
The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'

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Abstract

Covert, extrajudicial removals of suspected terrorists from Western countries to face interrogation in nations using torture are now a feature of the post-9/11 world. These 'extraordinary renditions' may transgress human rights obligations. They may also engage an often forgotten principle of international law: diplomatic protection of nationals. In the best documented rendition to date, the individual removed by the United States and tortured in Syria was a national, not only of the latter state, but also of another country, Canada. The question this article asks is whether international law stands in the way of countries like Canada extending diplomatic protection to their rendered dual nationals. The article concludes that old rules precluding protection in a contest between two states of nationality are no longer part of international law. For this and other reasons, dual nationality is not a legal bar to diplomatic protection of persons swept up in extraordinary renditions.

Introduction

In March 2005, Human Rights Watch told journalists assembled at a press conference on Capital Hill that sending persons 'to torture is the moral equivalent of engaging in torture directly'.¹ The organization was commenting on 'extraordinary rendition', a practice another human rights group has defined as 'the transfer of an individual, with involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subject to torture or cruel, inhuman, or degrading treatment'.² These removals to countries

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¹ Wendy Patten, US Advocacy Director, Human Rights Watch, 'Statement on U.S. Rendition Legislation', Remarks at Press Conference Held by Representative Ed Markey (10 Mar. 2005), available at <http://www.hrw.org/english/docs/2005/03/10/usint10294.htm>.

² Committee on International Human Rights of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'* (Oct. 2004), at 4.

practising torture constitute clear US government policy,³ and may also be the practice of certain other Western countries.⁴

Publicly, US officials deny that torture is the objective of renditions, pointing to the diplomatic ‘assurances’ the United States seeks from countries to which it removes individuals.⁵ Less publicly, US officials admit that the threat of torture motivates many renditions.⁶ Moreover, human rights organizations and other critics report that, following their removal, at least some rendered individuals have been tortured for intelligence in the ‘war on terror’.⁷

For these reasons, renditions do clear violence to fundamental human rights norms. They may also raise difficult questions surrounding an ancient and often forgotten principle of international law: diplomatic protection of nationals. Where one state renders to a second country an individual who is a national of a third nation, international law permits that third country to intervene, seeking relief for the rendered person. Diplomatic protection becomes more difficult, however, where the rendered individual is a *dual* national of both the state to which he or she was removed and the third country. For instance, in the best documented case of an individual rendered by the United States – that of Maher Arar – a national, not only of the state to which he was removed (Syria), but also of another country (Canada). The circumstances surrounding Arar’s case remain the subject of several lawsuits and an official Canadian government inquiry. It would appear, however, that Arar’s dual nationality made him particularly vulnerable to ill-treatment by partially hobbling (or discouraging) the Canadian government’s intervention on his behalf.

The question this article asks is whether international law truly stands in the way of countries like Canada extending diplomatic protection to their dual nationals swept up in renditions to torturing countries. Section 1 examines the factual backdrop to rendition, discussing the specifics of cases like that of Arar. Section 2 shifts the focus to an examination of diplomatic protection, highlighting its contours and prerequisites. To this end, it defines diplomatic protection in its broad, classical sense, focusing first on the extent to which international law permits both consular protection of nationals and also the ‘espousal of claims’ in international proceedings. Section 3 then examines the impact of dual nationality on diplomatic protection in the rendition context. Drawing on the specifics of the Arar case, it focuses on the extent to which one state of nationality – Canada – may extend diplomatic protection against

³ *Ibid.*; Stockman, ‘U.S. Sounds Alarm on Human Rights’, *Boston Globe*, 1 Mar. 2005, at A6 (quoting Acting Assistant Secretary of State for Democracy, Human Rights, and Labor, Michael Kozak, as saying that extraordinary rendition (with diplomatic assurances) ‘happens all the time’).

⁴ For an overview of rendition practices in several countries, see Human Rights Watch, *Still at Risk: Diplomatic Assurances no Safeguard Against Torture* (Apr. 2005).

⁵ Smith, ‘Gonzales Defends Transfer of Detainees’, *Washington Post*, 8 Mar. 2005, at A03 (‘Attorney General Alberto R. Gonzales yesterday defended the practice of “extraordinary rendition”, the process under which the United States sometimes transfers detainees in the war on terrorism to other nations where they may undergo harsh interrogation, trial or imprisonment’).

⁶ *Ibid.*, noting that ‘U.S. officials have privately described the threat of rendition as a powerful tool in prying loose information from suspects who fear torture by foreign countries’.

⁷ Human Rights Watch, *supra* note 4; Committee on International Human Rights *et al.*, *supra* note 2, at 9 ff.

both a third-party state – the United States – and the other nation of nationality – Syria. The article concludes that dual nationality is no bar to diplomatic protection in modern international law and no excuse for inaction where dual nationality citizens are removed to torture.

1 Extraordinary Rendition and the War on Terror

A Background

Rendition – covert removals without formal extradition or deportation – is not a new practice. The procedure was employed by US officials pre-9/11 to remove expeditiously persons wanted abroad for suspected involvement in terrorism.⁸ It is now conducted on a much vaster scale, and its focus has shifted from rendition to ‘justice’ to rendition to interrogation (often in circumstances where torture is likely).⁹ Some estimates suggest that 150 people have been rendered by the United States since 11 September 2001.¹⁰

News reports name several states – all of whom have been accused by the US State Department of employing torture¹¹ – as the countries to which individuals have been rendered. These nations include Egypt, Jordan, Morocco and Syria.¹² In the handful of extraordinary rendition cases documented to date, the individuals removed to each of these countries appear usually to have been that state’s nationals.¹³ However, in at least the Maher Arar matter, the rendered individual was also a dual national, domiciled in his second country of nationality – Canada – at the time he was removed to Syria. If renditions of persons living in North America or Europe continue, the Arar situation may turn out to be the norm.¹⁴ The details of his case are set out below and, except as noted, are drawn from the complaint filed in his ongoing lawsuit against the United States.¹⁵

⁸ *Ibid.*

⁹ *Ibid.* at 5.

¹⁰ Mayer, ‘Outsourcing Torture’, *The New Yorker*, 14 Feb. 2005, available at www.newyorker.com/fact/content/?050214fa_fact6 (citing research done for the NYU Law School and the New York City Bar Association report, *supra* note 2).

¹¹ US State Department, *Human Rights Country Reports* (2005) (under the headings ‘Morocco’, ‘Egypt’, ‘Jordan’, and ‘Syria’).

¹² Mayer, *supra* note 10.

¹³ See discussion in Committee on International Human Rights *et al.*, *supra* note 2, at 9 ff.

¹⁴ Indeed, in Sept. 2005 the new US ambassador to Canada reportedly refused to apologize for Mr Arar’s treatment and warned that other dual nationals might suffer the same fate: ‘[w]ill there be other deportations in the future? I’d be surprised if there’s not. . . . The United States made that decision (to deport Arar) based on the facts it had, in the best interests of the people of the United States, and we stand behind it’: Brown, ‘New U.S. ambassador offers no apologies for Arar’s treatment’, *Ottawa Citizen*, 19 Sept. 2005, at A2. Amnesty International has reported the rendition of a least one other dual-national: German–Syrian Muhammad Hayder Zammar, rendered from Morocco to Syria in Nov. 2001. See Amnesty International, ‘Syrian-born German held three years without charge in rat-infested Syrian “tomb”’, 8 Oct. 2004, AI INDEX: MDE 24/066/2004, available at [http://web.amnesty.org/library/pdf/MDE240662004ENGLISH/\\$File/MDE2406604.pdf](http://web.amnesty.org/library/pdf/MDE240662004ENGLISH/$File/MDE2406604.pdf) (last visited Sept. 2005).

¹⁵ *Arar Complaint* (US DC, EDNY No. 04-CV-0249-DGT-VVP), available at http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf (last visited May 2005).

B *The Arar Case*

Maher Arar is a 35-year-old Canadian citizen, living in Ottawa, Canada. At age 17, Arar emigrated from Syria, his country of birth. He remains a national of that country under Syrian law.

While on a family vacation in Tunisia in late September 2002, Arar received an e-mail from his employer – a high-tech consultancy company operating from Massachusetts – asking him to return to Ottawa. On 25 September, Arar flew to Zurich and then boarded a flight to Montreal, with a transfer stop at John F. Kennedy Airport, New York. Upon debarkment in the United States, Arar presented his valid Canadian passport to the US immigration inspector. He was immediately detained and was then interrogated by an assortment of US government officials for almost two weeks. American authorities – probably tipped off by suspicious Canadian officials – asserted in these interrogations that Arar had links to Al-Qaeda.

Several days into his detention, US authorities allegedly asked Arar to ‘volunteer’ to be sent to Syria. He refused, insisting that he instead be returned to Canada (his home) or Switzerland (the country from which he had arrived in the United States). Ultimately, on 1 October, the American immigration authorities found Arar ‘inadmissible’ to the United States by reason of his claimed Al-Qaeda ties.

That same day, Arar was finally permitted to make his first telephone call. He chose to contact family members. These relatives – people who had been frantically searching for Arar – contacted the Office for Canadian Consular Affairs, and retained a New York immigration attorney. Up to this point, Canadian consular officials had received no formal notification of Arar’s detention.

On 3 October, Arar was visited by an official from the Canadian Consulate in New York. He showed this official the immigration document declaring his inadmissibility to the United States and voiced concern that he might be removed to Syria. He was assured by the official that he could not be deported in this fashion, given his Canadian citizenship.

The next day, two US immigration officers visited Arar’s cell, asking that he designate in writing the country to which he wished to be removed. Arar formally selected Canada. Nevertheless, in the early morning hours of 8 October, Arar was allegedly taken in chains and shackles to a room where two US immigration officials told him he would be sent to Syria. Arar protested that he would be tortured, but the officers allegedly stated that the US immigration service was not governed by the ‘Geneva Convention’.

Arar was placed on a small private jet, and flown to Washington, D.C. From there, he was removed via a circuitous route to Amman, Jordan, again on board a private aircraft. The *New York Times* has since verified many of the specifics of the flight detailed by Arar.¹⁶ The Jordanians – acting apparently as transfer agents for the Americans – allegedly inflicted a beating and then turned Arar over to Syria. During his subsequent detention in Syria, Arar reports that he was subjected to physical and

¹⁶ Scott *et al.*, ‘Detainee’s Suit Gains Support From Jet’s Log’, *New York Times*, 30 Mar. 2005, at 1.

psychological torture. During intermittent interrogations, the questions posed to Arar by Syrian security officers were apparently similar to those asked Arar by FBI agents in New York.

On 21 October 2002, Syrian officials confirmed to the Canadian Embassy in Damascus that Arar was in their custody. United States officials, for their part, allegedly would not acknowledge to Canada that Arar had been removed to Syria.

Ultimately, after substantial controversy in Canada, Arar was released on 3 October 2003. Syria's highest-ranking diplomat in Washington explained that Syrian officials had sought to uncover a connection between Arar and Al-Qaeda, but could find no such affiliation. Syrian officials affirmed publicly that they 'could not substantiate any of the allegations against' Arar.¹⁷

The precise Canadian role in Arar's US detention, and his subsequent removal to and torture in Syria, remains unclear, and is the subject of a public inquiry in Canada. Some evidence has emerged at that inquiry suggesting complicity by Canadian officials in Arar's ill-treatment.¹⁸ Mr. Arar's case appears linked with that of several other Syrian-Canadians, detained in Syria at about the same time and likely tortured. Canadian rights groups have accused the Canadian government of 'sub-contracting' torture, in the hopes of extracting intelligence.¹⁹ Under these circumstances, questions arise as to whether Canada turned a blind eye, choosing to exercise only desultory diplomatic protection of Arar. This article cannot answer that question. Instead, the issue to which it now turns is a narrower, legal one: whether the country of dual nationality – in the Arar case, Canada – *may* legally exercise diplomatic protection of a dual nationality citizen enmeshed in a rendition to torture.

2 Diplomatic Protection of Aliens

International law permits states to protect their nationals. As early as 1758, Emmerich de Vattel claimed in his treatise, *The Law of Nations*, that 'whoever uses a citizen ill indirectly offends the State, which is bound to protect this citizen'.²⁰ A state's entitlement to exercise such protection is indisputable. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice held that 'a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels'.²¹ In extending such protection, reasoned the Court, a state was merely preserving its own rights; namely, 'its right to ensure, in the person of its subjects, respect for the rules of international law'.²² The protection

¹⁷ *Arar Complaint*, *supra* note 15, at para. 65. See also Shepard, 'Untangling Tale of Tortured Canadian', *Toronto Star*, 1 May 2004, at A01.

¹⁸ Sallot, 'Canada May Have Encouraged Syrian Torture, ex-Detainee Says', *Globe & Mail*, 22 Apr. 2005, at A13.

¹⁹ See Naumetz, 'Rights Groups Accuse Canada of "Sub-Contracting" Torture', *Ottawa Citizen*, 2 Sept. 2005, at A14.

²⁰ E. de Vattel, *Law of Nations* (1833), at 161.

²¹ [1924] PCIJ Rep, Ser. A, No. 2, at 12.

²² *Ibid.*

extended by states is sometimes referred to as ‘diplomatic protection’, a concept with several guises.

A Consular Access

First, ‘diplomatic protection’ has a very literal dimension. Article 3 of the Vienna Convention on Diplomatic Relations lists, as one of the functions of a diplomatic mission, ‘protecting in the receiving state the interests of the sending state and its nationals, within the limits permitted by international law.’²³ The Vienna Convention on Consular Relations asserts a similar role for consular officials.²⁴

More critically, the consular relations treaty also sets out the responsibilities of ‘receiving’ states in facilitating consular assistance of ‘sending’ state nationals. Thus, Article 36 provides that consular officials are ‘free to communicate with nationals of the sending State and to have access to them’. Nationals of the sending state have a reciprocal freedom to communicate with, and have access to, consular officers of the sending state. Moreover, upon request of that national, the receiving state must inform consular officials that a national is detained. In a provision at issue in two recent International Court of Justice cases,²⁵ the receiving state must inform ‘without delay’ the detained alien of his or her right to contact consular officials. In *Avena*, the International Court of Justice concluded that this obligation arises immediately upon receiving state officials learning (or suspecting) that the detained individual is a foreign national.²⁶ Once notified of the detention, consular officials then have a right to visit and converse with their national and arrange for his or her legal representation, unless refused by the national.²⁷

B Espousal of Claims

Second, ‘diplomatic protection’ has a broader meaning than simply consular access in foreign states. It includes ‘an international proceeding, constituting “an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties”.’²⁸ In keeping with this broad definition, the International Law Commission’s Special Rapporteur on diplomatic protection (ILC

²³ 500 UNTS 95 (1961).

²⁴ Vienna Convention on Consular Relations 1963, 596 UNTS 261, Art. 5.

²⁵ See *Avena and other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 128, 43 ILM (2004) 581 (31 Mar. 2004) (*‘Avena’*) and *LaGrand (Germany v. United States of America)* [2001] ICJ Rep 104, 40 ILM (2001) 1069 (27 June 2001).

²⁶ *Avena*, *supra* note 25, at para. 63.

²⁷ Vienna Convention on Consular Relations, *supra* note 24, Art. 36(1)(c).

²⁸ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (1915), at 354. See also Randelzhofer, ‘Nationality’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), iii, at 506 (‘A State’s right of diplomatic protection comprises two aspects: firstly, the helping and protecting of nationals abroad in the pursuance of their rights and other lawful activities by consular or diplomatic organs . . . ; secondly, the claiming of compensation from a State which has treated the nationals of the protecting State in a manner incompatible with international law’).

rapporteur) recently defined the concept as an ‘action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State’.²⁹

While the ILC rapporteur included many sorts of responses in his definition of ‘action’, a key component includes judicial or arbitral proceedings. Known as ‘espousal of claims’, diplomatic protection of this sort involves the state stepping into the shoes of the national whose rights have been violated to prosecute a complaint against the violating country.

C Prerequisites of Diplomatic Protection

Exactly when a state may exercise diplomatic protection – especially of the espousal of claims variant – is a key question. In practice, diplomatic protection is circumscribed by several prerequisites, each of which must be satisfied.

1 An International Wrong

First, and most obviously, for a claim to be espoused by a state there must be an international wrong, attributable to the injuring state.³⁰ Where the complaint is sparked by impeded consular access to a detained national, the wrong flows from the violation of a binding Vienna Convention obligation.

The list of infractions that might justify an espousal of claims is not, however, limited to consular violations. A claim may be sparked by other mistreatment at the hands of a state, so long as it rises to the level of an international delict.³¹ Exactly what sort of treatment constitutes an international wrong has been the source of some contention between the developing and developed world. In its rawest form, state protection of foreign nationals was, in the 19th century, the pretext for substantial gunboat diplomacy.³² As a consequence, some developing countries have set the

²⁹ J. Dugard, *First Report on Diplomatic Protection*, International Law Commission, 52nd Session, A/CN.4/506 (2000), at 11.

³⁰ See, e.g., International Law Commission, *Diplomatic Protection: Titles and Texts of Draft Articles adopted by the Drafting Committee*, A/CN.4/L.613/Rev.1, 7 June 2002 (Art. 1: ‘Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State’) (emphasis added), adopted by the ILC at its 2730th to 2732nd meetings, held from 5 to 7 June 2002.

³¹ See the 1927 resolution of the Institute of International Law on ‘International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners’: ‘[t]he State is responsible for injuries caused to foreigners by any action or omission contrary to its *international obligations*’ (emphasis added). Likewise, the Third Committee of the Hague Conference for the Codification of International Law in 1930 introduced a provision that read: ‘[i]nternational responsibility is incurred by a State if there is any failure on the part of its organs to carry out *the international obligations* of the State which causes damage to the person or property of a foreigner on the territory of the State’ (emphasis added). Both of these passages are reproduced in Dugard, *supra* note 29, at 11.

³² R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984), at 14–15. See also Dugard, *supra* note 29, at 5 (observing that ‘diplomatic protection has been greatly abused’ and citing its use as a pretext by the British in the Boer War and by the US in its interventions in Latin America, as recently as the invasion of Panama in 1989).

bar for treatment of aliens quite low, preferring a ‘national treatment’ standard: a state must treat a foreign national no worse than it treats its own nationals.³³

National treatment is, however, simply a non-discrimination principle. It sets no affirmative standards for state behaviour, leaving aliens open to abuse where states choose to treat their own citizens equally poorly. To allay these concerns, developed countries have grafted onto national treatment a ‘minimum treatment’ standard. Minimum treatment – setting a baseline below which state conduct must not fall – may reflect the current requirements of customary international law.³⁴

Exactly how poor a state’s behaviour must be to breach minimum treatment is somewhat uncertain. In classic international law, minimum treatment precludes a ‘denial of justice’. In the era prior to the emergence of modern human rights, ‘denial of justice’ had a broad meaning, and included any internationally cognizable injury befalling an alien.³⁵ It captured, for instance, due process violations in criminal

³³ See J. Currie, *Public International Law* (2001), at 311 (‘[i]n general, ‘western’ developed states have favoured the . . . minimum international standard approach. . . . In contrast, several developing states continue to advocate the national treatment standard as the correct approach to defining the basic level of treatment due to foreign nationals’). The most famous proponent of national treatment was the Argentine diplomat Calvo, who argued that aliens have only those rights and privileges extended to nationals, and that they must seek relief for any grievances in national courts. The so-called ‘Calvo Doctrine’ was influential in Latin America, but ‘never has received widespread support elsewhere, primarily because its drastic curtailment of the institution of diplomatic protection would leave aliens without even nominal procedural safeguards under the existing international order’. Lillich, ‘The Current Status of the Law of State Responsibility for Injuries to Aliens’, in R. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983), at 4.

³⁴ Vagts, ‘Minimum Standard’, in Bernhardt (ed.), *supra* note 28, iii, 408, 409 (‘[i]t is probable that an international tribunal would now conclude that aliens still have claims to a minimum standard of personal protection’); I. Brownlie, *Principles of Public International Law* (5th edn., 1998), at 527 (‘[a] majority of states represented at the Hague Codification Conference supported the international [minimum] standard, and this standard is probably affirmed in the Declaration of the United Nations General Assembly adopted in 1962 on Permanent Sovereignty over Natural Resources. The standard has also enjoyed the support of many tribunals and claims commissions’); J. Brierly, *The Law of Nations* (1963), at 279 (‘[f]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law’). See also *Case Concerning Certain German Interests in Polish Upper Silesia* [1926] PCIJ Rep, Ser. A, No. 7 (implicitly rejected the national treatment approach in recognizing ‘the existence of a common or generally accepted international law respecting the treatment of aliens . . . which is applicable to them despite municipal legislation’).

³⁵ I. Brownlie, *Principles of Public International Law* (4th edn., 1990), at 429 (noting that the expression ‘has been employed by claims tribunals so as to be coextensive with the general notion of responsibility for harm to aliens’); *Restatement 3rd of the Foreign Relations Law of the U.S.* (1987), at § 711, comment a (making a similar point). See also Brierly, *supra* note 34, at 286 (‘[t]he term “denial of justice” is sometimes loosely used to denote any international delinquency towards and alien for which a state is liable to make reparation . . . There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state . . . [including] corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it’).

proceedings,³⁶ arbitrary government use of force and constraints on liberties such as the freedoms of speech and religion, internal travel within a country, and the right to marry.³⁷ Many of these concepts are now covered by international human rights law, and their violation in relation to an alien presumably remains a justification for diplomatic protection. Given this evolution, 'denial of justice' has taken on a more intuitive meaning in modern parlance, and is now defined as an injury 'consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil'.³⁸

In addition to the 'denial of justice' requirements, there may also be a supplemental, more generic standard of conduct that must be met as part of minimum treatment. The case often cited as the classic decision on minimum treatment is *Neer v. Mexico*, a 1926 ruling of the US-Mexico Claims Tribunal.³⁹ In *Neer*, a US national was killed by Mexicans, provoking only a desultory investigation by the Mexican authorities. In discussing the merits of the claim provoked by this half-hearted response, the Tribunal observed that 'the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.⁴⁰

The *Neer* 'outrage' threshold is rather undemanding of states. Whether it remains the standard 80 years after it was decided is unclear. For instance, a rich, modern case law on minimum treatment has been developed by arbitration panels constituted under Chapter 11 of the North American Trade Agreement (NAFTA). Article 1105 of the NAFTA, entitled 'minimum standard of treatment' and governing investments, asserts that international law on such treatment requires 'fair and equitable treatment and full protection and security'.⁴¹ Notably, Article 1105 is intended simply to codify customary minimum treatment law, not to carve out new rules for NAFTA investors.⁴²

³⁶ See M. Shaw, *International Law* (5th edn., 2003), at 735 (denial of justice 'refers to improper administration of civil and criminal justice as regards an alien. It would include the failure to apprehend and prosecute those wrongfully causing injury to an alien').

³⁷ *Restatement*, *supra* note 35, at § 711, rep. note 2.

³⁸ *Ibid.* at comment a. See also Brownlie, *supra* note 35, at 429; Brierly, *supra* note 34, at 286 (denial of justice in its 'more proper sense is an injury involving the responsibility of the state committed by a court of justice'); Verosta, 'Denial of Justice', in Bernhardt (ed.), *supra* note 28 (1962), i, 1007 (describing denial of justice as 'any defect of justice which entails a violation of the international legal duties of States with respect to the judicial protection of aliens').

³⁹ (1926) 4 RIAA 60. *Neer* is cited as reflective of the customary minimum standard by, *inter alia*, Brownlie, *supra* note 35, at 525 and Shaw, *supra* note 36, at 734–735.

⁴⁰ *Neer*, *supra* note 39, at 61.

⁴¹ The text of the NAFTA is available at http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?CategoryID=42 (last visited May 2005).

⁴² In the words of the NAFTA countries, convening as the NAFTA Free Trade Commission, '[t]he concepts of "fair and equitable treatment" and "full protection and security" [in Art. 1105] do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'. NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 2001), available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> (last visited May 2005).

Yet, NAFTA arbitrators have found the minimum treatment guaranteed by Article 1105 to be more exacting than the standard set in the *Neer* case. Indeed, in *Mondev International v. United States*,⁴³ a NAFTA Chapter 11 panel rejected the proposition that the *Neer* ‘outrage’ standard reflected the modern measure of minimum treatment. In the Tribunal’s words, ‘[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.’⁴⁴

If the NAFTA adjudicators are correct – and customary international law is now more demanding than the *Neer* case suggests – minimum treatment arguably provides more protections than does human rights law. The latter restrains specific forms of ill-treatment without imposing a general obligation of fairness and equity in all contexts.

2 Exhaustion of Local Remedies

Second, in most instances before a state extends diplomatic protection, the harmed individual must exhaust all local remedies in the state said to have violated his or her rights.⁴⁵ There are, however, exceptions to this rule. First, international law does not require pursuit of futile local remedies.⁴⁶ The ILC’s draft articles on diplomatic protection exclude an exhaustion requirement where, *inter alia*, ‘[t]he local remedies provide no

⁴³ *Mondev*, Final Award, 11 Oct. 2002, available at <http://www.state.gov/documents/organization/14442.pdf> (last visited May 2005).

⁴⁴ *Ibid.*

⁴⁵ Art. 44 of the International Law Commission’s *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Adopted by the International Law Commission at its 53rd session (2001), notes, *inter alia*, that state responsibility will not exist if the ‘claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted’. The ILC *rapporteur* on diplomatic protection listed local exhaustion in his recent *Second Report on Diplomatic Protection*, specifying that a state ‘may not bring an international claim arising out of the injury to a national . . . before the injured national has . . . exhausted all available local remedies in the State alleged to be responsible for the injury’: J. Dugard, *Second Report on Diplomatic Protection*, International Law Commission, 53rd Session, A/CN.4/514, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited Feb. 2006). The ILC’s state responsibility commentaries invoke, as justification for this rule, the International Court of Justice’s decision in *Elettronica Sicula SpA (ELSI)* [1989] ICJ Rep 42. At para. 50, a chamber of the Court called the exhaustion rule ‘an important principle of customary international law’. See also *Interhandel Case* [1959] ICJ Rep 27, describing exhaustion of local remedies as ‘a well-established rule of customary international law’ and noting, in the specific context of diplomatic protection of aliens, that ‘the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system’.

⁴⁶ In *Elettronica*, *supra* note 45, at 46, para. 59, the ICJ concluded that ‘it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success’. The ILC’s state responsibility commentaries are even clearer: ‘there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal’: International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its 53rd session (2001), at 306–307, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Feb. 2006). See also Brierly, *supra* note 34, at 282 (the local remedies rule ‘does not mean that it is necessary for the individual to exhaust remedies which, though theoretically available, would be ineffective or insufficient to redress the injury of which he complains’).

reasonable possibility of effective redress' or '[t]here is undue delay in the remedial process which is attributable to the State alleged to be responsible'.⁴⁷

Second, the International Court of Justice has underscored that the exhaustion doctrine does not apply where the alleged infraction concerns Article 36 of the Vienna Convention on the Law of Consular Relations. A violation of that provision constitutes a breach of obligations owed other state parties, not simply of rights possessed by foreign nationals.⁴⁸ A state, in other words, is not obliged to rely on the courts of another state to defend the international obligations owed to it.

3 Link of Nationality

Last, it is generally said that diplomatic protection may only be exercised by the state whose nationality the harmed individual possesses.⁴⁹ A bond of nationality between the state extending protection and the individual claiming this protection is the *sine qua non* of traditional rules of diplomatic protections.⁵⁰ The ILC's newly adopted draft articles on diplomatic protection are emphatic on this point: "The State entitled to exercise diplomatic protection is the State of nationality."⁵¹ This nationality must exist at the time the complaint is brought and, with a few exceptions, at the time the injury was suffered.⁵²

These principles, however, leave open a key question: Who is a 'national' entitled to diplomatic protection? On this point, the ILC's draft articles on diplomatic protection simply specify: '[f]or the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law'.⁵³ This last passage – invoking consistency with international law – requires further explanation.

(a) Acquiring Nationality

International law says surprisingly little about nationality. In its 1923 *Nationality Decrees in Tunis and Morocco* decision, the Permanent Court of International Justice put

⁴⁷ International Law Commission, *Diplomatic Protection: Titles and Texts of the Draft Articles 8 [10], 9 [11] and 10 [14] adopted by the Drafting Committee*, A/CN.4/L.631, 15 May 2003, Art. 10[14], adopted by the ILC at its 2768th meeting, held on 5 June 2003.

⁴⁸ *Avena*, *supra* note 26, at para. 40.

⁴⁹ See C. Tiburcio, *The Human Rights of Aliens Under International and Comparative Law* (2001), at 37.

⁵⁰ See, e.g., *Panevezys-Saldutiskis Railway Case* [1939] PCIJ Rep. Ser.A/B, No. 76, at 16 ('[i]n the absence of 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').

⁵¹ International Law Commission, *Diplomatic Protection: Titles and Texts of Draft Articles adopted by the Drafting Committee*, A/CN.4/L.613/Rev.1, 7 June 2002, Art. 3[5]. For the full draft articles, see ILC, *Report of the International Law Commission—56th Session* (2004), Supplement No. 10, A/59/10, at 17. An allusion to this position is also found in the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 45. Art. 44 of these draft articles provides that state responsibility may not be invoked if, *inter alia*, '[t]he claim is not brought in accordance with any applicable rule relating to the nationality of claims'. In its commentary accompanying this provision, the ILC observes that 'the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable': ILC, *supra* note 46, at 305.

⁵² ILC, *Report*, *supra* note 51, at 18 (Art. 5).

⁵³ *Ibid.*, Art. 4.

it this way: ‘in the present state of international law, questions of nationality are . . . in principle within the reserved domain’.⁵⁴ This position is affirmed in Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention): ‘[i]t is for each State to determine under its own law who are its nationals’.⁵⁵ Still, there is an outer limit to the deference international law accords states in determining their own nationality rules. A state’s approach may be challenged ‘where there is insufficient connection between the State of nationality and the individual or where nationality has been improperly conferred’.⁵⁶

This international limit is reflected in the International Court of Justice’s famous *Nottebohm* case.⁵⁷ Nottebohm was a German national residing for several decades in Guatemala. Soon after the outbreak of the Second World War, he acquired the nationality of Liechtenstein, a country with which he had only the most peripheral of contacts. Thereafter, Guatemala persisted in treating Nottebohm as a German alien national, eventually prompting Nottebohm to seek diplomatic protection from Liechtenstein. The latter brought a case before the ICJ, where the key issue was the entitlement of Liechtenstein to pursue international remedies.

The Court underscored that nationality was a question for each sovereign state to settle under its own law.⁵⁸ Nevertheless, where a state purports to exercise diplomatic protection over its nationals, the question of nationality then becomes one of international law. Here, the question is whether a respondent state must recognize the applicant state’s purported extension of nationality to the person whose claim it now espouses.⁵⁹

Probing the meaning of the term, the Court characterized nationality as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’. It is, in the Court’s words, ‘the judicial expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than that of any other State’.⁶⁰ Absent this ‘genuine connection’, a state claiming diplomatic protection cannot insist on recognition of its claim.⁶¹

Accordingly, in *Nottebohm*, the Court was obligated to review the ‘nationality granted to Nottebohm by means of naturalization’ to determine

⁵⁴ [1923] PCIJ Rep, Ser. B, No. 4, at 24. See also discussion in B. Bauchot, *La protection diplomatique des individus en droit international* (2002), available at <http://194.167.255.17/telechargement/memoires/bauchotb02.pdf> (last visited 15 Dec. 2003).

⁵⁵ 179 LNTS 89 (1930), available at <http://www.austlii.edu.au/au/other/dfat/treaties/1938/4.html> (last visited May 2005).

⁵⁶ Dugard, *supra* note 29, at 35. The Hague Convention, Art. 1, itself notes that nationality decisions inconsistent with ‘international conventions, international custom and the principles of law generally recognized with regard to nationality’ need not be recognized.

⁵⁷ *Nottebohm* [1955] ICJ Rep 4.

⁵⁸ *Ibid.*, at 20.

⁵⁹ *Ibid.*, at 21–22.

⁶⁰ *Ibid.*, at 23.

⁶¹ *Ibid.*, at 23.

[w]hether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact judicial expression of a social fact of a connection which existed previously or came into existence thereafter.⁶²

In the end, Nottebohm's connections to Liechtenstein were so peripheral as to violate the genuine connection standard.⁶³ Liechtenstein's assertions of diplomatic protection, in these circumstances, were invalid.

Some observers interpret *Nottebohm* as obliging the existence of a genuine connection between a person and a state extending nationality to that person, even in instances where the person has only one nationality.⁶⁴ The strict application of this approach – sometimes called 'effective nationality' – in cases of diplomatic protection was criticized by the ILC rapporteur on diplomatic protection: in a world where 'there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire', strict application of the effective nationality concept would 'exclude literally millions of persons from the benefit of diplomatic protection',⁶⁵ thereby creating a class of unprotected persons.

The legitimacy of these fears depends, ultimately, on the international law standard for effective nationality being more exacting than *Nottebohm*'s facts suggest. In *Nottebohm*, international recognition was sought for a nationality where no genuine connection *ever* existed. The fear voiced by the ILC rapporteur arises only if international law also provides that a state may not exercise diplomatic protection in relation to a national who, at one point, had a genuine link, but that connection has eroded and become less than 'genuine' with time. Under this latter standard, a legitimate national is robbed of the diplomatic protection of their state if he or she takes up residence as an expatriate, cutting all ties with the protecting state and rendering his or her connection with that entity less 'genuine'. Such a rule – allowing a sort of 'dissipating' nationality – would render diplomatic protection a virtual nullity. The very purpose of diplomatic protection is to protect nationals abroad, sometimes in circumstances where their connections to the protecting state have become tenuous.

The United States-Italian Conciliation Commission rejected exactly this sort of 'dissipating' nationality approach in the *Flegenheimer Case*.⁶⁶ Flegenheimer was naturalized in the United States, but only resided briefly in that country. Subsequently, the

⁶² *Ibid.*, at 24.

⁶³ *Ibid.*, at 26.

⁶⁴ Dugard, *supra* note 29, at 37 ('[t]he *Nottebohm* case is seen as authority for the position that there should be an "effective" or "genuine link" between the individual and the State of nationality, not only in the case of dual or plural nationality (where such a requirement is generally accepted), but also where the national possesses only one nationality').

⁶⁵ *Ibid.*, at 41.

⁶⁶ Decision No. 182 of 20 Sept. 1958, 14 RIAA 327.

Nazi regime divested Flegenheimer of his original German citizenship, leaving US citizenship as his sole nationality. At issue was whether Flegenheimer was a US national for the purposes of compensation under the terms of the post-World War II peace treaty between the United States and Italy.

The Italian government urged that Flegenheimer not be considered a US national. For assorted treaty reasons, the Commission agreed. However, it rejected the Italian argument that even absent these treaties, Mr. Flegenheimer would lose on the basis of effective nationality. In the Commission's words, '... when a person is vested with only one nationality ... the theory of effective nationality cannot be applied without the risk of causing confusion ... [T]he persons by the thousands who, because of the facility of travel in the modern world, possess the positive legal nationality of a State, but live in foreign States where they are domiciled and where their family and business centre is located, would be exposed to non-recognition, at the international level, of [their] nationality'.⁶⁷

The *Flegenheimer* approach seems to view effective nationality, not as a 'standing' requirement that must co-exist at the time diplomatic protection is asserted by the protecting state, but as a means of determining whether a nationality was, at any juncture in the past, properly granted. It is a 'threshold' test, in other words.⁶⁸ This approach likely remedies the ILC rapporteur's concerns about dissipating nationalities: a nationality that meets the genuine connection requirements at the time bestowed will not dissipate with subsequent attenuation of the link. Still, as discussed below, another concern is compounded by this 'threshold' approach: the problem of 'clinging' nationalities.

(b) Losing Nationality

Clinging nationalities arise in circumstances in which those who wish to leave behind the nationality of their country of ancestry, birth or subsequent naturalization are prevented from doing so by the laws of that state. If, as suggested above, the *Nottebohm* effective nationality test does not vitiate an attenuated, but originally properly bestowed nationality, then any international legal right to renounce a citizenship must stem from some other source.

There is, however, no strong principle of international law permitting a state to recognize renunciations by their nationals.⁶⁹ The United Nations Universal Declaration

⁶⁷ *Ibid.*, at 377.

⁶⁸ The ICJ's own words in the *Nottebohm Case* support this interpretation. There, the Court emphasized that the required genuine connection had to exist 'in the period preceding, contemporaneous with and following [the] naturalization', or exist 'previously or [come] into existence thereafter': *Nottebohm, supra* note 57, at 24. The Court went on to ask: '[a]t the time of his naturalization does Nottebohm appear to have been more closely attached by his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?': *ibid.* It did not further specify that the genuine connection must also exist at the time that a claim is espoused by the protecting state.

⁶⁹ See Deen-Racsmay, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *AJIL* (2001) 606, at note 16 (suggesting that the propensity of some states to deny their nationals the power to renounce their citizenship is not prohibited by international law, subject to an exception where the desire to renounce is driven by fear of persecution).

of Human Rights indicates that a person is free to 'change their nationality'.⁷⁰ The right to change citizenship has also received some attention from publicists over the years.⁷¹ However, there is no compelling argument that it is customary international law. Certainly, state practice does not demonstrate a widely held view that nationalities may be changed. A large number of states apparently refuse to recognize renunciations of their nationalities.⁷² They also deny the existence of dual nationality, prompting regular warnings in the travel advisories of Western countries to their dual nationals.⁷³ Meanwhile, the right to change nationality found in the Declaration is not replicated in the International Covenant on Civil and Political Rights.⁷⁴

For its part, the 1930 Hague Convention creates a limited capacity to renounce nationality. Pursuant to Article 6, 'a person possessing two nationalities *acquired without any voluntary act* on his part may renounce one of them *with the authorisation* of the State whose nationality he desires to surrender' (emphasis added). The capacity of the state to deny this authorization is constrained somewhat: renunciation may not be refused 'in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the State whose nationality he desires to surrender are satisfied'. However, Article 6 apparently only applies where the two nationalities are *both* involuntarily acquired; for instance, by birth. It is inapplicable to circumstances where a person acquires one citizenship through naturalization (i.e., intentionally) and then seeks to renounce a prior nationality acquired unintentionally.⁷⁵

⁷⁰ See Universal Declaration of Human Rights, Art. 15(2), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 Dec. 1948, available at <http://www.un.org/Overview/rights.html> (last visited 14 May 2004).

⁷¹ See the discussion in Tiburcio, *supra* note 49, at 13 (noting that some international scholars have proposed the existence of an international right to change one's nationality).

⁷² See Sallot, 'No ban for dual passports, Graham says', *The Globe and Mail*, 13 Aug. 2003, at A10 (noting that Canada will not ban dual nationality because many Canadian dual nationals are unable to renounce their foreign citizenships under the laws of these states); Australian Department of Foreign Affairs and Trade, *Travel Information for Dual Nationals—What Could it Mean for You when Travelling Overseas?*, available at <http://www.dfat.gov.au/consular/dualnat.html> (last visited May 2005), ('[m]any countries have laws that prevent citizens giving up their nationality, either under any circumstances at all, or except by a formal act of renunciation').

⁷³ See, e.g., Australian Department of Foreign Affairs and Trade, *Travel Advice for Syria*, available at <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Syria> (last visited May 2005) (observing that 'Australian citizens who also hold Syrian citizenship (dual nationals) should be aware that Syrian authorities regard them as Syrian citizens while in Syria'). See also Canadian Department of Foreign Affairs, *Travel Report: Syria*, available at <http://www.voyage.gc.ca/dest/report-en.asp?country=283000#6> (as of May 2005) (observing that 'Canadians who also have Syrian nationality or who are eligible for Syrian citizenship may be subject to compulsory military service and other aspects of Syrian law. Holding dual nationality may limit the ability of Canadian officials to provide consular services').

⁷⁴ The International Covenant on Civil and Political Rights (ICCPR) specifies in Art. 12 that 'everyone shall be free to leave any country including his own', but does not include reference to a change of nationality: ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 Mar. 1976, available at <http://www1.umn.edu/humanrts/instreet/b3ccpr.htm> (last visited May 2005).

⁷⁵ This interpretation is consistent with the official documents of the Hague Conference. See, e.g., 'Report of the First Committee', 24 *AJIL* (1930), Supplement: Official Documents, 215, at 226 ('[t]he text of the Basis was limited so as to exclude the case of an individual possessing two nationalities, one of which was

International law therefore authorizes persons to acquire intentionally the nationality of a state through naturalization, but not to discard actively a once valid nationality no longer wanted. The result may be dual nationality by default. As discussed below, this peculiar state of affairs becomes troublesome when states attempt to exercise diplomatic protection of their dual nationals *vis-à-vis* another state whose nationality that person also possesses, a phenomenon that arose in the Arar case.

3 Diplomatic Protection of Dual Nationals and its Implications in the War on Terror

Dual citizenship creates real difficulties for governments intent on protecting their citizens. In the words of the US State Department, '[t]he U.S. Government recognizes that dual nationality exists but does not encourage it as a matter of policy because of the problems it may cause. Claims of other countries on dual national U.S. citizens may conflict with U.S. law, and dual nationality may limit U.S. Government efforts to assist citizens abroad.'⁷⁶ These comments are echoed by other governments.⁷⁷ The difficulties in assisting citizens abroad feared by these governments stem, at least in part, from the unsettled state of international law in relation to diplomatic protection of dual nationals.

The starting point in discussing diplomatic protection of dual nationals is the 1930 Hague Convention.⁷⁸ Article 4 of that treaty indicates, quite clearly, that '[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses'. Article 4 is of incidental relevance in its own right. Only a handful of countries have ratified the Hague

acquired voluntarily by naturalisation. This was done in order to meet the wishes of certain immigration countries'). It is also consistent with contemporary descriptions of Art. 6. See, e.g., Flourney, Jr., 'Nationality Convention, Protocols and Recommendations Adopted by the First Conference on the Codification of International Law', 24 *AJIL* (1930) 467, at 472 (discussing the Art. as intended to deal with persons 'born' with dual nationality).

⁷⁶ See US State Department, *Dual Nationality*, available at <http://travel.state.gov/dualnationality.html> (last visited May 2005).

⁷⁷ See, e.g., Australian Department of Foreign Affairs and Trade, *supra* note 73 ('Australia seeks to extend to all its citizens, including dual nationals, the full range of its consular assistance abroad. However, under international law, countries are not obliged to recognise dual nationality. A country may not permit Australian consular assistance to be given to Australian citizens who, according to its laws, it considers and treats as its own nationals'); Canadian Department of Foreign Affairs, *Dual Citizenship: What Travellers Should Know*, available at http://www.voyage.gc.ca/main/pubs/dual_citizenship-en.asp (last visited May 2005) ('your Canadian citizenship may not be recognized in the country of your second citizenship. The authorities of that country may not recognize Canada's right to provide you with consular assistance'); UK Home Office, Immigration and Nationality Directorate, *Information about Dual Nationality*, available at http://www.ind.homeoffice.gov.uk/ind/en/home/applying/british_nationality/advice_about_nationality/bn18_-_dual_nationality.html (last visited May 2005) ('[u]nder international law, a State may not give diplomatic protection to one of its nationals in a country whose citizenship that person also holds').

⁷⁸ *Supra* note 55.

Convention.⁷⁹ However, the provision – creating a ‘non-responsibility’ rule in relation to dual nationals – may have codified customary international law.⁸⁰ If customary international law remains so exacting, it represents an uncomfortable exception to the diplomatic protection rules.

A Consequences of the Non-responsibility Doctrine for Extraordinary Renditions

Non-responsibility, when coupled with clinging nationalities, may place particularly important impediments in the path of countries protesting treatment of their dual nationals in the war on terror. Notably, the key countries named as recipients of persons rendered by US authorities all put barriers in the path of citizenship renunciations. Thus, Morocco and Jordan require that the government pre-approve any renunciations of their nationalities.⁸¹ Egypt also requires such permission, and those who fail to obtain it will have dual nationality by default.⁸² For its part, Syrian nationality is very difficult (and perhaps impossible) to shed. According to an investigation by the US Office of Personnel Management, Syrian nationals of military age may not renounce their citizenship. Further, where renunciation is permitted under the law, the Syrian Information Office reported that

⁷⁹ These countries are Australia, Belgium, Brazil, Canada, China, Monaco, Netherlands, Norway, Poland, Swaziland, Sweden, and the UK. A number of countries have succeeded to the treaty: Cyprus, Fiji, Kiribati, Lesotho, Malta, Mauritius, Pakistan, and Zimbabwe. Canada entered a denunciation of the treaty in 1996: see UN Treaty Database, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/treaty-4.asp> (last visited May 2005).

⁸⁰ The Hague Codification Conference leading to the Convention apparently believed Art. 4 to be ‘a declaration of existing law’: Flourney, *supra* note 75, at 471. See also *United States of America ex. Rel. Florence S. Mergé v. Italian Republic*, 14 RIAA 236 (Italian–United States Conciliation Commission, 1955), at 243 ([t]he Hague Convention, although not ratified by all the Nations, expresses a *communis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted’); *Salem Case (Egypt v. US)* (1932), 2 RIAA 1161 (‘the practice of several governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their national, neither of these powers can raise a claim against the other in the name of such a person’). See also Borchard, *supra* note 28, at 588 ([t]he principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal’); H. Lauterpacht, *Oppenheim’s International Law* (1955), i, 347–348 (*locus standi* depends on the person ‘(a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward’); Institute of International Law, *Session at Warsaw—The National Character of an International Claim Presented by a State for Injury Suffered by an Individual* (1965), available at http://www.idi-iil.org/idiE/resolutionsE/1965_var_01_en.pdf (last visited 13 May 2004) (Art. 4(a): ‘An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seized of the claim’); K. Hailbronner, *Nationality: Paper submitted to the Conference on International Legal Norms and Migration*, Geneva, 23–25 May 2002, available at http://heiwwww.unige.ch/conf/psio_230502/files/hailbronner.doc (last visited May 2005).

⁸¹ United States Office of Personal Management, *Citizenship Laws of the World* (2001), at 104 and 138, available at <http://www.multiplecitizenship.com/documents/IS-01.pdf> (last visited May 2005).

⁸² *Ibid.*, at 69.

it is so complicated that it is best not to attempt the process. In effect, according to that Office, the process is complicated in order to discourage renunciation of Syrian citizenship. Former citizens of Syria probably maintain an unofficial dual citizenship status and would be subject to Syrian law as citizens should they return to Syria.⁸³

The ‘clinging’ citizenship rules of these countries mean that even emigrants inclined to renounce their original nationality may find it difficult to do so. If subsequently caught up in a rendition to their country of origin, these emigrants may be denied the diplomatic protection of their new country of nationality by application of the non-responsibility doctrine. This problem reportedly arose during Arar’s detention in Syria. Syria viewed international consular law as inapplicable to Arar, at least initially. Canadian officials complained that Syrian officials regarded Arar as a Syrian and that ‘they took their time in letting us know [that Mr. Arar was incarcerated in Syria], because we weren’t primarily responsible for Mr. Arar’.⁸⁴

B Alternatives to Non-responsibility

Syria’s position in the Arar matter is consistent with the classic non-responsibility doctrine. Yet, the impact of this rule in relation to renditions should not be overstated. Countries who decline diplomatic protection to their dual nationals in blind adherence to the non-responsibility doctrine do a disservice to their citizens. First, there is good reason to believe that the principle of non-responsibility has fallen away, to be replaced with a concept of effective nationality drawn from the *Nottebohm* context. Second, at best the non-responsibility doctrine applies in a contest between the two states of nationality, and not a state of nationality and a third-party nation. Last, there may be other avenues in public international law permitting alternatives to classic espousal of claims where a person is ill-treated as part of a rendition. Each of these assertions is examined below.

1 The Effective Nationality Approach

Despite claims to the contrary, the non-responsibility doctrine may not have customary international status. First, there is reason to query whether the drafters of the Hague Convention, in concluding that Article 4 codified then-existing international law, correctly assessed the weight of authority as of 1930. Influential in the drafting of Article 4 were the conclusions of Professor Borchard in his 1916 treatise, *The Diplomatic Protection of Citizens Abroad*.⁸⁵ There, Borchard assessed cases concerning diplomatic protection of dual nationals. Yet, Borchard’s conclusion that ‘a person having

⁸³ *Ibid.*, at 192.

⁸⁴ Mr Konrad Sigurdson (Director General, Consular Affairs Bureau, Department of Foreign Affairs and International Trade), House of Commons Standing Committee on Foreign Affairs and International Trade, *Evidence*, 37th Parl., 2nd Sess. (Thursday, 25 Sept. 2003).

⁸⁵ *Islamic Republic of Iran v. United States of America*, Iran–United States Claims Commission, Case No. A-18, 23 ILM (1984) 489 ([t]he writing of at least one scholar, Professor E. B. Borchard, apparently had a considerable effect, not only because of the later writers who have echoed his views which favored the rule of non-responsibility, but also because of his influence on the Hague Conference that adopted the 1930 Convention discussed above’).

dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal⁸⁶ is not supported by the cases he cites. In fact, his conclusion has been called 'a myth – or at best an inaccurate oversimplification of the body of precedents existing when he wrote, and subsequently'.⁸⁷ Further, observers at the time the convention came into force queried whether Article 4 'would control in the case of an extraordinary or inhumane outrage perpetrated by the government of a state upon a person having not only its nationality but the nationality of another state and maintaining an habitual residence in such other state'.⁸⁸

Second, even if non-responsibility represented the state of the art in 1930, it likely does not remain so at the beginning of the 21st century. International tribunals grappling with the issue since the Second World War have expressed an unease with the non-responsibility approach. In the Italian-United States Conciliation Commission's *Mergé* case,⁸⁹ Mergé was a US national by virtue of birth in the United States. She was also an Italian national by marriage, and had lived in Italy for years, used an Italian passport and had comported herself – and been treated like – an Italian national during the war while residing in Japan, never having been interned as an enemy alien.

Focusing on whether Mergé could be considered a US national for purposes of compensation after the war, the Commission held that 'based on the sovereign equality of states', customary international law 'bars protection on behalf of those who are simultaneously also nationals of the defendant State'.⁹⁰ Nevertheless, it went on to conclude that '[t]he principle based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State'.⁹¹

The same dual nationality issue has been addressed by the Iran-United States Claims Commission. In *Islamic Republic of Iran v. United States of America*, Case No. A-18,⁹² the tribunal's attention was drawn to the expression 'nationals' in the U.S.-Iran Claims Agreement, the treaty giving the tribunal jurisdiction over citizens of the two states. Iran argued that this word was to be accorded a meaning consistent with the customary international law of diplomatic protection. The latter law, it argued, precluded one state from espousing the claims of a dual national against a state whose nationality the complainant also possessed. The Claims Commission disagreed, holding that the Hague Convention non-responsibility rules had been supplanted by a

⁸⁶ Borchard, *supra* note 28, at 588.

⁸⁷ Griffin, 'International Claims of Nationals of Both the Claimant and Respondent States—The Case History of a Myth', 1 *International Lawyer* (1966–67) 400, at 402.

⁸⁸ Flourney, *supra* note 75, at 471.

⁸⁹ *Mergé*, *supra* note 80.

⁹⁰ *Ibid.*, at 246.

⁹¹ *Ibid.*, at 247. In the end, the Commission applied the principle of effective nationality and held, on the facts, that the US had no standing to bring the claim because Ms Mergé 'cannot be considered to be dominantly a United States national': *ibid.*, at 248.

⁹² 5 Iran-US Cl. Trib. Rep. (1984) 251, reprinted in 23 ILM (1984) 489.

more modern approach.⁹³ Pointing to *Nottebohm* and *Mergé*, the tribunal focused on the question of effective nationality. In the Tribunal's words,

the relevant rule of international law which the Tribunal may take into account for purposes of interpretation . . . is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality is involved.'

The Tribunal then held that it would assess effective nationality by 'consider[ing] all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.'⁹⁴

For their part, publicists of the second half of the 20th century have also abandoned the non-responsibility doctrine in favour of the *Nottebohm* effective nationality approach.⁹⁵ Together these cases and commentary demonstrate a trend in the late 20th century away from non-responsibility. The mild countervail to this view is found, arguably, in the ICJ's recent *Avena* case, involving a contest between Mexico and the United States under the Vienna Convention on Consular Rights. There, the

⁹³ On this issue, the tribunal commented on the debate discussed above as follows: 'the precedents on which Borchard relied did not generally support his conclusion, and the Parties in the present case have acknowledged that the law prior to 1930 was uncertain. . . . [T]he Tribunal is satisfied that . . . the better rule . . . today is the rule of dominant and effective nationality': *ibid.*, at 499.

⁹⁴ See also *Bavanati and The Government of the Islamic Republic of Iran*, Case No. 296, Chamber Two, Award No. 564-296-2, as cited in 10-6 Mealey's Int'l Arb Rep (1995) 8, dismissing a compensation case brought by an Iranian-US dual national where the claimant could not establish a dominant and effective US nationality. In the tribunal's words, 'evidence shows that since 1974, when the claimant moved to Germany, his habitual residence, center of interest, family ties, participation in public life and other attachments have been insufficient to support a finding that Mr. Bavanati's links to the United States were dominant over his links to Iran during the relevant period, between the time when his Claim allegedly arose and 19 January 1981'. See also *Joan Ward Malekzadeh, Sonya Malekzadeh, Alireza Malekzadeh and the Islamic Republic of Iran*, Case No. 356, Chamber One, Award No. 543-356-1, as cited in 9-9 Mealey's Int'l Arb Rep (1994) 17 (assessing the dominant and effective nationality of a claimant, a US national married to an Iranian national, and concluding that she retained effective US nationality because she did not seek to integrate into Iranian society or to live in Iran permanently); *Nimmi Ladjevardi (formerly Burgel) and the Government of the Islamic Republic of Iran*, Case No. 118, Chamber One, Award No. 553-118-1, as cited in 8-12 Mealey's Int'l Arb Rep (1993) 6, rejecting a dual national's claim because of the absence of a dominant and effective US nationality. In the tribunal's words, '[i]n light of the Claimant's continuing familial and economic ties to Iran, ties that the Claimant provides no evidence of having severed . . . such a short period of residence in the United States is not alone sufficient to prove the dominance and effectiveness of her United States nationality at the time the Claim arose and consequently during the relevant period'.

⁹⁵ Griffin, *supra* note 87, at 423 (arguing that the *Nottebohm* case, *supra* note 57, captures 'the true rationale of the foregoing century and a half of history of the treatment by international tribunals of the claims of dual nationals against one of the governments of the claimant's nationality'); de Visscher, 'Cours général de droit international public', [1972-II] *Recueil des Cours* 1, at 163, as cited in Dugard, *supra* note 29, at 49 ('[t]he effective link or dominant attachment doctrine was applied consistently in the nineteenth century; however, because it was usually applied in order to reject claims, it came to be seen as indicating that claims on behalf of dual nationals were generally inadmissible . . . The idea established itself that any claim for protection on behalf of a dual national should be declared inadmissible. That rule . . . which the Institute of International Law considered it necessary to reaffirm in 1965, does not accurately reflect current law . . . in rendering the *Nottebohm* judgment, the International Court really did intend to state a general principle').

United States government endorsed non-responsibility, at least in relation to the Vienna Convention. It urged that it was ‘an accepted principle that, when a person arrested or detained in the receiving State is a national of that State, then even if he is also a national of another State party to the Vienna Convention, Article 36 has no application, and the authorities of the receiving State are not required to proceed as laid down in that Article’.⁹⁶ The ICJ never squarely addressed the US view, instead holding that the US had furnished none of the factual prerequisites for this argument; namely, proof of the dual nationality of the Mexicans whose rights had been violated.⁹⁷ The fact that the ICJ did not dismiss the US claims of non-responsibility on their legal merit may, nevertheless, lend credence to the US view.

On the other hand, such an interpretation sits poorly with other recent international legal developments; specifically the work of the International Law Commission. The ILC’s special rapporteur on diplomatic protection, and more recently the International Law Commission itself, have clearly opted in favour of diplomatic protection for dual nationals. Rejecting Article 4 of the Hague Convention, the ILC rapporteur proposed, in draft Article 6 of his first report, that ‘the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual’s (dominant) (effective) nationality is that of the former State’.⁹⁸ In the accompanying commentary, the rapporteur urged that

The weight of authority supports the dominant nationality principle in matters involving dual nationals. Moreover, both judicial decisions and scholarly writings have provided clarity on the factors to be considered in making such a determination. The principle contained in article 6 therefore reflects the current position in customary international law and is consistent with developments in international human rights law, which accords legal protection to individuals even against the State of which they are nationals.⁹⁹

The rapporteur’s position proved persuasive to the International Law Commission. The thrust of the ILC’s now adopted draft article permits claims by an espousing state on an ‘effective nationality’ basis: ‘A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national *unless the nationality of the former State is predominant*, both at the time of the injury and at the date of the official presentation of the claim.’¹⁰⁰

Read together, these authorities greatly undermine arguments that the non-responsibility doctrine remains good international law.

2 Third-party States

Next, in evaluating the implications of dual nationality on diplomatic protection in the ‘war on terror’, it is important to underscore that the non-responsibility rule

⁹⁶ *Avena*, *supra* note 26, at para. 41.

⁹⁷ *Ibid.*, at para. 57.

⁹⁸ Dugard, *supra* note 29, at 42 (parentheses in original).

⁹⁹ *Ibid.*, at 54.

¹⁰⁰ ILC, *supra* note 30 (emphasis added). The ILC adopted Art. 6 at its 2730th to 2732nd meetings, held from 5 to 7 June 2002. See also Art. 7, ILC, *Report of the International Law Commission—56th Session (2004)*, *supra* note 51, at 19. States are expected to respond to the draft articles by Jan. 2006.

applies only where both the applicant and the defendant state claim a tie of nationality to the abused individual. It does not exist where the wrongs are committed by a third state, with no ties of nationality to the individual.

In the Arar matter, that third state is the United States. There is no evidence that US officials notified Arar of his right to contact consular officials, despite being acutely aware of his foreign nationality. Indeed, assertions made by Arar's lawyer in the Canadian public inquiry on his rendition suggest that Arar may have asked for consular access, from the moment of his detention.¹⁰¹ Yet, the Canadian consulate was not informed of his detention by US officials. Instead, that information apparently came from Arar's family.

Arar's dual nationality should not preclude a Canadian complaint based on Article 36 of the Vienna Convention on Consular Relations against the United States, or a broader claim that minimum treatment obligations were not met in Arar's removal to torture. The Hague Convention itself provides, in Article 5, that within a third state, a 'person having more than one nationality shall be treated as if he had only one. . . . [A] third State shall . . . recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected'. If this principle reflects customary international law, it requires third-party states to assess the effective nationality of the dual national, and treat them as a single national of the country with whom they are most closely tied. Diplomatic protection may be extended by this latter nation.

For their part, the ILC's draft articles on diplomatic protection are even more receptive to diplomatic protection against third states: '[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national'.¹⁰²

3 *Other Remedies in Public International Law*

As a final consideration, while classic international law in relation to diplomatic protection may be preoccupied with nationality, other components of public international law focus on obligations states owe one another, or the international community as a whole. Two such aspects of international law open the door to states raising concerns tied to specific extraordinary renditions, but in a fashion independent of any official espousal of claims. The form of the complaint differs, in other words, but the function remains the same: intervening at the international level to protect an individual. For this reason, these alternatives are worthy of discussion in this article.

¹⁰¹ Transcripts, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (23 June 2004), at 680.

¹⁰² ILC, *supra* note 30, Art. 5[7]. See also Dugard, *supra* note 29, at 56 ('[w]here the State of nationality claims from another State of nationality on behalf of a dual national there is a clear conflict of laws. No such problem arises, however, where one State of nationality seeks to protect a dual national against a third State. Consequently there is no reason to apply the dominant or effective nationality principle').

(a) The Concept of *Erga Omnes* Obligations

First, there are clear circumstances where, even absent a link of nationality, a state should be well positioned to complain of the internationally wrongful treatment of persons by another state: violations of rights possessing *erga omnes* status.

An obligation *erga omnes* is a duty that 'all States can be held to have a legal interest' in protecting.¹⁰³ In *dicta* in the *Barcelona Traction* case, the International Court of Justice listed examples of obligations *erga omnes*: the bars on aggression and genocide and rules concerning 'basic rights' of human beings, including the prohibition on slavery and racial discrimination.¹⁰⁴ More recently, the ICJ has viewed the right to self-determination as also constituting an obligation *erga omnes*.¹⁰⁵

In its discussion in *Barcelona Traction*, the ICJ drew a distinction between 'obligations of a State towards the international community as a whole', and 'those arising vis-à-vis another State in the field of diplomatic protection'. Later in its judgment, the ICJ said this: '[w]ith regard more particularly to human rights . . . it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.'¹⁰⁶ These passages apparently exclude from obligations *erga omnes* the very subject matter of this article, namely diplomatic protection.

Nevertheless, reading the Court's approach to *erga omnes* together with these more cautious words, it would seem that where 'basic rights' of human beings attracting *erga omnes* status are at issue, states are free to invoke those obligations, even for non-nationals. This conclusion raises the obvious question of which 'basic rights' of human beings have *erga omnes* status.

The ICJ, in *Barcelona Traction*, listed the bar on slavery and racial discrimination as two examples of *erga omnes* obligations relating to the 'principles and rules concerning the basic rights of human beings'.¹⁰⁷ It did not assert, however, that these were the only human rights principles having *erga omnes* status. More recent sources expand this list. Thus, the Restatement on the Foreign Relations Law of the United States lists as additional *erga omnes* obligations: murder or disappearing of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and a 'consistent pattern of gross violations of internationally recognized human rights'.¹⁰⁸ The Institute of International Law went even further in 1989 in resolving that the international obligation to ensure the observance of human rights is an *erga omnes* obligation. In the Institute's words, this obligation is 'incumbent upon every State in relation to the international

¹⁰³ *Barcelona Traction Co. Case* [1970] ICJ Rep. 6, at 32.

¹⁰⁴ *Ibid.* See also M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), at 139.

¹⁰⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, General List No. 131 (9 July 2004), 43 ILM (2004) 1009, at para. 88.

¹⁰⁶ *Barcelona Traction*, *supra* note 103, at 47.

¹⁰⁷ *Ibid.*, at 32.

¹⁰⁸ *Restatement*, *supra* note 35, s 702.

community as a whole, and every State has a legal interest in the protection of human rights'.¹⁰⁹

In sum, under both the Restatement's version and certainly under the Institute's interpretation, complaints responding to abuses of aliens of the sort identified in the rendition cases – namely, torture – may be pursued by *any* state, including states without any national link to the victim. This is a significant consideration. If non-responsibility is in fact a prevailing norm of international law, then abuse by one state of nationality against a dual national who also possesses the citizenship of another state does not constitute a justiciable injury to the latter. Even so, this second state may circumvent non-responsibility by invoking *erga omnes* obligations. This possibility is expressly anticipated by the International Law Commission's draft articles on state responsibility. Article 48 of that draft reads: 'Any State other than an injured State is entitled to invoke the responsibility of another State . . . if . . . [t]he obligation breached is owed to the international community as a whole.'

(b) ICJ Jurisdiction under the Torture Convention

Second, the events described in relation to the rendition of Arar constitute a clear violation of international human rights law; particularly, the UN Convention against Torture.¹¹⁰ Article 3 of that treaty precludes a party removing a person 'to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. Renditions by the United States may violate this bar.¹¹¹ Article 1, meanwhile, prohibits torture for the purpose, *inter alia*, of extracting information or a confession. Syria's alleged acts in the Arar matter constitute a clear violation of this requirement.

Notoriously, remedies in international human rights law are few and far between. Neither Syria nor the United States, for instance, accept the jurisdiction of the UN Committee Against Torture to issue views in response to complaints brought by individuals against those states concerning compliance with the treaty.¹¹² The United States has also precluded other states from bringing a complaint concerning the treaty's interpretation or application before the International Court of Justice, something otherwise permitted by Article 30.¹¹³

The United States does accept, however, the jurisdiction of the Committee against Torture under Article 21 to receive complaints against it, brought by other *states* that also accept the Committee's jurisdiction under Article 21. Syria, meanwhile, did not

¹⁰⁹ Institute of International Law, *Resolutions Adopted at Saint-Jacques-de-Compostelle (The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, Article 1)*, available at http://www.idi-iil.org/idiE/resolutionsE/1989_comp_03_en.PDF (last visited May 2005).

¹¹⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (1984).

¹¹¹ See the discussion in Committee on International Human Rights *et al.*, *supra* note 2, at 35 ff.

¹¹² See reservations of the US and declaration of the Syrian Arab Republic upon accession to the UN Convention Against Torture, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

¹¹³ See reservations of the US upon accession to the UN Convention Against Torture, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

foreclose ICJ jurisdiction under Article 30 of the Torture Convention when it acceded to the treaty in August 2004.¹¹⁴ Syria's accession to the Torture Convention obviously post-dates the events described above, in relation to Maher Arar. Article 30 may be of little relevance to Mr. Arar's case. It would, however, be an option open to the Canadian government were renditions of Canadian dual nationals to Syria to continue, a real possibility given recent revelations concerning the numbers of Canadian-Syrians detained on security suspicions in that country since 2001.¹¹⁵

Opportunities exist, in other words, to dress an espousal of claims in a different guise: an inter-state complaint by Canada against the United States before the Committee against Torture under Article 21 and an arbitration and then a complaint brought by Canada against Syria at the ICJ pursuant to Article 30, and focused on Syria's adherence to the Convention against Torture. In either instance, no question of dual nationality should intrude. Canada, as a state party under the Convention against Torture, is exercising a right available to it in reviewing the performance that another state party owes its fellow parties.

Conclusion

Extraordinary rendition has been called 'torture by proxy'.¹¹⁶ If so, it must attract a response, not least from countries whose nationals are being rendered. In most cases, it would seem that the torturing countries are themselves the states of nationality of the rendered individual. In these circumstances, the victim has recourse, at best, to the feeble enforcement mechanisms of the international human rights system. For other rendered individuals – those who also possess the nationality of a third state – the options are brighter.

As this article suggests, in modern international law, dual nationality is no bar to diplomatic protection by states of their citizens. The traditional principle of non-responsibility may once have stymied protection where the defendant state also claimed a nationality link to the wronged individual. This doctrine appears, however, to be giving way to a more nuanced approach, one that permits diplomatic protection where the protecting state has the closest link to the individual. Other concepts in public international law – not least *erga omnes* obligations – also open the door to complaints being voiced by states in relation, *inter alia*, to the treatment of their dual nationals.

In these circumstances, those states that invoke non-responsibility to justify inaction in response to renditions shelter behind a dubious legal fig-leaf – a lack of political will masquerading as a commitment to international law. It is certainly true that in many instances, states will have difficulty finding international venues in which to espouse the claims of their wronged nationals. An infraction of international law may

¹¹⁴ See declaration of the Syrian Arab Republic upon accession to the UN Convention Against Torture, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>.

¹¹⁵ See *supra* note 19 and accompanying text.

¹¹⁶ See Committee on International Human Rights *et al.*, *supra* note 2.

give rise to state responsibility. Yet, with notable exceptions – such as Article 30 of the Convention against Torture – such transgressions do not guarantee the jurisdiction of international courts to hear complaints. This venue problem in relation to diplomatic protection is complicated by the failure of countries like Canada to accede to – and the recent US decision to withdraw from – the optional protocol of the Vienna Convention on Consular Relations, a document giving the ICJ jurisdiction to hear cases concerning the interpretation and implementation of that treaty.¹¹⁷

Venue problems should not, however, stand in the way of a very public effort by states to insist on consular access to, and minimum treatment of, their dual nationals in all available political arenas and in diplomatic discourse. Strong legal bases exist for these complaints. If rendition to torture is morally equivalent to commission of torture, silence in response to rendition is only a few notches lower on the scale of complicity.

¹¹⁷ Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 596 UNTS 487 (1963). The US withdrew in Mar. 2005. See communication to the UN Secretary-General, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty33.asp#N1>.