

Topic 9: Diplomatic protection (297-329)

- Where a state mistreats a national of another state in such a way as to **violate standards prescribed by CIL or conventional** international law, the state whose nationality the mistreated person possesses is regarded as the victim of an **internationally wrongful act**.¹
- The ILC notes that diplomatic protection conducted by a State at inter-State level is an important remedy for the protection of persons whose human rights have been violated abroad.²
- Unless there is a treaty in force between two States concerning treatment of foreign nationals are entitled, the content of treatment depends on CIL and general principles of law. DADP is referred to.
- Seek Diplomatic Protection If
 - Can Establish internationally wrongful conduct
 - Individual is national
 - Exhaustion of local remedies
- Standard of treatment: historically two schools of thought.
 - **‘National treatment’ standard**
 - According to this view, a foreign national is entitled to be treated no worse than a person possessing local nationality. Rests on the principle of non-discrimination. Provided the foreign national receives the same treatment as local national, no international wrong is committed.
 - **‘International minimum’ standard**
 - According to this view, a foreign national is entitled to minimum standards of protection, regardless of the treatment of local nationals. A State’s failure to extend that minimum standard of treatment to a foreigner engages the international responsibility of the State.
 - Accepted by most publicists, supported by the substantive development of international human rights law.
 - To a considerable extent international mechanisms for human rights protection help to ensure these minimum standards, since they invariably encompass treatment by a state of non-nationals of that state. Eg: 167 states are party to the *International Covenant on Civil and Political Rights*; 47 states are party to the *European Convention on Human Rights*
 - Some states are not party to any human rights treaty. In those cases it is harder to determine the minimum standards of protection that a state should afford non-nationals.
 - This aligns with the rule that it is international law and not domestic law that determines when a State’s conduct is internationally wrongful.

¹ *Mavrommatic Palestine Concessions case (Jurisdiction) (Greece v United Kingdom)* PCIJ Rep (1924) Ser A No. 2.

² **Draft Articles on Diplomatic Protection**, *Yearbook of the International Law Commission*, 2006, Vol II, Pt II, 25, 26.

- What is Internationally Wrongful Conduct → Decisions of US-Mexican/Panama Claims Commissions
 - **Roberts Claim**³: State's negative obligations
 - Imprisonment in Mexico of a US national.
 - **Unacceptable prison conditions**. Small room, no sanitary accommodations, food was scarce and unclear. Deemed to be cruel and inhumane treatment.
 - The conditions of captivity were held to be unacceptable, even though Mexican prisoners received the **same treatment**
 - Obligated not to mistreat foreign nationals held in lawful custody
 - **Massey Claim**⁴: State's positive obligations
 - **unauthorised release of a suspect** from custody
 - Involved murder of a US citizen by a Mexican in Mexico. The Mexican murderer was allowed to escape.
 - Mexico was held responsible for the escape
 - Failure to punish persons who have committed serious crimes against foreign nationals may engage State's responsibility.
 - Murderer of a US national in Mexico was arrested and imprisoned pending trial. Mexican prison officer allowed the murdered to escape from the prison. Prisoner eluded recapture. Prison officer was punished. Mexico was still held responsible for **failure to capture and punish** the killer.
 - **Janes Claim**⁵: State's positive obligations
 - inadequate measures to apprehend a suspect
 - Murder of US national. Murdered was well known. Slayer left on foot. Mexican police magistrate was informed of shooting within 5 minutes of its occurrence. 8 years later killer still had not been apprehended.
 - Tardiness by a local Mexican police *Comisario* in pursuing the escaping killer of a US national.
 - Mexico was held responsible for **failing to bring the killer to justice**.
 - **Youmans Claim**⁶:
 - Mexico held responsible to US for **murder of three US nationals by contingent of Mexican soldiers**. This was although the soldiers acted contrary to orders.
 - **Yeager v Iran**:⁷
 - Iran-United States Claims Tribunal said that giving the US national **30 minutes notice** to pack a few personal belongings without any advance notice gave insufficient time for the foreigner to put his affairs in order.
 - Iran was responsible for the internationally wrongful conduct.
 - **Noyes Claim**⁸: State's positive obligations

³ *Roberts (USA) v United Mexican States* (1926) 4 RIAA 77.

⁴ *Massey (USA) v United Mexican States* (1927) 4 RIAA 155.

⁵ *Janes (USA) v United Mexican States* (1926) 4 RIAA 82.

⁶ 301 cit 162

⁷ 302 cit 167

⁸ *Noyes (US) v Panama* (1933) 6 RIAA 308, 310-311.

- Failure to take such steps as are required to protect foreign nationals from **the effects of mob violence**, terrorism or insurrection will engage the state's responsibility.
 - Claim for personal injuries caused by the Panama police to prevent an assault on a US national by an unruly and intoxicated crowd. Several hundred adherents of the party then in control of Govt gathered for a meeting. Police had not been increased for the occasion, **3 police stationed** there. Crowd became unruly. Chief of police drove with reinforcements. Claimant passed through village in car. Mob began attacking. **Police officer protected claimant** and remained with him until the crowd cleared. He had already been attacked and was attacked again. The police actively protected the claimant. However officials had not increased the police force that day although they knew about the meeting in advance.
 - Panama was held to be **not responsible** for injuries and damage to property resulting from the inadequate police presence. There would need to be a more general failing in policing. There must be **special circumstances** such as general failure to comply with their duty to maintain order, to prevent crimes or prosecute or punish criminals.
 - **Chattain Claim:**⁹
 - United States-Mexico General Claims Commission said that Mexico's handling of criminal proceedings against a United States national for **embezzlement** was highly insufficient, insufficiency of governmental action recognizable by every unbiased man. **Deficiencies in the trial** included absence of proper investigations, withholding from accused the opportunity to know all charges against him, undue delay.
 - Mexico was held internationally responsible for the act towards US national.
 - ICCPR art 14 contains guide of CIL regarding requirements for conduct of criminal proceedings against all persons.
 - **Diallo case**¹⁰: arrest or detention in violation of art 9 of ICCPR for states bound by the provision.
- Expropriation of property
 - State may be internationally responsible for taking property belonging to foreign national. Often where foreign corp property has been nationalized by the State in whose territory that property is located.
 - **UNGA Resolution on Permanent Sovereignty over Natural Resources 1803 (1962)**¹¹ widely recognised as reflecting CIL. It permits nationalisation, expropriation or requisition of foreign-owned assets provided:

- it is based on grounds of 'public utility, security or the national interest which are recognised as overriding purely individual or private interests', and

⁹ 303 cit 173

¹⁰ 304 cit 180

¹¹ 306 cit 181

- lawful expropriation gives rise to the payment of fair compensation or of the just price of what was expropriated. State must pay *damnum emergens*, the value of the property, measured as the market value of the property at the time of its taking. Compensation should reflect market value.
- If the expropriation is unlawful, the State protecting the foreign national will also be entitled to an award of *lucrum cessans*, lost profits up to the time of judgment.
- Not entitled to an award of punitive damages in either case.

- Conditions for diplomatic protection: Admissibility of Claims
 - 2 conditions must be met for State to bring claim against another state in relation to the first state's national:
 - nationality rule
 - exhaustion of local remedies rule.
 - **DASR art 44: Admissibility of claims**
 - The 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;
 - (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.
- Rule (a): Nationality of claims
 - Where a State seeks to protect diplomatically a private person, must ask whether that person is a national of the State.
 - CIL position is that State may assert diplomatic protection only in respect of its own nationals.¹⁷
 - CIL position is supported in DADP Art 1. However DADP extends a State's right of diplomatic protection to two classes of persons who are not its own nationals but who are lawfully and habitually resident in the State exercising the right of protection:
 - stateless persons
 - persons recognized by the protecting State as refugees in accordance with internationally accepted standards. Host state is prevented from diplomatically protecting him or her from mistreatment at the hands of the refugee's own State of nationality.
 - must belong to this class at the date of injury and the date of presentation of claim.
 - **Nationality Rule: defines diplomatic protection, given to nationals**
 - **DADP art 1: Definition and scope**
 - For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the

¹⁶ 310 cit 196

¹⁷ *Dickson Car Wheel Co v Mexico* 4 RIAA (1931) 669, 678.

responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

- **DADP art 3: Protection by the State of nationality**
 - 1. The State entitled to exercise diplomatic protection is the State of nationality.
 - 2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.
- **Extension of Nationality Rule: refugees and stateless persons, not CIL but progressive development of law**
- **DADP art 8: Stateless persons and refugees**
 - 1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
 - 2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
 - 3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.
- **Determining Nationality**
 - *jus sanguinis* ('right of blood')
 - nationality is determined largely by ancestry
 - nationality conferred by State law at birth by virtue of the fact that one or both parents possessed the State's nationality
 - historically included most of Europe, eg Germany
 - *jus soli* ('right of the soil')
 - nationality is determined largely by place of birth
 - nationality conferred by State law at birth by virtue of the fact that they were born in State's territory
 - historically included France and the UK
 - **Hague Convention on Conflict of Nationality Laws, 1937**
 - **Article 1:** It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.
 - **DADP art 4 State of nationality of a natural person**
 - For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

- **Where there is dual nationality and claim against third state**
 - **Article 6: Multiple nationality and claim against a third State**
 - 1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.
 - 2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.
 - Can seek protection from either or both regardless of which nationality is predominant.¹⁸
- **Where there is dual nationality and claim against nationality state**
 - **Article 7: Multiple nationality and claim against a State of nationality**
 - 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.
 - Must be the **predominant** state.
 - ILC's Commentaries note that Predominance has not been defined however there are **certain factors to indicate predominance**:¹⁹ including habitual residence, amount of time spent in each country of nationality, date of naturalization, place language of education, employment, place of family life, family ties in each country, participation in social and public life, taxation, social security insurance, military services.
 - Weigh up factors to determine which of the two States the person is more closely connected. If the person's predominant nationality is that of the claimant State, the nationality of claims requirement is satisfied.
- **Individual possesses nationality of claimant State and stronger links to the State against which claim is being made: Nottebohm case.**²⁰
 - Nottebohm born in Germany, automatically acquiring German nationality.
 - Aged around 24, Nottebohm moved to Guatemala, where he lived and worked for the next 38 years. However, he did not acquire Guatemalan nationality.
 - Nottebohm visited Liechtenstein, where he was granted Liechtenstein nationality, thus losing his German nationality. Nottebohm then returned to Guatemala.
 - Aged around 62, Nottebohm was expelled from Guatemala as an enemy (ie German) national. His property was also seized.
 - Liechtenstein claimed against Guatemala in the ICJ re Guatemala's treatment of Nottebohm.
 - **ICJ held:** Liechtenstein was not entitled to bring a claim against Guatemala re Nottebohm, since his **connection with Liechtenstein was not 'real and effective'**. But he **did have a 'real and effective'**

¹⁸ *Salem case (Egypt v United States)* (1932) 2 RIAA 1161, 1188.

¹⁹ 315 cit 213

²⁰ 316 cit 219

connection with Guatemala (even though he was not a Guatemalan national.)

- Liechtenstein could protect against other state that is not Guatemala, as N had such a longstanding business, residential, family and social connection to Guatemala. Connection with Liechtenstein was tenuous. No settled abode, no prolonged residence, no intention of settling there. He returned to Guatemala shortly after his naturalisation and showed every intention of remaining there.
- Guatemala is under no obligation to recognise nationality granted in such circumstances. Liechtenstein is not entitled to extend its protection to N, and claim must be held to be inadmissible.
- Unlikely that this could be applied in cases of nationality acquired at birth *de jure soli* or *de jure sanguinis*. Judgement is that individual without genuine bonds of attachment to the naturalising state will not be able to enjoy the benefit of that State's diplomatic protection against another State to which he or she does have such bonds. Claim would have been admissible against any State except Guatemala.