
As If: The Legal Fiction in Diplomatic Protection

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*Wie kommt es, dass wir mit bewusstfalschen Vorstellungen doch Richtiges erreichen?*¹

Abstract

Diplomatic protection is premised on a fiction: injury to an individual is treated as if it constituted injury to the individual's national state, entitling the national state to espouse the claim. While the International Law Commission, in its Draft Articles on Diplomatic Protection acknowledged this legal fiction, it continues to be the subject of debate and criticism. Yet, a closer look at the legal fiction reveals that it enables the application of secondary rules (the rules on diplomatic protection) to a violation of a primary rule. This is a rather complex process: the violation of an individual's right gives rise to the right of the state of nationality to exercise diplomatic protection. The complexity is caused by the question of whose rights are being protected (the state's or the individual's) and the nature of the various elements of the law on diplomatic protection. These questions should not, however, lead to a rejection of the fiction. To the contrary, a careful analysis of legal fictions in general and the fiction in diplomatic protection in particular shows that the fiction is no more than a means to an end, the end being the maximal protection of individuals against violations of international (human rights) law.

1 Introduction

In May 2006 the International Law Commission (ILC) adopted on second reading its draft articles on diplomatic protection. These articles largely codify existing

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¹ H. Vaihinger, *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit* (1922), at p.xii: 'How is it that we arrive at the truth through knowingly wrong ideas?'

customary international law on the protection of nationals abroad by means of diplomatic protection. As is well known, and clearly stated in the commentary to the articles adopted on second reading, diplomatic protection is premised on a fiction: the injury to an individual is treated as if it constituted an injury to the individual's national state, thereby entitling the national state to espouse the claim.² The legal fiction underpinning diplomatic protection has, however, led to debate in the ILC, and was raised as a point of discussion in the comments and observations by states on the draft articles prior to the second reading. In order to determine the value of the fiction, we must explore what function the fiction has within diplomatic protection. Legal systems are almost by definition imperfect and it often happens that unforeseen events pose challenges to the existing systems. Sometimes the solution is to change the system. At other times, the device of the legal fiction is applied. Something that fits ill with the existing paradigm is treated as if it were something else, in particular as if it were something that is covered by existing rules and regulations. The protection of individuals in an era where they did not exist under international law – by means of diplomatic protection – was made possible by resort to this fiction.³ Draft article 1 of the ILC draft articles on diplomatic protection adopted on first reading reflected strongly this fictive nature and was a faithful copy of the dictum in the *Mavrommatis Palestine Concessions* case.⁴ It stipulated that states adopt in their own right the injury sustained by their national.⁵ In *Mavrommatis* the Permanent Court of International Justice stated that:

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, the right to ensure, in the person of its subjects, respect for the rules of international law.⁶

The regime reflected in *Mavrommatis* clearly shows the operation of the legal fiction. The decision in *Mavrommatis* relies on what is often called the 'Vattelien' fiction. Writing in 1758, the Swiss jurist Vattel stated:

*Quiconque maltraite un Citoyen offense indirectement l'Etat, qui doit protéger ce Citoyen. Le Souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'agresseur à une entière réparation, ou le punir; puisqu'autrement le Citoyen n'obtiendrait point la grande fin de l'association Civile, que est la sûreté.*⁷

² See Official Records of the GA, 61st session, Supp. 10 (A/61/10), Ch. IV, Commentary to the draft Arts on diplomatic protection adopted on second reading (2006), Commentary to draft Art. 1: '[o]bviously it is a fiction', at 25 (hereinafter: Commentary to the draft Arts on second reading).

³ See *ibid.*, at 25.

⁴ *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, PCIJ, Series A, No. 2 (1924) (hereinafter: *Mavrommatis*).

⁵ Diplomatic Protection—titles and texts of the draft Arts on Diplomatic Protection adopted by the Drafting Committee on first reading, International Law Commission, 56th session, A/CN.4/L/647 (2004), at 1.

⁶ *Mavrommatis*, *supra* note 4, at 12.

⁷ E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle* (1758), i, bk II, at para. 71. 'Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen. The sovereign of the latter should avenge his wrongs, oblige the aggressor, if possible, to make full reparation or punish him; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.'

Although Vattel's views on the nature of international law and the necessity of states' consent may be questioned, the fictitious nature of diplomatic protection is appropriately described: the state pretends to suffer an injury through injury suffered by one of its nationals as a result of an internationally wrongful act. At this stage, it is important to emphasize the indirect nature of the injury. Vattel clearly considered an injury to a national as an indirect injury since it is contrasted to direct injury in the paragraph containing the 'famous' quotation: the paragraph starts with a description of direct injury and then continues with indirect injury. In this respect, it is curious to note that Vattel dedicated quite a few lines to the question of state responsibility for acts of individuals, which is only incurred in the case of implied or express approval of wrongful conduct of nationals of a state by that state.⁸ The limitation to the responsibility of a state for acts of individuals is another indication of the fictitious nature of diplomatic protection, as will be pointed out below. In interpreting Vattel's position, it is clear that the initial violation of the law is not a violation of the right of a state. While it is certainly true that states partly assert their own rights in exercising diplomatic protection, they only do so through a fiction that transforms the violation of the primary rights of the individual national concerned to the secondary right of his or her national state to present claims. The right they assert is the right to exercise diplomatic protection. Although the statement by Vattel taken together with the findings of the Permanent Court in *Mavrommatis* are sometimes interpreted to imply that indeed injury to a national in reality directly offends the state, this paper will demonstrate the flaws in this interpretation, even if both supporters and critics of diplomatic protection seem to rely on this line of thought. There can be no doubt that the injury that stands at the basis of the exercise of diplomatic protection is an injury of individual rights. It should be borne in mind that this does not exclude the possibility of so-called 'mixed claims'. A mixed claim is a claim based on both direct and indirect injury, such as occurred in the *LaGrand* and *Avena* cases before the International Court of Justice (ICJ). It is only for the part of the claim that is based on indirect injury that resort is sought to diplomatic protection and that the conditions for the exercise of diplomatic protection, such as the exhaustion of local remedies and the nationality of claims rule, are applicable. Even if the claim also contains elements of direct injury, the conditions for the exercise of diplomatic protection will be applicable to the indirect part of the claim.⁹ Under international law, claims based on direct injury do not require the instrument of diplomatic protection but can be brought directly.¹⁰

An appeal to self-defence has sometimes been expressed in the context of protection of nationals, in particular in situations involving a substantial group of nationals

⁸ *Ibid.*, at paras 74–78. This, of course, is also a fiction: the state assumes responsibility as if the act was committed by it and not by one of its nationals/citizens.

⁹ *Interhandel case (Switzerland v. United States)* (Preliminary Objections) [1959] ICJ Rep 6 and *Case Concerning Elettronica Sicula SpA (ELSI)* (*United States v. Italy*) [1989] ICJ Rep 15.

¹⁰ A discussion of 'mixed claims' as such is beyond the scope of this article. For these issues reference is made to Dugard, 'Second Report on Diplomatic Protection', International Law Commission, 53rd session, A/CN.4/514 (2001), paras 18–31.

or rescue operations involving resort to the use of force in the exercise of protection of nationals.¹¹ As Okowa has stated, '[t]here is a presumption that nationals are indispensable elements of a State's territorial attributes and a wrong done to the national invariably affects the rights of the State.'¹² This position is however difficult to support. The general understanding of the espousal of an individual claim by his or her national state is that indeed it is premised on a fiction and not on a direct injury. As Brierly has stated, while 'a state has in general an interest in seeking that its nationals are fairly treated in a foreign country, ... it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too'.¹³ It is also difficult to reconcile with the requirements applicable to diplomatic protection (exhaustion of local remedies and nationality of claims) which do not apply if a state is *in reality* claiming its own right. Even if injury to its national may *affect* the rights of his or her national state, this is only because through the operation of the fiction the violation of the individual right entitles the state to exercise diplomatic protection and to demand reparation. As a consequence, instances of protection of nationals involving the use of force have generally been interpreted as diplomatic protection rather than an exercise of self-defence.¹⁴

The fiction underlying diplomatic protection has been subject to debate in the ILC. A request to reconsider draft article 1 particularly in the light of the fiction came from the Italian government and was supported by a number of ILC members.¹⁵ The debates in the ILC showed views vacillating between the position that states are protecting their own rights and the position, advocated by the Italian government, that the fiction should be abandoned since diplomatic protection does not involve any state's rights and that the individual should have complete control over the procedure. As will be shown, the ILC has tried to find a balance by retaining the fiction in draft article 1, but adding an exhortatory provision in draft article 19.¹⁶ This solution may advance the position of the individual and thereby constitute a progressive step away from the rigid '*Mavrommatis*' régime. It does not, however, affect the fictitious nature of diplomatic protection.

¹¹ For instance by the US in its attempts to rescue its nationals held hostage in Iran. See on this d'Angelo, 'Resort to Force by States to Protect Nationals: the U.S. Rescue Mission to Iran and its Legality under International Law', 21 *Virginia J Int'l Law* (1981) 485. See generally N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985).

¹² Okowa, 'Issues of Admissibility and the Law on International Responsibility', in M.D. Evans, *International Law* (2006), at 483.

¹³ J.L. Brierly, *The Law of Nations* (1963), at 276–277.

¹⁴ See Dugard, 'First Report on Diplomatic Protection', International Law Commission 52nd session, A/CN.4/506 (2000), paras. 47–60. In this context it is important to note that the use of force for the purpose of diplomatic protection was not prohibited in the late 19th and early 20th centuries. See on this point E.M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1919, reprint 2003), at 448. The ILC has however decided not to endorse this view and has rejected the use of force as a means of diplomatic protection. See Diplomatic Protection, Titles and texts of the draft Arts adopted by the Drafting Committee on second reading, A/CN.4/L.684 (2006), draft Art. 1 (hereinafter Draft Arts on 2nd reading).

¹⁵ Comments and Observations Received from Governments, International Law Commission, 58th Session, A/CN.4/561/Add.2 (2006) (hereinafter Comments and Observations, Add. 2), at 1.

¹⁶ To be discussed in more detail below, at Sect. 3.B.1.

This paper aims to present the positions relating to the question of whose rights are being protected in the exercise of diplomatic protection and attempts to elucidate the debate by showing that it is helpful in this respect to distinguish primary and secondary rules of international law, as has been the approach of the ILC. It will further demonstrate that the legal fiction does not only or merely transform an individual right into the right of a state but that it facilitates the application of secondary rules of international law to the violation of a primary rule. Since the distinction between primary and secondary rules with respect to diplomatic protection is not as evident as in other fields of law and the manner in which the distinction is made, this function of the legal fiction is not always clear. However, as will be argued, the question of the fiction itself has a limited bearing on the question of whose rights are being protected. The fiction is no more than a means to an end, the end being the maximal protection of individuals against violations of international (human rights) law.

The next section of this article will define legal fictions in general and discuss their function and application in law. The relation between the primary and secondary rules of international law and the effect this distinction has on diplomatic protection and the legal fiction will be explored in the following section. In section 4, the application of the fiction in diplomatic protection will be clarified by discussing the work of the ILC on this issue. Special Rapporteur Bennouna raised some questions with regard to the fiction in his Preliminary Report and his successor Special Rapporteur John Dugard has explained the views of the ILC on the fiction and its insertion into the Draft Articles on Diplomatic Protection. The unsatisfactory discussion of this issue in the ILC has invited scholars and states to comment on the fictitious nature of diplomatic protection and in turn caused renewed attention by the ILC for this issue in its 58th session in 2006. In the conclusion, it will be demonstrated that the fiction is still a necessary tool for the protection of individual rights, particularly considering the limited agency that individuals have under international law.

2 Fictions in Law

The use of legal fictions is ubiquitous in law. Fictions are partly unavoidable since law is a construct, an attempt at formalizing reality. Well known is the fiction applied to the unborn child: *nasciturus pro iam nato habetur*.¹⁷ In public international law, apart from the fiction in diplomatic protection, (collective) non-recognition,¹⁸ pretending

¹⁷ See generally Salmon, 'The Device of Fiction in Public International Law', 4 *Georgia J Int'l & Comp L* (1974) 251; H. Nientseng, *La Fiction en Droit International* (1923) (Dissertation); C. Perelman and P. Foriers (eds), *Les Présomptions et les Fictions en Droit* (1974).

¹⁸ By collective non-recognition, an entity is denied statehood because it does not comply with certain international norms, such as the prohibition on aggression or that on slavery. The fictitious element of this practice is particularly clear when one considers the fact that existing states that commit violations of such norms are reprimanded, but usually not denied statehood, while 'new' states will be. See on collective non-recognition generally C.J.R. Dugard, *Recognition and the United Nations* (1987). See also Menon, 'Some Aspects of the Law of Recognition Part VII: the Doctrine of Non-Recognition', 69 *Revue de Droit International* (1991) 227, who stated, at 227, that non-recognition is 'not an absence of [the non-recognised states'] legal status and capacity for relations predicated upon them'.

that a ship is part of the flag-state's territory¹⁹ and pretending there is consensus when there are no objections²⁰ are legal fictions. Legal fictions are derived from Roman law and find their origin in religious context: an example given by Honsell is the religious offering of artificial animals instead of real ones.²¹ In the early stages of Roman law, the application of fictions allowed the Roman *praetors* to apply existing rules to situations that were not foreseen when the rules were drafted.²² The fiction thus operated as a mechanism for transition: short of rules that apply to the situation at hand, rules are being applied *as if* the situation were another, which is covered by existing rules. Legal fictions are tools for the application of the law.²³ They are '*l'un des expédients . . . du développement du droit.*'²⁴ More philosophically van de Kerchove and Ost have said that

[I]oin de représenter un dysfonctionnement de la discursivité juridique, les fictions ne font que pousser à la limite l'efficace propre d'un discours que s'est, tel le récit ou le performatif, résolument installé dans « sa » réalité. Les juristes classiques feignent de croire que les fictions sont du réel méconnu ou dénaturé, et qu'il devrait être possible de s'en passer pour atteindre, sans détours ni artifices, la réalité telle qu'elle est. Mais dès lors que cette réalité échappe nécessairement puisqu'elle n'est jamais que le produit d'une nomination conventionnelle, la fiction apparaît moins comme un défaut que comme un révélateur de la nature du discours juridique.²⁵

However, not all conceptual constructions are legal fictions. First, legal fictions should be distinguished from presumptions. A classic presumption is the individual's knowledge of the law: all individuals are presumed to know the law. The most important difference between fictions and presumptions is that fictions always conflict with reality, whereas presumptions may prove to be true.²⁶ Secondly, the legal fiction discussed in this paper should be distinguished from a concept like 'legal personality',

¹⁹ See *Case of SS Lotus (France v. Turkey)*, PCIJ, Series A, No. 9 (1927), at 25. But see the criticism by Judge Finlay in his dissenting judgment, at 50–58.

²⁰ E.g. votes in the UN Security Council: under Art. 27(3) of the UN Charter: all matters other than procedural require the 'concurring' vote of all permanent members. Abstentions in these matters do not block the decision and, therefore 'count' as concurring votes. See on this N.M. Blokker and H.G. Schermers, *International Institutional Law* (2003), at paras 821, 824, and 1339.

²¹ H. Honsell, *Römisches Recht* (2002), at 13.

²² R. Dekkers, *La Fiction Juridique, étude de droit romain et de droit comparé* (1935), at 117 ff.

²³ It is not within the scope of this study to enter into the question of instrumentalism. For instrumentalism reference is made to R.S. Summers, *Essays on the Nature of Law and Legal Reasoning* (1992); Koskeniemi, 'What is International Law for?', in M.D. Evans, *International Law* (2006), at 64–78 and van Aeken, 'Legal Instrumentalism Revisited', in L.J. Wintgens, *The Theory and Practice of Legislation* (2005), at 67–92. Koskeniemi and van Aeken include bibliographies.

²⁴ Dekkers, *supra* note 22, at 87. [they are] 'one of the means of the development of the law'.

²⁵ M. van de Kerchove and F. Ost, *le Droit ou les Paradoxes du Jeu* (1992), at 160–161: 'far from representing a dysfunction of the law's discursivity, fictions merely push the limits of the very efficacy of a discourse, in narrative or performance, firmly established in "its" reality. Classical jurists pretend to believe that fictions constitute an underestimated or unnatural reality, and that it is possible to bypass them, without deviations and artificial constructs, in order to grasp reality as it is. But, since reality is necessarily elusive, being nothing more than the product of conventional nomination, the fiction will appear not as a deficiency but rather as the manifestation of the nature of legal discourse'.

²⁶ See Vaihinger, *supra* note 1, at 258; Dekkers, *supra* note 22, at 24–37; Foriers, 'Présomptions et Fictions', in Perelman and Foriers, *supra* note 17, at 7–8.

which is also sometimes called a fiction because of the element of 'pretending' that the two 'fictions' have in common. Yet, the fictive element in 'legal personality' is not so much that it is an express twist of reality or an assimilation of one thing to something it is not, but rather its non-tangible nature. 'Legal personality' is virtual rather than fictitious.

A The Nature of Legal Fictions

Dekkers, who has offered a useful model for an understanding of the nature of legal fictions, has described three characteristics of legal fictions: they are imprecise, necessary and limited.²⁷ The lack of precision is due to the fact that they are always forced and always knowingly present a false situation by pretending something is something else: '*on n'assimile que les choses qui ne s'assimilent pas toutes seules*.'²⁸ The assimilation is thus imperfect. One of the main reasons for the imperfection is that the assimilation only occurs one way. To give one standard example from Roman law: the alien is treated as a citizen but not vice versa. The necessity for legal fictions arises out of lack of an applicable regime for a particular situation. If there are no laws on inheritance from or by aliens, we pretend that the aliens are citizens to include them in an existing regime. It is particularly for this reasons that fictions are a means to an end. As Dekkers puts it: '*[I]a fiction propre vise à ménager par la pensée une route artificielle vers une solution de droit directement inaccessible, ou plutôt à emprunter abusivement la seule route qui y conduise*.'²⁹ Finally, fictions are limited. The fiction applies to one field of law or one set of rules but not to another. The fiction that aliens are citizens is only applicable with respect to, for instance, inheritance. Applying the fiction to these matters does not imply that they also have all the other rights citizens have, such as the right to vote. Or, to return to diplomatic protection, the fiction that injury to an individual is an injury to the individual's national state does not also imply that the responsibility of an individual is the same as the responsibility of a state. As mentioned above, legal fictions are a device to apply an existing regime to a (new) situation or compilation of facts that is not (yet) governed by its own regime but for which regulation is deemed necessary. They are a reaching out to establish inclusion.

However, if a new, more adequate, regime is established for this situation, the fiction will be abandoned. The transitional character of fictions is particularly evident if we consider the example of immunity for embassy premises: the immunity and inviolability to embassy premises has in the past been ensured by applying the legal regime applicable to the territory of the sending state, thus excluding the jurisdiction of the receiving state.³⁰ Nowadays, since diplomatic immunities are approached on a more functional basis, the fiction is abandoned and immunity and inviolability is ensured by an argument of necessity derived from the function of diplomatic relations: immunity

²⁷ Dekkers, *supra* note 22, at 39.

²⁸ *Ibid.*, at 40: 'one assimilates only those things that do not automatically assimilate with each other'.

²⁹ *Ibid.*, at 47: 'the genuine fiction envisages to lead by a mentally invented artificial route to a legal solution that is not directly accessible, or rather to take abusively the only route that leads there'.

³⁰ I. Brownlie, *Principles of Public International Law* (2003), at 343.

is necessary in order for diplomatic relations to be enjoyed undisturbed. Rather than a blanket provision where the entirety of the embassy is considered to be beyond the jurisdiction of the receiving state, a new and more adequate regime for immunities is now provided for in the Vienna Conventions on Diplomatic Relations and Consular Relations, specifying where immunities apply and where they do not.

While the establishment of the Vienna Conventions concerning Diplomatic and Consular Relations may provide a clear abandonment of the fiction, there is however an inherent difficulty concerning the transitional character of legal fiction which is made clear by Dekkers:

*ceux qui ne connaîtront ou n'admettront pas l'explication directe [i.e. an argument dismissing the fiction and replacing it by something else] continueront à prétendre que le cas envisagé constitue un exemple typique de fiction. Ceux qui, au contraire, admettront cette explication, auront tendance à dire, non seulement qu'il n'y a plus de fiction dans ce même cas, mais qu'il n'y en a point, voire même qu'il n'y en a jamais eu.*³¹

The point is that the acceptance of a fiction depends largely on the perceived status of the subject of the fiction in law. Thus, those who believe that individuals have complete and full agency under international law will reject the legal fiction in diplomatic protection (and say in fact that it never existed and that the Court in *Mavrommatis* was wrong), while those who consider the state as the primary actor in the international field and who reject to a large extent the individual as an entity with international legal personality will maintain the fiction as a desirable, and necessary, tool for the protection of individual rights. Indeed, recent developments in international law have led some scholars, primarily French, to believe that the fiction in diplomatic protection has lost its relevance and that it should be abandoned.³² As mentioned above, this discussion has again gained relevance through the work of the International Law Commission (ILC), since the drafting of the Articles on Diplomatic Protection has come to an end. As will be described below, both states, in their comments and observations to the Draft Articles, and individual members of the ILC have raised the issue of the fiction, since the Draft Articles adopted on first reading and the Special Rapporteur seem to adhere to the fiction as it was laid down in Vattel's writing and the *Mavrommatis* decision.

³¹ Dekkers, *supra* note 22, at 200 (emphasis in original): 'those who do not know or do not accept the direct explanation will continue to consider that the case at hand constitutes a typical example of a fiction. On the contrary, those who accept this explanation have a tendency to say not only that there is *no longer* a fiction in the same case, but that there is *no fiction at all*, or even that *there never* was a fiction' (translation by the author).

³² See, e.g., Pellet, 'Le Projet d'Articles de la C.D.I. sur la Protection Diplomatique, une codification pour (presque) rien', in M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amicorum Lucius Cafilisch* (2006), at 1133, para. 18; Dominici, 'Regard Actuel sur la Protection Diplomatique', in J.D. Bredin et al., *Liber Amicorum Claude Reymond, Autour de l'Arbitrage* (2004), at 75; *id.*, 'La Prétention de la Personne Privée dans le système de la Responsabilité Internationale des Etats', in *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz* (2004), ii, at 742–743; Dubois, 'La Distinction entre le droit de l'Etat réclamant et le Droit du Ressortissant dans la Protection Diplomatique', 67 *Revue Critique de Droit International Privé* (1978) 614, but note that he also states, at 629, that '[c]omme tant d'autres cette fiction s'imposerait parce qu'elle est utile et non dépourvu de tout lien avec la réalité'.

B *Vaihinger's Philosophy of As If and Kelsen's Response*

We have seen that legal fictions operate as assimilation: something is treated *as if* it were something else. In this respect, it is interesting to address the views of Hans Vaihinger on fictions and Hans Kelsen's response to Vaihinger. In the early years of the 20th century, the German philosopher Hans Vaihinger wrote an extensive treatise on fictions in general: *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit*. His hypothesis was that human beings are unable to know everything surrounding them and that they continuously create concepts of reality, and pretend that these are true. Fictions are an instrument '*das uns dazu dient, uns in der Wirklichkeitswelt besser zu orientieren*'³³ or, in other words '*[o]hne solche Abweichungen [i.e. fictions] kann das Denken seine Zwecke nicht erreichen*'³⁴ the purpose being to know and understand reality. According to Vaihinger, legal fictions are a special kind of symbolic (analogical) fiction, which rely on analogy as opposed to abstractions that are fictive because they expressly ignore certain details or characteristics,³⁵ or artificial classifications, such as Linnaeus' system, that are fictive because they suppose an order on the outside world that does not exist in reality.³⁶ While a diversion from reality, fictions are as indispensable to law as axioms are to mathematics: '*[w]eil die Gesetze nicht alle einzelnen Fälle in ihren Formeln umfassen Können, so werden einzelne besondere Fälle abnormer Natur so betrachtet, als ob sie unter jene gehörten.*'³⁷

In Vaihinger's view, fictions are thus a tool used to enhance our understanding and knowledge of reality. In 1919 Hans Kelsen wrote an essay in response to Vaihinger's book, in which he expressed his profound disagreement with Vaihinger's views on fictions in general and legal fictions in particular.³⁸ He pointed out that law and legislation are not designed for the purpose of knowledge or understanding but rather constitute an act of will (*Willenshandlung*).³⁹ According to Kelsen, this means that legal fictions are a *fremdcörper* in Vaihinger's *philosophy of as if*, and that their *raison d'être* is not what Vaihinger thinks it is. At the outset it should be noted that this does not necessarily entail that Vaihinger's analysis of legal fictions per se is erroneous. Whether or not one agrees with Vaihinger that the purpose of fictions is the understanding of reality, Vaihinger correctly noted that fictions are a twist of reality and that they are a means to an end. They are a legal mechanism to apply legal rules to a given, unregulated, situation.

³³ Vaihinger, *supra* note 1, at 23.

³⁴ *Ibid.*, at 49.

³⁵ The example of the latter given by Vaihinger is Adam Smith's economic theory, which pretends, according to Vaihinger, that all economic drive is derived from human egoism, thereby ignoring factors such as custom and benevolence: see *ibid.*, at 30.

³⁶ *Ibid.*, at 25–27.

³⁷ *Ibid.*, at 46 (emphasis in original) and similarly at 70.

³⁸ Kelsen, 'Zur Theorie der juristische Fiktionen', in H. Klecatsky, R. Marci, and H. Schambeck, *Die Wiener Rechtstheoretische Schule, ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross* (1968), at 1215–1241. Kelsen refers to the second edition of Vaihinger's book, which was published in 1913. The edition used for present purposes is a later one, which however does not deviate from the second edition.

³⁹ *Ibid.*, at 1222–1223.

Kelsen's analysis of the examples of fictions given by Vaihinger was designed to show that these are by their very nature not fictions. First, he argued that it is not correct to treat the case in which the law grants a foreigner the same rights as a citizen as a legal fiction. One should rather consider that the legal framework has been expanded to also include foreigners.⁴⁰ The inclusion of persons or entities within an existing framework that originally did not envisage covering these entities or persons broadens the application of the law. It is important to note, however, that the element of expansion does not deprive this situation of its fictitious nature. Indeed, the broadening of the law's application is achieved through the instrument of the fiction. The positions of Kelsen and Vaihinger are therefore not as difficult to reconcile as Kelsen suggested. Perhaps an explanation for their difference of opinion is that while for Kelsen the result determined the outcome of his analysis, Vaihinger was more concerned with the mechanism itself.

A different point of critique by Kelsen was directed against the fiction that 'the king can do no wrong' put forward by Vaihinger as a classical example of fictions in neo-Kantian style.⁴¹ Kelsen argued that this is not a fiction, but that the king in reality can do no wrong because the law is not applicable to the king. Doing wrong is not inherently wrongful. It is only wrongful if a *Rechtsnorm* says so. If the king is beyond the law, it means that in reality he can do no wrong.⁴² There are, however, two difficulties with this line of reasoning. First, it is not true that the king can do no wrong in reality. The point is that the king cannot be held responsible for his wrongful acts, but this is not to say that no one can be held responsible for the king's doing or that he is beyond the reach of the law. Vaihinger has explained this by reference to the situation where it is legally pretended that the speeches of the king are issued by his ministers.⁴³ This clearly constitutes a twist of reality, a denial of a truth, in short: a fiction. If an official speech of the king contains racist elements, this will be in violation of the laws of his country, but the prime minister will be held responsible as if it were the prime minister who had given the speech. Secondly, a similar issue concerns the powers of ruling bodies to take binding decisions and the extent to which they are subject to review. Kelsen argued that the maxim that the king can do no wrong reflects reality: the king is inherently unable to take a decision that is in violation of the law, since there is no review. He would be de facto beyond the law.⁴⁴ Perhaps the best current example of this is provided by the UN Security Council and the extent to which, if at all, it is limited in its decision-making. Article 25 of the UN Charter obliges UN Member States to 'carry out the decisions of the Security Council in accordance with the present Charter'. The Security Council is in its turn obliged to act in accordance with the purposes and principles of the United Nations under Article 24(2). The Charter does not explicitly provide for review of the

⁴⁰ Kelsen, *supra* note 38, at 1229.

⁴¹ Vaihinger, *supra* note 1, at 696–697.

⁴² Kelsen, *supra* note 38, at 1227.

⁴³ For instance, under the Dutch constitution, the Prime Minister is responsible for acts of the Queen. See Wet van 28 Oct. 1954, houdende aanvaarding van het Statuut voor het Koninkrijk der Nederlanden (Act of 18 Oct. 1954, containing the adoption of the Statute of the Kingdom of the Netherlands), Art 2(1).

⁴⁴ Kelsen, *supra* note 38, at 1227.

decisions by the Security Council.⁴⁵ However, the question of review and responsibility should be clearly distinguished from the question of initial illegality. Since the Charter itself limits the powers of the Security Council, any decision in breach of those purposes and principles would be an act *ultra vires*. The question of whether anyone can actually hold the Security Council responsible or provide some kind of review is another matter. This applies in the same way to the example discussed by Kelsen and Vaihinger: the king can do no wrong. It is submitted that this does not reflect reality, but is a fiction applied to put the entity in question beyond responsibility.

More complicated is Kelsen's criticism on the fiction of legal personality. As pointed out above, legal personality is not a fiction properly speaking: its fictitious nature is derived from its intangibility rather than its conflict with reality. While this does fall within the scope of Vaihinger's *philosophy of as if*, since his philosophy includes all abstractions and intellectual and mental constructs, it is not a legal fiction properly speaking. Kelsen correctly noted that this kind of 'fiction' belongs to legal theory, rather than to legislation or legal practice,⁴⁶ but he has found another difficulty with this fiction as a legal fiction: As long as legal personality is a reflection of something else (*ein Spiegelbild*), it is not necessarily to be rejected.⁴⁷ In law, however, legal personality exists separately from the physical entity that owns the personality and has been hypostatized into a natural entity within the reality of law. The independent existence of legal personality alongside its origin, the 'real' person, renders the fiction unacceptable. It is, in Kelsen's words, an '*eigenartige Duplikation des Rechtes*' or a tautology.⁴⁸ It seems, however, that Kelsen did finally accept the existence of legal personality and its fictitious nature, but only with the inclusion of a caveat: one should always be aware of the fictive nature of legal personality and of the fact that it is a duplication of something else, to avoid internal contradiction in the legal system itself.⁴⁹

However, while Kelsen did not object strongly to the use of fictions in legal theory, he has considered them particularly problematic if applied in legislation or legal practice: '*[d]ie juristische Fiktion kann nur eine fiktive Rechtsbehauptung, nicht eine fiktive Tatsachenbehauptung sein.*'⁵⁰ Since the judiciary lacks the power to expand the law as it sees fit, it may have to resort to a fiction to solve a case at hand. However, in reality this is problematic. The 'reality' that fictions belong to is the *Rechtsordnung* and because fictions contradict this reality emphasis should be on their provisional and

⁴⁵ The issue of Security Council review has been discussed extensively in recent years. It is beyond the scope of this study to provide an exhaustive list of publications on this issue. For a general introduction see Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *ICLQ* (1997) 309; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004); Lamb, 'Legal Limits to the United Nations Security Council', in G.S. Goodwin-Gill and S. Talmon (eds), *The Reality of International Law—Essays in honour of Ian Brownlie* (1999), at 361–388; *Prosecutor v. Dusko Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case no. IT-94-AR72 of 2 Oct. 1995, at paras 14–22 and *Prosecutor v. Dusko Tadic* (Jurisdiction), Case no. IT-94-IT, Trial Chamber decision of 10 Aug. 1995.

⁴⁶ Kelsen, *supra* note 38, at 1221.

⁴⁷ *Ibid.*, at 1221.

⁴⁸ *Ibid.*, at 1220.

⁴⁹ *Ibid.*, at 1220–1222.

⁵⁰ *Ibid.*, at 1230: 'the legal fiction can be no more than a fictitious claim about law, not about facts'.

correctable nature. Legal fictions are not a detour leading ultimately to the reality of law but a deviation that ‘vielleicht zu demjenigen führt, was der Fingierende für nützlich und zweckmäßig hält, niemals aber zum Gegenstand der Rechtswissenschaft: dem Recht’.⁵¹ This implies that correction should be possible and often will be necessary. Vaihinger however has said that unlike other fictions, legal fictions do not require correction, which Kelsen has considered unacceptable not only for fictions that belong to legal theory such as legal personality, but in particular for fictions applied in legal practice.

Taking into account Vaihinger’s insistence on the contradictory nature of fictions and yet his emphasis on the purpose of fictions, Kelsen concluded that ‘[r]echtstheoretisch ist somit eine Fiktion des Gesetzgebers unmöglich, eine Fiktion des Rechtsanwenders gänzlich unzulässig, weil rechtszweckswidrig’.⁵² Legal fictions are not only inconsistent with reality, but also with the legal system in which they operate. Consequently, they obviate the purpose of any legal system. According to Kelsen, again, Vaihinger’s fictions cannot exist in Vaihinger’s world.

While one may find Kelsen’s criticism enlightening, since it does discuss the very nature of fictions, it does not convincingly show that legal fictions do not or should not exist at all. When discussing legal fictions, it is necessary not only to see the outcome of the process but also to study the process by which this outcome was facilitated. One should inquire what is actually achieved by resorting to a legal fiction and how this is done. The fact that a certain outcome seems ‘real’, such as ‘the king can do no wrong’, does not imply that fictions were or should be absent. As Hart has said, the fact that there is no sanction does not imply that the rule itself does not exist,⁵³ meaning that the fact that an entity fictitiously cannot be held responsible does not preclude its obligation to comply with the law. In addition, when the application of a fiction establishes a transformation, such as the foreigner who is treated as if he or she were a citizen, this transformation is not eternal, indefinite nor irreversible. Legal fictions may well provide the only way to a certain end. Within the framework of diplomatic protection, this is clearly the case: as long as individual agency under international law is limited, the fiction in diplomatic protection will be indispensable.

3 The Fiction in Diplomatic Protection and the Distinction between Primary and Secondary Rules of International Law

A Introduction

International law generally distinguishes between primary and secondary rules. This distinction is relevant with respect to the legal fiction in diplomatic protection since it

⁵¹ *Ibid.*, at 1232: [a deviation that] ‘perhaps leads to what the designer of the fiction finds useful and sensible, but never to the subject of legal scholarship itself, which is the law’.

⁵² *Ibid.*, at 1233: ‘from the point of view of legal theory, the application of fictions by legislators are therefore impossible, the use of fictions by those who apply the law are totally unacceptable because they are contrary to the purpose of the law’.

⁵³ H.L.A. Hart, *The Concept of Law* (1961), at 212–213.

is exactly through the operation of the fiction that a state has the right to espouse a claim (a secondary rule) based on injury to an individual national arising out of the violation of a right under international law of this individual (a primary rule). The fiction thus facilitates the transformation from a primary rule into a secondary rule. Whereas this supports the position that the state is in reality not claiming its own right but only exercises a secondary right, any ambiguity of the distinction between primary and secondary rules or indeed of the status of the rights involved in diplomatic protection has a bearing on the fiction.

In what follows the hybrid nature of diplomatic protection with respect to the distinction between primary and secondary rules will be discussed in particular with respect to the function of the legal fiction. The first section will discuss the requirement of the occurrence of an internationally wrongful act. In the second section, the relation between the concept of denial of justice and the requirement to exhaust local remedies will be explored. One minor issue will just be mentioned here. As has been pointed out by Bennouna, the rules on nationality, which were largely developed within the framework of diplomatic protection, belong to the primary rules of international law, while the nationality of claims rule itself is part of the secondary rules.⁵⁴ This is a first, albeit minor, indication that some elements of diplomatic protection are somewhat in between the primary and the secondary rules of international law.

B *The Law of State Responsibility: A Set of Secondary Rules*

Diplomatic protection is part of the law of state responsibility. In 1962 Roberto Ago, who was to be appointed Special Rapporteur to the ILC in 1963, introduced the distinction between primary and secondary rules of international law to the ILC with respect to the law of state responsibility, thereby abandoning F. V. Garcia Amador's approach which had included a study on the substantial rules regarding the treatment of aliens.⁵⁵ Thus, under the law of state responsibility 'the focus is upon principles concerned with second-order issues, in other words the procedural and other consequences flowing from a breach of a substantive rule of international law'.⁵⁶ For the theoretical underpinning of the distinction, reference is usually made to Hart's *Concept of Law*, in which he has said that primary rules 'impose duties' and 'concern actions involving physical movement or changes', whereas secondary rules 'confer

⁵⁴ Bennouna, 'Preliminary Report on Diplomatic Protection', International Law Commission, 50th Session, A/CN.4/484 (1998), at para. 60.

⁵⁵ See [1963] II Yearbook of the ILC 228, at para. 5. Although Ago has generally been applauded as the designer of this distinction, it was hardly new. It had been advocated before in the *Recueil des Cours* at the Hague Academy in the 1920s: in 1925 Charles de Visscher, in the chapter entitled 'La Codification du Droit International', wrote '[il existe] entre les règles de droit une distinction qui, à notre avis, est absolument fondamentale. C'est la distinction . . . entre les règles primaires ou normatives et les règles secondaires, constructives ou techniques', 6 *Recueil des Cours* (1925) 329, at 341 (emphasis in original). He continued by explaining, at 342–344, that the function of the secondary rules is to enforce the primary rules, to lay down competences and to regulate sanctions. It is also part of Hart's concept: see *infra* note 57 and accompanying text.

⁵⁶ M.N. Shaw, *International Law* (2003), at 694.

powers' and 'provide for operations which lead not merely to physical movement or change but to the creation or variation of duties or obligations.'⁵⁷

Despite the convenience of categorizing, it is difficult to give precise definitions of the terms 'primary' and 'secondary' norms. One way to describe the distinction is by reference, more common in civil law systems, to the distinction between substantive law and procedural law. Secondary rules are, in addition, sometimes considered necessary for a legal system by bringing unity to the compilation of primary obligations that otherwise would be juxtaposed without structure.⁵⁸ The secondary rules are the 'meta'-rules that lay down the consequences arising out of a violation of the primary rules, the modalities of change of the primary rules and, wherever applicable, the hierarchy between these rules. They are *about* other rules of law and become relevant *after* the breach of another rule. The primary rules are those that concern the rights and obligations of states, such as the prohibition on the use of force, *pacta sunt servanda*, the prohibition of genocide, the right to declare a foreign diplomat a *persona non grata* etc. The secondary rules are necessary to enforce the primary rules, to facilitate change or lay down the rules of adjudication.⁵⁹ Since the ILC Articles on State Responsibility are considered to contain secondary rules of international law,⁶⁰ diplomatic protection, being a part of the law on state responsibility, in particular the responsibility for injury to aliens, has likewise been placed under the secondary rules and the ILC in its project on the draft articles on diplomatic protection has been consistent in this approach.⁶¹

The secondary nature of state responsibility is however not always clear. Some rules are both primary and secondary. For instance, if a state violates a rule of diplomatic law versus another state, which is a violation of a primary rule, the latter state will be entitled to respond and to resort to countermeasures, which is a secondary rule. However, it may not react in kind since diplomatic law is excluded from the realm of countermeasures under Art 50(2)(b) of the Articles on State Responsibility, which reflects the dictum of the ICJ in the *Tehran Hostages* case.⁶² This indicates that the rules on diplomatic and consular relations operate both on the primary and on the secondary level. In his Reports to the ILC as Special Rapporteur on State Responsibility, James Crawford repeatedly referred to the distinction and particularly to issues transgressing the distinction between primary and secondary rules. While the distinction proper is

⁵⁷ Hart, *supra* note 53, at 79.

⁵⁸ See Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends', in L.A.N.M. Barnhoorn and K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law* (1995), at 31–32.

⁵⁹ See on this point Hart, *supra* note 53, at 77.

⁶⁰ See International Law Commission, 'Report on the work of its 53rd session', GA Official Records, 55th Session, supp. 10. A/56/10 (2001), at 59, para. 77.

⁶¹ See Bennouna, *supra* note 54, at paras 55–65; Dugard, *supra* note 14, at para. 35; Seventh Report on Diplomatic Protection, International Law Commission, 58th session, A/CN.4/567 (2006), at para. 3; and Commentary to the draft Arts on second reading, *supra* note 2, at 22–24 and 26.

⁶² *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* [1980] ICJ Rep 3, at para. 53.

not within the scope of the present discussion,⁶³ special complexities arise with respect to some elements of state responsibility and diplomatic protection.

In his First Report Crawford defended the distinction by pointing to the advantages, such as that '[g]iven rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification'.⁶⁴ In the Second and Third Reports, specific issues pertaining to the (ambiguity of) the distinction were revealed. Two of these issues are particularly relevant as they also play a significant role in the law of diplomatic protection. State responsibility only arises after the occurrence of an internationally wrongful act which 'constitutes a breach of an international obligation of the State'.⁶⁵ However, as Crawford noted, '[i]n determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules', thereby aggravating the strict separation of primary and secondary rules.⁶⁶ He suggested, however, that the draft articles 'are intended to provide a framework for that consideration'.⁶⁷ It should thus not be interpreted to threaten the distinction. A similar issue arises in the context of diplomatic protection: it can only be exercised in response to an internationally wrongful act. The occurrence of an internationally wrongful act is both a criterion of admissibility and the primary rule, being part of the merits of the claim. In most claims concerning diplomatic protection, the questions of nationality and local remedies will be dealt with first since failure to comply with the nationality of claims rule or the requirement to exhaust local remedies will render the claim inadmissible. If both criteria are fulfilled, the merits phase will consider the occurrence of an internationally wrongful act. However, if it is decided that in fact there was no internationally wrongful act, one may question what will be the grounds of dismissal: Will the case be held to be inadmissible or unfounded? In practice, it may not be very relevant to make this distinction, but it is submitted that it does affect the distinction between primary and secondary rules.

⁶³ See, for instance, van Detta, 'The Irony of Instrumentalism: using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases', 87 *Marquette L Rev* (2004) 425, who stated, at 447, that 'substantive law has among its goals the regulation of private conduct that exceeds prescribed parameters' but at 438-449 that 'without procedure, the substantive law remains, at best, hortatory and indeterminate', thereby arguing against the rigidity of distinction and adhering to Dworkin's model emphasizing principles.

⁶⁴ Crawford, 'First Report on State Responsibility', International Law Commission, 50th session, A/CN.4/490 (1998), at para. 15.

⁶⁵ Arts on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC on 10 Aug. 2001, 'Report of the International Law Commission', 53rd session, A/56/10, Ch. IV (2001), annexed to General Assembly Resolution 56/83 (2001), Art. 2(b).

⁶⁶ Crawford, 'Second Report on State Responsibility', International Law Commission, 51st session, A/CN.4/498 (1999), at para. 3.

⁶⁷ *Ibid.*

C *Local Remedies and Denial of Justice*

More complicated is the matter of exhaustion of local remedies, which is also particularly relevant to the exercise of diplomatic protection since it is one of its conditions. Whereas the local remedies rule clearly is a criterion of admissibility, it is closely related to the concept of denial of justice. The latter, however, has generally been regarded as part of the primary rules. The occurrence of a denial of justice as a primary rule has a bearing on the requirement to exhaust local remedies as a secondary rule but the two are not always easily distinguishable. As Freeman already noted ‘[t]he relationship between the local remedy [sic] rule and the State’s duty of providing an adequate judicial protection for the rights of aliens is so close as to promote continuous confusion’.⁶⁸ He went on to say that in certain cases ‘the denial of justice creates at once the grounds *and* the conditions of the claim’s presentation’.⁶⁹ In a similar manner, Crawford has recognized that there is some ambiguity: ‘the refusal of a local remedy will itself be internationally wrongful’⁷⁰ and ‘the failure to provide an adequate local remedy is itself the relevant internationally wrongful act ... for example, where the injury to the alien is caused by conduct not attributable to the State, or where the violation involves a breach of due process standards ... which occurs at the time of seeking the remedy.’⁷¹ However, since he referred to denial of justice as an example of a ‘complex act’ giving rise to state responsibility, he clearly placed it under the primary rules.⁷² In this, he was preceded by scholars such as Borchard,⁷³ Freeman⁷⁴ and Roth,⁷⁵ and succeeded by Paulsson.⁷⁶ Although they also discussed the nature of denial of justice and the question of which failure in the judiciary would amount to a denial of justice, they have all stressed the fact that the occurrence of a denial of justice engages state responsibility of the host state.

Amerasinghe has attempted to disentangle the two concepts. He noted that ‘the fact that the process of internal remedies results in a decision which is contrary to international law or is in violation of the international obligations of the host state cannot appropriately and is not to be characterized as a denial of justice’.⁷⁷ In such a case ‘after the exhaustion of local remedies the final decision taken is simply not one

⁶⁸ A.V. Freeman, *International Responsibility of States for Denial of Justice* (1938, reprinted 1970), at 406.

⁶⁹ *Ibid.*, at 406 (emphasis in original).

⁷⁰ Crawford, *supra* note 66, at para. 138.

⁷¹ *Ibid.*, at para. 145 (footnotes omitted).

⁷² *Ibid.*, at paras 97 and 126.

⁷³ Borchard, *supra* note 14, at 330.

⁷⁴ See Freeman, *supra* note 68, who stated at 410 that ‘responsibility arising out of denial of justice is purely a substantive matter’ (emphasis in the original).

⁷⁵ A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949), who wrote, at 178, that ‘the violation of these substantive rights [i.e. the right not to suffer a denial of justice] by the State organs entails the State’s responsibility’. See also at 181.

⁷⁶ J. Paulsson, *Denial of Justice in International Law* (2005), at 40 stated that ‘[i]t is no longer seriously possible to contend that the nature of national judicial bodies is so different from other governmental instrumentalities that the state is insulated from international liability on account of judicial conduct’ and he then referred to the ILC Arts on State Responsibility.

⁷⁷ C.F. Amerasinghe, *Local Remedies in International Law* (2004), at 98.

which an international tribunal in prospect would take in the case concerned'.⁷⁸ If, however, the denial of justice is the international wrong underlying the claim in exercise of diplomatic protection, the local remedies rule applies to this wrong. The injured individual is required to exhaust local remedies *with respect to the denial of justice* and this is thus the cause of action before local courts.⁷⁹ The implication of this is that the occurrence of a denial of justice does not affect the requirement to exhaust local remedies and that the two rules exist separately.

This, of course, is theoretically correct. After the occurrence of an internationally wrongful act, local remedies must be exhausted before an international claim can be brought. In addition, a denial of justice is relatively easy to repair by proper administration of justice. Paulsson has taken this line of thought even further and has stated that while the requirement to exhaust local remedies may be waived in other instances, it is a pertinent rule in cases of allegations of denial of justice, since such a denial cannot be established until remedies have been exhausted. He stated that 'it is in the very nature of the delict that a state is judged by the final product'.⁸⁰ He justified this strictness by reference to the principle of non-interference: 'it avoids interference with the fundamental principle that states should to the greatest extent possible be free to organise their national legal systems as they see fit. . . . If aliens are allowed to bypass those mechanisms and bring international claims for denial of justice on the basis of alleged wrong-doing by the justice of the peace of any neighbourhood, international law would find itself intruding intolerably into internal affairs.'⁸¹ Yet, even Paulsson admitted that there is an element of reasonableness since '[t]he victim of a denial of justice is not required to pursue improbable remedies'⁸² and he continued by demonstrating that it is far from easy to determine when this improbability applies.⁸³ He concluded that a test based on reasonable availability and effectiveness would be most viable.⁸⁴ Clearly, Paulsson did not consider this matter from the perspective of the distinction between primary and secondary rules and only allowed a denial of justice to constitute a mitigating factor for the requirement to exhaust local remedies.

The ILC considers the local remedies rule to be a rule of procedure rather than of substance: state responsibility arises after the commission of an internationally wrongful act, regardless of exhaustion of local remedies, but diplomatic protection can only be exercised after the exhaustion of these remedies.⁸⁵ While this emphasizes the secondary nature of the local remedies rule, it does not in itself clarify the relation between the local remedies rule and denial of justice. Dugard, in his reports to the ILC on diplomatic protection, has discussed the issue of denial of justice and

⁷⁸ *Ibid.*, at 98.

⁷⁹ *Ibid.*, at 99–102.

⁸⁰ Paulsson, *supra* note 76, at 108.

⁸¹ *Ibid.*, at 108.

⁸² *Ibid.*, at 113.

⁸³ *Ibid.*, at 113–119.

⁸⁴ *Ibid.*, at 118.

⁸⁵ Dugard, *supra* note 10, at paras 63–66. See also Amerasinghe, *supra* note 77, at 419–421.

exhaustion of local remedies. Aware of the ambiguities, he has called for some flexibility.⁸⁶ He echoed a concern raised by his predecessor Bennouna, who had asked the ILC for guidance on this topic. Although Bennouna agreed with the approach taken by the ILC, he had also stressed that too much rigidity would be undesirable.⁸⁷ He felt that it is not always easy to clearly distinguish primary and secondary rules of international law and although he concluded that diplomatic protection doubtlessly belongs to the latter, he was reluctant to exclude any discussion on primary rules.⁸⁸ Dugard in his turn concluded that:

[c]ircumstances of this kind [ie the ‘intimate connection’ between the concept of denial of justice and the local remedies rule], coupled with the fact that denial of justice may be seen both as a secondary rule excusing recourse to further remedies (associated with the ‘futility rule’ ...) or as a primary rule giving rise to international responsibility, suggest that the attempt at maintaining a rigid distinction between primary and secondary rules followed in the study on State responsibility should not be pursued with the same degree of rigidity in the present study.⁸⁹

Amerasinghe has correctly noted that the occurrence of a denial of justice is not a prerequisite for the exercise of diplomatic protection and that not every malfunctioning of the judiciary amounts to a denial of justice.⁹⁰ However, Dugard’s concerns apply to cases in which a denial of justice did occur, particularly if this was in addition to another internationally wrongful act and occurred in the process of exhausting local remedies for the first injury. Amerasinghe would then require the injured individual to bring another claim against the host state in local courts seeking redress for the denial of justice. Again, in theory this may be right. In practice, however, one should consider that this puts the threshold for the exhaustion of local remedies too high. In particular, the Italian government, in its comments and observations to the draft articles on diplomatic protection, has raised this point. It considered denial of justice as an exception to exhaust local remedies when it suggested that an express reference should be included in draft article 16(b) [now article 15(b)] of the articles on second reading since it was not easily inferred from paragraph a of the same article.⁹¹ This suggestion did not receive sufficient support in the ILC. Nonetheless, this was not because the members felt that denial of justice would not create an exception to the local remedies rule but because the concept of denial of justice was considered to belong to the primary rules of international law and thus should not be referred to here.⁹² Even if the distinction between primary and secondary rules entailed the exclusion of the concept

⁸⁶ Dugard, *supra* note 10, at para 9. See also Dugard, ‘Third Report on Diplomatic Protection’, International Law Commission, 54th session, A/CN.4/ 523 (2002), at para. 21.

⁸⁷ Bennouna, *supra* note 54, at paras 62–64.

⁸⁸ *Ibid.*, at paras 55–65.

⁸⁹ Dugard, *supra* note 10, at para 10.

⁹⁰ *Supra* notes 78 and 79 and accompanying text.

⁹¹ Comments and Observations, Add. 2, *supra* note 15, at 5.

⁹² The ILC deliberately omitted the term: the draft Arts adopted on second reading do not contain the term ‘denial of justice’, neither do the commentaries to the relevant Arts: see commentary to draft Art. 15(a) and (b), Commentary to the draft Arts on second reading, *supra* note 2, at 77–80.

of denial of justice, the draft articles cover the situation described by the Italian government. Draft article 15 quite strongly relies on the *reasonableness* of the exhaustion of local remedies: an exception will apply where this is unreasonable. It will be recalled that this was also advocated by Paulsson.⁹³ An example of unreasonableness is the absence of a voluntary link between the individual and respondent state, for instance in the case of transboundary pollution or radioactive fallout.⁹⁴ Similarly, the exhaustion of local remedies is not necessary when the local judiciary is 'notoriously lacking independence' or when there is no 'adequate system of judicial protection'.⁹⁵ These instances are both included in the concept of denial of justice.⁹⁶ This leads to the conclusion that under certain circumstances an individual who has suffered a denial of justice cannot reasonably be expected to repeat the exercise of going through the local judiciary for the purpose of exhausting the local remedies.⁹⁷ Nonetheless, the implication is again that a primary rule and a secondary rule conflate into one and that the distinction between primary and secondary rules is obscured.

D Conclusion

The two conditions of diplomatic protection discussed in the preceding sections have in common that they operate both on the primary and on the secondary level. This could be taken to question the very distinction between secondary and primary rules and it is necessary to explore how and to what extent this affects the position of the legal fiction in diplomatic protection. Whereas this will be done more extensively below in the Conclusion, after discussion of the ILC's approach to the matter, some preliminary remarks must be made.

The legal fiction is a mechanism of transition, transforming the individual's primary right into his or her national state's secondary right. This transition is effected in two ways. An individual right is transformed into the right of a state and a primary right is transformed into a secondary right. Yet, these transitions do not operate on a parallel level. Whereas the primary rights only belong to the individual and the right to exercise diplomatic protection belongs to his or her national states, some of the underlying rights and obligations within the secondary rules also belong to the individual. The legal fiction entitling the state to exercise diplomatic protection thus operates at a rather late stage: only after local remedies have been exhausted and after the occurrence of an

⁹³ *Supra* note 83 and accompanying text.

⁹⁴ See draft Art. 15(c) and the commentary thereto which stipulates that this exception applies when 'it would be unreasonable and unfair to require an injured person to exhaust local remedies ... because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State': Commentary to Art. 15(c), para. 7, Commentary to the draft articles on second reading, *supra* note 2, at 80–81.

⁹⁵ *Ibid.*, at 79.

⁹⁶ See, e.g., Freeman, *supra* note 68, at 50–51; Paulsson, *supra* note 76, at 163–167, 170–173, 200–202.

⁹⁷ Perhaps the clearest example would be the *Aksoy* case before the European Court of Human Rights. In this case, the failure of the public prosecutor to take up Mr Aksoy's complaint was used both to allow an exception to the local remedies rule and to establish a violation of Art. 13 ECHR: see App. no. 21987/93, *Aksoy v. Turkey*, Judgment of 18 Dec. 1996, Rep 1996-VI, at paras 41–56 and 95–100.

internationally wrongful act has been established. It thereby brings a combination of primary and secondary rules into the realm of the secondary rules. Indeed, in applying the fiction as the element raising the claim from one level to the other, it channels various ambiguities into a right that is more easily definable. The resulting right is the right of a state: the right to claim responsibility of another state and to demand reparation for the injury. As will be further elaborated in the conclusion, this transition is necessitated by the incapacity of the individual to claim his or her own right under international law *vis-à-vis* another state. As long as individuals lack sufficient standing and influence in the international field, reliance on their national state will continue to be of major importance, which is only possible through the legal fiction in diplomatic protection.

4 The Fiction and the International Law Commission

As already mentioned, the question of the fiction in diplomatic protection has repeatedly been discussed within the framework of the ILC draft articles on diplomatic protection. ILC Special Rapporteur Mohamed Bennouna drew attention to the question in his Preliminary Report; it was raised again by his successor Special Rapporteur John Dugard in his First and Seventh Report; it is dealt with in the Commentary to the draft articles on first reading; it has been raised by various states in their comments to the draft articles prior to the second reading and individual members of the ILC in discussing these articles; and, finally, it was discussed by the drafting committee during the second reading of the draft articles.

A *The Preliminary Report*

In his preliminary report to the ILC,⁹⁸ Special Rapporteur Bennouna was clearly troubled by the fiction, in particular by the question of whose rights were being protected and whose right diplomatic protection itself actually was. A clear sign of Bennouna's confusion is the way in which he has quoted Vattel: 'Anyone who mistreats a citizen *directly* offends the State'.⁹⁹ The word 'indirectly' in the original text is here replaced by 'directly'. This, it is submitted, is more than a mere typographic error. It is indicative of a misunderstanding of the operation of the fiction in diplomatic protection as explained by Vattel. Hence, it is not surprising that the report does not introduce the main concepts related to diplomatic protection but rather asks for guidance by the ILC on most of the topics concerned. In addition, Bennouna's discussion shows an ambivalence *vis-à-vis* the topic of diplomatic protection as such, attempting to find a balance between views rejecting diplomatic protection as imperialist and old-fashioned and views promoting the mechanism as an instrument for the protection of human rights.¹⁰⁰ He therefore asked for guidance by the ILC on the question whether

⁹⁸ Bennouna, *supra* note 54.

⁹⁹ *Ibid.*, at para 6 (emphasis added). Bennouna relies on a translation provided in J.B. Schott, *The Classics of International Law* (1916).

¹⁰⁰ He refers for instance to Judge Padilla Nervo (at para. 8), G. Scelle (at para. 26), D. Carreau (at para. 47) (*contra*) and P.C. Jessup (at para. 10), R.B. Lillich (at n. 21) (*pro*). See also at para. 50.

a state 'when bringing an international claim, is ... enforcing his own right or the right of its injured national'.¹⁰¹ As he described it, the first dispute arises between an individual and the host state of which the individual is not a national. However, then 'his state of nationality ... can espouse his claim by having him, and the dispute, undergo a veritable "transformation"'.¹⁰² Although Bennouna recognized that this process is based on a legal fiction,¹⁰³ he seemed to question the status of the rights concerned based on a perceived 'duality': diplomatic protection both concerns the rights of an individual and the rights of a state. This duality has also been noted by Dubois who wrote that '[c]ette vision est en complète harmonie avec la thèse dualiste qui repose sur une séparation rigide entre l'ordre juridique international, celui des relations entre Etats, et l'ordre juridique interne dans lequel seul l'individu est sujet de droit'.¹⁰⁴ As discussed above, Bennouna found that various requirements of diplomatic protection are difficult to reconcile with the position that the state of nationality of the injured individual is the sole claimant and that this state is in fact acting in its own right. While this 'duality' can be explained as indicated above, meaning the right of the individual that has been violated and the right of the state to exercise protection, this difficulty prevented Bennouna from presenting any conclusions in the Preliminary Report and he left the matter to his successor.

B From the First Report to the Second Reading of the Draft Articles in the ILC

John Dugard addressed the issue of the fiction in his First Report.¹⁰⁵ He has stressed that while fictions clearly are a twist of reality they should not be dismissed out of a 'disdain for the use of fictions in law',¹⁰⁶ in particular when the 'institution, like diplomatic protection' relying on a fiction 'serves a valuable purpose', that is, the protection of human rights.¹⁰⁷ Short of other, more effective, mechanisms for the protection of individual (human) rights, the Special Rapporteur strongly urged not to throw the baby out with the bathwater.

In the commentary to draft article 3 in the First Report, the Special Rapporteur discussed the fiction in more detail.¹⁰⁸ The question raised here is 'the question of *whose* rights are asserted when the State of nationality invokes the responsibility of another

¹⁰¹ *Ibid.*, at para. 54.

¹⁰² *Ibid.*, at para. 16.

¹⁰³ *Ibid.*, at para. 21.

¹⁰⁴ Dubois, *supra* note 32, at 621: 'this vision is in complete harmony with the dualist thesis which relies on a rigid separation between the international legal order, the one of inter-state relations, and the domestic legal order in which the individual is the only legal subject'.

¹⁰⁵ Dugard, *supra* note 14, at paras. 17–32.

¹⁰⁶ *Ibid.*, at para. 18.

¹⁰⁷ *Ibid.*, at para. 21.

¹⁰⁸ Draft Art. 3 provides: '[t]he State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right', in *ibid.*, at para. 61. This provision was modified on second reading and now reads: '[t]he State entitled to exercise diplomatic protection is the State of nationality'. The reference to the discretion has disappeared. See Draft Arts adopted on second reading, *supra* note 14, Art. 3.

State for injury caused to its national'.¹⁰⁹ Referring to Vattel and the *Mavrommatis* decision, the commentary to this draft article concludes by supporting the traditional view in which the state asserts its own right. While admitting the difficulties with this position¹¹⁰ and after discussing options offered by others,¹¹¹ the Special Rapporteur remained convinced of the utility of the traditional view.¹¹² Since this position has caused some criticism by states in their observations and comments and also by some members of the ILC, it has partly been abandoned in the draft articles adopted on second reading, which has affected the wording in Article 1 in particular.

1 *Mavrommatis*, Pretending and Reality: The Wording of Draft Article 1

The *Mavrommatis Palestine Concessions* case may be the most cited authority on diplomatic protection, but it presents us with a difficulty that is not easily overcome and that has been a source of confusion with respect to the question of whose rights are protected in the exercise of diplomatic protection. The adherence by the ILC to this decision constitutes a continuation of this problem. As explained above, a legal fiction is an express twist of reality, a denial of a truth. Thus, if one agrees with the position that diplomatic protection is premised on a fiction, one cannot simultaneously maintain that a state is *in reality* claiming its own right. The very fiction in diplomatic protection is that a state *pretends* to claim its own right, while *in reality* it is the right of its individual national that is at stake. The only right the state has is the right to exercise diplomatic protection, which is a different right than the violated right that is asserted by taking up the claim. While this was clearly acknowledged by the Special Rapporteur in his Seventh Report, the language in draft article 1 in the same report continued to refer to the state's own right.¹¹³ The reason given for retaining the *Mavrommatis* formula was that '[i]n the light of the fact that the draft articles are premised on the soundness (if not accuracy) of the *Mavrommatis* rule (see, in particular, article 1), little purpose would be served by an examination of criticisms of the rule at this stage.'¹¹⁴ The ILC however did reopen the debate pursuant to criticism received by states and members of the ILC.

Italy, in its comments and observations to the draft articles, stated that

draft article 1 . . . adopts a wording which is too traditional, especially when it speaks of a State 'adopting in its own right the cause of its national'. The wording implies not only that the right of diplomatic protection belongs only to the State exercising such protection, but also that the right that has been violated by the internationally wrongful act belongs only to the same State. However, the latter concept is no longer accurate in current international law.¹¹⁵

Other states, in their comments and observations, also pointed to the relationship between the protecting state and its national, but they did not go as far as Italy.¹¹⁶

¹⁰⁹ Dugard, *supra* note 14, at para. 61 (emphasis in original).

¹¹⁰ *Ibid.*, at paras. 65–66.

¹¹¹ *Ibid.*, at paras. 69–72.

¹¹² *Ibid.*, at para. 73.

¹¹³ Dugard, *supra* note 61, at paras. 3 and 8–14.

¹¹⁴ *Ibid.*, at para. 3.

¹¹⁵ Comments and Observations, Add. 2, *supra* note 15, at 2.

¹¹⁶ See Comments and Observations Received from Governments, International Law Commission, 58th Session, A/CN.4/561 (2006), at 8 (Austria) and 10 (The Netherlands).

While Italy did not question the discretionary right of a state here,¹¹⁷ it objected to the idea that states are protecting their own rights when exercising diplomatic protection and suggested that draft article 1 should refer both to the rights of the individual and to the rights of the state.¹¹⁸ Italy's reasoning, however, is complex, since it relies not only on the *LaGrand* decision, but also on *Avena*. In fact, it derived the wording of its proposal for article 1 from that decision.¹¹⁹ While *LaGrand* clearly confirmed that individual rights exist and that diplomatic protection is the proper mechanism for claiming these rights without pretending that they are in reality a state's own rights, *Avena* is more complicated. In *Avena*, the ICJ dismissed the exercise of diplomatic protection and treated the protection on behalf of the Mexican nationals as a claim based on direct injury. The Court's decision on this point is particularly confusing. It presents us with an overdrawn interpretation of the words 'in its own right' of *Mavrommatis* and denies the individual any role.¹²⁰ Since the Italian proposal for a new draft of this article retains the duality, implying that some primary rights of the state are also protected by the exercise of diplomatic protection, it does not particularly elucidate the matter. As opposed to *Mavrommatis*, both *LaGrand* and *Avena* were mixed claims involving both direct and indirect injury. Now, clearly, when a state is claiming its own rights it will not be required to resort to diplomatic protection, since the violation of a state's own rights results in direct injury. If one really wishes to emphasize the individual rights underlying diplomatic protection, mixed claims do not provide the best instance from which to derive the language and the inclusion of 'in its own right' is not helpful.

Despite the lack of clarity in the Italian proposal, the underlying idea, that of the right of the individual and of abandoning too much focus on the state as the supreme holder of all international rights, received quite some support in the ILC. As a result, the drafting committee reconsidered the wording of Article 1. It decided not to adopt the proposal put forward by Italy, but it did modify Article 1. It now reads:

For the purpose of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to implementing such responsibility.¹²¹

The changes in this article not only pertain to the fiction – there is also a new emphasis on the invocation and implementation of the responsibility of another

¹¹⁷ It is interesting to note that Italy did suggest an exception to this discretion in the case of violations of peremptory norms: see Comments and Observations, Add. 2, *supra* note 15, at 2–3.

¹¹⁸ Italy proposed the following wording: '[d]iplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of *its own rights and the rights of its national* in respect of an injury to that national arising from an internationally wrongful act of another State': see Comments and Observations Add. 2, *supra* note 15, at 2 (emphasis added).

¹¹⁹ *Ibid.*, at 2.

¹²⁰ For the full argument on this point see Künzli, 'Case concerning Mexican Nationals', 18 *Leiden J Int'l L* (2005) 49.

¹²¹ Draft Arts adopted on second reading, *supra* note 14, Art 1.

state – but the discussion will be limited to this issue here. It is submitted that the current draft is more accurate with respect to the nature of diplomatic protection in the light of the legal fiction and thus has considerable advantage over the previous draft. Since it emphasizes the fact that the injury was inflicted on the individual rather than the state, it is in line with the operation of the legal fiction.

While the omission of the words ‘in its own right’ should be interpreted as a departure from the opaqueness in *Mavrommatis* and should be welcomed for that reason, the ILC unfortunately decided to leave some room for discussion, unnecessarily. It explained in the Commentary to this provision that it ‘is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both’.¹²² It is difficult to reconcile this comment to the actual wording of the article. Even if the provision does not explicitly exclude the protection of a state’s own rights in the exercise of diplomatic protection, which would account for the comment that this question is left open, this must be the conclusion. The repeated references to the law of state responsibility and the ILC Articles on this topic are a clear reminder also of the distinction between direct and indirect injury. The ICJ may have overlooked this distinction in *Avena*, but the ILC certainly did not: the Commentary to draft article 14 (on local remedies) explains that the local remedies rule is only applicable to indirect injury and not to direct injury.¹²³ As has been mentioned before, diplomatic protection is not the proper mechanism for claiming responsibility of another state for direct injury. Viewing diplomatic protection ‘through the prism of State responsibility’¹²⁴ entails that this distinction should be made and that the protecting state is acting in response to a violation of the rights of its national, and not its own rights. Perhaps the difference between the provision itself and the accompanying commentary can be explained as reflecting the consensus which allows the draft article and the commentary taken together to be agreeable to all.

By structuring the exercise of diplomatic protection as a right of a state to present a claim based on an injury to its national, the provision further underlines the distinction between primary and secondary rules of international law and allows the legal fiction to transform the violation of a primary right into the state’s secondary right to address this violation. In the Commentary, the modification is explained by reference to the imperfections in the fiction: ‘[m]any of the rules of diplomatic protection contradict the correctness of the fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim’.¹²⁵ The point is of course that certain rights and obligations of the individual affect the perception one has of diplomatic protection or conflict outright with the concept of the state’s rights. Even as the modification of draft article 1 has significantly contributed to a proper understanding of the mechanism of diplomatic protection, some questions remain to

¹²² Commentary to the draft Arts on second reading, *supra* note 2, at 26.

¹²³ *Ibid.*, at 74.

¹²⁴ *Ibid.*, at 26.

¹²⁵ *Ibid.*, at 25.

be reviewed. The (importance of the) role of the individual has led some to argue that the legal fiction is inappropriate. It would harm the position of the individual and put too much emphasis on states. In the First Report the Special Rapporteur had raised the issue of the role of the individual and acknowledged that the local remedies rule, the continuous nationality of claims rule (CNR), and the general practice since the *Chorzow Factory* case¹²⁶ to measure damages according to the injury suffered by the individual clearly show the fictitious nature of diplomatic protection.¹²⁷ They primarily relate to the individual but constitute conditions for the right of the individual's national state. While an attempt could be made to explain these requirements in a way that also confirms a right of the protecting state, such an attempt is destined to fail, in particular with respect to the CNR and the practice regarding compensation. The requirement to exhaust local remedies is the least controversial in this respect since one could argue that the local remedies rule is in reality a tribute to the sovereignty of the defendant state, supporting the inter-state character of diplomatic protection.¹²⁸ Thus, while the burden to exhaust local remedies is upon the individual national, this does not necessarily put the individual at the centre of the claim. In what follows, issues related to compensation and the continuous nationality rule will be considered in particular in the light of the discussions in the ILC preceding the adoption of the draft articles on second reading.

2 Compensation and Draft Article 19: Pulling the Rabbit out of the Hat

The influence of the injury sustained by the individual on the award of remedies and the question of whether the individual has any entitlement to receive any compensation obtained by his or her national state constitute a complex issue. One way is to see this as a practicality that does not affect the fundamental nature of the claim, especially since most states do not subscribe to the existence of a rule obliging them to transfer any reparations to the individual (even if they do so in practice)¹²⁹ and considering the many 'lump-sum' agreements¹³⁰ which also deny an articulate part to the individual.¹³¹ One would thus not expect any provisions on this matter in the draft articles on diplomatic protection, especially considering their state-centred nature.

Yet, the ILC decided to reconsider compensation and to include a new article during the second reading which provides, in soft language, that states 'should' not only

¹²⁶ *Case concerning the Factory at Chorzow (Germany v. Poland)*, PCIJ, Series A, No. 17 (1928), at 28.

¹²⁷ Dugard, *supra* note 14, at para. 19.

¹²⁸ See for instance Freeman, *supra* note 68, at 406–407 who stated that 'the sole function of the local remedy rule is to give the territorial State and opportunity of appreciating and discharging a responsibility that has already been engaged'.

¹²⁹ On this matter, there seems to be quite some state practice, but the lack of *opinio juris* would bar the formation of a rule of custom: see Dugard, *supra* note 61, at paras 93–103.

¹³⁰ See B.H. Weston, R.B. Lillich, and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements 1975–1995* (1999), at 3–4, who define a lump sum settlement as follows: '[u]nder lump sum settlement agreements, the respondent state pays a fixed—sometimes called an "en bloc" or "global"—sum to the claimant state, with the latter ... adjudicating the separate claims and allocating a share of the fund to each successful claimant'.

¹³¹ See on distribution of the negotiated lump sum *ibid.*, at 21 ff.

consider the wishes of the individual with respect to the extent and kind of protection, but should also transfer (part of) any compensation received to this individual.¹³² Since this is an exercise in progressive development, the provision is worded in a way that avoids creating binding obligations and it has thus little more than a hortatory effect, reminding states of good practices. As the Commentary explains, these are ‘desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment’.¹³³

The transfer of compensation received to the injured individual is widely supported in state practice¹³⁴ and this is a legitimate ground for the ILC to propose the provision by way of progressive development. While one may support the policy considerations underlying this provision,¹³⁵ it is not easily understood in the light of the fiction and the nature of the exercise of diplomatic protection under the draft articles.

One may note as a preliminary issue that this provision is a secondary rule to a set of secondary rules: it prescribes the consequences of the consequences of an internationally wrongful act. This in itself confirms the secondary nature of diplomatic protection, but does not operate on the same level. More importantly for the purpose of the present discussion, draft article 19 troubles the strict application of the legal fiction, not only with respect to compensation. The fiction in its pure form transforms the primary right of the individual to a secondary right of the state. Draft article 19, however, brings it back to the individual. In doing so, it creates additional secondary rules applicable to individuals. Whereas this provision does not create legally binding obligations, it does create something short of an obligation and thus it creates something short of a corresponding right. The latter clearly is the individual national’s. It is submitted that while the ILC may have intended to address some of the issues related to the position of the individual, it has created an oddity that fails to concord with the general system of diplomatic protection. Once a state has espoused a claim, it has a discretionary power over the way in which the claim is pursued. It may be argued that states are not entirely free in their decision whether or not to espouse the claim,¹³⁶ but this is a different matter than a state’s discretion upon espousal. As the Commentary correctly notes, this provision is contrary to the logic of diplomatic protection.¹³⁷ More specifically, it is difficult to reconcile with the idea of the legal fiction transforming an individual right to a state’s right. As such it does not affect the transformation from a primary to a secondary right.

¹³² Draft Arts adopted on second reading, *supra* note 14, Art 19(c).

¹³³ Commentary to the draft Arts on second reading, *supra* note 2, at 95.

¹³⁴ Dugard, *supra* note 61, at paras 93–103.

¹³⁵ The present author certainly supports this policy argument and the creation of an obligation to exercise diplomatic protection under certain circumstances: see Vermeer-Künzli, ‘Restricting Discretion: Judicial Review of Diplomatic Protection’, 75 *Nordic J Int’l L* (2006) 279.

¹³⁶ See on this matter Commentary to the draft Arts on second reading, *supra* note 2, at 96 and Vermeer-Künzli, *supra* note 135.

¹³⁷ Commentary to the draft Arts on second reading, *supra* note 2, at 97.

3 Continuous Nationality

If one considers the state as the owner of the secondary right to exercise diplomatic protection and one also considers that this right is a discretionary right, then the continuous nationality rule CNR raises questions similar to the ones related to draft article 19. Despite some support for the rule, current international law does not attribute a customary law status to the CNR. The very existence and the scope of the rule are controversial and subject to debate, both in the ILC and in legal writing.

Both the position that an exception should be made for changes of nationality between the time of the injury and the presentation of the claim and the position that nationality must be continuous not only at the time of the presentation of the claim but until the award of the claim have been expressed. In an exhaustive overview of the status of the CNR under current international law, Duchesne has argued that the CNR is difficult to reconcile with the position that a state espouses the claim of the individual and through the operation of the fiction makes it its own. He thus questions the status of the CNR beyond the time of the occurrence of the injury as a rule under customary international law.¹³⁸ The former position is also supported by the ILC draft articles adopted on first reading in Article 5(2), supported by the Special Rapporteur. While Dugard recognized the undesirability of 'nationality shopping', he has pleaded for some flexibility in the application of the CNR to accommodate involuntary changes of nationality.¹³⁹ This view was also supported by a number of states in their comments and observations to the Draft Articles (Belgium,¹⁴⁰ the United Kingdom,¹⁴¹ Austria, El Salvador, The Netherlands, and the Nordic Countries¹⁴²) and by various members of the ILC in their statements to the ILC while discussing this draft article.

The strongest supporter of the latter view is perhaps the United States in its comments to the ILC on the Draft Articles on Diplomatic Protection adopted on first reading, in which it proposed that a continuity of nationality be required until the *resolution* of the claim, which is clearly more than the original *presentation* of the claim.¹⁴³ Although it admitted that extending the requirement of continuous nationality beyond the presentation of the claim may not be part of current customary law, the United States, while relying on the *Loewen Group* decision,¹⁴⁴ emphasized that this

¹³⁸ Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes', 36 *George Washington Int'l L Rev* (2004) 783. See also Dubois, *supra* note 32, at 623.

¹³⁹ Official Records of the General Assembly, 59th session, Supp. 10 (A/59/10), Ch. IV, Commentary to the draft Arts on diplomatic protection adopted on first reading (2004), Commentary to draft Art. 5 (hereinafter Commentary to the draft Arts on first reading), at 34–37.

¹⁴⁰ See Comments and Observations Received from Governments, International Law Commission, 58th Session, A/CN.4/561/Add.1 (2006), at 6.

¹⁴¹ *Ibid.*

¹⁴² See Comments and Observations, *supra* note 116, at 15–16.

¹⁴³ See *ibid.*, at 17.

¹⁴⁴ *The Loewen Group, Inc and Raymond L Loewen v. United States of America*, ICSID Case No. ARB (AF) 98/3, 42 ILM (2003) 811. This decision has been heavily criticized: see Duchesne, *supra* note 138; Mendelson, 'The Runaway Train: the "Continuous Nationality Rule" from the *Panevezys-Saldutiskis Railway* case to *Loewen*', in T. Weiler (ed.), *International Investment Law and Arbitration* (2005), at 97–149; Acconci, 'The Requirement of Continuous Corporate Nationality and Customary International Rules on Foreign Investments: The *Loewen* case', 14 *Italian Yearbk Int'l L* (2004) 225.

extension is desirable since a state would lose its legal interest in receiving the remedies when the individual involved is no longer its national. The ICSID tribunal in *Loewen* also supported the rule.

In response, the Special Rapporteur pointed out that the interpretation by the United States of the *Loewen Group* decision (and other decisions) to support a general extension of the CNR until the making of an award is flawed. While this decision and other decisions referred to by the United States show that a claim must be dismissed when the individual changes nationality between the presentation of the claim and the making of an award, it is simultaneously true that they have one particularity in common. As Dugard wrote, ‘many of the decisions in favour of the date of the resolution of the claim, and on which the United States relies, involve instances in which the national changed his/her nationality after the presentation of the claim and before the award to that of the respondent State’.¹⁴⁵ The result of such a situation would be that the respondent state pays compensation to its own national. In all fairness, this should be a reason to declare the claim inadmissible. While this exception may in turn raise issues with respect to protection of dual nationals against a state of nationality – a discussion of which is beyond the scope of the present paper – it certainly does not support a general extended requirement for continuous nationality until the making of an award.

Despite absence of proof of international customary law, the ILC decided to include the CNR in the draft articles on diplomatic protection and retained that provision on second reading. Referring to the CNR, it stipulates that protection may be exercised on behalf of a national ‘who was a national continuously from the date of injury to the date of the official presentation of the claim’ and adds that such nationality will be presumed if it ‘existed at both these dates’.¹⁴⁶ It provides for one exception and two further restrictions: loss of nationality unrelated to the bringing of the claim does not exclude protection, whereas injury caused by a former state of nationality at the time the national had that nationality and acquisition of the nationality of the respondent state both render the exercise of diplomatic protection inadmissible.

This draft article is clearly the result of a compromise. While the CNR is thus included in the rules on diplomatic protection, it is not an absolute rule and the word ‘only’, which was suggested by the United States,¹⁴⁷ was not included, nor was the requirement of continuity extended until the resolution of the claim. In addition, Article 5(1) limits the burden of proof on the applicant state. On the other hand, while the draft article adopted on first reading was silent on this issue, the new provision does address the ‘*Loewen*’ situation, where the national changes nationality to that of the respondent state after the presentation of the claim in draft article 5(4). This requirement, in itself a restriction of the exercise of diplomatic protection, is relatively strict: it does not allow for an exception if the change of nationality was involuntary (for instance due to marriage or adoption).¹⁴⁸

¹⁴⁵ Dugard, *supra* note 61, at para. 40.

¹⁴⁶ Draft Arts adopted on second reading, *supra* note 14, Art. 5(1).

¹⁴⁷ Comments and Observations, *supra* note 116, at 17.

¹⁴⁸ Similar provisions apply to corporations. See Draft Arts adopted on second reading, *supra* note 14, Art. 10.

The difficulty with the CNR is that it touches on the nature of diplomatic protection as a state's right and therefore on the operation of the legal fiction. While many states may be prepared to consider the injury as purely affecting the individual, they certainly do not reject the discretionary nature of diplomatic protection and the draft articles as a whole do not challenge this discretion. It may be advantageous for the defending state to adhere to the CNR, since it will limit the number of admissible claims, but it is problematic from the perspective of the fiction. A strict adherence to the CNR emphasizes the role of the individual: through the continuity of his or her nationality, the legal interest of the protecting state is preserved. However, as has already been referred to above, this is difficult to reconcile with an equally strict adherence to the *Mavrommatis* principle stipulating that the state is the 'sole claimant'.¹⁴⁹ If the legal fiction transforms the injury caused by a violation of a primary rule into a right of a state to present a claim, the nationality of the individual is only relevant at the time of the injury. Cases such as the *LaGrand* case, where the individuals at the origin of the claim had died by the time the claim was presented or resolved, provide clear support for the view that indeed the state is the sole judge regarding the modes and continuation of the claim.

This, however, brings us to the same issue as the one underlying the complexities of draft article 19: the individual's secondary rights and obligations that influence his or her national state's secondary right to exercise protection on his or her behalf. In this respect, the legal fiction is even more 'imperfect' and 'limited' than originally envisaged. Not only is the fiction limited to protection and does not entail a state's responsibility for actions of the individual, but the legal fiction is hampered because of the individual's role in the secondary stages. Under the ILC draft articles on diplomatic protection, the legal fiction is not an absolute fiction and *Mavrommatis* has been abandoned on more than one account. Both the bringing of a claim 'in its own right' is no longer adhered to and the element of complete discretion, the state as the 'sole judge' is limited.

5 Conclusion

Law makes use of many fictions and could not function as it does without them. Yet, fictions are not always clear and it is necessary to question their function and to analyse in detail what they aim to achieve. This is hardly new: as we have seen, Vaihinger and Kelsen discussed fictions, arriving at very different conclusions. Whereas in the case of fictions that are perceived to present an undesirable picture of reality, one may question their value, it should be kept in mind that fictions are a legal tool to enable the application of the law in an area that is in need of regulation. They are by their very nature imperfect, limited yet necessary and for that reason should be subject to scrutiny. In this process, one should consider whether the purpose of the fiction is still legitimate, but also whether the mechanism itself is still desirable.

¹⁴⁹ *Mavrommatis*, *supra* note 4, at 12.

In the context of diplomatic protection, the legal fiction that allows a state to espouse the claim of one of its nationals has been subject to criticism and held to be irreconcilable with the current state of the law. The position of the individual under international law today is very different from the early 20th century. Individuals are increasingly recognized as subjects of international law and would thus no longer need protection by their national state, thus rejecting the mechanism provided by the legal fiction. Yet it will be shown that individual agency is still, regrettably, limited and that diplomatic protection continues to be indispensable.

In analysing legal fictions in general and the distinction between primary and secondary rules of international law, it has been demonstrated that the fiction in diplomatic protection operates on two levels. Through the application of the legal fiction, the espousal of the claim, a primary right gives rise to a secondary right. This is not surprising. The transformation from a primary right to a secondary right in itself does not require a fiction. Under the law of state responsibility, the violation of a primary right puts into operation the system of secondary rules that are enshrined in the ILC articles on state responsibility. In this process, there is no pretending: state responsibility only applies after the occurrence of an internationally wrongful act. Nevertheless, diplomatic protection is different from the 'normal' law of state responsibility. Instead of applying secondary rules to primary rules of the same owner, the secondary rules apply after the violation of primary rights of another person: the individual national of the espousing state. This is accomplished through the legal fiction.

As we have seen, the question of the transformation from rights of the individual to rights of the state is rather complex. The injury is without any doubt sustained by the individual and not by the protecting state. Similarly, the right to exercise diplomatic protection is without doubt the right of the protecting state and not the individual national's. There is however much in between that shifts the focus from the individual to the state and back. The conditions for the exercise of diplomatic protection contain obligations of both the state and the individual national. The local remedies rule is intimately connected to the prohibition on denial of justice, conflating the secondary condition and a primary right. Similarly, the CNR emphasizes that the legal interest of the claiming state must be supported by the nationality of the injured individual up and until the presentation of the claim. This is not so much a conflation of two rights, but rather contradicts the position that the espousing state is the sole claimant. It only becomes the sole claimant after the presentation of the claim. Yet when applying the CNR it does not continue to be solely in control. In addition, whereas the ILC generally seems to support the state-centred view on diplomatic protection, it requires states to consider the wishes of the individual national and in draft article 19 it reminded states of the cause of and reason for the exercise of diplomatic protection. Taken in an extreme way, this reduces the state to a representative of the individual. One scholar has, perhaps with this in mind, distinguished diplomatic protection and 'representative action', the difference being that diplomatic protection concerns a claim based on the state's rights and the individual national's rights which are not easily separated, whereas representative action only concerns the protection of individual rights. To support his argument, the author has relied on the ICJ's decision in

Avena.¹⁵⁰ As was pointed out earlier, however, in relation to the Italian government's proposal, *Avena* generally does not support specific arguments related to diplomatic protection. The Court in *Avena* did not accept the claim as based on diplomatic protection but as a direct injury to Mexico, thereby bypassing the requirement to exhaust local remedies. Even if one were to consider the concept of representative action, a case that is interpreted to be one of direct injury certainly provides no support. The discretionary nature of diplomatic protection, even taking into account draft article 19, dictates that states are not merely representing their nationals. More generally, it is not necessary to make this distinction once it is acknowledged that states do not protect their own rights in the exercise of diplomatic protection.

Yet, they do exercise their own right of diplomatic protection and enjoy a large measure of discretion in the modalities of the exercise of this right, despite the encouragement in draft article 19. Once the legal fiction is applied and the violation of the individual right has prompted the resort to diplomatic protection by his or her national state, the state will decide how and to what extent protection will be exercised and what part of the reparation received, if at all, will be transferred to the individual.

But does this all mean that the legal fiction in diplomatic protection has lost its value and that it should be abandoned, since the mechanism does not ensure the individual's control? It is submitted that it has not and should not. Whereas individuals undeniably are the bearers of certain rights, such as human rights, their capacity to ensure protection of these rights is still, regrettably, limited. The limited agency of individuals under current international law is clearly shown by a number of international and national decisions. In the *Al Adsani* case, decided by the European Court of Human Rights, the state immunity of Kuwait was upheld despite allegations of torture. This decision was recently confirmed by the House of Lords in the United Kingdom in the *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya et al.*, where it was again found that immunities would be upheld.¹⁵¹ Even if the claimants in both cases could pursue civil procedures against the relevant states, the execution of the decision would remain largely unwarranted. In an inter-state claim, such immunities would not be of any significance. Another example is provided by individuals who attempted to challenge the inclusion of their names on counter-terrorism listings. The *Kadi* and *Yusuf* cases before the European Court of First Instance¹⁵² clearly showed the ineffectiveness of individual action against such lists, which was further confirmed in the Belgian case of *Sayadi & Vinck v. l'Etat Belge*.¹⁵³ In most of these cases the Courts and parties indicated that it could not but uphold the relevant immunities, but that this would not

¹⁵⁰ Santulli, 'Entre Protection Diplomatique et Action Directe : La Représentation', in : Société française pour le Droit International, *Le Sujet en Droit International, colloque du Mans* (2005), at 85–98.

¹⁵¹ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others v. Al-Dali and others and the Kingdom of Saudi Arabia* [2006] UKHL 26, per Lord Hoffmann.

¹⁵² Cases T–306/01, *Yusuf and Al Barakaat* [2005] ECR II–3533 and T–315/01, *Kadi* [2005] ECR II–3649. See also Bulterman, 'Fundamental Rights and the UN Financial Sanction Regime—the Kadi and Yusuf Judgments of the CFI', 19 *Leiden J Int'l L* (2006) 753.

¹⁵³ *Sayadi & Vinck v. l'Etat Belge*, Tribunal de première instance de Bruxelles, decision of 18 Feb. 2005.

lead to impunity given the possibility of diplomatic protection.¹⁵⁴ This clearly shows the incapacity of the national court to address the matter and it shows the importance of diplomatic protection for the protection of the individual. As Dugard has stated in the Commentary, '[t]he individual may have rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose ... rights have been violated abroad'.¹⁵⁵ Abandoning the legal fiction now would be premature and not in the interests of the individual. To end with Ost and van de Kerchove: '*[v]oilà donc qu'il allait falloir s'accompagner de ces « jouets », si du moins on avait le souci d'assurer la suite de la représentation.*'¹⁵⁶

¹⁵⁴ App. no. 35763/97, *Al-Adsani v. United Kingdom*, Reports 2001–XI, at para. 50; Cases T–306/01 and T–315/01, *Yusuf and Al Barakaat and Kadi*, *supra* note 152, at paras 267 and 314 respectively.

¹⁵⁵ Commentary to the draft Arts on second reading, *supra* note 2, at 26.

¹⁵⁶ Ost and van de Kerchove, 'Le jeu, un paradigme fécond pour la théorie du droit', in F. Ost and M. van de Kerchove, *Le jeu : un Paradigme pour le droit* (1992), at 258: 'thus, it turns out that we cannot do without these "tools", at least as long as we wish to ensure the continuation of the representation (performance)'.