Netherlands International Law Review (2018) 65:463–480
https://doi.org/10.1007/s40802-018-0119-4

ARTICLE

Nationality and Diplomatic Protection

Eileen Denza[1]

Published online: 30 November 2018

Abstract

Nationality came during the nineteenth century to be regarded as conferring an entitlement to diplomatic protection by the national government. Powerful States used the rules against weaker ones to enforce rights of their nationals who had failed to secure justice through local remedies. Changes in the international order had the effect of diminishing the effectiveness of this practice. But the reduction in formal diplomatic protection for individuals and for companies has been matched by growth in compensatory mechanisms—wider human rights protection, government to government claims settlements and investment protection agreements.

Keywords Protection of nationals · Effect of grant of nationality · UN staff · Corporate nationality · Two meanings of 'diplomatic protection' · Legal entitlement · Dual nationals · International claims agreements · Investment protection agreements · Human rights · EU citizens' entitlement · ILC draft articles

1 Introduction

On Easter Day, 1847, in the course of anti-Semitic riots in Athens, the house of the Jewish merchant Don Pacifico was burned down while the police stood passively by. Don Pacifico was a British subject by virtue of his birth in Gibraltar, although he was Spanish by descent and had served as a consul of Portugal in Morocco and in Greece. His attempts to secure compensation from the Greek Government proved fruitless until in 1850 the British Foreign Secretary, Lord Palmerston, in support of his claim sent a naval squadron to blockade Greece. In consequence, a commission was set up and £4000 awarded to Britain by way of compensation. There were protests from France and Russia who at the time were with Britain joint protecting powers of Greece, and Lord Palmerston's intervention was censured by the British House of Lords. During a later debate in the house of Commons lasting several days, Palmerston defended his actions in a 5 hour speech, saying that the issue was whether

✉ Eileen Denza

[1] London, UK

> the principles on which the foreign policy of Her Majesty's Government has been conducted, and the sense of duty which has led us to think ourselves bound to afford protection to our fellow subjects abroad, are proper and fitting guides for those who are charged with the Government of England; and whether, as the Roman, in days of old, held himself free from indignity, when he could say Civis Romanus sum; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.

Palmerston carried the day in the House of Commons and with the English public (in spite of mockery and criticism from William Gladstone), and his words may be regarded as entrenching in British consciousness the link between nationality and moral (though never legal) entitlement to diplomatic protection.[1]

2 The Link Established in Customary International Law

Throughout the nineteenth and the first half of the twentieth century the link between nationality and diplomatic protection remained central. In 1939 the Permanent Court of International Justice restated the classical rule of diplomatic protection whereby

> a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford, nor can it give rise to a claim which that State is entitled to espouse.[2]

Next to the right of abode, entitlement to diplomatic protection was the most important benefit of nationality, and a sovereign State could determine under its domestic law which individuals and corporate enterprises held its nationality. In 1955, however, the International Court of Justice emphasized in the *Nottebohm* case that the fact that international law left it to sovereign States to determine rules for the grant of its nationality did not imply that the status so granted had effect as regards other States 'unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as

[1] Don Pacifico Affairs, Britannica Online Encyclopaedia, Hansard HC Debates 25 June 1850, Jenkins (1995) pp. 117–120.

[2] *Panevezys–Saldutiskis Railway* case, PCIJ (1939) Series A/B No. 76, para. 65; Jennings and Watts (2008), pp. 511–515.

against other States…'[3] A State was entitled to exercise diplomatic protection only if its grant of nationality amounted to a translation into juridical terms of the individual's connection with that State.

In the *Reparation for Injuries Suffered in the Service of the United Nations* case,[4] the International Court of Justice in 1949 established not only that the UN possessed the capacity to bring an international claim against a State responsible for injury to the UN or to its officers and agents, but that the bringing of such a claim by the UN could be reconciled with the rights of the States of which the victims were nationals. The UN was entitled to claim not by virtue of any bond of nationality but because of direct injury to itself. The Court stressed that this did not involve extending the concept of nationality, saying:

> 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 Organisation 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.

The national States of the injured agents might not feel justified or disposed to bring international claims, and so to ensure the independent performance of UN missions, the Organisation must be able to provide these agents with adequate protection. Competition between the right of the victim's national State and the UN was a problem which could easily be resolved in individual cases or through emerging practice, so that the defendant State would not have to pay reparation twice for the same damage. International tribunals were already familiar with the problem of claims in which two or more national States had an interest, and were well able to resolve any difficulties.

3 Nationality of Corporate Bodies

As with individuals, the nationality of a State entitles companies to important operating benefits such as the right to own land, to licences and concessions and to preferential treatment regarding taxation. A foreign enterprise may sometimes be permitted to carry on business only if it establishes and incorporates a subsidiary—having local nationality but in many cases wholly owned by the foreign enterprise or having most of its shareholders nationals of the home State. Expectation of diplomatic protection is among the factors influencing enterprises seeking to do business abroad in their choice of method, as is the possibility of claiming benefits from any investment treaty—though these will not usually be the principal concerns. International law permits a State to choose in the context of diplomatic protection which corporate bodies it regards as its nationals, and there is considerable variation in the criteria adopted by individual States.[5]

[3] *Nottebohm* case, *Liechtenstein v. Guatemala*, ICJ Reports 1955, p. 4.
[4] ICJ Reports 1949, p. 174, and see analysis in Amerasinghe (2008), pp. 47–53.
[5] Okowa (2018), pp. 462–465.

The classical rules—following the most frequently employed test of corporate nationality—were confirmed by the International Court of Justice in the *Barcelona Traction* case[6] in 1970 when it concluded that the nationality of a company must be determined by the laws of the State where it was incorporated or maintained its registered office. Barcelona Traction was incorporated in Canada, but at the time of seeking compensation for injury by Spain most of its shareholders were Belgian nationals. The Court held that the injury was to the company and not to its shareholders, so that Canada and not Belgium was the State entitled to exercise diplomatic protection by bringing an international claim. Only if a company had ceased to exist could the State exercise diplomatic protection on behalf of shareholders, or if the alleged injury affected shareholders directly—for example a prohibition on payment of dividends. Allowing a State to exercise diplomatic protection on behalf of shareholding nationals could cause confusion as shares were so easily transferred. The majority on the Court did not accept that the requirement of a 'genuine link' with the State of incorporation applied to companies. The principles set out in the *Barcelona Traction* case were broadly confirmed by the International Court of Justice in the *Diallo*[7] cases in 2007 and 2010.

4 The Meaning of 'Diplomatic Protection'

In what is written above, the expression 'diplomatic protection' is used in its formal sense, as defined by the International Law Commission in its draft articles as meaning 'the invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for an injury caused by an internationally wrongful act to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility'.[8] The expression 'diplomatic protection' however is also used informally to mean the informal assistance given by diplomatic missions and consular posts to their nationals—and it is understandable that this causes confusion. The Vienna Conventions on Diplomatic and on Consular Relations list among the basic functions of diplomatic missions and of consular posts 'protecting in the receiving State the interests of the sending State and of its nationals'.[9] There are important distinctions between formal 'diplomatic protection'—which is exercised by a State following exhaustion of local remedies by one of its nationals—and informal 'diplomatic protection' which is exercised by diplomatic agents or consular officers normally to assist their nationals to access and to make use of local remedies. But in both cases the entitlement to protection depends

[6] *Barcelona Traction, Light and Power Company Limited, Second Phase,* ICJ Reports 1955, p. 3, and see Amerasinghe (2008), pp. 122–140.

[7] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, ICJ Reports 2007, p. 580, 2010, p. 636.

[8] UN Doc. A/CN.4/L 684.

[9] Vienna Convention on Diplomatic Relations 1961, Art. 3; Vienna Convention on Consular Relations 1963, Art. 5. See Roberts (2017), 8.25 and chapter 9; Denza (2016), pp. 29–37; Lee and Quigley (2008), chapter 8.

on the nationality of the primary claimants. A State, or a diplomatic mission, which tries to protect an individual or an enterprise which does not have its own nationality must either find a legal basis going beyond the customary rules—a possibility which will be explored in the sections below—or face the likelihood of challenge or rebuff by the host State or the defendant State.

5 Absence of Legal Entitlement for Individuals and Enterprises

Whether the individual has any right to diplomatic protection from his State of nationality depends almost entirely on national law. Under customary international law the right belonged to the State and each State could choose not only the timing and extent of any action but whether it would take any action at all. Under the domestic law of most States the individual or enterprise had no more than a legitimate expectation that the State of nationality would take up a claim, and the timing of any protest or formal presentation of a claim even when local remedies had been exhausted would depend on domestic political pressure and on the state of relations with the defendant State.[10] Even where national law on its face provides a right to diplomatic or consular protection, the executive is given such discretion in the extent or the method that the practical effect is no different from that available to nationals of States where it is expressly stated to be a matter of policy, discretion or at most 'legitimate expectation'. In the case of *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Office*,[11] the English Court of Appeal confirmed that there was no enforceable right to protection under UK law, but found that the discretion of the UK Government might be judicially reviewed if it could be shown that it had been exercised irrationally or without regard for legitimate expectation. The applicant in the case had been detained by US authorities in Guantanamo Bay, and the Court expressed concern that he had found himself in a legal black hole without access to objective review of the legality of his detention. In *Kaunda and others v. President of the Republic of South Africa and others*,[12] 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. According to the Court, 'the citizen is entitled to have his request considered and responded to appropriately'.[13] So the theoretical constitutional entitlement does not in practice place the injured individual in a stronger position.

From the point of view of the individual or company seeking justice from a State other than its own national State, diplomatic protection is a somewhat limited

[10] For a detailed account of practices in all 28 Member States of the European Union, including the extent of any legal right to consular protection, see Consular and Diplomatic Protection: Legal Framework in the EU Member States: Final Report of the CARE (Citizens Consular Assistance Regulation in Europe) Project, 2010. For wider analysis of practice and principle, see Amerasinghe (2008), chapter 9.

[11] [2002] EWCA Civ 1598.

[12] Case CCT 23/04, 2005 (4) SA 235 (CC).

[13] In para. 63.

guarantee. Active pursuit of diplomatic protection by the State of nationality has been described as subject to 'the doctrine of the permanent unripeness of time'. Of course the classical rules are still employed unobtrusively by States in a large number of cases which remain unrecorded because representations are successful. It is regrettably the case that—as with much of diplomacy—only the high-profile cases or those where routine protection fails to obtain justice attract public or academic interest.

6 Dual Nationals

Overwhelmingly, the most important limitation on the right of a State to extend diplomatic protection to its nationals—either informally or by presentation of a formal claim—is that where a person has dual nationality, neither one of the two States may extend protection against the other. The classic rule was codified in Article 4 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws which stipulates that 'A State may not afford diplomatic protection to one of its nationals against another State whose nationality such person also possesses.' Where the individual claimant also possesses the nationality of a third State, Article 5 of the Hague Convention allows for greater flexibility and regard is likely to be paid to which of the two nationalities is the more effective. In the absence of an element of abuse or 'nationality shopping', a defendant State is in practice unlikely to reject protection efforts by either of the two States whose nationality the claimant possesses.[14]

Modern state practice shows very little softening of the rule that a dual national is not entitled to any kind of diplomatic protection from either of his national States while he is in the other. The UK Government warns all holders in the Notes printed in the actual passport that

> A British citizen who holds dual citizenship (also known as dual nationality) cannot get diplomatic help from the British Government while they are in the other country where they hold citizenship. A person who has dual nationality may be subject to the laws of the other country. It is your responsibility to determine what responsibilities you may have with that other country.

The leaflet 'Support for British Nationals Abroad: A Guide'—available online—also makes clear that support cannot ordinarily be given to a dual national in the other country whose nationality they hold.

The 1965 Convention for the Settlement of Investment Disputes which entitles a national of a Contracting State directly to invoke the jurisdiction of the Centre for the Settlement of Investment Disputes to determine a dispute with any other

[14] 179 LNTS 89; International Law Association (2006), pp. 372–73; Jennings and Watts (2008), pp. 515-517. See also Amerasinghe (2008), pp. 106–113.

Contracting State excludes claims where the claimant individual also holds the nationality of the other Contracting State.[15]

There have been a number of well-publicised victims of this rule in recent years—particularly in Iran, where at least 30 dual nationals have been detained since 2015 without access to diplomatic or consular protection. Some of those so detained have previously been strongly supportive of the authorities in Iran. In April 2018 Abbas Edalat, a British–Iranian Professor of computer science, was arrested and detained without charge after travelling to Tehran to attend an academic workshop.[16] Kayous Seyed Emami, a dual Canadian–Iranian Professor of sociology in a Tehran University, was arrested in January 2018 and died a few days later (according to the Iranian authorities as a result of suicide).[17] Dual UK–Iranian nationals also held without nor mal access include a member of the staff of the British Council, Aras Amiri, a business man running a research firm who had appeared on Iranian television, as well as Nazanin Zaghari-Ratcliffe—detained at the end of a family visit and separated from her baby daughter. She was sentenced to 5 years in jail in 2016 for 'plotting to overthrow the Iranian régime', and new charges of 'spreading propaganda' were added in 2018—although on that occasion she was permitted for the first time to telephone the British Ambassador.[18]

7 Changes in the Classic Rules

Since 1945 international law has in many respects shifted towards a much greater emphasis on individual rights. The disadvantages of the rigidity of the rules on nationality and diplomatic protection have been lessened by several developments which have made reliance on these restrictive rules and indeed more generally on diplomatic protection now of less importance—even though as explained above it is still extensively practised. The three most important developments in this context are, first, the increased practice of settling inter-governmental claims by means of collective treaties leading to payment of a lump sum to the claimant government; secondly, the increased reliance on investment protection agreements both bilateral and multilateral; and thirdly, the growth in multilateral human rights treaties—in particular those treaties which permit the individual or enterprise to access justice directly from an international body. In all these three contexts the need for an injured claimant to prove continuous nationality of a plaintiff State has been substantially diminished. These three developments will be briefly described.

[15] 4 ILM 524 (1965), Art. 25.
[16] *The Times*, 26 April 2018.
[17] *The Times*, 12 February 2018.
[18] *The Times*, 3 May 2018, *Hampstead and Highgate Express*, 1 March 2018 and 24 May 2018.

7.1 International Claims Agreements

In the years following 1945 a significant number of countries embracing socialist principles nationalised foreign-owned property. Expropriations with limited or no compensation included the property of refugees from Communist governments many of whom had acquired the nationality of their new home State, as well as that of enterprises whose capitalist activities were no longer welcome. There were also large numbers of claims resulting from persecution before or during the Second World War or for reparation for war damage. The practice grew up of negotiating compensation by means of large-scale negotiations in which the—mainly Western European and like-minded governments—sought compensation for all individual and corporate claimants whose claims they had registered and also for their own claims. Although these negotiations usually began with detailed scrutiny of individual claims—where the traditional rules regarding nationality were deployed—the sheer weight and numbers of the claims after a while led to a deal known as a lump-sum settlement. The claimant government extracted the largest sum it could from the defendant government—but then had almost complete discretion as to how this would be distributed. From the 1950s until the 1990s there were hundreds of these claims settlement agreements. The governments which received compensation usually relaxed the rules when making distributions—they might waive their own claims, and they might allow claimants to share who could not satisfy the requirement of continuous nationality because they possessed the nationality of the claimant State by virtue of naturalisation having fled their country of origin after seizure of their property. They might permit shareholders in a company driven out of business or wound up under compulsion from the defendant government to receive compensation for their economic losses. Many of the international agreements did stipulate that only nationals of the claimant State might share in the resulting distribution, but there is no evidence that States having paid compensation investigated in detail how that compensation was actually later distributed by the recipient governments, far less demanded adjustment to failure to comply with the terms of settlement.[19]

The Anglo-Soviet Agreement of 1986, for example, which settled financial claims dating back to the Russian revolution of 1917, provided that each Government 'shall be solely responsible for the settlement of claims and for any distribution to physical and juridical persons of their respective States' of the relevant assets remaining in their respective territories. Distribution of Russian assets to UK registered claimants was made under the terms of an Order in Council by the Foreign Compensation Commission and reported to the UK Parliament.[20]

[19] For detail, see Interim Report on Lump Sum Agreements and Diplomatic Protection by David Bederman, Report of the Seventieth Conference of the International Law Association (New Delhi, 2002) p. 230, esp. pp. 237–260. See also Weston et al. (1999); Bederman (1993), p. 119.

[20] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, 13 July 1986, Cm 22, Art. 4; Foreign Compensation (Union of Soviet Socialist Republics) (Distribution) Order 1987, S.I. 1987 No. 663, 43 Annual Report of the Foreign Compensation Commission for the Financial Year ended 31 March 1993. Cm 2311.

Under the Algiers Accords of January 1981, claims and counter-claims between the US and Iran were to be resolved by the newly established US–Iran Claims Tribunal. The Tribunal stated in the *Esphahanian* case[21] that dual US–Iran nationals were entitled to claim before the Tribunal provided that their dominant and effective nationality was not that of the defendant State. Dominant and effective nationality was according to the jurisprudence of the Tribunal to be determined by a range of factors including habitual residence, family ties, language spoken and participation in public life.[22]

These claims settlement agreements have tended to be underplayed by academic writers on the ground that they were *lex specialis*, but they have enabled just compensation for takings and for injuries to be awarded to many individuals and enterprises whose claims would not have met the traditional nationality requirements (or indeed other requirements) of the classical rules of diplomatic protection.

7.2 Investment Protection Agreements

In 1959 Germany concluded an investment protection treaty with Pakistan which was designed to remedy for Germany the consequences of loss of its overseas possessions following the Second World War and to offset the limitations of reliance on the traditional rules of diplomatic protection. Germany, Switzerland and then other European States followed this with other bilateral agreements—known as bilateral investment treaties (BITs) or investment promotion and protection agreements (IPPAs). The agreements were all at first between a developed and a developing State, and they helped the flow of outward investment from the richer countries by protecting their investors from the increasing tendency of newly independent States to assert their sovereignty by expropriating without 'prompt, adequate and effective compensation' investments mostly made during the colonial era, seeking to give preferential treatment to their own fledgling enterprises by denying the foreign investor equivalent, or 'equitable' treatment, or imposing stringent restrictions on repatriation of profits. The newly independent countries used their numerical weight in the United Nations to try to recast the international economic order—most significantly with the 1974 Charter of Economic Rights and Duties.[23] The major capital exporting States meanwhile concluded the OECD Draft Convention on the Protection of Foreign Property which was based on more traditional standards of protection of foreign property, but this was never formally adopted as a treaty.[24]

As the network of bilateral treaties exchanging protection for the promise of increased investment grew during the 1970s and 1980s into the hundreds and then into the thousands, they came for investors to replace the older reliance on diplomatic protection. They were initially concluded for the protection of nationals of the

[21] *Esphahanian and Bank Tejarat*, 2 Iran-US CTR 157 (1983-I); noted in 77 AJIL (1983) 646.
[22] See Bederman (1993), p. 119.
[23] GA Res. 3281, adopted 12 December 1974, with the US and the majority of European Community States voting against; see Chatterjee (1991).
[24] OECD Publications No. 15637, December 1962.

capital exporting States, but—circumventing the restrictions of *Barcelona Traction* they normally included direct protection for shareholders. This was seen as economically essential because so many developing States required incorporation of a local subsidiary (with the nationality of the host State) as a condition for doing business or acquiring concessions to exploit natural resources. There have been a number of efforts to extend the relatively similar rules set out in the bilateral investment agreements into multilateral treaties—so escaping the general tendency for the bilateral agreements to be concluded between a capital-exporting and a developing country and thus carrying more weight as a potential source of customary international law—but to the limited extent that these initiatives have been successful, their main impact has been in areas other than that of the rules on nationality—in particular on the enormous growth in international arbitration.[25] The entry into force of the Treaty of Lisbon in 2009 gave the European Union a new and exclusive competence over foreign direct investment—and the implications of this radical shift of powers are gradually being clarified both by cases decided by the Court of Justice of the EU and by new agreements concluded by the European Union.[26]

7.3 Human Rights Agreements

The third method in which the individual might in seeking redress avoid the rigid nationality rules as well as the slow and uncertain procedures of diplomatic protection is through the growing range of direct entitlements under human rights or humanitarian treaties. These treaties protect rights to property as well as personal rights such as life and freedom from torture. The International Court of Justice alluded to this possibility in the *Barcelona Traction* case—noting that

> on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of human rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought…[27]

The European Convention on Human Rights (ECHR) did not assist Barcelona Traction in that case since Spain was not yet a Member of the Council of Europe or a Party to the Convention. But in the succeeding years virtually all Members of the Council of Europe have become Parties to the ECHR as well as accepting the compulsory jurisdiction of the European Court of Human Rights and the right of individuals to bring petitions directly before the Court. The European Union has made it

[25] See Bonnitcha et al. (2017), esp. chapter 1, and pp. 50–57 on the definition of 'investors' and 'investments' covered by the treaties. For early UK practice see Denza and Brooks (1987), p. 908; International Law Association (2006), pp. 368–376, 382–385.

[26] See Dimopoulos (2011).

[27] ICJ Reports 1970, p. 3, at para. 91.

a condition for new applicants for membership that they should first become Parties to the ECHR and accept the right of individual petition.[28]

Most individuals bring claims for breach of the obligations under the Convention against the State of which they are themselves nationals, but the ECHR in Article 1 requires the Contracting Parties to 'secure to everyone within their jurisdiction the rights and freedoms defined in […] the Convention'. For example, individuals denied refuge in an overseas diplomatic or consular mission of a Member State,[29] or detained in the context of a conflict abroad in which a Member State is engaged may seek a remedy for denial of their rights without engaging the support of the State of which they are themselves nationals. Thus in the case of *Al-Jedda v. the United Kingdom* the European Court of Human Rights held that an Iraqi national who had been held by the UK in detention without charge for over 3 years in Iraq while the UK was an Occupying Power in Iraq as part of a multinational force was 'within the authority and control of the United Kingdom throughout…' His internment was therefore attributable to the UK rather than (as the UK had argued) to the United Nations and fell within the jurisdiction of the UK for the purposes of Article 1 of the ECHR.[30]

8 The Entitlement of Citizens of the EU to Protection from Missions of Any Member State

As explained above, a distinction must be drawn between formal 'diplomatic protection' by one State against another and 'protection of nationals' as practised by diplomatic missions and consular posts under customary international law and now as a function of diplomatic agents under Article 3 of the Vienna Convention on Diplomatic Relations and as a function of consular officers under Article 5 of the Vienna Convention on Consular Relations. It is this latter form of protection which under the successive Treaties on European Union beginning with the 1992 Treaty of Maastricht has been made a right of citizens of the EU. Citizenship of the EU is a status derived from nationality of any one of the twenty-eight Member States of the European Union. Each Member State defines without restriction who are by law its nationals for the purposes of the Treaties, if appropriate informing the other Member States, and citizenship of the Union follows automatically.

Article 46 of the EU Charter of Fundamental Rights—which now forms an integral part of and has the same value as the EU Treaties[31]—provides that

[28] The requirement was formalised in the Conclusions of the European Council at Copenhagen in June 1993 which elaborated on the need for candidate States to respect democracy, equality, the rule of law and human rights.

[29] See *R (on the application of 'B' and Others) v. Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344.

[30] *Al-Jedda v. the United Kingdom*, Appl. no. 27021/08, at paras. 74-86, 53 EHRR 23. For an overview of international, regional and sub-regional human rights bodies, including the extent to which they permit individual access, see Clooney (2017), chapter 17.

[31] Art. 6(1) of the TEU: see Blanke and Mangiameli (2013), pp. 287 and 300–305.

> 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 and consular authorities of any Member State, on the same conditions as nationals of that State.[32]

Article 20 of the Treaty on the Functioning of the European Union (TFEU)—which lists all the entitlements of citizens of the EU, provides that this right to protection 'shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Article 23 of the TFEU then gives powers for further enabling legislation by the European Parliament and Council—but detailed implementing rules and procedures were already in 1995 agreed among the Member States in the form of a Decision of the representatives of the Member States—in effect an international agreement.[33]

The key requirement on Member States under the 1995 Decision was to treat nationals of other Member States (on proof of their status) as if they were their own nationals. There is no uniformity among Member States either on the question of whether a national has a legal right or merely a legitimate expectation of receiving protection from his own embassy or consular post, and the EU rules do not impose any such uniformity. Nor is there uniformity on the extent of protection offered by individual missions or posts. Missions and consular posts each operate under national constraints which are legal, practical and financial—performing a wide range of protective functions. These functions range from the sensitive political assistance which may be required by a person unjustly imprisoned or charged, through administrative functions such as renewal of a passport or registration of a birth or death to practical assistance with return home or subsistence following a robbery. Article 5 of the Decision listed the forms of help available and provided that assistance might be provided in other circumstances. Some functions—such as the issue of a passport—may only be carried out on behalf of those having the nationality of the protecting Member State. The specific cases listed in the 1995 Decision were:

(a) assistance in case of death;
(b) assistance in case of serious accident or serious illness;
(c) assistance in case of arrest or detention;
(d) assistance to victims of violent crime;
(e) the relief and repatriation of distressed citizens of the Union.

It was also understood, and confirmed by practice, that sensitive political assistance involving for example challenge to local judicial procedures or laws would not be within the scope of the protection envisaged. Missions and consular posts

[32] For Commentary on this provision, see Denza (2014), pp. 1177–1195; House of Commons Select Committee on European Scrutiny (2006).
[33] Decision 95/553/1995, [1995] OJ L 314/73 and Council Doc. 11107/95.

are likely to have guidance regarding rejection of frivolous requests[34] and for security for recovery of costs when assisting with repatriation of an individual robbed of cash and credit cards. The individual from another Member State cannot claim to be entitled to the treatment which would be given by a post of his own State of nationality, but only to what is on offer to nationals of the Member State mission or post offering him protection as a citizen of the EU. Article 6 of the Decision expressly provided that except in case of extreme urgency, no financial assistance might be given or expenditure incurred without the permission of the authorities of applicant's State—and except in case of express waiver by those authorities, the applicant must undertake to repay.

The practice of one State protecting the interests of another following breach of diplomatic or consular relations is of course of long-standing and is now expressly authorised under Articles 45 and 46 of the Vienna Convention on Diplomatic Relations and under Article 27 of the Vienna Convention on Consular Relations. Article 8 of the Consular Convention also provides that on appropriate notification to the receiving State and in the absence of objection, a consular post may exercise consular functions on behalf of a third State. Protection of diplomatic or consular interests in other circumstances—such as when a State does not maintain relations for financial reason—is a more recent practice also now covered in the Diplomatic and Consular Conventions. In those cases the host State may reject the proposed protecting State, and it has become practice for a special agreement to be concluded between protecting and protected States listing functions to be performed and providing for reimbursement of expenses. The host State then has no ground for objecting to protective functions being exercised by the protecting State on behalf of nationals of the protected State. The European arrangements are much wider in scope, and it was at the outset reasonable to suppose that objection might be raised by host States to protection by a mission or consular post of persons who were not its nationals. Article 23 of the TFEU authorises Member States to 'start the international negotiations necessary to secure this protection'—and the European Commission has suggested that Member States should embark separately on negotiations with all non-Member States (thus envisaging approximately 170×28 negotiations). In practice the Member States have not found further special negotiations 'necessary' in order for practical protection to be extended—the 1995 Decision described above was notified to all non-member States without raising protest and there appeared to be no instance of a non-member State raising objection either to the general scheme or in actual cases. Where negotiations for a new consular convention are independently under way, Member States have taken the opportunity to confirm the entitlement to protection of all EU citizens. Of course actual protection usually occurs in circumstances of emergency, it does not cover sensitive political representations, and the absence of objection confirms the practice that host States do not usually raise objection to

[34] Cases documented by UK consulates include a lady requesting the British consul to arrange for her 40 dogs to be flown home, and a demand by a harassed husband in the context of a matrimonial row that the consul should translate what his irate Portuguese wife was shouting at him: Dickie (1992), p. 48.

protection by one State of nationals of another except where the second nationality is their own.

The extended protection opened up by the arrangements for EU citizens has been most visible and effective in the context of crises whether caused by political events such as the terrorist attacks in Mumbai in 2008 or by natural disasters such as the Asian tsunami. In such circumstances diplomatic and consular posts have often exceeded the requirements in the EU legislation—for example by including non-EU family members in evacuation arrangements. Increase in numbers of EU business and holiday travellers has not been matched by increased overseas representation for which resources have become tightened, so that the increased possibilities of seeking protection available under the EU scheme are greatly to be welcomed. Passports of most EU Member States (but not those of France or the UK) now give information on the entitlement, and details of what services may be secured are also available online.

On 20 April 2015 the Council of the EU adopted a Directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC.[35] The Directive entered into force following national implementation on 1 May 2018. Recital (4) to the Directive expressly confirms that it 'does not affect Member States' competence to determine the scope of the protection to be provided to their own nationals'. The Directive also makes clear that it does not affect rights and obligations under the Vienna Consular Convention. Article 6 specifies that a Member State is not represented in a third country if it has no embassy or consulate established there on a permanent basis, or if it has no embassy, consulate or honorary consul there 'effectively in a position to provide consular protection in a given case'. There is a very modest enlargement of the specified forms of protection—the 'crime' need not be 'violent' and the citizen seeking relief or repatriation need not be 'distressed'. There is a new entitlement to emergency travel documents.[36]

The arrangements for cooperation in the new Directive emphasize strongly the primary responsibility of the Member State of nationality to provide protection. Article 10.2 provides

> When a Member State receives a request for consular protection from a person who claims to be an unrepresented citizen, or is informed of an individual emergency situation of an unrepresented citizen, it shall consult without delay the Ministry of Foreign Affairs of the Member State of which the person claims to be a national or, where appropriate, the competent embassy or consulate of that Member State, and provide it with all the relevant information at its disposal, including regarding the identity of the person concerned, possible costs of consular protection, and regarding other family members to whom consular protection may also need to be provided. Except in cases of

[35] Council Directive (EU) 2015/637, [2015] OJ L 106/1. For an account of the issues which were controversial during the negotiation of the Directive, see Wouters et al. (2016), p. 563.

[36] As provided for in Decision 96/409/CFSP, [1996] OJ L168/4.

extreme urgency, this consultation shall take place before assistance is provided. The assisting Member State shall also facilitate the exchange of information between the citizen concerned and the authorities of the citizen's Member State of nationality.

The Member State of nationality if requested must then provide relevant information to the assisting Member State, and is responsible for any necessary contact with family members or other relevant persons or authorities. Article 3 of the Directive entitles the Member State of nationality to request the Member State from whom the unrepresented citizen seeks consular protection to redirect the application to the State of nationality to enable it to provide protection in accordance with its national law or practice. This procedure is designed to avoid 'shopping' among posts of different Member States in search of the most favourable terms of protection. Even if the Member State of nationality has no representation in the relevant non-member State, it may well be able to provide adequate protection by providing legal advice or funds through telephone or electronic communication. The Directive is designed to make clear that this is the preferable option. As the European Commission's Press release points out: 'The Directive thus preserves the crucial role of the home country in taking care of its own citizens in distress abroad'.[37] The Commission maintains a website which gives general information about the scheme, helps travellers find out whether their national State has an embassy or consulate in any third country and if not provides contact details of missions of other Member States who could be contacted for assistance.[38]

Article 7 also permits permanent arrangements among Member States for providing protection (as authorised under the Vienna Convention on Consular Relations) and for practical collaborative arrangements among Member States. This enables redirection of a request, but is accompanied by the proviso that consular protection should not be compromised—in particular if the matter requires urgent action by the Member State first requested. Article 11 sets out the role of Union delegations in assisting this coordination, facilitating exchange of information among embassies and consulates and making information about entitlements generally available to the unrepresented citizen.

Taken as a whole, the new Directive responds well to the approach taken by almost all of the individuals and organisations who gave evidence on the subject of consular services to the UK's Review of the Balance of Competences (undertaken during the approach to the 2016 Referendum on EU membership).[39] Many of the respondents lived abroad and had experience of using consular services, and they expected the arrangements for closer sharing of responsibilities to be beneficial in terms of improving services while hoping that they would not be used as an excuse to undermine what was already on offer from national consulates and missions.

[37] Press release of 20 April 2015.

[38] See https://ec.europa.eu/consularprotection/index.action.

[39] Review of the Balance of Competences: Consular Services: Evidence from Stakeholders, available online.

9 The International Law Commission's Draft Articles

Against this background of long-standing state practice, national and international cases and analysis by writers, the UN General Assembly in 1996 invited the International Law Commission (ILC) to consider the topic of diplomatic protection, and 10 years later, after extensive work under the guidance of two successive Rapporteurs, Mohamed Bennouna of Morocco and John Dugard of South Africa, the Commission adopted and submitted draft Articles.[40] These Articles have been influential in subsequent practice and cases, but so far it has not been agreed that they should be submitted to a Conference with a view to formalizing them in a treaty.

In regard to the importance of nationality as the main basis for the exercise of diplomatic protection, the Articles for the most part codify established practice. But there are two areas where the Commission sought to introduce an element of progressive development. The first related to the question of whether a State is under any international obligation to exercise diplomatic protection. A proposal that there should be such an obligation when the wrong complained of constituted violation of a *ius cogens* rule was not accepted by the ILC as a whole, but found some support in the comments of States. Article 19, on Recommended practice, provides that a State should 'give due consideration to the possibility of exercising diplomatic protection, especially where a significant injury has occurred'. This does not really go beyond the flexible requirements already contained in national legal provisions, cases or practice, but strengthens the growing trend towards giving greater weight to the position and expectations of the individual claimant.

The second area where the ILC sought to improve the position of the individual claimants was that of dual nationality, where the second nationality is that of the defendant State. The final version of Article 7 provides that

> 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.

This formulation is more favourable towards the claimant than the traditional or indeed the current practice. Like a number of other provisions in the draft Articles it is expressly designed to limit 'nationality shopping'. It draws some support from recent practice of arbitral tribunals—though it must be recalled that the terms of reference of such tribunals, in particular the Iran–United States Claims Tribunal, are often more generous to the individual than general international practice.

[40] Printed, with commentaries, in Report of the ILC on its 58th Session, UN Doc. A/61/10. See Introductory Note by John Dugard, later Professor of International Law at Leiden University, in UN Audiovisual Library of International Law.

10 Conclusion

The political and public perception that nationality carries an entitlement to diplomatic protection is stronger than is legally justified. Neither international nor national laws guarantee timely or specific protective action and all States in practice exercise their discretion with careful regard to wider aspects of their international relations. Although diplomatic protection in the formal sense is no longer only the prerogative of the stronger States claiming to uphold international rules, the options open to States in order to enforce the rights of their nationals are substantially reduced since Palmerston's vigorous action in 1850. Justifying intervention on the ground of protecting a State's nationals has since the action of the UK and France in Suez in 1956 not only become less acceptable in terms of the UN Charter and customary international law but is also less practised. While forcible measures to rescue individuals held hostage pass without protest, wider interventions involving the threat or use of force are now justified by the intervening States mainly on other grounds.[41] While a State's discretion in regard to conferring nationality under domestic law is restricted only by international agreements on nationality, it is now accepted that to have international effect, the nationality link must be a genuine one.

As traditional protective measures by States have become less common, the alternative remedies open to injured individuals and economically damaged companies have by way of compensation been enlarged. Individuals denied justice increasingly pursue actions under human rights conventions, governments use economic incentives such as enabling credit or enlarging trading links as well as political pressures to compel defaulting governments to meet their international obligations through lump sum financial settlements,[42] and business enterprises increasingly rely on investment protection agreements to secure arbitration and compensation for claims which would be barred under the traditional rules on nationality.

Informal diplomatic and consular protection of nationals abroad continues to be of great practical benefit and is limited only by the financial constraints faced by almost all States on overseas expenditure. But increased sharing of protective functions through protection of interests agreements under the mechanisms available under the Vienna Diplomatic and Consular Conventions and more recently under the European scheme giving entitlement to citizens of the European Union compensate for these constraints. All these options however continue to emphasize the primary responsibility of the State of nationality to protect—particularly when the ground for complaint is politically sensitive and involves criticism of the defendant government or its institutions.

[41] See Gray (2018), pp. 88–92 and 156–160.

[42] Access to the London-based international financial market was an important factor in persuading the Soviet Government in 1986 to accept a deal to settle the UK claims arising from the 1917 default on Russian bonds and later nationalisations: see *The Times*, 16 July 1986.

References

Amerasinghe CF (2008) Diplomatic protection. OUP, Oxford
Bederman BJ (1993) Nationality of individual claimants before the Iran–US Claims Tribunal. ICLQ 42:119–135
Blanke H-J, Mangiameli S (eds) (2013) The Treaty on European Union (TEU): a commentary. Springer, Heidelberg
Bonnitcha J, Poulsen L, Waibel M (2017) The political economy of the investment treaty regime. OUP, Oxford
Chatterjee SK (1991) The Charter of Economic Rights and Duties: an evaluation. ICLQ 40:669–684
Clooney A (2017) Human rights. In: Roberts I (ed) Satow's diplomatic practice, 7th edn. OUP, Oxford, pp 305–334
Denza E (2014) Article 46. In: Peers S, Harvey T, Kenner J, Ward A (eds) The EU Charter of Fundamental Rights: a commentary. Hart Publishing, Oxford, pp 1177–1195
Denza E (2016) Diplomatic law: commentary on the Vienna Convention on Diplomatic Relations, 4th edn. OUP, Oxford
Denza E, Brooks S (1987) Investment protection treaties: the British experience. ICLQ 36:908–923
Dickie J (1992) Inside the Foreign Office. Chapmans, London
Dimopoulos A (2011) EU foreign investment law. OUP, Oxford
Gray C (2018) International law and the use of force, 3rd edn. OUP, Oxford
House of Commons Select Committee on European Scrutiny (2006) Diplomatic and consular protection of Union citizens in third countries, 16th report, 2006–07. https://publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/41-xvi/4104.htm. Accessed 19 Oct 2018
International Law Association (2006) Report of the 72nd conference, Toronto. International Law Association, London
Jenkins R (1995) Gladstone. Macmillan, London
Jennings R, Watts A (2008) Oppenheim's international law, 9th edn. OUP, Oxford
Lee LT, Quigley JB (2008) Consular law and practice, 3rd edn. OUP, Oxford
Okowa P (2018) Issues of admissibility and the law on international responsibility. In: Evans M (ed) International law, 5th edn. OUP, Oxford, pp 450–483
Roberts I (ed) (2017) Satow's diplomatic practice, 7th edn. OUP, Oxford
Weston BH, Lillich RB, Bederman DJ (1999) International claims: their settlement by lump sum agreement, 1975–1995. Transnational Publishers, Ardsley
Wouters J, Duquet S, Meuwissen K (2016) Caring for citizens abroad: the European Union and consular tasks. Eur Foreign Aff Rev 19:563–580