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NICOLA ORTU*

IS DIPLOMATIC PROTECTION FIT FOR A WORLD OF HUMAN RIGHTS? REFLECTIONS ON THE RELEVANCE OF DIPLOMATIC PROTECTION *VIS-À-VIS* THE INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEM

SUMMARY: 1. Introduction.– 2. Diplomatic protection. What role for the individual?– 3. The three requirements of diplomatic protection in classic international law.– 3.1. The attribution of an internationally wrongful act to a third State.– 3.2. Citizenship.– 3.3. The prior exhaustion of local remedies.– 4. Contemporary developments in the requirements for the exercise of diplomatic protection.– 4.1. The expansion of the scope of diplomatic protection in favour of a wider array of beneficiaries.– 4.2. The recommended practice: limits on the discretionary power of States in the exercise of diplomatic protection.– 4.3. On the right of the individual to receive compensation.– 5. Diplomatic protection and human rights protection: striving towards the same goal.– 5.1. The enduring relevance of diplomatic protection in light of the shortcomings of the contemporary system of safeguards of human rights.– 6. Conclusions.

1. *Introduction*

In an age of enduring globalisation, people travel, intertwine and oftentimes find their place of habitual residence in a foreign State. By virtue of these developments, citizens of a State increasingly find themselves in what has been defined a situation of «extraterritorial vulnerability»[1]. Recent events have highlighted the enduring need for the State to protect its nationals abroad, from the Covid-19 pandemic[2], to disaster relief actions[3] and human rights

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[1] F. MEGRET, *The Changing Face of Protection of the State's Nationals Abroad*, in *Melbourne Journal of International Law*, 2020, pp. 450-468.

[2] *Ibid.*

[3] See the actions following the outbreak of the Cholera epidemic in Haiti in the context of diplomatic protection, in B. KOMBO, *Closing the 'Remedy Gap'-The Limits and Promise of Diplomatic Protection for Victims of the Cholera Epidemic in Haiti*, in *Groningen Journal of International Law*, 2017, pp.115-134.

violations[4]. As a result, diplomatic protection, an institute of classic international law, has gathered new momentum.

The Draft Articles on Diplomatic Protection (thereinafter, DADP) of the International Law Commission define it as «the invocation by a State, through diplomatic action or other means of peaceful dispute settlement, of the responsibility of another State for 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»[5]. In this regard, it consists of a traditional inter-State dispute settlement mean.

In the classic conception of public international law, only States were subjects of the international legal order. In this regard, diplomatic protection offered a valuable tool to safeguard the rights of individuals in the international legal system at a time in which people could not be considered subjects of the international legal order. Within the limits of the classic conception of public international law, diplomatic protection represented an incredibly modern tool. The situation has changed in contemporary international law. Individuals – at least natural persons – can be considered to bear at least a partial international legal personality. Although doctrine is not unanimous on the matter of international legal personality of natural persons, it is accepted that the individual «peut être personnellement titulaire de droits subjectifs institués par une règle de l'ordre juridique international»[6]. The International Court of Justice (ICJ) has also stressed on several occasions that individuals bear rights and duties in the international legal system.[7]

Nowadays, the development of international human rights law and its international system of safeguards mean that injured persons can, at certain conditions, directly act to safeguard their rights in the international legal system, without the *necessary* interposition of their State of nationality. However, this development comes without prejudice to the right of the State to act in diplomatic protection.[8] For example, legal persons, which, under certain conditions, can act through specific treaty-based dispute-settlement mechanisms, such as ICSID, are able to uphold their rights directly through mixed arbitrations.[9] All these developments taken together have brought part of the doctrine to sound the death knell of diplomatic protection.[10]

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[4] See, for instance, the case of Nazanin Zaghari-Ratcliffe, which will be discussed in the course of this paper. Nazanin Zaghari-Ratcliffe: a political hostage in Iran finally returns home (ft.com).

[5] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection with commentaries* (2006), art. 1.

[6] C. DOMINICÉ, *L'ordre juridique international entre tradition et innovation*, Genève, 1997.

[7] *LaGrand (Germany v. United States of America),* Judgment*, I.C.J. Reports 2001*, p. 466, par.77; *Avena and Other Mexican Nationals (Mexico v. United Slates of America),* Judgment*, I.C.J. Reports 2004*, p. 12, par. 40. Also see: RECUEIL DES SENTENCES ARBITRALES, *Sur la question du régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France*, Vol. XXV, pp. 231-266, par. 82.

[8] INTERNATIONAL COURT OF JUSTICE, *LaGrand* cit., par. 42 (« […] does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national»).

[9] It is true that art. 27(1) of the ICSID convention affirms 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 […]», but this obligation is always contingent on the consent of the State, expressed through the ratification of the Convention. As a general rule, an injury to an individual does not bar the State of nationality to act in diplomatic protection. This article will focus on the role of diplomatic protection in relation to individuals, leaving aside the analysis of the protection of legal persons.

[10] C. F. AMERASINGHE, *Diplomatic Protection,* Oxford, 2008. See esp.: *The Human Rights Factor -The Claimed Obsolescence of Diplomatic Protection.*

This narrative sees diplomatic protection as a sort of *relic* of classic international law, a tool that has now been displaced by the system of international human rights protection. Doctrine has at times fallen in the simplistic division between old and new instruments of protection of human rights, with only the latter being truly capable of satisfying the threshold of protection demanded in the modern world, inevitably condemning the former to obsolescence or to a merely ancillary role. However, as testified by recent practice, diplomatic protection remains an important tool for the protection of the rights of nationals abroad, even though it should not be mistaken for other institutes of public international law for the protection of citizens abroad[11].

This paper will argue that diplomatic protection remains a valuable and living tool of contemporary international law. Indeed – even when assessed against the known limits imposed by the nationality of claims and the discretional nature of the action of the State – I will stress that diplomatic protection remains a valuable tool in the system of safeguards of fundamental rights. Indeed, it remains the only customary international law procedure capable to safeguard individual rights when human rights instruments are lacking.

This article is divided in four sections. First, it discusses the rationale behind the legal fiction of Emerich de Vattel in light of the role of natural persons in today's international legal system. Subsequently, the article turns to the analysis of the requirements to enact diplomatic protection in both classic and contemporary international law, highlighting the influence of international human rights law on the evolution and progressive development of diplomatic protection. Last, it tries to provide a definitive assessment of the relationship between diplomatic protection and the international system of protection of human rights. I will sustain that diplomatic protection should be assessed in complementarity rather than in antagonism with the protection of human rights and that, in light of its recent evolutionary trends, represents an incredibly valuable asset in the protection of fundamental freedoms in contemporary international law.

2. *Diplomatic protection. What role for the individual?*

Diplomatic protection consist of the free invocation of the international responsibility of a State by another State for an injury to one of its nationals. As such, it pertains to that set of rules concerning the consequences of the violation of international norms – so called *primary rules* – in the relations between States – *secondary rules.*

Before touching upon the requirements of diplomatic protection in more detail, it is important to stress that diplomatic protection is a prerogative of the State of nationality, and not of the injured individual, as defined in the legal fiction first theorised by Emerich De Vattel in *The Law of Nations, or the Principles of Natural Law*[12].

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[11] In recent literature, the point is briefly mentioned in E. SCISO, *Il caso Regeni: la difficile sintesi tra diritti inviolabili dell'uomo, protezione diplomatica e interessi dello Stato,* in *Rivista di Diritto Internazionale,* 2021, pp. 197-204. Also see R. PISILLO MAZZESCHI, *Il caso Regeni: alcuni profili di diritto internazionale,* in *Ordine internazionale e diritti umani,* 2018, pp. 526-535.

[12] E. DE VATTEL, *The law of nations: or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns*, Philadelphia, 1835, p 161: «Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed, and, if possible, force the aggressor to give full satisfaction or punish him».

According to this legal fiction, the ill-treatment of an individual by a third State represents an injury to their State of nationality – and to it only. In other words, «[s]i un Etat revendique à l'égard de ses ressortissants un droit de protection, il ne fait en réalité valoir que l'exécution par les autres Etats de leurs obligations à son égard».[13] Diplomatic protection is thus a by-result of the injury to the individual, in which only the State of nationality *can* be considered the injured subject and has the *right* to act in diplomatic protection.

International law attaches no particular limit or obligation in the decision of the State to intervene. This approach has formed a constant, consolidated jurisprudence since the time of the Permanent Court of International Justice (PCIJ). In the *Mavrommatis* case, the Court stated: «[e]n prenant fait et cause pour l'un des siens […] cet État fait, à vrai dire, valoir son droit propre, le droit qu'il a de faire respecter en la personne de ses ressortissants, le droit international»[14].

The vision theorised by Vattel finds in the mirroring of the injury suffered by a national of the State the *locus standi* to act in diplomatic protection. Diplomatic protection stems from the customary obligation that States treat aliens according to an international minimum standard, the violation of which represents a breach of the right of their State of nationality to have their subjects treated according to international norms. In such circumstances, the only relevant violations of norms of international law could not be but those pertaining to the rights of the State. This perspective coherently explains why the State maintains full discretion over the exercise of diplomatic protection.

When analysed coherently with the time in which it was first theorised, it was the legal fiction that actually allowed to bridge the gap between the injured individual and the possibility to seek redress for an injury in the international legal system. Vattel's theorisation is thus the essential element to claim on the pane of inter-State relations those rights which the international system of laws would not *directly* recognise to the benefit of the individual, but whose violations had an inevitable impact on the well-being of citizens abroad. At the same time, it is evident that such an approach bears limits in contemporary international law.

3. *The three requirements of diplomatic protection in classic international law*

Classic international law has long held that an action in diplomatic protection requires three cumulative elements. First, there must have been an internationally wrongful act; second, the injured person must possess the nationality of the claimant State; third, the injured individual should have exhausted all local remedies. The present section will describe these three requirements, whilst the next section will expand on the contemporary developments that are contributing to make the exercise of diplomatic protection more in line with the safeguard of human rights.

3.1. *The attribution of an internationally wrongful act to a third State*

First, even if it might seem self-evident, the initial requirement for the exercise of diplomatic protection is the existence of an internationally wrongful act attributable to a third

[13] S. TOUZÉ, *La protection des droits des nationaux à l'étranger: recherche sur la protection diplomatique*, Paris, 2008, p.30.
[14] Publications de la Cour Permanente de Justice Internationale. Serie A – N. 2. Le 30 août 1924, *Recueil des Arrêts*, *Affaire des Concessions Mavrommatis en Palestine*, p. 12.

State. If in some respects one could say that this requirement translates in a tautology[15], the attribution of the unlawful conduct to a State could be disputed, but even controversial, such as in cases of "dual responsibility".

The general rules on attribution and the rules concerning the responsibility of States for internationally wrongful acts as codified in the Articles on State Responsibility for Internationally Wrongful Acts of 2001[16] (ARSIWA) are applicable to diplomatic protection. The illicit suffered by the individual should amount to an *international* illicit, that is, a violation of primary rules of public international law (hence, not every violation of the rights of the individual can give rise to an action in diplomatic protection) and the internationally wrongful act should be attributable to the State.

3.2. *Citizenship*

Citizenship represents the legal link between the injured individual and the State. Nationality translates the offence committed against the foreign national into the sphere of inter-State relations. The importance of citizenship has been emphasised by the Inter-American Court of Human Rights, which defined it: «the political and legal bond that links a person to a given state and binds him to it with ties of allegiance and loyalty, entitling him to diplomatic protection from that state»[17].

Nationality is traditionally left to the domestic arrangements of States. As the PCIJ stated in its advisory opinion on *Nationality Decrees Issued in Tunis and Morocco*, international law considers matters of citizenship and nationality within their *domaine réservé*[18]. In accordance with this approach, article 4 of the DADP defines a State of nationality as a «State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalisation, succession of States or in any other manner, not inconsistent with international law»[19].

For the purposes of diplomatic protection it is sufficient that nationality is acquired in accordance with the law of that State, as well as in a manner not inconsistent with international law. On the other hand, the ICJ's *Nottebohm* case is often cited as the proof that contemporary international law subjects the nationality element to further requirements in order to be applicable to diplomatic protection. In that case, the Court had stated that for nationality to be effective in the field of inter-State relations there should be a «genuine link» between the State of nationality and the individual[20]. However, the *Nottebohm* case actually reaffirms the necessary *bona fide* in the granting of citizenship, a general principle of public international law. This intention is evident from the choice of words in the merits of the case, where the Court stated that «ses liens de fait avec le Liechtenstein sont extrêmement ténus»[21]. The limits on the exercise of diplomatic protection arise not so much by virtue of the

[15] Indeed, if domestic remedies are to be exhausted, one must then admit that the internationally wrongful act must be attributable to that State.

[16] INTERNATIONAL LAW COMMISSION, *Responsibility of States for Internationally Wrongful Acts,* 2001.

[17] INTER-AMERICAN COURT OF HUMAN RIGHTS, *Case of Castillo Petruzzi et al. v. Peru Judgment of May 30, 1999 (Merits, Reparations and Costs),* par. 99.

[18] COUR PERMANENTE DE JUSTICE INTERNATIONALE. *Décrets de nationalité promulgués en Tunisie et au Maroc,* fevrier 1923, n. B04. Série B, *Recueil des avis consultatifs* (1923-1930), p. 24.

[19] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection*, cit.

[20] *Nottebohm Case (second phase),* Judgment of April 6th, 1955, *I.C. J. Reports*, 1955, p. 4.

[21] *Ibid.*

presence of a stronger genuine link with any other State, but rather, from the *shallowness* of the nationality link with the State of naturalisation.

As a result, the genuine link requirement is not a bar on the possibility for the State of birth or descent of the injured individual to act in diplomatic protection[22], and should be confined to cases in which the injured person has no link or connection with the State instituting proceedings[23]. The applicability of the *Nottebohm* ruling to other cases of diplomatic protection has been denied in the most recent case law of the ICJ. In fact, the proof of a genuine link was not required in *Diallo*. In that case, the Guinean national on whose behalf his State of birth was acting in diplomatic protection had been a habitual resident and had his centre of business in the respondent State, the Democratic Republic of the Congo. Unlike in *Nottebohm*, the Court did not concern itself with the fact that Mr Diallo had close relations with the respondent State, since he did not possess the nationality of the latter. The *Diallo* case further contributes to shed some light on the reasoning followed by the Court in *Nottebohm*: in *Diallo,* even though the ties between the injured individual and the respondent State were evident, the Court found no need to deal with the requirement of the genuine link, which is not «a 'standing' requirement that must be in place at the time diplomatic protection is asserted by the protecting state, but […] a means of determining whether nationality was, at any juncture in the past, properly granted in cases of naturalisation»[24].

This interpretation is mirrored in the wording of the 2006 Draft Articles, which make no mention of the requirement of genuine link. The absence of the genuine link requirement is a positive result for the protection of human rights, even though it does not stem as a by-result of the influence of international human rights law on diplomatic protection. In this respect, Special Rapporteur Dugard rightfully found that a too stringent application of the genuine link requirement would «exclude literally millions of persons from the benefit of diplomatic protection»[25].

For the purposes of diplomatic protection, nationality should also be continuous, from the date of injury to the date of the presentation of the claim. According to article 5 of the DADP, 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» (*dies a quo*) «to the date of the official presentation of the claim» (*dies ad quem*)[26]. The duration of the nationality link has been stressed in numerous cases before international courts and tribunals as a customary requirement and mirrored in the statues of conciliation commissions[27].

The rationale behind this requirement is a logical corollary of the Vattelian legal fiction: for an injury to an alien to be considered an injury to the State of nationality, the injured individual should have been a citizen of the claimant State at the time of the tort. On the

[22] C. F. AMERASINGHE, *Diplomatic Protection,* cit., p. 116.
[23] *Ibid.*
[24] C. FORCESE, *The capacity to protect: diplomatic protection of dual nationals in the 'war on terror'*, in *European Journal of International Law*, 2006, p. 382.
[25] J. DUGARD, *First Report on Diplomatic Protection*, INTERNATIONAL LAW COMMISSION, 52nd Session, A/CN.4/, p. 41, 506 (2000).
[26] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection*, cit.
[27] See, for an example, article VII(2) of the US-Iran claims settlement declaration, *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. Available online: https://iusct.com/foundingdocuments-2/#1691403390419-41851774-9f16

other hand, the requirement of continuous nationality also seems to respond to political necessities, as it stands as a bulwark against the phenomenon of "nationality shopping".

Last, international law poses limits to the discretion of the State to act in diplomatic protection in favour of one of its nationals: the «State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national»[28]. The multiple nationality threshold is particularly relevant for the protection of human rights, as violations are oftentimes perpetrated by the State of nationality of the individual. In the next section, we shall analyse some contemporary developments concerning the protection of dual nationals.

In sum, the citizenship or nationality requirement is what clearly tells apart diplomatic protection from the international human rights protection. Nationality confines an action in diplomatic protection to the safeguard of citizens abroad. In this regard, the main difference between diplomatic protection and the protection of human rights in international law is that of the constituency to which the instrument is addressed: the former can only be enacted in favour of citizens of the acting State, whereas the latter can benefit any individual. Most importantly, if the internationally wrongful act is perpetrated by the State of nationality of the injured person, diplomatic protection loses its very *raison d'être* for the protection of individual rights. In such cases, the limits of classic international law overwhelmingly come to mind.

3.3. *The prior exhaustion of local remedies*

The last requirement for the exercise of diplomatic protection concerns the prior exhaustion of local remedies. This is an element of customary international law, and has been mirrored in article 14 of the DADP: a «State may not present an international claim in respect of an injury to a national […] before the injured person has […] exhausted all local remedies»[29]. Customary international law provides for exceptions to the local remedies rule.

The local remedies rule allows the allegedly responsible State to remedy its own tort whilst preserving its own sovereignty. In order to be complied with, all non-extraordinary remedies normally offered by the domestic legal order up to the latest instance should be exhausted before a case can be brought in diplomatic protection.

It has been debated whether the local remedies rule constitutes a procedural or a substantial requisite of diplomatic protection. If one espouses the former viewpoint, the internationally wrongful act is already "perfect" at the time of the appeal in the local courts, but cannot be internationalised because of the need to exhaust the local remedies. According to the former viewpoint, on the other hand, the local remedies rule would constitute a substantive component of the internationally wrongful act. In other words, the illicit would come into existence only when and if the local remedies were not able to offer an adequate redress to the initial tort.

In our viewpoint, the local remedies rule should be understood as being prevalently procedural in nature. As such, they act as a procedural bar to an action in diplomatic protection. It cannot be denied that the internationally wrongful act does already exist at the time of the plea, but inter-State dispute settlement requires that States be given the opportunity to remedy their own tort prior to the involvement of the State of nationality of the injured alien. This viewpoint seems to be confirmed by the wording of article 44(1)(b) of

[28] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection*, cit., art. 7.
[29] *Ibid.,* art. 14.

the ARSIWA, which states that «the claim is *inadmissible* if any available and effective local remedy has not been exhausted»[30]. This is not to say that the exhaustion of local remedies is *exclusively* procedural in nature. There are some residual cases in which the application of the rule constitutes a substantial requirement for the constitution of the internationally wrongful act, for example in those instances in which the domestic courts give rise to a *déni de justice*.

4. *Contemporary developments in the requirements for the exercise of diplomatic protection*

Notwithstanding its intrinsically classical standpoint, diplomatic protection remains a living instrument of international law. Proof of such enduring evolution are the sections that concern the progressive development of international law in the Draft Articles on Diplomatic Protection. They all point towards a more human rights-oriented approach to the exercise of diplomatic protection, striking a balance between the State-centric approach proper of the time in which the institute crystallised in international practice and the increasing weight accorded to individual rights in the contemporary international system.

Even though diplomatic protection is not changing its nature of State-centric tool of dispute settlement, it is increasingly taking into account the role of the individual. Exceptions to the nationality of claims rule – such as continuous nationality, the protection of dual nationals, of refugees and of stateless persons –, the justiciability of the choices of the executive by domestic courts and tribunals as well as the right of the individual to enjoy compensation all point to a development of diplomatic protection which takes greater care of the role of the injured individual. It is a clear proof of the positive contamination of international human rights law on diplomatic protection.

4.1. *The expansion of the scope of diplomatic protection in favour of a wider array of beneficiaries*

The area in which the progressive development of diplomatic protection is more evident is that of the beneficiaries of diplomatic protection. In this regard, it can be said that contemporary international law has contributed to at least water down the sharpest edges of the nationality of claims rule.

In cases of multiple nationality, the general rule wants that any State of nationality can bring a claim in favour of one of its nationals. However, according to the rule of non-responsibility, one State of nationality cannot bring a claim in in favour of a dual national against another State of nationality. In other words, no State of nationality can act against another State of nationality. This viewpoint was strongly held in classic international law, as mirrored in article 4 of the Convention on Certain Questions relating to the Conflict of Nationality of Laws[31]. In an evident progressive development of diplomatic protection, a State of nationality can today raise a claim in diplomatic protection against another State of

[30] INTERNATIONAL LAW COMMISSION, *Responsibility of States*, cit., p. 121, pt. 3. My italics. For recent jurisprudence see INTERNATIONAL COURT OF JUSTICE, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 30 March 2023, parr. 55-73.
[31] The article reads: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses".

nationality if the individual in favour of which it is acting bears the "predominant" nationality of the applicant State[32].

According to article 7 of the DADP – which is willingly formulated in the negative form – «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 […]»[33]. It is important to stress that the article purposefully does not use the term effective or dominant nationality – which were used in the *Nottebohm* judgment – to distinguish the notion of predominant nationality that is relevant for article 7 from the requirement of genuine link elaborated by the ICJ. The choice of the term "predominant", as the commentary reads, «conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another»[34]. As such, it does not touch upon the matter of whether the ties with one or another State are genuine, but only concerns itself with the weighting of the relative force of both equally valid citizenships.

This progressive development is inspired by the *Mergé* case of the Italian-United States Conciliation Commission[35], in which the Commission accepted that a State of nationality could act in diplomatic protection against another State of nationality, as a derogation from the principle of sovereign equality of States, and was applied in over 50 subsequent cases concerning dual nationals[36]. In current practice, this development was made evident in the claim brought in diplomatic protection by the UK in favour of Ms. Nazanin Zaghari Ratcliffe against Iran, of which she was also a citizen at the time of the injury. Witness to the rarity of the event, the note from the Foreign Office at the time read: «the UK has previously stated that it will only exceptionally exercise diplomatic protection in the case of a dual national where the respondent state is the state of second nationality»[37].

The progressive development of diplomatic protection in favour of a wider array of beneficiaries is also evident from the attenuation of the duration of the nationality requirement[38]. As it has been said, the injured person should possess the nationality of the applicant State from the moment of the internationally wrongful act (*dies a quo*) until the day of presentation of the plea (*dies ad quem*). However, in certain cases, it is now accepted that a State may exercise diplomatic protection in favour of a citizen which did not possess its citizenship at the time of the injury, but who had renounced or lost a previous citizenship to acquire that of the protecting State for reasons unrelated to the dispute[39].

To strike a balance between the progressive development of the law and the intrinsic nature of diplomatic protection, it must be stressed that such a claim should not be directed

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[32] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection*, cit., art. 7.
[33] *Ibid.*
[34] *Ibid.,* p. 35, par. 4.
[35] RECUEIL DES SENTENCES ARBITRALES, *Mergé Case—Decision No. 55,* 10 June 1955, volume XIV pp. 236-248.
[36] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection*, cit., p. 35.
[37] Foreign & Commonwealth Office, *Foreign Secretary affords Nazanin Zaghari Ratcliffe diplomatic protection,* 7 March 2017. Available online : https://www.gov.uk/government/news/foreign-secretary-affords-nazanin-zaghari-ratcliffe-diplomatic-protection
[38] For a comprehensive analysis, see F. BATTAGLIA, F. PERRINI, *La regola della continuità della cittadinanza,* in L. PANELLA (a cura di), *La protezione diplomatica: sviluppi e prospettive,* Torino, 2009, pp. 57-81
[39] The reference is to article 5(2) of the *Draft Articles on Diplomatic Protection*, which reads: «Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law».

against a previous State of nationality, yet another *homage* to the rule of non-responsibility. On the other hand, this development allows diplomatic protection to apply to cases in which a more formalistic application of the rule would have left the individual excluded from the possibility to enjoy the protection of its State of nationality. Such cases would have resulted in a *de facto* inability for both the individual and its State of nationality to seek redress for a tort as a result of a change of nationality unrelated to the claim – for instance in cases of succession of States or conflicts of nationality laws.

It is nonetheless with regard to individuals that do not have *any* link with the protecting State that the development of the nationality of claims finds its most striking evolution. Article 8 of the DADP prescribes that, at certain conditions, a State of lawful and habitual residence of a refugee or of a stateless person may exercise diplomatic protection in their favour. It can be read as a general exception to the nationality requirement in favour of two categories recognised in international law by virtue of their vulnerability. The rationale behind the norm is to offer these two categories of individuals a possibility of redress in case of injuries suffered on behalf of a third State – a safeguard which would not be possible by virtue of their intrinsic situation: for the former category, because oftentimes the State of nationality is also the author of the injuries which led the individual to seek refuge abroad, in the latter case, because the State does not actually exist[40].

From the different nature of refugees and stateless people stems another important caveat that applies to the protection of refugees. In fact, in addition to having recognised the refugee in accordance with international norms and standards, the State of lawful and habitual residence of the refugee may not exercise diplomatic protection against their State of nationality. This limitation has forcefully been debated, especially in light of the fact that the Convention Relating to the Status of Refugees explicitly defines the vulnerability of a refugee «owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion », and is exactly by virtue of such fears that the refugee «is outside the country of his nationality and is unable or […] unwilling to avail himself of the protection of that country»[41].

From a strictly formal viewpoint, the rule is coherent. Think of the prescription in article 44(1) of the ARSIWA, which states that «[t]he responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims»[42]. However, in the context of the progressive development of diplomatic protection, the rule is at best counterintuitive. From the perspective of the safeguard of individual rights, «cette règle serait contraire à la logique juridique, car si le réfugié doit être protégé, il devrait l'être, tout d'abord, à l'encontre de son État national, qui l'a persécuté»[43]. In this context, the State of nationality of the refugee is effectively shielded from the possibility that another State might invoke its responsibility for an internationally wrongful act committed against one of its citizens through the means of diplomatic protection[44].

[40] A stateless person is defined by article 1 of the 1954 Convention relating to the status of stateless people as «une personne qu'aucun Etat ne considère comme son ressortissant par application de sa législation».
[41] Convention Relating to the Status of Refugees, article 1(A)(2).
[42] INTERNATIONAL LAW COMMISSION, *Articles on State Responsibility,* cit., art. 44.
[43] C. ZANGHÌ, *La protection diplomatique*, in *Cursos euromediterràneos bancaja de derecho internacional*, voll. XI-XII (2007-2008), Valencia, 2010, p. 959.
[44] For a wider critique, see A. 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,* in *AWR Bulletin*, 2005, pp. 266-272.

Most importantly, the limits to afford diplomatic protection by the State of lawful and habitual residence of the refugee seem superfluous. By virtue of the continuous nationality requirement, which applies as per every other action in diplomatic protection, the refugee is most likely to have suffered an injury by its State of nationality before having been granted the status of refugee. In other words, the requirement of continuous *nationality* would not be satisfied at the *dies a quo,* barring the State of habitual residence from the exercise of diplomatic protection to the benefit of the refugee. The ILC justifies this limitation in political terms: «[a]utoriser l'exercice de la protection diplomatique en pareils cas reviendrait à ouvrir la porte à d'innombrables réclamations internationales. De plus, la crainte que les réfugiés ne les pressent d'intenter une action en leur nom risquerait de dissuader les Etats d'accepter des réfugiés sur leur territoire»[45]. This explanation cannot be deemed satisfactory. Any action by the State of lawful and habitual residence would be subject to its full discretion. This is all the more true in cases concerning refugees, in which the contentious nature of the claim is likely to reverberate on the political ties between the parties.

4.2. *The recommended practice: limits on the discretionary power of States in the exercise of diplomatic protection*

In *Barcelona Traction,* the ICJ affirmed that «a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit»[46]. Traditional doctrine circumscribes whichever obligation of the State to act in diplomatic protection in favour of an injured individual as «only a moral and not a legal duty, for there is no means of enforcing its fulfilment», riaffirming that «there is no legal duty incumbent upon the State to extend diplomatic protection»[47]. It is known that «[l]a décision d'agir en protection diplomatique en faveur d'un individu est aussi indépendante d'une éventuelle limitation posée, soit par l'Etat étranger, soit par l'individu lésé», so that «l'Etat préserve son droit d'action en protection et peut user de celui-ci malgré une réfutation préalable qui découlerait d'une opposition ponctuelle de l'individu ou du résultat d'un accord ou d'une disposition insérée dans un engagement contractuel entre la personne privée et l'Etat étranger»[48]. Reference is made here to cases in which individuals avail themselves of so-called "Calvo clauses", which can be considered a mere reaffirmation of the requirement of prior exhaustion of local remedies and can in no way curb the free decision of the State to act in diplomatic protection[49].

As of today, no internationally binding instrument, nor international custom, explicitly prescribes to the State of nationality to act in favour of one of its injured citizens. It should not be surprising that the domestic courts of numerous countries have considered «any request for review of action (or inaction) undertaken under diplomatic protection to be non-justiciable as the subject belongs to the discretionary realm of the executive»[50]. It is not a

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[45] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection,* p. 36.

[46] *Barcelona Traction, Light and Power Company, Limited, arrêt, C.I.J. Recueil* 1970, p. 3, par. 78.

[47] E. M. BORCHARD, *The diplomatic protection of citizens abroad, or, the law of international claims*, New York, 1915, p. 29.

[48] S. TOUZÉ, *La protection des droits des nationaux,* cit., p.237.

[49] The Calvo clause is a contractual obligation which subjects any dispute arising from a foreign investment to the jurisdiction of the domestic courts. As such, it seeks to prohibit the exercise of diplomatic protection by the State of nationality of the investor. For an appraisal, see C. ZANGHÌ*, La protection diplomatique,* cit., pp. 995-996.

[50] A. VERMEER-KÜNZLI, *Restricting discretion: Judicial review of diplomatic protection*, in *Nordic Journal of International law*, 2006, p. 281.

matter of debate whether States still retain absolute discretion over the exercise of diplomatic protection – one of the fiercest critiques to this institute of public international law from the most progressive side of the international legal doctrine – but it should nevertheless be stressed how doctrine and practice are somehow trying to soften the sharpest edges of this rule. Indeed, recent years have seen a flourishing of domestic practice and judicial decisions which could in perspective provide the basis for the *diuturnitas* and *opinio juris* necessary to sustain the development of international customary law in favour of some limits to the absolute discretion that States enjoy in the exercise of diplomatic protection.

Article 19 of the DADP prescribes States to follow certain practices that have not yet acquired the status of customary international law, are not susceptible to evolve into rules of progressive development in the near future, but represent nonetheless a desirable conduct. By virtue of their non-binding nature, they stand in sharp distinction with the elements so far analysed. These practices touch upon the most discretionary prerogatives of States, such as the right to exercise diplomatic protection and the right to benefit from compensation. As such, they concur to «add strength to diplomatic protection as a means for the protection of human rights»[51].

First, the article *recommends* that States exercise diplomatic protection in favour of a national that has suffered significant injury. The *rule,* instead, is that it is up to the State to exercise diplomatic protection, as reaffirmed in article 2 of the DADP. The choice of the State is regardless of the gravity of the injury; as practice and *opinion iuris* currently stand, any exercise of diplomatic protection in favour of injured citizens remains the sole prerogative of the State and not a right of the individual.

Domestic laws and judicial practice in domestic courts might pose some limits on the freedom of action of the executive branch. Moreover, some States provide in their domestic system of laws a proper right to diplomatic protection in favour of injured citizens abroad. These developments are without prejudice to the state of customary international law, as practice is not accompanied with the necessary *opinio iuris.*

Some domestic courts are exercising judicial oversight on the discretionary choices of the executive, thus departing from the traditional jurisprudence that had seen diplomatic protection as a non-justiciable *acte de gouvernement.* As a result, «in cases showing arbitrary decision-making, due to inadequate investigation by the executive, or when serious and fundamental human rights violations are at stake, […] the refusal to exercise diplomatic protection may be in breach of the government's obligations»[52]. On the other hand, it must be stressed that these obligations do not seem to prescribe an obligation to act on the executive, even in cases of grave breaches of human rights.

Domestic courts in the UK had maintained a constant jurisprudence which strongly upheld the theory of non-justiciability. In the *Fehrut Butt* case, the Court stated that: «[w]hether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the Courts»[53]. However, since the ruling in *Abbasi v Secretary of State*, the Court has maintained that, even in the absence of an obligation to intervene in diplomatic protection pending on the executive, that decision would be subject to judicial review. As such, the choice *not* to act

[51] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection,* cit., p. 53, par. 1.
[52] A. VERMEER-KÜNZLI, *Restricting discretion*, cit., p. 281.
[53] *Regina* v. *Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Ferhut Butt*, High Court, 1 July 1999 and Court of Appeal, 9 July 1999, 116 ILR 607-22.

in diplomatic protection would be unlawful according to domestic law if that choice were contrary to the *legitimate expectations* of the individual. In an *obiter dictum,* the Court goes as far as to state that there might be an obligation to act in favour of the individual in case of grave human rights breaches, especially of *jus cogens*[54].

In two cases before the *Conseil Fédéral Suisse* – JAAC 61.75 and 68.78 – the Court stated that it was under the obligation to exercise a judicial oversight on the choices of the executive, even though it considered that «la seule limitation imposée à l'Etat dans l'exercice de son pouvoir relatif à la protection diplomatique est l'interdiction de l'arbitraire»[55]. In the latter case, the *Conseil Fédéral* «did find that the decision by the Swiss government not to exercise diplomatic protection was arbitrary»[56]. As both cases show, the question of non-justiciability has been put aside in favour of a control on the merits on the discretional choices of the Government.

In sum, even though the exercise of diplomatic protection remains discretionary, the choice «might be judicially reviewed if it could be shown that it had been exercised irrationally or without regard for legitimate expectation»[57]. In more simplistic terms, the discretionary nature of diplomatic protection should now be read in conjunction with the legitimate expectations of the injured citizen. On the other hand, one cannot bypass the fact that, as of today, these elements, albeit welcome, only concern the evolution of the domestic pratice of *certain* States. This is all the more true given that the legitimate expectations doctrine does not seem capable to extend to the individual the enjoyment of a perfect right. At best, the judicial oversight of the courts ensures that similar legal situations be treated alike. In this regard, one might deem the obligation fulfilled when «the government has a more or less consistent policy with respect to the protection of nationals abroad [so that] individual nationals may rely on this policy and expect the government to act accordingly»[58].

On a related note, besides the exercise of judicial oversight by internal courts, domestic legal systems are also encompassing laws and regulations that limit the discretion of the executive in the exercise of diplomatic protection. A well-known example of such practice is the *Kaunda v. President of the Republic of South Africa* judgment, in which the Constitutional Court of South Africa explicitly ascribed the judicial oversight on the discretion of the executive in the exercise of diplomatic protection as part of the State's international human rights obligations. The Court concerned itself with the matter whether «in certain circumstances where injury is the result of a grave breach of a *jus cogens* norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person»[59]. The matter thus started as an appraisal on the existence of a proper individual right to diplomatic protection. In its judgment, the Court stated that «[t]here may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to the government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such

[54] *Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & and the Secretary of State for the Home Department,* EWCA Civ 1598 (06 November 2002), parr. 28-29.
[55] Conseil Fédéral Suisse. *JAAC 61.75*, par. 2.3.
[56] Conseil Fédéral Suisse. *JAAC 68.78*, parr. 3.2–3.3.
[57] E. DENZA, *Nationality and diplomatic protection*, in *Netherlands International law Review,* 2018, pp.463- 480.
[58] A. VERMEER-KÜNZLI, *Restricting discretion*, cit., p. 294.
[59] *Samuel Kaunda and others v. The President of the Republic of South Africa.* Cause CCT 23/04, par. 3.

a request would ever be refused by government, but if it were, the decision would be justiciable, and a court could order the government to take appropriate action»[60].

Hence, if the Court correctly denied the existence of an individual right to diplomatic protection – explicitly stating that «currently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such»[61] - it ascribed such right to the domestic norms of South Africa. Otherwise said, «the Constitutional Court of South Africa accepted that diplomatic protection was a constitutional entitlement, but that the method of implementing it was a matter of executive discretion»[62]. The individual right to petition the State to act translates in having «the request considered and responded to appropriately»[63].The power of the Court was limited to ascertain whether «that government has failed to respond appropriately» but would not extend to telling «the government how to make diplomatic interventions»[64].

Hence, if it is undeniable that diplomatic protection is experiencing an evolution, this evolution remains for now confined to the internal legislation of some States and is thus not susceptible to amount to any form of relevant practice – also in the light of the lacking *opinio iuris* – for the evolution of customary international law. Domestic courts are in fact affirming their prerogative to judicially determine and provide due judicial oversight on the discretional choices of the executive – a clear development from the traditional doctrine of non-justiciability, but still far from the encompassing of an individual right to diplomatic protection. On the other hand, in light of the purpose of this paper, it is exactly in favour of the safeguard of the fundamental rights of the individual that the discretional powers of the executive are being tamed. Both concepts of legitimate expectations and the prohibition of arbitrary choices play a role in ensuring that individuals have their rights safeguarded through the means of diplomatic protection. Once again, this development should be taken as it is, as every domestic court concerned has consistently reaffirmed the absence of an individual right to the enjoyment of diplomatic protection. Yet, the recommended practice of article 19 of the DADP should not be dismissed as mere ink on paper, as it could still push States to act in favour of injured citizens by constituting a political incentive in their favour. To conclude, nothing excludes that diplomatic protection could in the future come with stricter limits to the discretion of the State, but it would be premature to see any such development as the law currently stands. This is all the more true by looking at the genesis of article 19, as the previous article 4 of the first report by John Dugard stated the obligation for the State to act in diplomatic protection in favour of its citizens in certain circumstances[65].

4.3. *On the right of the individual to receive compensation*

If the legal fiction of diplomatic protection did not consider the individual as an injured person in the action in diplomatic protection, it logically followed that the citizen did not have any role in the enjoyment of any compensation received by its State of nationality

[60] *Ibid.*
[61] *Ibid*, par. 29.
[62] E. DENZA, *Nationality and diplomatic protection*, cit., p.463.
[63] Constitutional Court of South Africa, *Kaunda and others*, cit., parr. 61-63.
[64] *Ibid.,* respectively parr. 78 and 73.
[65] See J. DUGARD, *First Report,* cit., art. 4(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».

following reparation for the internationally wrongful act. As a general rule, since the *Mavrommatis* case it has been made clear that «l'État jouit d'un pouvoir discrétionnaire absolu s'agissant de verser à son national l'indemnité qu'il a pu recevoir à la suite d'une réclamation qu'il a présentée au bénéfice dudit national»[66]. This is exactly by virtue of the fact that «the State is asserting its own right in making the claim, it is always in the position [...] that any compensation due is paid to the claimant State, and belongs to it, for use at its discretion»[67]. To borrow from Judge Fitzmaurice's words in his pristine separate opinion in the *Barcelona Traction* case:

> «[s]o far as international law goes, the claimant State can use this compensation as it pleases: it can keep it for itself (though this naturally is not normally done) or it can pay it to the private party who was injured, whether (as it will usually be the case) he is still its national, or has since become the national of another State, or to the national owner of the affected property, or to a foreign owner who may have bought it, or the claim, off the former, etc. There is, internationally, neither legal nor practical difficulty here»[68].

This viewpoint, albeit rooted in customary international law, has long been considered illogical in contemporary international law, not merely as a result of the legal fiction behind diplomatic protection, but also for the fact that the quantification of the reparation owed to the State of nationality following the internationally wrongful act is calculated on the basis of the damage suffered by the individual. The PCIJ stated in the *Factory at Chorzov* case that the obligation of reparation had to reflect the injury suffered by the alien: «the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered»[69]. At the same time, the Court made clear that that injury could not give rise to international rights in favour of the injured individual, but could «only afford a convenient scale for the calculation of the reparation due to the State»[70].

If one can understand the absolute discretion of the State in using compensation as it pleases in the classic conception of diplomatic protection, the same cannot be said in contemporary international law. If one considers that the *conditio sine qua non* for action in diplomatic protection is the injury suffered by the individual, as well as the fact that the latter is a bearer of rights and duties in the international legal system, then the enjoyment of compensation by the injured citizen following an action in diplomatic protection should be a logical corollary of this evolution.

Contemporary international law does not seem to have shifted much from this conception, even though it must be emphasised that «transfer of compensation received to the injured individual is widely supported in state practice»[71]. What we are witnessing, therefore, is not much a neglect of individual rights in practice, but rather, the absence of the

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[66] J. DUGARD, *Protection Diplomatique, Septième rapport sur la protection diplomatique*, Document A/CN.4/567, 2006, p.25.
[67] INTERNATIONAL COURT OF JUSTICE. *Separate opinion of Judge Sir Gerald Fitzmaurice,* in *Barcelona Traction (Merits),* pt. 53.
[68] *Ibid.*
[69] Publications of the Permanent Court of International Justice, *Series A.-No. 17,* September 13th, 1928. Collection of judgments no. 13. *Case Concerning the Factory at Chorzow (Claim For Indemnity) (Merits)*, p. 27.
[70] *Ibid.*, p.28. See also S. TOUZÉ, *La protection des droits des nationaux à l'étranger,* cit., p. 322.
[71] A. VERMEER-KÜNZLI, *As if: the legal fiction in diplomatic protection*, in *European Journal of International Law,* 2007, p. 62.

recognition of an individual right to enjoy compensation by States. The practice to transfer compensation received to the injured individual, albeit not isolated, does not seem to be sustained by the adequate *opinio iuris* necessary for the development of a new norm of customary international law. The practice of some States in this regard should be assessed in political or moral terms.

A welcome development of article 19 of the DADP is the *recommendation* that States transfer any compensation received to the injured national, subject to any reasonable deductions[72]. This recommendation stems from the application of the general principle of equity in international law, even though the commentary underlines that States «are under no obligation to transfer moneys received for a claim based on diplomatic protection to the injured national»[73].

In the relatively recent *Diallo* case *(Reparation)* the ICJ seems to have embraced a more human rights centric approach to the individual benefit of compensation. The Court stated that at least part of the reparation owed *to the State* for the action in diplomatic protection was to the benefit of the injured individual. In his separate opinion, late Judge Cançado Trindade stated that: «[a]lthough the amounts of compensation are formally due from the Democratic Republic of the Congo (as respondent State in the cas d'espèce) to Guinea (as complainant State in the present case), the ultimate subject (titulaire) of the right to reparation and its beneficiary is Mr. A. S. Diallo, the individual who suffered the damages. The amounts of compensation have been determined by the Court to his benefit»[74]. In sum, the recommended practice in article 19(1)(c) of the DADP as well as the jurisdictional developments in *Diallo* seem to point for a potential development in the future in favour of the individual right to enjoy at least part of the compensation received following an action in diplomatic protection by the State of nationality.

5. *Diplomatic protection and human rights protection: striving towards the same goal*

The previous section has highlighted some contemporary developments that are contributing to making diplomatic protection more akin to the protection of human rights. On the other hand, such developments do not seem liable to strip diplomatic protection if its intrinsically inter-State nature. And paradoxically, the relative shortcomings evident in some areas of diplomatic protection analysed before – from the absence of an individual right to enjoy reparation to the impossibility for the State of legal and habitual residence of refugees to exercise diplomatic protection in their favour against their State of nationality – have further fuelled the narrative of diplomatic protection as a second tier tool for the safeguard of fundamental rights. One could well claim diplomatic protection and human rights protection belong to two different faces of international law, the former to a classic, State-centric world in which the individual was merely an object of the international legal system; the latter, to one in which the individual has *finally* found its due positioning, with

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[72] According to article 19(1)(c) of the *Draft Articles on Diplomatic Protection:* «A State entitled to exercise diplomatic protection according to the present draft articles, should: […] transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions».
[73] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection,* cit., p. 54, par. 5.
[74] INTERNATIONAL COURT OF JUSTICE, *Separate Opinion of Judge Cançado Trindade,* Judgment of 19 June 2012. *(Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports* 2012, p. 324, par. 100.

adequate safeguards and guarantees as part of the international legal system, without the interposition and discretion of the State of nationality.

The norms on the treatment of aliens that have animated diplomatic protection are now complemented by primary norms that ascribe rights and obligations directly to the individual, who can now thus claim to have at least a partial international legal personality. The first turning point in this respect came with the jurisprudence of the international military tribunals of Nuremberg and Tokyo, in which it was first stated that international law imposes obligations and duties to individuals as much as States[75]. With the approval by the UN General Assembly of the 1948 Universal Declaration on Human Rights (UDHR)[76], as well as the conclusion of the "twin" Covenants of the United Nations of 1966, individuals have acquired a set of fundamental rights that can be claimed in the international legal system. These rights are not only ascribed directly to the individual, but people can, under certain conditions and circumstances, directly act to ensure the respect and enforcement of their rights. As a result, the rationale for diplomatic protection and the very fiction upon which it is based – that the individual, not being a subject of international law, had to rely on the State of nationality following an internationally wrongful act against it– might thus seem obsolete.

This need not mean that the protection of human rights and diplomatic protection should be seen as two separate tools for the protection of individual rights. Rather, it is the purpose of this article to sustain that diplomatic protection can represent a valuable tool for the protection of individual rights, even though it might not necessarily tick all the boxes prescribed by the modern tools for the protection of human rights. This complementarity has been made evident by the ruling of the ICJ in the *Diallo (Preliminary Objections)* case, where the Court explicitly stated that «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»[77]. This is further confirmed by the fact that the norms on the exercise of diplomatic protection co-exist with alternative means of redress, as affirmed by article 16 of the DADP, which clarifies that «[l]es droits des États, des personnes physiques, des personnes morales ou d'autres entités d'engager en vertu du droit international des actions ou des procédures autres que la protection diplomatique en réparation du préjudice causé par un fait internationalement illicite ne sont pas affectés par le présent projet d'articles»[78].

The development of the contemporary system of safeguards of human rights in international law has entailed some non-negligible progresses *vis-à-vis* the limits imposed by diplomatic protection. First, it has separated the protection of individual rights from the discretion of the State of nationality, thus giving individuals the possibility to act themselves for the safeguard of their rights. Secondly, human rights commitments extend to all people within the jurisdiction of the parties, regardless of citizenship[79]. Third, as the ICJ stressed in its advisory opinion on the *Reservations to the Convention on Genocide*, such treaties are

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[75] See *The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General.* Document A/CN.4/5 Available online: https://legal.un.org/ilc/documentation/english/a_cn4_5.pdf

[76] The UDHR is not a binding instrument, nor does its approval by the UN General Assembly make its respect mandatory for Member States. However, at least some parts of the UDHR now form part of customary international law. In this regard, see amongst others *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980,* p. 3, par. 91.

[77] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports* 2007, p. 582, par. 39.

[78] INTERNATIONAL LAW COMMISSION, *Draft Articles on Diplomatic Protection,* art. 16.

[79] See as an example article 2 of the International Covenant on Civil and Political Rights.

characterised by non-reciprocal obligations, so that «the contracting States do not have any interests of their own; they merely have, one and all, a common interest»[80]. This perspective, thereinafter reaffirmed by the Human Rights Committee in its General Comment n.24, makes clear that «such treaties […] are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place»[81]. As a result, any party may invoke the international responsibility of another party for the non-performance of its obligations, according to article 48(1) of the ARSIWA and, under certain circumstances, also according to article 42(b)[82].

5.1. *The enduring relevance of diplomatic protection in light of the shortcomings of the contemporary system of safeguards of human rights*

These developments are welcome news for the safeguard of fundamental rights, complementing some of the known shortcomings of diplomatic protection. In turn, it is also true that diplomatic protection is itself capable to fill the gaps that concern some of the shortcomings of the contemporary system of safeguards of fundamental rights. By overturning the traditional narrative whereby it is only international human rights law that positively influences diplomatic protection, I sustain that the positive contamination between the two disciplines is mutual.

It is beyond the scope of this paper to dissect the architecture of the international human rights protection system. For the sake of clarity, the latter can be broken down in two trunks: the universal system of safeguards and the regional system. The rationale underlying the division is that individuals have different means of redress at their disposal depending on under whose jurisdiction they fall. The former system is open to all States of the international community, notwithstanding their geographical location, but usually lacks robust enforcement mechanisms. The latter usually depends on a country's membership in one or more regional organisations. Given that regional integration usually entails deeper forms of integration beteen fewer, like-minded States, the regional system of safeguards usually comes with robust enforcement mechanisms, such as jurisdictional means of redress and, in some limited cases and subject to certain conditions, the possibility for individuals to independently file complaints against States.

Now, it is undeniable that some norms on the protection of human rights are now part not only of customary international law, but can also be considered *erga omnes* obligations – whose respect can be claimed by all members of the international community – such as self-

[80] *Reservations to the Convention* on *Genocide, Advisory Opinion*, *I.C.J. Reports* 1951, p. 23.
[81] *General Comment n.24* of the Human Rights Committee, *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), par. 17.
[82] The former article deals with the invocation of international responsibility by a State other than the injured State. This situation can arise in cases in which the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or, alternatively, the obligation breached is owed to the international community as a whole. The latter, instead, consists of the invocation of the responsibility by an injured State, which can happen if the obligation breached is owed to a group of States including that State or the breach specifically affects that State. It would be improper to consider here letter (b)(ii) of article 42, inasmuch as it deals with reciprocal obligations the breach of which is of such a character as to radically change the position of all the other States.

determination[83] or the prohibition of genocide[84]. However, it is equally true that from the enactment of such rights does not necessarily follow a comparable level of enforcement in case of breaches. In other words, lacking a "world court" or tribunal with mandatory jurisdiction on the violation of human rights, the safeguard of human rights still relies on the principle of consent to jurisdiction. Consent to jurisdiction is either given *ex ante* – that is, through the ratification of treaties, such as through regional cooperation agreements, which usually comprise the most advanced means of dispute settlement – or *ex post*, by engaging in the sort of negotiation, mediation or inter-State dispute settlement following an action in diplomatic protection.

The relative shortcomings that characterise the enforcement side of the contemporary human rights system of safeguards are witness that diplomatic protection retains its importance in contemporary international law. First, few human rights treaties offer adequate and binding enforcement means. The most objectively advanced regional system of safeguards for human rights protection is that of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the ratification of which constitutes a mandatory requirement for becoming a member State of the Council of Europe (CoE). After the entry into force of Additional Protocol 11 (AP11) the ECHR provides a unified and permanent European Court of Human Rights, based in Strasbourg. The Court can adjudicate definitive and binding judgments for the Member States and, according to article 34 of the Convention, is open to all individuals that falling within the scope of jurisdiction of the ECHR and meeting all admissibility criteria, file a plea to the Court.

The ECHR is by far the most advanced system of human rights safeguards worldwide. As every legal instrument, it still retains its relative shortcomings. For example, even if the judgment is binding for the parties, it is up to the State to implement it. In this regard, the sentence has a merely declaratory character. Monitoring is demanded to the political organ of the CoE, the Committee of Ministers, which can adopt resolutions on the matter[85]. Indeed, in a community of States still based on the principle of sovereign equality and absent a superior authority to that of States, in practice the reticence of a party not to conform to a judgment might stretch to the point as to render void the otherwise consistent guarantees offered by the ECHR. Take the case of Russia's membership in the organisation.[86] The Parliamentary Assembly of the Council of Europe first decided to suspend some of Russia's voting rights following the annexation of Crimea in 2014[87], then the Committee of Ministers decided, in March 2022, on the cessation of the membership of the Russian Federation to the Council of Europe[88].

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[83] See, amongst others, *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports* 1995*,* p. 90, par. 29.

[84] See, amongst others, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa vs. Israel),* order of 26 January 2024, par. 33.

[85] See article 46 of the *European Convention on Human Rights*, esp. parr. 4 and 5.

[86] See C. ZANGHÌ, *La problematica partecipazione della Federazione russa al Consiglio d'Europa: dall'ammissione alla perdita dello* status *di membro,* in *Ordine internazionale e diritti umani,* 2022, pp. 318-342 and C. ZANGHÌ, *Federazione Russa-Consiglio d'Europa. Evoluzione Parlamentare della nota vicenda, ivi,* pp. 578-580.

[87] Resolution n.1990 of the Parliamentary Assembly of the Council of Europe, 10th of April 2014. Available online : https://www.assembly.coe.int/LifeRay/APCE/pdf/Communication/2014/20140410-Resolution1990-EN.pdf.

[88] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (Adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies). Available online: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51. See also J. JAHN, *The Council of Europe Excludes Russia: A Setback for Human Rights,* in *EJIL: Talk!*, 23 March 2022. Available online: The Council of Europe Excludes Russia: A Setback for Human Rights – EJIL: Talk! (ejiltalk.org)

The other relevant regional systems of safeguards, the Inter-American system and the African system, display even deeper shortcomings. First, the jurisdictional strengths proper of the ECHR are not mirrored in the other systems. In the Americas, the American Convention on Human Rights (ACHR) – also known as Pact of San José – has been in force since 1978. Member States of the Organisation of American States (OAS) *can choose* to be parties to the Convention. Hence, the ratification of the instrument is not required to become a party to the regional integration organisation. Moreover, the ACHR relies on a less advanced system of individual safeguards that mirrors that of the ECHR prior to the ratification of AP11: an Inter-American Commission on Human Rights monitors the implementation of the Convention by State parties through a system of appeals. States are under the obligation to accept that individuals under their jurisdiction may appeal to the Commission. However, the Commission remains a non-jurisdictional body, whereas access to the Inter-American Court of Human Rights is contingent on the explicit acceptance of its jurisdiction by State parties. In addition to that, the individual has no right to autonomously bring claims to the Court, which can only receive applications by State parties or the Commission.

The ratification of the African Charter on Human and People's Rights of 1981, also known as Banjul Charter, is open to all State parties of the African Union, as the successor organisation to the Organisation of African Unity. The Charter creates a system of safeguards which relies on an African Commission on Human and People's Rights, which – similarly to what happens in the American system – can receive both individual and inter-State communications. Following the 1998 Additional Protocol, ratified by 34 out of 55 member States of the African Union, the system is complemented by an African Court on Human and People's Rights. The legitimation to bring claims to the Court is reserved to the African Commission and to the State whose citizen has been injured by a violation of human rights by another State party. This last remedy allows the African Court, in a clear show of complementarity between international human rights protection and diplomatic protection, to act as a tool for the exercise of diplomatic protection. The Court can adjudicate on individual claims and claims by NGOs with observer status before the Commission that concern parties to the protocol and have filed an additional declaration according to article 34(6) of the protocol[89]. Out of the 55 Member States of the African Union, only eight have ratified the additional protocol and accepted the jurisdiction of the Court to consider applications filed by individuals and NGOs. To add injury to insult, Rwanda, Tanzania, Cote d'Ivoire and Benin have since withdrawn their declarations.

In sum, diplomatic protection «continua, infatti, ad essere uno strumento efficace in tutte quelle circostanze in cui non esistano strumenti pattizi che permettano all'individuo di tutelare direttamente i propri diritti a livello internazionale».[90] Indeed, universal safeguards in the UN system lack an adequate enforcement mechanism. Second, only regional safeguards allow the individual to access jurisdictional-type remedies, thus having a higher degree of legal certainty, impartiality and – at least in theory – effectiveness. Third, only *few* regional

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[89] Art. 34(6) of the additional protocol stipulates that: «at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State which has not made such a declaration».

[90] V. ZAMBRANO, *Protezione diplomatica,* in *Enciclopedia Treccani, Diritto on line,* 2019. Available online: https://www.treccani.it/enciclopedia/protezione-diplomatica_(Diritto-on-line)/

safeguards – and only the most advanced ones, such as the ECHR – allow the individual to directly file claims to Court.

As it has been evident with Russia's membership of the Council of Europe and the recent withdrawals of the declarations of acceptance of the jurisdiction of the African Court of Human Rights, the positive trend set by the development of international human rights law is subject to be questioned. When regional safeguards are inadequate or not in place, diplomatic protection thus remains the only customary international law instrument through which the vast majority of the world's population can enjoy the protection of their rights. As such, even if it comes with its known shortcomings, the positive developments of recent years showcase the evolution of diplomatic protection towards a more attentive tool to the safeguard of fundamental rights.

6. *Conclusion*

At first glance, there seem to be multiple analogies between diplomatic protection and the international protection of human rights, so much so that the latter is oftentimes presented as the more advanced and modern iteration of the former. However, it has been argued that this dichotomy suffers from multiple shortcomings. It is true that diplomatic protection is the fruit of a now surpassed conception of the role of the individual in public international law, but it would be superficial to infer from this assumption a sort of inevitable obsolescence of diplomatic protection, also in light of the oftentimes remarkably positive developments that have permeated this institute in recent times.

Notwithstanding the widening of the array of beneficiaries of diplomatic protection, the most evident difference with international human rights law evidently concerns the scope of the protection offered to individuals, with the rule of nationality of claims acting as an intrinsic limit on the subjects that can benefit from diplomatic protection. Moreover, human rights protection concerns the rights intrinsic to every human being, not those of injured aliens alone. This point represents a key advantage of international human rights protection *vis-à-vis* diplomatic protection: the latter is not only effective *erga omnes,* but can also be claimed against the State of nationality of the injured individual.

On the other hand, the reciprocal influences between diplomatic protection and human rights protection are evident, especially in the development of diplomatic protection in contemporary international law. Contact points between the two disciplines are blossoming: there is growing attention to the role of the individual in the exercise of diplomatic protection, more and more domestic norms are imposing *de minimis* thresholds to the discretion of the executive, and diplomatic protection has now explicitly been ascribed as a tool for the protection of human rights by the ICJ in the *Diallo* case.

Diplomatic protection is thus a valuable tool in the arsenal at the disposal of the State to protect human rights. With all its limits, it still represents as of today the *only* instrument in customary international law capable to enforce the international responsibility of States for violations concerning the treatment of aliens. Yet, diplomatic protection certainly has limitations that, when contrasted with the international human rights protection regime, may make it appear outdated: its state-centric approach; the discretion of the State in the decision to act and to provide compensation to the injured individual. This notwithstanding, in some cases diplomatic protection can be a valuable tool to compensate the contemporary

shortcomings of the international human rights protection regime. Where guarantees are lacking in effectiveness or are not present, diplomatic protection strives towards the attainment of objectives that are indeed common to both, that is the protection of the rights of the individual. Even if one considers the institution of diplomatic protection from the perspective of *Mavrommatis*, the rationale behind the legal fiction was not to limit the individuals in the enjoyment of their rights, but to provide them with the possibility of redress through the action of their State of nationality at a time in which it would have been impossible to consider them bearers of rights and duties in the international legal order. In the absence of diplomatic protection, impunity would have filled the vacuum and would still do.

Today, international human rights law has opened up a new pathway for the protection of the rights of individuals, who now enjoy their rights as human beings, without respect to their nationality or the will of their State. At the same time, from the point of view of customary international law, international human rights law still needs to develop so as to offer uniform, binding dispute settlement guarantees, especially in areas where regional integration is not well established. From this point of view, diplomatic protection and the international protection of human rights appear to be far from antithetical: with their respective shortfalls, they both contribute to the ultimate safeguard of the rights of individuals in the context of relations between States. Yet, their mutual contamination is making diplomatic protection a more modern and dynamic tool to safeguard fundamental freedoms to the benefit of injured citizens abroad.