian Yearbook of International & European Law 15; David Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 (3) Netherlands International Law Review 299-317.

[18] Serena Forlati, 'Nationality as a Human Right' in in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge Press 2013) 19.

[19] Gerard-René de Groot, 'Children, their Right to a Nationality and Child Statelessness' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 149.

[20] See e.g. Peter Spiro, 'A New International Law of Citizenship' (2011) 105 American Journal of International Law 694,720; Liav Orgad, 'Naturalization' in Ayelet Shachar and Others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 339.

do not discriminate against any particular nationality or persons.[21] In *Genovese v. Malta*, for example, the ECtHR held that since "Maltese legislation expressly granted the right to citizenship by descent and established a procedure to that end. […] The State, Malta in this case, must ensure that the right is secured without discrimination".[22]

Finally, the loss and deprivation of nationality are also subject to HR considerations.[23] In general, nationality might be lost through the operation of law or deprived of through an administrative act.[24] According to Article 5 (1) of the CRS, one may lose their nationality if "the law entails loss of nationality as a consequence of a change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption". In addition, the loss of nationality might occur as a result of acquiring another nationality, or through renunciation of nationality.[25] In any case, the loss of nationality is "conditional upon possession or acquisition of another nationality".[26]

With respect to the deprivation of nationality, which comprises all forms of involuntary loss of nationality that happen as a consequence of a discretionary act initiated by the authorities of the State,[27] it is widely accepted the withdrawal of nationality in this context is prohibited when it is arbitrary.[28] A precise prohibition of the arbitrary deprivation of nationality is established in some HR instruments such as Article 15 (2) of the UDHR, and Article 20 of

[21] Article 1 (3) of the International Convention on the Elimination of All Forms of Racial Discrimination.
[22] *Genovese v. Malta***,** (Application no. 53124/09), ECtHR, Judgment of 11 October 2011, para 34.
[23] See e.g. Jorunn Brandvoll, 'Deprivation of Nationality: Limitations on Rendering Persons Stateless under International Law' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 194; Tamás Molnár, 'The Prohibition of Arbitrary Deprivation of Nationality under International Law and EU Law: New Perspectives' (2014) Hungarian Yearbook of International & European Law 67.
[24] Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects' in Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 21.
[25] Article 7 of the CRS.
[26] Article 5 (2) of the CRS.
[27] Jorunn Brandvoll (n 23) 199; Tamás Molnár (n 23) 75.
[28] Matthew Gibney, 'Denaturalization' in Ayelet Shachar and Others (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) 372.

the ACHR. There are many factors that determine the arbitrariness of the deprivation. For example, the deprivation of nationality on discriminatory grounds such as "race, ethnicity and religious or political orientation" is prohibited under international law.[29] In addition, the decisions that deprive a person of their nationality without a legitimate purpose or without following the principle of proportionality and those which are not open to administrivia or judicial review are also unacceptable.[30]

Returning to Article 4 of the ADP, it is obvious that this provision reveals the difficulty of drawing a decisive distinction between the requirement of nationality in the context of DP and its requirement for other purposes. As such, if one ignores the restriction of "for the purposes of the diplomatic protection", the impression is that this provision establishes a general rule that seems appropriate for any purpose whenever the determination of the State of nationality is required. Apparently, this difficulty has resulted in providing a non-exhaustive list of the connecting factors that are commonly used to confer nationality.[31] First, reference is made to the chief principles on which the conferral of nationality is grounded, namely; the descent from a national (*jus sanguinis*), and the birth within State territory (*jus soli*).[32] In addition, other manners of the acquisition of nationality, such as naturalization and succession of States, are also mentioned.[33]

Apart from this, the crucial issue here concerns the influence of the weakness in the connection between the State and its national on the exercise of DP. In other words, does the absence of an effective connection deprive the individual, who possesses one nationality, of this right?

[29] Article 9 of the CRS.
[30] Article 8 of the CRS
[31] ADPC, Report of the International Law Commission, Fifty-Eighth Session, [2006] Doc. (A/61/10) 32.
[32] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 388.
[33] ADPC (n 31) 32.

In *Nottebohm,* the opinion of the ICJ was that DP cannot be afforded unless the connection between the protecting State and its national seems genuine.[34] However, the Court was confronted in this case with a situation where the injured person appeared to have obtained the nationality of the claimant State in a manner that did not conform with international law.[35] Hence, the international effect of Nottebohm's naturalization was at the core of the ICJ's consideration, which had to ascertain whether:

> The nationality conferred on Nottebohm by Liechtenstein by means of a naturalization […] can be validly invoked as against Guatemala, and whether it bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala and therefore entitles it to seise the Court of a claim relating to him".[36]

Owing to the exceptional circumstances under which the naturalization took place, particularly having "no settled abode, no prolonged residence in that country at the time of his application for naturalization",[37] the Court released the defendant State from the duty of recognizing "nationality granted in such circumstances".[38] Such special circumstances led the ILC to take the approach that "the Court in *Nottebohm* case did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein's position is required to show a genuine link with it national". [39]

In light of this, it seems correct to say that if the injured person obtains their nationality in accordance with international law, they will benefit from DP regardless of the absence of a genuine connection with the protecting State.[40] In fact, this interpretation is useful in today's

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[34] *Nottebohm Case (Liechtenstein v. Guatemala),* (second phase), Judgment of 6 April 1955 (1955) ICJ Rep 4, pp12-13 and 17.
[35] ibid, p 21.
[36] ibid, pp 16-17.
[37] ibid, p 25.
[38] ibid, p 26.
[39] ADPC (n 31) 33.
[40] Robert Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 (1) Harvard International Law Journal 1, 59.

world where "there are millions of persons who are drifted away from their States of nationality to make their lives is States whose nationality they never acquire".[41]

Moreover, this interpretation finds support in the practice of States and case law. For example, the settlement of Mr. Diallo in the DRC for thirty-two years had no impact on the admissibility of his claim.[42] Despite the fact that residency in a foreign country for a long period is sufficient evidence to demonstrate a weakness in the connection between the persons and their original State, the close connection between Mr. Deghayes and the UK did not lead the British Government to protect him diplomatically.[43] The response of the Minister of Foreign Affairs to his claim was that "although we understand Mr. Deghayes has long term or indefinite leave to remain in the United Kingdom, he is a Libyan national and not a British national. We are therefore unable to act on his behalf. His detention and welfare are matters for the United States and Libya".[44]

In summing up, it has become clear that the existence of the nationality bond, even with a tenuous connection, between the protecting State and the protected citizen at the time when the wrongful act was taken place, is broadly acknowledged. On the other hand, the same cannot be said about the likely consequences of changes in the nationality of the injured person after the date of the damage; this is explored in the following section.

4.2.2 Elucidating the Status of the Continuous Nationality Rule

Scholars have differing views on the necessity of possessing the nationality of the plaintiff State continuously from the time when the damage occurred.[45] In general, the argument

[41] John Dugard, First Report on Diplomatic Protection [2000] Doc. (A/CN.4/506 and Add. 1**)** 41.
[42] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment of 24 May 2007 (2007) ICJ Rep 582, para 41.
[43] *R (on the application of Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972. (Admin), para 29.
[44] ibid, para 29.
[45] See e.g. Francisco Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge University Press 2004) 37; Patrick Dumberry,

against continues nationality stems from the probability of causing a great injustice if the injured changes their nationality after the occurrence of the alleged violation.[46]

Fitzmaurice criticises the rigid application of the continuity rule because it could lead to "situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations".[47] Since these considerations do not serve the ends of justice,[48] Sinclair sees no reason that can be advanced for the survival of such a rule other than that the plaintiff State is loath to espouse the claim of those who were not its nationals at the time of injury.[49] In a similar vein, the rejection of the rule of continuity has also been grounded on the assertion that the rule is not consistent with the Vattelian approach to DP.[50] According to this approach, the damage to the individual accrues to the State of nationality immediately at the time of injury, which renders subsequent changes in nationality irrelevant for the purposes of the claim.[51]

On the other side of the debate, the argument that the nationality of the injured person should be continuous from the date on which the wrong was committed and thereafter is strongly supported in the writings of some eminent publicists such as Hurst,[52] Borchard,[53] Jessup,[54]

'Obsolete and Unjust: The Rule of Continuous Nationality in the Context of State Succession' (2007) 76 (2/3) Nordic Journal of International Law 153.

[46] See e.g. Mohamed Bennouna, Preliminary Report on Diplomatic Protection [1998] Doc. (A/CN.4/484) para 24; John Dugard, First Report on Diplomatic Protection (Add.1) (n 41) para 189.

[47] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase), Judgment of 5 February 1970 (1970) ICJ Rep 3, Separate Opinion of Judge Gerald Fitzmaurice, para 63.

[48] Sidney Freidberg, 'Unjust and Outmoded: The Doctrine of Continuous Nationality in International Claims' (1969) 4 (5) International Lawyer 835, 836; Christopher Ohly, 'A Functional Analysis of Claimant Eligibility' in Richard Lillich (ed), *International Law of State Responsibility for Injuries to Aliens* (University of Virginia Press 1983) 290.

[49] Ian Sinclair, 'Nationality of Claims: British Practice' (1950) 27 British Yearbook of International Law 125, 130.

[50] See above, pp 43-44.

[51] John Dugard, First Report on Diplomatic Protection (Add.1) (n 41) para189.

[52] Cecil Hurst, 'Nationality of Claims' (1926) 7 British Yearbook of International Law 163,182.

[53] Edwin Borchard, 'The Protection of Citizens Abroad and Change of Original Nationality' (1934) 43 (3) Yale Law Journal 359.

Garcia-Amador,[55]and Jennings and Watts.[56] By and large, the continuance of nationality is centred upon the assumption that:

> Any other rule would open wide the door for abuses and might result in converting a strong nation into a claim agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims.[57]

Having said that, the proponents of the continuity rule differ on the period during which the link of nationality must exist. Some are of the view that the nationality of the claimant State must be possessed "at the time of suffering the injury and conserve[d] until the claim is adjudicated".[58] Others, on the other hand, adopt the view that the link of nationality must persist until the date on which the claim is presented.[59] However satisfactory this argument may be, it could be challenged by suggesting that it is uncommon under international law to make assertions that have no backing in State practice and case law.[60] Therefore, one needs to investigate whether or not the rule of continuity finds support in States practice and case law.

In the practice of States, the UK has long held that "the claimant should be a British national both at the time when the injury was suffered and at the time when the claim is presented".[61] Likewise, the rule of continuity was adopted by Algiers Accords of 1981.[62] In this regard,

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[54] Philip Jessup, 'Responsibility of States for Injuries to Individuals' (1946) 46 (6) Columbia Law Review 903,909.

[55] Francisco Garcia-Amador, Third Report on State Responsibility [1958] Doc. (A/CN.4/111) para 22.

[56] Robert Jennings and Arthur Watts, *Oppenheim's International Law: Vol 1, Peace: Introduction and Part 1* (9th edn, Longman 1992) 512.

[57] John Dugard, First Report on Diplomatic Protection (Add.1) (n 41) para 191.

[58] See e.g. Cecil Hurst (n 52) 182; Francisco Garcia-Amador (n 55) 22.

[59] See e.g. Guy Leigh, 'Nationality and Diplomatic Protection' (1971) 20 (3) International and Comparative Law Quarterly 453, 456; Chittharanjan Amerasinghe, *Diplomatic protection* (Oxford University Press 2008) 102-103; Malcolm Shaw, *International Law* (8th edn, Cambridge Press 2017) 616.

[60] Edwin Borchard, 'The Protection of Citizens Abroad and Change of Original Nationality' (n 53) 381.

[61] Protection of Nationals Abroad, B: Diplomatic Action and Claims Practice, (1988) 37 ICLQ 1002, 1006-8.

[62] Algiers Accords consisted of a set of agreements between the United States and the Islamic Republic of Iran to find solutions to hostage crisis, mediated by Algeria where it was signed on the 19th of January 1981. See e.g. Rahmatullah Khan, *The Iran-United States Claims Tribunal: Controversies, Cases, and Contribution* (Martinus Nijhoff Publishers 1990); George Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal (Oxford

Article VII of the Claims settlement Declaration attached to Algiers Accords states that "claims of nationals of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that State".[63]

At the judicial level, it might be true that the PCIJ was less explicit in its support for the rule of continuous nationality in *Panevezys- Saldutiskis Railway*.[64] In this case, the first objection raised by the Lithuanian Government was based on "the non-observance by the Estonian Government of the rule of international law to the effect that a claim must be a national claim not only at the time of its presentation, but also at the time when the injury was suffered".[65] Having joined the preliminary objections raised by Lithuania to the merits decision, [66] the PCIJ did not refute the first part of the objection and unquestionably accepted the second part of it by stating that "the Lithuanian agent is right in maintaining that Estonia must prove that at the time when the injury occurred which is alleged to involve the international responsibility of Lithuania the company suffering the injury possessed Estonian nationality".[67]

More recently, however, the arbitration tribunal has explicitly held in *Loewen Group Inc. v. USA* that "international law has not evolved to the position where continuous nationality to

University Press 1996); Charles Brower and Jason Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers 1998).

[63] Declaration of The Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, at http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf (accessed 15/06/2019).

[64] *Panevezyz Saldutisks Railway case (Estonia v Lithuania)*, Preliminary Objections, Order made on 30 June 1938 (1938) PCIJ Rep Series A/B No 75; *Panevezyz Saldutisks Railway case (Estonia v Lithuania)*, Merits, Judgment of 28 February 1939 (1939) PCIJ Rep Series A/B No 76.

[65] In addition, the Lithuanian Government raised another objection to the claims of the Estonian Government which was based on the non-observance of the rule of international law requiring the exhaustion of the remedies afforded by municipal law. *Panevezyz Saldutisks Railway case (Estonia v Lithuania)*, Preliminary Objections, (n 64) p 55.

[66] ibid, p 56.

[67] *Panevezyz Saldutisks Railway case (Estonia v Lithuania)*, Merits, (n 64) pp 16-17.

the time of resolution is no longer required".[68] In light of this, the initial impression is that the rule of continuous nationality seems to be extensively accepted in State practice and international case-law. Nevertheless, the above-mentioned instances of State practice and case law have been seen as insufficient evidence for establishing a binding rule of customary international law in the context of DP.[69]

For example, Mendelson supports a complete abandonment of the rule of continuity.[70] Likewise, Dugard has made every endeavour to exclude the rule of continuous nationality by proposing that:

> Where an injured person has undergone a bona fide change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.[71]

Interestingly, this proposal makes the rule of continuity an exception instead of determining the circumstances in which the rule may not be applied. To this end, several justifications have been put forward in order to support the view that the injured person should only be a national of the protecting State when the claim is presented. First, the doctrinal conflict between the application of the rule of continuity and the Vattelian conception of DP has been raised.[72] Nevertheless, the proposal itself conflicts with the Vattelian conception due to its

[68] *The Loewen Group, Inc. and Raymond L. Loewen. v United States of America*, [ICSID], Case No. ARB(AF)/98/3, para 35.

[69] Matthew Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes' (2004) 36 George Washington International Law Review783; 784.

[70] Maurice Mendelson, 'The Runaway Train: The 'Continuous Nationality Rule' From the Panevezys-Saldutiskis Railway Case to Lowen' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Publishing 2005) 103.

[71] John Dugard, First Report on Diplomatic Protection (Add.1) (n 41) para 189.

[72] ibid.

insufficient explanation of why the new State of nationality, which was not harmed when the injury occurred, is entitled to protect its new citizen.

Secondly, HR considerations have been raised in opposition to the rule of continuity by arguing that the institution of DP needs to be released from "the chains of the continuity rule".[73] It is said that this liberation guarantees the establishment of a resilient regime that takes into consideration the realities of current international law, according to which the change of nationality is widely accepted as a basic right that is ensured by conventional and customary law.[74] However, it appears that such an argument is a clear example of where the consideration of HR concerns is not appropriate. This is largely due to the fact that the voluntary change of nationality is an optional procedure associated with several advantages and disadvantages. Thus, if someone desires the benefit of being a national of another State, they must accept the consequent drawbacks that may occur.[75]

In effect, the above-mentioned proposal was met with resistance.[76] Brownlie, asserts that such a suggestion attacks a principle that is generally supported by State practice in a field where governments claimed that they encountered no difficulties.[77] Likewise, Economides emphasises that "the classic rule of continuous nationality is an established principle of international law that has long been the bedrock of the exercise of DP".[78] In the end, it was agreed that the final provision on the issue should strike a balance between the necessity of maintaining the rule of continuous nationality and the possibility of making it subject to some exceptions. However, this provision raises the question of the extent to which the continuous nationality rule is reflected in the ILC's output on DP.

[73] ibid, 246.
[74] ibid.
[75] Edwin Borchard, 'The Protection of Citizens Abroad and Change of Original Nationality' (n 53), 381
[76] The proposal was subject to a fierce debate between the members of the ILC. See particularly, Meetings 2680, 2685 and 2686, Yearbook of the International Law Commission [2001] Vol I, Doc. (A/CN.4/SER.A/2001) 86-123 and 133.
[77] ibid, Meeting 2685, 130, para 30.
[78] ibid, 25, para22.

4.2.3 Questioning the Final Outcome of the ILC with regard to the Rule of Continuity

Article 5 (1) of the ADP was reworded to provide that:

> A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.[79]

Dugard's statement that this paragraph progressively develops the law by requiring that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim.[80] In reality, however, this paragraph merely codifies one of the previously mentioned views that demands a continuance in the bond of nationality from the time of injury until the time of the claim's presentation at least.[81] In addition, there is no need for adding the term "official presentation" simply because DP means, in its accurate sense, bringing a formal claim by the protecting State.[82]

More substantially, the adoption of the date in which the claim is presented as a maximum date means that any change in the nationality of the injured person following the presentation of the claim will have no impact on its conclusion. Practically speaking, however, changes in the nationality of the injured are conceivable if one considers the period of time that may pass between filing the claim and the final decision. The passing of fourteen years between the presentation and the ultimate judgement in *Diallo*,[83] makes it legitimate to suppose that Guinea would have withdrawn the case if Diallo had willingly lost his nationality either by

[79] ADP (n 12) 6.
[80] ADPC (n 31) 36.
[81] See above, p 111.
[82] See above, pp 49-50.
[83] Guinea brought this case before the ICJ on 28 December 1998 and the Court took 14 years to deliver its final decision. On 24 May 2007, the Court dismissed the DRC's preliminary objection regarding the LRs rule and the nationality of the claim rules. On 30 November 2010, the Court delivered its decision on the merits confirming the responsibility of the DRC for the violation of Diallo's HR and ordered the DRC to pay compensation the amount of which was subjected to the agreement between the parties. Since this agreement was not reached the Court delivered its compensation award on 19 June 2012. See https://www.icj-cij.org/en/case/103 (accessed 15/06/2019).

acquiring the nationality of the DRC or another nationality. Therefore, it seems plausible that the date of the final decision should have been adopted as the date until which the bond of nationality must exist.

Having incorporated the general principle, the need for taking account of situations where the change of the injured person's nationality, either after the date of injury or before the date of the final decision, takes place regardless their willingness should be highlighted. In this regard, there is no doubt that the succession of States is a clear example of the circumstances in which the change of nationality is compulsorily imposed.[84] However, Article 9 (2) of the ADP does not distinguish the mandatory change of nationality in such a circumstance from other situations. The paragraph states that:

> A State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.[85]

As argued above, the voluntary change of nationality is not a reasonable basis for criticising the application of the rule of continuity. Therefore, it should be questioned why it is being equated with other situations in which a change in nationality is imposed. It is argued that the justification of this is that the acquisition of a new nationality, after the date of injury, is subject to several conditions and should be done in a good faith "for reasons unrelated to the bringing of the claim".[86] Indeed, this mirrors the traditional reasoning of the rule of continuity that considers any deliberate change in the injured nationality, after the occurrence of the

[84] See e.g. Christian Knox, 'The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition' (2012) Political Science Student Work 1; James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 374-448.
[85] ADP (n 12) 3.
[86] ADPC (n 31) 38.

injury, as evidence of the desire of the concerned person to be a citizen of a country more willing and able to bring a claim on their behalf.[87] Currently, it seems difficult to assume that the powerful States that are usually capable of asserting successful protection would put themselves in the position of fraudulently granting naturalisation to purchase a claim.[88] On the contrary, States are generally very cautious with regard to the conferment of nationality and require a long period of residence before considering the naturalisation request.[89]

4.3 Are there any Circumstances under which DP could be conferred upon Non-Citizens?

There are various reasons for investigating the possibility of subjecting the requirement of nationality to some exceptions: firstly, due to unsuccessful attempts to contain some categories of non-nationals within the domain of DP; secondly, due to the confusing reference, by some regional conventions, to the possibility of exercising DP for the sake of non-nationals; and thirdly, because of the erroneous analogy between DP and the protection of crew members by the flag State.

4.3.1 Nominal Exceptions Based upon Humanitarian Grounds

The dilemmas of statelessness and refugees have always been amongst the priorities of the international community.[90]At this stage, the aim is confined to exploring whether these

[87] Guy Leigh (n 59) 420.
[88] ibid.
[89] Michigan Law Review, 'Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal' (1984) 83 (3) 597,615.
[90] In this regard, instruments such as the 1954 Convention Relating to the Status of Stateless Persons and the 1961 CRS are the key international conventions addressing statelessness. Likewise, the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol are the centrepiece of refugee's protection. See e.g. James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005); Kate Darling, 'Protection of Stateless Persons in International Asylum and Refugee Law' (2009) 21 (4) International Journal of Refugee Law 742; Maryellen Fullerton, 'Without Protection: Refugees and Statelessness: A Commentary and Challenge' (2013) Brooklyn Law School Legal Studies (Research Paper No. 351); Alice Edwards and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014).

categories of people can be sheltered by means of DP. Consequently, attention will be paid to assessing the efficiency of Article 8 of the ADP, which reads as follows:

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.[91]

Commenting on this provision, Amerasinghe and Vermeer-Künzli have stated that the provision presents a praiseworthy step towards developing the law of DP.[92] Others, having warmly welcomed this exception, criticise the limitations to which the exercise of DP on behalf of these persons is subjected.[93] It is said that the inclusion of paragraph 3 is centred upon the assumption that "most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow DP in such cases would be to open the floodgates for international litigation".[94] Nevertheless, Kateka considers this inclusion a hurdle that detracts from the effectiveness of the exception by contending that "that fear is mistaken and exaggerated, just as much as the fear that

[91] ADP (n 12) 4.

[92] Chittharanjan Amerasinghe, *Diplomatic protection* (n 59) 117; Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection: A Reappraisal' (n 2) 89. See also, Paula Escarameia, 'Professor Dugard as an Innovator in the Work of the International Law Commission' [2007] 20 (4) Leiden Journal of International Law 931,935; Max Plessis, 'John Dugard and the Continuing Struggle for International Human Rights' (2010) 26 (2) South African Journal on Human Rights 292.

[93] See e.g. Alberta Fabbricotti, 'The Diplomatic Protection of Refugees by their State of Asylum: A Few Remarks on the Exclusion of the State of nationality of the Refugee from the Addressees of the Claim' (2005) 43 (4) AWR Bulletin 266; James Kateka, 'John Dugard's Contribution to the Topic of Diplomatic Protection' (2007) 20 (4) Leiden Journal of International Law 921; Gerald Neuman, 'The Resilience of Nationality' (2007) 101 American Journal of International Law 97, 99.

[94] ADPC (n 31) 51.

demands for diplomatic action by refugees might deter States from accepting refugees".[95] Similarly, Fabbricotti submits that the perpetration of a wrongful act means the wrongdoer shall be penalised either it was the State of the refugee's nationality or not, but paragraph 3 leaves no room for such a responsibility and seems to provide the wrongdoer with a certain impunity.[96]

Be that as it may, what seems more important is the fact that Article 8 runs counter to a firm rule according to which only citizens can benefit from DP. Thus, one might legitimately question the potential impact of such an exception. In other words, does this inclusion grant surrogate protection to these categories of people? Seemingly, the practicability of Article 8 could, among other indicators, be deduced from the related case law. In this respect, the decision of the EWCA in *Al-Rawi* case exemplifies a perfect instance of the impracticability of exempting stateless persons and refugees from the requirement of nationality in order to qualify for DP.

This case was firstly filed before the EWHC by a number of claimants who were held in Guantanamo Bay "none of them were British nationals but each has been a long-term resident of the United Kingdom".[97] The first three claimants, Mr. Bisher Al Rawi,[98] Mr. Jamil EL Banna[99] and Mr. Omar Deghayes,[100] were given indefinite leave to remain in the UK, the first because of his long residence, the second and the third were refugees who had both been

[95] James Kateka (n 93) 927.
[96] Alberta Fabbricotti (n 93) 268.
[97] *R (on the application of Al Rawi and others) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 972 (Admin), para 1.
[98] Mr. Al Rawi is an Iraqi national who was born in Iraq in 1967 and came to the UK with his family in 1983 and remained in this it until the time of his detention. ibid, para 3.
[99] Mr. EL Banna is a Jordanian national who came to the UK in 1994 and was given indefinite leave to remain as a refugee. ibid, para 4.
Responding to their request the Foreign Secretary said that "although both men have a long residence in the UK, this is not a substitute for nationality". ibid, para, 30.
[100] Mr. Deghayes is a Libyan citizen left his country after the assassination of his father, it is said, by Gadafy's regime in 1980. ibid, para12.

granted asylum in Britain.[101] Together, they claimed that "their connection with this country is such that they have a legitimate expectation that the British government will make a formal and unequivocal request for their return in the same way as it did in relation to British nationals".[102] Notwithstanding, "the secretary of State for Foreign and Commonwealth Affairs, had consistently declined to make such a request, making it clear that he considers himself under no obligation to do so because these claimants are not British nationals".[103]

The EWHC dismissed the claims and confirmed that:

> Despite the fact that the first claimant has good humanitarian arguments for being treated in the same way as a British national, by reason of his long residence here, and the fact that all his family are British nationals, the only argument for saying that it would be wrong to treat him differently from a British national is that it could be said that to do so would substitute formality for reality. But the fact is that he is not a British national; and international law and the Convention to which we have referred, clearly accept that what is described as a formality is a matter of substance. Nothing said or done by the UK government could have given him any expectation otherwise.[104]

With regard to the second and the third claimants, it was held that:

> They are refugees; they have both been granted asylum in the United Kingdom. And there is respectable academic support for the proposition that refugees should be accorded diplomatic protection by the State which has accepted that status.[105] However, there are some difficulties with that argument, among them, is the fact that Article 8 on diplomatic protection is not yet part of international law, and even if it was clear that it would become accepted, that would not change the current legal position.[106]

[101] ibid, paras 4 and 12.
[102] ibid, para 1.
[103] ibid, para 1.
[104] ibid, para 59.
[105] ibid, para 60.
[106] ibid, para 63.

The claimants appealed the decision of the EWHC before the EWCA on the grounds, *inter alia*, that "(i) the decision of the High Court constituted a breach of enforceable legitimate expectations; (ii) the Foreign Secretary's position on State-to-State claims in international law and the prime role of nationality was mistaken".[107]

The EWCA dismissed the appeal and stated, among other things, that there is no basis for accepting the idea of the legitimate expectation, as held in the *Abbasi's case*,[108] simply because the claimants are not British nationals.[109] The Court then went on to consider the applicability of Article 8 of the ADP holding that this provision could not be treated as existing law because "no principle of international law had yet been established by which the status of refugees was assimilated with that of nationals in the context of the diplomatic protection afforded by means of State-to-State claims".[110]

No doubt, these decisions cast doubt on the possible influence of Article 8 of the ADP and illustrate how insignificant it is.[111] It is a pity unfortunate that some of the most oppressed categories of people on earth cannot be diplomatically protected by the State where they lawfully and habitually resident. However, it is worth noting that since the growing number of refugees is mainly caused by political conflicts around the world, the most effective solution is likely to be a political one.[112] Similarly, statelessness is a timeless and unsolvable

[107] *Regina (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Another (United Nations High Commissioner for Refugees intervening),* [2006] EWCA Civ 1279, para 4.
[108] See above, p 64.
[109] *Regina (Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and Another (United Nations High Commissioner for Refugees intervening)* (n 93) para 89.
[110] ibid, para 3.
[111] Guy Goodwin-Gill, 'The Queen (Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another (United Nations High Commissioner for Refugees intervening)' (2008) 20 (4) International Journal of Refugee Law 675.
[112] Chusei Yamada, Meeting 2627, Yearbook of the International Law Commission [2000] Vol I, Doc. (A/CN.4/SER.A/2000) 122.

dilemma, attributable to the errors of international law and to the rigidity of domestic law,[113] neither of which can be solved by the institution of DP.

4.3.2 A Treaty-Based Exception

Many decades ago, the PCIJ has made it clear that "in the absence of a special agreement, the right to exercise DP is necessarily limited to intervene on behalf of the State's nationals".[114] According to Vermeer-Künzli, the special agreements mentioned in this judgment are limited to "agreements between the State of nationality and the defendant State".[115] Seen from a historical perspective, however, it appears more logical to presume that these agreements mean the traditional agreements and treaties which gave, at the time of the judgment, States with overseas empires the capacity to extend their protection to the native residents of the mandated territories and those of the territories under the system of trusteeship.[116]

While it is true that there is no place for these agreements under contemporary international law,[117]some regional conventions refer to the exercise of DP on behalf of non-nationals.[118] As such, Article 46 of the Charter of Fundamental Rights of the European Union, which literally

[113] See e.g. Lindsey Kingston, 'A Forgotten Human Rights Crisis: Statelessness and Issue (Non) Emergence' (2013) 14 (2) Human Rights Review 73; Will Hanley, 'Statelessness: An Invisible Theme in the History of International Law' (2014) 25 (1) European Journal of International Law 321,322; Matthew Gibney, 'Statelessness and Citizenship in Ethical And Political Perspective' in Alice Edwards, and Laura Van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 57; Laura Van Waas, 'Are We There Yet?' The Emergence of Statelessness on the International Human Rights Agenda' (2014) 32 (4) Netherlands Quarterly of Human Rights 342.

[114]*Panevezyz-Saldutiskis Railway*, Merits, (n 64) p16 .

[115] Annemarieke Vermeer-Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (2006) 66 Heidelberg Journal of International Law 321, 341.

[116] Hersch Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens' (1947) 9 (30) Cambridge Law Journal 330,339.

[117] Benedetto Conforti, *The Law and Practice of the United Nations* (3rd edn, Martinus Nijhoff Publishers 2005) 265.

[118] European Commission Green Paper of 28 November 2006 on Diplomatic and Consular Protection of Union Citizens in Third Countries [COM (2006) 712 final Official Journal C 30 of 10.02.07]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l16022 (accessed 15/06/2019).

corresponds to Article 23 of the Treaty on the Functioning of the European Union,[119] postulates that:

> Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.[120]

In fact, these provisions raise significant questions about the actual meaning of the protection that can be afforded to Europeans by other members of the European Union (EU). It is unclear whether these provisions cover DP as it is known under international law or whether they are being developed an independent legal system different from the long-established institution of DP.[121] In investigating these areas, two points should be demonstrated.

The first is related to the above-mentioned differences between DP and other State activities.[122] Once again, it should be asserted that the decision to grant DP, in its strict sense, is generally taken after careful consideration of the given situation by the executive authorities of the protecting State, not by an embassy.[123] Indeed, what can be granted by the diplomatic or consular authorities on foreign territory is simply the protection authorised by the VCDR and the VCCR, which does not necessarily have to be DP.[124] Furthermore, the reference to situations in which there are no permanent representation of the State of the

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[119] Official Journal of the European Communities, December 2000, C 364/19. Available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed15/06/2019).

[120] Official Journal of the European Union, October 2012, C 326/58. Available at: https://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf (accessed 15/06/2019).

[121] Madalina Moraru, 'Protection of EU Citizens Abroad: A legal Assessment of the EU Citizen's Right to Consular and Diplomatic Protection' (2011) 3 (2) Perspective on Federalism 67, 94.

[122] See above, pp 49-50.

[123] Eileen Denza, 'Article 46', in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1177, 1187.

[124] Florian Geyer, 'The External Dimension of EU Citizenship: Arguing for Effective Protection of Citizens Abroad' (2007) 136 (3) Centre for European Policy Studies 1, 5; Stefano Battini, 'The impact of EU law and Globalization on Consular Assistance and Diplomatic Protection' (2011) Global Administrative Law and EU Administrative Law 173,177; Jan Wouters, Sanderijn Duquet and Katrien Meuwissen, 'The European Union and Consular Law' (2013) Working Paper No. 107, Leuven Centre for Global Governance Studies and the Institute for International Law 1.

injured person, which is only applicable outside the EU, implies the applicability of these provisions to diplomatic and consular assistance as a main task of the diplomatic or consular authorities abroad,[125]and highlights the exceptional nature of this protection which could be given in special circumstances.[126]

The second point that needs to be illustrated concerns the so-called EU Citizenship and the validity of rendering it equal to the bond of nationality between a country and its nationals.[127] As a matter of law, EU citizenship does not fulfil the requirement of nationality for the purpose of DP.[128] Consequently, the afore-mentioned EU treaty provisions do not establish an autonomous system of protection and generally interpreted as non-applicable to DP. Yet, these provisions are applicable to diplomatic and consular assistance.[129]

4.3.3 A False Analogy with Protection Based on Practical Considerations

As a matter of a wider principle, the protection of a ship's crew by the State of its nationality (the flag State) regardless of their nationality is generally accepted.[130] In its inaugural judgment, the International Tribunal for the Law of the Sea (ITLOS) was confronted with a

[125] Alessandro Saliceti, 'Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 (1) European Public Law 91, 94.

[126] Federico Forni, 'Diplomatic Protection in EU Law: What's New under the Sun?' (2014) 9 (2) The Hague Journal of Diplomacy 150,175.

[127] See e.g. Elspeth Guild, 'The Legal Framework of Citizenship of the European Union', in David Cesarani and Mary Fulbrook (eds) *Citizenship, Nationality and Migration in Europe* (Routledge Press 1996) 30; Elizabet Meehan, 'Citizenship and the European Union' (2000) Center for European Integration Studies 1: Pierluigi Simone, 'Nationality and Regional Integration: The case of the European Union' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge Press 2013) 169.

[128] Annemarieke Vermeer-Künzli, Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance' (117) 342.

[129] See e.g. John Dugard, Seventh Report on Diplomatic Protection [2006] Doc. (A/CN.4/567) para 26; Patrizia Vigni, 'Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution?' (2010) European University Institute (EUI working papers) 1; Peter Pavlovič, 'Protection of EU Citizen According to Art. 23 TFEU: Diplomatic Protection as Defined by International Law?' (2012) Journal of Interdisciplinary Research 1.

[130] In *I'm Alone case*, a Canadian ship was sunk by an American guard ship, the Canadian government succeeded in seeking redress for three non-citizens crew members. This request was accepted on the basis that where a claim is on behalf of a vessel, members of the crew are to be deemed, for the purposes of the claim, to be of the same nationality as the vessel. *S.S "I'm Alone" (Canada, United States)* (30 June 1933 and 5 January 1935) UNRIAA, Vol III, 1609.

dispute that arose out of "the arrest and the dentition of the *Saiga*, an oil tanker, by Guinea, while it was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa".[131] The tanker "was registered in Saint Vincent and the Grenadines and its master and crew were Ukrainian nationals. There were also three Senegalese workers on board at the time of the arrest".[132]

To challenge the admissibility of the case, Guinea contended, *inter alia*, that "Saint Vincent and the Grenadines is not competent to institute these claims on behalf of the persons concerned since none of them is a national of Saint Vincent and the Grenadine".[133] On the other hand, Saint Vincent and the Grenadines argued that:

> The rule of international law that a State is entitled to claim protection only for its nationals does not apply to claims in respect of persons and things on board a ship flying its flag. In such cases, the flag State has the right to bring claims in respect of violations against the ship and all persons on board or interested in its operation. Saint Vincent and the Grenadines, therefore, asserts that it has the right to protect the ship flying its flag and those who serve on board, irrespective of their nationality. [134]

In dealing with this issue, the Court was of the view that "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[135] To justify its opinion, the Court drew attention to "the transient and multinational composition of ships' crews",[136] which may lead to undue hardship "if each person sustaining damage were obliged to look for protection from the State of which such a person is a national".[137] Consequently, "the Tribunal was unable to accept Guinea's contention that Saint Vincent and the Grenadines is not entitled to

[131] *MIV "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment, [1999] ITLOS Rep 10, para 31.
[132] ibid.
[133] ibid, para 103.
[134] ibid, para 104.
[135] ibid, para 106.
[136] ibid, para 107.
[137] ibid.

present claims for damages in respect of natural and juridical persons who are not nationals of Saint Vincent and the Grenadines".[138]

In light of this, the question of whether this type of protection is analogous to DP should be raised. Watts and Brownlie are of the view that this kind of protection does not constitute an example of DP "in the absence of the link of nationality between the flag State of a ship and the members of a ship's crew".[139] However, the ILC insisted, despite differences of views amongst its members,[140]on listing this type of protection under the broader category of DP. Pursuant to Article 18 of the ADP:

> The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.[141]

This provision describes the intervention of the State of nationality as DP, whereas the claim of the State of the ship's nationality is a mere request for reparation. This request cannot be accepted unless a foreign member of the crew was "injured in connection with an injury to the vessel resulting from an internationally wrongful act". This means that such a request does not detract from the enactment of DP but might work as a valuable supplement to it.[142] By so doing, it establishes a rule of priority according to which the State of nationality of the

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[138] ibid, para 108.

[139] See e.g. Arthur Watts, 'The Protection of Alien Seamen' (1958) 7 (4) International and Comparative Law Quarterly 691,711; Ian Brownlie, Meeting 2796, Yearbook of the International Law Commission [2004] Vol I, Doc. (A/CN.4/SER.A/2004) 43, para 39. On the contrary, See; Sten Verhoeven, 'Diplomatic Protection by the Flag State in Favour of the Crew of a Ship'. Available at: https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/dipl.pdf (accessed 15/06/2019).

[140] There has been a lively debate between the members of the ILC on this issue. See particularly, Meetings 2792, 2793, 2794, 2795 and 2796, Yearbook of the International Law Commission [2004] (n 139) 11-44.

[141] ADP (n 12) 8.

[142] David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet & Maxwell Publishing 2015) 510.

individual crewmember should have the first option of affording its protection and, if it does not do so, then the State of the ship's nationality could take action.[143]

Technically, this kind of protection seems to be grounded upon a functional link between the flag State and the injured member. Therefore, it appears more accurate to describe this form of protection as functional protection similar to that afforded by international organizations "to help an agent of the organization in the performance of his duties".[144] This is because the functional protection is not grounded upon the link of nationality, but upon the legal bond between the organization and its agent.[145]

From the discussion in this section, one should reassert that the exercise of DP is heavily reliant upon the possession of the protecting State's nationality. This reflects the reality of contemporary international law, which despite the movement towards a phase where individuals are acquiring rights beyond those afforded by the State, DP is still centred on the assumption that it is "only through the medium of the State, and nationality, that individual may obtain the full range of benefits".[146] As a result of this reality, citizens remain the exclusive beneficiaries of DP.[147] In fact, this exclusivity is not in conflict with the current usage of DP which aims, *inter alia*, to remedy the violations of individuals' HR.[148] This is mainly because non-nationals may benefit from the DP of their own States of nationality,[149]

[143] Giorgio Gaja, Meeting 2796, Yearbook of the International Law Commission [2004] (n 141) 43, para 41.
[144] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949 (1949) ICJ Rep 174, p 182.
[145] The ICJ emphasized this fact by holding that "it is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals". ibid, p 182.
[146] Malcolm Shaw (n 44) 612.
[147] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005 (2005) ICJ Rep168, para 333.
[148] See above, pp 84-89.
[149] Gonçalo Matias, *Citizenship as a Human Right: The Fundamental Right to a Specific Citizenship* (Macmillan Publishers 2016) 41.

or alternatively from the protection of the international community as a whole in situations where a breach of the so-called *erga omnes* obligations has been committed.[150]

4.4 The Multiplicity of Nationality in the Context of DP

The last decades have witnessed a dramatic increase in the phenomenon of possessing more than one nationality, which affects millions of individuals worldwide.[151] The duality or multiplicity of nationality can occur at birth due to the adoption of different attitudes towards the two main principles on which nationality is based.[152] Some States embrace the principle of *jus soli*, whereas others are complying with the principle of *jus sanguinis.*[153] Likewise, several methods such as naturalization, marriage and so on, may lead to the acquisition of a new nationality without losing the original.[154]

As an unavoidable phenomenon in a world where individuals are frequently crossing international boundaries for various reasons,[155] the multiplicity of nationality causes some complexities in the context of DP. The first and most problematic issue pertains to the possibility of its affordance by one State of nationality vis-a-vis another State of nationality. The second controversial issue concerns the exercise of DP by one State of nationality against a third country.

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[150] See e.g. Annemarieke Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes'* (2007) 56 (3) International and Comparative Law Quarterly 553; Giorgio Gaja, 'Is a State Specially Affected When Its Nationals' Human Rights Are Infringed?' in Chand Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Martinus Nijhoff Publishers 2003) 373.

[151] See e.g. David Martin, 'The Trend Towards Dual Nationality' in David Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 3;Alfred Boll, *Multiple Nationality and International Law* (Martinus Nijhoff Publishers 2007) 1; Peter Spiro, 'Dual citizenship as Human Right' (2010) 8 (1) International Journal of Constitutional Law 111,116.

[152] Ian Brownlie, *Principles of Public International Law* (n 32) 388.

[153] ibid.

[154] ADPC (n 31) 35.

[155] Craig Forcese, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law' (2005) 37 George Washington International Law Review 469,490.

4.4.1 DP by One State of Nationality against Another

The eligibility of one State of nationality to afford its protection against a second State in which the injured person is also a national has long been situated at the point of convergence of two competing principles. The first is the principle of non-responsibility, which proscribes one State's adoption of the claims against another in cases where both States consider the injured person as a citizen. The second principle permits this adoption if the requirement of effective or dominant nationality is met.

Before going further, it seems useful to correct a common fallacy according to which the principle of non-responsibility is classified as "the older and more traditional principle",[156]whereas the principle of effective nationality is categorized as the modern principle.[157] To this end, reference is usually made to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws as an instance of the non-responsibility principle.[158] Nevertheless, a quick historical account of some arbitral awards illustrates that the principle of effective nationality may have existed first.[159] In this regard, it is usually said that the decision of the British Privy Council in the *Drummond* case of 1834 was the first precedent in which this test was invoked.[160] The claimant was a dual national of France and Britain asking reparation for the expropriation of his property by the French authority in 1791.[161] The claim was refused because:

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[156] Abraham Kannof, 'Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, and the Case of Anwar Al-Aulaqi' (2011) 25 Emory International Law Review 1371, 1387.

[157] ibid.

[158] Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws states that "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses".

[159] Zvonko Rode, 'Dual Nationals and the Doctrine of Dominant Nationality' (1959) 53 (1) American Journal of International Law 139,143.

[160] Peter Mahoney, 'The Standing of Dual Nationals Before the Iran-United States Claims Tribunal' (1983) 24 (3) Virginia Journal of International Law 695,700.

[161]Jessica Peake, 'Diplomatic Protection for Dual Nationals: Effective Nationality or Non-Responsibility' (2007) 10 Trinity College Law Review 98, 103.

> Drummond was technically a British subject, but in substance a French subject, domiciled (at the time of seizure) in France, with all the marks and attributes of a French character […] The act of violence that was done to him was by the French Government in the exercise of its municipal authority over its own subject.[162]

Moreover, the standard of dominant nationality is given preference in the Statues of the ICJ[164]and the ILC,[165]whereas the principle of non-responsibility was described in 1949 as "an ordinary practise[….]because States do not exercise protection on behalf of one of its nationals against a State which regards him as its own national".[166] Apparently, the historical account seems far from playing a decisive part in the debate over which one of these principles was applied before the other. Hence, one must examine the substantive justifications for each principle, and which one gains acceptance in theory and practice.

Theoretically, the principle of non-responsibility pays significant attention to the equality of nationalities.[167] It is argued that the espousal of the effective nationality criterion runs counter to the principle of the sovereign equality of States, and permits interference in the internal affairs of the respondent State in respect of a person who is legally a national of that State.[168] As a consequence, a person who possesses two nationalities is incapable of making "one of the countries to which he owes allegiance a defendant before an international tribunal".[169] As a matter of practice, the principle of non-responsibility has been applied in a number of disputes. For example, in the *Salem* case, the American government intervened on behalf of

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[162] ibid.

[164] Article (3) of the ICJ 's Statue points out that "(1) The Court shall consist of fifteen members, no two of whom may be nationals of the same state. (2) A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights".

[165] Article 2 (3) of the ILC Statue provides that "In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights"

[166] *Reparation for Injuries Suffered in the Service of the United Nations* (n144**)** p 186.

[167] Guy Leigh (n 59) 460.

[168] Constantin Economides, Meeting 2625, Yearbook of the International Law Commission [2000] (n 114) para 44.

[169] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (Banks Law Publishing Company 1915) 588.

George Salem, a dual national of Egypt and America, who had been mistreated by the Egyptian government.[170] While Egypt contended that Salem's claim should be rejected because Salem was effectively an Egyptian citizen, the arbitral tribunal said that:

> The principle of the so-called 'effective nationality' the Egyptian Government referred to does not seem to be sufficiently established in international law. […] Accordingly, the Egyptian Government need not refer to the rule of "effective nationality" to oppose the American claim if they can only bring evidence that Salem was an Egyptian subject.[171]

Nevertheless, it should be kept in mind that the principle of non-responsibility may result in depriving dual nationals of their only chance for reparation "out of rigid deference to the defendant State sovereignty".[172] Consequently, it is strongly advised that the appropriate solution to this problem lies in the application of the effective or dominant nationality standard.[173] In its essence, this principle gives the State to which the injured person has predominantly linked the right to protect them against wrongs attributed to another State that also considers them as a citizen.[174]

As mentioned above, this principle has been in existence for a long time,[175] but the case that continued to be perceived as the fundamental frame of reference is that of *Nottebohm.*[176] Although this case did not involve a conflict between two nationalities, the predominance of effective nationality was confirmed by announcing that:

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[170] *Salem Case (Egypt, USA)* (1932), UNRIAA, Vo II, 1161.
[171]ibid, p 1187.
[172] See e. g. Kay Hailbronner, 'Rights and Duties of Dual Nationals: Changing Concept and Attitudes' in David Martin and Kay Hailbronner (eds), *Rights and Duties of Dual Nationals: Evolution and Prospects* (Kluwer Law International 2003) 22; Jessica Peake (n 163) 105.
[173] John Dugard, First Report on Diplomatic Protection (n 41) paras 121-159
[174] ibid.
[175] William Griffin, 'International Claims of Nationals of Both the Claimant and Respondent States: The Case History of a Myth' (1967) International Lawyer 400.
[176] See e.g. the decision of the Italian- American Conciliation Commission in *Mergé Case (USA v. Italy)* (1955) UNRIAA, Vol XIV, pp 236-248. *Mergé Case, (USA v. Italy)* (1955) UNRIAA, Vol XIV, pp 236-248.

> International arbitrators have decided […] numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.[177]

Writing in regard to this case, Amerasinghe says that "it is difficult to conclude that the case is authority […] because it did not involve the claimant's national having the nationality of the respondent State".[178] However, this view might be challenged by referring to the jurisprudence of the Iran-United States Claims Tribunal (IUSCT) as an example of a dispute between two States of nationality.[179] On several occasions, the tribunal prioritised the principle of dominant nationality by giving the dual nationals of the two States the right of making claims before it when their dominant and effective nationality was of the State other than the respondent.[180] The clearest example of this tendency is to be found in case No.A18, where the full tribunal supported the American argument in favour of this principle.[181] The tribunal confirmed the extension of "its jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant was that of the United States".[182]

Nevertheless, some are still of the view that the emphasis on the predominance of the effective nationality principle undervalues the body of precedents which is frequently

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[177] *Nottebohm Case* (n 34), p 23.

[178] Chittharanjan Amerasinghe, *Diplomatic Protection* (n 59) pp 108, 115.

[179] The Tribunal, which was regarded as the most important arbitral body in history had disposed of nearly 4000 cases in a 20-year period. See e.g. Richard Lillich (ed), *The Iran-United States Claims Tribunal 1981-1983* (University of Virginia Press 1983)**;** David Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution' (1990) 84 (1) American Journal of International Law 104; Nancy Combs, 'Toward a New Understanding of Abuse of Nationality in Claims Before the Iran-United States Claims Tribunal' (1999) 10 American Review of International Arbitration, 527.

[180] See e.g. David Bederman 'Nationality of Individual Claimants Before the Iran-United States Claims Tribunal' (1993) 42 (1) International and Comparative Law Quarterly 119, 125; Mohsen Aghahosseini, *Claims of Dual Nationals and the Development of Customary International Law: Issues Before the Iran-United States Claims Tribunal* (Martinus Nijhoff Publisher 2007) 33-36.

[181] IUSCT, Case No. A/18, IRAN-U.S. C.T.R. 251, 265.

[182] ibid.

construed as supporting non-responsibility.[183] Once again, this argument fails to take due account of the recent consensus on embracing the principle of stronger links as a rule of customary international law.[184] This consensus has resulted in incorporating the principle into Article 7 of the ADP, which reads as follows:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.[185]

Instead of utilizing the phrase "effective or dominant", the expression "predominant" was employed because it "conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another".[186] Further, it is said that as the concerned tribunals are called for balancing the strengths of competing nationalities "this exercise is more accurately captured by the term predominant when applied to nationality than either effective or dominant".[187]

Aside from this, some authors highlight the difficulty of differentiating between predominant and non-predominant nationality.[188] Yet, this argument is flawed because the judicial decisions, particularly the decisions of the IUSCT and the ICJ,[189] have provided clarity on the factors to be considered in determining the predominance of the individual's links with the

[183] See, the opinions of Igor Lukashuk and Mauricio Sacasa; Meeting 2625, and Sreenivasa RAO's view; Meeting 2627, Yearbook of the International Law Commission [2000] (n 114) 101-102 and 119.
[184] James Crawford, 'The International Law Commission's Articles on Diplomatic Protection Revisited' in Tiyanjana Maluwa, Max de Plessis and Dire Tladi (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff 2017) 151.
[185] ADP (n 12) 4.
[186] ADPC (n 31) 42.
[187] ibid.
[188] See e.g. Kim Rubenstein, 'Citizenship in a Borderless World' in Antony Anghie and Garry Sturgess (eds), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International 1998) 202; Constantin Economides; Meeting 2625, Yearbook of the International Law Commission [2000] (n 112) p 104.
[189] *Nottebohm Case* (n 34) p 22.

State of nationality. While "the importance of these factors may differ from one case to the next",[190] they generally include:

> habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service.[191]

Having authorized the State of the predominant nationality to afford its protection vis-a-vis the State of the other 'weaker' nationality, the latter is considered as equal to the former if a third party is involved. This element of the ILC's conclusions is discussed in the following sub-section.

4.4.2 DP against a Third State

Reference has previously been made to the fact that the criterion of effective nationality does not apply to situations in which the injured person possesses a single nationality. On the other hand, it has been concluded that the application of this criterion to the claims of dual nationals, even against one State of nationality, is widely acknowledged. The question that must now be addressed concerns the possibility of applying the standard of the dominant nationality in all circumstances where the claims of dual nationals are pursued. According to Article 6 of the ADP:

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

[190] ibid.
[191] ADPC (n 31) 46.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.[192]

It is said that this provision "does not require a genuine or effective link",[193] because "the weight of authority does not require such a condition".[194] However, Crawford notes that this line of reasoning can only be accepted if a landmark case such as *Nottebohm* is disregarded.[195] In that case, although Guatemala was third party, the ICJ accepted its objection to the way in which naturalisation was granted.[196] This means that the ILC's approach contradicts the fact that the standard of effective nationality, as a general rule of international custom, should cover all cases of multiple nationality, either against the State of nationality or a third State.[197] In effect, the third State should be given the right to reject the claim of the dual national unless it is supported by the State with which the injured has effective links. The IUSCT was faced with this situation and required proof of the predominance of American nationality as the injured person held US nationality and that of third State.[198]

Regarding paragraph 2, there are several reasons for suggesting that its implementation is highly problematic. First, it does not lay down a criterion for averting the possibility of filing two separate claims by two States simultaneously. Secondly, it may prevent the State of effective nationality from claiming on behalf of its national if the State of weaker nationality has already been compensated because the respondent State is not obligated to pay

[192] ADP (n 12) 3.
[193] ADPC (n 31) 42.
[194] ibid.
[195] James Crawford, The International Law Commission's Articles on Diplomatic Protection Revisited' (n 183) 149.
[196] ibid.
[197] See the views of Zdzislaw Galicki, Meeting 2626; Chusei Yamada, Meeting 2627, Yearbook of the International Law Commission [2000] (n 112) pp 109 and 122.
[198] Bederman disapprovingly refers to this fact by saying that "it is troubling that some roadblocks have been unnecessarily erected by the Tribunal in some individual claims. One clear example is a person who holds US nationality and citizenship of a third State. It makes no sense, in such a case, to require proof of dominant and effective American nationality. No purpose is served in such a showing". David Bederman (n 179) 135.

compensation twice.[199] In his comment on this paragraph, Dugard admits the difficulty of dealing with varied situations of this kind by saying that "they should be dealt with in accordance with the general principles of law recognized by international and national tribunals".[200] By so doing, he has accidentally referred to the principle of effective nationality, which would have effectively addressed these issues.[201]

4.5 Conclusion

This chapter reflected in-depth on the requirement of nationality in the context of DP. The chapter began by refuting the allegations of the increased flexibility in the application of the requirement of nationality. In this respect, it has been concluded that the link of nationality has never disappeared and therefore it is still considered an important criterion for granting DP, which cannot be triggered if the protected persons do not possess the nationality of the protecting State.

In addition, the possibility of subjecting the requirement of nationality to some exceptions has also been evaluated. Here, it was highlighted that the argument for the existence of such exceptions is insufficient. Yet, it was posited that the strict application of the nationality condition is not in contradiction with the humanization of DP due to the existence of other viable alternatives.

Furthermore, this chapter has investigated the allegation that a new set of principles on the nationality of claims has recently emerged. This allegation was refuted by emphasising the validity of traditional principles such as the rules of continuous and dominant nationality. With respect to the former, the attempts to abandon the rule of continuous nationality was addressed with reference to the clear uniformity in State practice and case law. Likewise, the

[199] Chittharanjan Amerasinghe, *Diplomatic protection* (n 59) 112.
[200] ADPC (n 31) 43.
[201] The Qatari comment, Comments and Observations received from Governments [2006] Doc. (A/CN.4/561 and Add. 1–2) p 42.

argument against the latter could not prevent its codification due to its status as a rule of customary international law.

Chapter Five

Exhaustion of Local Remedies: Towards a Uniform, Consistent and Flexible Application

5.1 Introduction

The prior exhaustion of LRs is an essential condition that must be fulfilled before the bringing of DP claims.[1] Despite the fact that this requirement has consistently been classified as a well-founded rule, or principle, of customary international law,[2] its application is still a matter of controversy. The cause of this controversy lies particularly in the allegation that the rule of LRs has two distinct areas of content depending on its application, namely the traditional realm of DP, and the field of HR protection.[3]

Accordingly, the critique of this position will be the focal point of the discussion in this chapter with the aim of proving that the rule of LRs is not a double-faced rule; on the

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1 On the other hand, the rule of LRs does apply when the claimant State was directly injured by a wrongful act of another State. The question of whether a specific claim is direct or indirect has attracted a great attention. In this regard, tests such as the subject of the dispute, the nature of the claim and the kind of the required relief have been used to determine the category of the claims. The ICJ stated in the *Arrest Warrant* case that *"*as the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies". *The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* Judgment of 14 February 2002 (2002) ICJ Rep 3, para 40. See also, Theodor Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 British Yearbook of International Law 83; Matthew Adler, 'The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in ELSI' (1990) 39 (3) International and Comparative Law Quarterly 641; John Dugard, Second Report on Diplomatic Protection [2001] Doc. (A/CN.4/514); Ian Brownlie, *Principles of International Law* (7th edn, Oxford University Press 2008) 493-494; Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 172-186.

2 See e.g. *Claim of Finnish Shipowners against Great Britain in respect of the Use Of Certain Finnish Vessels during the War (Finland v Great Britain)* (1934) UNRIAA, Vol III, 1490; *Interhandel Case (Switzerland v. United States of America),* (Preliminary Objections), Judgment of 21 March 1959 (1959) ICJ Rep 6, p 27; *Elettronica Sicula S.P.A (ELSI) Case, (United States of America v. Italy)* Judgment of 20 July 1989 (1989) ICJ Rep 15, para. 50.

3 See e.g. Antônio Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press 1983) 47-57; Chittharanjan Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge University Press 2005) 427; Silvia D'Ascoli and Kathrin Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' (2007) 2 European University Institute 1, 17; Antônio Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011) 101-107.

contrary, it is a single rule that has consistently stretched over two intertwined areas of international law. This discussion will bring an added clarity to the status of the rule arguing that the elasticity that the application of the rule of LRs in the context of HR protection could be used to advance its application in the context of DP.

This chapter proceeds as follows: section (5.2) begins by discussing the view that the rule of LRs has two separate meanings. Special attention is given to two areas in this regard. Firstly, the idea of analogous application of the rule under the law of HR and the law of DP will be established. Secondly, the interaction between DP and HR will be employed to underline the necessity of crossing the traditional boundaries between the two areas of international law. Section (5.3) highlights several areas of the overlap in the rule's application. As such, the consistencies in the rationales of the rule and the characteristics of its application will be at the core of the discussion. Section (5.4) explains why the rule of LRs is subject to notable exceptions despite the fact that it is equal to the nationality requirement. It argues that the existence of these exceptions composes a practical demonstration of how the application of the rule in the field of DP may benefit from the flexible application of the rule of LRs in the field of HR protection.

5.2 Refuting the Allegations of the Rule's Duality

The argument in favour of differentiating the implementation of the rule of LRs in the contexts of HR and DP assumes that since the two systems are based upon different origins and premises, the rule must therefore be considered differently. However, two points, explored below, challenge this argument.

5.2.1 The Analogous Application of the Rule

Amerasinghe distinguishes between the application of the rule of LRs to HR protection claims and its application to DP claims by referring to the different origins of the rule.[4] He argues that the application of the rule in the field of HR protection results from conventional provisions, whereas its application to DP claims is mainly based on customary law.[5] However, there are deep deficiencies in this line of argument.

Firstly, it was mentioned above that the occurrence of the wrongful act, due to which DP might be exercised, is not influenced by the provenance of the breached obligation.[6] Logically, therefore, one needs not to focus on the origin of the rule of LRs but more importantly on its current application. As such, a look at Articles 41 (c) of the CCPR,[7] 35 (1) of the ECHR,[8] and 46 of the ACHR[9] reveals an evident emphasis on the importance of applying the rule "in accordance, or in conformity, with the generally recognised rules of international law". Commenting on this, Trindade has contended that this clause shows a complete misunderstanding of the proper scope of the rule as it draws a false analogy between the two systems of DP and HR protection.[10] Crawford and Grant, on the other hand, consider this clause to be an assertion of the analogous application of the rule of LRs in the two fields.[11] Indeed, this opinion is more plausible because it reflects the fact that

[4] Chittharanjan Amerasinghe, *Local Remedies in International Law* (n 3) 69.
[5] ibid.
[6] See above, pp 72-74.
[7] Article 41 (c) of the CCPR states that **"**the Committee [UNHR] shall Deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law".
[8] Article 35 (1) of the ECHR states that "the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law"
[9] Article 46 1 (a) of the ACHR states that "admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements: (a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law".
[10] Antônio Trindade, *The Application of the Rule of Exhaustion of Local Remedies* (n 3) 52.
[11] James Crawford and Thomas Grant, 'Local Remedies, Exhaustion of' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law: Volume VI* (Oxford University Press 2012) 897. See also,

"international law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law".[12]

Secondly, it is true that the codification and embodiment of customary rules of international law "in multilateral conventions does not mean that they cease to exist".[13] Yet, the existence of international rules with a dual nature should not prevent their uniform application,[14] particularly when it is obvious that the customary content constitutes the basis of the codified rules.

5.2.2 The Need for Crossing the Boundaries between two Intertwined Areas of International Law

Notwithstanding the above, D'Ascoli and Scherr are of the view that the differentiation between the areas of application is still relevant due to the fact that the area of HR protection, as an area to which the rule of LRs was not originally intended to apply, involves interests and situations different to those of DP.[15] Brauch has recently claimed that the rule of LRs as provided for in HR instruments and developed through HR case law is "an autonomous rule".[16] As such, he points to the difference in the rule's application arguing that in cases of DP the rule applies to relationships between a State and a foreigner, whereas under the law of HR it applies to relationships between a State and its own nationals.[17]

A serious weakness with this argument, however, is that it focuses on variations that have largely disappeared. In the first place, it overlooks the consequences of the infiltration of HR

Sandy Ghandhi, 'Some Aspects of the Exhaustion of Domestic Remedies Rule under the Jurisprudence of the Human Rights Committee' (2001) 44 German Yearbook of International Law 485, 487.

[12] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*), Compensation, Judgment of 2012 (2012) ICJ Rep 324, Declaration of Judge Christopher Greenwood, para 8.

[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction & Admissibility, Judgment of 26 November 1984 (1984) ICJ Rep 392, para 73.

[14] Susan Breau, *The Responsibility to Protect in International Law: An Emerging Paradigm Shift* (Routledge Press 2016) 116.

[15] Silvia D'Ascoli and Kathrin Scherr (n 3) 10.

[16] Martin Brauch, 'Exhaustion of Local Remedies in International Investment Law' (2017) International Institute for Sustainable Development 1, 4.

[17] ibid.

considerations into DP which have, *inter alia*, positively evolved the substantive content of the wrongful act in the context DP.[18] Furthermore, the discussion should not focus on who is compelled to fulfil the rule, but, rather, on questions such as why LRs are prioritised, what are the rationales behind the necessity of exhausting them, and under what circumstances, if there any, the exhaustion of LRs is not required.[19] Interestingly, the answers to these questions, which are addressed more fully below, show that the norms that govern the application of the rule of LRs under customary international law and international HR law are in perfect harmony.

In addition, it was mentioned above that the role of DP, outside of cases involving personal injuries to nationals abroad, has dramatically decreased and therefore there are two situations in which DP may be beneficial.[20] The case of *Diallo* constitutes an instance of the absence of an investment treaty that a foreign investor may depend on to resolve a dispute with the host State.[21] In this case, the ICJ acknowledges no difference between the application of the rule of LRs in relation to the violations of Mr. Diallo personal rights and the violations of his direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire.[22] The ICJ concluded that "the DRC's objection to admissibility based on the failure to exhaust LRs cannot be upheld because the DRC has not proved the existence in its domestic legal system of available and effective remedies".[23] Indeed, the requirement of proving that the respondent State is obliged to prove the existence of available and effective remedies is widely espoused in the jurisprudence of HR protection bodies.[24] The second situation in which DP may play a

[18] See chapter three.
[19] Riccardo Mazzeschi, Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights' (2000) (10) Italian Yearbook of International Law 17, 43.
[20] See above, p 58.
[21] ibid.
[22] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Preliminary Objections, Judgment of 24 May 2007 (2007) ICJ Rep 582, para 74.
[23] ibid, para 48.
[24] See below, pp 155-158.

role is where investment treaties exist but are inoperative.[25] Here, there seems no room to take account of the impact of HR law on the application of the rule of LRs because investors are generally not obliged to exhaust LRs under international investment law.[26]

In light of this, the differentiation between the areas of the rule's application appears nonsensical. Hence, instead of concentrating on marginal differences, the rule of LRs will be dealt with as a single rule the application of which has spread into two areas of international law. In doing so, special attention is given to the potential, and apparently beneficial, impact that the incorporation of the LRs rule into the instruments of HR protection may have on DP, the institution for which the rule was initially designed.[27]

5.3 Fundamental Indications of the Uniform Application of the Rule

5.3.1 The Consistency in the Rule's Rationales

Whether under the law of HR or the law of DP, the rationales of the rule of LRs are remarkably similar. By and large, these rationales revolve around two justifications: the first is associated with the necessity of giving the wrongdoer an opportunity to correct the wrong, whereas the second is related to the importance of reducing the number of claims.

5.3.1.1 Giving the Author of the Wrongdoing an Opportunity to right it

Many years ago, Borchard highlighted the significance of the rule of LRs writing, *inter alia*, that "the government of the complaining national should give the State in which the injury has occurred an opportunity of doing justice to the injured party and repairing the injury in its own regular way".[28] Due to its reasonableness, this justification has received much support in

[25] See above, p 58.
[26] See below, p 164.
[27] Antonio Bultrini, 'The European Convention on Human Rights and the Rule of Prior Exhaustion of Domestic Remedies in International Law' (2010) (20) Italian Yearbook of International Law 101, 101.
[28] Edwin Borchard, 'Theoretical Aspects of the International Responsibility of States' (1929) 1 Heidelberg Journal of International Law 223, 241.

the related written authorities,[29] and it is usually used as a practical guide on the admissibility of complaints before HR bodies such the ECtHR[30] and the ACtHPR.[31] More importantly, the jurisprudence of the ICJ[32] and that of regional judicial and quasi-judicial bodies of HR protection consistently refers to this justification.[33]

It is said that providing the respondent State with such an opportunity shows due regard to its "sovereignty and jurisdiction by not pre-empting the operation of their legal systems".[34] In a similar vein, it is argued that "national courts are better placed to determine the facts of, and the law applicable to, any given case, and where necessary, to enforce an appropriate remedy".[35] In addition to this, domestic courts are usually "quicker, cheaper, and more

[29] See e.g. Algot Bagge, 'Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders' (1958) 34 British Yearbook of International Law 162, 165; Henry Onoria, 'The African Commission on Human and Peoples' Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 (1) African Human Rights Law Journal 1, 2; Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education Limited Publishing 2010) 225; Phoebe Okowa, 'Issues of Admissibility and the Law on International Responsibility' in Malcolm Evans (ed) *International Law* (4th edn, Oxford University Press 2013) 500; William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 764; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 620.

[30] Practical Guide on Admissibility Criteria (4th edn, Council of Europe Publications 2017) 19. Available at; https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed15/06/2019).

[31] Admissibility of Complaints before the African Court of Human and Peoples' Rights: Practical Guide (FIDH Publications 2016) 34. Available at: https://www.fidh.org/en/region/Africa/admissibility-of-complaints-before-the-african-court-fidh-publishes-a (accessed 15/06/2019).

[32] In *Interhandel* the ICJ stated that *"*before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." *Interhandel Case* (n 2) p 27.

[33] See e.g. *Selmouni v. France,* (Application no. 25803/94), ECtHR, Judgment of 28 July 1999, para 74; *Kudła v. Poland,* (Application no. 30210/96), ECtHR, Judgment of 26 October 2000, para 152; *Azinas v. Cyprus*, (Application no. 56679/00), ECtHR, Judgment of 28 April 2004, para 46; *Miguel Caballero Denegri and Andrea Victoria Denegri Espinoza v. Peru,* (Admissibility), IACommHR, Report No. 68/11, Petition 1095-03, 31 March 2011, para 26.

[34] Malcolm Shaw (n 29) 620.

[35] Cesare Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Springe Publishing 2013) 564; Antonios Tzanakopoulos, 'Domestic Courts as the 'Natural Judge' of International Law: A Change in Physiognomy' in James Crawford and Sarah Nouwen (eds), *Selected Proceedings of the European Society of International Law: International Law 1989–2010: A Performance Appraisal* (Hart Publishing 2012) 160.

effective than international ones".[36] This efficiency might be ascribed to the fact that "an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect".[37]

Notwithstanding, the recourse to domestic courts, or remedies in general, might not result in obtaining adequate redress and may result in spending time and money in a pursuit that is of no avail to the claimant.[38] As mentioned above, this fear has traditionally been used by developed counties to reject the incorporation of the so-called Calvo Clause into contracts between their nationals and developing counties.[39] In addition to other things, it was alleged that the courts in these counties could not be relied upon to dispense justice to foreigners.[40]

Recently, however, developed countries have changed their position by embracing the traditional attitude of developing countries towards the rule of LRs.[41] To justify this alteration, it is said that in host States with a genuine rule of law, the national courts, not foreign arbitrators, are more capable of settling claims concerning FI by offering "better guarantees of independence and openness".[42] Despite the plausibility of this statement, the change could also be due to the fact that the picture of FI has entirely changed and developing countries are no longer alone in the position of the respondent States.[43] According to the United Nations Conference on Trade and Development (UNCTAD), the year of 2013 witnessed the initiation of "at least 57 known cases pursuant to international

[36] Nsongurua Udombana, 'So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 79 (1) American Journal of International Law 1, 9.
[37] ibid.
[38] Chittharanjan Amerasinghe, *Local Remedies in International Law* (n 3) 61.
[39] See above, pp 51-52.
[40] ibid.
[41] Rodrigo Lazo, 'The No of Tokyo Revisited: or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine' (2015) 30 (1) ICSID Review 172,174.
[42] Gus Van Harten, 'Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA' (2014) 59 Osgoode Legal Studies Research Paper 1, 55; Matthew Porterfield, 'Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2015) 41 Yale Journal of International Law Online 1, 5.
[43] Guillermo Alvarez and William Park, 'New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale Journal of International Law 365, 398.

investment agreements, among these case, an unusually high number of cases, almost half of the total, were filed against developed States; most of these have the Member States of the EU as respondents".[44]

In any event, the priority of domestic remedies is also supported by the subsidiarity nature of international courts to the national ones.[45] This idea stipulates that "when a national body is capable of providing the necessary remedy, it should do so, without an international body getting involved".[46] This order reflects the primacy of national remedies and should encourage States to deal with the alleged violations themselves in order to avert the internationalisation of the concerned claims.[47] However, if the contrary occurs, the respective international judicial body will "benefit from the views of the national courts",[48] mainly because the passing of the claim through several domestic filters provides the international body with the necessary information about the matter under its scrutiny.[49] For instance, it helps to clarify the existence of circumstances under which the fulfilment of the rule of LRs is not required.[50]

5.3.1.2 Preventing Potential International Claims

The second function of the Rule of LRs is aimed at reducing the mass of claims.[51] In this sense, the compliance with the requirement of LRs constitutes a precautionary measure

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[44] United Nations Conference on Trade and Development (UNCTAD), IIA Issues, Recent Development in Investor-State Dispute Settlement (ISDS) [2014]. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf (accessed 15/06/2019).

[45] See e.g. Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006) 216; Roger-Claude Liwanga, 'From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies' (2015) 41 (1) Brooklyn Journal of International Law 99, 111; Andreas Staden, 'Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts' (2016) 20 (8) International Journal of Human Rights 1113, 1115.

[46] Admissibility of Complaints before the African Court of Human and Peoples' Rights (n 31) 36.

[47] ibid.

[48] *Burden v. the United Kingdom*, (Application no. 13378/05), ECtHR, Judgment of 29 April 2008, para 46.

[49] Cesare Romano (n 35) 564.

[50] Admissibility of Complaints before the African Court of Human and Peoples' Rights (n 31) 36.

[51] See e.g. Richard Lillich, 'The Effectiveness of the Local Remedies Rule Today' (1964) 58 American Journal of International Law 101, 107; Frans Viljoen, 'Communications under the African Charter: Procedure and

preventing international judicial or quasi-judicial bodies from being engulfed by hundreds of thousands of complaints that could have been more easily and more profitably dealt with at local level.[52] The domestic settling of these claims normally results in redressing the well-established cases and dismissing or refusing the ungrounded ones. If a case is lost at the domestic level, it might be reviewed internationally.[53]

However, it should be clear that the purpose of this revision is not to review a decision delivered by a national court acting within its own sphere of competence.[54] Since this function makes international judicial bodies a fourth level of jurisdiction,[55] the aim of this review is confined to "determine the State's responsibility for failing to comply with some of its international obligations".[56] As a matter of practice, reaching this stage means that the contention that LRs have not been exhausted is expected to be raised by the respondent party as a preliminary objection to the admissibility of the relevant claim.[57]

The jurisprudence of HR protection bodies shows that the question of LRs is often used as the first line of defence to bar the admissibility of the complainants and communications.[58] Likewise, in *Interhandel,*[59] *Barcelona Traction,*[60] *ELSI,*[61] and *Diallo*[62] the respondent parties

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Admissibility' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (2nd edn, Cambridge University Press 2008) 76; Javaid Rehman (n 29) 225.

[52] Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013) 272.

[53] Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 92.

[54] Cesare Romano (n 28) 563.

[55] *Chaparro Álvarez y Lapo Íñiguez v. Ecuador*, (Preliminary Objections, Merits, Reparations, and Costs), IACtHR, Judgment of 21 November 2007, paras 19-23.

[56] ibid, para 20.

[57] James Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure' (1954) 31 British Yearbook of International Law 452, 452.

[58] See e.g. *Lohe Issa Konate v Burkina Faso*, (Application no. 004/2013), ACtHPR, Judgment of 5 December 2014, para 75; *Kostenko Arkadyevich v. Russian Federation*, (Communication no. 2141/2012) UNHRC, 15 October 2015, UN Doc. CCPR/C/115/D/2141/2012, para 6.3; *Bimala Dhakal & Others v. Nepal*, (Communication no. 2185/2012) UNHRC, 5 May 2017, UN Doc. CCPR/C/119/D/2185/2012, para 4.3; *R.R.L v Canada*, (Communication no. 659/2015), UNHRC, 15 September 2017, UN Doc. CAT/C/61/D/659/2015, para 8.2; *APDF and IHRDA v. Republic of Mali*, (Application no. 046/2016), ACtHPR, Judgment of 11 May 2018, para 35.

[59] *Interhandel Case* (n 2), p 11.

all claimed that the applications should be dismissed due to the failure to satisfy the exhaustion requirement. In *Diallo*, the DRC asked the ICJ to adjudge and declare that the application was inadmissible, maintaining, *inter alia*, that "its domestic legal system provided for available, effective remedies which Mr. Diallo should have exhausted before his cause could be espoused by Guinea".[63] However, the ICJ refused this argument due to the failure of the DRC "to prove the existence in its domestic legal system of available and effective remedies".[64]

This implies that the respondent State has to convince the respective judicial body that the remedies in its domestic legal system were available and effective at the relevant time.[65] The success of the defendant State in doing so shifts the burden of proof to the applicant who will be required to show that "the remedies advanced by the respondent State were in fact exhausted",[66] or "were for some reason inadequate and ineffective in the particular circumstances of the case",[67] or that "there existed special circumstances absolving him or her from this requirement".[68]

5.3.2 The Characteristics of the Required Exhaustion

By and large, the fulfilment of the LRs condition necessitates two key demands. First, the exhaustion must be characterised as being comprehensive. Second, the decision that was delivered by the relevant domestic authorities must be final.

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[60] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970 (1970) ICJ Rep 3, para 25.
[61] *Elettronica Sicula* (n 2) para 10.
[62] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 22) para 36.
[63] ibid, para 36.
[64] ibid, para 48.
[65] See e.g. *Elettronica Sicula* (n 2), para 59; *Hernando Osorio Correa v. Colombia,* IACommHR, (Report no 62/00, Case 11.727), 3 October 2000, para 23; *Vučković and others v. Serbia*, (Preliminary Objection), ECtHR, Judgment of 25 March 2014, para 77.
[66] *Grässer v. Germany*, (Application no. 66491/01), (Admissibility), ECtHR, Judgment of 16 September 2004, p 10
[67] *Gherghina v. Romania*, (Application no. 42219/07), ECtHR, Judgment of 9 July 2015, para 89.
[68] ibid.

5.3.2.1 The Comprehensiveness of the Exhaustion

The thoroughness of the exhaustion imposes upon the aggrieved party the duty of testing "all those domestic remedies of a legal nature which appear to be capable of providing an effective and sufficient means of redress".[69] In addition to courts and tribunals, these remedies encompass;

> The procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane.[70]

While the courts include both ordinary and special ones "the crucial point is not the ordinary or extraordinary character of a legal remedy but whether it gives the possibility of an effective and sufficient means of redress",[71] the administrative bodies must be those with the authority of delivering binding decisions.[72] In this sense, LRs do not include remedies whose "purpose is to obtain a favour and not to vindicate a right",[73] or remedies of grace unless they form an essential prerequisite for "the admissibility of subsequent contentious proceedings".[74]

Apart from the category of the remedy, the claimant in question must exhaust the remedies available to their fullest extent.[75] It is required that "all contentions, both of law and of fact, should have been raised before the local courts and tribunal and pronounced on by them".[76] This means, in the ICJ's words, that "the essence of the claim has been brought before the

[69] *Bjorn Schouw Nielsen v. Denmark,* (Application No. 343/57), Report of the ECommHR 1961, 37-38.
[70] *Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)* (1956) UNRIAA, Vol: XIII, 83, 120.
[71] ADPC, Report of the International Law Commission, Fifty-Eighth Session [2006] Doc. (A/61/10) 72.
[72] ibid
[73] John Dugard, Second Report on Diplomatic Protection (n 1) para 14.
[74] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 22) para 47.
[75] Phoebe Okowa (n 23) 501.
[76] *Claim of Finnish Shipowners* (n 2) 1498.

competent tribunals and pursued as far as permitted by local law and procedures, and without success".[77]

All the above-mentioned contours have been codified in Article 14 of the ADP which stresses the significance of the exhaustion requirement by stating in Paragraph 1 that "a State may not bring an international claim in respect of an injury to a national […] before the injured person has […] exhausted all local remedies".[78] Paragraph 2 outlines the major types of legal remedy that should be used by stipulating that LRs means "legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury".[79] According to the ECtHR, this imposes on the applicant the duty of doing everything that could reasonably be expected to exhaust LRs.[80]

The last Paragraph in Article 14 requires that LRs "shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national […]".[81] The commentary to this paragraph adds that:

> Local remedies are to be exhausted not only in respect of an international claim but also in respect of a request for a declaratory judgment brought preponderantly on the basis of an injury to a national. […..] There are cases in which States have been required to exhaust local remedies where they have sought a declaratory judgment relating to the interpretation and application of a treaty alleged to have been violated by the respondent State in the course of, or incidental to, its unlawful treatment of a national.[82]

[77] *Elettronica Sicula* (n 2), para 59.
[78] ADP, [2006] Doc. (A/CN.4/L. 684) 6.
[79] ibid.
[80] See e.g. *İlhan v. Turkey,* (Application no. 22277/93), ECtHR, Judgment of 27 June 2000, para 59.; *D.H & Others v. the Czech Republic,* (Application no. 57325/00), ECtHR, Judgment of 13 November 2007, para 116.
[81] ADP (n 78) 7.
[82] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 76.

5.3.2.2 The Finality of the Related Decision

The pronouncement of a decision with a final effect is the main criterion for fulfilling the finality requirement.[83] According to Anzilotti, the term with final effect means that the delivered decision cannot be subject to amendment, cancellation, or replacement by another.[84] Clearly, decisions with this character are those delivered by the highest body in the hierarchy of the judicial system of the relevant State.[85] Despite the explicit inclusion of this requirement in Articles 35 (1) of the ECHR[86] and Article 46 (1) (b) of the ACHR,[87] Article 14 of the ADP makes no reference to it. Alternatively, the commentary to the same Article succinctly states that "if the municipal law in question permits an appeal in the circumstances of the case to the highest court, such an appeal must be brought in order to secure a final decision in the matter".[88]

In any event, there are two opposing issues associated with the finality requirement. The first is that this requirement may not be satisfied by the decisions of the highest court in some cases. For example, in *Interhandel* the claimant secured a judgment from the Supreme Court, however, the ICJ refused to consider it as final because the decision of the Supreme Court of

[83] It is worth mentioning that HR conventions require that complaints must be submitted to the respective judicial or quasi-judicial bodies within a period of six months from the date on which the final decision was taken. Articles 35 (1) of the ECHR and Article 46 (1) (b) of the ACHR are explicit examples of this requirement.

[84] *Electricity Company of Sofia Case and Bulgaria (Belgium v. Bulgaria),* Preliminary Objection, Judgment of 4 April 1939 (1939) PCIJ Series A/B No. 77, Separate Opinion of Judge Dionisio Anzilotti, p 97.

[85] The ACtHPR declared in *Rutabingwa Chrysanthe* that "the Application is inadmissible on the ground that the applicant has not exhausted LRs […] because he did not bring his application before the Supreme Court and did not give reason for not doing so". *Rutabingwa Chrysanthe v. Republic of Rwanda,* (Application no. 022/2015), ACtHPR, Judgement of 11 May 2018, paras 45- 46.

[86] Article 35 (1) of the ECHR states that "the Court may only deal with the matter after all domestic remedies have been exhausted, […], and within a period of six months from the date on which the final decision was taken"

[87] Article 46 (1) (b) of the ACHR states that "the petition or communication is lodged within a period of six months from the date on which the party alleging violation of its rights was notified of the final judgment"

[88] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 72.

the US reversed the decision of the First-tier court and sent the case back to the District Court for further investigation.[89] The ICJ stated that:

> The judgment of the Supreme Court of the United States on June 16th, 1958 reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it […] and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.[90]

On other occasions, however, applicants are not required to pursue their claims through to the highest court when there is "no prospect of success".[91] This applies specifically to instances where a contrary supreme court ruling exists,[92] and to instances where the actions complained of are authorised by domestic legislations or constitutional provisions.[93] As such, the ECtHR held that since "the Czech Constitutional Court dismissed the applicants' appeal, partly on the ground that it was manifestly unfounded and partly on the ground that it had no jurisdiction to hear it".[94] Consequently, the Court found: "it would be unduly formalistic to require the applicants to exercise a remedy which even the highest court of the country concerned had not obliged them to use".[95]

At first glance, the finality requirement gives the impression that it constitutes an obstacle to injured persons seeking a remedy. Nevertheless, the jurisprudence of HR protection bodies reveals a general tendency towards applying it leniently. Indeed, this propensity could be construed as a reflection of the fact that the approach of these institutions is strongly based on

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[89] *Interhandel Case* (n 2), pp 26-27.
[90] ibid.
[91] *Open Door and Dublin Well Woman v. Ireland*, (Application no 64/1991/316/387-388), ECtHR, Judgment of 23 September 1992, para 48.
[92] *George Kemboge v. United Republic of Tanzania*, (Application no. 002/2016), ACtHPR, Judgment of 11 May 2018, para 31.
[93] Javaid Rehman (n 29) 135.
[94] *D.H & Others v. the Czech Republic* (n 80), para 28.
[95] ibid, para 118.

the necessity of applying the rule of LRs "with some degree of flexibility and without excessive formalism".[96] In practise, this flexibility has not been limited to the finality requirement but, more importantly, extends to cover the application of the rule of LRs as a whole.

It is true that HR conventions, which are adopted for a purely humanitarian […..] purpose,[97] might be interpreted more leniently because of the nature of the interests that they protect.[98] Nevertheless, these conventions are ultimately "international treaties to be interpreted in accordance with the related rules and principles of public international law, in particular, in the light of the 1969 VCLT".[99] For example, the ECtHR "has never considered the provisions of the ECHR as the sole framework of reference for the interpretation […]. On the contrary, it must also take into account any relevant rules and principles of international law applicable".[100]

This stance seems to confirm that the ECtHR sees no contradiction between the ECHR as a HR instrument and its interpretation based on accepted canons of interpretation, where the VCLT has a particular role.[101] Here, reference should be made to Article 31 (1) of the VCLT which, despite given priority to the treaty text, necessitates that the text itself must be

[96] *Akdivar and Others v. Turkey,* (Application no. 21893/93), ECtHR, Judgment of 16 September 1996, para 69; *D.H & Others v. the Czech Republic* (n 80) para 116; *Gherghina v. Romania*, (n 67), para 87.

[97] *Reservations to the Convention on Genocide,* Advisory Opinion of 28 May 1951(1951) ICJ Rep15, p23

[98] See e.g. Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 (3) European Journal of International Law 585; Laurence Burgorgue-Larsen, 'Decompartmentalization: The key Technique for Interpreting Regional Human Rights Treaties' (2018) 16 (1) International Journal of Constitutional Law 187; James Crawford and Amelia Keene, 'Interpretation of the Human Rights Treaties by the International Court of Justice' (2019) The International Journal of Human Rights (published online: 09 May 2019). Available at: https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1600509 (accessed 15/06/2019).

[99] *Cyprus v. Turkey,* (Application no. 25781/94), (Just Satisfaction) Judgment of 12 May 2014, para 23.

[100] ibid.

[101] Geir Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties' (2019) International Journal of Human Rights (published online: 09 May 2019). Available at: https://doi.org/10.1080/13642987.2019.1598055(accessed 15/06 2019).

interpreted according to the convention's object and purpose.[102] The object and purpose of HR conventions is obviously the protection of HR. This may explain why HR protection fora have frequently acknowledged the applicability of the VCTR rules of interpretation.[103]

In addition, observations such as the application of the rule of LRs "must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights",[104] does not mean that the values underpinning flexibility in the application of the rule of LRs in the context of HR protection are different from those in the context of DP. Therefore, the rule of LRs can be applied leniently in the context of DP, mainly because DP plays nowadays an important role in dealing with HR violations which are prohibited by universal and regional HR instruments.[105] The following section is devoted to highlighting the situations in which the exhaustion of LRs is not required.

5.4 Practical Assertions of the Elastic Application of the Rule of LRs

It was concluded in the previous chapter that the requirement of nationality is not subject to genuine exceptions in which DP can be afforded to non-nationals.[106] This rigidity is understood in light of the common and widespread portrayal that nationality "is the right to have rights".[107] In addition to this, one may add that the requirement of nationality is linked to the acquisition of the right to DP itself, whereas the requirement of LRs is more attached to its protection. This is not to suggest that the two requirements are not alike, but to say that the application of the rule of LRs could be affected by this difference.

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[102] ibid.

[103] Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 739.

[104] *Akdivar and Others v. Turkey* (n 96) para 69.

[105] See Chapter Three.

[106] See Chapter Four.

[107] *Trop v. Dulles, Secretary of State & others,* Supreme Court of the United States, 356 U.S. 86, (1958), p 102.

It has been concluded in the preceding chapter that the exceptions mentioned in Article 8 of the ADP are largely meaningless.[108] On the other hand, the rule of LRs "is neither absolute nor capable of being applied automatically".[109] Therefore, after establishing the principle in Article 14 of the ADP, the ILC has inserted a number of well-established exceptions to the rule of LRs. These exceptions, which constitute a practical illustration of the rule's flexibility, are listed in Article 15 of the ADP and can be divided into four categories, as explored below.

5.4.1 Exceptions based on the Availability and Effectiveness of LRs

Article 15 (a) of the ADP exempts the injured alien form the requirement of LRs where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress".[110] Thus, for LRs to be exhausted, they must be "available in theory and practice".[111] In this sense, remedies that are either practically or legally unavailable to the applicant are not genuine[112]as a remedy is not considered available unless "the complaint can pursue it without impediment".[113]

In practice, the term impediment refers to a wide variety of obstacles and barriers such as the situations in which the injured person "cannot turn to the courts because of a generalized fear for his/her life, the life of his relatives, or of his representatives".[114] Likewise, the situations

[108] See above, pp 117-128.
[109] *Aksoy v. Turkey*, (Application no. 21987/93), ECtHR, Judgment of 18 December 1996, para 53.
[110] ADP (n 78) 7.
[111] See e.g. *Delong, Baljet & van den Brink v The Netherlands*, (Application no. 8805/79; 8806/79; 9242/81), ECtHR, judgment of 22 May 1984, para 39; *Johnston and Others v. Ireland* (Application no 9697/82), ECtHR, Judgment of 18 December 1986, paras 45-46; *Dalia v. France*, (Application no 154/1996/773/974), ECtHR, judgment of 19 February 1998, para 38.
[112] James Crawford and Thomas Grant (n 11) 900.
[113] *Jawara v Gambia*, (Communications 147/95-149/96), ACommHPR, (2000), para 32.
[114] See e.g. *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, (Communication no. 379/09), ACommHPR, (2014), paras 48-52; Exhaustion of Domestic Remedies in the African Human Rights System (International Justice Resource Center Publications, Last updated: August 2017) 2. Available at: https://ijrcenter.org/wp-content/uploads/2017/11/7.-Exhaustion-of-Domestic-Remedies-African-System.pdf (accessed 15/06/2019).

where the claimants were involuntarily forced to leave the responsible State, the remedies should be considered unavailable.[115] In *Diallo*, the ICJ notes that:

> The expulsion was characterized as a "refusal of entry" when it was carried out [….] It is apparent that refusals of entry are not appealable under Congolese law […] which expressly states that the "measure [refusing entry] shall not be subject to appeal" […] The Court considers that the DRC cannot now rely on an error allegedly made by its administrative agencies at the time Mr. Diallo was "refused entry" to claim that he should have treated the measure as an expulsion. Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule. The Court further observes that, even if this was a case of expulsion and not refusal of entry, as the DRC maintains, the DRC has also failed to show that means of redress against expulsion decisions are available under its domestic law.[116]

Once LRs have been rendered available, the question of their effectiveness immediately arises.[117] In this regard, two tests have been used to determine the situations in which LRs could be considered ineffective. According to the first test, LRs are to be considered ineffective only if they are obviously futile, whereas the second test renders LRs ineffective when they offer "no reasonable prospect of success".[118] The test of obvious futility is clearly higher than that of "no reasonable prospect of success" since it requires an absolute certainty of failure.[119]

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[115] The ACommHPR held that "according to information at the disposal of the Commission, it appears that those expelled did not have the possibility to challenge their expulsion in court. In view of the foregoing, the Commission notes that local remedies were not accessible to the complainants. *Union Inter-Africaine des Droits de l'Homme and Others v Angola*, (Communication no. 159/96), ACommHPR, (1997), para. 12.

[116] *Ahmadou Sadio Diallo*, Preliminary Objections, (n 22) paras 46-47.

[117] See e.g. *Gert Timmer v Netherlands*, (Communication no. 2097/2011), UNHRC, 24 July 2014, UN Doc. CCPR/C/111/D/2097/2011, para 6.3; *Shadurdy Uchetov v Turkmenistan* (Communication no. 2226/2012), UNHRC, 26 September 2016, UN Doc. CCPR/C/117/D/2226/2012, para 6.3.

[118] See e.g. John Dugard, Third Report on Diplomatic Protection [2002] Doc. (A/CN.4/523 and Add) para 20.

[119] Chittharanjan Amerasinghe, *Diplomatic Protection* (n 1) 152.

While the obvious futility test is advocated by some authors[121]and has been applied in a number of earlier arbitral awards,[122] it is apparent that its application means that the threshold will be too high and the risk to the claimants too great. To avert this, Article 15 (a) adopts the less stringent test by opting for the absence of "a reasonable possibility of success". This test is widely accepted in the jurisprudence of HR protection bodies[124]and finds vigorous advocacy in the writings of the leading scholars of international law.[125] It may be said that this test might appear too generous to complainants.[126] Yet, it is not satisfactory for the claimants to merely show that the possibility of success is low to absolve themselves from the requirement of LRs.[127]

Consequently, pretexts such as that LRs do not produce results favourable to the claimants,[128]or that further appeals are difficult or costly will not be accepted.[129] This is due to the fact that "the test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief".[130] In this context, there are various examples of circumstances in which LRs have been considered unable to provide a reasonable possibility of success. For example, it is held

[121] See e.g. ibid, 155-156; Thomas Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (AW Sijthoff Publisher 1968) 77.
[122] *Claim of Finnish Shipowners* (n 2) 1498; *Ambatielos Claim* (n 70) 119.
[124] The IACommHR stated that "a petitioner may be excused from exhausting domestic remedies with respect to a claim where it is apparent from the record before it that any proceedings instituted on that claim would have no reasonable prospect of success in light of prevailing jurisprudence of a State's highest courts". *Jessica Gonzales and Others v. United States*, (Application no. 1490/05), IACommHR, 24 July 2007, para. 49. See also, *Erich Gilberg v. Germany*, (Communication no. 1403/2005), UNHRC, 25 July 2006, UN Doc. CCPR/C/87/1403/2005, para. 6.5; *Corey Brough v. Australia*, (Commutation no. 1184/2003), UNHRC, 27 April 2006, UN Doc. CCPR/C/86/D/1184/2003, para. 8.10; *Petr Gatilov v Russian Federation* (Communication no. 2171/2012), UNHRC, 30 August 2017, UN Doc. CCPR/C/120/D/2171/2012, para 8.3.
[125] See e.g. Gerald Fitzmaurice, 'Hersch Lauterpacht: The Scholar as Judge: Part I', (1961) 37 British Yearbook of International Law 1, 60-61; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 495; Malcolm Shaw (n 29) 620; James Crawford and Thomas Grant (n 11) 900.
[126] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 78.
[127] *Azem Kurbogaj & Chevdet Kurbogaj v. Spain* (Communication no. 1374/2005), UNHRC, 14 July 2006, UN Doc, CCPR/C/187/D/1374/2005, para 6.3.
[128] *Vélasquez Rodríguez v Honduras*, IACtHR, Judgment of 29 July 1988, para 67.
[129] *Azem Kurbogaj & Chevdet Kurbogaj v. Spain* (n 125) para 6.3.
[130] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 79.

that LRs do not need to be exhausted where "domestic courts have no jurisdiction over the dispute in question because the conduct of which the alien complains is not subject to judicial review",[131] "the courts notoriously lacking in independence",[132] or "there is a consistent and well-established line of precedents adverse to the alien".[133]

In summary, it is not necessary to comply with the rule of LRs when these remedies are unavailable or incapable of redressing the alleged infringement effectively. Here, it should be said that this exception is inherent in the content of the rule itself and, therefore, there seems no need to explicitly require that the LRs must be available and effective.[134] As such, a reading of the related provisions in HR instruments, particularly Article 35 (1) of the ECHR, Article 46 (1) (a) of the ACHR and Article 56 (5) of the ACHPR underlines the importance of dealing with the complaints after ascertaining that all LRs have been exhausted without further explanation. Two exceptions to this are to be found in Article 41 (c) of the CCPR and Article 5 (2) (b) of the Optional Protocol to the International Covenant on Civil and Political Rights (OPtCCPR) which refer only to the availability of LRs, but this reference does not, of course, mean that the effectiveness request is not needed.

5.4.2 Exceptions related to the Administration of LRs

In several instances, LRs might be available in theory and practice and seem able to provide a reasonable possibility of success. However, the injured party is not obliged to pursue them further when there is an undue delay in their application.[135]This is the case when the exhaustion of LRs is "unreasonably prolonged" according to Article 41 (c) of the CCPR and

[131] *The Panevezys-Saldutiskis Railway (Estonia v. Lithuania),* Judgment of 28 February 1939 (1939) PCIJ, Series A, No 2., p18.
[132] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 79.
[133] ibid.
[134] Article 44 of the ARSIWA requires that LRs must be "available and effective"
[135] David de Arechaga, 'International Responsibility' in Max Sørensen (ed), *Manual of Public International Law* (Macmillan & Col Ltd 1968) 589; Guido Raimondi, 'Reflections on the Rule of Prior Exhaustion of Domestic Remedies in the Jurisprudence of the European Court of Human Rights' (2010) (20) Italian Yearbook of International Law 163, 167.

5 (2) (b) of the OPtCCPR; or where the procedure of achieving local redress would be "unduly prolonged" pursuant to Articles 56 (5) of the ACHPR; or where "there has been unwarranted delay" pursuant to Article 46 (2) (c) of the ACHR. In this sense, the process of pursuing LRs "must be taken on by [the respondent State] with all seriousness and must be pursued diligently so that it is concluded within a reasonable time frame".[136] This is because the pursuance of LRs shall "never lead to a halt or delay that would render international action in support of the defenceless victim ineffective.[137]

As a result, Article 15 (b) of the ADP points to "undue delay in the remedial process which is attributable to the State alleged to be responsible"[138] as an important exception to the rule of LRs. Generally, the time frame begins on the date when State's judicial system begins dealing with the issue,[139]however, the overall time frame requires judging each case on its own circumstances.[140] In *Interhandel*, for example, the passing of 10 years since the start of the proceedings before the American courts, did not lead the ICJ to consider this period long enough to merit an exception to the rule.[141] It is said that the delay in this case occurred due to the failure of the claimant to present key documents.[142] On the other hand, when a case does not involve complex factual or legal issues and the claimant is not responsible for the delay,[143] the United Nations Human Rights Committee (UNHRC) was of the view that the elapsing of 11 years "constitute[d] an unreasonably prolonged delay".[144]

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[136] See e.g. *Leonardo René Morales Alvarado et al., v. Honduras,* IACommHR, (Report no. 38/14, Petition 1089.06), Admissibility, 3 July 2014, para 22; *Brewer Carías V. Venezuela,* (Preliminary Objections), IACtHR, judgment of 26 May 2014, para144.

[137] *Godínez-Cruz v. Honduras*, (Preliminary Objections), IACtHR, Judgment of 26 June 1987, para 95.

[138] ADP (n 78) p 6.

[139] *Interhandel Case* (n 2), p 18.

[140] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 80**.**

[141] *Interhandel Case* (n 2), p 29.

[142] James Crawford and Thomas Grant (n 11) 902.

[143] *X v Sir Lanka,* (Communication no. 2256/2013), UNHRC, 22 August 2017, UN Doc. CCPR/C/120/D/2256/2013, para 6.3.

[144] ibid.

For its part, the African Commission on Human and Peoples' Rights (ACommHPR) does not set up standard criteria to determine if a process has been unduly prolonged.[145] Ruther, it scrutinises each communication individually in light of "the political situation of the country, the State's judicial history, and the nature of the complaint".[146] However, the ACommHPR interestingly holds that:

> While the Commission has not developed a standard for determining what is unduly prolonged, it can be guided […] by the common law doctrine of a reasonable man's test. Under this test, the court seeks to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.[147]

The ACtHPR, when making its evaluation, has subsequently followed this test.[148] In some instances, the ACtHPR reviewed the progression of various applications throughout the courts of the respondent State in order to assess whether a particular application had been unduly prolonged compared with other applications.[149] In *Peter Chacha*, the applicant maintained that "the local remedies in the national courts were unduly prolonged and that he is therefore covered by the exception to the requirement to exhaust local remedies under Article 56 (5) of the Charter".[150] However, the ACtHPR refused this argument, holding that:

> To fully address the issue of undue prolongation of domestic courts, it would be necessary to monitor the progress of the applications through the national courts of the respondent. Between 2007 and 2011, the applicant was able to file a total of seven applications in the High Court of Arusha.[151] The Court observes that the majority of the applications were pending in the Hight Court for periods of between less than six (6) months and one (1) year (about four (4) applications). The duration of the other

[145] Exhaustion of Domestic Remedies in the African Human Rights System (n 114) 6.
[146] ibid
[147] *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v. Zimbabwe*, (Commination no. 293/2004), Merits Decision, ACommHPR, (2008), para 60.
[148] *Wilfred Nganyi & 9 Others v. The United Republic Tanzania*, (Application no. 006/2013), ACtHPR, Judgment of 18 March 2016, para 92.
[149] Exhaustion of Domestic Remedies in the African Human Rights System (n 114) 10.
[150] *Peter Chacha v. The United Republic of Tanzania*, (Application no. 003/2012), ACtHPR, Judgment of 8 March 2014, para 146.
[151] ibid, para 147.

> three (3) was two years and two months [……]. It must be born in mind that in the year 2010 alone, the Applicant filed four (4) out of seven (7) applications and that had some effect on the progress of the applicant's cases. [Since] the average duration each took to conclude did not exceed two (2) years and two (2) months, it is the opinion of the Court that the proceedings were not unduly prolonged. It is therefore the view of this Court that the exception does not apply in the present case.[152]

In addition to the undue delay, Article 15 (d) indicates the case where "the injured person is manifestly precluded from pursuing local remedies" as an exception to the rule of LRs. It is maintained that "this paragraph is an exercise in progressive development".[153] However, there seems no real difference between it and Article 46 (2) (b) of the ACHR, which relieves the injured party from the exhaustion requirement if they have "been denied access to the remedies under domestic law or has been prevented from exhausting them". In addition, it is said that since the phrase preclusion may imply action by the claimant itself, the term prevention seems more appropriate.[154] By and large, the manifest preclusion to which Article 15 (d) refers might be material or physical in character, such as the case of false imprisonment, refusal of legal representation, intimidation of lawyers, and so on.[155]

5.4.3 Exceptions based upon the Will of the Respondent State and other Consensual Bases

Reference was made earlier to the fact that the purpose of the rule of LRs is to safeguard the interests of the State that is allegedly responsible for causing damage to a foreign national. As a corollary result, the rule can be waived by the party for whose benefit it exists.[156] This idea,

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[152] ibid, para 148.
[153] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 83.
[154] James Crawford and Thomas Grant (n 11) 903.
[155] ibid.
[156] See e.g. Antônio Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (n 3) 129; Committee on Diplomatic Protection of Persons and Property, 'Final Report on Diplomatic Protection of Persons and Property' in International Law Association Report of the 72nd Conference (Toronto 2006) para 6.1.

which is codified in Article 15 (e) of the ADP,[157] finds support in case law. For example, the IACtHR once held that:

> The rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly.[158]

It is true, as explained above, that the question of LRs is regularly resorted to by the respondent State to bar the admissibility of claims.[159] On some occasions, however, the conduct of the State during specific litigation may result in that State being estopped from requiring that LRs be exhausted.[160] In this sense, the State's silence on the question of whether the injured party has met the requirement of LRs will logically mean that the requirement is met.[161]

Likewise, the timing of the objection that relates to the exhaustion of LRs is significant because the plaintiff State cannot raise an objection if it has failed to do so at the appropriate time.[162] In this respect, the ECtHR repeatedly asserts that objections on grounds of non-exhaustion are worthless unless they were "raised at the initial stage of the proceedings".[163] In a similar vein, the IACtHR indicates that "the State did not allege the failure to exhaust LRs before the Commission [the IACommHR]. By not doing so, the State waived a means of

[157] Article 15 (e) states that "the State alleged to be responsible has waived the requirement that local remedies be exhausted".
[158] *In the matter of Viviana Gallardo & Others,* (Advisory Opinion no. G 101/81), IACtHR, 1981, para 26.
[159] See above, p 147.
[160] John Dugard, Third Report on Diplomatic Protection (n 118) para 60.
[161] See e.g. *Elettronica Sicula* (n 2), para. 54; *G v. Australia,* (Communication No. 2172/2012), UNHRC, 28 June 2017, UN Doc. CCPR/C/119/D/2172/2012, para 6.3.
[162] James Crawford and Thomas Grant (n 11) 899.
[163] *See e.g. Artico v. Italy,* (Application No. 6694/74), ECtHR, Judgment of 13 May 1980, para 24; *Bozano v. France,* (Application no. 9990/82), ECtHR, Judgment of 18 December 1986, para 44.

defence that the Convention established in its favour and made a tacit admission of the non-existence of such remedies".[164]

In addition, the effect that the exhaustion of LRs is not always required may be inserted in a treaty entered into force before or after the dispute arises, or in a contract between a foreigner and the respondent State.[165] For example, the exhaustion requirement was completely dispensed with in the Claims settlement Declaration attached to the Algiers Accords of 1981, which paved the way for submitting all disputes between Iranian and US nationals directly to the IUSCT.[166] Likewise, Article 26 of the ICSID Convention provides that:

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

This provision was referred to in the commentaries to Article 15 (e) of the ADP as an exception to the rule of LRs.[167] However, it is worth mentioning, in light of Article 26 of the ICSID Convention, that the portrait under international investment law seems entirely reversed because the non-exhaustion of LRs is the general principle, whereas their exhaustion is the exception that is usually dispensed with.[168] Here then, the default position in ICSID arbitration is that investors are not expected to exhaust LRs before instituting an ICSID claim.[169] Likewise, it is generally accepted in non-ICSID investment treaty arbitration that the

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[164] *Castillo-Petruzzi & Others v. Peru*, (Preliminary Objections), IACtHR, Judgment of 4 September 1998, para 56.

[165]ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 84.

[166] Declaration of The Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration), 19 January 1981, at http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf (accessed 15/06/2019).

[167]ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 84.

[168] Jan Voss, *The Impact of Investment Treaties on Contracts Between Host States and Foreign Investors* (Martinus Nijhoff Publishers 2011) 286.

[169] Berk Demirkol, *Judicial Acts and Investment Treaty Arbitration* (Cambridge University Press 2018) 80.

rule of LRs does not apply.[170] Even when the exhaustion of LRs is required by some bilateral investment treaties, they usually "contain an exit or opt out provision, allowing arbitration if a national court has not rendered its judgment within a specified period of time".[171]

More importantly, arbitral practice asserts that the exhaustion of LRs is not an essential requirement under contemporary investment arbitration, which could easily be circumvented.[172] To this end, Gaja observes that the reference to Article 26 of the ICSID Convention appears unnecessary as it only confuses the possibility of excluding the requirement of LRs by the will of the respondent State with other instances of *lex specialis* where the exhaustion is not required at all.[173]

5.4.4 Exception based on the Absence of any Connection between Injured Party and Respondent State

In practice, it is not difficult to visualise situations in which individuals may be harmed as a result of wrongful acts committed by a foreign States either outside its territory[174] or within its territory when the injured party has no connection with the territory.[175] Traditionally, it has been accepted that the injured person should be exempted from the obligation of seeking a domestic remedy if there is no connection with the plaintiff State.[176] This is due to the fact that in all DP claims "the injured alien has voluntary established or may be deemed to have established, either expressly or impliedly, a link with the State whose actions are impugned".[177] However, the question of whether or not the rule of LRs applies where the

[170] ibid, 81.
[171] Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008) 95-96.
[172] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration' (2005) 4 (1) The Law and Practice of International Courts and Tribunals 1, 2.
[173] Meeting 2717th, Yearbook of the International Law Commission [2002] Vo I, Doc (A/CN.4/SER.A/2002) 35.
[174] See e.g. *Trail smelter case (United States, Canada)* (1935), UNRIAA, Vol III, p 1905, 1912.
[175] John Dugard, Third Report on Diplomatic Protection (n 118) para 66.
[176] See e.g. David Mummery, 'Increasing the Use of Local Remedies' (1964) 58 American Journal of International Law 389, 391; David de Arechaga (n 133) 583.
[177] Theodor Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (n 1) 94.

injured alien has no voluntary link with the respondent State because of the absence of territorial connection has been subject to much debate between the ILC's members.[178]

In his third report to the ILC, Dugard was cautious about this issue, stating that "there is no clear authority either for or against the requirement of a voluntary link".[179] Brownlie and Simma, however, refute Dugard's tentative approach towards the concept of a voluntary link stating that where there is no voluntary link, there is no obligation to exhaust LRs.[180] Likewise, Pellet strongly criticizes Dugard's position arguing that the idea of a voluntary link means that LRs do not have to be exhausted in a case when a State caused injury to a person who has had nothing to do with their own misfortune, has not taken any risk, has not gone to the territory of the responsible State and has not invested there.[181]

In the end, Article 15 (c) exempts the injured person from the requirement of LRs when there is "no relevant connection between the injured person and the State alleged to be responsible at the date of injury".[182] The commentary to this paragraph states that:

> Paragraph (c) does not use the term voluntary link to describe this exception as this emphasizes the subjective intention of the injured individual rather than the absence of an objectively determinable connection between the individual and the host State. In practice it would be difficult to prove such a subjective criterion. Hence paragraph (c) requires the existence of a relevant connection between the injured alien and the host State and not a voluntary link.[183]

It is argued that the term "relevant link" provides a wide room of manoeuvre in order to determine the existence of this connection at the time of the injury.[184] This is because it

[178] See e.g. Meetings 2716, 2717, 2718 and 2719 Yearbook of the International Law Commission [2002] Vo I, (n 171) 35-54.
[179] John Dugard, Third Report on Diplomatic Protection (n 102) para 66.
[180] Meeting 2717, Yearbook of the International Law Commission [2002] Vo I, (n 171), 38-40.
[181] ibid, 38.
[182] ADP (n 78) 7.
[183] ADPC, Report of the International Law Commission, Fifty-Eighth Session (n 71) 82.
[184] ibid.

allows the respective judicial body to "examine not only the question whether the injured individual was present, resided or did business in the territory of the host State but whether, in the circumstances, the individual by his conduct, had assumed the risk that if he suffered an injury it would be subject to adjudication in the host State".[185]

5.5 Conclusion

This chapter has investigated the requirement of LRs as a critical admissibility condition, the fulfilment of which is required before the pursuance of DP claims by the State of nationality. The argument in this chapter departed from the hypothesis that the rule of LRs must be dealt with as a signal rule that applies to HR and DP claims uniformly. It has been demonstrated that claims under the law of HR and DP meet at the point that they cannot be raised unless the remedies of redress provided by the relevant State have already been exhausted. It has also been explained that the non-exhaustion objection is the first defence that can be used to have the claims rejected in the two fields of international. This convergence was supported by the consistency in the rationales behind the rule and the identical characteristics of the exhaustion that required under the law of HR and DP.

The analysis has shown that the extensive espousal of the rule of LRs by the instruments of HR, and the manner in which it is being dealt with by the related judicial and quasi-judicial bodies have contributed enormously to widening the circumstances in which the requirement of LRs might be dispensed with. This is largely because the jurisprudence of these bodies and institutions shows a clear tendency for exempting the claimants from the obligation of pursuing all remedies at the domestic level. These deductions have paved the way for attaining the most important objective of this chapter, namely the liberal interpretation and the elastic application of the rule of LRs.

[185] ibid.

Chapter Six

The Consequence of Successful DP Claims

6.1 Introduction

This chapter deals with an issue that has been excluded from the work of the ILC on DP, namely the consequences of DP.[1] Whilst the main reason behind the non-inclusion lies in the fact that most aspects of the subject are covered by the ARSIWA,[2] this justification does not seem sufficient to not engage with the outcome of DP claims for two main reasons. First, the injured party under the law of SR, or in inter-State disputes, are the States themselves, whereas the individuals, either natural or juristic, are the main beneficiaries in the context of DP. This difference raises a crucial question about which outcome is more capable of remedying the injuries that required DP to be exercised. Second, the interaction between the law of HR and DP, which plays a positive role in determining the content of the wrongful act[3] and the application of the rule of LRs,[4]seems to have likewise a significant influence on the standards of reparation in the context of DP.

With these ideas in mind, this chapter will build upon the conclusions of the previous chapters to illustrate the ultimate outcome of successful DP claims. To do so, this chapter is structured as follows. Section (6.2) begins with an explanation of the theoretical and practical foundations of the responsibility of the infringement's author to repair that infringement. Section (6.3) focuses on the question of which form of reparation is more appropriate for DP claims, and then proceeds to analyse its main characteristics. Having done this, section (6.4) is devoted to demonstrating the advantageous impact of the jurisprudence of international HR bodies on the award of adequate reparation in the realm of DP.

[1] Johan Dugard, Seventh Report on Diplomatic Protection, [2006] Doc (A/CN.4/567) para 93.
[2] ibid.
[3] See Chapter Four.
[4] See Chapter Five.

6.2 The Foundations of Duty to Repair

6.2.1 Theoretical Foundations

In theory, it is commonly acknowledged as a matter of law that the wrongdoer is obliged to incur the injurious effects of their wilful or negligent conduct.[5] This reflects a well-grounded legal assumption according to which "any act causing injury to others obliges whoever is responsible for that injury to make reparation for it".[6] Needless to say, this conception is not unique to relations between individuals, which are governed by domestic laws, but has also been recognised as being applicable to the relations between States.[7] Having said that, the basis of the duty to repair **(**D2R) has divided opinions and generated much debate.[8]

Centuries ago, Grotius based the D2R upon the postulates of natural law, saying that "a fault or trespass […] arises an obligation by the law of nature to make reparation for the damage".[9] For his part, Hegel has philosophically emphasised the necessity of punishing the wrongdoer for their unlawful conduct as a sufficient foundation of the duty.[10] Notwithstanding, the applicability of the sanction-based reparation to international law is not attractive to many of

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[5] See e.g. Clyde Eagleton, 'Measure of Damages in International Law' (1929) 39 (1) Yale Law Journal 52; Frederick Mann, 'The Consequences of an International Wrong in International and National Law' (1977) 48 (1) British Yearbook of International Law 1; Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 4-6; Lisa Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 513; Rutsel Martha, *The Financial Obligation in International Law* (Oxford University Press 2015) 413.

[6] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Compensation, Judgment of 19 June 2012 (2012) ICJ Rep 324, Separate Opinion of Judge Cançado Trindade, para 29.

[7] See e.g. Brigitte Stern, 'The Obligation to Make Reparation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 563; Gentian Zyberi, 'The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations' (2011) 7 (1) Utrecht Law Review 204.

[8] See e.g. Julio Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility' in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Martinus Nijhoff Publishers 2005) 10; Andrew Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 54; *Ahmadou Sadio Diallo,* Compensation, (n 6) Separate Opinion of Judge Cançado Trindade, paras 22-40.

[9] Hugo Grotius, *The Rights of War and Peace* (1625) (Edited by Richard Tuck), Bk II, Ch, XVII, The Damage Done by an Injury, and of the Obligation Thence Arising (Liberty Fund, Inc 2005) 884.

[10] Hugh Nisbet and Allen Wood, *G. W. F. Hegel: Elements of the Philosophy of Right* (Cambridge University Press 1991) 124.

the leading figures in international law.[11] For instance, Kelsen refutes this understanding because "the substitute obligation to make reparation cannot be considered as having the character of a sanction, for a sanction is a coercive act, not an obligation".[12] Likewise, Ago distinguishes between sanction and reparation owing to the fact that the former "has an afflictive character, it is an end in itself, and its only function is that of punishing the author of the breach, whereas the reparation is limited to restoring the right of the injured subject, or at least to letting him has equivalent satisfaction".[13]

What is more important is that the sanction-based reparation seems at odds with the main characteristic of reparation under international law as a remedial measure that should be free of all punitive connotations.[14] A salient example of this is to be found in the notion of non-military countermeasures,[15]which should not be taken in order to punish the delinquent party.[16] Non-military countermeasures are procedural tools with an essential objective of inducing the responsible State to comply with its international obligations.[17] In addition, the conspicuous correlation between the D2R and the perpetration of wrongdoing implies that the conduct of the responsible party is an act that should not be done, mainly because it is

[11] Luka Burazin, 'Legal Nature and Functions of Damage Reparation: Sanction-Based and Duty-Based Understanding' (2013) 44 (3) Rechtstheorie 395,395.

[12] Hans Kelsen, *Principles of International Law* (2nd edn, Lawbook Exchange 2003) 21.

[13] As quoted by Julio Barboza (n 8) 10.

[14] *Eritrea-Ethiopia Claims Commission [Final Award] Eritrea's Damages Claims* (2009) UNRIAA, Vol, XXVI 505, 508.

[15] See e.g. Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 (5) European Journal of International Law 889; Thomas Franck, 'On Proportionality of Countermeasures in International Law' (2008) 102 (4) American Journal of International Law 715.

[16] Article 49 of the ARSIWA, which deals with the objectives and the limits of countermeasures, provides that: "1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question".

[17] See e.g. Julio Barboza (n 8) 11; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 20; Math Noortmann, *Enforcing International Law: From Self-Help to Self-Contained Regimes* (2nd edn, Routledge Press 2016) 35-37.

prohibited or disallowed by an international rule.[18] When a wrong occurs, adequate reparation, which shall always be reparative in nature with the aim of correcting the injustice done, must be provided for the resulting harms.[19]

Therefore, as long as the compliance with, or the fulfilment of, the international obligations is the ultimate purpose of international reparations, then it may provide a sufficient theoretical basis for the D2R. This foundation is a reflection of the assumption that violations and reparations always come together "confirming an indissoluble whole: the latter is the indispensable consequence or complement of the former".[20] Moreover, it is in line with the international case law on reparation, including the landmark precedent concerning *Chorzow Factory*.[21]

6.2.2 Practical Foundations

In practice, it has been stressed in a number of international judicial decisions that "it is a principle of international law […] that any breach of an engagement involves an obligation to make reparation".[22] Based on this, the law of international responsibility, as elaborated by the ILC in 2001, refers to the obligation of making reparation as an immediate corollary of the responsibility that arises automatically whenever a wrong is committed without requiring the

[18] James Crawford and Jeremy Watkins, 'International Responsibility' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 286.

[19] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 (2) American Journal of International Law 833, 836.

[20] *Ahmadou Sadio Diallo,* Compensation (n 6) Separate Opinion of Judge Cançado Trindade, para 40.

[21] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (n 19) 836.

[22] *The Factory at Chorzow (Germany v. Poland),* Merits, Judgment of 13 September 1928 (1928) PCIJ Serie A, No 17, p 29. Thereafter, this principle has been reaffirmed in; *Gabcíkovo-Nagymaros Project (Hungary v. Slovakia),* Judgment of 25 September 1997 (1997) ICJ Rep 7, para, 152; *Avena and Other Mexican Nationals (Mexico v. United States of America),* Judgment of 31 March 2004 (2004) ICJ Rep 59, para. 119; *MIV "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea),* Judgment [1999] ITLOS Rep 10, para 170; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment of 19 December 2005 (2005) ICJ Rep168, para 259; *Pulp Mills on the River Uruguay (Argentina v. Uruguay*) Judgment of 20 April 2010 (2010) ICJ Rep 14, para. 273; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo),* Merits, Judgment of 30 November 2010 (2010) ICJ Rep 639, para 160.

request of the wronged party.[23] This is mirrored in Article 31 (1) of the ARSIWA which emphasises that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*"*. Equally, the right of victims of HR violations to be repaired constitutes an integral part of international HR law.[24] It is stated, for instance, that the expression "effective remedy" as confirmed in Article 2 (3) of the CCPR,[25] is utterly meaningless "without reparation to individuals whose Covenant rights have been violated".[26]

Interestingly, the importance of the D2R or the right to reparation, if viewed from a different angle, to the law of SR and to the international law of HR has resulted in the adoption of similar remedies.[27] This occurs despite the fact that the law of SR concentrates primarily on the wrongs committed by one State against another,[28]and international HR law focuses on infringements against individuals.[29] As such, the methods of reparation as listed in Article 34 of the ARSIWA are "restitution, compensation, and satisfaction, either singly or in combination".[30] These methods have Subsequently been espoused in principles 19, 20 and 22 of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

[23] ARSIWAC, Report of the International Law Commission, Fifty-Third Session [2001] Doc. (A/56/10) 91.

[24] This fact is reflected in various HR instruments such as Article 8 of the UDHR, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 13 of the ECTH, and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[25] Article 2 (3) (a) of the CCPR imposes on each State party various obligations; including the obligation "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."

[26] UNHRC, The Nature of General Obligations Imposed on States Parties to the Covenant [2004] UN Doc. (CCPR/C/21/Rev.1/add. 1326), para 15.

[27] James Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (Routledge Press 2012) 92.

[28] André Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 (2) Indiana Journal of Global Legal Studies 535, 536.

[29] Theo van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines' in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff Publishers 2009) 25.

[30] ARSIWA (n 23) p 9.

Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles).[31]

For its part, the International Criminal Court (ICC) has set out in *Lubanga* a very detailed approach to be taken to reparations and can be "applied, adapted, expanded upon, or added to by future Trial Chambers".[32] The main features of the ICC's approach that relate to this study are, first, the consistency of the ICC's approach with internationally recognized HR,[33] and, secondly, the frequent reference to the UN Basic Principles.[34] As a consequence, the forms of reparation that espoused by the ICC are identical to those under the law of SR and international HR law.[35] Particularly, this applies to the main two forms of reparation, namely restitution and compensation, in addition to rehabilitation, which is extremely important in the context of international criminal law but unlikely in the context of DP.[36]

This similarity in the modes of reparation can be used as a general framework, particularly if one takes into consideration the following facts. First, it has been mentioned above that the law of DP overlaps with the law of SR at various points including the methods of repairing the injurious consequences of wrongs inflicted. Second, the current use of DP as a tool of HR protection is not in conflict with the reliance on the modes of reparation under the law of SR

[31] UN Basic Principles. Available at: https://www.legal-tools.org/en/doc/bcf508/ (accessed 15/06/2019).

[32] Judgment on the Appeals against the "Decision establishing the Principles and Procedures to be applied to Reparations", Amended Order for Reparations (Annex A), para 5. Available at: https://www.icc-cpi.int/pages/record.aspx?uri=1919024 (accessed 15/06/2019); See also, Lucia Catani, 'Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case (2012) 10 Journal of International Criminal Justice 905; Kai Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues' (2012) 12 (2) International Criminal Law Review 115; Carsten Stahn, 'Reparative Justice after the Lubanga Appeal Judgment: New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?' (2015) 13 (4) Journal of International Criminal Justice 801.

[33] Decision establishing the Principles and Procedures to be applied to Reparations, para 229. Available at; https://www.icc-cpi.int/CourtRecords/CR2012_07872.PDF (accessed 15/06/2019).

[34]See e.g. paras 13, 15, 16, 23, 30, 35, 37 and 39 of the Amended Order for Reparations (Annex A). Available at: https://www.icc-cpi.int/pages/record.aspx?uri=1919024 (accessed 15/06/2019).

[35] Decision establishing the Principles and Procedures to be applied to Reparations (n 44), paras 222-236.

[36] Anja Wiersing, 'Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court' (2012) (3:4) Amsterdam Law Forum 21, 27.

because these modes are related to the outcome of successful claims regardless of the nature of the litigant, whether a State or an individual.[37] Third, the compensation decisions of HR Courts and Tribunals are often drawn upon the principles of reparation under general international law.[38]

6.3 Specifying the Appropriate Outcome for DP Claims and an Analysis of its Characteristics

6.3.1 What is the Appropriate Outcome for DP Claims?

In its broad sense, the term reparation includes "all measures that may be employed to redress the various types of harms the victims have suffered".[39] This generality necessitates making a comparison between its forms to decide upon the appropriateness of which is most applicable to DP. As a starting point, it should be said that the forms of reparation under the law of SR and the law of HR are hierarchically structured according to their characteristics.[40] As such, restitution often comes as the primary remedy,[41] but where it is not provided or does not fully

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[37] See. e.g. Natalino Ronzitti, 'Access to Justice and Compensation for Violations of the Law of War' in Francesco Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press 2007) 101; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 163.

[38] ARSIWAC (n 23) 102.

[39] According to Oxford Bibliographies, "reparation refers to the process and result of remedying the damage or harm caused by an unlawful act. The purpose of reparation is generally understood to re-establish the situation that existed before the harm occurred. It can also serve as a measure to end ongoing breaches and to deter future ones, as a vehicle for reconciliation or to restore relations between the violator and injured parties, as well as a basis to repair or rehabilitate physical and psychological integrity and dignity". Carla Ferstman, Reparations - International Law - Oxford Bibliographies, Available at: http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0003.xml (accessed 15/06/2019); See also, Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 452.

[40] See e.g. Richard Falk, 'Reparations, International Law, and Global Justice: A New Frontier' in Pablo De Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2008) 482-483; Yann Kerbrat, 'Interaction Between the Forms of Reparation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 573; Felicia Maxim, 'Forms of Reparation of Prejudice in International Law: Reflections on Common Aspects in the Draft Regarding the Responsibility of the States for Internationally Wrongful acts' (2011) 1 (2) Juridical Tribune Journal 20-30.

[41] Antoine Buyse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 Heidelberg Journal of International Law 129; Christine Gray, 'The Different Forms of Reparation: Restitution' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 589.

eradicate the consequences of the wrongful act, the injured party must be compensated or/and satisfied.[42]

In its essence, restitution aims to "re-establish the original situation before committing the wrong or the violation",[43]whereas "compensation consists of a monetary payment that corresponds to the financially assessable damages suffered by the injured party".[44] These are the two main methods of reparation that might be accompanied by satisfaction in patterns such as "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[45] In this sense, satisfaction is a suitable method for repairing moral damages committed against States since these damages are not financially assessable.[46] In addition, it may play a complementary role and might be required, or awarded, in situations where the other forms are not capable of providing full reparation.[47]

Besides these forms, some scholars consider cessation and assurances or guarantees of non-repetition amongst the methods of reparation owing to the difficulty of drawing a clear distinction between them and the main three forms of reparation.[48] While it is true that this difficulty may exist when the wrongful act is continuously perpetrated against a State breaching, for instance, its territorial integrity.[49] However, it has been previously mentioned that DP is a remedial instrument intends to deal with the consequences of wrongs already

[42] Yann Kerbrat (n 36) 573.
[43] See e.g. Article 35 of the ARSIWA and principle 19 of the UN Basic principles.
[44] ARSIWAC (n 23) 99; See also, John Barker, 'The Different Forms of Reparation: Compensation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 600-602.
[45] Article (37) (2) of the ARSIWA.
[46] ARSIWAC (n 23) 106.
[47] Eric Wyler and Alain Papaux, 'The Different Forms of Reparation: Satisfaction' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 623-637.
[48] See e.g. Magarrell Lisa, 'Reparations in Theory and Practice' (2007) International Center for Transitional Justice, Reparative Justice Series 1,1; Chittharanjan Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 83-84; Christine Gray, 'Remedies' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 879.
[49] ARSIWAC (n 23) 106.

done, which means that it is impossible to exercise it without a prior perpetration of a wrongful act against the protected person.[50] Therefore, there is no need to indulge into the debate over the suitability of cessation and assurances or guarantees of non-repetition in the context of DP,[51]since they are designed either to stop the wrongful act if it is on-going, or to secure assurances against future violations.[52]

In light of the foregoing, the scope of the comparison should be narrowed down to choose from two forms of reparation, namely restitution and compensation. Here, it is worth remembering that the wrongful acts in the context of DP generally revolve around the violations of personal rights or violations of property right and other economic interests.[53] Indeed, the restoration of the original situation in these cases does not correspond to a truly attainable goal because it is either an insufficient or impractical solution to the problem.[54]

On one hand, it might be insufficient because harms produced in most cases involving HR violations cannot be restored,[55]especially with regard to moral damages.[56] For example, the release of a detainee who was arbitrarily detained will not eradicate the whole consequences of their detention. On the other hand, restitution might be materially impossible in cases where a foreign property was unlawfully confiscated if the property in question had been

[50] See Chapter Three.

[51] See e.g. Oliver Corten, 'The Obligation of Cessation' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 545-549; Sandrine Barbier, 'Assurances and Guarantees of Non-Repetition' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 551-561; Pierre D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press 2014) 208**.**

[52] Article 30 of the ARSIWA provides that **"**the State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

[53] See Chapter Three.

[54] Octavian Ichim, *Just Satisfaction under the European Convention on Human Rights* (Cambridge University Press 2015) 24.

[55] Michael Addo, *The Legal Nature of International Human Rights* **(**Martinus Nijhoff Publishers 2010) 308.

[56] Fiona McKay, 'What Outcomes for Victims?' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 925.

destroyed or fundamentally changed in character.[57] Moreover, the argument in favour of returning such property may run counter to the rules by which the expropriation of the foreign property has long been governed.[58]

In effect, restitution is not an anticipated outcome,[59]and the injured person should be remediated by something else that represents as far as possible the damage sustained.[60] To a great extent, this objective could be achieved through paying "an amount of money as a valuation of the wrong done".[61] This reality reflects the idea that money is a common measure of valuable things,[62]and explains why monetary reparation has normally and frequently been the most sought form of relief in the realm of DP.[63] In *Barcelona* case, for example, restitution was practically and legally impossible which led Belgium to ask the ICJ "to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of".[64] Likewise, the same Court held in *Diallo* that:

> In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation.[65]

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[57] ARSIWAC (n 23) 97.
[58] See above, p 91.
[59] Even in the inter-States disputes restitution is an exception that is often illustrated by referring to the *Temple case* where the ICJ ordered Thailand "to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may have been removed from the Temple or the Temple area by the Thai authorities". *The Temple of Preah Vihear (Cambodia v. Thailand),* Merits, Judgment of 15 June 1962 (1962) ICJ Rep 6, p 37.
[60] Fiona McKay (n 56) 925.
[61] Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 459.
[62] Hugo Grotius (n 9) 897.
[63] Frederick Mann (n 5) 2.
[64]*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase), Judgment of 5 February 1970 (1970) ICJ Rep 3, p 12.
[65] *Ahmadou Sadio Diallo,* Merits, (n 22) para 161.

6.3.2 The Main Characteristics of Monetary Reparation

In general, the compensation decision should create a balance between two opposing considerations. The first lies in the importance of awarding effective reparation that can wipe out the consequences of the wrongful act, whereas the second pertains to the necessity of ensuring that the awarded pecuniary reparation is not excessive in nature.

6.3.2.1 Eradicating the Consequences of the Wrongful Act

According to the principle of full reparation, the purpose of monetary compensation should always be the eradication of the whole effects of the illegal act.[66] Basically, the fulfilment of this requirement imposes on the author of the wrongdoing an obligation to repair any resulting loss or damage whether material or moral.[67] The moral or non-material damages[68] refer to harms other than material injuries which may include, among other things, "the loss of loved ones, pain and suffering, mental anguish, degradation, humiliation, loss of social position or injury to credit and reputation".[69] Despite the difficulty of quantifying them "by money standards",[70]the moral damages are "very real"[71]and therefore should be repaired.[72]

As mentioned above, moral damages to States are not financially assessable. However, if the sufferers of them are individuals, then a financial assessment is conceivable.[73] In effect, the

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[66] According to the PCIJ, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". *The Factory at Chorzow,* Merits, (n 22), p 47.

[67] This fact is confirmed in Article 31 of the of the ARSIWA which reads as follows: "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

[68] See e.g. Stephen Wittich, 'Non-material Damage and Monetary Reparation in International Law' (2004) 15 Finnish Yearbook of International Law 321-368; Patrick Dumberry, 'Compensation for Moral Damages in Investor-State Arbitration Disputes' (2010) 27 (3) Journal of International Dispute Settlement 247–276; Stanimir Alexandrov, 'The Present and Future of Moral Damages in Investment Arbitration' in Borzu Sabahi and Others (eds), *A Revolution in the International Rule of Law: Essays in Honor of Don Wallace, Jr* (Juris Publishing 2014) 515.

[69] *Ahmadou Sadio Diallo,* Compensation, (n 6) para 18.

[70] *Opinion in the Lusitania Cases (United States v. Germany)* (1923) UNRIAA, Vol, VII, 40.

[71] ibid.

[72] ibid.

[73] See e.g. Article 36 of the ARSIWA and Principle 20 of the UN Basic Principles.

efficiency of monetary reparation to redress these damages has long been grasped by various international adjudicative bodies such as the ITLOS,[74]the IACtHR,[75] the ECtHR[76] and a large number of international Claims Commissions.[77] In light of this, the ICJ accepted Guinea's contention that "Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC".[78] The Court held that:

> Mr. Diallo had been arrested without being informed of the reasons for his arrest and without being given the possibility to seek a remedy; that he was detained for an unjustifiably long period pending expulsion; that he was made the object of accusations that were not substantiated; and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities Thus, it is reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.[79]

On the other hand, there is no difficulty in assessing material damages by monetary standards, since they are "assessable in financial terms".[80] By and large, these damages are related to damages to property or other economic interests.[81] As mentioned above, the well-known examples of these damages are the unlawful expropriation of foreign property and the wrongs committed against the owners of shares in foreign companies.[82] In addition, material

[74] The ITLOS held in *MIV "Saiga" (No. 2)* that "Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the Saiga, including all persons involved or interested in its operation. Damage or other loss suffered by the Saiga and all persons involved or interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment" *MIV "Saiga" (No. 2)* (n 22), para 172.

[75] *Goiburú and Others v. Paraguay*, (Merits, Reparations and Costs), IACtHR, Judgment of 22 September 2006, para 156.

[76] *Halford v. the United Kingdom*, (Application no 20605/92) ECtHR, Judgment of 25 June 1997, para 76.

[77] David Caron, 'International Claims Commissions Bodies' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014)278-294.

[78] *Ahmadou Sadio Diallo*, Compensation, (n 6) para 19.

[79] ibid, p 334, para 21.

[80] ARSIWAC (n 23) 92.

[81] See Chapter Three.

[82] ibid.

damages refer also to other losses such as "the loss of personal property, the loss of professional remuneration, and the deprivation of potential earnings".[83]

6.3.2.2 Ensuring the Award of Non- Excessive Reparation

Monetary reparation could be classified as excessive in cases where the awarded payment is not proportional to the damages that followed from the wrongful act.[84] In this sense, the full reparation for moral and material damages must always be subject to ensuring that the awarded compensation is not excessive.[85] Normally, it is assumed that the applicant seeks to obtain what seems adequate compensation from their perspective, whereas the respondent party will logically consider that request to be exaggerated. In other words, the award of excessive compensations occurs mainly due to the failure in assessing harms in a manner that accounts for their genuine value.[86] The solution to this conflict relies on the success of the respective judicial or arbitral body in awarding accurate monetary reparations that reflect the reality of the harms sustained. This purpose can be achieved by adopting a case-by-case approach rather than a specific formula. This is because such an approach has regard to the circumstances of each individual case in terms of determining the appropriate levels of monetary compensation.

For example, the case of *Diallo* has witnessed a considerable disagreement on the amount of compensation that should be awarded to Mr. Diallo. Guinea sought a total of more than US$11,590,148 million,[87]whereas the DRC considered the amount of only US$30,000

[83] *Ahmadou Sadio Diallo*, Compensation, (n 6) paras 37-54.

[84] See e.g. Thomas Franck, 'Proportionality in International Law' (2010) 4 (2) Law & Ethics of Human Rights 231; Adamu Usman, *Theory and Practice of International Economic Law* (Malthouse Press 2017) 226.

[85] *Ahmadou Sadio Diallo*, Compensation, (n 6) Separate Opinion of Judge *AD HOC* Mahiou, para 7.

[86] Ian Brownlie, 'Remedies in the International Court of Justice' in Malgosia Fitzmaurice and Vaughan Lowe (eds), *Fifty Years in the International Court of Justice: Essay in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 558.

[87] This amount was divided as follows; "(1) US$250,000 for mental and moral damage, including injury to his reputation; (2) US$6,430,148 for loss of earnings during his detention and following his expulsion; US$550,000

sufficient "to make good the moral injury suffered by Diallo as a result of his wrongful detentions and expulsion in 1995/1996".[88] Yet, the ICJ ordered the DRC to pay a fixed sum of US$95,000 of which US$85,000 for the non-material damages,[89]and US$10,000 for the material ones.[90]

Since this sum amounted to less than 01% of what Guinea was seeking, one should ask whether it is proportional to the damages sustained or not. In other words, does it ensure proportionality between the damages and the amount of compensation? Here, it should be mentioned that the Court rested "the quantification of compensation on equitable considerations",[91] to award US$ 85, 000 for the moral damages that resulted particularly from the wrongful detention of Mr. Diallo for 72 days, and from his unlawful expulsion".[92]

According to judge Greenwood, the award in *Diallo* "is higher than might be expected when one bears in mind the sums awarded by other international courts and tribunals, especially those with the most extensive experience of determining compensation for violations of human rights".[93] By doing so, he apparently points to the parsimonious approach of the ECtHR to just satisfaction,[94] which refers generally to monetary compensations awarded as a result of violations of the ECHR.[95] According to Article 41 of the ECHR:

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for other material damage; and US$4,360,000 for loss of potential earnings". *Ahmadou Sadio Diallo*, Compensation, (n 6) para 10.

[88] ibid.

[89] ibid, para 25.

[90] ibid, para 36.

[91] ibid, para 24.

[92] ibid, para 12.

[93] *Ahmadou Sadio Diallo*, Compensation, (n 6) Declaration of Judge Christopher Greenwood, para 11.

[94] See e.g. Octavian Ichim (n 54) 22; Julia Laffranque, 'Can't Get Just Satisfaction' in Anja Seibert-Fohr and Mark Villiger (eds), *Judgments of the European Court of Human Rights: Effects and Implementation* (Ashgate Publishing 2014) 75.

[95] See e.g. Alexia Solomou, 'The Contribution of the European Court of Human Rights and the Inter-American Court of Human Rights to the Emergence of a Customary International Rule of Just Satisfaction and the Creative Expansion of Its Scope'. Available at: http://revista.ibdh.org.br/index.php/ibdh/article/view/259/259 (accessed 15/06/2019); Grigory Dikov, 'The European Human Rights System'. Available at: https://www.nyulawglobal.org/globalex/European_Human_Rights_System1.html (accessed 15/06/2019).

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

To justify the ECtHR's practice, it is argued that this provision makes the Convention guarantees tangible and elastic instead of theoretical and illusory.[96] It is also said that the low-level of awards made by the Court follows from the fact that the main duty to provide reparation in the event of a violation of the ECHR is principally left to the States.[97] This renders the role of the Court in affording reparations a secondary role that is dependent upon the failure to obtain full reparation at the domestic level.[98] Likewise, it is maintained that the practice of the ECtHR is due to a prevailing view that the primary remedy in Strasbourg is the finding of a violation of the Convention itself. [99]

However, the low level of awards of the ECtHR has been a subject of consistent discussion.[100] In particular, the practice of the ECtHR is disputed mainly because instead of laying down specific means of calculating damages, such as a daily rate for unlawful detention,[101] the ECtHR regularly makes its awards on an equitable basis.[102] Yet, resorting to

[96] Michael Addo (n 55) 307.

[97] *Salah v. The Netherlands*, (Application no. 8196/02), Judgment of 6 July 2006, para 50.

[98] Helen Keller, Andreas Fischer and Daniela Kühne, "Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals" (2011) 21 (4) European Journal of International Law 1025, 1031.

[99] Philip Leach, *Taking a Case to the European Court of Human Rights* (4th edn, Oxford University Press 2017) 600.

[100] See e.g. Matthieu Loup, 'The Content of State Responsibility under the European Convention on Human Rights: Some Reflections on the Court's Approach to General International Law on State Responsibility' in Samantha Besson, *International Responsibility: Essays in Law, History and Philosophy* (Schulthess Verlag 2017) 139; Elisabeth Abdelgawad**,** 'Is There a Need to Advance the Jurisprudence of the European Court of Human Rights with Regard to the Award of Damages?' in Anja Seibert-Fohr and Mark Villiger (eds), *Judgments of the European Court of Human Rights: Effects and Implementation* (Ashgate Publishing 2014) 115.

[101] Philip Leach (n 99) 601.

equity in order to assess the alleged damages might derogate from the widely accepted principle of full reparation.[103] This assumption is supported by the practice directions which indicate that just satisfaction may not cover the damages if the ECtHR finds reasons of equity to award less than the value of the actual damages sustained.[104]

As a result, the awards of the ECtHR are usually parsimonious even in the most serious violations such as those of Article 3 of the ECHR, which is connected to torture, inhuman and degrading treatment, and Article 5 of the ECHR, which relates to arbitrary detention.[105] In a recent judgment, the ECtHR awarded an amount ranging from €10,000 to €15,000 to victims of a violation of Articles 5 and 3 of the ECHR.[106] Compared with this, the compensation in *Diallo* appears to be correctly assessed, particularly if one takes into account the following facts.

First, the case of *Diallo* was far from being one of the gravest cases of HR violations, since there was no evidence that the victim had been "subjected to inhuman or degrading treatment during his detentions".[107] Second, based on the duration of detention the ICJ saw the Guinean demand of US$250,000 disproportionate to the actual damage,[108]but equally, it did not follow the figure of US$100,00 per day, which was followed in a number of awards concerning arbitrary imprisonment.[109] In the end, the moral damages were calculated at US$1,180,00 per day, which was "an astonishing amount compared to any previous international judgment or

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[102] Just Satisfaction: Practice Directions issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007. Available at: https://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf (accessed 15/06/2019).
[103] Matthieu Loup (n 100) 153.
[104] Just Satisfaction: Practice Directions issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 (n 102).
[105] Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2019) 29 (4) European Journal of International Law 1091, 1108.
[106] *Georgia v. Russia (I)*, (Application no. 13255/07), (Just Satisfaction) Judgment of 31 January 2019, para 77.
[107] *Ahmadou Sadio Diallo*, Compensation, (n 6) para 12.
[108] ibid, p 330, para 10.
[109] Clyde Eagleton (n 5) 60.

any domestic standard of compensation for similar wrongs".[110] Thirdly, it should not be overlooked that Guinea had failed in its attempt to link the alleged material losses to the conduct of the DRC. This failure compelled the Court to award US$10,000 for the loss of Mr. Diallo's personal property,[111] and to dismiss a significant part of the claim that was related to "the loss of remuneration and the deprivation of potential earnings".[112]

Apart from the debate over the adequacy of the awarded compensation, a question should be asked regarding the possibility of ordering the claimant State to transfer compensation to the individual on behalf of whom DP was triggered. While the ICJ referred in *Diallo* to the fact that "the sum awarded to Guinea in the exercise of DP of Mr. Diallo is intended to provide reparation for the latter's injury",[113] it gives no explicit answer to this question in its judgment and makes no reference to Article 19 (c) of the ADP which recommends, among other things, that "any compensation obtained for the injury from the responsible State, subject to any reasonable deductions, should be transferred to the injured person".[114]

In this respect, three explanations could be assumed to justify the attitude of the ICJ. First, it might be said that the formulation of Article 19 as a recommendation may have driven the Court to avoid making reference to this provision. Second, it is possible that the ICJ ignored this provision because the costs of proceedings requested by Guinea, but dismissed by the Court,[115]exceeded the awarded monetary reparation, which effectively nullified the

[110] Pierre D'Argent, Award of Compensation by International Tribunals in Inter-State Cases: ICJ Decision in the Diallo Case – UPDATED; https://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case (accessed 15/06/2019).
[111] *Ahmadou Sadio Diallo,* Compensation, (n 6) para 36**.**
[112] ibid, paras 37-54.
[113] ibid, p 344, para 57.
[114] ADP [2006] Doc. (A/CN.4/L. 684) 9.
[115] Guinea estimated these costs at US$ 500,000 claiming that they should be awarded in its favour. Based on Article 64 of the ICJ Statute however each party was ordered to bear its own costs. *Ahmadou Sadio Diallo,* Compensation, (n 6) paras 58-60.

compensation for Mr. Diallo.[116] Thirdly, the international courts and tribunals are not compelled to follow the ILC's conclusions unless the relevant provisions are, tacitly at least, in line with the rules that govern the given issue. As such, it seems that the ICJ was not convinced that Article 19 (c) is an accurate reflection of the prevailing rules in the realm of DP, though it has theoretically been seen as a significant step towards developing the law of DP.[117]

Leaving the stance of the ICJ aside, it remains a question whether national courts have the authority to command the applicant State to pass the obtained compensation on to the injured persons. It appears that what has been said about national developments that are narrowing States' discretion on whether to exercise DP in the first place is applicable here.[118] If the original decision of the State not to grant DP is open to review, by analogy therefore, the same should be said about the decision of the State to not pass the compensation on to the injured person. It is true that subjecting such a decision to judicial review does not necessarily mean that the State would be commanded to pass on the compensation. However, it does imply that the protecting State may be compelled to reconsider cases where the injured person has requested awarded compensation to be transferred to them.

6.4 Factors Contributing to the Award of Adequate Monetary Reparation

6.4.1 Benefiting from the Legacy of HR Protection Bodies

It is worth mentioning that in the landmark precedents in which the claims of DP were under the consideration of both the PCIJ and the ICJ no compensations were awarded. In the case of

[116] Annemarieke Vermeer-Künzli, 'Diallo: Between Diplomatic Protection and Human Rights' (2013) 4 (3) Journal of International Dispute Settlement 487, 498.

[117] See e.g. Paula Escarameia, 'Professor Dugard as an Innovator in the Work of the International Law Commission' (2007) 20 (4) Leiden Journal of International Law 931, 935; James Kateka, 'John Dugard's Contribution to the Topic of Diplomatic Protection' (2007) 20 (4) Leiden Journal of International Law 921, 925; Gerald Neuman, 'The Resilience of Nationality' (2007) 101 American Journal of International Law 97, 99; Chittharanjan Amerasinghe, *Diplomatic protection* (n 48) 117; Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection: A Reappraisal' in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge Press 2013) 89.

[118] See Chapter Two.

Mavrommatis, the claimant State failed to bring sufficient evidence of the alleged loss.[119] Also, the cases of *Nottebohm, Barcelona Traction,* and *Interhandel* were all dismissed due to considerations related to the requirement of nationality,[120]or to the exhaustion of LRs.[121] Undoubtedly, these precedents would have been clear instances if they had reached the merits phase.[122] However, the absence of such a guidance left the ICJ with no choice but to refer to the experience of other intentional courts, tribunals and commissions such as the ITLOS, the IACtHR, the ECtHR, the IUSCT, the Eritrea-Ethiopia Claims Commission and the United Nations Compensation Commission in order to ensure that the awarded monetary reparation in *Diallo* case was consistent with the principle of full reparation.[123]

Gray criticises the ICJ's approach saying that the reference to the practice of other international courts and tribunals is an exceptional technique used to approve that "a State may claim compensation for non-material damage to injured individuals, but not to establish any specific method of assessment".[124] Notwithstanding, what is more important is that the approach of the Court might be used to shed some light on the phenomenon of fragmentation of international law.[125]

As such, it is suggested that the growth in the number of the international courts and tribunals "create[s] inconsistency within case law, which may jeopardize the unity of international

[119] *The Mavrommatis Palestine Concessions (Greece v. United Kingdom),* Judgment of 30 August 1924 (1924) PCIJ, Serie A, No 2, p12.
[120] *Nottebohm Case (Liechtenstein v. Guatemala),* (second phase), Judgment of 6 April 1955 (1955) ICJ Rep 4, p 26; *Barcelona Traction* (n 58) para 102.
[121] *Interhandel Case (Switzerland v. United States of America),* Preliminary Objections, Judgment of 21 March 1959 (1959) ICJ Rep 6, p 30.
[122] Annemarieke Vermeer-Künzli, 'Diallo: Between Diplomatic Protection and Human Rights' (n 100) 497.
[123] *Ahmadou Sadio Diallo,* Compensation, (n 6) para 13.
[124] Christine Gray, 'Remedies' (n 48) 882.
[125] See. e.g. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the international Law Commission (Finalized by Martti Koskenniemi) [2006] Doc. (A/CN.4/L.682).

law".[126] This phenomenon has been described as "decisional fragmentation",[127]and regarded, in addition to other things, as a contributing factor in the fragmentation of international law.[128] While it is true that the risk of the fragmentation emerges when international courts reach conflicting conclusions on similar issues,[129]the situation in *Diallo* was slightly different and might be seen "as a counter-argument to concerns about the fragmentation".[130] This is because the case is not related to different answers to the same question of law, but it is mainly about the beneficial effect of the decisions of other international adjudicative bodies.

Indeed, the multiplicity of the sources upon which the Court's decision was built is an assertion of "its role as the principal judicial body of the United Nations, a genuine world court, and the ultimate arbiter of general international law".[131] In addition, this tendency constitutes an illustration of the fact that "each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions".[132] The reliance on the jurisprudence of the IACtHR and the ECtHR as "a reference scale and source of inspiration"[133]is a salient

[126] Judge Gilbert Guillaume, 'Address by HE Judge Gilbert Guillaume, President of the International Court of Justice, to the UN General Assembly' (26 October 2000). Available at: https://www.icj-cij.org/files/press-releases/9/2999.pdf (accessed 15/06/2019). See also; Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1998) 31 New Yok University Journal of International Law & Politics 709, 751; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 (3) Leiden Journal of International Law 553,579; Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International law' (2007) Stanford Law Review 595-631.

[127] Karin Oellers-Frahm, 'Proliferation' in William Schabas and Shannonbrooke Murph (eds), *Research Handbook on International Courts and Tribunals* (Edward Elgar Publishing 2017) 299.

[128] ibid.

[129] Pierre-Marie Dupuy and Jorge Viñuales, 'The Challenge of Proliferation: An Anatomy of the Debate' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 147.

[130] Sean Murphy, 'What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence', (2013) 4 (3) Journal of International Dispute Settlement 539, 540; Chiara Giorgetti, 'Introductory Note to the International Court of Justice: Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of The Congo) Compensation Owed by the Democratic Republic of the Congo to the Republic of Guinea' (2012) 51 (4) International Legal Materials 737, 739.

[131] Mads Andenas, 'Ahmadou Sadio Diallo' (2013) 107 (1) American Journal of International Law 178, 183.

[132]*Ahmadou Sadio Diallo,* Compensation, (n 6) Declaration of Judge Christopher Greenwood, para 8.

[133] ibid, Separate Opinion of Judge *AD HOC* Mahiou, para 6.

example of the strong interaction between the law of HR and DP and shows how the former has found its way in almost every aspect of the latter.

6.4.2 Adopting a Flexible Approach Towards Causality Link

In general, the term causality refers to "the process of connecting an act or omission with an outcome as cause and effect".[134] While the existence of such a connection between the conduct of the wrongdoer and the damages suffered is an essential requirement of the D2R,[135] its application seems to be affected by the category of the damage for which reparation is sought.

With regard to non-material damages, the experience of the IACtHR and the ECtHR shows notable flexibility in dealing with causality.[136] This flexibility appears to be the corollary result of assuming that "moral suffering comes as an inherent consequence of any violation and does not have to be proved".[137] Under the influence of this assumption, the ICJ held in *Diallo* that "non-material injury can be established even without specific evidence.[It] is an inevitable consequence of the wrongful acts of the DRC".[138]

As regards material damages, although one cannot speak of a complete disregard of the necessity of proving the existence of the causal link, a certain degree of flexibility could be deduced from the ICJ's ruling on this issue. As such, the case of *Diallo* experienced an unexpected level of compensation for the loss of personal property, which was awarded despite the shortcomings in the evidence of causation.[139] To justify its decision, the ICJ said that:

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[134] Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 (2) European Journal of International Law 471, 472.
[135] This could be easily deduced, among other sources, from Articles 31, 34, and 36 of the ARSIWA.
[136] See e.g. *Goiburú and Others v. Paraguay* (n 69), para 156; *Halford v. the United Kingdom* (n 70), para 76.
[137] Octavian Ichim (n 54) 24.
[138] *Ahmadou Sadio Diallo*, Compensation, (n 6) para 21.
[139]ibid, para 33.

> Mr. Diallo lived and worked in the territory of the DRC for over thirty years, during which time he surely accumulated personal property. Even assuming that the DRC is correct in its contention that Guinean officials and Mr. Diallo's relatives were in a position to dispose of that personal property after Mr. Diallo's expulsion, the Court considers that, at a minimum, Mr. Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC. Thus, the Court is satisfied that the DRC's unlawful conduct caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived.[140]

Commenting on this statement, judge *AD HOC* Mampuya severely criticises the ICJ's conclusion, saying that:

> In respect of material injuries, the burden of proof relating to the existence of those injuries and to the causal link should normally be borne by the applicant, and the absence of proof of one or other of these must lead to the rejection of the claim […….] In this case, Guinea has not demonstrated that there is a causal link between the material injury resulting from the loss of personal property alleged by Mr. Diallo and the conduct of the DRC […….] Thus, the Court would inevitably have had to reject Guinea's claims for the loss of material property for which it had failed to provide "sufficient proof" in support of its claim. [141]

However, there are some necessary responses to this line of thinking. First, the ICJ did not entirely dispense with the causality inquiry and dismissed the claim for compensation in respect to other material damages, namely "the loss of remuneration and the deprivation of potential earnings" due to the lack of connection between the DRC's conduct and the alleged losses.[142] Second, in order to award adequate compensation for the loss of personal property, the Court's conclusion was based on the considerations of equity.[143] By doing so, it followed what seems to be a common practice in the case law of the regional HR courts, which tend to alleviate the rigidity of the causality requirement by resorting to these considerations "in

[140] ibid.
[141] ibid, Separate Opinion of Judge *AD HOC* Auguste Mampuya, para 38.
[142] *Ahmadou Sadio Diallo*, Compensation, (n 6) paras 37-54.
[143] ibid, para 33.

setting forth the amount of compensations due to individual victims in the absence of sufficient evidence".[144]

6.5 Conclusion

This chapter explored the outcome of successful DP claims. It started by delineating the theoretical and practical foundations of the duty of the wrongdoer to repair their actions. On one hand, the theoretical foundation of the D2R was grounded in a general obligation in international law that imposes on the members of the international community the duty of fulfilling their commitments towards each other. On the other, the practical foundation was deduced from the overlap between the law of SR and the law of HR in terms of the methods of reparation.

Taking the nature of the victim on behalf of whom DP is often exercised in mind, monetary reparation was specified as an appropriate outcome for DP. Nevertheless, this specification was conditioned on the success of the compensation decision in balancing the importance of awarding adequate monetary reparation whilst ensuring that it is not excessive. In addition, this chapter highlighted another aspect of the infiltration of HR consideration into the institution of DP. In this regard, the chapter explained the positive impact of the jurisprudence of regional and international HR protection bodies on the award of adequate monetary reparation in the context of DP.

[144] ibid, Separate Opinion of Judge Cançado Trindade, para 65.

Conclusion

Chapters Summary

Chapter 1 was an introductory chapter that mapped the road for the rest of the thesis. The centrality of the ADP to this study necessitated understanding how the ILC functions. The chapter replied to the allegation that the ILC has ceased to play any important role. Here, it has been asserted that the contributions of the ILC to the process of codifying and developing international law continue despite changes in the form of its outputs in recent times. In addition, the chapter examined the relationship between the ILC and the organs of the UN, particularly its close connection with the ICJ. More importantly, this chapter reflected upon the legal authority the ILC's outputs concluding that they might be classified or dealt with as possible customary rules of international law subject to their acceptance in State practice and relevant jurisprudence.

In Chapter 2, several fundamental issues concerning DP were subject to scrutiny. The chapter explored the basis of DP in line with the real position of the individual in international law. Having done this, the current definition of DP was questioned and described as incomplete because of its ineffectiveness on specific issues. Additionally, the chapter illustrated the positive impact of international HR law on DP. Lastly, this chapter highlighted the restrictions on the discretionary power of States to take up the DP claims of their nationals.

Chapter 3 deciphered the content of the wrongful act as an initial requirement for DP. The chapter established a new criterion for characterising the nature of the respondent State's conduct. This criterion challenges the traditional idea of the IMST that was used to determine the wrongfulness of the given conduct in cases where personal HR were breached. In addition, this chapter demonstrated other wrongs that may be committed against the economic interests of aliens or their property. Here, the settled rules of international costmary

law on the expropriation of foreign property and those ban any arbitrary deprivation of the shareholders in foreign companies from enjoying their rights were used to determine the existence of the wrongful act. Finally, the chapter analysed the influence of the initial fault of the injured person on the admissibility of DP claim and the possibility of classifying it as a circumstance capable of precluding the wrongfulness of the host State's conduct.

Chapter 4 examined the requirement of nationality as an essential admissibility condition of DP. The chapter assessed the soundness of the contention that the application of this requirement has recently enjoyed a considerable degree of flexibility. Having justified the necessity of existing the nationality bond, it was concluded that the requirement of nationality is still considered an important criterion for granting DP, which cannot be triggered if the protected person does not possess the nationality of the protecting State. In addition, the possibility of subjecting this requirement to some exceptions has also been evaluated and it was confirmed that there are no real exceptions to the requirement. Yet, it was suggested that the strict application of the nationality requirement is not in contradiction with the humanization of DP. Finally, this chapter considered the phenomenon of multiple nationality from the perspective of DP and clarified the current principles by which the phenomenon is ruled.

Chapter 5 moved on to deal with the exhaustion of LRs as a second admissibility condition of DP claims. The chapter started by asserting that the rule of LRs is a single rule of international law the application of which has stretched over the area of HR protection and DP. This chapter affirmed the nonsensicality of distinguishing between the application of the rule of LRs to HR protection claims and its application to DP claims. In this regard, the chapter highlighted several indications of the uniformity in the rule's application, such as the consistencies in the rationales behind the rule and the characteristics of the required exhaustion. Finally, the chapter showed how the extensive espousal of the rule of LRs by HR

instruments, and the manner in which it is being dealt with by the related judicial and quasi-judicial bodies, has contributed to widening the circumstances in which the requirement of LRs can be dispensed with.

Chapter 6 built upon the results of the previous chapters and explored the appropriate outcome for DP claims. The chapter started by delineating the theoretical and practical foundations of the D2R. In addition, the chapter specified the monetary reparations as appropriate outcome for DP claims. Yet, this specification was conditioned upon the success of the compensation decision in balancing the importance of awarding adequate monetary reparation with the necessity of ensuring that it is not excessive. Finally, the chapter highlighted another aspect of the infiltration of HR considerations into the institution of DP by explaining the positive impact of the jurisprudence of regional and international HR protection bodies on the awarding of adequate monetary reparations in the context of DP.

Main Findings of the Research

This study examined international law on the protection of citizens abroad. Recent developments in international law and jurisprudence begged the question whether the twin doctrines of DP and HR protection can be relied upon to protect citizens abroad. The study showed that urgent effort is required to transform strategies for the protection of citizens abroad from the discretionary DP approach to a more robust obligatory approach that is capable of guaranteeing protection of citizens abroad from potential abuse of host States. The study approached DP from a dual perspective which took into consideration the traditional SR perspective in addition to a much-needed HR perspective.

The main goal of this study was to determine whether DP still has a role in current international law. This dissertation revealed that DP has survived the passage of time. From the time of *Mavrommatis* until the recent debate concerning the possibility of protecting Mrs.

Nazanin Zaghari-Ratcliffe diplomatically by Britain, DP has persistently been an integral part of international law, as reflected in State practice and case law. The most obvious finding to emerge from this study is that the survival of DP has been the consequence of remarkable changes in the law of DP protection. Specifically, the institution of DP has benefited greatly from the on-going developments in the field of international HR protection in recent times. In this respect, this study has explored the extent to which HR considerations are infiltrating into DP. The study observed various aspects of the advantageous impact of this infiltration.

Firstly, the substantive content of the wrongful act has evolved from the traditional idea of the IMST to include the infringements of internationally guaranteed HR rights of individuals who live or conduct business abroad. This has come to mean that any violation of these rights is the current criterion for characterizing the lawfulness of the respondent State's conduct, and therefore the occurrence of the wrongful act which paves the way for DP to be exercised.

The second aspect of the impact of HR considerations on DP has been found in the application of the rule of LRs. The application of this rule to DP claims has been subject to considerable changes resulting from the liberal interpretation and the elastic application of the rule by HR institutions. The consequence of this is that the rule of LRs is being applied to DP claims in a manner that tends to exempt the claimants from the obligation of exhausting their options at the domestic level. The existence of several exemptions to the rule of LRs is a clear example of this tendency.

Thirdly, the interaction between the law of HR and DP plays a constructive role in terms of determining the appropriate outcome for DP claims. Here, it is sufficient to say that the jurisprudence of the IACtHR and the ECtHR has been used as a reference to ensure the award of adequate monetary reparations in the realm of DP.

With regard to the question of the success of the ILC in its task, the investigation of the relevant judicial decisions delivered, either by international or national courts, after the espousal of the ADP revealed three different stances. In some cases, the ILC's ADP were refused. The ruling of the EWCA on Article 8 of the ADP is an example of this. In other cases, no reference was made to the ILC's product on DP despite the possibility of applying the related provision to the issue at stake. This was the attitude of the ICJ with regard to the application of Article 19 (c) to the case of *Diallo*. On several occasions, however, the ADP have been used as a short avenue to concluding that the rules under considerations are rules of international law. This meant that the courts, either at domestic or international level, will not rely upon the conclusions of the ILC unless it is generally understood that the relevant provisions are likely to be customary in nature.

Contribution to Knowledge

This study has comprehensively examined the doctrine of DP with the aim of exploring where it stands today. It is hoped that this work might make a contribution to the scholarship on DP. In an attempt to achieve this contribution, this study has identified as its starting point the assumption that DP must be approached from two perspectives, the traditional SR perspective and a much-needed HR perspective. This approach finds its justification in the necessity of inserting new considerations into the ancient institution of DP in order to give it a new lease of life and confirm its continued usefulness. These considerations are those of the injured individuals on behalf of whom DP is to be exercised. Thanks to this approach, this study has closed some gaps in the existing literature.

In the first place, this study has demonstrated the content of the wrongful act in the context of DP. This determination was absent from the work of the ILC and therefore neglected in the existing literature. By doing so, this study challenged the received wisdom concerning the

distinction between primary and secondary rules of international law and has investigated the area of the primary rules with the aim of setting up a new criterion for characterising what amounts to an internationally wrongful act, the perpetration of which may trigger DP.

This study has also closed another important gap in the existing literature concerning the consequence of successful DP claims. While the outcome of these claims has previously been interpreted and linked only to the law of SR, this study has linked them to the modern law of HR. As a result, this study has answered a question that remained unanswered for a long time, namely; what is the best outcome for remediating wrongs committed against nationals abroad?

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