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# Diplomatic Protection and Human Rights: *Quo Vadis?*

Alexander Heeps

## Abstract

*The protection of nationals abroad has been routinely discussed in the academic literature, typically in the context of the law of state responsibility and diplomatic protection. For centuries, when nationals are abroad, they have had recourse to their state of nationality to exercise diplomatic protection on their behalf when they have been injured. However, following the conclusion of the World War II, the attention paid to human rights has increased and there has subsequently been a proliferation of international and regional human rights conventions, accompanied with the necessary enforcement machinery to protect those human rights. As a result of this development, it has been questioned whether there is still a need for diplomatic protection, as nationals can resort to relying on human rights norms to seek protection when they are abroad. The purpose of this article is to discuss whether the proliferation of human rights replaces the need for diplomatic protection, or whether the calls to make diplomatic protection redundant are perhaps exaggerated in light of the enforcement and remedial weaknesses inherent in human rights. This paper maintains that while human rights and diplomatic protection have their weaknesses, they can and should coexist to protect nationals abroad.*

## **1. Introduction**

For centuries, individuals have moved from one state to another. The reasons for doing so are diverse: it may be to seek work in another state, it may be driven by the need to escape persecution in one state, or it may be to seek investment and/or business opportunities in another state.<sup>1</sup> Regardless of the reason for moving to another state, it follows that there is no guarantee that individuals will receive immunity from a violation of human rights or from sustaining an injury when they are abroad. However, when an individual is injured in a country of which it is not a national: how does one seek a remedy for the violation that has taken place?

Typically, the protection of nationals abroad has been studied under the headings of state responsibility and diplomatic protection.<sup>2</sup> When an individual has suffered or been injured by an internationally wrongful act, that individual can ask his or her state of nationality to intervene and exercise diplomatic protection on their behalf. However, more recently, there

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<sup>1</sup> The International Labour Organization estimates that there are around 232 million international migrants, of which 150 million are labour migrants. For further statistics, see: International Labour Organisation, 'Labour Migration', (*International Labour Organization*, 15 December 2015) <<http://www.ilo.org/global/topics/labour-migration/lang--en/index.htm>> accessed 25 March 2013.

<sup>2</sup> It is not within the scope of this article to repeat the substance of the law of state responsibility as it applies to 'aliens', for further literature on this topic refer to, *inter alia*, C. Amerasinghe, *State Responsibility for Injury to Aliens* (London: Clarendon Press 1967); R. Lillich, *International Law of State Responsibility for Injuries to Aliens* (Charlottesville: UPV 1983).

may be more options available to seek a remedy for the same wrong, and it has been argued that diplomatic protection's monopoly on the protection of nationals abroad is about to be broken in light of developments in human rights law. The proliferation of human rights law since the end of World War II now questions whether there is a need to rely on diplomatic protection to protect the rights of nationals abroad. In other words, has human rights law replaced the need for diplomatic protection to protect nationals abroad? This article seeks to contribute to this contemporary polemic, and to determine whether human rights law replaces the institution of diplomatic protection, or whether these claims are perhaps exaggerated, using contemporary examples from different human rights regimes.

This article is therefore structured as follows: firstly, it will chart the historical development and legal framework surrounding state responsibility and diplomatic protection to clearly define what is meant by diplomatic protection (**Section 2**). Following this, the proliferation of human rights since WWII will be analysed, and it will be shown how this relates to diplomatic protection (**Section 3**). At this juncture, it will be examined whether human rights developments have replaced the need for diplomatic protection considering the perceived enforcement and remedial weaknesses, and discuss ways in which both human rights law and diplomatic protection may coexist (**Section 4**). In doing so, this article will use examples from international human rights law regimes and contemporary human rights problems to strengthen the article's argument, *viz.* that claims that diplomatic protection has been replaced are exaggerated. Finally, some concluding observations will be made (**Section 5**).

## **2. Diplomatic Protection in International Law**

### 2.1 State Responsibility: The Relationship with Diplomatic Protection

Any discussion relating to diplomatic protection is not complete without giving due regard to the law of state responsibility. It is the case that states are subjected to various obligations under international law, which naturally they must fulfil. However, international law recognises that when states do not fulfil these obligations, then the state will be held responsible for this failure.<sup>3</sup> This principle of international law is neatly encapsulated in the *Spanish Zone of Morocco* case whereby it was held: "responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation".<sup>4</sup> In that regard, international law recognises that where states do not uphold their obligations, there will be ramifications for that act or omission.

Regarding the law of state responsibility, a further distinction must be made between primary rules of state responsibility and secondary rules of state responsibility. The primary rules of state responsibility determine when an international obligation has been violated.<sup>5</sup> Only once it has been established that an internationally wrongful act has taken place, can diplomatic

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<sup>3</sup> J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP 2012), 540; H. Strydom *et al.*, *International Law* (Oxford: OUP 2016), 119.

<sup>4</sup> *Spanish Zones of Morocco Claims* (1925) 2 RIAA 615, 641.

<sup>5</sup> A detailed discussion of the primary rules of state responsibility lies outside the scope of this article. For further reading, see A. Abass, *International Law: Text, Cases and Materials* (Oxford: OUP 2012), 240-283.

protection be used to extract restitution for the wrongful act.<sup>6</sup> As such, only when there exists a breach of international law can diplomatic protection be used. Therefore, the secondary rules of state responsibility pertain to how to remedy the commission of an internationally wrongful act. Crawford neatly encapsulates this distinction by stating “[d]iplomatic protection, classically, is the mechanism by which a State might espouse a claim of one of its nationals in respect of an injury arising from a breach of an international obligation by another State”.<sup>7</sup> Diplomatic protection therefore serves as a means of enforcing state responsibility.<sup>8</sup>

At this juncture, two key features of diplomatic protection should be highlighted. Firstly, diplomatic protection is somewhat of an umbrella term as there is no one standard form that diplomatic protection may take. When a state exercises diplomatic protection, it may engage in mediation with another state, resort to international litigation, impose economic sanctions or abrogate diplomatic ties with the violating state.<sup>9</sup> Historically, it would have engaged in force with the other state for breaching international law, which led to the phenomenon known as ‘gunboat diplomacy’.<sup>10</sup>

The second noticeable feature of diplomatic protection is that it is a subsidiary remedy, and can only be used once the primary rules of state responsibility have established that an internationally wrongful act has taken place. Furthermore, there are certain conditions (which will be discussed *infra*) that must be fulfilled before a national can ask his or her state of nationality to exercise diplomatic protection, and therefore the subsidiary nature of diplomatic protection is explicated on the fact that those conditions must be fulfilled.

## **2.2 Diplomatic Protection: Development and Definition**

### 2.2.1 Development

In comparison to other facets of international law, diplomatic protection is a comparatively recent legal development.<sup>11</sup> The theoretical foundations of diplomatic protection were laid down by a Swiss Jurist – Emer de Vattel – who is credited with establishing the doctrinal foundations of diplomatic protection. In his seminal treatise of 1586 – *The Law of Nations, or the Principles of Natural Law* – Vattel theorised that the state lived vicariously through its nationals; therefore, harming a national was tantamount to harming the state itself. In his own words, Vattel opined:

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<sup>6</sup> C. Amerasinghe, *Diplomatic Protection* (Oxford: OUP 2008), 37; H. Strydom et al., *International Law*, 119.

<sup>7</sup> J. Crawford, ‘State Responsibility’, in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Online edition, 2006), 59.

<sup>8</sup> A. Abass, *International Law: Text, Cases and Materials*, 288 *et seq.*

<sup>9</sup> John Dugard, ‘First Report on Diplomatic Protection’, [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_506.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf), 217.

<sup>10</sup> It should be noted that the use of force in international law is, generally, proscribed. *See for example*, Article 2(4) of the United Nations Charter which stipulates, “[a]ll members shall refrain in their international relations from the threat or use of force against the territory or political independence of any state, or in any other manner inconsistent with the Purposes of the Charter”. For a good historical overview of ‘gunboat diplomacy’, *see* B. McBeth, *Gunboats, Corruption and Claims: Foreign Intervention in Venezuela, 1899-1908* (Westport: Greenwood Press 2001).

<sup>11</sup> C. Amerasinghe, *Diplomatic Protection*, 8.

[w]hoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is safety.<sup>12</sup>

It is important to remember the time-period in which Vattel was writing, and to note that there are several critiques which can be derived from Vattel's works.<sup>13</sup> Notwithstanding these critiques, however, the theoretical construct laid down by Vattel remains the same today. It is the case that the state has the ultimate right to determine whether it wishes to exercise diplomatic protection, and has rather broad discretion in choosing whether to do so.<sup>14</sup> Therefore speaking of an individual right to diplomatic protection is somewhat of a misnomer, and something which has never been recognised in international law.<sup>15</sup>

The use of diplomatic protection to protect citizens' interests has not always been universally accepted. During the 19<sup>th</sup> century, following the expansion of international trade, diplomatic protection was frequently used to protect nationals when they were abroad. In Latin America, in particular, there was a wealth of untapped natural resources which were very much in demand in Europe and North America and as a such there was a surge in trade in this area which meant that many Europeans travelled to Latin America to maximise their wealth and to seek new business opportunities. However, many states in Latin America had recently gained their independence and the political situation in many Latin American states was somewhat tumultuous, meaning that injuries to 'aliens' took place on a regular basis. Latin American countries recently gained their independence in the 19<sup>th</sup> century, and possessed a wealth of natural resources and commodities that were coveted by Western powers. Unable to exploit the economic benefits of these resources, the Latin American countries were dependent on foreign investment and migration to realise these resources. The economic and political conditions in these countries were anything but stable, meaning that the alien workforce regularly appealed to their state of nationality to intervene diplomatically on their behalf.<sup>16</sup> These countries, fearful of what they believed was a form of imperialism carried out by the perceived Western powers, wished to curtail the use of diplomatic protection in order to vindicate their sovereignty and

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<sup>12</sup> E. Vattel, *The Law of Nations, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Illinois: Liberty Fund, 2008), §71.

<sup>13</sup> *Inter alia*, F. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore: John Hopkins Press 1932), 52. Dunn remarked: "... [Vattel's] personification of the state as an organic unit made up of the sovereign and his subjects (from which he derived his thesis that an injury to a citizen is an injury to the state) undoubtedly served a useful purpose in the juristic evolution of the modern state, but it is not easy to apply to the modern world of extensive international trade and intercourse, and easy and frequent changes of allegiance". See also A. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection', 18 *EJIL* (2007) 39-40.

<sup>14</sup> *Barcelona Traction, Light and Power Company Limited*, Second Phase, Judgment, ICJ Reports 1970. "Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting (...) the State must be viewed as the sole judge to decide whether its protection will be granted."

<sup>15</sup> *Mavrommatis Palestine Concessions*, Judgment No 2, 1924, PCIJ, Series A, No 2, "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State (...). By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, its right to ensure, in the person of its subjects, respect for the rules of international law."

<sup>16</sup> D. Shea, *The Calvo Clause* (Minneapolis: University of Minnesota Press 1955), 12. Shea notes that the evidence provided to the state of nationality was not often convincing, and that because of domestic political pressures, the states often exercised diplomatic protection notwithstanding the fact that the evidence of an injury was dubious.

they developed a doctrinal framework to counter the perceived abuses of diplomatic protection.<sup>17</sup>

This use of diplomatic protection was seen as being used to exploit weaker countries, and therefore the use of diplomatic protection was somewhat of a bone of contention for these Latin American states who often resented the use of diplomatic protection.<sup>18</sup> One Argentinean diplomat – Carlos Calvo - wrote extensively on his opposition to the use of diplomatic protection, espousing that there should be equality between sovereign nations. According to Calvo, foreigners should have no greater rights than nationals, and thereby the use of diplomatic protection should be curtailed. In the event of any dispute, Calvo argued that the local courts and tribunals should be competent to decide the outcome of the dispute, and not through diplomatic protection.<sup>19</sup>

Calvo's ideas, however, have never been fully embraced by the international community.<sup>20</sup> One of the main reasons behind this was because its logic ran contrary to established international law at the time, in that it meant that states were not permitted to establish claims on behalf of their nationals. And according to the view of Smith, Calvo's reasoning was illogical since it could lead to a situation whereby if one state deprived all of its citizens of their rights, then it would be able to do this for non-nationals as well, which would clearly be unacceptable.<sup>21</sup> Instead, what was favoured by the international community was the advancement of an 'international minimum standard' according to which there is a minimum standard of treatment which states have to afford to all non-nationals, which applies irrespective of the treatment rendered to nationals.<sup>22</sup>

### 2.2.2 Definition and Conditions

In defining what is meant by diplomatic protection, this article will adopt the definition contained in the Draft Articles of Diplomatic Protection,<sup>23</sup> which eruditely extrapolates the features of diplomatic protection according to the view of the international community. Article 1 of the Draft Articles of Diplomatic Protection stipulates:

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

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<sup>17</sup> For a fuller and historical, understanding of the use of diplomatic protection in Latin America, *see ibid.*, 9-11, 14 "Not surprisingly, the Latin American republics saw in these 'imperialistic encroachments' an enemy to be greatly feared". C. Amerasinghe, *Diplomatic Protection*, 21 – 'Inevitably diplomatic protection of this kind came to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the lawful rights of aliens'.

<sup>18</sup> Shea notes that the Latin American countries were particularly opposed to the use of diplomatic protection because they viewed the use of diplomatic protection as a form of 'economic imperialism'. *See further ibid.*, 13.

<sup>19</sup> C. Calvo, *Le Droit International: Théorique et Pratique Volume I* (Paris: Tome Premier 1896), 350.

<sup>20</sup> For a good discussion of the effect of the Calvo Clause, please consult: W. Shan, 'Is Calvo Dead?', 55 *AJCL* (2007), 123-165.

<sup>21</sup> R. Smith, *Textbook on International Human Rights* (Oxford: OUP 2003), 9.

<sup>22</sup> *ibid.*, 9-10.

<sup>23</sup> Draft Articles on Diplomatic Protection (2006), *Official Records of the General Assembly, Sixty-First Session, Supplement No 10* (A/61/10).

natural or legal person that is a national of the former State with a view to the implementation of such responsibility.<sup>24</sup>

This definition of diplomatic protection affirms its subsidiary nature, since from the reading of this definition it follows that the use of diplomatic protection is contingent on the finding of an internationally wrongful act (a reference to the primary rules of state responsibility). This definition is also comprehensive in that it also leaves open the means that diplomatic protection may take; while the definition lists “*diplomatic action or other means of peaceful settlement*” as a means of diplomatic protection, it is silent on what form this may take; therefore, this definition is open enough to cover all other forms of diplomatic protection which may include mediation,<sup>25</sup> arbitration,<sup>26</sup> international litigation,<sup>27</sup> economic sanctions etc. As a result, this definition neatly encapsulates the *raison d’être* of diplomatic protection and therefore will be the definition of diplomatic protection adopted in this article.

In addition, the subsidiary nature of diplomatic protection is also inherent from the fact that certain conditions must be fulfilled before a state can have recourse to diplomatic protection. These particular conditions have been formed as a result of previous diplomatic protection claims, particularly from the case law of the International Court of Justice (and its predecessor, the Permanent Court of International Justice).<sup>28</sup> These conditions have been codified in the Draft Articles on Diplomatic Protection, which have been developed and created by the work of the International Law Commission, and which reflect the views of the international community on how diplomatic protection should be exercised.<sup>29</sup>

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<sup>24</sup> Note, that although diplomatic protection covers the protection of legal persons, this contribution eschews an analysis of the diplomatic protection of legal persons, and instead focuses on the diplomatic protection of natural persons.

<sup>25</sup> Mediation in this sense refers to a dispute that is resolved by bringing the parties together before a third party, and trying to ensure that a mutually agreeable solution can be found. It should be furthermore noted that mediation in international dispute settlement does not refer to one particular procedure, but the mediation may take place in different formats. By way of contrast to inter-state negotiation, mediators carry out their work proactively, and will present proposals and information to states on how best to solve their dispute. There is no obligation to accept the mediator’s proposals, but may assist states that are unable to negotiate a dispute on their own. Mediating disputes is present, for example, within the International Committee of the Red Cross and regularly carried out through various branches of the United Nations. For a more holistic and in-depth analysis of international mediation, please consult: J. Merrills, *International Dispute Settlement* (Cambridge: CUP 2011), 26-40.

<sup>26</sup> By way of contrast to negotiation and mediation – which can be regarded as diplomatic means of resolving disputes – arbitration, is a legally binding way of resolving disputes whereby a particular conflict is brought before an independent third party whom then renders a binding resolution either in favour or against a state party. Arbitration is characterised by the fact that it usually involves the creation of an *ad hoc* tribunal which is designed specifically to deal with a particular dispute; it is thereby the case that arbitration is created *inter partes* between states, and disputes are not submitted to a permanent body such as the International Court of Justice. Examples of such arbitration committees/commissions include, *inter alia*, the American-Mexican Claims Commission and the system of arbitration set up under the auspices of Article V of the Jay Treaty (1795). See further, C. Brower II, ‘Arbitration’, in R. Wolfrum (ed.), *the Max Planck Encyclopedia of Public International Law* (Online Edition, 2006).

<sup>27</sup> Here, international litigation refers to the process of referring a dispute to a permanent international court or tribunal. The primary example of this (in the context of diplomatic protection) is the International Court of Justice.

<sup>28</sup> K. Parlett, ‘Diplomatic Protection and the International Court of Justice’, in C. Tams, J. Sloan, *The Development of International Law by the International Court of Justice* (Oxford: OUP 2013).

<sup>29</sup> Draft Articles on Diplomatic Protection with Commentaries (2006), *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*. The Draft Articles on Diplomatic Protection were adopted in May 2006 and reflect the international law in the area of diplomatic protection. For a fuller history the rationale behind these articles and the adoption process, refer to, A. Pellet, ‘The Second Death of Euripide Mavrommatis?’

There are three cumulative conditions which must be fulfilled before a state will consider exercising diplomatic protection. Firstly, there must be an injury to an individual; secondly, the individual must possess the nationality of the state who is exercising diplomatic protection<sup>30</sup> and thirdly, the individual must have exhausted all local remedies before seeking diplomatic protection.<sup>31</sup>

While it is the case that these conditions must be fulfilled, it should also be remembered that exercising diplomatic protection is inherently discretionary, and therefore a state may still decide not to exercise diplomatic protection even if these conditions are fulfilled. This is defensible on the basis that in choosing to exercise diplomatic protection a state will naturally engage some political considerations:<sup>32</sup> for example, exercising diplomatic protection may cause a diplomatic rift between two countries and therefore many countries will eschew using diplomatic protection to ensure diplomatic comity between nations. As correctly explained by Borchard:

in the first place, reparation is demanded only for such injuries as the state in its discretion deems a justification for diplomatic protection. Factors which enter into consideration in determining the state's interposition are the seriousness of the offence, the indignity to the nation, and the political expediency of regarding the private injury as a public wrong to be repaired by national action – in short, the interests of the people as a whole against those of the citizen receive first consideration before state action is initiated.<sup>33</sup>

### **3. The Protection of Nationals Abroad Through Human Rights?**

The previous sections have shown how diplomatic protection has developed, and how it is exercised. It is clear, however, that much of the development of diplomatic protection took place in the 19<sup>th</sup> Century, at a time when ideas and theories of human rights were not as advanced as they are now. At that time, the individual had very little rights under international

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Notes on the International Law Commission's Draft Articles on Diplomatic Protection', *LP ICT* (2008), 33-58; M. Zieck, 'Codification on the Law of Diplomatic Protection: The First Eight Draft Articles', *LJIL* (2001), 209-232.

<sup>30</sup> *Panevezys-Saldutiskis Railway* (Estonia v Lithuania) [1939] PCIJ (Ser A/B), No 76, 16 "In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection". See also the famous 'Nottebohm' case: *Nottebohm Case (Liechtenstein v Guatemala)*, Second Phase Judgment, ICJ Reports 1955. In terms of the Draft Articles on Diplomatic Protection, the nationality rules pertaining to the exercise of diplomatic protection are contained in Articles 4-8 of the Draft Articles on Diplomatic Protection.

<sup>31</sup> This condition does not need to be fulfilled where it would be futile to exhaust local remedies for example due to systemic corruption in the judiciary or where there is no justice to exhaust. See further, Malcolm Shaw, *International Law* (Cambridge: CUP 2008), 820; *Greece v United Kingdom (Ambatielos)* (1956) 12 RIAA 83, 119, "[t]he ineffectiveness of local remedies may result clearly from the municipal law itself. That is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance of matters of fact, and when, failing such reconsideration, no redress can be obtained. In such as case there is no doubt that local remedies are ineffective". This has been codified in Article 14 of the Draft Articles on Diplomatic Protection, exceptions to the 'local remedies rule' are contained in Article 15 of the Draft Articles on Diplomatic Protection.

<sup>32</sup> E. Borchard, *Diplomatic Protection of Nationals Abroad* (New York: The Banks Law Publishing Company 1915), 351 *et seq.*

<sup>33</sup> *ibid.*



law, if any, and therefore diplomatic protection was perhaps the only means of extracting any redress for any internationally wrongful acts and subsequent injury that occurred when nationals were abroad.<sup>34</sup>

A lot has changed since the 19<sup>th</sup> century, and since the end of World War II, the existence and recognition of human rights has the potential to alter the paradigm of diplomatic protection and consequently the protection of nationals abroad. It has often been argued that since individuals can now rely on human rights to espouse their claims, there is no need for the state of nationality to intervene. Almost all states are party to some international or regional human rights convention, whether this is the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the Inter-American Convention on Human Rights (IACHR) or the African Charter on Human and Peoples' Rights. Considering the increased attention paid to human rights, the argument goes that diplomatic protection is now somewhat otiose as a means of protecting nationals when they are abroad. What reasons therefore, are put forth supporting the claim that human rights have replaced the need for diplomatic protection? And are these claims correct?

Firstly, the requirement of nationality is not seen as a prerequisite for enforcing human rights, which in turn gives it an added advantage over resorting to diplomatic protection. According to human rights theories, the possession and enforcement of human rights is not contingent on possessing one particular nationality, or in some cases any nationality (i.e., for the protection of stateless persons), but rather are possessed and enforced simply by being a human being.<sup>35</sup> Human rights are often said to be 'universal', and frequently reinforce the idea of 'equality'. What is meant by this is that human rights apply to every person, regardless of race, gender, religion or nationality.

Taking the ECHR as an example, based on the case law of the European Court of Human Rights (ECtHR), it has been affirmed that the ECHR is not so concerned with the issue of nationality when it comes to the protection afforded by the ECHR. In the case of *Ireland v. The United Kingdom*<sup>36</sup> it was held that:

[u]nlike international treaties of the classic kind, the convention comprises more than mere reciprocal arrangements between contracting states. It creates, over and above a network of mutual, bilateral undertakings, objective obligations, which in the words of the Preamble, benefit from a "collective enforcement".<sup>37</sup>

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<sup>34</sup> J. Dugard, First Report on Diplomatic Protection by the Special Rapporteur, 52nd session of the ILC (2000), 212.

<sup>35</sup> R. Smith, *Textbook of International Human Rights*, 5-8.

<sup>36</sup> *The Republic of Ireland v The United Kingdom* (1978) EHRR 25.

<sup>37</sup> *ibid.*, para. 239. Similar observations can be made in respect of the International Court of Justice's reservations to the Genocide Convention, whereby it pronounced the idea that a Convention, such as the Genocide Convention, goes beyond states and encompasses the protection of all individuals, regardless of their nationality: 'The [Genocide] convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality'. For the full opinion, see ICJ Advisory Opinion: *Reservations to the Genocide Convention*, 1951 ICJ 15.

The lack of importance attached to nationality in the human rights framework, it would seem as if utilising human rights instead of invoking diplomatic protection would be more attractive.

Based on this reasoning, every person is entitled to human rights, and the universal character of human rights secure that they are applicable regardless of time and place. Therefore, the requirement of nationality which is required before a state can exercise diplomatic protection does not feature in the human rights discourse and therefore enforcing one's human rights may be seen as a more attractive means of ascertaining protection when abroad, rather than relying on an inherently discretionary and nationality-centric procedure like diplomatic protection.<sup>38</sup> This development, coupled with the fact that there has been a proliferation in international human rights courts and tribunals, may suggest that diplomatic protection has now been made redundant.<sup>39</sup>

Another argument which supports the view that human rights law has replaced the need for diplomatic protection is that the individual now has 'standing' in international law. International law, particularly public international law, it is argued, is applicable only to states and therefore individuals do not have any rights under public international law.<sup>40</sup> Some scholars argue, however, that this is no longer the case in light of developments in international human rights law, since individuals can have recourse to international human rights law to enforce their rights when they are abroad, and therefore not have to rely on diplomatic protection to protect their rights and ascertain remedies.<sup>41</sup> However, this argument has been criticised by John Dugard, the UN's Special Rapporteur for diplomatic protection, who argues that the individual is merely a 'participant' in international law, and that even if individuals can rely on international human rights law to pursue their claims, difficulties often arise at the remedial stage which make this particular option unattractive.<sup>42</sup>

However, this particular narrative should be carefully analysed, and it should be asked whether this is truly the case. The following sections will highlight the shortcomings in human rights systems and argue that there is still a need for diplomatic protection, and therefore the claims that diplomatic protection is now obsolete will be rejected. The reasons for this will be set out

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<sup>38</sup> However, it should be noted that the Draft Articles on Diplomatic Protection make explicit reference to the diplomatic protection of non-nationals, that is for refugees and stateless persons. See to this effect, Article 8 of the Draft Articles on Diplomatic Protection. This provision reflects international law's attitude to the treatment of stateless persons, in accordance with the Convention on the Reduction of Statelessness 1961, United Nations Treaty Series, vol. 989, p. 678.

<sup>39</sup> Vasileios Pergantis, 'Towards a "Humanization" of Diplomatic Protection', 66 *ZaöRV* (2006), 352 – "[t]he robust development of human rights law, which confers directly rights to the individual, the subsequent proliferation of dispute settlement mechanisms granting an eminent role to the injured individual and the multiplication of international judicial fora directly accessible by him/her, have called into question the usefulness and adequacy of diplomatic protection in the framework of the (human rights) protection of nationals abroad, precisely because of its State-centred character".

<sup>40</sup> See, for example, G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (London: Stevens & Sons 1957), 139-146. This traditional view may now be regarded as somewhat of an anachronism. Dugard suggests that this conceptualisation is somewhat misleading. In his First Report on Diplomatic Protection, Dugard argues that debates surrounding whether the individual is a subject or an object of international law are rather otiose. Dugard insists that it may be better to conceptualise the individual as a participant in the international legal order. This contemporary polemic is also well-documented by Rosalyn Higgins. See, R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: OUP 1994), 45.

<sup>41</sup> L. Condorelli, 'La protection diplomatique et l'évolution de son domaine d'application', *RDI* (2003), 5-26.

<sup>42</sup> J. Dugard, First Report on Diplomatic Protection, 213.

in the following sections, and will focus on human rights' weaknesses in enforcement and remedies respectively.

#### **4. Human Rights Law and Diplomatic Protection: Enforcement and Remedial Perspectives**

##### 4.1 Weaknesses in the enforcement of human rights law

One of the main reasons why claims that diplomatic protection is obsolete are exaggerated is because human rights are often portrayed as being the 'silver bullet' for reducing and eliminating violations of human rights. While it cannot be denied that that human rights pursue noble goals, and that every society should endeavour to uphold the principles that human rights espouse (right to life, freedom from torture, free speech etc.), it is the case that in many international and regional human rights regimes, the human rights form mere aspirational and interpretative principles which states *should* follow; however, these human rights instruments are not necessarily accompanied with the necessary enforcement machinery, which therefore hinders their enforcement in practice. For nationals abroad, this presents a very real problem.

One of the very real problems in this area is the lack of any binding judicial mechanisms to enforce the human rights that individuals receive from international human rights treaties, at least outside of Europe. Even in the sophisticated human rights frameworks which do have binding rulings – such as the ECHR and the corresponding enforcement by the European Court of Human Rights (ECtHR) – it is the case that, however favourable a ruling an applicant may obtain, it must be recognised and acknowledged by the respondent state, which may ultimately decide not to act.<sup>43</sup> Simply put, even the finding of a human rights violations by a specialised court or tribunal does not necessarily mean that change will take place as a result.

In any case, many human rights systems rely on self-regulation and the use of 'naming and shaming' reports, and hope that by attributing a violation of human rights to a state, it will coerce states into changing their behaviour, but such measures are not endowed with any binding force. For example, under the African Charter of Human Rights, the African Commission on Human Rights is tasked with reporting and issuing non-binding resolutions on human rights violations, in addition to the African Commission on Human Rights, an African Court of Human Rights was established in order to deal with the interpretation and alleged violations of the African Charter.<sup>44</sup> However, in a report by the European Parliament it was noted that there were several structural difficulties in the reporting mechanism, in that certain states who are party to the Convention were not submitting the necessary documents to the Commission.<sup>45</sup> This may explain why diplomatic protection has been favoured in recent years

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<sup>43</sup> R. Smith, *Textbook on International Human Rights*, 146-147; 163.

<sup>44</sup> Article 45 of the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

<sup>45</sup> For the full report, see European Parliament, 'Human Rights Protection Mechanisms in Africa: Strong Potential, Weak Capacity' (*Directorate General for External Policies*, February 2013) <[http://www.europarl.europa.eu/RegData/etudes/briefing\\_note/join/2013/491487/EXPO-DROI\\_SP\(2013\)491487\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP(2013)491487_EN.pdf)> accessed 12 April 2017, 5-6.

in Africa,<sup>46</sup> as recent cases before the International Court of Justice demonstrate, instead of reliance on the human rights infrastructure. While the use of ‘naming and shaming’ reports can be defensible on the basis that it constitutes a less interfering process, ultimately the lack of any binding measures means that reliance on human rights instead of diplomatic protection is a somewhat unattractive process which may not be effective for the protection of nationals abroad.

Temporal limitations must also be taken into account. It is often the case that international human rights tribunals are inundated with applications for alleged human rights violations. This is perhaps most salient in relation to the ECtHR, which is (perhaps infamously) known for its backlog of cases.<sup>47</sup> It is often stated that ‘justice delayed is justice denied’ and this adage is particularly appropriate as the ECtHR struggles to clear its ever-increasing case load, with ill-effects for individuals currently petitioning the court,<sup>48</sup> which in turn means that well-founded allegation of human rights abuses may be going undiscovered. Again, this further strengthens the argument that human rights law has not replaced the institution of diplomatic protection, but rather acts as a complementary means of ensuring the protection of nationals abroad.

## **5. Remedial Perspectives: Co-Existence between Human Rights and Diplomatic Protection?**

Even if an individual successfully convinces a human rights court that their human rights have been violated, this may be regarded as somewhat of a Pyrrhic victory considering the weaknesses in remedies that are redolent of human rights litigation. In many legal systems, it is generally accepted that where there is a right, there is a remedy – *ubi jus ibi remedium*. And that the purpose of any remedy, where possible, is to try and restore that individual to the position they were in before the violation took place – *restitution in integrum*.<sup>49</sup> As Bekker points out however, violations of ‘private’ wrongs and ‘public’ wrongs differ, because the state is the entity which is constitutionally tasked with upholding human rights, and therefore a

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<sup>46</sup> See to this effect: *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Case 103, Judgment, 30 November 2010. And commentary: S. Ghandi, ‘Human Rights and the International Court of Justice: The *Ahmadou Sadio Diallo* Case’, 11 HRLR (2011), 527-555.

<sup>47</sup> In 2011, the ECtHR had a backlog of 160,000 cases (September 2011).

<sup>48</sup> M. Dembour, ‘Migrants avoidance of the European Court of Human Rights concerns us all’ (*Strasbourg Observers*, 10 February 2016) <<https://strasbourgobservers.com/2016/02/10/migrants-avoidance-of-the-european-court-of-human-rights-concerns-us-all/>> accessed 28 March 2017.

<sup>49</sup> The idea of *restitution in integrum* has been discussed before various international tribunals. The duty to ensure reparation was famously discussed in *Chorzów Factory* (Jurisdiction), P.C.I.J ser. A, No. 9 (1927). Here, the PCIJ stated at para. 29, ‘it is a principle of international law that the breach of an engagement involves an obligation to make reparation in *an adequate form*’ (emphasis added). The PCIJ further continued this, in *Chorzów Factory* (Indemnity)(Merits), P.C.I.J ser. A, No. 17 (1928), para. 124, by stating, ‘reparation must, as far as possible, wipe-out all the consequences of the illegal act and *re-establish the situation which would, in all possibility, have existed if that act had not been committed*’ (emphasis added). For a more detailed discussion on the issue of reparation in international law, with further references, please consult: R. Wallace, O. Martin-Ortega, *International Law* (London: Sweet & Maxwell 2013), 208-210.

violation of a human right norm not only affects the individual, but the community as a whole.<sup>50</sup>

In terms of remedies, human rights courts can be said to offer two types of remedies when there is a finding of a human rights violation: monetary and non-monetary remedies. The monetary remedies are rather straightforward in that they entail the granting of compensation or reparation to an individual or group of individuals. The non-monetary remedies may be remedies such as declaratory relief, rehabilitation, guarantee of non-repetition etc.<sup>51</sup> At this point, the use of non-monetary remedies may be having little effect, but this is not always the case. It is not always easy to put an economic tag on the suffering of the individual and therefore non-monetary remedies may be used to ensure that such abuses of human rights do not take place again, and therefore can be regarded as ‘victim-centred’ as they allow individuals needs to be catered for.<sup>52</sup> Using the example of the Inter-American Convention on Human Rights, which frequently resorts to the use of non-monetary remedies, Antokowiak identifies that the use of such remedies is beneficial as it allows for experimentation and gives states time to determine how they will avoid future abuses taking place.<sup>53</sup> He further identifies that victims have a preferences for these kinds of remedies, and therefore receiving an apology and a promise that such a violation will never take place again fulfils a cathartic role which should not be underestimated.<sup>54</sup>

Returning to the link with diplomatic protection, it is the case that human rights may have the upper hand concerning the remedies that are available for individuals who successfully prove that their human rights have been violated. Regarding diplomatic protection, however, it is difficult to see what remedies have been afforded to individuals who have been offered diplomatic protection, since there is no accurate record of what kind of relief individuals have been granted, as diplomatic protection claims and remedies are not recorded in the same way as the judgment of a human rights court or tribunal. It is the case, however, that the remedial options that are available in diplomatic protection may influence the way in which states exercise diplomatic protection and as a result states may seek non-monetary remedies to redress the nationals that have been injured as a result of an internationally wrongful act.<sup>55</sup> Therefore, instead of responding to claims that human rights have replaced the need for diplomatic protection, it may be more appropriate to comment on the way in which human rights law and practice can influence diplomatic protection, and vice -versa.

In addition to this, there is also a debate surrounding who benefits from diplomatic protection when it is exercised: is it the individual or is it the state?<sup>56</sup> In this regard, it can be questioned

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<sup>50</sup> G. Bekker, ‘The African Commission on Human and Peoples’ Rights and Remedies for Human Rights Violations’, 13 *HRLR* (2013), 502.

<sup>51</sup> For more detailed analysis on the remedies available for human rights violations, refer to: D. Shelton, *Remedies in International Human Rights Law* (Oxford: OUP 2005), 269-289.

<sup>52</sup> T. Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’, 46 *CJTL* (2008), 387.

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*, 388.

<sup>55</sup> C. Amerasinghe, *Diplomatic Protection*, 330-332.

<sup>56</sup> The existence of human rights can be seen in this debate. As mentioned, it is unclear whether, when exercising diplomatic protection, a state is acting in its own right or for the interest of the individual. However, in Dugard’s 2006 report on diplomatic protection, he notes the distinction between primary and secondary rules of international

whether the state is acting in the interest of the victims when it is exercising diplomatic protection, or whether it is acting in its own, that is national, interest. This is corroborated by the fact, as has been mentioned before, that the state is always competent to decide when it should exercise diplomatic protection, and no individual right to diplomatic protection can be inferred from international law. Some states have included provisions in their constitutions to the effect that they will protect nationals when they are abroad.<sup>57</sup> This in turn has raised questions regarding the justiciability of diplomatic protection before national courts. So far, certain jurisdictions have dealt with claims from individuals who have averred that the state should be obliged to exercise diplomatic protection, and examples from these jurisdictions show that these claims have been framed in human rights language.<sup>58</sup> And furthermore, none of these claims have been successful, from which it can be inferred that when exercising diplomatic protection, the state may be acting in its own interest, and not in the interests of its nationals.

To give one example from the United Kingdom, the case of *Abbasi*<sup>59</sup> provides a good and interesting example of the fact that states may be acting in their own interests, which in turn means that diplomatic protection may not be as effective at protecting nationals when they are abroad. The facts of the case concerned Mr. Abbasi, a British citizen, who was captured by US forces in Afghanistan and transferred to Guantanamo Bay in Cuba, where he was held indefinitely without charge and without access to legal counsel or a court or tribunal. The violation of Mr Abbasi's human rights thus stemmed from his uncertain legal situation, as there was no evidence of Mr. Abbasi being mistreated, conditions in the camp being generally regarded as humane.<sup>60</sup> The proceedings in the case were brought by Mr. Abbasi's mother, who claimed that this treatment was contrary to the right to not be arbitrarily detained as Mr. Abbasi's legal situation was uncertain, and he was not given the opportunity to challenge the grounds for his detention. Considering this, it was argued before the English Court of Appeal

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law. In this regard, the primary rules are those such as the right not to be tortured or the right to have one's property respected, it is only when these primary rules are violated that a state is able to execute diplomatic protection. In respect of the primary rules, Dugard observes that these are certainly the rights of individuals and not of states, and since the diplomatic protection claim is contingent on some form of injury occurring to the individual, it follows therefore that when exercising diplomatic protection, states are in fact acting in the interests of the individual and not in their own state interest – thereby leading to a complementary relationship between human rights and diplomatic protection. See further, J. Dugard, 'Seventh Report on Diplomatic Protection', [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_567.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_567.pdf).

<sup>57</sup> See, *inter alia*, Article 14 of the Constitution of Portugal (*Constituição da República Portuguesa*); Article 42 of the Constitution of Spain (*Constitución Española*); Article 35 of the Constitution of Italy (*Costituzione della Repubblica Italiana*); Article 5 of the Constitution of Slovenia (*Ustava Republike Slovenije*); Article 36 of the Constitution of Poland (*Konstytucja Trzeciego Maja*); Article 1 of the Constitution of Mexico (*Constitución Política de los Estados Unidos Mexicanos*); Article 20A of the Constitution of Malta (*Kostituzzjoni Ta' Malta*); Article 7a of the Constitution of Slovakia (*Ústava Slovenskej republiky*); Article 13 of the Constitution of Lithuania (*Lietuvos Respublikos Konstitucija*); Article 98 of the Constitution of Latvia (*Satversme*); Article 10 of the Constitution of Croatia (*Ustav Republike Hrvatske*); Article 7 of the Constitution of Roumania (*Constituția României*) and Article 25 of the Constitution of Bulgaria (*Конституция на Република България*).

<sup>58</sup> Exigencies of space mean that a full discussion of case law from other jurisdiction cannot be undertaken. See for example, in South Africa, *Samuel Kaunda and Others v The President of the Republic of South Africa and Others*, [2004] ZACC 5; *Josias van Zyl and Others v The Government of the Republic of South Africa and Others* [2007] ZASCA 109. For Australia, see *Hicks v Ruddock*, [2007] F.C.A. 299.

<sup>59</sup> *R(Abbasi) v Secretary of State for Foreign Affairs*, [2002] EWCA Civ. 1598.

<sup>60</sup> *ibid.*, para. 5.

that the British Government was obliged to intervene in this situation to protect one of its nationals who was being subject to an internationally wrongful act.<sup>61</sup>

The Court of Appeal, however, despite being sympathetic to Mr. Abbasi's situation, and the fact that the treatment he was receiving was blatantly contrary to established human rights law,<sup>62</sup> ultimately held that this issue was not justiciable and therefore the English courts were not able to offer any remedy in this respect. The Court of Appeal ultimately held that

... [i]t is clear that there can be no direct remedy in this court. The United States Government is not before the court, and no order of this court would be binding upon it. Conversely, the United Kingdom Government, which, through the Secretaries of State is the respondent to these proceedings, has no direct responsibility for the detention. Nor is it suggested that it has any enforceable right, or even standing, before any domestic or international tribunal to represent the rights of the applicant, or compel access to a court.<sup>63</sup>

What the *Abbasi* case shows is, notwithstanding the lack of individual relief to Mr. Abbasi, the positive influence that human rights can have on diplomatic protection. As mentioned above, similar developments can be seen in other jurisdictions, whereby national courts have analysed whether human rights law can provide for a right to diplomatic protection, which has hitherto not been recognised by the international community. While none of these claims have yet, been successful, it is not inconceivable that such a claim will be upheld in the future. It is a case that national courts have begun to recognise and attach importance to human rights norms, thereby identifying the role that they can play in this ambit. What human rights has done, therefore, is to alter the traditional paradigm of diplomatic protection which may in the future limit the state's scope of discretion when choosing whether to exercise diplomatic protection.<sup>64</sup> Whereas courts would have previously declined jurisdiction with regards to these types of cases, what we are able to witness in more recent times is that courts are now willing to entertain these claims and to review them on their merits. It is therefore becoming clear that human rights are altering the paradigm of diplomatic protection, and one should therefore keep a close eye on future developments in this regard.

As this article has pointed out, the development of diplomatic protection is rooted in the fact that the state has the exclusive right to determine when it will exercise diplomatic protection, and therefore has full discretion to determine when it will intervene to protect its nationals. As it rightly pointed out by Vermeer-Künzli,

[i]t is submitted that the *Abbasi* decision clearly indicated that the right to diplomatic protection is not solely and exclusively conferred on the state and that the exercise of diplomatic protection is not at the absolute discretion of government officials but that it is subject to human rights standards and rules of legal certainty.<sup>65</sup>

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<sup>61</sup> The breach of international law in the *Abbasi* case was the right not to be arbitrarily detained, which is a so-called *jus cogens* norm and this argument was put forward by the lawyers in the *Abbasi* case. See, *Ibid.*, para. 28.

<sup>62</sup> *Ibid.*, para. 64 "(...) we do not find it possible to approach this claim for judicial review other than on the basis that *in apparent contravention* of fundamental principles recognised by both jurisdictions and international law, Mr Abbasi is at present arbitrarily detained in a legal 'black hole'".

<sup>63</sup> *Ibid.*, para. 67.

<sup>64</sup> Annemarieke Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75 *NJIL*, 280-281, 285.

<sup>65</sup> *ibid.*, 295-296.

In addition to this, Amerasinghe also notes that the use of ‘extraordinary’ remedies that have been seen in human rights litigation is something which could inform the law of diplomatic protection, and therefore he posits that there are lessons that diplomatic protection can learn from human rights law practice and litigation.<sup>66</sup>

This all points towards the conclusion that it is not proper to speak of human rights replacing diplomatic protection, but rather that we should focus on ways in which human rights and diplomatic protection can co-exist to the benefit of the protection of nationals abroad more holistically. This is arguably visible in the debates surrounding whether international organisations should be able to exercise diplomatic protection for flagrant human rights abuses – it is in this context that a combination of human rights and diplomatic protection can be seen.

The treatment of the Rohingya in Myanmar provides a good example of this debate. It is the case that the Rohingya constitute an ethnic Muslim population, primarily located in Myanmar, but have never been recognised as nationals of Myanmar due to the enactment of the Burmese nationality legislation, leaving them vulnerable to widespread mistreatment and discrimination.<sup>67</sup> As they are not nationals, they cannot ask their state of nationality to exercise diplomatic protection on their behalf for the mistreatment they have suffered, and it cannot be denied that the Rohingya have been subject to egregious violations of their human rights. Some scholars have therefore argued that international organisations, like the UN, should be able to step in and provide diplomatic protection for the Rohingya.<sup>68</sup> This is certainly something which challenges the traditional paradigm of diplomatic protection,<sup>69</sup> but it is easy to see how this kind of solution incorporates both human rights and diplomatic protection dimensions, and could be something that becomes a recurring practice in the future.

## **6. Concluding Observations**

It cannot be denied that the proliferation of human rights, which has its genesis in the post-WWII political climate, has affected the way in which diplomatic protection operates. This article set out to determine whether human rights has replaced the need for diplomatic protection, or whether these claims are somewhat exaggerated. To do this, this article looked at the perceived enforcement and remedial weaknesses within selected human rights regime, and at this point it is necessary to determine whether this is the case.

Diplomatic protection has existed in international law for centuries and is deeply entrenched in the law of state responsibility. It is characterised by the fact that it is a remedy which can only

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<sup>66</sup> C. Amerasinghe, *Diplomatic Protection*, 332.

<sup>67</sup> The reports recording the treatment of the Rohingya are voluminous, see *inter alia*, United Nations Human Rights Office of the High Commissioner, ‘Flash Report: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016’ (OHCHR, 3 February 2017) <<http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>> accessed 26 April 2017.

<sup>68</sup> F. Ahmed, ‘Diplomatic Protection for the stateless Rohingya’ (*Asia & The Pacific Policy Society*, 22 March 2017) <<https://www.policyforum.net/diplomatic-protection-for-the-stateless-rohingya/>> accessed 26 April 2017.

<sup>69</sup> The draft articles on diplomatic protection are at present only applicable to States. However, Article 8(1) concerns the diplomatic protection of stateless persons and therefore an amendment to this clause, as advocated by Ahmed, could assimilate the UN to a state thereby giving it the opportunity to exercise diplomatic protection. However, such a move is likely to be politically unpopular and unrealistic.



be exercised by the state and that individuals do not have a right to diplomatic protection. It is also regarded as a subsidiary remedy for the protection of nationals abroad – as individuals must fulfil the three cumulative criteria before they can ask their state of nationality to offer them protection. Individuals will therefore always be able to request diplomatic protection from their state of nationality, however, only those which have fulfilled the three aforementioned criteria are likely to have their claim taken up by their state of nationality.<sup>70</sup> However, doubt has been cast over the need for diplomatic protection in recent years, precisely because human rights law offers protection to individuals abroad, and is more effective at doing so.

However, these claims are somewhat exaggerated, and it cannot be denied that both human rights and diplomatic protection have their weaknesses. While the proliferation of human rights law must be seen as a positive development, there are certain weaknesses in human rights enforcement and remedies which mean that they do not fully eclipse the need for diplomatic protection. For example, as this article has shown, structural deficiencies in human rights regimes, and burgeoning case-loads mean that justice can be denied to those who have suffered human rights violations, which means only a small percentage of those who have suffered human rights violations actually receive any remedies for the violations. In addition, at the remedial stage, the use of non-monetary remedies may be seen somewhat as a Pyrrhic victory, although it can also be argued that there is some merit in the use of non-monetary remedies.

This is not to say that diplomatic protection is flawless. It too has its faults, namely rooted in the fact that it is an inherently discretionary remedy, and the state may not exercise diplomatic protection for political reasons – which again means that human rights violations go unnoticed or without any attention, which is clearly a regrettable situation.

Instead, therefore, of focusing on whether human rights have replaced the need for diplomatic protection, we should rather focus on the way in which these two institutions can work together for the benefit of nationals abroad. Perhaps what is required at this juncture is a reminder of the very reasons why states were keen to enact international human rights law. Following the atrocities that were witnessed during the Second World War, it was felt that an international framework was needed to ensure that no state could exculpate itself from liability when the most basic human freedoms have been violated.<sup>71</sup> It stands to reason therefore that any international human rights regime should seek to ensure that states are held accountable when an individual's human rights are violated. However, considering the enforcement and remedial weaknesses that this article has uncovered, it follows that international human rights regimes and their concomitant enforcement machinery cannot ensure that every violation of human rights is made salient. Therefore, it suffices to say that diplomatic protection has not been rendered otiose through the enactment of international human rights regimes. A combination of human rights and diplomatic protection can therefore work together to ensure an effective system that can protect nationals abroad, which in turn is suited for the 21<sup>st</sup> century, and the example of the Rohingya in Myanmar serves a good example of how diplomatic protection and

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<sup>70</sup> See, Section 2.2.2. *supra*.

<sup>71</sup> For a brief overview of the reasons why international rules were enacted, see P. Sands, *Lawless World* (London: Penguin Publishers 2006), Chapter 1 – 'International Law: A Short and Recent history'.

human rights can co-exist.<sup>72</sup> There is no reason to suggest why human rights and diplomatic protection cannot co-exist and protect the rights of nationals abroad.

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<sup>72</sup> See Section 4 *supra*.