A human rights perspective on diplomatic protection: David Hicks and his dual nationality

Natalie Klein* and Lise Barry**

The plight of David Hicks, an Australian imprisoned in Guantánamo Bay, raised widespread concern among the Australian community. One question frequently asked was why the Australian Government would not do more to secure his release. The lack of action by Australia during Hicks's five years of incarceration led his lawyers to consider what other avenues of protection may be available. The discovery and recognition of Hicks's entitlement to British nationality in addition to his Australian nationality opened up the possibility of Hicks being treated in a comparable manner to other British nationals held in Guantánamo Bay — namely, his release from that prison and repatriation to the United Kingdom. Hicks's acquisition of dual nationality raised many issues related to Australia and the United Kingdom taking action on his behalf against the United States through their right of diplomatic protection. This article explores why the nationality of David Hicks was significant in efforts to protect his rights and how he was reliant on the actions of Australia and the United Kingdom to exercise their right of diplomatic protection. Despite increasing recognition that the right of diplomatic protection is an important tool in the promotion and protection of human rights, the situation of David Hicks demonstrates that diplomatic protection remains bound in a state-centric construct. As a result, an important means of vindicating individuals' human rights was denied.

Introduction

Nationality is a foundational issue in international law for the protection of individuals from the internationally wrongful conduct of state actors. As subjects of international law, individuals have the right to a nationality under international human rights law. It is nationality that entitles individuals to a range of human rights, most notably civil and political rights. As objects of international law, individuals are dependent on the state of their nationality taking up their claim in the exercise of that state's right of diplomatic protection. The right of diplomatic protection involves a state asserting the claim of its national against another state as if the claim were its own. While there has been some recognition that the right of diplomatic protection is an important tool in the promotion and protection of human rights (most notably in the recent work of the International Law Commission on this

* Natalie Klein teaches in the Division of Law, Macquarie University, Sydney.

** Lise Barry, Tutor in Law, Division of Law, Macquarie University, Sydney.

topic), the prevailing emphasis in the exercise of diplomatic protection is on the right of the state rather than individual rights.

The situation of former Guantánamo Bay detainee David Hicks provides a case in point. His case is illustrative of the human toll that the current state-centric position on diplomatic protection can illicit. Hicks is an Australian national by birth who converted to Islam as an adult after training with the Kosovo Liberation Army in Kosovo (US Military Commission 2004). According to his father:

> … after [he] returned to Australia he decided to go abroad to further his Islamic studies and to learn ancient Arabic. He travelled to Pakistan to study in a madrassa, an Islamic school. [Amnesty International 2005.]

In the background provided by the United States Military Commission, it was alleged that around November 1999, Hicks travelled to Pakistan, where he joined the Lashkar e Tayyiba (LET) or 'Army of the Righteous'. In 2001 he travelled to Afghanistan, where he attended Al Qaeda training camps, before being captured by Northern Alliance forces in Afghanistan in early December 2001. Hicks was then transferred to the United States detention centre in Guantánamo Bay. While Australia took some steps to secure additional rights for Hicks, it long refused to seek his release (Ruddock). Australia's stance may be contrasted to that of the United Kingdom, which in 2005 secured the release of nine British nationals held in Guantánamo Bay. In 2006, it was discovered that Hicks was also entitled to British nationality. This entitlement raised hope that Hicks would then be treated comparably to the other British nationals who were returned to the United Kingdom. However, the United Kingdom refused to seek his release because he was an Australian citizen at the time of his capture and had already received consular assistance from Australia (Kennedy 2006). Instead, the United Kingdom stripped Hicks of his British nationality, only a day after it was officially conferred. Legal efforts were subsequently instituted before British courts to challenge this removal decision on the basis that the evidence relied on to strip Hicks's British nationality was procured by means of torture and so should not be admissible (Australian Broadcasting Corporation 2007).[1]

Hicks was initially charged with conspiracy to commit war crimes, attempted murder by an unprivileged belligerent and aiding the enemy. However, when the United States Military Commission established by President George W Bush was deemed unlawful in *Hamdan v Rumsfeld*, the United States Congress then passed the *Military*

1. This case was to be heard in May 2007 (Australian Broadcasting Corporation 2007). However, in light of Hicks's subsequent guilty plea and return to Australia, there may be little need to pursue this action.

Commissions Act 2006. Fresh charges were then served on Hicks, but were limited to providing material support for terrorism. Hicks pled guilty to this charge and has now returned to Australia to serve the remainder of his sentence. Over five years passed from when Hicks was first detained in Guantánamo Bay until he was formally charged. Hicks's father has speculated that his son's guilty plea reflects more a desire for the ongoing detention in Guantánamo Bay to end than any sort of culpability for his actual conduct prior to December 2001 (*Sydney Morning Herald* 2007).

Throughout David Hicks's detention, government decision-making as to which state is entitled to assert a right of diplomatic protection for Hicks, and whether that right should have been asserted and how it might have been exercised, appears to have been largely separated from concerns regarding the human rights at stake. This article attempts to demonstrate how a stronger human rights perspective may have been brought to bear on a state's right of diplomatic protection. The case of David Hicks provides an opportunity for this examination in view of the human rights violations to which he was subjected and how his dual nationality may have ameliorated his position through the exercise of diplomatic protection. It is argued that as long as states continue to conceive of diplomatic protection as a predominantly state-centric right, as Australia and the United Kingdom have done, an important means of vindicating individuals' human rights has been denied.

The nationality of David Hicks

Most states' laws ascribe nationality according to the principle of *jus sanguinas* (acquisition by descent from a parent who, at the time of birth, possessed the country's nationality) or *jus soli* (acquisition by birth in the territory of the state). Citizenship is a matter of domestic law, and is associated with eligibility for a range of rights and entitlements, including the right to vote, marry, work and carry a passport. The term 'citizenship' is often used interchangeably with 'nationality', but is generally understood to mean 'the status bestowed on full members of a community' (Marshall 1977, 84). The term 'nationality' is more commonly used in international law and indicates the connection that an individual has to a particular state (Kunz 1960, 546).

It is well accepted in international law that how an individual acquires the nationality of any state is a matter of domestic law for the state concerned. The Permanent Court of International Justice articulated this position in *Nationality Decrees*, stating: 'In the present state of international law, questions of nationality are, in principle, within the reserved domain.' Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality (the Hague Convention 1930) confirmed that '[i]t is for each State to determine under its own law who are its

nationals'. While Australia and the United Kingdom are therefore entitled to determine if Hicks is one of their nationals, these decisions must account for the fundamental right to nationality. These features of Hicks's nationality are discussed in this section of the article, along with the interaction of states' nationality laws with international law.

The right to nationality

The right to nationality has traditionally underscored the realisation of many other rights in international law, as generally a person relies on their state of nationality to acknowledge and uphold their rights vis-a-vis other states in any dispute. The fundamental importance of the right to nationality has been described by former United States Supreme Court Chief Justice Warren as follows:

> Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. [Warren CJ in *Perez v Brownell*, 1958, at 44, p 64.]

The right to nationality is enshrined in Art 15 of the Universal Declaration on Human Rights. It further provides that '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. Subsequent human rights conventions, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, confirm the importance of the right to nationality. Similar provisions are found in regional human rights instruments, such as Art 20 of the American Convention on Human Rights, which provides:

> Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Nationality was defined by the Inter-American Court of Human Rights in *Castillo-Petruzzi v Peru* as:

> … the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State. [*Castillo Petruzzi v Peru*, 1999, at 99.]

The European Convention on Nationality also upholds the right to a nationality, and allows for the acquisition of multiple nationalities. The right to nationality is further confirmed in conventions and instruments related to the issue of statelessness and state succession (Convention on the Reduction of Statelessness, Convention Relating to the Status of Refugees, Convention Relating to the Status of Stateless Persons).

Hicks's Australian nationality

David Hicks was born on 7 August 1975 in Adelaide, Australia. His birth in Australia means that he has Australian citizenship by virtue of the *Australian Citizenship Act 1948* (Cth), s 10(1). His mother was born in the United Kingdom and emigrated to Australia when she was a child (Australian Broadcasting Corporation 2005a). His English grandparents both served with the British military in World War II prior to their emigration, his grandfather as a military policeman and his grandmother as a nurse (above). Hicks's father was born in Australia (above). Little is recorded of Hicks's early life or young adulthood. He left school early and was employed in various jobs: boning chickens, filleting kangaroos, recycling tyres (above). Hicks has two children from a failed relationship with a woman he met while working on a remote cattle station (BBC News 2006*).* There is no indication that Australia sought to deny or remove Hicks's Australian citizenship during his detention in Guantánamo Bay.

British nationality laws as applied to Hicks

During a casual conversation about the Ashes cricket series, Hicks's US-appointed lawyer, Major Mori, realised that Hicks could also be eligible for British citizenship. Hicks could claim a right to British citizenship by virtue of a new s 4C inserted into the *British Nationality Act 1981*, extending citizenship by descent to those persons born between 1961 and 1983 of mothers with British citizenship at the time of birth, a right previously granted only to those whose fathers had citizenship. Major Mori lodged Hicks's application for registration at the British Embassy in Washington DC on 16 September 2005.

On 9 November 2005, Hicks's solicitors received a response from the British Home Secretary of State, stating that they would accede to the application for citizenship but intended to seek simultaneously 'an order for the deprivation of citizenship under section 40 of the British Nationality Act on the grounds that [Hicks] has done things seriously prejudicial to the vital interests of the UK' (*Home Secretary v Hicks*, 2006, at [3]). In outlining the factors deemed prejudicial, the Home Secretary argued that receiving terrorist training in Pakistan and Afghanistan and training with Islamic extremists constituted such behaviour. Further details were later

provided,[2] and included allegations that Hicks attended an LET training camp in Kashmir in around 2000; attended camps linked to Al Qaeda in Afghanistan in 2000; received various guerilla warfare training in Afghanistan; and met and trained with British nationals known to be Islamist extremists and also with Abu Hafs, an Al Qaeda terrorist (*Home Secretary v Hicks*, 2006, at [5]). Under the *Nationality, Immigration and Asylum Act 2002* and the *British Nationality Act 1981*, the Home Secretary has powers to deprive a person of British citizenship (acquired by naturalisation or registration) if they have been 'disloyal or disaffected' towards the Queen or assisted an enemy. The 2002 Act further authorises the Home Secretary to deprive by order a person of a citizenship status 'if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom'.

Hicks's legal team sought to appeal against the decision of the Home Secretary. In the decision at first instance, Justice Collins held that there was no legal basis for denying Hicks's application for registration, as the registration was of right. Justice Collins distinguished between registration and naturalisation, allowing that there was a discretion to permit deprivation of citizenship based on fraud, false representation and concealment of material facts or imprisonment, but that these grounds applied to post-registration conduct (*Hicks v Home Secretary*, 2006, at [27]). Justice Collins further held that '[d]isloyalty … must relate to a time when the person concerned owed some allegiance' (*Hicks v Home Secretary*, 2006, at [25]).

This decision was then appealed by the Home Secretary. The primary question to be considered on appeal was whether the Home Secretary could 'rely on conduct of the respondent prior to the acquisition of British citizenship when considering whether to deprive him of that citizenship' (*Home Secretary v Hicks*, 2006, at [6]). For the Home Secretary, the argument was that even if Hicks's:

> … conduct in Afghanistan in 2000 and 2001 was not capable of being 'disloyal or disaffected towards her Majesty', the conduct could be relied on as showing that, at the moment of registration as a British citizen, the respondent was disloyal and disaffected. Current disaffection could and should be inferred from previous conduct. [*Home Secretary v Hicks*, 2006, at [12].]

2 These details were provided by letter dated 5 December 2005, based on information provided by Hicks to the UK Security Service on 26 April 2003 and in similar terms to the allegations outlined in the US Military Commission charges, although the letter explicitly stating that the United Kingdom did not rely on the Military Commission charges (*Home Secretary v Hicks*, 2006, at [5]).

The Court of Appeal disagreed and held:

> What none of these propositions establish … or come close to establishing, is that conduct of an Australian in Afghanistan in 2000 and 2001 is capable of constituting disloyalty or disaffection towards the United Kingdom, a state of which he was not a citizen, to which he owed no duty and upon which he made no claims. [*Home Secretary v Hicks*, 2006, at [37].]

The court ruled that Hicks could only be stripped of his citizenship if his alleged offences occurred after he had acquired citizenship. The government of the United Kingdom was therefore obliged to provide Hicks with an opportunity to swear an oath of allegiance to the United Kingdom to complete his registration.

Hicks was eventually granted British nationality on 6 July 2006, only to be stripped of it the following day by order of the Home Secretary (Crabb 2006). This decision was made possible by new British legislation, the *Immigration, Asylum and Nationality Act*, which received royal assent on 30 March 2006 and came into force in June. Section 56 of this Act amends the powers of the Secretary of State contained in s 40 of the earlier *British Nationality Act*. Whereas s 40 referred to a person who had 'done anything seriously prejudicial to the vital interests of the United Kingdom', the new s 56(1) of the *Immigration, Asylum and Nationality Act* extends much broader powers of deprivation: 'The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.' It has been suggested that the new legislation was specifically made to address Hicks's situation in order that the British Government could avoid any diplomatic embarrassment to Australia arising from the grant of British citizenship (Crabb 2006).

Dual nationality

Hicks's dual nationality arose from a convergence of two principles of citizenship characterisation: that of *jus soli* (citizenship by birth in Australia) and *jus sanguinis* (citizenship of Britain by virtue of the British citizenship of his birth mother). Until 4 April 2002, s 17 of the *Australian Citizenship Act 1948* (Cth) mandated loss of Australian citizenship for anyone who acquired a new citizenship. Following a review of this legislation, the Australian Citizenship Council reported that of the submissions they received, three-quarters commented on s 17, with 86 per cent in favour of its repeal (Australian Citizenship Council 2000, 61–62). Consequently, the *Australian Citizenship Legislation Amendment Act 2002*, No 5 (Cth) repealed s 17 so that anyone acquiring citizenship or nationality of another country after 4 April 2002 would no longer lose their Australian citizenship.

As a matter of international law, dual nationality had initially been regarded unfavourably by states. The preamble to the Hague Convention 1930 contained a warning on the dangers of dual nationality:

> BEING CONVINCED that it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality and should have one nationality only; RECOGNISING accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality …

Even in 1963, the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (the 1963 Convention), a Europe-wide convention on the reduction of cases of multiple nationality and on military obligations in cases of multiple nationality, was adopted with the rationale that multiple nationalities were undesirable. Scholars have noted some of the many disadvantages of dual nationality, including the perception that it would undermine allegiance to the state (Spiro 2002, 20).

Attitudes towards dual nationality have undergone a significant shift in the last 50 years to encompass the global realities of inter-racial marriage, inter-state migration and movements across borders related to war and civil upheaval. These changes and their acceptance as new global realities are exemplified in changes to legislation on the subject of nationality within Europe. In 1993, the Council of Europe adopted a protocol that amended the dual-nationality provision of the 1963 treaty to allow retention of the original nationality in certain circumstances, and then, in 1997, the Council of Europe adopted a new European Convention on Nationality. In marked contrast to the 1963 Convention and the Hague Convention 1930, the preamble to the 1997 treaty notes 'the varied approach of States to the question of multiple nationality'. Acknowledging that 'each State is free to decide' whether or not to allow dual nationality, the Convention focuses more on 'finding appropriate solutions to consequences of multiple nationalities'. Outside Europe, Murazumi has noted that in Latin America, 19 countries agreed in 1933 to restrict their respective citizens to single nationalities, but that 13 of them subsequently reversed their positions due to emigration patterns and changing economic interdependence (Murazumi 2000, note 203). As Spiro states, 'to imagine even hypothetical situations in which dual nationality poses a threat to the national interest is now increasingly difficult' (Spiro 2002, 20).

Renunciation of nationality

Although Major Mori declared that Hicks had no intention of renouncing his Australian citizenship, it was suggested that this option could have been considered

in an effort to strengthen his claim to diplomatic protection from the United Kingdom (O'Brien 2006). The right to renounce Australian citizenship is encapsulated within s 18 of the *Australian Citizenship Act 1948*. However, the Minister may refuse a declaration of renunciation under certain circumstances, including during a war in which Australia is engaged, or 'if the Minister considers that it would not be in the interests of Australia to do so'. Hicks would have only been able to renounce his Australian citizenship following his grant of British citizenship, as any attempt to renounce prior to his registration would have been defeated by the protections against statelessness. The removal of Hicks's British nationality foreclosed this option.

International dimension to nationality

While states have the competence to determine who their nationals are, this discretion is not completely unlimited (Kunz 1960, 546). In a 1984 Advisory Opinion, the Inter-American Court found that:

> Despite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction. [*Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, 1984, paras 32–34.]

In recognising the competence of states to determine nationality under their domestic laws, the Permanent Court further observed that 'the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations' (*Nationality Decrees in Tunis and Morocco Case*, 1923, at 24). Developments in international relations may well include the considerable growth in international human rights law. One shift in this direction may be discerned from the preamble of the International Law Commission's (ILC's) commentary to the draft articles on Nationality of Natural Persons in Relation to the Succession of States, which '[r]ecogniz[es] that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals' (ILC 1999, 23). The Commentary goes on to conclude:

> As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission finds it appropriate to affirm … [t]hat, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account. [ILC 1999, 24.]

These statements continue to show deference to the rights of states when addressing questions of nationality, but there is also a clear indication that the interests of individuals should be taken into account. Such an approach is desirable in state decision-making as to whether and how to assert the claim of a national through the right of diplomatic protection.

Right of diplomatic protection

The right of diplomatic protection involves a certain amount of fiction as it refers to a situation where a state asserts the claim of an individual against another state as if that claim were the state's own.[3] It is therefore consonant with the traditional view that states are the only subjects of international law and individuals have no place of their own in the international legal system without their state of nationality espousing their claim on their behalf. In this regard, diplomatic protection has been regarded as 'the corollary of the personal jurisdiction of the state over its population, when elements of that population, while in foreign territory, have suffered injury in violation of international law' (ILC 1998, para 10).

This fiction has been continuously reaffirmed in international law. The most familiar articulation of the right of diplomatic protection is drawn from a decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions Case:*

> 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. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. [*Mavrommatis Palestine Concessions Case*, 1924, at 12.]

This approach has been endorsed more recently in the work of the ILC in describing diplomatic protection as the:

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3 This mechanism has been referred to as the Vattelian fiction, as Emmerich de Vattel stated:

> Anyone who mistreats a citizen directly offends the State. The sovereign of that State must avenge its injury, and if it can, force the aggressor to make full reparation or punish him, since otherwise the citizen would simply not obtain the main goal of civil association, namely, security. [ILC 1998, para 6, citing Vattel 1758, vol 1, bk 2, p 309, para 71.]

> … 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 … [ILC 2006a, Art 1.]

These formulations have reinforced that it is the right of the state at issue in diplomatic protection.

The state of nationality may take up the claim of its nationals against another state in a variety of ways. Included among the actions associated with diplomatic protection are 'consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force' (Forcese 2005, 473). The very seriousness with which a state may hold its right to diplomatic protection is reflected in the comment that '[e]xperience has shown that international controversies of the gravest moment sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government' (*Hines v Davidowitz*, quoted in Lauterpacht 1945–47, 336).

Relevance of nationality for diplomatic protection

In view of the significance of the right of diplomatic protection, especially in light of the possible consequences that may flow from states' efforts in taking up the claims of their injured nationals, it is inevitable that some link between the state asserting the claim and the injured person is required (Forcese 2005, 16). That link is nationality. In international law, nationality has been described as the:

> … juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than that of any other State. [*Nottebohm,* 1955, at 24.]

It is important to note that the requirement of a nationality link 'is … a general condition for the invocation of responsibility in those cases where it is applicable' (Forcese 2005, 481).

A range of conditions must be met for a state to be entitled to exercise its right of diplomatic protection for a particular national. These conditions have been set out in articles on diplomatic protection adopted by the ILC in 2006, as part of its mandate for the progressive development and codification of international law (ILC 2006a). In its work, the ILC has accounted for the fact that both diplomatic protection and human rights should serve the common goal of protection of human rights (ILC 2004a, para 37). The human rights perspective on diplomatic protection that the ILC

sought to include in formulating the articles has somewhat tempered certain of the conditions that traditionally had to exist for a state to exercise its right of diplomatic protection. However, as examined below, it is clear that Australia and the United Kingdom did not embrace this perspective in their practice in dealing with Hicks.

Genuine link

The traditional position under international law has been that for a state to assert a claim on behalf of an individual, there must be a 'genuine link' between that individual and his or her state of nationality. For example, in *Nottebohm*, the International Court of Justice considered that a genuine connection to the state asserting the right of diplomatic protection had to exist:

> … nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State … it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national. [*Nottebohm*, at 23.]

This approach would have presented immediate difficulties for the United Kingdom in light of the tenuous connection Hicks has to that country. To ascertain whether a genuine link exists between the state of nationality and the individual, the court suggested that different factors could be taken into consideration, such as habitual residence, 'the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.' (*Nottebohm*, at 22). No particular weight was to be given to any one factor, but instead their importance could vary from one case to the next (*Nottebohm*, at 22). For Hicks, his only connection to the United Kingdom is it being his mother's birthplace and hence part of his ancestry. No information available about Hicks otherwise indicates any affiliation whatsoever with the United Kingdom. Without this genuine link being established between Hicks and the United Kingdom, that state's grant of nationality and subsequent effort to present Hicks's claim against the United States may not have been recognised under international law (*Nottebohm*, at 23).

This need for a genuine link has been highly criticised, even at the time of the *Nottebohm* judgment, because of the level of subjective judgment that had to be brought to bear in any assessment of nationality for the purposes of asserting an international law claim. In this regard, Kunz argued:

> Such a development of international law seems to us entirely undesirable. First, it is not always possible, under the conditions of modern life, to determine with what state a person has a factual connection, absolutely preponderant in relation to any connection which may have existed between him and any other state. Second, the important link of nationality which, under present international law, is a legal link, imperiously demands objective and secure criteria, whereas the 'genuine link doctrine' introduces purely subjective criteria, shifting from case to case, and would therefore necessarily lead to a situation of uncertainty as to nationality which would be undesirable from all points of view. [Kunz 1960, 564.]

The ILC decided that a state should not have to prove that an effective or genuine link existed between itself and its national (ILC 2004b, Art 4; ILC 2006a, Art 4). The ILC further took the position that *Nottebohm* should now be confined to its particular facts, especially because:

> … if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection. [ILC 2006a, Art 4 (Commentary, para 5).]

Instead, the very fact that a state is willing to grant an individual its nationality or recognise an individual as a national should be sufficient proof of a link existing between the state and that national (Kunz 1960, 553). The United Kingdom could have benefited from this development in the law and considered that the simple fact of Hicks's nationality would have been sufficient for action in light of its opposition to Guantánamo Bay. It does not appear that any assessment was made of the genuine connection of the other British nationals to the United Kingdom prior to their release from Guantánamo Bay being sought, and so Hicks may have similarly benefited from the United Kingdom's endeavours to protect their nationals. However, the actions of the United Kingdom instead tend to indicate that establishing any link to Hicks was considered undesirable. Rather than the existence of British nationality motivating further protection of human rights, it appears that the absence of a need for a genuine link provided additional reason for the United Kingdom to resist such nationality being ascribed to Hicks from the outset.

Dual nationals

In stripping Hicks of his British nationality and refusing to take action on his behalf, it is arguable that the United Kingdom has shown some deference to the position of Australia in its treatment of Hicks. However, in asserting the right of diplomatic

protection in respect of a dual national, it is generally recognised that either state of nationality may take up the claim of this national in relation to a third state (that is, a state of which the individual is not a national) (ILC 2006a, Art 6(1)). So Australia or the United Kingdom would be equally entitled to assert Hicks's claim against the United States.

It is usually only where there is a situation of a state of nationality seeking to make a claim against another state of nationality in respect of a dual national that any question of genuine link still may arise. In this instance, a state has the right to exercise diplomatic protection if the nationality of the individual to that state can be described as predominant (ILC 2006a, Art 7). The United Kingdom was thus entitled to assert Hicks's claim against the United States, even if it would not have been able to assert a claim against Australia. Dual nationality could have been viewed as an increased opportunity to protect Hicks's human rights, rather than as another reason to deny assistance.

Continuity of nationality

Situations may arise where there is a change of nationality between the time of injury of the national and when a claim of diplomatic protection is asserted. A requirement normally applied in cases of states exercising their right to diplomatic protection is that there must be continuity of nationality between the time of injury and the time of presentation of the claim (ILC 2001, para 168; ILC 2006a, Art 5; Jones 1956, 231). The United Kingdom initially relied on this rule in denying the exercise of diplomatic protection on Hicks's behalf because, it was argued, Hicks was an Australian at the time of his capture and hence, in the view of the United Kingdom, at the time of his injury (Kennedy 2006). For the continuous nationality requirement to be satisfied, it therefore fell to Australia to present Hicks's claim.

During early debates in the International Law Commission, it was proposed by the Special Rapporteur that:

> … the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs. [ILC 2001, 509.]

This proposed rule would not have assisted Hicks, given that Australia had rendered some assistance to him, albeit not as much as the United Kingdom afforded for British nationals. Although the change in approach would not have benefited Hicks, the rationale for altering the continuous nationality requirement is noteworthy as it

reflects the human rights orientation in the work of the ILC. In particular, the Special Rapporteur argued for the adoption of a more flexible rule 'giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection' (ILC 2001, para 169). The change was rationalised on the bases of uncertainty as to what may constitute the date of injury and the possibility of injustice if involuntary changes of nationality occurred (ILC 2001, para 169).

Other members of the ILC expressed strong support for maintaining the traditional continuity of nationality rule (ILC 2001, para 172). One reason was that it avoided 'the danger of abuse through "forum shopping"' (ILC 2001, para 172). Certainly, such an allegation against Hicks would be well founded, as it is evident that he and his lawyers sought his registration as a British national precisely because of the further efforts the United Kingdom had made to secure the release of their nationals compared to Australia.

The Special Rapporteur also proposed a new rule, which was adopted by the ILC, whereby a state would be able to exercise diplomatic protection:

> … in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person … lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law. [ILC 2006a, Art 5(2).]

This exception was endorsed in the ILC so as to avoid cases of unfairness while still seeking to minimise 'nationality shopping' (ILC 2006a, Art 5 (Commentary, para 1)). If Hicks had been afforded the opportunity to renounce his Australian citizenship upon registration as a British national, he may have benefited from such a rule, except that his motivations may have again been called into question. The changes to the rule of continuous nationality therefore illustrate recognition for greater appreciation of the interests of the individual in the exercise of the right of diplomatic protection. It must nonetheless be acknowledged that the modifications would have been unlikely to have aided Hicks.

Discretionary right accorded to the state

As important as the right of diplomatic protection may be for the protection of individuals when they are outside their state of nationality, the predominant emphasis has been that a state has a *right* to diplomatic protection and not a *duty* to exercise diplomatic protection (Jones 1956, 230; Forcese 2005, note 17). It remains a matter for the state to determine as to whether and how it will exercise diplomatic

protection (Kunz 1960, 560). This approach was endorsed by the International Court of Justice in *Barcelona Traction*:

> The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. [*Barcelona Traction*, 1970, at [79].]

An individual such as Hicks faces a dual battle — first, of the state deciding whether it will exercise its right of diplomatic protection on his behalf; and second, of the state determining exactly what it will do pursuant to the right of diplomatic protection.

In the United Kingdom, the discretionary nature of diplomatic protection has been long recognised (Warbrick 2002, 724). At most, statements by the United Kingdom indicate that the 'government will continue to give "consideration" to making representations, not that it will make them, even when all other steps have been taken by the individual …' (above, 728). The United Kingdom has recognised the diversity of actions that may be taken in the exercise of the right of diplomatic protection, particularly acknowledging that beyond the presentation of a formal claim, '[i]t may sometimes be permissible and appropriate to make informal representations even where the strict application of the rules would bar the presentation of a formal claim' (above, 725, citing UK Materials on International Law 1999).

Whether the United Kingdom was required to exercise the right of diplomatic protection for those detained in Guantánamo Bay has been argued before the British courts, but was considered as an issue of justiciability. As such, attempts to persuade courts to exercise jurisdiction have so far failed (Warbrick 2002, 732). In *Abbasi*, the British courts were asked to protect the rights of a British national detainee at Camp X-Ray, Guantánamo Bay, particularly in view of the human rights violations entailed through the conditions of detention and the lack of access to legal advice (*R (Abbasi) v Secretary of State*, 2002). The Court of Appeal confirmed the traditional position that there was no remedy in English law to require the government to exercise any right of diplomatic protection. It was enough in this case that the United Kingdom authorities had considered the request for them to exercise their right of diplomatic protection (*Abbasi,* at [92]). The court would not otherwise review the government's decision unless it could be shown that it was irrational or contrary to legitimate expectation and that the court would not 'enter into forbidden areas, including decisions affecting foreign policy' (A*bbasi,* at [106]). No further duty could be imposed on the British government by the courts, even though it was 'objectionable … that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the

legitimacy of his detention before any court or tribunal' (A*bbasi*, at [66]). In assessing this decision, Warbrick rightly concludes: 'The dislocation between human rights law and diplomatic protection remains' (Warbrick 2002, 733).

The recent work of the ILC has affirmed that a state has the right to exercise diplomatic protection, rather than a duty or obligation to do so (ILC 2006a, Art 2 (Commentary, para 2)). During the drafting of the articles on diplomatic protection, '[a] proposal that a limited duty of protection be imposed on the State of nationality was rejected by the Commission as going beyond the permissible limits of progressive development of the law' (ILC 2004b, Art 2 (Commentary, para 2); Dugard 2005, 80–83). Instead, the ILC included a recommendation in the articles on diplomatic protection that states 'should … give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred' (ILC 2006a, Art 19). Although the inclusion of such a provision again requires greater consideration of human rights when states decide on exercising the right of diplomatic protection, the discretionary right of the state remains the entrenched position.

For Australia, there was less of an issue as to whether Australia would exercise its right of diplomatic protection in favour of Hicks, but more a concern as to what Australia was willing to do for him. In exercising its discretionary right of diplomatic protection, Australia, as a close ally of the United States, consistently supported the decision of the United States to hold Hicks in detention in Guantánamo Bay to await trial (*The Age* 2006). Despite recent public misgivings about the length of Hicks's detention without trial, Prime Minister John Howard reportedly told party room colleagues that 'he could secure the release of David Hicks any time but says that would be wrong because the terrorism suspect should face a trial first' (Coorey and Banham 2007). The Australian Government was advised that no prosecution of Hicks would be available in Australia (Ruddock). The position of Hicks contrasted with that of Australian Mamdouh Habib, who was repatriated to Australia without charge on the basis that Australia 'accept[ed] responsibility for [Habib] and will work to prevent [him] from engaging in or otherwise supporting terrorist activities in the future' (US Department of Defense 2005).

Australia initially supported Hicks's detention on the basis that the Military Commissions were a legitimate means of bringing these issues to trial and also accepted United States assertions that torture is not used at Guantánamo Bay (Ruddock). In discussion with the United States, the Australian Government secured several commitments relating to Australian detainees (above). These commitments included assurances that the United States would not seek the death penalty in Hicks's case, that Australia would seek his extradition to Australia to serve any sentence, that Hicks would have confidential access to his lawyer and that Australian officials would

be permitted to monitor his trial. As a result of these early negotiations, a number of improvements to the rules of procedure occurred and Australia gave a public commitment to continue to monitor the process (above). Even after five years of detention, the response of the Australian Government to Hicks's plight was to insist that the matter be resolved as quickly as possible by the United States (*The Age* 2007).

In view of Australia's reticence to act prior to Hicks's guilty plea, lawyers for Hicks instituted proceedings before the Federal Court of Australia, seeking an order of habeas corpus and judicial review of a decision by the Commonwealth not to request Hicks's release from internment in Guantánamo Bay (*Hicks v Ruddock*, 2007). In recognition of Australia's discretionary right, it was argued that the Commonwealth had 'a duty to *consider* an application by an imprisoned Australian citizen that a request be made to the United States authorities to deliver the citizen to Australian authorities' (*Hicks v Ruddock*, 2007, at [57], emphasis in original). Hicks's counsel rightly described this as 'a duty of imperfect obligation' (at [61]) and 'not enforceable as a legally binding duty' (at [62]). Nonetheless, any consideration by the Commonwealth, it was argued, must be in accordance with law and consequently should not include 'irrelevant considerations', including whether Hicks could be prosecuted under Australian law if returned to Australia (at [58]). The Commonwealth responded that 'the discretion concerned is a wide and unfettered executive discretion at the highest level, and that there are no constraints or criteria imposed on that discretion' (at [60]). An application by the Commonwealth for summary judgment was dismissed and the matter was to be heard in full, but the case was rendered moot in view of Hicks's subsequent guilty plea and return to Australia.

Debate has arisen as to what extent unlawful activity on the part of an individual should serve to forfeit any claim to a state exercising its right of diplomatic protection. Writing in 1928, Borchard favoured such a limitation:

> It is a general rule that an injury to an alien arising out of a breach of or failure to observe the local law or police regulations involves a complete or partial forfeiture by the alien of the protection of his own government. [Borchard 1928, 735.]

If this approach were to be followed with respect to Hicks, allegations of terrorist activity could deny him any benefit under a state's right of diplomatic protection. Equally, an admission of providing material support to terrorists could have jeopardised the right of Australia (or the United Kingdom) to exercise diplomatic protection.

The approach recently adopted by the ILC has been to deny this concept of 'clean hands' from having any special place in diplomatic protection (ILC 2004c, para 9).

The Special Rapporteur took the view that if an individual had committed an unlawful act in another state and was arrested and duly prosecuted, then no internationally wrongful act occurred warranting the exercise of diplomatic protection (ILC 2004c, para 8). However, if an individual who had committed an unlawful act was arrested and then subjected to violations of due process or torture at the hands of the detaining state, then the state of nationality of the injured individual would be entitled to act if it wished because the due process violation or torture reflected an internationally wrongful act (ILC 2004c, para 8). Similarly, Shapovalov has argued that the right of diplomatic protection should be exercised to the extent that it would ensure a fair trial or make certain the application of appropriate penalties (Shapovalov 2004–05, 851). Otherwise, the individual suffers due to the further limitations imposed on the right of diplomatic protection. For Hicks, the conclusion that could be drawn is that regardless of any offenses he may have committed, either Australia or the United Kingdom could have exercised the right of diplomatic protection in light of his arbitrary and prolonged detention in Guantánamo Bay, along with the conditions of his detention there. It is arguable that the accusations against Hicks in fact coloured the decisions of both states in their willingness to exercise the right of diplomatic protection and to what extent the right should be exercised.

A human rights perspective on diplomatic protection

The exercise (and lack thereof) of Australia's and Britain's right of diplomatic protection in relation to Hicks highlights the vulnerability of the individual in seeking the enforcement of international human rights law. Even when violations of human rights standards are manifest, as is the case with the detainees in Guantánamo Bay, the practice of Australia and the United Kingdom has favoured a state-centric construct of diplomatic protection that reduces the international protection available to individuals. This approach is clearly out of step with recent developments in international law. After more fully describing the human rights violations associated with Hicks's detention, this section of the article argues that a greater emphasis on human rights could, and should, have been brought to bear on the exercise of diplomatic protection by Australia and the United Kingdom.

Human rights violations perpetrated against Hicks

In early 2006, a report presented to the United Nations Commission on Human Rights by five Special Rapporteurs of that Commission described how conditions in Guantánamo Bay violated a number of human rights (United Nations Economic and Social Council Commission on Human Rights 2006). In particular, it was reported that denying the right of detainees to challenge their detention before a judicial body

violated the prohibition against arbitrary detention. The Military Commission procedure established at that time by the United States was in violation of the right to a fair trial. Various interrogation techniques authorised by the United States administration and used at Guantánamo Bay constituted unlawful or degrading treatment. The prolonged and indefinite nature of the detention amounted to inhuman treatment in violation of the rights to health and to be treated with humanity and respect for the inherent dignity of the person. Excessive violence used in transportation and forced feeding of detainees was tantamount to torture, with the failure to adequately investigate these allegations being a further human rights breach. The report concluded that in light of these multiple human rights abuses, the United States should either expedite the trials of detainees or release them, and should close the Guantánamo Bay detention facility without delay.

Well prior to this report, the International Committee of the Red Cross received a report from Hicks in 2002 alleging that he was tortured in Guantánamo Bay. Stephen Kenny, Hicks's former Australian legal consultant, said that this report referred to:

> … specific incidences that I believe were not just the actions of individual guards, but rather a well known activity that must have been authorized by some reasonably high-up people in the chain of command of the US forces. [Amnesty International 2005; Australian Broadcasting Commission 2005b.]

In May 2004, Hicks gave a sworn affidavit to his United States lawyer, Major Mori, making further allegations about the treatment of detainees in Guantánamo Bay that amounted to torture or other cruel, inhuman and degrading treatment. In particular, Hicks alleged that he was:

- repeatedly beaten, once for eight hours, including while restrained and blindfolded;
- forced to take unknown medication;
- subjected to sleep deprivation 'as a matter of policy';
- not allowed to leave his cell in Camp Echo to exercise in the sunlight between July 2003 and March 2004. [Amnesty International 2005.]

Amnesty International has documented further allegations made by Hicks about the US Immediate Response Force in Guantánamo Bay, and in an interview on the ABC's *Four Corners* program, Hicks's father alleged that his son had been sexually abused by American troops. Australian officials state that Hicks's allegations have been investigated and that there is no credible evidence to support them (Ruddock).

The United Kingdom has evinced strong concerns in relation to the human rights abuses recorded in Guantánamo Bay and reported by the United Nations. The

former British Prime Minister, Tony Blair, described Guantánamo as 'an anomaly' and expressed the view that it should be closed down in time (Margolin 2006). The British High Commissioner to Washington met with senior United States officials in April 2005, outlining British concerns about conditions in Guantánamo Bay (*Al Rawi*, at [33]), and in a more forthright attack on the facility, the former British Attorney General, Lord Goldsmith, called for Guantánamo Bay to close, denouncing the centre as 'unacceptable' (Doward and Townsene 2006). Even the United States President, George W Bush, has expressed a desire for the facility to be closed, recognising that the conditions pave the way for other states to criticise the human rights record of the United States (Bush 2006b). It is precisely these circumstances that must be borne in mind when states decide how to exercise their right of diplomatic protection in respect of the Guantánamo Bay detainees.

Exercising diplomatic protection consistently with human rights

In focusing on the protection of individuals through the lens of diplomatic protection, states are maintained as the primary subjects of international law and the rights of the state still tend to hold sway over those of the individual. Such an approach 'is to impose yet a further limitation upon the availability of international justice to the individual as such' (Jones 1956, 244). The state-centric emphasis in the right of diplomatic protection is outdated in the current international legal system, where individuals are now directly granted rights as subjects of international law and states are under international obligations to ensure that those rights are respected. 'The dualist approach taken by the original promoters of diplomatic protection is therefore no longer appropriate in such cases …' (ILC 1998, para 35). As Warbrick has noted:

> Generally though, save for his obligation to exhaust domestic remedies, the individual rather stands outside the process of diplomatic protection, a perspective distinctly at odds with the developing law of human rights, for, although it is not necessarily the case that a diplomatic claim will involve an allegation of a violation of human rights, in most cases, it will be a central element of the complaint – ill-treatment, failure of due process, interference with property rights. [Warbrick 2002, 726.]

The development of individual rights in international law provided some motivation for the Special Rapporteur to the ILC to advocate that a more flexible rule be adopted 'giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection' (ILC 2001, para 169). This recognition was predominantly accorded through the inclusion of a recommendation to states to give consideration to the exercise of the right of diplomatic protection in the articles adopted by the ILC in 2006 (ILC 2006a, Art 19). The ILC was willing to include such a provision in light of a number of national court decisions that indicated:

> … although a State has a discretion whether to exercise diplomatic protection or not, there is an obligation on that State, subject to judicial review, to do something to assist its nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection. [ILC 2006a, Art 19 (Commentary, para 3).]

The inclusion of the recommendation is intended to serve 'as a reminder to States that they should consider the possibility of resorting to this remedial procedure' (ILC 2006a, Art 19 (Commentary, para 2)).

Even with the development of international human rights law, there have been mixed views on whether the right of diplomatic protection should still be seen as a distinct mechanism or whether, and to what extent, human rights perspectives should affect the right of diplomatic protection. With respect to the former, the inherently discretionary nature of the right of diplomatic protection tends to detract from any assertion that diplomatic protection is the best mechanism for the protection of human rights. This view is reflected in government comments to the United Nations Sixth Committee on the work of the ILC on diplomatic protection. The Nordic States, for example, wrote:

> There was no obligation on the State to present a claim on behalf of an injured national. Moreover, there should be no doubt that diplomatic protection was not recognized as a human rights institution and could not be enforced as such. [Quoted in Warbrick 2002, 725.]

A separation of diplomatic protection from international human rights law may be substantiated when it is recalled that 'states remain obligated to meet some meaningful standards, separate and distinct from their international human rights obligations, in their treatment of aliens' (Forcese 2005, 475). The distinct existence of the right of diplomatic protection from other avenues of human rights protection has been acknowledged in the work of the ILC. The ILC has taken the position that the exercise of the right of diplomatic protection should be without prejudice to the rights of individuals to pursue remedies in their own right or for states to resort to actions or procedures other than diplomatic protection to secure redress for injury to a state's nationals (ILC 2006a, Art 16). The right of diplomatic protection should not 'exclude' or 'trump' other means of protecting individual rights (ILC 2004b, Art 17 (Commentary, para 1); ILC 2006a, Art 16 (Commentary, para 1)). Dugard has noted that some commentators have gone so far as to propose that diplomatic protection should be abandoned completely because human rights law now exists to protect the rights of individuals (Dugard 2005, 76–77).

More commonly, however, it is now argued that '[d]iplomatic protection is undoubtedly an important tool in human rights protection' (Shapovalov 2004–05, 832; Dugard 2005, 77–79). One of the reasons for the value of diplomatic protection

in upholding the human rights of individuals is that most states treat a claim of diplomatic protection more seriously than an individual's complaint (Shapovalov 2004–05, 859). Given the limited procedural capacity that is accorded to individuals to assert their rights in the international legal system, a state's right to exercise diplomatic protection remains an important avenue for individuals to gain access to justice. As the ILC Special Rapporteur noted, 'until the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection' (ILC 2000, para 29).

It would seem that if diplomatic protection remains an important institution for the protection of human rights, then it is only appropriate to understand diplomatic protection from a human rights perspective. Shapovalov argues:

> Diplomatic protection is an institution of international law aimed at benefiting individuals, and frequently concerns the protection of human rights. A number of authors have referred to the growing importance of human rights and pointed out that 'diplomatic protection has to take account of the developments in international human rights law'. [Shapovalov 2004–05, 864–65.]

It is not therefore a matter of arguing that there is a 'human right to diplomatic protection to supplement the established position in customary law' (Warbrick 2002, 731), but more that in the exercise of the right of diplomatic protection greater weight could be accorded to the protection of international human rights. The articles on diplomatic protection adopted by the ILC have provided an opening for states to do so. However, neither Australia nor the United Kingdom seized on this opportunity in relation to Hicks.

For Hicks, a human rights perspective on diplomatic protection might have resulted in a shorter length of detention in Guantánamo Bay. In exercising the right of diplomatic protection, Australia may have followed the precedent set by the United Kingdom in securing the release of its nationals. Consistent with its stated position on Guantánamo Bay, the United Kingdom could have insisted on the objective fact of nationality providing Hicks with a sufficient connection to the United Kingdom to act on his behalf. The continuity of nationality requirement need not have affected a British right of diplomatic protection, since Hicks's ongoing detention and the conditions of that detention could be viewed as violations of rights that continued at the time of his acquisition of British nationality. If the political will had existed in favour of protecting Hicks, legal barriers to the right of diplomatic protection could have been overcome.

If the United Kingdom had intervened on behalf of Hicks, it could have also been argued that it 'is not necessarily motivated by a subjective interest based on the

nationality link; it is deemed to be acting in the objective interests of the international legal order' (ILC 1998, para 36). Such an approach would be consistent with the statement of the International Court of Justice in the *Barcelona Traction* case that 'rules concerning the basic rights of the human person' are 'obligations *erga omnes*', so all states have an interest in upholding these obligations. Among the obligations recognised as *erga omnes* obligations are murder; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and a 'consistent pattern of gross violations of internationally recognized human rights' (Forcese 2005, 497). As Forcese states:

> By the ICJ's own reasoning, to the extent that the 'basic rights' of human beings attracting *erga omnes* status overlap with state obligations vis-à-vis aliens, states are clearly free to invoke those latter obligations, even for non-nationals. [Forcese 2005, 497.]

Difficulties that the United Kingdom may have otherwise faced in the exercise of diplomatic protection should fall away when this perspective is brought to bear on Hicks's case. In his seventh report, the ILC Special Rapporteur noted developments in international law whereby states were entitled to protect the rights of non-nationals 'subjected to the violation of human rights norms (with the status of *jus cogens* or which qualify as obligations *erga omnes*) in foreign countries' (ILC 2006b, para 84). This position was eloquently stated by the first Special Rapporteur to the ILC, who argued that 'what is at stake here is the interest of the community in protecting "the common values which the system enshrines"' (ILC 1998, para 37).

Conclusion

The situation of David Hicks and what ended up as fruitless attempts to benefit from his British nationality place in sharp relief the weaknesses of diplomatic protection in promoting human rights. Nationality remains an important source of rights for individuals, particularly because the bond of nationality between an individual and a state may provide protection to that individual when outside his or her state of nationality. Indeed, the established role of states in this regard is underlined by the considerable efforts of the United Kingdom to deny Hicks his British nationality. The United Kingdom rightly recognised that once the link of nationality was established, claims would be asserted for the United Kingdom to act on Hicks's behalf.

Nonetheless, the right of diplomatic protection is one held by the state. In this regard, it was completely within the discretion of the United Kingdom to decide not to act on Hicks's behalf in asserting his rights against the United States. Equally, Australia had a discretion to decide to what extent it would seek to provide assistance to Hicks. Moreover, limitations on the exercise of the right of diplomatic protection could be,

and were, used against Hicks. While this approach is countenanced by the traditionally state-centric nature of diplomatic protection, this emphasis is no longer completely appropriate in view of the current status of individuals in international law. Individuals are accorded rights and responsibilities under international law, though their capacity to enforce their rights remains restricted. A procedural capacity to defend human rights has been recognised in regional human rights systems and at the United Nations. Where gaps remain, diplomatic protection has an important role to play. As part of this system, it is evident that a human rights perspective should be brought to bear on diplomatic protection and both Australia and the United Kingdom failed to adopt such an approach in dealing with Hicks. David Hicks was only one of hundreds of detainees held at Guantánamo Bay who fell in this gap as someone unable to enforce individual human rights. His case demonstrates that the right of diplomatic protection should have been exercised to protect individuals rather than allowing for the perpetuation of human rights violations.

Postscript

On 7 August 2007, the United Kingdom requested that the United States release five detainees held in Guantánamo Bay who were residents, but not nationals, of Britain. It was reported that this change in policy was a result of pressure from legal proceedings pursued in the United Kingdom, as well as recognition by the new British Prime Minister, Gordon Brown, of the importance of human rights in the battle against terrorism (Bonner 2007). This step certainly marks an important shift towards a human rights approach to the exercise of diplomatic protection.

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