RESPONSIBILITY TO PROTECT (R2P) AS DUTY TO PROTECT?

REASSESSING THE TRADITIONAL DOCTRINE OF DIPLOMATIC PROTECTION IN LIGHT OF MODERN DEVELOPMENTS IN INTERNATIONAL LAW

by

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Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law

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Abstract

This thesis will reassess the traditional doctrine of diplomatic protection in light of two significant and related developments in modern international law: (i) the proliferation of international human rights law and its granting of rights to individuals as subjects of international law; and (ii) the evolving conception of State sovereignty as including responsibility pursuant to the U.N.’s “Responsibility to Protect” doctrine. It will argue that the traditional doctrine – which holds that States have a discretionary right to espouse claims on behalf of their own nationals for wrongs committed against them by other States, but that the individuals harmed have no right to protection – is outdated and that these developments should lead to the recognition of a limited individual right and concomitant State obligation to provide diplomatic protection in certain circumstances. Responsibility to protect thus confirms a duty to protect using diplomatic means.
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I. Introduction

In 1847, an anti-Semitic Greek mob ransacked and burned to the ground the Athens home of David Pacifico, a Portuguese Jew known as ‘Don Pacifico’. Born in Gibraltar and thus possessing a British passport, Pacifico petitioned the British government for assistance in obtaining compensation, his local Greek claim having proven unsuccessful. Lord Palmerston (then the British Foreign Minister) took up Pacifico’s cause. He first wrote to the Greek government demanding compensation and, when no response was received, in January of 1850 he ordered the British navy to blockade the port of Athens at Piraeus. After protracted negotiations, Pacifico’s claim was eventually referred to international arbitration in Lisbon and the blockade lifted. Meanwhile, Lord Palmerston’s conduct, which had frustrated French and Russian interests in Greece, resulted in a vote of censure passing the House of Lords and vote of confidence being called in the House of Commons.1 In an impassioned speech to the Commons defending his actions in the Don Pacifico affair, Lord Palmerston concluded with a stirring reference to Britain’s responsibility towards its overseas nationals:

I therefore fearlessly challenge the verdict which this House, as representing a political, a commercial, a constitutional country, is to give on the question now brought before it; whether 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.2

2 Hansard, 3rd series, cxii (25 June 1850) at 444 (reproduced in Bourne, id. at 302; emphasis added).
According to a recent biography, when Palmerston sat down, “the House ... ‘attentive and breathless’ throughout, erupted in long, enthusiastic cheering”. The government prevailed in the confidence vote.

The Don Pacifico Affair is a noteworthy historic example of diplomatic protection in operation. It is also significant for Lord Palmerston’s great speech, in which he suggests that the government is bound to protect the interests of British subjects abroad. Lord Palmerston was not alone in this understanding. Emer de Vattel, the first international legal scholar to address the subject, similarly spoke of diplomatic protection in language suggesting that it was an obligation to its citizens on the part of the State. In more recent times, the U.S. Supreme Court has shared in this view. In *Hines v. Davidowitz*, Mr. Justice Black commented as follows in delivering the opinion of the Court:

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.

Despite these weighty citations, the orthodox doctrine of diplomatic protection – what will be referred to here as the ‘traditional doctrine’ – holds that States are under no international legal obligation to provide their nationals with diplomatic protection when they are harmed in foreign countries and local remedies are ineffective. States may intervene on behalf of their nationals, but choosing to provide protection is their discretionary right. The International Court

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3 Chambers, *Palmerston*, op. cit. at 322.
4 *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (1758) at Bk. II, Ch.VI, § 71.
5 312 U.S. 52, 61 S.Ct. 399 (1941) at 64 (cited to U.S.; emphasis added).
of Justice’s decision in the *Barcelona Traction* case\(^6\) is the most often cited authority for this proposition. Most contemporary international legal scholarship accepts the correctness of the traditional doctrine as well.\(^7\) This thesis will demonstrate that the doctrine grew up around the orthodox notion of international law as only involving and regulating sovereign States in their relations with one and other. It also formed during a period in which international law held a fixed view of State sovereignty as entailing only rights to control over physical territory and populations and no reciprocal responsibilities or obligations. Part II, below, will describe the historical development of the traditional doctrine of diplomatic protection with an emphasis on locating it within the then prevailing legal theories of international law.

Due to international events, the doctrine of diplomatic protection has been a subject of increased legal significance and interest in recent years. In particular, the United States government’s detention and mistreatment of foreign nationals at its Guantánamo Bay military base has mobilized some States to seek, through diplomatic means, the physical protection and repatriation of their citizens. In other instances, failures to take such positive steps have resulted in domestic court proceedings seeking to compel States to perform diplomatic undertakings on behalf of their nationals detained at Guantánamo. Part III will discuss the renewed importance of diplomatic protection given the circumstances of Guantánamo Bay and will review the treatment of international law in domestic cases arising from detainee claims for diplomatic protection from their home governments.

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The central thrust of this thesis is to argue that the traditional doctrine of diplomatic protection is outdated in light of more recent developments in international law. Therefore, Part IV will outline: (i) the rise of international human rights law in the 20th century and the inclusion of individual persons as legitimate subjects of international law; and, relatedly, (ii) the changing definition of sovereignty as entailing not only control, but also responsibility towards citizens as reflected in the adoption by the United Nations’ General Assembly and Security Council of the “Responsibility to Protect” doctrine (or “R2P” as it has become known colloquially). Part V will argue that these significant changes in international law militate in favour of expanding diplomatic protection to include limited rights and obligations and that the responsibility to protect doctrine, in particular, confirms this. Academic criticism of such an expansion on the traditional doctrine will also be addressed in Part V.

II. The History of Diplomatic Protection

According to most accounts, the doctrine of diplomatic protection is of relatively recent vintage, at least in comparison with international law itself. Grotius, writing in the 17th century, did not address the subject specifically; neither did Suarez nor Puffendorf. Vatell’s *Le Droit des gens*, published in 1758, is the first scholarly treatise to take account of the doctrine. A possible explanation for this time lag is that the common person was simply not travelling abroad during the immediate post-Westphalian period. It followed that there was no particular need to consider the legal consequences of injury to aliens at that time.

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9 Amerasinghe, *id.* at 9 (referencing Grotius, *De jure belli et pacis libri tres* (1625); Suarez, *De legibus, ac Deo legislatore* (1612); and Pufendorf, *Elementorum jurisprudence universalis libri II* (1672)).
Although it was somewhat late in developing, diplomatic protection was actually an extension to the international plane of a much older legal concept: the reciprocal relationship of allegiance and protection between the individual and the sovereign ruler. As outlined below, this relationship was a clear feature of the common law and, to a certain extent, Roman civil law. However, by the time social conditions (namely the movement of people between States) required the application of this relationship to international circumstances, the structure of international law had coalesced into its traditional State-to-State form. This disjunct between changing real world conditions and unchanging legal doctrine resulted in the legal institution of diplomatic protection attempting, as Frederick Dunn put it, “to deal with a new set of practical needs and conflicts of interests in terms of old doctrines and standards developed to fit the requirements of a different type of civilization”.10

A. Origins of the Allegiance-Protection Relationship

Sir Hersch Lauterpacht places the common-law origin of the allegiance-protection relationship in a “feudal doctrine of much antiquity and much moral force … [that] the protection given by the lord had as a necessary corollary the obligation of fidelity”.11 This feudal doctrine was given common law expression in Calvin’s Case (1608), where Sir Edward Coke, then Chief Justice of the Court of Common Pleas, held that:

[T]he King is called the liege lord of his subjects. ... ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.12

10 Dunn, op. cit. at 46.
12 7 Coke Report 1a, 77 E.R. 377 at 382 (cited to E.R; emphasis added).
Calvin’s Case thus established the common law maxim that “protection trahit subjectionem, et subjection protectionem” (protection draws to it subjection, subjection, protection).\(^{13}\) Similarly, Roman civil law recognized the allegiance relationship through the maxim *civis Romanus sum* (I am a Roman citizen), referenced in Lord Palmerston’s great speech to Parliament.\(^{14}\) It held that a Roman citizen was entitled to all the rights and duties associated with citizenship, wherever in the world he might find himself. Cicero described the importance of this protection in 70 B.C. with regard to the corruption trial of Gaius Verres, a former Imperial governor of Sicily. Verres was alleged to have prosecuted and often executed Roman citizens without honouring the plea of *civis Romanus sum*.\(^{15}\) In supporting Verres’s conviction and exile, Cicero commented as follows:

Men of no importance, born in an obscure rank, go to sea; they go to places which they have never seen before; where they can neither be known to the men among whom they have arrived, nor always find people to vouch for them. But still, owing to this confidence in the mere fact of their citizenship, they think that they shall be safe, not only among our own magistrates, who are restrained by fear of the laws and of public opinion, nor among our fellow-citizens only, who are united with them by community of language, of rights, and of many other things; but wherever they come they think that this will be a protection to them. Take away this hope, take away this protection from Roman citizens, establish the fact that there is no assistance to be found in the words “I am a Roman citizen”; that a praetor, or any other officer, may with impunity order any punishment he pleases to be inflicted on a man who says that he is a Roman citizen, though no one knows that it is not true; and at one blow, by admitting that defense, you cut off from the Roman citizens all the provinces, all the kingdoms, all free cities, and indeed the whole world, which has hitherto been open most especially to our countrymen.\(^{16}\)

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\(^{13}\) *Id.*; see also Lauterpacht, “Allegiance, Diplomatic Protection …”, *op. cit.*

\(^{14}\) *Supra* note 2.

\(^{15}\) See Cicero, *In Verrem II*, Liber Quintus at LV-LXVIII.

\(^{16}\) *Id.* at LXV.
Another vivid example is found in the New Testament’s Book of Acts, where it is said that Paul of Tarsus (later St. Paul) claimed his Roman citizenship while on trial in Jerusalem and was accordingly granted passage to Rome by his captors.17

The principle enshrined in the allegiance relationship – “the reciprocity of benefit and duty, of allegiance and protection” – was not for Lauterpacht, “an artificial or obsolete formula of a past period”.18 It was instead “expressive of a compelling principle of political ethics and, above all, of security of the State”.19 A modern example demonstrating the continued salience of the allegiance relationship can be found in the House of Lords decision in *Joyce v. Director of Public Prosecutions*.20 Following the Second World War, William Joyce, the holder of a British Passport, but otherwise a legal alien, was convicted of high treason and sentenced to death by an English criminal court. During the war, Joyce had taken up a position in Berlin as an announcer of English news for a German radio company. Not being a British subject by birth, the issue for the House of Lords was whether Joyce could legally have committed treason against the Crown. As Lord Jowitt L.C. framed it, this issue was “bound up with the question of allegiance”.21 If, as the House in fact held, Joyce owed a duty of allegiance, then he could legally commit treason. Joyce’s allegiance was found to stem from the British passport he attained during residency in England and, notably, it was linked to the reciprocal protections of the Crown the passport symbolized. “[T]he possession of a passport by one who is not a British subject”, said Lord Jowitt (for a unanimous House of Lords on this point), “gives him rights and imposes upon the

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17 Book of Acts at 22, 27.
19 Id. at 335.
20 [1946] A.C. 347 (H.L.); see generally Lauterpacht, id. at 332-336.
21 Joyce’s Case, id. at 366.
sovereign obligations which would otherwise not be given or imposed”. The Lord Chancellor commented further upon the nature of the Crown’s duties as follows:

What is this protection upon which the claim to fidelity is founded? To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges. A well known writer on international law has said (see Oppenheim, *International Law*, 5th ed., vol. I, p. 546) that by a universally recognized customary rule of the law of nations every state holds the right of protection over its citizens abroad. This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights.

*Joyce*’s Case thus demonstrates the extension of the allegiance relationship into international circumstances. However, in making this transition, the principle attained a previously unmentioned gloss. This was provided in the very next line of Lord Jowitt’s speech: “It is true”, he said, “that the measure in which the state will exercise its right lies in its discretion”. What is not discussed is how or why State obligation became discretionary right when individual allegiance remained strictly construed to the extent that a legal alien could be tried and executed for treason because of it. The answer to these questions is found in the orthodoxy of international law that developed starting in the 18th century.

**B. The Development of State-‘Centric’ International Law**

It was a standard conceit of the early modern period of public international law (1789-1946) that an individual person was not a subject of such law. For example, writing in 1905,
Lassa Oppenheim stated that, “the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of international law”. Similarly, in 1946, Lauterpacht wrote that, “the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law”. This idea had its genesis in the *raison d’etat* thinking that emerged towards the end of what might be considered the “pre-modern” period of international law (1300-aproximately 1789). Scholars such as Vattel (1714-1767) and the Abbé Grégoire (1750-1831) were among the first to conceive of the State as independent entity operating distinctly from the sovereign prince and the nation. This was, however, something of a new idea at the time. Much of the pre-modern period was actually characterized by the idea that all individual humans, from the common man to the sovereign prince, were subject to the *jus gentium* (law of nations) just as they were subject to natural law.

While it is debatable whether the scholarship of this early period concerned “public international law” properly-so-called, it is interesting to note that the individual’s place in the then law of nations parallels, to some extent, his or her elevated standing in modern international law. For example, St. Thomas Aquinas (1225-1274) described the *jus gentium* as being “natural to man” and, significantly, stated that it “should be framed not for the community, but for the individual”. The scholars of the Spanish ‘School at Salamanca’ of the mid-16th century – Francisco Vitoria (1480-1546) and Francisco Suarez (1548-1617) – shared this view. Vitoria’s

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29 See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001) at 3 (Koskenniemi argues that international law did not begin after the peace of Westphalia in 1648, but at the meetings of the *Institute de droit international* in Europe in the 1870’s).
30 Aquinas, *Summa theologia* (1265-1272) at Ia-IIae 96: Of the power of human law, articulus I.
conception of the *jus gentium* has been described as applying “to men, to sovereigns, their counsellors and others responsible for the foreign relations of the state, as well as to private individuals, like merchants, having contact with other nations”. All of these, according to Vitoria, were subject to the *jus gentium* “individually in their consciences”. Suarez, for his part, defined *jus gentium* as “the law which all the various peoples and nations ought to observe in their relations with each other”. He also provided examples of *jus gentium*, such as freedom of contract and commercial intercourse, which obviously related to individuals directly.

Aquinas, in particular, and the Salamancans, to a lesser extent, lived and worked prior to the formation of clearly autonomous political communities. In Aquinas’s lifetime, the Holy Roman Empire dominated. Vitoria and Suarez witnessed the post-medieval emergence of centralized political communities, such as France, England and, their homeland, Spain. The Holy Roman Empire would not, however, reach its practical demise until the Thirty Years’ War (1618-1648) and its denouement in the Peace Treaties of Westphalia in 1648. It is notable then, that Grotius’s *De Jure Belli ac pacis* (1624), written during the war, began to reposition the individual within the law of nations. To do so, Grotius drew an important analogy between the legal and moral rules that govern States and those that govern individuals. For example, he argued that, because individuals are “bidden to share one another’s sufferings and misfortunes”,

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32 *Id.* at 27.
33 *De legibus ac deo legislatore* (1612) at Bk. II, Ch. XIX, 8 (emphasis added).
34 *Id.* at Bk. II, Ch. XIX, 7.
so too “peoples as such” and “kings as such” should enter alliances aimed at preserving peace.\(^{37}\)

Lauterpacht explained the significance of such analogies as follows:

> The analogy – nay, the essential identity – of rules governing the conduct of states and of individuals is not asserted for the reason that states are like individuals; it is due to the fact that states are composed of individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings. This is the true meaning of the Grotian analogy of states and individuals.\(^{38}\)

Thus Grotius, per Lauterpacht, subtly shifted the position of the individual within the *jus gentium*. Instead of being subject to a sort-of universal natural law common to men of all nations, the individual human being was then closer to being a subject of the law of nations strictly through the medium of the State.

A full shift to the orthodox, State-centric international law of the early modern period was not contemplated intellectually until Vattel’s *Droit des gens* more than a century later. In the intervening period, the political communities of Europe had become increasingly centralized in the figure of the sovereign and their relations with one and other had become increasingly complex. No longer was just war theory or invocation of natural law sufficient to assist the contemporary practice of international relations. This helps, in part, to explain the success of the law faculty at the University of Göttingen in 18th century Germany. The Göttingen lawyers used a historical/empirical methodology to incorporate natural law into the study of effective government in modern States.\(^{39}\) In doing so, they built on the legacy of Samuel Pufendorf (1632–1694), who portrayed Europe, in Martti Koskenniemi’s felicitous turn-of-phrase, as a

\(^{37}\) Grotius, *De Jure Belli ac pacis* (1624) at Bk. II, Ch. XV, § xii.


collection of “egoistic but interdependent sovereigns”. Pufendorf disciples Stephan Pütter (1725-1807) and Gotfried Achenwall (1719-1772) thus described the law of nations as the “external public law … of peoples”; however, they also explained that, in reality, it was the sovereign, having attained the right of majesty in the social contract, who also had the rights of nations.

Perhaps the most significant Göttingen scholar was George Friedrich von Martens (1756-1821), whose writing and teaching both focused on the actual practice of foreign relations amongst European sovereigns. He wrote in a taxonomical style that focused on the treaties and customs between nations as a means of teaching aspiring diplomats and State officials the practices of European public law. Martens himself conducted practical exercises in diplomacy with his students once a week at the university. Importantly, his approach suggests that the rules, customs, agreements, etc. governing relations between sovereign princes were operating in an actual system of law. His approach also demonstrates a further shift in the law of nations from universal natural law to raison d’etat, or for the reason and practice of States.

Vattel shared with Martens an early appreciation that the States of Europe were the member units of a larger legal system, what he called a “society” of States in his 1758 treatise on Le Droit des gens. This is most poignantly demonstrated in his discussion of the criteria for a lawful war, one being to uphold the equilibrium or balance of power amongst the society of

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40 Id. at 192.
41 J.S. Pütter and G. Achenwall, Anfangsgrunde des Naturrechts (Elementa juris naturae) (1750) at § 898.
43 M. Koskenniemi, “Into Positivism …”, supra note 36 at 194 (citing Martens’s Precis de droit des gens de l’Europe (1789) and Recueil des traits (first ed., 1791)).
44 Id.
45 Id. at 195.
46 See “Preliminaries”, § 7.
States in which each individual State is incorporated. In Vattel’s words: “The Laws of the natural society of Nations are so important to the welfare of every State that …. all Nations may put down by force the open violation of the laws of the society which nature has established among them, or any direct attacks upon its welfare.” While this is certainly a significant statement of international law in its own right, Vattel is noteworthy here because he was the first to conceive of the “State” operating independently of both the nation and the sovereign. For Vattel, the “Nation” is the body of individual people composing the substance of the State, the “State” itself is the political organization forming a shell over the Nation, and the “Sovereign” refers to the actual person of the sovereign, responsible for administering the State. Early on in *Le Droit des gens*, Vattel makes it known that “the Law of Nations is the law of sovereigns; free and independent States are moral persons, whose rights and obligations we are to set forth in this treatise”. As Peter Remec notes, this statement “clearly puts forward the moral, juristic entity of ‘state’ as the person of the law of nations. In this sense Vattel’s theory was understood by his world, and the sovereign states are still the accepted subjects of international law today”.

In Vattel then, the individual retains a position in the system, being part of the substance of the State; however, his law of nations, strictly speaking, is between States and does not apply to individuals. This marked a significant change in thinking about *jus gentium* from the Salamancans, Grotius, and even Pufendorf and his disciples. A similar vision of international law came to be shared in revolutionary France. For example, Jean-Jacques Rousseau (1712-1778) in his *Essay on the State of War* comments upon whom he views as the actual belligerents in a war:

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48 *Le Droit des gens* at “Preliminaries”, § 22.
49 Remec, *op. cit.* at 172.
50 Bk. I, Ch. I, § 12 (emphasis added).
51 Remec, *op. cit.* at 171-172.
[W]ho then are those between whom war takes place and who alone can truly be called enemies? I answer that they are public persons. And what is a ‘public person’? I answer that it is that moral creation called a Sovereign, which owes its existence to a social compact and all the decisions of which go by the name of ‘laws’.52

The result of this distinction for Rosseau is that the true belligerents are the “moral beings” of the States and not the individual persons that form their armies.53 The Abbé Grégoire (1750-1831) thought in similar terms regarding the nature of the State. His Declaration de droit des gens (1795), superimposed the Revolution’s Rights of Man of 1789 onto the State, treating it as a separate entity capable of possessing its own rights and obligations.

The consequences of this emergence of State-‘centric’ international law around the turn of the 19th century are aptly described by Roscoe Pound:

[The law of nations] was no longer a system imposed on one responsible man in each land, nor, as things came to be, upon a definite small cohesive group of men. It was expected to govern whole populations, not by acting upon single individuals therein, but taking each population as a legal unit, and it was expected to do this through the juristic assumption that each population as a collective person was accountable and amenable to legal reason as such.54

For better or worse, international law, in its orthodoxy, stuck to this assumption well into the 20th century, as is demonstrated by the quotations from Oppenheim and Lauterpacht regarding the exclusion of individuals from standing in its system of law. In fact, the development of the concept of sovereignty in the early modern period furthered the dominant position of the State. Amongst the “sweeping powers and rights” it attained, Antonio Cassese considers the “quintessence” of traditional sovereignty to be the “power to wield authority over all the

53 Id. at 43.
54 R. Pound, “Philosophical Theory and International Law” (1923), 1 Bibliotheca Visseriana 71 at 78.
individuals living in [a State’s] territory”. It is this element of popular sovereignty – the total sublimation of the individual within the State for the purposes of international law – that came to influence the development of the doctrine of diplomatic protection.

C. Historical Development of the Traditional Doctrine of Diplomatic Protection

It is perhaps fitting, if not coincidental, that Emer de Vattel was not only one of the fathers of international law as a system of sovereign States, but also, as Professor Dunn put it, the “spiritual father” of the institution of diplomatic protection. As mentioned, earlier scholars such Grotius did not comment on the circumstances of harm to aliens for the simple reason that travel and trade between distinct political communities was relatively limited in the 17th century and prior. By the time of Le Droit des gens in the mid-18th century, on the other hand, the New World had been colonized and foreign trade was a significant element of the European economy. While Chittharanjan Amerasinghe notes that there is no recorded evidence of any State practice that Vattel could have observed, the conditions were evidently sufficient for him to consider the doctrinal basis for individual relief against harm occurring abroad. Vattel thus wrote that:

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, since otherwise the citizen will not obtain the chief end of civil society, which is protection.

56 See generally Amerasinghe, supra note 7 at 8-20; Dunn, supra note 8 at 46-61.
57 Dunn, id. at 48.
58 Id. at 47.
59 Id. at 48.
60 Amerasinghe, supra note 7 at 12.
61 Le Droit des gens at Bk. II, Ch.VI, § 71 (the reference to “protection” as being the “chief end of civil society” is notable for its echo of the allegiance-protection relationship described above at Part II, A.).
Professor Amerasinghe’s point regarding a lack of Vattelian-era State practice demonstrates that, while the beginnings of globalization could produce a theoretical discussion of what would later be called diplomatic protection, it could do little more. It was not until the occurrence of further social and legal developments through the 19th century that diplomatic protection became an established and legitimate doctrine of international law. In this regard, an early legal event of some significance was Great Britain and the United States’ agreement on the Jay Treaty of 1794. The Jay Treaty included provisions for the establishment of arbitration commissions to settle, inter alia, claims by British subjects for confiscated debts and reciprocal claims of allegedly illegal seizure of American ships by the British government. Both Professors Dunn and Amerasinghe note that these arbitration provisions introduced a means of settling disputes through the diplomatic protection by States of their citizens’ interests abroad that came to be resorted to with increasing frequency.62

On a societal level, the 19th century saw a growth in communications technology, as well as mechanization and industrialization that resulted in individuals travelling widely both in search of raw materials and to sell manufactured goods.63 With such increases in the movement of people abroad came increases in harm occurring to individuals in foreign countries and, it followed, increases in opportunities for States to assist their travelling nationals through diplomatic means. This was especially the case in Latin American countries. Professor Dunn explains that political disorder in Latin America gave rise to frequent injury to foreigners. This, combined with the failure of local institutions to redress such injuries, resulted in the number of

62 Dunn, supra note 8 at 53; Amerasinghe, supra note 7 at 12-13.
63 Amerasinghe, id. at 13.
claims against Latin American countries by States on behalf of their nationals far exceeding similar claims against other countries. Such a quantitative disparity in the use of diplomatic protection led to opposition against its use in Latin America. This was expressed, for example, by the Argentinean scholar and statesman Carlos Calvo (1824-1906), who argued that foreigners were entitled to no better treatment by local institutions than enjoyed by native Latin Americans and that as long as local justice was open to foreigners there could be no basis for any international complaint.

It is noteworthy that the proliferation of Latin American State practice, which gave rise to increased doctrinal interest in diplomatic protection in the early 20th century, was arguably an element of imperial State foreign policy in Latin America. Calvo and others, for instance, argued that diplomatic protection was often used by European States, as well as the U.S., in unmeritorious cases and as a means of “imperialistic encroachment” in Latin America. The Individual Opinion of Judge Padillo Nervo in the Barcelona Traction case also made this point. In discussing diplomatic protection, Judge Nervo commented that, “The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection …”

One of the earliest and perhaps most important writers to consider the doctrine of diplomatic protection after the turn of the century was Edwin Borchard, an American scholar of

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64 Dunn, op. cit. at 55-56; see also D.R. Shea, The Calvo Clause (Minneapolis: University of Minnesota Press, 1955) at 10-11.
65 Shea, id. at 19 (Calvo’s opposition led to the development of the “Calvo Clause” for contracts between private parties and Latin American governments. The provision purported to waive an individual’s ability to claim relief in any international fora, such as through diplomatic protection. Western States resisted the validity of the Calvo Clause on the basis of the legal fiction that harm to the individual was a de jure harm to the State of nationality, on which more to follow, infra).
66 Id. at 12-14.
67 Supra note 6 at 246.
international law and author of the first specialized text on the subject. Borchard was obviously not the first to consider the legal nature of diplomatic protection – as he himself noted, early writers including Vattel had spoken of it in language suggesting that it was a duty of the State as well as a right of the individual. On the other hand, Vattel did not go far beyond the bare assertion of the duty quoted above in analyzing the doctrine and, if anything, an individual right against one’s own State at international law appeared to contradict Vattel’s general theory of sovereignty. Borchard took the idea of a duty to provide diplomatic protection and subjected it to critical appraisal. He found that if there was such a duty, “it is only a moral and not a legal duty for there is no means of enforcing its fulfillment”. He continued:

Inasmuch as the state may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf, – for the interests of the majority cannot be sacrificed – it is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection. Whether such a duty exists toward the citizen is a matter of municipal law of his own country, the general rule being that even under municipal law the state is under no legal duty to extend diplomatic protection.

Borchard stressed that the individual’s lack of enforceable rights in the international sphere precluded a legal duty on States from existing:

It is hardly correct … to speak of the of the citizen’s power to invoke the diplomatic protection of the Government as a “right” of protection … At best, therefore it is an imperfect right … Being devoid of any compulsion, it resolves itself merely into a privilege to ask for protection. Such duty of protection as the Government may be assumed to owe the citizen in such cases is a political and not a legal one …

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69 Id. at 29. Vattel had asserted that the State “must protect” the citizen and that the “sovereign of the injured citizen must avenge the deed” (see supra note 61 and accompanying text; emphasis added).
70 Borchard, id. (emphasis added).
71 Id.
… Such remedy as the claimant has it is within the discretion of his own government, through diplomatic measures, to accord, and no legal means exists to compel his government to prosecute the claim.\textsuperscript{72}

Both the Permanent Court of International Justice (PCIJ) and its successor, the International Court of Justice (ICJ), have approved Borchard’s thesis that there is no legal right or duty of diplomatic protection as well as what has become known as the “Vattelian fiction”\textsuperscript{73} that a wrong committed against an individual citizen is actually a wrong committed against his or her State. The latter point was accepted by the PCIJ in the \textit{Mavromatis Palestine Concessions Case} (1924), where the Court stated that, when the Greek government took up the contractual claims of its citizen against the British government (then controlling sovereign in Palestine), the dispute “entered the domain of international law and became a dispute between States”.\textsuperscript{74} According to the Court, Greece’s ability to protect its national in this way stemmed from the fact that it was “in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law”.\textsuperscript{75} The ICJ reaffirmed this position in the \textit{Notteb"ohm Case} of 1955 where it held that: “Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State”.\textsuperscript{76}

Based on the historical development of diplomatic protection, the Vattelian fiction appears to have been accepted as a means of addressing the disconnect between international law’s rejection of the individual person as a competent legal actor and the fact that individuals were increasingly subject to harms of an international scope. Its recognition by the PCIJ and ICJ

\textsuperscript{72} Id. at 356 (emphasis added).
\textsuperscript{74} (1924), P.C.I.J. (Ser. A) No. 2 at 12.
\textsuperscript{75} Id.
logically produced something like a prosecutorial discretion on the part of the State. Given that the State has the international right to protect its citizens, only it has the choice to seek redress for the wrong against the offending State, whether it be espousal of a claim for monetary compensation or making diplomatic submissions to ensure its citizens’ physical safety or repatriation. The ICJ made this point clear in the *Barcelona Traction* case, where it held that:

> Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to international law, if means are available, with a view to furthering their cause or obtaining redress. …

The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.77

The ICJ has considered claims for diplomatic protection in two subsequent cases: the *ELSI* case78 and the *Diallo* case79. It has thus accepted the legitimacy of the doctrine as part of international law.80 It has not, however, revisited its opinion in *Barcelona Traction* regarding the discretionary nature of the institution.

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77 Supra note 6 at 45.
80 Amerasinghe, supra note 7 at 17-18.
D. Recent Developments Concerning Diplomatic Protection

The most significant recent development in the field is undoubtedly the Draft articles on Diplomatic Protection produced by the U.N. International Law Commission (ILC). These articles were adopted by the ILC in 2006 and submitted to the U.N. General Assembly after approximately eight years consultation. The Draft articles confirmed, in Article 2, that diplomatic protection is a right exercised by States. It is noteworthy, however, that an early version of the articles, proposed by ILC Special Rapporteur John Dugard, contained a provision (proposed Article 4) placing the State under a “legal duty” to exercise diplomatic protection on behalf of its injured nationals in certain limited circumstances. The proposed Article 4 read as follows, in full:

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

   (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;

   (b) Another State exercises diplomatic protection on behalf of the injured person;

   (c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

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Inclusion of this provision reflected Special Rapporteur Dugard’s view that “there are signs in recent State practice, constitutions and legal opinion of support for the view that States have not only a right but a legal obligation to protect their nationals abroad”. The provision was ultimately removed from the Draft articles formalized by the ILC and submitted to the General Assembly. As a result, it must be conceded that, at least formally speaking, the ICJ’s judgment in *Barcelona Traction* remains the law (*lex lata*) and that proposed Article 4 is the law as it should be (*lex ferenda*). Special Rapporteur Dugard himself acknowledged its progressive nature in the commentary accompanying his first draft articles and, following Commission debate, conceded that, “there was a need for more State practice and, particularly, more *opinio juris* before it could be considered”. Be that as it may, the mere inclusion in the debate of a limited State duty reflects a growing discourse in favour of progressive development of the traditional doctrine in this respect.

Further, the *Draft articles*, as ultimately settled at the ILC, did include a provision suggesting greater scrutiny on States in their exercise of diplomatic protection. As a recommended practice, Article 19(a) provides that a State entitled to do so, “should … [g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred”. The ILC commentary regarding this article in its General Assembly report is illuminating. While recognizing the discretionary nature of diplomatic protection as codified in the articles, the ILC commented that, “Despite this there is growing support for the view that there is some obligation, however imperfect, on States … to protect their nationals abroad when

83 Id. at para. 87.
84 Id. at para. 88.
they are subjected to significant human rights violations”. The ILC found support for this proposition in the domestic law of “many States”; some provided constitutional rights of diplomatic protection for citizens abroad, others subjected government decisions withholding such protection to judicial review. Regarding the later, the ILC report cited especially the South African Constitutional Court’s decision in *Kaunda and Others v. President of the Republic of South Africa*, where it was held that:

> There may 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 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 a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.

Based on this domestic law, the ILC concluded that, “it is possible to suggest that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad”. Article 19(a) was said to reflect this progression in the law.

Another related development came in the ILC’s codification work regarding State responsibility. State responsibility in this context can be seen as the substantive law regarding second-order international obligations to which diplomatic protection serves as a specific procedural remedy. However, as Amerasinghe notes, elements relating to diplomatic

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87 Id. at 96.
88 Id.
89 2004 (4) S.A.L.R. 235 at para. 169 (C.C.) (quoted in id. at 96).
91 See Amerasinghe, supra note 7 at 58-62 (regarding the relationship between the ILC’s codification of both state responsibility and diplomatic protection); Dugard, *ILC Report*, supra note 82 at para. 33 (“The doctrine of diplomatic protection is closely related to that of State responsibility for injury to aliens”); see generally A.
protection can be found in the articles drafted by the ILC on both topics.\textsuperscript{92} This appears to be the case with respect to Articles 40 and 41(1) of the draft articles on the \textit{Responsibility of States for Internationally Wrongful Acts}. Article 41(1) provides that States are under a positive obligation (they “shall cooperate”) “to bring to an end through lawful means any serious breach within the meaning of article 40”. Article 40 defines a serious breach as a “gross or systematic failure” to fulfill an obligation “arising under a peremptory norm of general international law”. Presumably cooperation “through lawful means” is broad enough to contemplate a State providing diplomatic protection for its own national where the harm suffered is the result of a serious breach within the meaning of draft article 40. In light of Part III, below, regarding the treatment of detainees at Guantánamo Bay, it is significant that a United Kingdom Joint Committee of the House of Lords and House of Commons on Human Rights considered an appropriate example for the operation of article 41(1) to be “where a State systematically tortures terrorism suspects”; in a such a case, argued the Joint Committee, “other States are under a duty to co-operate to bring such a serious breach of the prohibition against torture to an end”.\textsuperscript{93} It is also notable that the substance of the draft articles and their codification of positive obligations of assistance appear to be reflected in the ICJ’s comments regarding State responsibility in the \textit{Palestinian Wall case} of 2004. There, the Court stated that, based on “the importance of the rights and obligations involved”, States were not only prohibited from giving legal recognition to or assisting in the construction of the wall dividing occupied Palestinian territory, but they were also obliged “to see to it that any

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\textsuperscript{92} Amerasinghe \textit{id.} at 62; the ILC has recognized the connection as well, commenting in its 2006 Report on Diplomatic Protection, \textit{supra} note 86 at 22, that: “Many of the principles contained in the articles on Responsibility of States … are relevant to diplomatic protection and are therefore not repeated in the present draft articles”. \\
\textsuperscript{93} \textit{Allegations of UK Complicity in Torture}, HL Paper 152, HC 230 (4 August 2009) at 14.
\end{footnotesize}
impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self determination is brought to an end”.94

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These more recent direct and indirect developments demonstrate an increased movement away from diplomatic protection’s origins as an absolute and discretionary right of the State. They also reflect the tension identified by Professor Dunn between the traditional doctrine and the changing nature of both modern international society and modern international law. Limiting the State’s discretion to provide diplomatic protection, as they do, is warranted given the individual’s increased trans-national mobility and necessarily increased chances of suffering harm while abroad. It is also, as will be shown, consistent with the development and proliferation of individual human rights in international law and the related adoption of the Responsibility to Protect doctrine. R2P, on the other hand, takes these recent legal developments a step further and establishes positive obligations to provide diplomatic protection against grave international harms.

III. Guantánamo Bay: Diplomatic Protection ‘in-Action’

The response of the United States and its allies to the events of September 11, 2001 has given rise to a host of legal, moral, and political issues. Of specific significance here is the treatment of detainees held at Guantánamo Bay and elsewhere pursuant to the U.S.-led ‘war’ on terror. A detailed discussion of the nature of this treatment is beyond the scope of this thesis; however, to highlight the renewed significance of diplomatic protection post 9/11, brief mention

will be made of some of the facts and legal conclusions that are now accepted by the international community. Following a general introduction highlighting the important role States can still play in protecting their nationals abroad, consideration will be given to the domestic case-law that has arisen as a result of States refusing to fulfill their protective role.

A. Treatment of Detainees

Although there may be other egregious species, the negative treatment of detainees can be roughly divided into two categories: (i) abuses of a legal nature, and (ii) abuses of a physical or mental nature.

With respect to legal abuses, the record is clear. Detainees at Guantánamo Bay were initially precluded from challenging their detention by habeas corpus application and so held indefinitely without access to legal process. In 2004, the United States Supreme Court concluded in Rasul v. Bush\textsuperscript{95} that it was illegal for such access to process to be denied, even with respect to detainees who were not U.S. citizens. The U.S. Supreme Court subsequently decided in Hamdan v. Rumsfeld\textsuperscript{96} that the military commissions established to try detainees violated both the Uniform Code of Military Justice and the Geneva Conventions. Congress’s attempt to legalize the process through enactment of the Military Commissions Act of 2006 was again held to illegally deny Guantánamo detainees their habeas corpus rights in Boumediene v. Bush\textsuperscript{97}.

Abuses of a physical or mental nature are more difficult to clearly establish; however, a compelling case can be made that detainees were subjected to treatment that amounts to cruel

\begin{footnotes}
\item[95] 542 U.S. 466, 124 S. Ct. 2686 (2004).
\item[97] 553 U.S. 723, 128 S. Ct. 2229 (2008).
\end{footnotes}
and unusual punishment and torture. For example, the UN Committee Against Torture and the UN Commission on Human Rights have both reached this conclusion in their respective reports regarding Guantánamo Bay. Lower court judges in the U.S. have ruled on the issue as well. In Al Rabiah v. United States, the D.C. District Court suppressed statements made by the applicant during his interrogation because he had been subject to mental and physical abuse. Also of note, Justice Mosley of the Federal Court of Canada held that Omar Khadr (of whom, more below), a Canadian citizen detained at Guantánamo had been subjected to treatment that violated both the UN Convention against torture and the Geneva Conventions.

It is not surprising that, given this treatment, foreign nationals held by the U.S. sought diplomatic assistance from their home governments. As the decisions reviewed below reflect, such assistance has not always been forthcoming.

B. Legal Claims for Diplomatic Protection

In England, two significant cases relating to the diplomatic protection of Guantánamo detainees have been adjudicated in the civil courts. The first in time was the claim of Feroz Ali Abbasi, a British national who was, in 2002, captured by U.S. forces in Afghanistan and later transferred to Guantánamo Bay. Mr. Abassi was one of seven Britons then held at the U.S. naval base in a state of indefinite detention. He thus claimed that his detention was arbitrary and

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100 Civil Action No. 02-828 (CKK) (2009); see also United States v. Jawad: D008, Ruling on Defense Motion to Dismiss - Torture of the Detainee (September 24, 2008).
in violation of conventional international law. Through his mother in England, Mr. Abassi petitioned the English High Court to order that the Foreign Secretary “take positive steps to redress [his] position, or at least to give a reasoned response to his request for assistance”. 103

Mr. Abassi’s application to the High Court was refused; however, the Court of Appeal granted leave to appeal. On appeal, the government argued that neither the legality of action taken by a foreign sovereign nor the executive branch’s conduct of foreign relations were justiciable issues. The Court of Appeal held that they were; however, Lord Phillips M.R., for a unanimous panel, rejected the argument that international law obligated the British government to intervene by diplomatic means to protect Mr. Abassi. In his Lordship’s view, the ICJ’s judgment in *Barcelona Traction* and Professor Dugard’s concession that a duty of diplomatic protection was *lex ferenda* provided a complete answer. 104 Instead, the Foreign Secretary’s conduct with respect to Mr. Abassi was subjected to the domestic administrative law doctrine of “legitimate expectation”. As the Court of Appeal put it, the government’s various public statements regarding the provision of diplomatic and consular assistance to its overseas nationals gave rise to an expectation that, if a British citizen was subjected to a violation of rights while abroad, “the British Government will not simply wash their hands of the matter and abandon him to his fate”. 105 Nonetheless, on the facts of *Abassi*, it was held that the Foreign Secretary’s consideration of the request for assistance, combined with his informal discussions with the U.S. government concerning British detainees, was all that Mr. Abassi could legitimately expect. As

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103 *Id.* at para. 25 (quoting Lord Phillips, M.R.’s description of the nature of relief of sought).
104 *Id.* at para. 69.
105 *Id.* at para. 98.
has been commented elsewhere, this conception of the legitimate expectation of diplomatic protection was indeed “quite limited”.\textsuperscript{106}

Other detainee cases have similarly followed the \textit{Abassi} approach. In the \textit{Al Rawi} case of 2006, three Guantánamo detainees, ordinarily resident in England, again petitioned for an order compelling the Foreign Secretary to provide them with diplomatic assistance.\textsuperscript{107} \textit{Abassi} was sought to be distinguished on the basis that allegations of detainee torture were squarely before the court and that the British government had, in the intervening years, successfully repatriated its nine citizens detained at Guantánamo (including Feroz Ali Abbasi on January 26, 2005).\textsuperscript{108} Despite this apparently unequal treatment of the applicants, two of whom were British refugees, the Court of Appeal reiterated that the traditional doctrine of diplomatic protection did not prescribe a duty on the State and held that no greater expectation existed than was found in \textit{Abassi}; namely, that the Foreign Secretary would consider providing diplomatic protection, which he had.\textsuperscript{109} In particular, Laws L.J. (for the Court) concluded that even assuming torture had occurred in violation of a recognized \textit{jus cogens} norm, the resulting obligations \textit{erga omnes} merely empowered but did not require the State to intervene diplomatically.\textsuperscript{110} Leave to Appeal

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\begin{enumerate}
\item R. (on the application of Al Rawi & others) v. Secretary of State for Foreign and Commonwealth Affairs, [2006] EWCA Civ. 1279, [2008] Q.B. 289 (hereinafter “\textit{Al Rawi}”) (in \textit{Al Rawi}, the Foreign Secretary had already refused to make a formal request to the U.S. for the applicants’ repatriation).
\item See BBC News online, “Timeline: Guantánamo Bay Britons” (27 January 2005), available at: \url{http://news.bbc.co.uk/2/hi/uk_news/3545709.stm}.
\item \textit{Al Rawi}, op. cit. at paras. 89-90 (legitimate expectations) and paras. 102-107 (diplomatic protection at international law).
\item Id. at para. 102 (citing \textit{Prosecutor v Furundzija}, [1998] ICTY 3 at para. 151). Lord Justice Laws’s conclusion in this regard was questioned subsequently in \textit{Mohamed v. Secretary of State}, [2008] EWHC 2048 (Admin), [2009] 1 W.L.R. 2579 at para. 178, where Thomas L.J. noted that in \textit{Furundzija} the ICTY had not addressed the issue of whether obligations \textit{erga omnes} required States to take positive action against violations of \textit{jus cogens} and that the ILC’s draft articles on \textit{State Responsibility for Internationally Wrongful Acts} did create obligations to take such positive action.
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the Al Rawi decision to the House of Lords was granted, but subsequently abandoned when the government changed its position and successfully sought the appellants’ repatriation.111

The plight of the Australian national David Hicks was perhaps more difficult. Mr. Hicks was held at Guantánamo Bay for over five years without being formally charged. The Australian government refused to seek his repatriation despite this seemingly arbitrary detention and despite allegations of torture. Prime Minister John Howard is reported to have told party colleagues that he “could secure the release of David Hicks at any time”, but felt that he should face trial in the U.S. first.112 As a result of this stance, Mr. Hicks, like his British counterparts, brought court proceedings against his own government seeking diplomatic assistance to secure his repatriation. In response, the Australian government sought to have the claim summarily dismissed. The application was unsuccessful, the Federal Court of Australia judging that, by reason of the developing nature of the law involved, Mr. Hicks’s action did reach the threshold of having a reasonable prospect of success.113 Tamberlin J., in particular, noted that, “the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law”.114 Ultimately the proceeding was discontinued prior to trial. Mr. Hicks pled guilty to a lesser charge in exchange for his extradition to Australia to serve his sentence.115

In Canada, the well known case of Omar Khadr provides another example of government failure to provide full diplomatic protection to one of its nationals. In fact, as the Supreme Court

111 On the circumstances of the repatriation and abandoned House of Lords appeal, see G.S. Goodwin-Gill, “Al Rawi, UNHRC intervening” (2008), 20 Int’l J. Ref. L. 675 at 676.
113 Hicks v. Ruddock, supra, note 25 at paras. 90-94.
114 Id. at para. 93.
115 Klein and Barry, supra note 112 at 18.
of Canada has held, Canadian officials actually themselves participated in activities that contributed to Mr. Khadr’s abuses at Guantánamo. Mr. Khadr, only 15 years old at the time, was captured in Afghanistan and transferred to Guantánamo Bay. His detention there continues. As the Federal Court of Canada concluded, it has involved cruel and unusual treatment contrary to international law. Despite this treatment and despite the Supreme Court of Canada’s conclusion that it is in continuing breach of Mr. Khadr’s domestic constitutional rights, the Canadian government has remained steadfast in its refusal to seek his repatriation. As a result, the trial proper of Mr. Khadr commenced in late April, 2010 in a Guantánamo Bay military commission with evidentiary hearings into the admissibility of his inculpatory statements allegedly obtained through torture. This notwithstanding reports that, up until nearly the eve of his trial, the U.S. government had been “quietly seeking a way to repatriate” Mr. Khadr to Canada rather than proceed with his military commission prosecution. As of writing, the “jury selection” of military commission members to hear and decide the case was

117 Khadr (FC, 2008), supra note 101.
118 The Globe and Mail online, “Ignoring Supreme Court’s Khadr ruling, Ottawa won’t request repatriation” (3 February 2010), available at: http://www.theglobeandmail.com/news/politics/ignoring-supreme-courts-khadr-ruling-ottawa-wont-request-repatriation/article1455515/. The Federal Court of Canada subsequently held that the Canadian government’s response to Khadr (SCC II) violated the duty of procedural fairness it owed to Mr. Khadr. As a result, Zinn J. ordered that, following a procedural fairness process involving Mr. Khadr’s participation, “Canada is to advance a potential curative remedy as soon thereafter as is reasonably practicable and to continue advancing potential curative remedies until the [Charter] breach has been cured or all such potential curative remedies have been exhausted”; see Khadr v. Canada, 2010 FC 715. The government has appealed the Federal Court’s order; see The Globe and Mail online, “Appeal of Khadr ruling sets of another legal battle in long running case” (12 July 2010), available at: http://www.theglobeandmail.com/news/politics/appeal-of-khadr-ruling-sets-off-another-legal-battle-in-long-running-case/article1637802/.
recently concluded. Opening arguments and then *vive voce* evidence are set to commence on August 12, 2010.

The Khadr case is unique amongst the recent diplomatic protection jurisprudence arising from Guantánamo Bay in that the Federal Court of Canada actually ordered the government to seek Mr. Khadr’s repatriation. However, Justice O’Reilly, the federal judge who made the order, reaffirmed in part the traditional international law of diplomatic protection, holding that there is “no clear duty” on States to provide diplomatic protection to their citizens pursuant to international law. Instead, the remedy (subsequently overruled by the Supreme Court of Canada) was made pursuant to violations of domestic constitutional rights linked to the Canadian government’s complicity in violations of Mr. Khadr’s international human rights. To reach this conclusion, O’Reilly J. did decide that citizens have a right to request diplomatic assistance and that government decisions whether or not to provide it were subject to judicial review for their appropriateness.

While the international legal aspects of the case were argued extensively at the Canadian government’s appeal of the repatriation order to the Supreme Court of Canada, the Court restricted its decision to domestic constitutional law. It concluded that ordering the government to request repatriation was not an appropriate and just remedy in the circumstances of the breach

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120 The Globe and Mail online, “And then there were 7: the Jury who will decide Omar Khadr’s fate” (11 August 2010), available at: [http://www.theglobeandmail.com/news/world/americas/and-then-there-were-7-the-jury-who-will-decide-omar-khadrs-fate/article1669446/](http://www.theglobeandmail.com/news/world/americas/and-then-there-were-7-the-jury-who-will-decide-omar-khadrs-fate/article1669446/).
121 Id.
123 Khadr (FC, 2009), id. at para. 47.
124 Khadr (SCC II), supra note 116.
125 Khadr (FC, 2009), supra note 122 at para. 48 (citing Kaunda v. President of South Africa, supra note 89).
of Mr. Khadr’s constitutional rights. Specifically, it held that evidentiary uncertainties concerning Mr. Khadr’s situation and the Canadian government’s related diplomatic efforts on his behalf, combined with the judiciary’s lack of institutional expertise concerning matters of foreign affairs – an area of Crown prerogative – made such a remedy inappropriate. The Court instead determined that the “prudent course” was to grant a declaration that Canada had breached Mr. Khadr’s constitutional right to life, liberty and security of the person and to leave it to the executive to craft a remedy for that breach as it saw fit. As mentioned, the executive, in its wisdom, considered the appropriate remedy of this breach to be essentially no remedy at all.

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The judicial treatment of Mr. Khadr, like those of the other Guantánamo Bay claimants, is significant to an assessment of diplomatic protection for a number of reasons. Maybe most importantly, it shows that the doctrine is still relevant to the circumstances of modern international society. While the domestic court actions were largely unsuccessful, the fact that they were brought and considered in the form they took makes it clear that diplomatic measures of assistance from one’s home State are still seen as a viable form of relief against particularly serious breaches of international human rights obligations. Holding government decisions whether and how to provide diplomatic protection to be justiciable and subject to judicial review in domestic courts also helps to confirm State practice limiting the scope of discretion provided under the traditional doctrine. In this sense, the domestic decisions regarding detainee treatment at Guantánamo Bay are consistent with recent developments away from the absolute position as historically established.

127 Khadr (SCC II), supra note 116 at paras. 33-47.
128 Id. at para. 46.
129 Id. at para. 47.
IV. The Evolving International Law

There have been two significant – and related – developments in modern international law that, in this paper’s view, should result in a reassessment of the traditional doctrine of diplomatic protection. They are: (i) the development of international human rights and the standing of the individual as a subject of international law; and, (ii) the development of the Responsibility to Protect doctrine and the re-defining of State sovereignty as including responsibility. A brief background of the history of these developments is outlined below.

A. International Human Rights and the Individual as Subject of International Law

As has been described, the consensus position until relatively recently was that only States had true international legal personality. That position changed dramatically in the 20th century with the development of individual standing.

There are three general aspects of individual standing at international law: procedural rights, substantive rights, and obligations. The early part of the 20th century saw the emergence of the procedural capacity of the individual recognized in conventional international law – such as, for example, the Polish-German Convention of 1922 – that conferred claimant status on individuals even against their own States. Such capacity was confirmed by the PCIJ in the Danzing Railway Officials Case, where it was held that an international tribunal should grant standing to individuals who have, by treaty, been conferred rights of an international character. Lauterpacht has called this pronouncement, “among the most important rendered

by the Court” and commenting that the decision, “laid down, in effect, that no considerations of 
theory can prevent the individual from becoming the subject of individual rights”.

Substantive rights and obligations of individuals were largely a post World War II 
development. For obligations, the London Charter of the Nuremberg War Crimes Tribunal made 
individuals responsible for various international crimes and the Tribunal itself confirmed that, 
“Crimes against international law are committed by men, not by abstract entities, and only by 
punishing individuals can the provisions of international law be enforced”. This development 
was the culmination of at least 25 years work towards creating binding obligations on individuals 
for committing crimes of an international character. For substantive individual rights, the 
conclusion of the war saw the formation of the United Nations, whose purpose was enshrined as, 
*inter alia*, “promoting and encouraging respect for human rights and for fundamental freedoms 
for all”. The U.N. itself quickly promulgated the *Universal Declaration of Human Rights*.

Although the declaration was a non-binding resolution, many of its covenants were later codified 
by the *International Covenant on Civil and Political Rights* (*ICCPR*) and the *International 
Covenant on Economic, Social and Cultural Rights* (*ICESCR*) whose obligations are binding on its State

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133 U.N.T.S. 279 (1945) at Art. 6.
134 (1947), 1 T.M.W.C. 171 at 223.
135 See L.C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed. (Manchester: Manchester University Press, 
2008) at 5-13 (tracing the attempt to create individual criminal responsibility for perpetrating illegal war from the 
Treaty of Versailles (1919) to the London Charter).
136 *Charter of the United Nations* at Art. 1(3).
parties. The ICCPR, like a number of regional human rights regimes, grants individuals the standing to bring complaints of human rights violations in its first Optional Protocol.

Human rights law is unique in the international legal order. Its special nature stems from the fact that it governs the relationship between the State and individuals within its control rather than relationships between States. The distinctive nature of human rights treaties has been noted by the ICJ as follows, commenting on the Convention on Genocide: “the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d’être of the convention”. The significance of this distinction, and its effect on human rights obligations, was further elaborated upon by the Inter-American Court of Human Rights:

Human rights impose on states obligations erga omnes, i.e. towards all, meaning they do not involve the creation of multiple bilateral relations between all state parties, similar to, for example, trade conventions. Because the international community as a whole has an interest in the state’s non-reciprocal undertaking to respect human rights, all states bound by the same norm as well as institutions like the Human Rights Committee can be said to have a legal interest.

The special status that has developed with respect to international human rights is part of what the International Commission on Intervention and State Sovereignty (ICISS) called “a parallel transition from a culture of sovereign impunity to a culture of national and international accountability”. This is because international human rights are legal rights enjoyed directly

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142 Kindred and Saunders, International Law ..., supra, note 130 at 839.
by individuals and that produce corresponding obligations on States, including, as John Currie notes, “the individual’s state of nationality”. In theory, continues Professor Currie, “the individual thus becomes the holder of an international legal right that is valid against any and all states”. International human rights therefore limit that “quintessence” of traditional sovereignty noted by Professor Cassese: the unlimited authority over all individuals living in a State’s territory.

Human rights law has already influenced the development of the doctrine of diplomatic protection, as is reflected in the ICJ’s decision in the recent Diallo case. At issue was the claim of the Republic of Guinea against the Democratic Republic of the Congo alleging various human rights abuses incurred by one of its nationals while resident in the Congo. In particular, it was alleged that Mr. Diallo, a Guinean citizen, “was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled”. In deciding its jurisdiction to hear Guinea’s complaint on behalf of Mr. Diallo, the Court commented as follows regarding the nature of the harm subject to the doctrine of diplomatic protection:

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

147 Id.
148 See supra note 55 and accompanying text.
149 Diallo case, supra note 79 at para. 1.
150 Id. at para. 39.
As a result of these comments, the ICJ has firmly established the suitability of human rights violations as a subject matter of diplomatic protection.\textsuperscript{151}

\textbf{B. The Responsibility to Protect Doctrine and a New Definition of Sovereignty}

In response to the difficulties of international intervention (Somalia, Bosnia, Kosovo) and non-intervention (Rwanda) in the 1990s, then UN Secretary General Koffi Annan challenged the international community to find a consensus approach to the question of humanitarian intervention.\textsuperscript{152} That challenge led to the adoption of the Responsibility to Protect doctrine (or “R2P”) by both the UN General Assembly and the Security Council. This section of Part IV will outline the basic history of R2P and describe the aspects of the doctrine that are relevant to the debate concerning diplomatic protection. Part V, below, will contain argument as to why R2P should lead to a redefinition of the traditional doctrine.

Secretary General Anan’s challenge was met, at first, by the Canadian government initiating the formation of the ICISS, which in 2001 published its report titled, \textit{The Responsibility to Protect}.\textsuperscript{153} The ICISS Report, which advocated coherent principles for States to follow in determining whether to intervene on humanitarian grounds in foreign countries, was premised on a refined approach to State sovereignty or, as it is put in the ICISS Report, “a necessary re-characterization … from \textit{sovereignty as control} to \textit{sovereignty as responsibility} in both internal

\textsuperscript{151}See also A. Vermeer-Künzli, “Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case” (2007), 20 Leid. J. Int’l. L. 941 (arguing that the ICJ’s decision reflects appreciation of and support for the ILC’s emphasis on human rights in drafting its articles on diplomatic protection).

\textsuperscript{152}See ICISS Report, \textit{supra} note 145 at paras. 1.7-1.8 (Sec. Gen. Anan is quoted as follows in his Millennium Report to the UN General Assembly in 2000: “…if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity”).

\textsuperscript{153}\textit{Id.}
functions and external duties”. The 2001 ICISS Report led to a U.N. High-Level Panel report on the subject in 2004 and a report from the Secretary General himself in 2005. Following this consultation, in 2005 the World Summit – a high level plenary meeting of the sixtieth session of the U.N. General Assembly – unanimously adopted, as part of its outcome, two provisions regarding R2P:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. […]

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The Security Council subsequently reaffirmed the provisions of paragraphs 138 and 139 of the World Summit Outcome in a 2006 resolution.

Since the World Summit and the approval of its resolutions in both U.N. governing bodies, the present Secretary General, Ban Ki Moon, has attempted to solidify the R2P doctrine and prevent debate concerning its principles from being re-opened. In 2009, he issued a report titled, Implementing the responsibility to protect, which stated that, “The task ahead is not to reinterpret or renegotiate the conclusions of the World Summit but to find ways of implementing

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154 Id. at para. 2.14 (emphasis in original).
its decisions in a fully faithful and consistent manner”. To emphasize this point the report makes reference to the unanimous nature of the *World Summit Outcome* and its subsequent reaffirmation by both the U.N. General Assembly and Security Council. Secretary General Moon’s report proceeds to outline three “pillars” upon which R2P is said to rest: (i) “the protection responsibilities of the State”; (ii) “international assistance and capacity building”; and, (iii) “timely and decisive response”. For the purposes of this thesis, the first pillar is particular noteworthy. An “enduring responsibility” of States, pillar one is premised on the concept of “responsible sovereignty” first articulated in the ICISS Report of 2001. The report emphasizes that States are primarily responsible for protecting their own populations from the harms outlined in paragraph 138 of the *World Summit Outcome*, namely: genocide, war crimes, ethnic cleansing and crimes against humanity. “Respect for human rights” is noted as an essential element in this regard and in the concept of responsible sovereignty generally.

Although R2P is ostensibly concerned with the narrow issue of humanitarian intervention and although there were some misgivings at the provisions ultimately included in the *World Summit Outcome*, the doctrine has a wider significance. Anne-Marie Slaughter, in describing the U.N. High-Level Panel Report that preceded R2P’s formal adoption, comments that it

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161 Id. at paras. 1 and 4.
162 Id. at para. 11.
163 Id. at paras. 13-14.
164 Id. at para. 16.
165 Including from, *inter alia*, members of the ICISS; see A.J. Bellamy, *Responsibility to Protect* (Cambridge: Polity Press, 2009) at 91-92 (Bellamy notes, at 92, that compared to the ICISS Report and the High-Level Panel Report, the *World Summit Outcome* provisions do not provide a criteria for R2P’s operation or recognize that it consists of a continuum of measures from prevention to intervention).
“accomplish[es] a tectonic shift” in the very nature and definition of sovereignty.\textsuperscript{166} In Professor Slaughter’s view, this is because:

[R2P] asserts that all signatories of the UN Charter accept a responsibility both to protect their own citizens and to meet their international obligations to their fellow nations. Failure to fulfill these responsibilities can legitimately subject them to sanction. In a word, membership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state’s domestic jurisdiction. It is rather the right and capacity to participate in the United Nations itself, working in concert with other nations to sit in judgment of and take action against threats to human security whenever and wherever they arise.\textsuperscript{167}

Jutta Brunnée has similarly described R2P as having “the potential to reshape foundational elements of the international legal order”.\textsuperscript{168} In particular, Professor Brunnée has applied R2P to the field of State responsibility and finds that it has reinforced and made explicit the international legal consequences of \textit{jus cogens} violations of an \textit{erga omnes} nature.\textsuperscript{169}

In a sense then, R2P is directly related to and has continued the project of international human rights law by limiting popular sovereignty and imposing obligations (or “responsibilities”) on States towards individuals. Significantly, in the case of R2P, rather than simply avoiding harmful conduct, the obligations are of a positive nature.

\textsuperscript{167} \textit{Id.} at 620.
\textsuperscript{168} J. Brunnée, “International Law and Collective Concerns: Reflections on the Responsibility to Protect” in Ndiaye and Wolfrum, eds., \textit{Liber Amicorum Judge Thomas A. Mensah} (Leiden: Martinus Nijhoff, 2007), 35 at 36; see also J. Brunnée and S. Toope, “Norms, Institutions and UN Reform: The Responsibility to Protect” (2006), 2 J. Int’l L. & Int’l Rel. 121 at 127-128 (describing the inclusion of the R2P provisions in the \textit{World Summit Outcome} as “astonishing” and commenting that R2P “presents a fundamental challenge to structural imperatives that have long shaped international law and politics. … It could entail a fundamental conceptual shift, rooted in prior developments, but going much further and calling upon states to re-consider the essentials of their role and powers”).
\textsuperscript{169} “International Law and Collective Concerns …”, \textit{id.} at 49-50.
V. In Favour of a Limited Individual Right and Duty of Diplomatic Protection

The general argument in this part is that the traditional doctrine is now outdated in light of the developments in international law discussed in Part IV, above. Thus, the general argument consists of two subsidiary points. First, that the emergent status of human rights law and the standing of the individual in international law have overtaken the State-centric emphasis of the traditional doctrine and have rendered its central premise – that only the State has rights that can be protected by international law – obsolete. Second, that the redefinition of State sovereignty as responsibility, pursuant to the development of the R2P doctrine, is likewise inconsistent with the traditional doctrine, particularly its notion that States have unfettered discretion in selecting when to bestow protection upon their nationals injured abroad. Given the removal of these theoretical impediments, the time is ripe for international law to redefine the contours of diplomatic protection and provide a limited individual right and a concomitant state obligation to such protection. In fact, it is arguable that formal acceptance of the R2P doctrine makes such a redefinition lex lata and not merely a hoped-for progressive development.

Criticism of redefining diplomatic protection as a limited State duty will also be addressed below. While the issues raised are often of a specific doctrinal nature, at root, the criticism reflects an institutional apprehension at mixing elements of the ‘classical’ and ‘modern’ paradigms of international law. Reading between the lines, diplomatic protection is seen as a product of by-gone era where States dominated and bilateral relations were the norm. The criticism thus implies that the doctrine cannot be addressed with reference to multilateral or community values and so should remain in its traditional form, static and un-evolved. Where relevant, it will be argued that such fears and ill-founded and that diplomatic protection can and should be reassessed in conformity with modern developments.
A. The Human Rights Perspective

The historical development of the traditional doctrine of diplomatic protection established that its legal operation rested on two foundational premises. First, that the sovereign State is the only true international legal actor capable of rights and obligations on the international plane. And, second, that sovereignty comprises the unfettered State control of its internal affairs. It was for these reasons that diplomatic protection came to be regarded as a discretionary right of States. The development of international human rights law and the related recognition that individuals can participate in the international legal order have created considerable doubt about their continuing validity as organizing premises. Regarding the first, it is clear that States are no longer the sole actors in the international legal system and that individuals can and do possess rights of an international character, namely international human rights. International human rights have also affected the second premise regarding the nature of sovereignty, a point Professor Cassese makes emphatically:

The arrival of human rights on the international scene is, indeed, a remarkable event because it is a subversive theory destined to foster tension and conflict among States. Essentially it is meant to tear aside the veil that in the past covered and protected sovereignty, giving each State the appearance of a fully armoured titanic structure, perceived by other States only ‘as a whole’, the inner mechanisms of which could not be tampered with. Today the human rights doctrine forces States to give account of how they treat their nationals, administer justice, run prisons, and so on. Potentially, therefore, it can subvert their domestic order and, consequently, the traditional configuration of the international community as well.\textsuperscript{170}

The application of a human rights perspective to the traditional doctrine of diplomatic protection has, however, been controversial. A contrarian school of thought suggests that

\textsuperscript{170} International Law, supra, note 55 at 375 (emphasis in original).
diplomatic protection is not an appropriate instrument for the vindication of individual human rights. This school can be broken into two camps (although with some overlap): (i) those who argue that the doctrine is now obsolete given that individuals can assert their own international legal claims; and, (ii) those who argue that the transposition of the doctrine into a tool for the protection of individual human rights cannot withstand theoretical scrutiny. On close examination, neither of these arguments is compelling.

The argument that diplomatic protection is obsolete was first articulated by Garcia Amador, an early ILC Special Rapporteur on State Responsibility. Traces of it can still be detected in a preliminary ILC report of Mohamed Bennouna, the Special Rapporteur on Diplomatic Protection who preceded John Dugard. In short, the argument is that the robust development of international human rights law, combined with the individual’s standing to enforce such rights in a multiplicity of international fora, have left diplomatic protection an unwanted and unneeded remedy. As Professor Dugard reframes it, the argument is essentially that, in light of these increased protections, the individual should now “fend for himself when he ventures abroad”. Other than in exceptional cases where the national interest is truly engaged, so it goes, the outdated Vattelian fiction should no longer be resorted to as a means of providing a remedy that individuals can obtain by asserting their personal rights. Put still another way, the implication of this argument is that the rise of human rights law has not only undermined the

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173 Special Rapporteur Bennouna was particularly troubled by the legal fiction employed, see *id.* at paras. 6-8 and 50.
premises on which traditional diplomatic protection rests, but has gone further and undermined the doctrine as a whole. To this extent, it overlaps with the more theoretical objections to using a human rights perspective to evaluate and develop diplomatic protection.

In opposition to this camp are those who do consider diplomatic protection to remain an appropriate, if not vital, means ofremedying human rights violations where circumstances allow. ILC Special Rapporteur Dugard made this point in his first report on diplomatic protection, where he stated that:

Although individuals today enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.174

This argument makes much sense. Until the individual has “comprehensive procedural rights under international law”175 – which of course do not currently exist – operation of the doctrine stands as an important method of protecting human rights. It is also relevant that individuals will in some circumstances have great practical difficulty in effectively protecting their rights personally through an international human rights monitoring body. The Guantánamo Bay detainees are a prime example. The success of the United Kingdom in repatriating its nationals detained at Guantánamo through diplomatic representations, as compared to a complete lack of individual international claims of any kind, bears out the argument that most States will treat

175 Dugard, *id.* at para. 29.
diplomatic claims from other States more seriously than a complaint to a human rights body or tribunal.\footnote{176}{As argued by, e.g. Dugard, \textit{id.} at para. 31.}

As for the fictitious nature of diplomatic protection, whether the Vattelian fiction is continued to be relied upon, whether, as some have suggested, it is discarded in favour of an agency model, or whether it is recognized that some harms have a dual nature, affecting the interests of both individual and State are nice legal issues, but, as one commentator has suggested, they are an example of international law failing “to see the wood for the trees”.\footnote{177}{V. Pergantis, “Towards a ‘Humanization’ …”, \textit{supra} note 172 at 374.} They are not really relevant to the ultimate disposition of the doctrine because the nature of the legal interest involved can and will necessarily change depending on the circumstances. In some cases, where the harm is strictly limited to the individual(s) concerned, as Orrego Vicuna states, “The State may still act as a conduit, an agent or on behalf of the individual”.\footnote{178}{F.O. Vicuna, “The Changing Law of Nationality of Claims” in International Law Association, \textit{Committee On Diplomatic Protection of Persons and Property. First Report} (2000), 631 at 633.} In other cases, harm to the individual will really amount to direct harm to the State. It is no fiction for the State to espouse such claims. Finally, in still other cases it may be that the harm is of a dual nature. In such circumstances, Professor Vicuna suggests that, “the right of the individual affected by a wrong should be asserted and enforced by means of diplomatic protection as the prevalent interest. A parallel right of the claimant State can also be asserted … but it should not be substituted for the individual’s own right”.\footnote{179}{\textit{Id.} at 646. Amerasinghe supports this approach as well; see, \textit{supra} note 7 at 90, n. 58.} Legal fictions are, in any event, used effectively and without much complaint in a variety of other legal contexts.\footnote{180}{See Vermeer-Künzli, “As If …”, \textit{supra} note 73 at 41-45, for an overview and examples (noting collective non-recognition of States, pretending that a ship is part of a flag-State’s territory, and pretending there is consensus when there are no objections, as examples of other accepted fictions in public international law).}

\footnote{176}{As argued by, e.g. Dugard, \textit{id.} at para. 31.}
\footnote{177}{V. Pergantis, “Towards a ‘Humanization’ …”, \textit{supra} note 172 at 374.}
\footnote{179}{\textit{Id.} at 646. Amerasinghe supports this approach as well; see, \textit{supra} note 7 at 90, n. 58.}
\footnote{180}{See Vermeer-Künzli, “As If …”, \textit{supra} note 73 at 41-45, for an overview and examples (noting collective non-recognition of States, pretending that a ship is part of a flag-State’s territory, and pretending there is consensus when there are no objections, as examples of other accepted fictions in public international law).}
for criticism of the doctrine itself: “those who believe that individuals have complete and full agency under international law” – and thus that the practice is obsolete – likewise “will reject the legal fiction in diplomatic protection”. 181 The fiction is not, of itself, a serious source of criticism.

The theoretical position against using a human rights perspective to evaluate and redefine diplomatic protection presents different forms of argument. One argument, effective until recently, is that the ICJ had, in *obiter dicta* comments in *Barcelona Traction*, suggested that diplomatic protection was inappropriate in cases where the obligation violated was owed *erga omnes*, to the international community as a whole. 182 The ICJ notably included “the principles and rules concerning the basic rights of the human person” in this category of obligation. 183 Vasileios Pergantis, for one, views this *dicta* as supporting the proposition that the “bilateral character” of diplomatic protection cannot be reconciled with the “communitarian characteristics of human rights *erga omnes*”. 184 The ICJ’s current approach to the issue has evolved, however, and no longer supports this line of argument. This is reflected especially in the *Diallo* case of 2006 (discussed above in Part IV.B). Noting the substantive development of international law in the area of individual human rights, the Court impliedly overturned its *obiter* comments in *Barcelona Traction* by allowing that the scope of diplomatic protection had widened to include claims for human rights violations espoused on behalf of a State’s nationals. 185 This is a significant development for it signals that the Court does not share the anxiety of mixing traditional, bilateral international law with the communitarian aspects of its modern form. There is further suggestion from the ICJ that it no longer holds a narrow, traditional view of diplomatic

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181 Id. at 44.
182 Supra, note 6 at 32.
183 Id.
185 See supra notes 149-151 and accompanying text.
protection in the recent LaGrand and Avena cases. In both, States were allowed to espouse the individual, treaty based rights of their nationals to consular assistance. Although not strictly implicating human rights, these decisions demonstrate that the doctrine is not limited to claims of economic harm, which had been a prominent feature of much of the World Court’s previous diplomatic protection jurisprudence, but includes direct harm to the individual similar in effect to a human rights violation.

Another related argument, put forward by Professor Amerasinghe, asserts that diplomatic protection is a process not a substantive human right and that, as a result, making it obligatory raises problems with respect to enforcement. Specifically, in considering Special Rapporteur Dugard’s proposed Article 4 regarding a limited obligation of diplomatic protection, he questions to whom such an international obligation would actually be owed. The implication of Amerasinghe’s query is that it cannot be the individual harmed because, even given the proliferation of conventional human rights law, such an individual has no standing or forum in which to enforce his or her home State’s obligation to protect. In this can be heard echoes of Borchard’s early rationale for the traditional doctrine: lack of enforceable individual rights.

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188 See e.g. Mavrommatis, supra note 74 (breach of contract); Notteböhmm, supra note 76 (expropriation of property); Barcelona Traction, supra note 6 (financial loss of a corporation); Interhandel Case (Switzerland v. United States of America), [1959] I.C.J. Rep. 6 (expropriation of property).
189 The individuals implicated in both cases were scheduled to receive the death penalty in the U.S. without having received notification of their right to consular assistance as required by the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1967).
190 Amerasinghe, supra note 7 at 81.
191 Id. at 85.
192 See, supra note 72 and accompanying text. Enforceability as a prerequisite can be traced to John Austin, who considered laws to be commands backed by “enforcement of obedience”; see “The Province of Jurisprudence determined” in Lectures on Jurisprudence, 4th ed. (Bristol: Thoemmes Press, 1996) at 92 (emphasis in original).
There are a number of possible responses to this line of reasoning. First, Professors Klein and Barry have it right when they argue that diplomatic protection need not be a human right, *per se*, but that, “in the exercise of the right of diplomatic protection greater weight could be accorded to the protection of international human rights”.\(^{193}\) It is not strictly necessary for the doctrine to be a human right insofar as it can be redefined to account for the proliferation of international human rights law. The ICJ’s comments in *Diallo* support this fine, but important distinction, as does its somewhat inconsistent (if not confusing) analysis in *LaGrand* and *Avena*.\(^{194}\) Moreover, to demand a strict separation between diplomatic protection and human rights law is to engage in abstract constructionism and to elevate form over substance. This is because, as Enrico Milano notes, the human rights standard is determinative of the standard of treatment for aliens in contemporary international law.\(^{195}\) It would be archaic and incoherent for a State to argue that, depending on the secondary obligation involved (i.e. diplomatic protection vs. individual human rights enforcement), it can owe a different standard of care to aliens for the same primary obligation. Or, in Milano’s succinct example, “To maintain that an alien has a right to a fair trial means to say that his rights in a foreign country are determined internationally by the law of human rights”.\(^{196}\)

A more direct argument regarding the enforceability issue is that enforcement is not actually a prerequisite for a binding international obligation. Borchard, who placed considerable reliance on lack of enforceability to justify the traditional doctrine’s discretionary nature, was

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193 Klein and Barry, “A human rights perspective on diplomatic protection …”, *supra* note 112 at 23; see also, Vermeer-Künzli, “A Matter of Interest …”, *supra* note 91 at 56 (“Diplomatic Protection] may not be a human right *pur sang*, yet it is an important mechanism for the invocation of responsibility for violations of human rights”).


195 Milano, *id.* at 122.

196 *Id.*
writing at a time (the early part of the 20th century) in which legal realism was rising towards its apogee as a popular theory of international law.\textsuperscript{197} He thus shared heavily in the realist view that a true obligation was defined by the presence of a related sanction – a view that modern international theorists consider “surprisingly naïve”.\textsuperscript{198} Even positivist scholars of comparable vintage contested this point. For instance, prior his appointment as a judge of the International Court of Justice in 1960, Sir Gerald Fitzmaurice grappled with the problem of enforcement in international law in an essay published in the \textit{Modern Law Review}.\textsuperscript{199} It was, he considered, “one of the most difficult in the whole field”.\textsuperscript{200} A misconception that he noted as contributing to the difficulty – and here he could have cited Borchard directly – was that, “It appears sometimes to be supposed that rules of law are binding if, and because, they are enforceable”.\textsuperscript{201}

In refuting this realist \textit{grundnorm}, Fitzmaurice’s words are as powerful as they are eloquent:

\begin{quote}
This is clearly incorrect: indeed it is the reverse of correct. \textit{The law is not binding because it is enforced: it is enforced because it is already binding.} Enforcement presupposes the existence of a legal obligation incumbent on those concerned. The prospect of enforcement is in fact little more than a factor or motive inclining people to obey rules that they are in any case under an obligation to obey: \textit{but it is not itself the source of the obligation.}\textsuperscript{202}
\end{quote}

\textsuperscript{197} See Kindred and Saunders, \textit{International Law, supra} note 130 at 5.
\textsuperscript{198} See J. Brunnée and S. Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002), 8 Finn. Y.B. Int’l L. 1 at 21 (Brunnée and Toope equate this with “the old common law idea that ‘where there is a right there is a remedy’ [to which] the realists implicitly added a maxim along the following lines: where there is a sanction there is a rule”).
\textsuperscript{199} G.G. Fitzmaurice, “The Foundations of the Authority of International Law and the Problem of Enforcement” (1956), 19 Mod. L. Rev. 1.
\textsuperscript{200} \textit{Id.} at 1.
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.} at 2 (emphasis added). Fitzmaurice argued that the ultimate source of a legal obligation, international or otherwise, has to be extra-legal (“justice”, for example); see \textit{id.} at 12.
A contemporary articulation of this point is made by Jutta Brunnée and Stephen Toope. Their “interactional theory” of international law builds on the work of Lon Fuller regarding the internal characteristics of law as the source of its obligatory nature. They view “the binding nature of an international norm [as] separate from the question of its enforceability”. Enforcement, from their interactional perspective, is rather a symbolic but unnecessary element of an otherwise binding international rule. Brunnée and Toope share common ground here with a dominant strand of recent international relations theory led by Abram Chayes and Antonia Handler Chayes, whose work on international compliance they compare and contrast with their own interactional model. The Chayes reject the “enforcement model” of international law on the basis, inter alia, that, “sanctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used”. They explain compliance on the basis of an international obligation’s “legitimacy”, which depends on “a discursive process of explanation, justification, and persuasion” – a theory that has been likened to “dialogue” among international actors.

The point of this is that, whatever the source of the binding nature of any international obligation, it is not its enforceability. It follows, a fortiori, that a lack of practical enforceability cannot be, as Borchard and, to a lesser extent, Amerasinghe propose, a reason to invalidate an obligation on a State to provide diplomatic protection to its nationals in certain circumstances.

203 See J. Brunnée and S. Toope, “An Interactional Theory of Legal Obligation”, University of Toronto Faculty of Law, Legal Studies Research Series, No. 08-16 (2008); Brunnée and Toope “Persuasion and Enforcement …”, supra note 198.
205 Brunnée and Toope, “Persuasion and Enforcement …”, op. cit. at 21.
206 Id. at 22.
208 Id. at 127.
Assuming, *arguendo*, that a determinative source for the State’s obligation to provide diplomatic protection can and should be specifically identified, in this paper’s view, there are two appropriate possibilities. The first was raised by Amerasinghe himself: the obligation stems from the *erga omnes* nature of certain human rights violations. Given this type of violation, the State of nationality of the victim would, common with all States in the international community, have the right to take positive steps to bring such a violation to an end. There is no reason that such steps cannot include diplomatic measures pursuant to the doctrine of diplomatic protection. As will be elaborated below, the adoption of the R2P doctrine has made this power to intervene and enforce explicitly obligatory with respect to U.N. member States and certain, very serious breaches of international law. The second possible source of the obligation likewise relates to R2P. Given the dramatic manner in which the U.N. members States have accepted this new doctrine, the consensual nature of the international dialogue can serve as a basis for the legitimacy of the obligation to protect.

**B. Responsible Sovereignty and R2P**

The United Nations’ recent adoption of the R2P doctrine at both the General Assembly and Security Council levels has a number of significant implications for the doctrine of diplomatic protection. It emphatically rejects the foundational concept of absolute sovereignty upon which the traditional doctrine was built. It also imposes clear international obligations on member States of the U.N. to both protect their own populations and to take positive action, including diplomatic means, to protect populations in other States from certain particularly grave abuses of an international scope. The abuses identified as triggering R2P obligations are,

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210 Amerasingh, *supra* note 7 at 85.
notably, of *jus cogens* status and *erga omnes* effect.\(^{211}\) This demonstrates a link between R2P and State responsibility doctrine, which in turn implicates the doctrine of diplomatic protection. Each of these implications will be considered below. First, the formal legal effect of the U.N.’s R2P resolutions will be considered.

The legal effect of United Nations’ resolutions is an uncertain and imprecise area of international law. General Assembly resolutions are usually considered to be “recommendations” unless made with respect to budgetary or administrative matters of the U.N., in which case they are binding.\(^{212}\) Depending on the circumstances, a General Assembly resolution can also represent the *opinio juris* necessary to found a principle of customary international law\(^{213}\) or, in the case of a recommendation directed to a specific State, create an obligation to give the resolution due consideration in good faith.\(^{214}\) A more extreme position holds that unanimously approved General Assembly resolutions create binding international law – that, in effect, the General Assembly can legislate new international law.\(^{215}\) While this is debatable, U.N. Security Council resolutions clearly can have binding effect pursuant to Article 25 of the U.N. *Charter*, which provides that, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. In its Advisory Opinion in the *Namibia Case*, the ICJ confirmed that Security Council

\(^{211}\) See Brunnée, “International Law and Collective Concerns …”, *supra*, note 168 at 49.
\(^{212}\) See *Charter of the United Nations*, at Articles 10 and 17.
\(^{215}\) See D.H. Ott, *Public International Law in the Modern World* (London: Pittman, 1987) at 22. Some support for this position can be found in the international arbitration between Libya and the U.S. where the Arbitrator, Professor René Dupuy, relied on the conditions under which a General Assembly resolution was adopted, including the vote count, to determine its legal effect; see *Texaco v. Libya* (1977), 53 I.L.R. 389 at paras. 84-87.
resolutions passed under its general powers enumerated in Article 24 were, by virtue of Article 25, binding on the U.N.’s membership as a whole.\textsuperscript{216}

The R2P resolutions under consideration here were enacted unanimously by the General Assembly at the World Summit – “one of the largest gatherings of Heads of State and Government in history”\textsuperscript{217}. Secretary General Moon’s recent report on the state of R2P describes the difficult circumstances that their enactment overcame and notes that many other significant topics did not meet with such agreement:

[T]here were intense and contentious deliberations on a number of issues, including on the responsibility to protect. On some important issues, such as disarmament and the proliferation of weapons of mass destruction, it proved impossible to find consensus language. It is therefore a tribute both to the determination and foresight of the assembled world leaders and to their shared understanding of the urgency of the issue that they were able to agree on such detailed provisions regarding the responsibility to protect. Their determination to move the responsibility to protect from promise to practice reflects both painful historical lessons and the evolution of legal standards and political imperatives.\textsuperscript{218}

The R2P resolutions were subsequently, and in short order, reaffirmed by resolution of the Security Council. Neither of the resolutions speak of the \textit{World Summit Outcome} provisions as being only recommendations and there is nothing specifically in the language of the Security Council resolution to suggest it was anything other than a binding “decision”. In such circumstances, and given especially the universal approval of their enactment, it is arguable that paragraphs 138 and 139 of the \textit{World Summit Outcome} are now binding obligations on the State parties to the U.N. \textit{Charter}.


\textsuperscript{217} Report of the Secretary General, \textit{supra} note 160 at para. 4.

\textsuperscript{218} \textit{Id.}
As detailed in Part IV. B, above, R2P is grounded in the evolved concept of sovereignty as entailing responsibility to a State’s citizens. Given the formal legal effect of the U.N.’s resolutions of 2005 and 2006, this foundational principle should now influence other areas of international law that have relied in substance on the classic definition of absolute sovereignty. It should be read into and redefine the doctrine of diplomatic protection. The traditional doctrine was premised on a conception of sovereignty that did not place any international obligations on the State with respect to its nationals. Instead, the traditional doctrine understood sovereignty to entail unfettered control of the State over its internal functions. That premise has now been rejected, at least with respect to U.N. member States. Professor Slaughter notes that, “Sovereignty in the state of nature, e.g., outside the UN system, may still mean some Westphalian ideal of absolute autonomy”, but for the member States, the responsibilities of R2P “spell nothing less than conditional sovereignty”. The condition of that sovereignty means certain limited international obligations owed by U.N. member States to their nationals. As a result, diplomatic protection can no longer be considered an unfettered, purely discretionary right of the State. The State must now provide such protection in conformity with the responsibilities entailed by its sovereignty. The historical relationship between allegiance of the citizen and protection of the State has now been given unlimited international dimension and scope.

Apart from the R2P’s effects on State sovereignty writ large, the specific obligations it imposes also implicate the progressive development of diplomatic protection. Paragraph 138 of the World Summit Outcome pertains to the protection responsibilities of each individual State to its own populations. It creates a duty of protection against genocide, war crimes, ethnic cleansing and crimes against humanity “through appropriate and necessary means”. The plain

terms of the resolution are facially broad enough to include diplomatic protection of a State’s nationals from being subjected to these grave harms while abroad. Such nationals remain part of a State’s “populations” even when outside its territorial borders; indeed, there is no legal reason to relieve a State from the responsibilities of its sovereignty in such circumstances. This is not to say that States will always be able to ensure that their nationals will be safe from grave harms when travelling abroad, but merely that available diplomatic measures should be used in the effort. Put another way, the State should act to the limits of its sovereignty to honour the responsibilities of its sovereignty. In a normative sense, could it really be true that States are, for example, obliged to prevent torture\textsuperscript{220} from occurring within their borders (including against legal aliens), but are not obliged to intervene diplomatically in an attempt to prevent their own citizens from being subjected to torture in foreign countries? International law, as expressed in the R2P doctrine, finally appears to say “no”.

Paragraph 139 of the *World Summit Outcome* is also highly relevant to redefining diplomatic protection. To reiterate, it provides that the “international community … also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means … to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”. This means, in effect, that States have the obligation to intervene internationally to protect persons in foreign countries against being subjected to grave harm. So, for example, if a national of State “A” is subjected to torture in State “B”, State B will have failed in its paragraph 138 R2P responsibilities. This would trigger State A’s paragraph 139 responsibility to intervene through diplomatic means to protect its citizen from a grave harm listed in the *World Summit Outcome*.

\textsuperscript{220} Torture “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” is a crime against humanity; see *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 90 (1998) at Art. 7.1(f).
It is true that State A’s responsibility to protect is, in such circumstances, shared by the U.N. community as a whole and that, under the terms of paragraph 139, a collective response would be administered through the Security Council. However, “collective action” and Security Council participation are only implicated “should peaceful means be inadequate” – a clear exception for autonomous diplomatic measures – and, as a practical, political matter, the State of nationality of the individual(s) harmed will have the greatest interest in leading a diplomatic response against the State where the harm is occurring. To continue the above example, State A is thus jointly and severally responsible to use diplomatic measures to protect the tortured individual in State B, whose connection of citizenship to State A is practically significant, but legally insignificant under this aspect of the R2P principles.

R2P has, in some sense, confirmed the progressive development of the law of diplomatic protection that the ILC and Special Rapporteur Dugard began. It has achieved a similar effect with respect to the related doctrine of State responsibility for international harms. In considering the later, Professor Brunnée notes that the conditioning of sovereignty entailed by R2P is not novel, “but actually solidly grounded in international law”. “Specifically, by virtue of their erga omnes effect, States already owe the human rights obligations underlying [R2P] not only to

221 Paragraph 139, second sentence provides that:

“... we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” (Emphasis added).

222 See Vermeer-Künzli, “A Matter of Interest …”, supra note 91 at 580-581 (“In practice, it may be easier to induce States to invoke responsibility when it concerns their nationals because of the national political repercussions if they refuse to do so”). She cites the case of Maher Arar in support. Mr. Arar, a Canadian citizen, did not initially receive assistance from the Canadian government after the US extraordinarily rendered him to Syria to face torture. Only after the media aired details of the situation did Canada take steps of redress. The repatriation of the Guantánamo Bay Britons provides a similar example. Omar Khadr is perhaps the exception that proves the rule.

223 J. Brunnée, “International Law and Collective Concerns …”, supra note 168 at 49; see also Report of the Secretary General, supra note 156 at para. 3 (“It should be underscored that the provisions of paragraphs 138 and 139 of the Summit Outcome are firmly anchored in well-established principles of international law”.)
persons under their jurisdiction, but also to all States”.224 She goes on to point out that the adoption of R2P essentially affirmed what had been considered a progressive development lacking the requisite State practice at the time the ILC’s draft articles on *State Responsibility for Internationally Harmful Acts* were enacted.225 Given the close relationship between the doctrines, R2P must have a similar implication for diplomatic protection. The U.N. community has, through the specific articulation of R2P, indicated an acceptance of general principles of international law regarding *jus cogens erga omnes*. It has also recognized that, as Articles 40 and 41 of the draft articles set out226 and as the ICJ suggested in its advisory opinion in the *Palestinian Wall* case,227 violations of *erga omnes* obligations can also themselves trigger further obligations on States to take positive action to vindicate the particular individual rights at stake. Acceptance of that principle should have a ripple effect leading, perforce, to the redefinition of other secondary, remedial rules of international law such as diplomatic protection.

The link between diplomatic protection and state responsibility/R2P even has some existing, though limited, precedential support at the ICJ. In the recent *Case Concerning Armed Activities on the Territory of the Congo*, the Court considered a counter-claim Uganda brought against the Democratic Republic of the Congo (DRC) based on diplomatic protection.228 The counter-claim was on behalf of a group of civilians that DRC soldiers were alleged to have violently mistreated as they attempted to flee from armed conflict in the Great Lakes region via Kinshasa International Airport in August 1998. The claim was dismissed because Uganda could not prove that the individual victims were its own nationals. One of the traditional requirements of diplomatic protection was therefore lacking. Judge Brunno Simma saw this aspect of the case

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224 Brunnée, id.
225 id.
226 Supra note 90.
227 Supra note 94.
differently. In his view, the Court overlooked, *inter alia*, the law of State responsibility and its relevance to the maltreatment at issue, which involved violations of the individuals’ rights under the *ICCPR*, the *African Charter on Human and Peoples’ Rights*, and the U.N. *Convention Against Torture*. Judge Simma noted that the ILC’s draft articles on State responsibility provided “not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State”. Given the nature of the human rights obligations violated, which were “instances *par excellence* of obligations that are owed to a group of States including Uganda”, he concluded that Uganda should have been given the necessary standing to espouse the claims against the DRC.

Judge Simma’s separate opinion demonstrates how diplomatic protection and State responsibility or R2P can interact in formal practice. In large measure, they are different sides of the same coin. A State can provide diplomatic protection, traditionally understood, for ‘regular’ or less serious harms suffered by its nationals abroad (economic harms, for example). Where particular human rights are at stake, a State would be simultaneously exercising diplomatic protection on behalf of a national, as well its own right to respond to a violation *erga omnes*. Finally, where the harm is of a more serious nature – a “serious breach” under the law of State Responsibility or one of the grave harms outlined in the *World Summit Outcome* – both State Responsibility and R2P obligate the State of nationality to provide diplomatic protection. In the

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229 See *id.*, Separate Opinion of Judge Simma at para. 31 (this aspect of the case was also considered from the perspective of international humanitarian law).
230 *Id.* at para. 35.
231 *Id.* (the Court’s omission of this issue may have been due to Uganda not raising it itself and the DRC not having an opportunity to respond. Judge Simma described the presentation of the counter-claim as “somewhat careless, both with regard to the evidence that Uganda mustered and to the quality of its legal reasoning”; see *id.* at para. 18).
technical nomenclature of public international law, these doctrines establish the second-order consequences of certain, particularly harmful breaches of primary international obligations.

Annemarieke Vermeer-Künzli, who has written widely on issues related to diplomatic protection,\footnote{See “As If …”, supra note 73; “A Matter of Interest …”, supra note 91; “Diallo and the Draft Articles …”, supra note 185; “Restricting Discretion: Judicial Review of Diplomatic Protection” (2006), 75 Nord. J. Int’l. L. 279; “Unfinished Business: Concurrence of Claims Presented before a Human Rights Court or Treaty Body and through Diplomatic Protection” (2010), 10 Hum. R.L. Rev. 269.} is in favour of strengthening both it and State responsibility doctrine, but also argues, contrary to the above analysis, that they should remain distinct areas of international law.\footnote{“A Matter of Interest …”, id. at 580.} She notes, to this end, the different sources of the rights and obligations that underscore each – diplomatic protection concerns the rights of the individual, while State responsibility, \textit{erga omnes}, concerns the rights of the State as part of the international community.\footnote{Id. at 579.} She also points out that the traditional requirements of diplomatic protection, such as nationality and exhaustion of local remedies, are inapplicable to \textit{erga omnes} obligations.\footnote{Id.} The implication being that a merger of the doctrines could make the more onerous technical requirements of the former applicable to the more serious concerns of the later.

Professor Vermeer-Künzli’s arguments regarding the distinction between diplomatic protection and State responsibility have much validity; however, they are also semantic and legalistic. Precisely which technical basis justifies his or her home State’s diplomatic intervention is an issue that will not matter very much to the particular individual harmed. To take the points at face value though, it can be noted that they are largely irrelevant to the concern with which this paper is primarily addressed: grave harms to individuals travelling abroad \textit{perpetrated by agents of a foreign State}. In such circumstances, the local remedies rule will
almost necessarily be inapplicable pursuant to the recognized exception for no reasonable possibility of such remedies providing effective redress.\textsuperscript{236} It would be absurd, outside situations of regime change (and perhaps even then), to expect a foreign State to provide an adequate remedy to an individual that it has, itself, subjected to a grave international harm. In the circumstances of Guantánamo Bay, to return to the paradigm example, the detainees continued to be subjected to such harm at the time diplomatic protection was needed and requested. Furthermore, the nationality requirement was obviously not an issue in many of those cases (Mr. Khadr, Mr. Abassi, and Mr. Hicks, for instance, all had clear nationality).\textsuperscript{237} A claim under either diplomatic protection or State responsibility would amount to the same thing in these circumstances.

In more general terms, the argument against mixing diplomatic protection and State responsibility reflects again the concern that this paper has sought to highlight; namely, the perceived inability to reconcile traditional and modern international law. It is true that diplomatic protection has its own unique history within public international law and has developed separately from each of State responsibility, \textit{erga omnes} obligations, and R2P. On the other hand, the history against which the traditional doctrine developed has now been mostly rewritten. Diplomatic protection is not, as recent events demonstrate, practically obsolete and it should not be rendered doctrinally obsolete by sheltering it from the influence of substantial developments in closely related areas. Analogies to domestic legal systems are usually inapt for

\textsuperscript{236} ILC, \textit{Draft articles on Diplomatic Protection}, \textit{supra} note 81 at Art. 15(a); see also \textit{Report of the International Law Commission, Fifty-eighth Session} (2006), \textit{supra} note 86 at 77-79 (for commentary regarding the Article 15(a) exception); Diallo, \textit{supra} note 79 at paras. 41-48 (finding that the respondent State had not proven that effective local remedies were available); \textit{Case Concerning Armed Activities on the Territory of the Congo}, Separate Opinion of Judge Simma, \textit{supra} note 229 at para. 36 (finding that attempts of the victims of DRC violence to pursue local remedies “would have remained futile”).

\textsuperscript{237} Note also that the ILC’s \textit{Draft articles on Diplomatic Protection} have begun to loosen the nationality requirement to allow for the diplomatic protection of Stateless persons in certain circumstances; see \textit{Draft articles}, \textit{id}. at Art. 8.
public international law; however, in this case, it should be noted that the common law is regularly developed incrementally to take account of the changing circumstances in modern societies.\footnote{See \textit{R. v. Salutoro}, [1991] 3 S.C.R. 654 at para. 39, for the Supreme Court of Canada’s exposition of this principle (“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country”).} The changing dynamics of modern international relations and, more importantly, the substance of conventional international law, require a similar development of diplomatic protection.

\textbf{VI. Conclusion}

The modern developments in international law discussed in this paper are significant to the doctrine of diplomatic protection for two distinct reasons. First, the redefinition of State sovereignty begun by the international human rights movement and culminating in R2P has cleared the theoretical ground impeding recognition of limited obligations on States to provide diplomatic protection. Second, the \textit{World Summit Outcome} provisions regarding R2P logically entail expanding the traditional doctrine to provide obligations and rights where the circumstances demonstrate that genocide, war crimes, ethnic cleansing or crimes against humanity form the basis of a need for diplomatic protection. It is arguable that, since the Security Council’s 2006 resolution affirming R2P, it is no longer correct to speak in terms of rights and obligations as being a “progressive development” of the law of diplomatic protection. Rather, in the limited circumstances of the grave harms outlined in the \textit{World Summit Outcome}, the current international law as it presently stands obligates States to provide diplomatic protection to their foreign-based nationals. While limiting State obligations to the specific abuses associated with R2P may fall a gradation short of the high standard once proposed at the ILC (i.e. an obligation to protect against \textit{any} violation of a \textit{jus cogens} norm), the law developing
in this fashion does have significance to circumstances like those at Guantánamo Bay. Where, as was the case there, individuals are subjected to crimes against humanity in a foreign State, their home States now appear obligated to use whatever diplomatic means are available to ensure their protection from such harm. Responsibility to protect begets a duty to provide diplomatic protection in such circumstances.