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Diplomatic Protection in International Law: A Comprehensive Analysis of ICJ Rulings with Particular Focus on the Landmark Diallo Case Judgment of 2012

Abstract: This paper explores the concept of diplomatic protection in international law through a detailed analysis of International Court of Justice (ICJ) rulings, with a particular focus on the landmark June 19, 2012 judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. Diplomatic protection, a traditional legal mechanism allowing states to seek redress for their nationals harmed by other states, reflects a nuanced intersection between state sovereignty and individual rights within international law. This study traces the evolution of diplomatic protection in ICJ jurisprudence, assessing how the Court has balanced state responsibility with the protection of individuals abroad. The Diallo judgment is analyzed for its substantive contributions, particularly in recognizing non-material damages and the principles underpinning adequate reparations. Through this case study, the paper examines key requirements for diplomatic protection, such as nationality, exhaustion of local remedies, and the discretionary nature of state action. By evaluating the implications of this and related ICJ rulings, this research offers insights into the evolving role of diplomatic protection and its effectiveness in modern international law for advancing individual justice within the framework of state sovereignty.

Keywords: diplomatic protection, International Court of Justice (ICJ), Ahmadou Sadio Diallo Case, state responsibility, international law, sovereignty and individ-

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ual rights, reparations, jurisprudence on diplomatic protection, nationality requirement, exhaustion of local remedies

Introduction

Throughout the history of human civilization, the interactions between societies and individuals have led to the adoption of international rules, whether express or tacit, codified or customary. These rules have taken the form of treaties and conventions, as well as domestic laws and regulations, which enable the peaceful coexistence of the various communities. In this context, international public law is the legal system arising from these rules, which governs relations between States and international and domestic entities recognized as subjects of the international community. Protection against violations of international law, particularly by States, often aims to regulate the subject matter of disputes at an international level. States, as subjects of international law, are entitled to defend their own legal rights, and, at times, the legal rights of other individuals and entities under their jurisdiction.

One way to safeguard legal rights is through the institution of diplomatic protection, which, in its broader meaning, refers to any action taken by a State to protect its own legal rights and those of persons other than its own nationals, who, in accordance with the rules of international law, are in a position effectively to act on behalf of the State. Diplomatic protection presupposes the taking of any diplomatic action in favor of these individuals or entities, with the aim of obtaining redress for injuries suffered, particularly when such injuries result from a violation of international law by the host state conducting an international obligation concerning the recipient state, whether or not material damage has occurred.

The primary and most common form of diplomatic action is diplomatic intervention in disputes arising from such activities, including legal disputes.²

² Many international legal proceedings have been based on diplomatic protection. In particular the Permanent Court of International Justice (PCIJ) dealt with a number of cases involving diplomatic protection: these include the *Mavrommatis Palestine Concessions*

When such disputes cannot be settled by negotiation or arbitration, they are submitted to international courts or tribunals for a binding decision. In this way, the subject matter of the dispute is addressed or resolved through a public international solution, as opposed to being reduced to a private settlement, which would occur if the claims of the injured states obtained benefits that correspond not to them, but to foreign nationals or even stateless persons residing or traveling in the foreign territory.

This paper aims to explore the institution of diplomatic protection in depth, examining its legal framework, historical development, and practical implications. It will examine the criteria that govern the exercise of diplomatic protection, the rights and duties of states, and the challenges that arise in its implementation. Additionally, this analysis will consider the evolving nature of diplomatic protection in light of recent developments in international law, including human rights law and the increasing recognition of individual rights in the global legal landscape. Through this exploration, we will gain a better understanding of the significance of diplomatic protection as a tool for promoting justice and accountability in the international community.

The International Court of Justice (ICJ), as the principal judicial organ of the United Nations,³ plays an essential role in the peaceful settlement of international disputes and the interpretation of international law. Over the years, the ICJ has shaped the development of international legal principles through its landmark rulings, providing clarity on various contentious issues among states. The judgment delivered on June 19, 2012, represents one such case where the Court's

Case (*Greece v. United Kingdom*), PCIJ, Series A, No. 2 (1924); *Certain German Interests in Polish Upper Silesia (Germany v. Poland)* PCIJ, Series A, No. 10; *Case Concerning the Payment of Various Serbian Loans issued in France (France v. Serb-Croat-Slovene State)*, PCIJ, Series A, Nos. 20/21 (1929); *Lighthouses in Crete and Samos (France v. Greece)*, PCIJ, Series A/B, No. 71; and *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, PCIJ, Series A/B, No. 76 (1937).

³ In accordance with the provisions of Chapter XIV of the Charter of the United Nations in its Article 92, the International Court of Justice constitutes the principal judicial organ of the United Nations. It operates in accordance with a Statute established on the basis of the Statute of the Permanent Court of International Justice and annexed to this Charter of which it is an integral part.

reasoning offers significant insights into the evolving framework of international law, particularly in matters concerning state responsibility, reparations, and the protection of human rights.

This paper also provides an in-depth analysis of the ICJ's judgment of June 19, 2012, exploring its legal implications and broader relevance in the context of international jurisprudence. By dissecting the Court's reasoning, this commentary aims to highlight how the decision aligns with established legal principles and where it introduces new interpretations that could influence future cases.

Additionally, this study examines the broader impact of the judgment on international relations and its contribution to the ongoing discourse on state accountability under international law. Through a detailed review of the case facts, legal arguments presented by the parties, and the Court's ultimate findings, this analysis seeks to offer a comprehensive understanding of the decision's place within the ICJ's broader body of jurisprudence. Furthermore, it reflects on the potential consequences of the ruling for international law, particularly in relation to human rights, reparations, and the scope of diplomatic protection of the decision's place within the ICJ's broader body of jurisprudence. Furthermore, it reflects on the potential consequences of the ruling for international law, particularly in relation to human rights, reparations, and the scope of diplomatic protection.

The Characteristics of Diplomatic Protection in International Law

The evolution of diplomatic protection is a significant aspect of the development of international law. Initially conceived to protect the commercial interests of states, particularly to support claims from merchants and investors harmed abroad, it has progressively expanded to encompass the protection of individual rights. Over the centuries, this evolution mirrors broader shifts in international law, which has transitioned from a state-centric framework to one

that increasingly prioritizes the rights of individuals. Diplomatic protection originally served as a tool for states to safeguard the interests of their nationals, particularly in the context of trade. This meant that if a foreign national's property or business dealings were violated abroad, their home country could intervene on their behalf, often using diplomatic channels or pressure to resolve the dispute.

The expansion of diplomatic protection's scope coincides with the growing recognition of human rights as a key component of international law. As international legal frameworks shifted from state sovereignty to include individual rights, diplomatic protection began to be used as a means to defend citizens who suffered violations of fundamental rights, such as wrongful detention or torture, particularly when the host state failed to provide an effective remedy.

While both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations acknowledge the rights of states to protect their nationals, neither provides a formal definition of *diplomatic protection*. Furthermore, no single normative definition exists across international legal instruments. As a result, scholars and practitioners often rely on doctrinal interpretations, which may vary considerably.⁴ The most widely recognized definition of diplomatic protection was formulated by E.M. Borchard in 1915. Borchard's conceptualization positions diplomatic protection as a right invoked only when the host state of a foreign national fails to adhere to international legal standards. This classical definition underlines the relationship between the international community's legal norms and the state's role in enforcing those norms on behalf of its nationals.⁵ Accord-

⁴ See Jan Sandorski, "Adwokat a opieka dyplomatyczna," *Palestra* 30, no. 1(337) (1986):15–24.

⁵ See the interesting reflection on diplomatic protection and the inability of private individuals in international law to directly defend their rights before international bodies. This principle highlights the fact that only States can act on behalf of their nationals in cases of rights violations committed by other States. This inability of private individuals to claim direct protection at the international level underscores the essential role of States in diplomatic protection and the recourse to international justice to obtain redress for the harm suffered.

ing to Borchard, “diplomatic protection serves as a mechanism to ensure that foreign nationals are treated in line with international standards of justice and fairness, especially when their rights are violated abroad.”⁶ This framework has significantly influenced subsequent legal developments. For instance, the International Law Commission (ILC), in its first report on the international responsibility of states, cited Borchard’s work as foundational. In this context, F.V. García Amador further refined the definition by stating: “The right of diplomatic protection is recognized as the right of a state to demand from other states that they treat persons and property of its nationals in accordance with the principles of international law.” Similarly, E.J.S. Castrén proposed that diplomatic protection entails a state’s ability to intervene through diplomatic and consular channels when its nationals are not afforded fair treatment according to international law, or binding agreements between states.⁷ Moreover, the Permanent Court of International Justice (PCIJ) also addressed this concept in the *Mavrommatis* case. The Court ruled that it is an “elementary principle of international law” that a state is entitled to protect its nationals if they are harmed by actions that contravene international law, particularly if they are unable to seek redress through ordinary legal remedies available in the host state. Incorporating these legal and doctrinal views, diplomatic protection emerges as both a state responsibility and an individual right within the international

Carlo Santulli, “Entre protection diplomatique et action directe, éléments épars du statut international des sujets internes,” in *Société française pour le droit international, Colloque du Mans – Le sujet en droit international* (A. Pedone, 2005), 85.

⁶ See Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (The Banks Law Publishing Co., 1915) review by W. W. Gager, *The Yale Law Journal*, 26, no. 7(1917): 623–24.

⁷ The existence of the state’s right to protect its own citizens is undisputed and confirmed by both legal doctrine and case law. Back in 1758, Vattel emphasized—“(…) whoever treats a citizen badly violates the rights of the state as the guardian of that citizen. Country has the right to avenge the wrongdoing done to a citizen and to force the offender to redress or punish him, because otherwise, the citizen would not achieve the main goal assigned to the civic community, which is security”; see Emer de Vattel, “Le droit des gens, t. II, chap. VI, par. 71,” in Wilhelm Euler, *Klassiker des Völkerrechts*, vol. 3 (Mohr, 1959), 217.

system, designed to safeguard the interests of nationals who face unjust treatment in foreign jurisdictions.

A pivotal moment in the development of diplomatic protection came in 2006, when the International Law Commission (ILC) adopted a set of Draft Articles on Diplomatic Protection.⁸ These articles were designed to clarify and harmonize state practice concerning diplomatic protection. They emphasize key principles such as exhaustion of local remedies, which requires individuals to attempt to resolve their grievances through the legal systems of the host country before seeking international intervention. The ILC's codification provided a clearer legal framework, aiming to reconcile different national practices and promote a more consistent approach in dealing with claims involving diplomatic protection. The trajectory of diplomatic protection from a tool for defending commercial interests to a mechanism for securing individual rights highlights a profound shift in international law. The ILC's codification of its rules was an important step in ensuring that the protection of nationals abroad is governed by clear, consistent principles, reflecting the evolving nature of international law from a focus on states to a more human rights-centered approach. Diplomatic protection is a mechanism that allows a state to assert claims on behalf of its nationals whose rights have been violated by another state, provided the wrongful act violates international law. It is rooted in the principles of state sovereignty and responsibility. Diplomatic protection is the right of a state to protect its nationals when their rights under international law are infringed abroad. The state, not the individual, is the pri-

⁸ The International Law Commission's *Draft Articles on Diplomatic Protection* reaffirm this customary principle. Article 1 states that diplomatic protection consists of the invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for harm caused by an internationally wrongful act of that State to a natural or legal person who is a national of the first State, with the aim of implementing that responsibility, see CDI, Rapport de la 58e session, Doc. off. AG NU, 61e sess., suppl. n° 10, A/61/10 (2006) [Projet d'articles sur la protection diplomatique]; Laurence Boisson de Chazournes, "The International Law Commission in a Mirror: Forms, Impact and Authority," in *Seventy Years of the International Law Commission: Drawing a Balance for the Future* (Brill/Nijhoff, 2020), 133–53 [I.C.J., 148–49].

mary actor. Individuals do not have a right to demand that their state exercise diplomatic protection—it remains a discretionary act of the state.⁹

Diplomatic protection, as a concept in international law, is governed by a set of strict conditions that must be met for a state to exercise its right to protect its nationals abroad. One of the requirements for the implementation of diplomatic protection is exhaustion of local remedies. Before invoking diplomatic protection, the affected individual must exhaust all available legal remedies in the state where the violation occurred. The principle of the *exhaustion of local remedies* is a key requirement in invoking diplomatic protection under international law. It dictates that before a state can espouse a claim on behalf of one of its nationals, the individual must first utilize all legal and administrative avenues available within the domestic legal system of the state allegedly responsible for the violation. This principle ensures respect for state sovereignty and provides the alleged offending state an opportunity to address the matter internally before it escalates to the international level. Local remedies refer to legal means provided by a state's judicial or administrative systems to redress a violation. Exhaustion means that the affected individual has pursued all levels of legal recourse (e.g., appeals) unless exceptions apply. Ensures the offending state has a fair chance to rectify its wrongful acts domestically. Protects international mechanisms from being overwhelmed with cases that could be resolved locally. A exceptions to this rule may apply if local remedies are unavailable or ineffective or the legal system is unduly delayed, biased, or unable to deliver justice. It has been central to cases like the *Interhandel* case (*Switzerland v. United States*),¹⁰ where

9 See Patrick Daillier and Alain Pellet, *Droit international public* (Librairie générale de droit et de jurisprudence, 2002), 809. It is important to note that, while this mechanism is essential for an injured individual to obtain international reparation for their harm, it remains discretionary in nature. In other words, the State is free to accept or refuse to endorse the cause of its injured national. If the State refuses, no blame can be placed upon it, and it cannot be held liable for this decision.

10 In the literature on the subject, there is a general consensus that a state cannot formally take steps to claim compensation for harm done to its citizen before the exhaustion of local remedies. The principle of international law regarding the exhaustion of local remedies is widely accepted, and its legal basis was clarified by the International Court of Justice (ICJ) in its judgment of March 31, 1959, in the *Interhandel* case. In this judgment, the Court stated

the International Court of Justice emphasized the need to exhaust local remedies. The rule is codified in Article 15 of the International Law Commission's *Draft Articles on Diplomatic Protection* (2006). The principle strikes a balance between an individual's right to redress and a state's sovereignty, ensuring an orderly process for resolving international disputes related to human rights and other violations. Another requirement is nationality. Only individuals with a genuine link of nationality to the protecting state can benefit. Diplomatic protection is reserved for individuals who possess a genuine and effective link of nationality to the protecting state. This principle, established in customary international law and upheld by various international legal instruments, ensures that a state can only espouse claims on behalf of its nationals. The criterion of a "genuine link" was famously elaborated in the *Nottebohm* case (*Liechtenstein v. Guatemala*) before the International Court of Justice (ICJ) in 1955. The ICJ emphasized that the nationality must reflect a meaningful connection between the individual and the state seeking to provide protection. The key aspects include the requirement of effective nationality. The individual must have substantive ties to the protecting state, such as residence, familial connections, or allegiance, rather than merely formal or nominal citizenship. For dual nationals, diplomatic protection may not apply if the individual holds nationality in the respondent state. Due to the customary nature of the rule, this criterion has been universally recognized as a component of international law and ensures the integrity of the state's protective claim. This rule underscores the alignment of diplomatic protection with principles of sovereignty and state responsibility in international law.¹¹

that the principle of exhausting local remedies before initiating international proceedings is a deeply rooted principle of customary international law. It is generally observed in cases where a state takes up the case of its citizen whose rights have been violated in another state in contravention of international law.

11 See Anne Peters, "Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction," *German Yearbook of International Law* 53, 2010: 623–76; Ian Brownlie, "The Relations of Nationality in Public International Law," *British Yearbook of International Law* 39, 1964: 284–85. *Nottebohm* (*Liechtenstein v Guatemala*) (*Second Phase*), Judgment of 6 April 1955, ICJ. Rep. 4. Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State. As the Permanent Court of International

The State responsibility, diplomatic protection arises only when the host state violates its international obligations. Diplomatic protection as an institution of international law is grounded in the principle of *state responsibility*. It is invoked when a host state violates its international obligations, causing harm to the nationals of another state. This principle is governed by well-established norms of international law, including the rules codified in the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) by the International Law Commission (ILC). The key Elements of State Responsibility in Diplomatic Protection: violation of an International Obligation, diplomatic protection can only be exercised when the host state breaches an international obligation owed to the injured person's state of nationality. These obligations may arise from treaties, customary international law, or other sources of international commitments, such as protecting the rights of foreign nationals. Attribution of Conduct to the State, the wrongful act must be attributable to the host state, meaning it involves the conduct of state organs or entities acting on behalf of the state (e.g., government officials or state-controlled entities).

The harm to the national of another State, diplomatic protection is premised on the idea that harm to an individual indirectly affects the state of nationality, allowing it to bring claims on behalf of its citizen. Diplomatic protection is not merely for individual redress but also serves to uphold international norms and deter future violations by holding states accountable. Diplomatic protection is typically exercised after the exhaustion of local remedies (unless exceptions apply, such as ineffectiveness or unavailability of remedies). In sum, state responsibility is the cornerstone of diplomatic protection, ensuring that states adhere to their international obligations while providing a mechanism for redress when these obligations are breached. This framework supports the enforcement of international law and the protection of individual rights within

Justice has said and has repeated, "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 rights—its right to ensure, in the person of its subjects, respect for the rules of international law" (PCIJ, Series A, No. 2, 12, and Series A/B, No. 20–21, 17).

the global legal system. The exercise of diplomatic protection is often influenced by political considerations. Conflicts may arise between the sovereign interests of states and the pursuit of justice for individuals.

The Aspects of the Intersection Between International and Domestic Law

On the domestic front, diplomatic protection is both a reflection of and a tool for the state's duty to protect its citizens under constitutional or administrative frameworks. Many states enshrine the protection of citizens abroad as a governmental duty. Diplomatic protection mechanisms are integrated into national foreign policy and legal systems, ensuring state support for citizens abroad. Domestic laws often regulate the circumstances and processes through which diplomatic protection is extended. Administrative procedures may require individuals to formally request intervention from their government. Domestic political and economic considerations may influence the extent and nature of diplomatic protection. For instance, a state may decline to provide protection if it conflicts with broader national interests or foreign relations. In many cases, embassies and consulates act as the operational arms of diplomatic protection, providing consular assistance and facilitating communication between the citizen and their home government. Diplomatic protection lies at the intersection of international and domestic law. While governed by international principles, its execution depends heavily on domestic legal frameworks and political decisions. The institution underscores the dual role of states as both sovereign entities in the international sphere and protectors of individual rights under domestic law.

Diplomatic protection relies on two primary means of action: diplomatic and jurisdictional. Diplomatic protection often starts with peaceful methods aimed at resolving disputes without escalating tensions. These methods can include, negotiations: direct talks between the state whose national has been wronged and the host state to seek a resolution. Good offices and mediation:

involving a neutral third party to assist in bringing both states to the negotiating table. Severing or downgrading diplomatic relations: in extreme cases, a state may break or suspend its diplomatic relations with the host state as a measure of protest or to exert pressure on the offending state. Such diplomatic actions aim to resolve the dispute in a manner that avoids litigation, fostering peaceful international relations. Jurisdictional means, if diplomatic efforts fail or the dispute remains unresolved, a state may pursue jurisdictional means by bringing the matter before international courts or tribunals. These include: The International Court of Justice (ICJ), the principal judicial organ of the United Nations, which resolves disputes between states, including those involving the violation of rights. International Criminal Court (ICC), for violations such as crimes against humanity or war crimes, the ICC has jurisdiction to prosecute individuals responsible for such actions. Arbitration tribunals, when both states agree, arbitration is an alternative dispute resolution mechanism where an independent tribunal makes a binding decision. These judicial and diplomatic actions aim not only to address the specific grievance but also to strengthen the overall system of international law by ensuring that states are held accountable for their actions. These mechanisms reflect a growing emphasis on protecting individual rights under international law, moving beyond the traditional focus on state-to-state relations. This dual approach ensures that states are able to resolve conflicts both peacefully and with legal recourse when necessary.

The Institution of Diplomatic Protection as a Mechanism in Human Rights Protection

As examined above, diplomatic protection is a complex legal concept in public international law. In its widest sense, it refers to those activities that are the essence of a State's functions as a lawyer for its nationals. In this capacity, a State claims wrongful acts done to its citizens in violation of international law as its own and directs claims against the delinquent State. Diplomatic pro-

tection is a fundamental principle of international law that allows a state to intervene on behalf of its nationals who have suffered harm due to actions taken by another state. This mechanism serves as a crucial means through which states can safeguard the rights and interests of their citizens abroad, ensuring that individuals are not left vulnerable to injustices in foreign jurisdictions. The institution of diplomatic protection is rooted in customary international law and has evolved over time to address the complexities of contemporary international relations, human rights, and state sovereignty. Diplomatic protection is one of the oldest rights of a state in international law. The diplomatic protection should be understood as the endorsement, or even appropriation, by a State of the claim of an individual who has been harmed by an internationally wrongful act committed by another State or an international organization. This legal fiction allows an individual or a legal entity, both of whom are not subjects of international law and lack the ability to directly assert their rights on the international stage, to have their rights defended by the State of which they are nationals.¹² As mentioned above, the primary condition for exercising diplomatic protection is citizenship. Citizenship, as the foundation of such protection, must exist not only at the time of the violation of the individual's rights but also at the moment when the claim is brought by the state. In other words, this private or legal person requests the State, to which they are a national, to

12 See Mariusz Muszyński, "Opieka dyplomatyczna i konsularna w prawie wspólnotowym," *Kwartalnik Prawa Publicznego*, no. 2/3(2002): 143–67; see K. Complak's commentary on Article 36 of the Constitution of the Republic of Poland, found in the work edited by M. Haczkowska (Krystian Complak, "Art. 36," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. Monika Haczkowska (LexisNexis, 2014)), emphasizes the constitutional framework regarding the protection of Polish citizens abroad. As highlighted by L. Garlicki and M. Zubik, Article 6, paragraph 2 of the Constitution should be applied to Poles living abroad. This article establishes the principle of state policy aimed at supporting Poles residing outside the country in maintaining their ties to their national cultural heritage (Leszek Garlicki and Marek Zubik, "Art. 36," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*, ed. Leszek Garlicki and Marek Zubik (Wydawnictwo Sejmowe, 2016), 175; Anna Maria Helena Vermeer-Künzli, "The Protection of Individuals by Means of Diplomatic Protection: Diplomatic Protection as a Human Rights Instrument" (PhD diss., Leiden University, 2007), Leiden University Scholarly Publications, <https://hdl.handle.net/1887/12538>).

take up their case and endorse their claim. Thus, a dispute that is initially private in nature becomes internationalized and transforms into a claim between States.¹³ The landmark ruling on diplomatic protection is the *Mavrommatis Palestine Concessions* case. In this decision, the Permanent Court of International Justice (PCIJ) stated that, by taking up the case of one of its nationals and initiating diplomatic or international judicial action on their behalf, the State is, in fact, asserting its own right—the right it holds to ensure that international law is respected in relation to its nationals.¹⁴ In a world characterized by increasing globalization and interconnectedness, the role of diplomatic protection has become ever more significant. As individuals traverse borders for work, education, and leisure, the potential for conflicts and disputes with foreign governments arises. In this context, diplomatic protection acts as a vital safeguard, allowing states to advocate for their citizens in situations where they may face violations of their rights or wrongful treatment.

Despite the norms established by international practice, there is a noticeable tendency among states to avoid fulfilling their obligation to protect their citizens. Nonetheless, diplomatic protection as a means of safeguarding the rights and freedoms of individuals remains a significant and necessary institution in international relations. In the present case, the analysis centers on the judgment of the Court concerning the application of general principles of international law regarding compensation for international delicts, as well as the issue of the function of diplomatic protection exercised by the state. While the International Court of Justice (ICJ) has addressed the issue of diplomatic protection in several previous cases, such as the *Nottebohm* case and the *Barcelona Traction, Light and Power Company* case,¹⁵ its experience in

13 See Denis Alland, *Droit international public* (Presses universitaires de France, 2000), 413.

14 See *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, PCIJ, Series A, No. 2 (1924), 12. See confirmation by the PCIJ: *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, PCIJ, Series A/B, No. 76 (1937); see Biswanath Sen, *A Diplomat's Handbook of International Law and Practice* (Martinus Nijhoff Publishers, 1988), 246; Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad* (William S. Hein & Company, 2003), 436.

15 For more on this topic, see: Józef Brzeziński, “Teoria efektywności obywatelstwa jednostki we współczesnym prawie międzynarodowym,” *Państwo i Prawo*, no. 12(1958): 1011–22;

the specific matter of diplomatic protection related to this case is limited. This case not only deals with the issue of a state's responsibility under international law but also addresses the matter of managing the amount of compensation for breaches of international obligations. This analysis refers to the International Court of Justice (ICJ) judgment of June 19, 2012,¹⁶ in relation to the proceedings concluded with the Court's judgment of November 30, 2010, concerning the determination of compensation for the damages arising from the unlawful detention and expulsion of Mr. Diallo, as well as the issue of reparations owed to Guinea for exercising diplomatic protection on behalf of its citizen. In this case, the Court had to adhere to the general principle that the burden of proof lies with the party that asserts a particular fact.¹⁷ However, flexible application of this principle was justified, especially when the defendant was in a better position to determine certain facts. The evidence submitted by Guinea served as the starting point for the Court's deliberations, considering the difficulties in providing some of this evidence due to the sudden nature of Mr. Diallo's expulsion.

The Judgment of June 19, 2012: Case Background and Significance

In its judgment of November 30, 2010,¹⁸ the Court called on the parties to engage in negotiations to reach an agreement on the amount of compensation, set-

and also Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, ICJ, Reports, 1970, 3.

16 See: Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Compensation, Judgment, ICJ, Reports 2012, 324.

17 See: ICJ Reports 2010 (II), 660, para. 54; see also Application of the Interim Accord of 13 September 1995 (*The former Yugoslav Republic of Macedonia v. Greece*), Judgment, ICJ Reports 2011 (II), 668, para. 72; Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, ICJ Reports 2010 (I), 71, para. 162); See Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*), Judgment on the question of the compensation owed by Nicaragua to Costa Rica; Report of the International Court of Justice (ICJ Report) 1 August 2017—31 July 2018.

18 In its judgment on the merits of 30 November 2010, the Court ruled that, in view of the conditions under which Mr. Diallo was expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the 'Cov-

ting a six-month deadline from the date the judgment was issued. It appears that no substantive negotiations took place, undoubtedly due to significant differences between the parties regarding the compensation amount. Each side blamed the other for this failure, as reflected in their submissions. Faced with this impasse, the case returned to the Court, which was tasked with ruling on the merits of the parties' positions and determining the amount of compensation owed by the Democratic Republic of the Congo to the Republic of Guinea.¹⁹

The Court duly established a number of facts, particularly the unlawful arrest of Mr. Diallo in 1988, which was overlooked due to Guinea's delayed request for assistance. Most notably, the unlawful detention lasted nearly two and a half months, during which Mr. Diallo was given no information regarding the reasons for his arrest, and was prevented from contacting Guinean authorities, leaving him uncertain about further proceedings. Clearly, beyond the discomfort of being in harsh detention conditions, this situation caused anxiety or distress, especially intense for the prisoner, who found himself in complete uncertainty about his fate. In this case, the moral harm stemmed from the actions of the Congolese authorities, which began harassing Mr. Diallo as soon as he tried to collect debts from his creditors. These creditors were public institutions and state-owned enterprises. Not only was he detained, but there were also attempts to discredit him and weaken his position as a businessman, using various means to undermine his reputation and dignity (e.g., accusing him of bribing state officials and judges, without allowing him to defend himself against these unfounded charges). Moreover, even though Congolese judges

enant'), as well as paragraph 4 of Article 12 of the African Charter on Human and Peoples' Rights (hereinafter the 'African Charter') (Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment, ICJ Reports 2010 (II), 692, para. 165, point 2 of the operative part). It also found that, given the conditions under which Mr. Diallo had been arrested and detained in 1995–1996 for the purpose of his expulsion, the DRC had violated paragraphs 1 and 2 of Article 9 of the Covenant and Article 6 of the African Charter (Judgment, ICJ Reports 2010 (II), 692, para. 165, point 3 of the operative part).

19 On, June 19, 2012, The International Court of Justice (ICJ), the principal judicial organ of the United Nations, delivered its judgment in the case of Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*) concerning the compensation owed by the Democratic Republic of the Congo to the Republic of Guinea.

did not pursue these accusations, their formulation and public disclosure had serious consequences, damaging the accused's business and, consequently, his future presence in Zaire (now the Democratic Republic of Congo).²⁰

Regarding compensation for personal property, the Court faced difficulty in determining the extent of the actual damage suffered by Mr. Diallo, as the evidence he provided about his household furnishings was highly unconvincing, and there was a complete lack of evidence regarding the list of valuable items and the contents of his bank accounts.²¹ While there was an inventory of his household furnishings, it was incomplete, and it is difficult to determine what may have happened between Mr. Diallo's arrest and the time the inventory was made, as the property could have been stolen during this period. This is not mere speculation, given that Mr. Diallo's standard of living was high, and his relationships with many prominent figures in politics and business suggest that he lived in a comfortable and well-furnished apartment. Therefore,

20 In the case of compensation for non-material loss or moral harm, the Court takes into account various factors when assessing the non-material harm suffered by Mr. Diallo, including the arbitrary nature of the arrests and detentions he endured, the excessively long duration of his detention, the unsubstantiated accusations against him, the unlawful nature of his expulsion from a country where he had resided for thirty-two years and conducted significant commercial activities, and the link between his expulsion and his attempts to recover debts he believed were owed to his companies by the Zairean State or companies in which the State held a significant share. The Court also considers the fact that it was not demonstrated that Mr. Diallo had been subjected to ill-treatment. Based on considerations of equity, the Court deems that the sum of 85,000 US dollars constitutes appropriate compensation for the non-material harm suffered by Mr. Diallo.

21 In the case of compensation for personal property, the Court finds that Guinea has not succeeded in proving the extent of the loss of personal property—namely, the furniture listed in the inventory of items found in Mr. Diallo's apartment, certain valuable objects allegedly present but not listed in the inventory, and bank assets—that Mr. Diallo may have suffered, nor the extent to which this loss was caused by the unlawful conduct of the DRC. However, the Court recalls that Mr. Diallo lived and worked on Congolese territory for about thirty years, during which time he could not have failed to accumulate personal belongings. It considers that Mr. Diallo would have had to move these belongings to Guinea or take measures to dispose of them in the DRC. Therefore, the Court does not doubt that the unlawful conduct of the DRC caused Mr. Diallo some material damage regarding the personal property left in his apartment. Under these circumstances, based on considerations of equity, the Court considers that a sum of 10,000 USD constitutes appropriate compensation for the material damage suffered by Mr. Diallo.

since paragraph 36 of the judgment sets a lump sum for the compensation, it could be argued that the value of the damage was underestimated, and its proper assessment may exceed the amount granted by the Court. However, it is still challenging to accept the Court's reasoning and decision. Regarding the valuable items for which compensation was requested, the claimant provided only a basic list to the Court, without any evidence to support their actual existence or value. This does not mean that these items did not exist, as—given Mr. Diallo's high standard of living before his arrest—it would not be unreasonable to trust his claims about the property listed. Nevertheless, the Court, lacking any proof, understandably could not rely solely on the claimant's statements and thus had no choice but to dismiss the claim.²² However, to some extent, the Court could have awarded a symbolic lump sum to cover these losses, in line with the principle of equity, but it did not find this necessary.

In this regard, it is regrettable that Guinea's claim was disproportionate and clearly excessive. Additionally, Guinea misinterpreted the Court's 2010 ruling to reinstate compensation for losses sustained by the two companies managed by Mr. Diallo, despite the Court's dismissal of these claims. The Court could only logically draw conclusions from its previous judgment and reject the claim for any alleged damages relating to the companies themselves.²³

22 This case shows that the International Court has contributed to the interpretation of remedies. Several aspects of the remedies available before the Court have been clarified through its practice and, consequently, states now have more reasonable expectations when they submit a dispute before the Court. The consistency that the Court has demonstrated in its interpretation of the remedies available before it has enhanced predictability in the manner in which the Court applies and clarifies the remedies that are requested by the parties appearing before it. The manner in which the remedies of international law are interpreted and applied is, however, strictly connected with the function of the Court, i.e., that of being the principal judicial organ of the United Nations. Therefore, the fact that the Court observes the manner in which its judgments contribute to the maintenance of international peace influences the application of remedies with respect to the disputes submitted before it.

23 In the case of loss of income and profits, the Court finds that Guinea has not established that Mr. Diallo was receiving a monthly salary from his two companies in the period immediately preceding his detentions. It notes that Guinea has also failed to explain how Mr. Diallo's detentions would have caused the interruption of any salary he might have received as the manager of those companies. Under these circumstances, the Court concludes that Guinea has not proven that Mr. Diallo suffered a loss of professional income as a result of

Even though the companies' losses fall outside the scope of this dispute, Mr. Diallo earned income from his work as an employee of the companies he managed. His two arrests, lasting more than two and a half months, followed by his expulsion, prevented him from fulfilling his managerial duties and deprived him of his rightful income.²⁴

Regarding the costs incurred for legal assistance, it is worth noting that this compensation pertains not to Mr. Diallo's personal situation but rather to Guinea's involvement. Indeed, by providing diplomatic protection, Guinea became the claimant in this case and covered the costs of defending the rights and interests of its citizen. Therefore, I believe Guinea also deserved compensation for these expenses. It is important to note that the Court has had few opportunities to rule on compensation, particularly regarding its calculation. While the Court established principles governing reparation for unlawful state actions in the famous *Chorzów Factory* case, its actual application of these principles has occurred in only one instance: the *Corfu Channel* case, in which the Court determined the compensation Albania owed for the human and material damage inflicted upon the British Royal Navy.²⁵ The principles govern-

his unlawful detentions. As a result, the Court awards no compensation for the alleged loss of salary suffered by Mr. Diallo during his detentions and after his expulsion.

24 It seems logical and fair to consider compensation for the loss of income. In reality, a manager who is also a shareholder is treated as self-employed and receives remuneration for performing their duties. This principle applies even when the shareholder is the majority or sole shareholder, as in this case. While Guinea did not provide evidence regarding the amount of compensation associated with Mr. Diallo's managerial functions in both companies, instead of rejecting the claim, the Court could have used the principle of equity to determine a reasonable amount of compensation for the material and moral losses incurred. Based on logic and common sense, I believe the Court took an overly categorical approach to this part of the case. In fact, while Mr. Diallo was imprisoned, he must have had some income from one source or another, even just to cover necessary expenses, such as rent for his apartment, lawyers' fees, ongoing costs, and daily living expenses, including food in prison, as prisoners were not provided with meals. Even though the compensation amount demanded by Guinea was disproportionate and it is difficult to estimate Mr. Diallo's income, the Court should have considered the specific circumstances of this case and awarded appropriate compensation. Therefore, the Court's radical decision to completely reject the claims (paragraph 46 of the judgment) is difficult to fully understand.

25 See *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Determination of the Amount of Reparations, Judgment, ICJ Reports 1949, 244).

ing compensation for damage resulting from actions contrary to international law are well-established in international law, largely due to norms from both international conventions and the jurisprudence of various international tribunals (the Permanent Court of International Justice, the International Court of Justice, arbitral tribunals, and especially regional human rights courts). Additionally, projects from the International Law Commission (ILC) on state responsibility, work from the International Human Rights Commission, and doctrinal contributions have further solidified these principles.²⁶ It is crucial to note that the Court excluded restitution in kind, which is typically the primary principle of reparation since the famous ruling of the *Chorzów Factory* case, which stated.²⁷

Given that Guinea did not request restitution in kind—and that it was no longer feasible—the purpose of the present judgment was to determine a financial sum corresponding to what restitution in kind would have required, based on the *Chorzów Factory* principles. This judgment aligns with Article 36 of the 2001 ILC, Articles, which states that a responsible state must provide compensation to the extent that damage is not remedied by restitution.²⁸

26 The question of interest here is to what extent these principles can apply to the case under review and how compensation should be determined. The compensation provisions were already largely defined in the aforementioned judgment of 30 November 2010, in which the Court ruled that the Democratic Republic of the Congo (DRC) was obliged to make reparations for violating certain provisions of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Vienna Convention on Consular Relations.

27 Referring to the *Chorzów Factory* case, the reasoning in Judgment No. 13 of 1928, the Permanent Court of International Justice (PCIJ) stated in Series A, No. 17, on page 47, that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” This landmark ruling introduced the principle of full restitution as the basis for remedying the damage caused by internationally wrongful acts committed by states; see *Factory at Chorzów (Germany v. Poland)*, 1927 PCIJ (Series A), No. 9 (July 26).

28 In 2001, the International Law Commission adopted the Articles on the Responsibility of States for Internationally Wrongful Acts.; see Mirka Möldner, “Responsibility of International Organizations – Introducing the ILC’s DARIO,” *Max Planck Yearbook of United Nations Law* 16, no. 1(2012): 286.

Conclusion

The above analysis of a various decisions shows that the discretionary nature of diplomatic protection has undergone a change. Contrary to earlier decisions dismissing all claims as falling outside the scope of judicial review as *acte de gouvernement* present day courts have agreed to review claims based on lack of protection. Notwithstanding the possibility of preliminarily dismissing the claims on the ground of non-justiciability, the judges, without exception, have entered into the merits of the various claims and considered carefully the actions taken by the respective governments and the violations of international law. Jan Sandorski's observation on the diminishing relevance of diplomatic protection in light of developing international human rights frameworks highlights a pivotal shift in international law. He noted that as international human rights mechanisms have evolved, particularly through treaties, conventions, and the work of specialized institutions like the United Nations Human Rights Council (UNHRC) or regional bodies like the European Court of Human Rights (ECHR), the need for diplomatic protection has diminished. Diplomatic protection, traditionally a tool for states to defend the interests of their nationals abroad, might seem less necessary in an era where individuals can directly petition international bodies.

However, in the current global landscape, individuals still face significant barriers in effectively invoking their rights through international mechanisms. One of the core challenges is that the processes for petitioning international bodies, such as the UN Human Rights Committee, can be long, complex, and difficult to navigate, especially for those without legal expertise. Moreover, as Sandorski pointed out, individuals often do not file complaints against the state where they reside—where they may face human rights violations—but rather against their own home state, which might have a role in those violations or the failure to address them.

In light of these challenges, diplomatic protection remains a critical safeguard. Rather than being obsolete, diplomatic protection continues to be a fun-

damental tool for ensuring the protection of foreigners' rights on foreign soil. States, particularly those with well-established diplomatic frameworks, still rely on diplomatic protection to ensure that their nationals are not subjected to unjust or illegal treatment abroad, especially when local legal remedies are unavailable or ineffective. Thus, diplomatic protection has evolved, and while it may no longer be the sole or primary avenue for protecting individuals' rights, it remains one of the most important mechanisms within the broader system of international human rights protection. This evolution underscores the complex interplay between traditional state-centered legal mechanisms and the contemporary focus on individual human rights. Diplomatic protection remains a vital institution, complementing modern human rights treaties and international legal recourse, ensuring that a dual layer of protection exists for individuals facing violations in foreign states. The creation of the International Court of Justice was centered around a key idea: in 1945, it was envisioned that the progress of international life would rely on a strong and increasingly prominent judicial function, with the shared hope, at the dawn of the post-World War II era, that peace could be achieved through law. Thus, a Court was established to serve as the true Olympus of the international order, a venerable and quasi-sacred institution meant to oversee the legal structure of modern international relations. The rulings of the ICJ are decisions issued by this court in the context of its activities related to the settlement of disputes and the provision of advisory opinions. These rulings are binding on the parties involved in the case and carry mandatory authority worldwide. The ICJ based its decisions among others on the principles of equity and established international jurisprudence, such as the *Chorzów Factory* case. Although compensation for Diallo's rights violations was granted, its extent was limited. The judgment underscores the challenges of assessing moral and material damages within diplomatic protection cases and highlights the importance of strong evidence in such proceedings. While Guinea achieved partial success, many aspects of compensation remain unaddressed, leading to questions about the complete-

ness of the reparations and the judgment's impact on international law development. In summary, the analysis of the International Court of Justice's (ICJ) judgment delivered on June 19, 2012, reveals the Court's pivotal role in shaping international law and upholding justice in the global arena. This judgment not only highlights the complexities inherent in disputes between states but also underscores the importance of the principles of state sovereignty, accountability, and the rule of law. Throughout our detailed commentary, we have examined the Court's reasoning, the legal precedents it referenced, and the implications of its findings for both the parties involved and the broader international community. The ruling serves as a vital reminder of the necessity for states to adhere to their international obligations and to engage in diplomatic dialogue to resolve conflicts peacefully. It also emphasizes the importance of the ICJ as a forum for the peaceful settlement of disputes, reinforcing its status as a cornerstone of the international legal system.

Moreover, the judgment reflects the evolving nature of international law, particularly concerning issues of human rights, environmental protection, and state responsibility. As global challenges become more intricate and inter-linked, the role of the ICJ will likely become even more critical in fostering cooperation among states and ensuring that justice is served. In conclusion, the June 19, 2012 judgment not only contributes to the development of international jurisprudence but also offers valuable insights for policymakers, legal practitioners, and scholars alike. As we navigate an increasingly complex international landscape, the principles elucidated in this ruling will continue to guide states in their interactions and reinforce the framework for upholding justice in the international legal order.

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