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Diplomatic Protection and International Criminal Law: Can the Gap Be Bridged?

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Abstract

The concepts of nationality and allegiance are central to the doctrine of diplomatic protection as well as to certain institutions of (horizontal) international criminal law such as jurisdiction over treason, passive and active personality jurisdiction, and the non-extradition of nationals. In this sense, there appears to be a clear parallel between these two fields of international law. Yet most scholars – including John Dugard – tend to place and keep diplomatic protection and international criminal law in distinct conceptual compartments, never addressing them in relation to each other. This study considers whether this prevailing strict doctrinal separation is necessary and justified – in other words, whether diplomatic protection and international criminal law are, or can, or should be bridged.

Key words

Draft Articles on Diplomatic Protection; extraterritorial criminal jurisdiction; international criminal law; nationality; non-extradition of nationals

1. Introduction

Since his appointment in 1999 as Special Rapporteur of the International Law Commission (ILC) on the subject, John Dugard's name has become inseparably connected with the field of diplomatic protection. His reports, which combine codification of customary international law with progressive development aimed at providing individuals with more effective protection, led to the adoption of an elaborate set of draft articles[1] by the ILC in 2006.

Beside his success and recognition in the area of public international law in general and in relation to diplomatic protection in particular, John Dugard is also a prominent scholar of international criminal law. His publications concerning this field, addressing a wide range of issues, are equally authoritative and widely quoted.

In the light of his substantial knowledge of these areas of law it is unfortunate that he has not yet had an opportunity to cross-fertilize these areas by presenting his views on their intersection, the existence or lack thereof, or on issues of common concern to both. His neglect of such questions probably explains his admitted initial scepticism regarding the endeavours[2] of this author – as eloquently put by John Dugard himself – 'to bridge the gap between diplomatic protection and international criminal law'.

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1. ILC Draft Articles on Diplomatic Protection, 2006, adopted at fifty-eighth session (hereinafter Draft Articles), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf.
2. Zs. Deen-Racsmány, 'Active Personality and Non-extradition of Nationals in International Criminal Law at the Dawn of the Twenty-first Century: Adapting Key Functions of Nationality to the Requirements

Inspired by this phrase, the present contribution aims at charting the relationship between these two fields and at identifying the impact each have, should have, or are likely to have on each other. It starts out with a short presentation of relevant definitions and by setting out fundamental relations between some key concepts. The stage having thus been set for a deeper study, three aspects of the relationship between diplomatic protection and international criminal law will be addressed, suggesting possible bridges between the two fields. First, it will be considered whether certain institutions of international criminal law may be seen as forms of diplomatic protection. The second question to be addressed is whether principles codified in the field of diplomatic protection may serve as a source for developing rules of international criminal law. The final aspect, in turn, concerns the role of international criminal law (questions of criminal jurisdiction in cases involving a foreign element) as a cause of diplomatic protection. The paper ends with some conclusions on the relationship between international criminal law and diplomatic protection.

2. Setting the stage: diplomatic protection and international criminal law

In order to facilitate the discussion of the relationship between diplomatic protection and international criminal law, it appears necessary to provide definitions and explain some relevant fundamental characteristics and functions of both fields.

Diplomatic protection is a traditional doctrine of public international law, closely related to the field of state responsibility.[3] As defined in the ILC Draft Articles,

> diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[4]

International law endows states[5] with a right to exercise diplomatic protection based on the fiction that 'an injury to a national is deemed to be an injury to the State itself'.[6] Subject to certain exceptions,[7] this right is conditional upon the existence of

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of International Criminal Justice', doctoral dissertation, Leiden, 2007, available at http://openaccess.leidenuniv.nl/handle/1887/492.

3. Draft Articles, *supra* note 1, at 22, para. 1.
4. Ibid., Art. 1. See notes 28–30 and accompanying text on the relation of this definition to other ones presented in doctrine and jurisprudence, *infra*.
5. Article 2 of the Draft Articles, ibid., provides that '[a] State has the right to exercise diplomatic protection in accordance with the present draft articles'. Whereas constitutional provisions of certain – mainly former communist – countries appear to lay down a corresponding individual right under domestic law, at present international law does not recognize an individual right to *receive* such protection. Cf. J. Dugard, First Report on Diplomatic Protection, UN Doc. A/CN.4/506 (2000) (hereinafter First Report), 29–33; Draft Articles, *supra* note 1, Art. 19 at 95–6; A. M. H. Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection', (2006) 75 *Nordic Journal of International Law* 93.
6. Draft Articles, *supra* note 1, at 25. On this fiction and its function see, for instance, A. M. H. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection', (2007) 18 EJIL 37.
7. Draft Articles, *supra* note 1, Art. 8 (Stateless persons and refugees), at 47–51. As evidenced by the First Report (*supra* note 5), John Dugard has intended to draft an article on the right of states to exercise diplomatic protection on behalf of non-nationals where the injury concerns the violation of an obligation *erga omnes* and the state of nationality fails to exercise diplomatic protection (at 34, n. 160; at 60, para. 185). This article

a particular link between the state and the injured individual: nationality[8] or, more specifically, allegiance.[9] Due to the centrality of these concepts to the doctrine of diplomatic protection, multiple nationality, changes of nationality, lack of nationality (statelessness), and other special problems concerning refugees and the nationality of legal persons have caused much controversy.[10]

Like diplomatic protection, international criminal law is closely related to public international law. The best view is probably that it is an 'essentially *hybrid branch of law*: it is public international law impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law'.[11]

From a substantive point of view, it is commonly described today as

> a body of international rules designed both to proscribe international crimes and to impose upon States the obligation to prosecute and punish at least some of those crimes. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.[12]

This statement reflects the narrow definition of the term, also referred to as 'vertical' international criminal law. In contrast, in the broad sense,[13] next to this segment, international criminal law also includes a substantial 'horizontal' component encompassing, *inter alia*, 'extraterritorial criminal jurisdiction and modalities of inter-state cooperation in penal matters'.[14]

The concepts of nationality, allegiance, and/or protection in return for allegiance are, in one way or another, central also to certain areas of international criminal law.[15] These include principles establishing jurisdiction over treason,[16] over

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has never been submitted to the ILC due to opposition by the majority during the discussion of the First Report.

8. In the politico-legal sense, nationality signifies the existence of a legal link between the individual (natural person) and a state. Through this link, the individual comes under the personal jurisdiction of the state, giving rise to mutual rights and obligations under municipal law. In this sense nationality may be perceived as a status (of belonging to the state as opposed to being an alien) or as a relationship (comprising material rights and duties). (See, e.g., P. Weis, *Nationality and Statelessness in International Law* (1979), 3–7 and 29–32; A. Randelzhofer, 'Nationality', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, (1997), III, 501, at 502; H. F. van Panhuys, *The Rôle of Nationality in International Law: An Outline* (1959), 24–38.)
9. E. M. Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad', (1913) 7 AJIL 497; M. Bennouna, Preliminary Report on Diplomatic Protection, UN Doc. A/CN.4/484 (1998), 3. Allegiance may be defined as 'the obligation of obedience and support' owed by the individual to his state of nationality or citizenship. (W. W. Willoughby, 'Citizenship and Allegiance in Constitutional and International Law', (1907) 1 AJIL 914, at 915.)
10. On these issues see Draft Articles, *supra* note 1, Arts. 4–13.
11. A. Cassese, *International Criminal Law* (2003), 19 (emphasis in original).
12. Ibid., at 15. It should, however, be noted that Cassese subsequently recognizes the existence of other meanings traditionally attributed to the term.
13. See, e.g., G. Schwarzenberger, 'The Problem of an International Criminal Law', (1950) 3 *Current Legal Problems* 263; M. Ch. Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in K. Koufa (ed.), *The New International Criminal Law* (*Thesaurus Acroasium*, Vol. 32) (2003), 19, at 26 (hereinafter 'Sources and Content'); B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 9.
14. Bassiouni, 'Sources and Content', *supra* note 13, at 37; cf. ibid., at 35–7.
15. The present study is primarily concerned with horizontal international criminal law. To the extent that the issues and concepts under consideration pertain also to the vertical components, there is arguably little reason to treat that segment of international criminal law differently. However, where the distinction is of importance, the resulting differences will be pointed out.
16. Jurisdiction over treason is commonly seen as falling under the protective principle of extraterritorial criminal jurisdiction (see, e.g., J. Dugard, *International Law: A South African Perspective* (2005), 154 (hereinafter *International Law*); M. N. Shaw, *International Law* (2003), 591; but, contra, I. Brownlie, *Principles of Public*

(extraterritorial) crimes committed by foreigners causing injury to nationals (passive personality principle),[17] over (extraterritorial) criminal conduct of nationals (active personality or nationality principle),[18] as well as the non-extradition of nationals.[19] More specifically, their common origin in, or at least shared justification relating to, the duty of the ruler to protect its subjects in return for their taxes and allegiance (the maxim *protectio trahit subjectionem, et subjectio protectionem*) provides a clear bridge between these instruments of international criminal law and diplomatic protection.

Finally, it should be emphasized that like diplomatic protection, the exercise of protective, active, and passive personality jurisdiction and the non-extradition of nationals are rights pertaining to the state (of nationality)[20] under international law. Accordingly, the state retains full discretion as to its exercise within the limits established by international law.

International Law (2003), 301–2, addressing internationally reported treason cases as applications of the principle of active personality), which permits states to prosecute aliens even for extraterritorial conduct that affect their security or other essential interests. To the extent that this principle allows the prosecution of aliens, not requiring a link of nationality, it is of no relevance for this study. However, the case of treason is an exception: the significance of the concepts of allegiance and protection arises here out of the fact that an act is treasonable – i.e. it may be prosecuted – only if committed by a national or else by a person who owes allegiance, even if qualified and temporary, to the state. (See, e.g., *Joyce v. Director of Public Prosecutions*, House of Lords, (1946) AC 347.)

17. Beside the centrality of the link of nationality (crucial for determining the range of acts that may be prosecuted by identifying nationals among the victims), the principle of passive personality is related to diplomatic protection through its goal: to protect nationals abroad. (See, e.g., G. R. Watson, 'The Passive Personality Principle', (1993) 28 *Texas International Law Journal* 1, at 18.)

18. The principle is often justified, *inter alia*, with reference to the *allegiance* owed by the individual (accused) to his state of nationality and to state sovereignty, giving rise to a competence to regulate and prosecute even extraterritorial acts of nationals (van Panhuys, *supra* note 8, at 127; Brownlie, *supra* note 16, at 301). For a more exhaustive list of justifications see, e.g., Harvard Draft Convention on Jurisdiction with Respect to Crime, with Comment, (1935) 29 AJIL, Suppl., 439, at 519–20). A more pragmatic reason is, however, that many countries – mainly those with a civil law tradition – generally do not extradite their own nationals (e.g. I. A. Shearer, *Extradition in International Law* (1971), 94–132). Jurisdiction over crimes committed by nationals abroad is thus necessary in order to prevent such crimes and criminals from escaping prosecution (e.g., Harvard Draft Convention, at 520). In this sense, to the extent that their non-extradition protects nationals from foreign criminal jurisdiction and perceived injustice related to that (see note 19, *infra*), the nationality principle, too, has an implicit protective function. This is especially apparent in cases where the choice to prosecute domestically would be made in the light of an *aut dedere aut judicare* obligation.

19. Some classical justifications of the non-extradition of nationals claim that 'the state owes its subjects the protection of its laws' (Sh. A. Williams, 'Nationality, Double Jeopardy, Prescription and the Death Sentence as Bases for Refusing Extradition', (1991) 62 *International Review of Penal Law* 259, at 260–1, summarizing the arguments cited – and rejected – by the 1878 British Royal Commission chaired by Lord Cockburn), and in particular protection against injustice served by foreign courts. Cf. S. Oeter, 'Effect of Nationality and Dual Nationality on Judicial Cooperation, Including Treaty Regimes Such as Extradition', in D. A. Martin and K. Hailbronner (eds.), *Rights and Duties of Dual Nationals: Evolution and Prospects* (2003) 55, at 58–9. It should, however, be noted that, irrespective of its apparent relation to the right to a fair trial, the non-extradition of nationals is not a human right. It is better seen as a nationality-related privilege. (See, e.g., Case No. P 1/05, Poland, Constitutional Tribunal (2005), unofficial English translation, at 19, para. 4.2, available at http://www.trybunal.gov.pl/eng.)

20. Even the right of nationals not to be extradited, laid down in many constitutions, is merely a right under domestic law, not recognized (although not rejected either) under public international law. R. Y. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1996), 950; Shearer, *supra* note 18, at 94–132; M. Ch. Bassiouni, *International Extradition: United States Law and Practice* (2002) (hereinafter *International Extradition*), 682–9.

3. International criminal-law measures as *forms* of diplomatic protection?

Justifications – general or related to specific cases – of the non-extradition of nationals as well as of the active and passive personality and protective principles of jurisdiction commonly invoke the notion of protection.[21] In relation to these last two forms of action, claims that they may constitute *diplomatic* protection seldom arise and are easily discarded. While squarely aimed at protecting one's nationals, passive personality jurisdiction constitutes an action against individuals (offenders), as opposed to protection against another state in the context of diplomatic protection. This aspect renders it impossible to accommodate passive personality jurisdiction under the ILC Draft Articles, or even under most other definitions of diplomatic protection.[22] It is even more difficult to treat protective jurisdiction over individuals accused of treason as diplomatic protection: the first serves to protect the interests and safety of the *state* (and only indirectly guards the safety and well-being of its nationals) against individuals, rather than to safeguard the rights of individuals against illegal acts of states.[23]

The treatment of the non-extradition of nationals and the exercise of active personality jurisdiction over extraterritorial acts of nationals, both aimed – at least to an extent[24] – at protecting nationals from foreign criminal jurisdiction, appear to be more closely related. The obvious similarities suggest a straightforward connection between diplomatic protection and international criminal law.

The existence of a bridge appears evident when reading a passage of a decision of the Appeals Chamber of the International Criminal Tribunal of the former Yugoslavia (ICTY) rendered while addressing referral of a case under Rule 11 *bis* of the Rules of Procedure and Evidence of the ICTY[25] on the transfer of confirmed ICTY indictments or cases for prosecution to national jurisdictions:

> the Government argues that as [the Accused] is now a citizen of Serbia and Montenegro, as *parens patriae*, it has special rights and responsibilities towards him under the general international law of diplomatic protection. Having jurisdiction over him by virtue of his citizenship, the Government of Serbia and Montenegro submits that it is willing and adequately prepared to accept for trial the case against [him].[26]

It may be submitted that, if intervention by Serbia and Montenegro to have criminal proceedings against its national referred to it may be seen as a form of diplomatic protection, arguably also the non-extradition of nationals for prosecution

21. See *supra* notes 16–19.
22. See *infra* notes 28–30 and accompanying text.
23. Admittedly, diplomatic protection is often resorted to in situations involving also a direct injury to the state of nationality. See, e.g., Draft Articles, *supra* note 1, at 74–6.
24. See *supra* note 18.
25. Available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf.
26. *Todović and Rašević* (IT-97–25/1) 'Foča', ICTY, Trial Chamber, Decision on Referral of Case under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005, available at http://www.un.org/icty/rasevic/trialc/decision-e/referral8july2005.pdf, para. 30, footnotes omitted. See too the statement of the representative of Serbia and Montenegro made at the Motion Hearing of 12 May 2005 (transcripts available at http://www.un.org/icty/transe25–1/050512ME.htm, 93, ll. 8–22).

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abroad or even the exercise of jurisdiction over extraterritorial acts of nationals[27] could be treated similarly.

There is, however, a significant problem regarding these common phenomena of horizontal international criminal law as forms of diplomatic protection, at least under the ILC Draft Articles on Diplomatic Protection. Admittedly, various definitions of 'diplomatic protection' have been presented over the past century, many of which differ from the one adopted by the ILC in terms of the types or even purpose of action covered.[28] Some of these would even permit considering action to protect nationals from *impending* violations of their rights (consular assistance) as diplomatic protection.[29] Yet the majority of the ILC favoured the more widely held position that diplomatic protection presupposes an injury to a national caused by an internationally wrongful act.[30]

As emphasized in the commentary to the Draft Articles,

> Diplomatic protection does not include demarches or other diplomatic action that do not involve the *invocation of the legal responsibility of another State*, such as informal requests for corrective action. . . . Diplomatic protection is *essentially remedial* and is designed to remedy an internationally wrongful act that has been committed; *while consular assistance is largely preventive* and mainly aims at preventing the national from being subjected to an internationally wrongful act.[31]

Accordingly, lacking a remedial element (invocation of state responsibility for a completed internationally wrongful act), intervention in Rule 11 *bis* referral cases for the purposes of ensuring transfer of a case concerning a national to one's own jurisdiction does not constitute diplomatic protection in the sense of the ILC Draft Articles.

Admittedly, such an intervention may be seen as diplomatic protection *latu sensu*. This is also true for, for instance, action undertaken in *specific instances* with the view to protect a national from an imminent violation of his or her rights through refusing extradition and/or opting to prosecute domestically in case of an *aut dedere aut judicare* obligation. Yet such measures 'should be distinguished from diplomatic protection *strictu sensu*, mainly because the conditions for the exercise of the former are much more flexible'.[32]

It is even more difficult to conceive of the *general practice* of non-extradition of nationals and the establishment and/or exercise of jurisdiction under the active

27. See *supra* note 18.
28. The existence of different definitions is implicitly recognized in Article 1 of the Draft Articles through the inclusion of the phrase '[f]or the purposes of the present draft articles'. For an exhaustive treatment see Draft Articles, *supra* note 1, at 24–8; Dugard, First Report, *supra* note 5, at 11–22; A. M. H. Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance', (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 321; V. Pergantis, 'Towards a "Humanization" of Diplomatic Protection?', (2006) 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 351, at 359–62.
29. E.g., L. Condorelli, 'La protection diplomatique et l'évolution de son domaine d'application actuelle', (2003) 86 *Rivista di diritto internazionale* 5, at 8–10; F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (1932), 18.
30. See Report of the International Law Commission on the work of its 52nd session (2000), UN Doc. A/55/10, 74, para. 424; UN Doc. A/55/10(Supp) 173, para. 495.
31. Draft Articles, *supra* note 1, at 27, para. 8 (emphasis added). Cf. ibid., at 27, para 10.
32. Pergantis, *supra* note 28, at 361, presenting this view as one of the two main approaches to the problem.

personality principle, which often do not even raise a looming violation of international law, as diplomatic protection in the sense of the Draft Articles. Even unspecified assertions that nationals will (probably) not be given a fair trial abroad (even if this may be seen as an imminent violation of the international minimum standard,[33] possibly coupled with a denial of justice[34]) would not alter this conclusion.

The above submissions are confirmed by the fact that Article 14 of the Draft Articles requires the exhaustion of local remedies as a precondition of the state's right to present a claim, excluding such measures and situations from the scope of diplomatic protection.[35]

4. Diplomatic protection as a *source* of international criminal law?

Thanks to the work of John Dugard and the ILC, the most important rules of diplomatic protection have been codified. This is far more than can be said of most rules of international criminal law, even of its older, horizontal components. Many of the unresolved issues are similar to those addressed in the Draft Articles on Diplomatic Protection. Questions concerning the right to exercise protective, active, and passive personality jurisdiction as well as the right to refuse extradition of nationals where the relevant link of nationality is not evident, as well as corporate nationality[36] in relation to these phenomena, are cases in point.

The centrality of the bond of nationality and/or of allegiance to the institutions of international criminal law addressed here suggests that the Draft Articles on Diplomatic Protection[37] may provide guidance for settling such outstanding issues. However, the parallel between diplomatic protection *strictu sensu* and various institutions of international criminal law discussed in this study is not always sufficiently strong. For instance, there are significant differences between criminal jurisdiction over treason under the protective principle and passive personality jurisdiction on the one hand, and diplomatic protection on the other, in terms of their purpose and the relations between the actors involved.[38] These features argue for dismissing the utility of the rules of the ILC Draft Articles on Diplomatic Protection by analogy to solve unsettled legal questions regarding the scope of persons who may be held responsible under them.

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33. On this concept see, e.g., Dugard, *International Law, supra* note 16, at 296–7.
34. On this concept see, e.g., J. Paulsson, *Denial of Justice in International Law* (2005).
35. Article 15 of the Draft Articles, *supra* note 1, establishes some exceptions that may seem relevant in the context of the case of Serbia-Montenegro's intervention for referral (text accompanying note 26, *supra*) or for other specific cases. For instance, it excuses the exhaustion of local remedies if '[t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress' (paragraph a) and if '[t]he injured person is manifestly precluded from pursuing local remedies' (paragraph d). Yet even these exceptions have at their roots the assumption that the person has already been injured, even though the injury may not at that stage constitute an internationally wrongful act attributable to the state concerned. (In relation to the exception stated under paragraph a the requirement of an injury is mentioned in the text of the commentary (ibid., at 79, para. 4.).)
36. European Committee on Crime Problems, Council of Europe, *Extraterritorial Criminal Jurisdiction* (1990) 28.
37. *Supra* note 1, Arts. 5–7.
38. See *supra* notes 22 and 23 and accompanying text.

In contrast, under the active personality principle and the non-extradition of nationals, the relationship of the relevant actors is very similar (state protects individual against state), suggesting a closer analogy between these phenomena and diplomatic protection. Moreover, in specific instances those measures may arguably even be considered diplomatic protection *latu sensu*.[39] The Draft Articles may thus be expected to be of greater value here than in the previous contexts.

Yet a closer analysis demonstrates that, in many cases, direct translation of the rules on diplomatic protection not only to treason cases and to the exercise of passive personality jurisdiction but even to active personality jurisdiction and the non-extradition of nationals may lead to bizarre results, inviting abuse. Even where such incongruities are not apparent, the utilization of rules codified in the Draft Articles in these fields of international criminal law is clearly not supported by domestic decisions and doctrine.

For instance, in contrast to diplomatic protection, international jurisprudence related to treason tends to discard any nationalities and allegiances other than the one owed to the state offended by the act, and to consider as sufficient any substantive link, including residence or former residence. In turn, applying to active personality jurisdiction the continuity requirement presented in Article 5 of the Draft Articles[40] would encourage an offender to change nationality, thereby terminating his criminal responsibility towards his state of original nationality. In contrast, the application of this requirement to the non-extradition of nationals would appear to promote justice, but it would possibly lead to claims of violation of the principle of non-retroactive application of criminal laws in relation to the hence permissible extradition of naturalized nationals.[41] In addition, it would seem logical and desirable to apply the dominant nationality requirement in relation to an extradition request for a dual national issued by one state of nationality to the other. Yet neither the continuity nor the dominant nationality criterion is convincingly borne out by jurisprudence. Moreover, the assessment of nationality is further complicated here by the lack of an agreement about the material moment at which the question of dominant nationality should be determined (the date of the offence or the date of extradition (request)).[42]

Finally, it is arguable that the theoretical complementarity[43] between active personality jurisdiction and the non-extradition of nationals would necessitate identical regulation of nationality issues in relation to these phenomena. However, due to their different relation to the concept of protection illustrated by the above examples, this would be difficult to accomplish taking the rules laid down under the Draft Articles as a starting point.

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39. See text accompanying note 32, *supra*.
40. *Supra* note 1.
41. On the relevance of the principle of non-retroactivity in this context, see note 49, *infra*.
42. For an overview of jurisprudence and doctrine in relation to these issues, see Deen-Racsmány, *supra* note 2, at 21–41 (active personality, treason, non-extradition of nationals); ibid., at 47–51 (non-extradition of nationals); *Joyce*, *supra* note 16; H. Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', (1945–7) 9 *Cambridge Law Journal* 330, at 333–4; Dugard, *International Law*, *supra* note 16, at 154 (treason). These solutions should be compared with Arts. 3–8 of the Draft Articles (*supra* note 1).
43. *Supra* note 18.

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In turn, problems are not absent in relation to the exercise of passive personality jurisdiction either. Examples of prosecution on this basis are very rare. In fact the author has not been able to identify any attempts to invoke it in relation to victims whose nationality status was not unambiguous. There is no reason to change this situation. Passive personality is namely the most controversial basis of extraterritorial criminal jurisdiction. The reason for this fact (perceived unfairness) relates to the notion that the principle may expose individuals 'not merely to a dual, but to an indefinite responsibility' (i.e. under the laws of the state of nationality as well as the laws of states whose nationals may potentially be harmed by the acts in question).[44] Accordingly, there is ample reason to restrict the scope of persons so protected, even more than is the case with the regulation of these issues under the Draft Articles on Diplomatic Protection.[45]

Even more problematically, a literal application to passive personality jurisdiction of the rules of the Draft Articles[46] concerning multiple nationals may lead to illogical results, including justifiable but seemingly unwarranted discrimination. For instance, a state would be permitted to exercise passive personality jurisdiction over an offence by a foreigner which causes injury to a national holding multiple nationalities only if the victim's dominant nationality is not of the state whose nationality the offender holds.

In addition, due to its inherently intrusive nature, the exercise of passive personality jurisdiction (and to some extent even active personality and extradition) is commonly seen as acceptable only subject to certain requirements, such as dual criminality and seriousness of crime or a certain minimum degree of punishment and reasonableness.[47] These conditions are clearly not required under the Draft Articles, nor are they easy to accommodate under them. Admittedly, in this respect transposition of the Draft Articles would be less problematic in the context of vertical international criminal law, in relation to international crimes.

More importantly, even if international criminal law may be considered a subdiscipline of public international law, it is one of a particular nature – 'impregnated with notions, principles, and legal constructs derived from national criminal law and human rights law'.[48] Most important from our perspective is national criminal law, which is in many respects quite distinct from public international law. It has a different purpose, regulates different relationships, and is governed by different rules and principles (the most important ones being the principles of legality[49] and

44. Watson, *supra* note 17, at 22 citing a 1989 letter of Assistant Secretary of State Mullins. Cf. ibid., at 14.
45. See, especially, Article 8, addressing the protection of stateless persons and refugees, and Article 19, suggesting that the state entitled to exercise diplomatic protection should duly consider exercising that right (*supra* note 1).
46. Ibid., Arts. 6(1) and 7.
47. See, e.g., E. Cafritz and O. Tene, 'Article 113–7 of the French Penal Code: The Passive Personality Principle', (2003) 41 *Columbia Journal of Transnational Law* 585, at 595–8.
48. Cassese, *supra* note 11, at 19. Criminal law is sometimes even considered to be the main component (e.g., K. Ambos, 'Remarks on the General Part of International Criminal Law', (2006) 4 *Journal of International Criminal Justice* 660, at 669).
49. The principle of non-retroactivity, a component of the principle of legality, is admittedly commonly considered to pertain only to substantive criminal law (definition of crimes), not to criminal procedure. However, it can be implied from recent decisions of the German Federal Constitutional Court

culpability), and it has its own hierarchy among those. For these reasons an uncritical adoption or literal translation of such rules to institutions of international criminal law may lead to incongruous results and is in many cases clearly not warranted. Yet the theoretical–conceptual similarities may justify an initial – critical – study of relevant rules related to diplomatic protection if the issue is not definitely regulated under international criminal law.

5. INTERNATIONAL CRIMINAL LAW AS A *CAUSE* FOR DIPLOMATIC PROTECTION?

Due to the expansion of extraterritorial criminal jurisdiction in the past decades,[50] and in the absence of a corresponding worldwide harmonization of national criminal justice systems, foreign criminal proceedings against nationals will likely raise claims of international wrong suffered through the exercise of extraterritorial jurisdiction. Under these circumstances (claims of) uncorrected violations of the rights of the accused[51] are likely to become more frequent, providing obvious candidates for diplomatic protection.[52]

(BVerfG, 2 BvR, Absatz-Nr.(1–201), 18 July 2005, 19, para 98.) and the Czech Constitutional Court (NO. Pl. ÚS 66/04, 3 May 2006, paras. 97–117, available at http://www.eurowarrant.net) on the surrender of nationals under the European Arrest Warrant (note 56, *infra*) that in certain cases the termination of the protection from extradition could amount to a retroactive application of penal laws, especially if the extradition request concerned acts not criminalized by the laws of the state of original nationality.

In addition, the use of analogy to the disadvantage of the accused is prohibited in most criminal-law systems under the principle of legality. Admittedly, the non-use of analogy, too, is generally held to be applicable only to substantive criminal law. However, the arguments raised in relation to the principle of non-retroactivity imply that the prohibition on analogy could be invoked if it were suggested that the defendant had become criminally responsible for an act – or if (s)he has come within the court's jurisdiction – through resort to analogy with rules of diplomatic protection.

50. This expansion relates to universal jurisdiction as well as to other bases of criminal jurisdiction. See, e.g., A. Pearlroth, Redress, 'Universal Jurisdiction in the European Union', Report (2003), available at http://www.redress.org/conferences/country%20studies.pdf; Bassiouni, *International Extradition*, *supra* note 20, at 388.

51. The exercise of extraterritorial criminal jurisdiction, even over foreigners, does not in itself (by definition) violate international law. (*Lotus (Turkey v. France)*, Judgement No. 9, 1927, PCIJ Ser. A, No. 10, at 18–19. For a more balanced view see F. A. P. Mann, 'The Doctrine of Jurisdiction in International Law', (1964-I) 111 *Recueil des cours* 1, at 39; V. Lowe, 'Jurisdiction', in M. D. Evans (ed.), *International Law* (2003), 329, at 335–6; R. Higgins, *Problems & Processes: International Law and How We Use It* (1994), 135; Dugard, *International Law*, *supra* note 16, at 77.) Hence foreign prosecution of a national for crime committed outside the forum state is not sufficient to justify institution of diplomatic protection on his or her behalf.

52. In past decades the bulk of diplomatic protection cases related to the taking of property of foreigners. However, the upsurge of cases before the International Court of Justice (ICJ) concerning claimed injury related to attempts to exercise extraterritorial jurisdiction over non-nationals may be an early indication of shift. (E.g. *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, [2002] ICJ Rep. 3; the unsuccessful attempts by Liberia to initiate proceedings against Sierra Leone in relation to the indictment against incumbent president Charles Taylor of Liberia by the Special Court of Sierra Leone (SCSL) (ICJ Press Release No. 2003/26, available at http://www.icj-cij.org); and the *Case concerning Certain Criminal Proceedings in France (Republic of the Congo v. France)*, see Press Releases 2002/37 and 2003/14, available at http://www.icj-cij.org). It should, however, be noted that these cases may not be the most suitable precedents as, arising out of claimed injuries to government officials, they involved a predominant direct injury to the state itself. (Cf. Draft Articles, *supra* note 1, at 76).

Moreover, recent attempts to abolish the right to refuse the extradition of nationals[53] in the context of the ad hoc international criminal tribunals,[54] the International Criminal Court[55] and under the European Arrest Warrant (EAW),[56] will contribute to such a trend by increasing the number of persons prosecuted before courts other than those of the state of nationality. The very establishment of international courts and tribunals will have the same effect.

International criminal courts and tribunals are not expected to violate the rights of the accused so as to culminate in an internationally wrongful act that could lead to admissible diplomatic protection in the strict sense. However, considering the number of controversies surrounding the prosecution and surrender of nationals to international criminal courts and tribunals, governments may perceive certain rights as having been violated, considering diplomatic protection justified.[57] In contrast, domestic fair trial standards are still not uniform, even within the European Union, raising the prospect of an upsurge of diplomatic protection claims for uncorrected violations of fair trial rights of the accused, in particular in relation to nationals extradited under the simplified procedures established under the EAW. In this sense, international criminal law is thus likely to become one of the largest causes of diplomatic protection.

Cases of diplomatic protection related to claimed violations of fair trial rights are not unexemplified in inventories of traditional diplomatic protection cases. Moreover, the primary rules on the treatment of aliens are expressly excluded from the scope of the Draft Articles on Diplomatic Protection. In other words, the type of injury or the cause for the exercise of diplomatic protection (the nature of the internationally wrongful act) are immaterial to the secondary rules (the modalities of the invocation of international responsibility) codified in this context. Accordingly, the application of the Draft Articles to such instances is expected to be straightforward.

In fact, such cases may even contribute to renewed attempts at restricting the discretion of states to exercise diplomatic protection; since they pertain to issues of fundamental importance (personal freedom, protection from torture, etc.) to any individual, it is not improbable that frequent occurrence of perceived or actual injustice experienced in foreign criminal proceedings will motivate nationals increasingly

53. Arguably, such solutions may become more readily acceptable if diplomatic protection proves to be a widely available, effective alternative capable of providing *ex post facto* relief. Alternatively, the doctrine of diplomatic protection could contribute to resolving the growing controversy around the non-extradition of nationals (arising out of the fact that its traditional justifications are claimed to have lost their validity) by enhancing our understanding of the utility of fiction. The general acceptance of the fictive claim that an injury to a national is an injury to the state (*supra* note 6) could be taken as an example to facilitate a solution for the debate. (See note 19, *supra*; Deen-Racsmány, *supra* note 2, at 71.) It could thereby contribute to the preservation of this long-standing and in many cases still useful (ibid., at 72) institution of international criminal law.

54. See, e.g., A. H. J. Swart, 'Arrest and Surrender', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute for an International Criminal Court* (2002), 1639.

55. See, e.g., Deen-Racsmány, *supra* note 2, at 155–80.

56. Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA), *Official Journal of the European Communities* L190 18.7.2002 1.) See, e.g., Deen-Racsmány, *supra* note 2, at 69–116, 155–80.

57. The application of Liberia against Sierra Leone at the ICJ (*supra* note 52) indicates a problem pertaining to vertical international criminal law in this context, namely the fact that only states can be respondents before the ICJ (hence Liberia was unable to bring a complaint against the SCSL itself before the ICJ).

to test the boundaries of this discretion. Yet the requirements of a completed internationally wrongful act and the exhaustion of local remedies as preconditions of the exercise of diplomatic protection are likely still to render the invocation of diplomatic protection relatively infrequent.

6. MANY BRIDGES – LARGE GAP

As this short overview has shown, many bridges are perceivable between two fields of John Dugard's expertise – diplomatic protection and international criminal law – arising primarily out of the shared centrality of the bond of nationality. In this sense, Professor Dugard's scepticism appears misplaced.

On the other hand, these bridges are rather weak. In addition, the number of bridges constructed over a single gap tends to be a reliable indicator of the size of the gap and/or of the state of the bridges. Admittedly, not all the bridges identified here are needed to enable interaction between the two sides, and the last two may to some extent contribute to the cross-fertilization of the two sides of the gap. Yet the main finding of this overview is that the gap is substantial. Scepticism is thus apparently justified.

In fact the most obvious bridge seems to be the result of confusion or disagreement about the precise scope of diplomatic protection. The link is not so much present in legal doctrine as it is in political–diplomatic terminology, and even there only in relation to specific action undertaken in particular instances.

Even more importantly, this study leads to the conclusion that as its two banks belong to bodies of law that are distinct and should remain so, the gap should not be arbitrarily bridged. Indeed, great caution should be exercised in utilizing the Draft Articles as a guide to solving similar questions in the field of international criminal law. Diplomatic protection as a source of international criminal law is a wobbly bridge.

On the other hand, as indicated by the last section of this study, the gap may be expected to close to an extent, due to expansive claims of extraterritorial jurisdiction and to international attempts to restrict the non-extradition of nationals. Disputes related to prosecution of nationals abroad are likely to form, next to expropriation claims, one of the largest categories of diplomatic protection cases in the future. This apparent trend could bring about a converging treatment of legal issues pertaining to both fields. Alternatively, if the regime of diplomatic protection proves efficient and reliable, it could provide an argument for further limiting the non-extradition of nationals in the future.

Finally, international criminal law may also serve as a catalyst for further developing the legal regime of diplomatic protection: the exercise of jurisdiction by international criminal courts and tribunals is likely to raise questions of the responsibility of the institution exercising jurisdiction over nationals and/or officials of a state towards that state. The settlement of such claims will necessitate and could provide an impetus for speedy codification of rules of diplomatic protection in relation to international organizations – a project still awaiting the ILC, hopefully guided by Special Rapporteur Dugard.