

ARTICLES ON DIPLOMATIC PROTECTION

By John Dugard

Professor of International Law

Department of Public Law, Faculty of Law, Leiden University

Historical Context

Codification is a difficult task when there is little jurisprudence on the subject in question. This was not the case with diplomatic protection as when the International Law Commission embarked on its codification of this subject there was already a rich history of case law, backed by treaties, previous attempts at codification and the writings of jurists. Indeed, on the basis of sources available for the codification process, this was probably the subject most ripe for codification ever addressed by the International Law Commission.

The origins of diplomatic protection reach far back into the history of international law. In 1758 the Swiss jurist Emmerich Vattel expounded the fundamental principle of diplomatic protection when he wrote that “Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen” (E. Vattel, *The Law of Nations, or the Principles of Natural Law*, Classics of International Law, Book II, Chapter VI at 136 (ed. C. Fenwick transl. 1916)). The principle that a State was entitled to protect a national injured abroad became a central feature of relations between Western European States and the United States on the one hand and Latin American States on the other during the latter part of the nineteenth century and the early part of the twentieth century. Nationals of the Western Powers who flocked to Latin America to exploit its natural resources and to participate in its industrial development frequently found themselves in disputes with the unstable and volatile governments of the region over their personal rights or property rights. They then turned to their national States for protection which sometimes took the form of arbitration and sometimes the use of force. Inevitably, the bullying approach adopted by the Western Powers to Latin American States in protecting their nationals’ interests gave diplomatic protection a bad reputation among developing nations. The arbitration tribunals, which sometimes comprised mixed claims commissions, did, however, contribute substantially to the development of this branch of the law by their jurisprudence. In the inter-war years attempts were made to codify aspects of the law governing the treatment of aliens and the principles governing diplomatic protection, particularly at a codification conference in the Hague in 1930. During the same period a number of important treatises were written, notably Edwin Borchard’s monumental *The Diplomatic Protection of Citizens Abroad* (1919).

After World War II two developments had an impact on the law of diplomatic protection. First, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965, and a myriad of bilateral investment treaties (BITs) facilitate the protection of foreign investment. These treaties, which relax the rules governing the nationality of claims and the exhaustion of local remedies, have substantially changed the legal environment of

international investment and reduced appeals to diplomatic protection in respect of property claims.

Secondly, the advent of the human rights treaty has seen the conferral of rights on individuals which may be asserted not only against an individual's own State but also against other States, without the intervention of the individual's national State. Many have argued that this makes diplomatic protection redundant.

Diplomatic protection is therefore today not the only instrument of international law that may be used by an individual whose personal or property rights have been unlawfully violated abroad by a foreign government. BITs provide protection for the investments of foreigners and human rights treaties offer remedies for the violation of personal human rights. But diplomatic protection remains a mechanism of international law that is still employed by States to secure just treatment for their nationals abroad. Moreover it has largely lost its reputation as a procedure used by rich, developed nations to interfere in the domestic affairs of developing nations. This is evidenced by the manner in which developing nations have not hesitated to invoke international law's oldest mechanism for the protection of aliens abroad.

As a branch of law with relatively settled rules and a rich jurisprudence to support these rules, diplomatic protection was an obvious candidate for codification by the International Law Commission (ILC). The subject is, however, closely related to that of State responsibility and this resulted in diplomatic protection suffering the same fate as State responsibility in respect of codification. In 1956 F.V. Garcia Amador of Cuba was appointed Special Rapporteur to the Commission on the subject of State responsibility. His focus on the primary rules of State responsibility for injuries to aliens and their property, which included some consideration of diplomatic protection, was highly controversial and failed to achieve consensus. The project was rescued by the next Special Rapporteur, Roberto Ago of Italy, who decided not to examine the primary rules which describe the acts or omissions that give rise to responsibility and instead to limit the study to the secondary rules of State responsibility, that is the rules comprising the framework of State responsibility dealing with such matters as the attribution of conduct to a State, the invocation of the responsibility of a State and the consequences of a wrongful act of a State. Progress under Ago and his successors was slow (and at times confused) and it was not until 1996 that a set of draft articles was completed on first reading. In 2001, under the rapporteurship of James Crawford of Australia, the ILC finally adopted a set of draft articles on second reading. These draft articles contain only one provision dealing directly with diplomatic protection. Article 44 provides that for a claim to be admissible it should comply with the rules governing the nationality of claims and the exhaustion of local remedies, but makes no attempt to consider the content of these rules. Of course, rules considered in this set of draft articles, such as the attribution of conduct to a State and the remedies available to redress a wrongful act, apply to injury to aliens as well as to other internationally wrongful acts.

It was only when the ILC was about to embark on its second reading of the draft articles on State responsibility that it was able to turn to the subject of diplomatic protection itself. In 1996 the General Assembly invited the ILC to

consider the topic of diplomatic protection and in 1997 the Commission appointed Mohamed Bennouna of Morocco as Special Rapporteur on this subject. When he resigned from the Commission, John Dugard of South Africa became Special Rapporteur. He presented seven reports to the Commission. In 2006 a set of nineteen draft articles on diplomatic protection was adopted. The question whether to adopt a convention on the basis of these articles is still before the General Assembly.

Significant Developments in Negotiating History

The line between codification and progressive development is very fine. Rules that seem to enjoy the support of State practice often become uncertain when subjected to the scrutiny of the codifier. Consequently there were extensive debates within the ILC about a number of issues. These included the following questions.

Use of Force

Although there is some support for the view that a State may use force in the exercise of the right of self-defence to protect its nationals who are threatened with serious bodily injury abroad, the ILC rejected a proposal that this be considered as the ultimate exercise of diplomatic protection.

An Injury to a National is an Injury to the State

Traditionally diplomatic protection has been viewed as a right vested in the State because an injury to a national is seen to be an injury to the State itself. This fiction, which was proclaimed by Vattel in 1758 (cited above), was endorsed by the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case when it declared that “by taking up the case of one of its subjects and by resorting to diplomatic protection 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” (*Mavrommatis Palestine Concessions (Greece v. U.K.), Judgments, P.C.I.J. Reports 1924, Series A, No 2*, p. 12). This explanation for diplomatic protection was premised on the assumption that under early international law the individual had no rights under international law. Subsequent developments in respect of human rights cast doubt on the continued validity of this explanation for diplomatic protection. Today the individual is the subject of many rules of international law which protect him or her against his or her own government and abroad against foreign governments. The ILC therefore was in doubt as to whether it was still necessary to justify diplomatic protection on the fiction that an injury to a national is an injury to the State. Consequently article 1 of the draft articles, which defines diplomatic protection, leaves this matter open and simply defines diplomatic protection as the invocation of responsibility by a State for an injury caused by an internationally wrongful act to a national of that State.

Right or Obligation to Exercise Diplomatic Protection

A State has the right to exercise diplomatic protection. But is this a discretionary right, as asserted by the International Court of Justice in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, *Judgment, I.C.J. Reports 1970*, p. 3), or is there an obligation on a State to exercise diplomatic protection on behalf of a national, particularly one who has been subjected to treatment constituting the violation of a norm of *jus cogens*? A proposal by the Special Rapporteur to acknowledge that there was some obligation on States, however limited, in the latter case, was rejected by the ILC at first reading. However, as a result of the suggestion by some States in their comments on the draft articles accepted at first reading that provision be made for such an obligation, a recommendation was made in the draft articles adopted at second reading that States “[g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred” (article 19).

Genuine Link

In the *Nottebohm* case, the International Court of Justice held that a State wishing to exercise diplomatic protection was required to prove that there was “a genuine connection of existence” between the national sought to be protected and the State (*Nottebohm case (second phase) (Liechtenstein v. Guatemala)*, *Judgment, I.C.J. Reports 1955*, p. 4). The ILC took the position that this decision was to be limited to the facts of the case in question and refused to provide that a natural person was required to prove such a genuine link with the protecting State in addition to his or her nationality.

Multiple Nationality

While the ILC agreed that any State of which a dual or multiple national is a national might exercise diplomatic protection on behalf of such a national where the national was not a national of the defendant State, there was disagreement as to whether this principle applied where the national was also a national of the defendant State. This was an issue that had troubled the Iran-United States Claims Tribunal in a number of cases (see, for example, Case No. A/18, *Iran-U.S. C.T.R.*, vol. 5 (1984), p. 251). In order to resolve this matter, the ILC decided that a State might only exercise diplomatic protection in the latter case where it was established that the nationality of the claimant State was predominant, both at the date of injury and at the date of presentation of the claim.

Stateless Persons and Refugees

In a clear exercise in progressive development of the law, the ILC adopted a provision allowing States to exercise diplomatic protection in respect of stateless persons and refugees who were “habitually resident” in the claimant State (article 8).

State of Nationality of a Corporation

In the famous *Barcelona Traction* case, the International Court of Justice held that the right to exercise diplomatic protection on behalf of a corporation

belonged to the State in which the corporation was incorporated and had its registered office (*Barcelona Traction*, p. 42). Although the Court refused to apply the genuine link test expounded in *Nottebohm* to corporations, it did suggest that there was a need for some “permanent and close connection” between the State exercising diplomatic protection and the corporation. The ILC therefore adopted the incorporation test but at the same time acknowledged that in certain circumstances factors demonstrating a “permanent and close connection” with a company might prevail over incorporation.

Shareholders

In principle a corporation is to be protected by the State of nationality of the corporation and not by the State(s) of nationality of the shareholders of a corporation. This principle was reaffirmed by the International Court of Justice in *Barcelona Traction* (pp. 34-35), as the Court feared that if the States of shareholders were permitted to exercise diplomatic protection, this would lead to a multiplicity of claims (pp. 48-49). There are, however, exceptions to this rule, as acknowledged by the Court in *Barcelona Traction* (pp. 40-41, 48). First, where the corporation has ceased to exist in its place of incorporation and, secondly, where the State of incorporation was itself responsible for inflicting injury on the company and the shareholders’ sole means of protection was through their State(s) of nationality. The latter exception had some support in arbitral awards and in the separate opinions of judges in *Barcelona Traction* (pp. 72-75 (Judge Fitzmaurice), 134 (Judge Tanaka) and 191-193 (Judge Jessup)), but was initially contested by a substantial minority of the ILC before it was adopted.

Exhaustion of Local Remedies

Unlike the rules governing the nationality of claims, the rules relating to the exhaustion of local remedies presented few difficulties. There was general agreement that local remedies were to be exhausted except when there was no reasonably available local remedy. There was, however, some debate over the question whether local remedies were to be exhausted when there was no relevant connection between the injured person and the State responsible for the injury. There was agreement that local remedies need not be exhausted when injury had been caused by transboundary environmental harm – as when radioactive fallout from the Chernobyl nuclear plant was felt in Scandinavia - or from the shooting down of an aircraft that had accidentally strayed into a States’ airspace (as occurred when Bulgaria shot down an El-Al flight that had accidentally entered its airspace).

J. Calvo Clause

In the late 1800s Carlos Calvo, an Argentinian lawyer, proposed that Latin American States should avoid claims for diplomatic protection by compelling aliens to waive recourse to international remedies in respect of disputes arising out of a contract entered into with the host State. The validity of such a waiver clause, known as the “Calvo Clause”, was disputed by Western Powers on the ground that an individual has no right to waive a right that belongs to the State – in terms of the rule in *Mavrommatis*. The “Calvo Clause” was, however, treated by Latin

American States as a regional custom and incorporated into the constitutions of some States. An attempt by the Special Rapporteur to find a compromise that would accord some recognition to the “Calvo Clause”, particularly in light of the objections to *Mavrommatis* discussed above, was, however, vigorously opposed by some members of the Commission and was not pursued.

Summary of Key Provisions

The articles on diplomatic protection are concerned with the secondary rules of diplomatic protection. They make no attempt to describe the conduct of States that causes injury to the persons or property of foreign nationals and gives rise to the responsibility of such States. Instead they focus on two issues: the nationality of claims, which focuses on the requirements of nationality that must be satisfied by natural persons and corporations before they may be protected by their State of nationality (articles 3 – 13); and the scope of the rule requiring local remedies to be exhausted before a claim for diplomatic protection may be brought by a State, and the exceptions to this rule (articles 14-15).

Article 1 defines diplomatic protection as the invocation by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a national of the former State. Article 2 affirms that a State has the right to exercise diplomatic protection in accordance with the articles; and article 3 proclaims that it is the State of nationality that is entitled to exercise diplomatic protection.

Articles 4 to 8 cover the subject of the nationality of natural persons. A person may acquire nationality by birth, descent, nationalization, the succession of States or any other manner not inconsistent with international law (article 4). Nationality must continue from the date of injury to the date of the official presentation of the claim (article 5). Dual or multiple nationals may be protected by any State of nationality against a State of which such person is not a national (article 6), but diplomatic protection may only be exercised against a State of which such person is also a national if the nationality of the claimant State is “predominant” (article 7). Article 8 provides for the diplomatic protection of stateless persons and refugees who are “lawfully and habitually resident” in the claimant State.

Articles 9 to 13 deal with the diplomatic protection of legal persons. Article 9 provides that the State of nationality of a corporation is the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State, has no substantial business activities in the State of incorporation, and has its seat of financial management and control in another State, that State is to be regarded as the State of nationality. A State is entitled to exercise diplomatic protection in respect of a corporation that was its national continuously from the date of injury to the official presentation of the claim (article 10). The State of nationality of shareholders in a corporation may not exercise diplomatic protection in respect of such shareholders in the case of injury to the corporation unless the corporation has ceased to exist according to the law of the State of incorporation or the State of incorporation of the company is responsible for causing the injury and the incorporation in that State was required

as a precondition for doing business there (article 11). Where an internationally wrongful act causes direct injury to the shareholders, as distinct from the corporation itself, the State of nationality of such shareholders may exercise diplomatic protection in respect of its nationals (article 12).

Only two provisions deal with the exhaustion of local remedies. Article 14 affirms that a State may not present a claim for diplomatic protection before local remedies have been exhausted and defines local remedies as legal remedies before judicial or administrative courts or bodies. This article also makes it clear that the exhaustion of local remedies rule applies only to cases in which the State has been injured “indirectly”, that is, through its national. It does not apply where the claimant State is directly injured by the wrongful act of another State. In the case of “mixed claims” containing elements of both injury to the State itself and injury to the nationals of that State, a “preponderance” test is applied to ascertain which claim is to prevail. Article 15 provides for the exceptions to the local remedies rule, that is, cases in which local remedies need not be exhausted. These are cases in which local remedies are obviously futile in the sense that there are no reasonably available local remedies; the respondent State has been guilty of undue delay in the remedial process; there is no relevant connection between the injured person and the respondent State; and the respondent State has waived the need to exhaust local remedies.

There are a number of miscellaneous provisions which make it clear that the articles are not to prevail over other procedures for the protection of an injured aliens’ rights contained in human rights conventions (article 16), bilateral investment treaties (article 17) and the rule of customary international law allowing the State of nationality of a ship to seek redress on behalf of crew members injured in connection with an injury to the vessel resulting from an internationally wrongful act (article 18).

Article 19 is unusual as it contains a number of recommendations to States in respect of the exercise of diplomatic protection. States should in terms of this provision give due consideration to the possibility of exercising diplomatic protection to nationals, especially when a significant injury had occurred; take into account the views of injured persons with regard to claims for reparation under diplomatic protection; and transfer to the injured person any compensation recovered for injury by another State.

The Influence of the Articles on Subsequent Developments

Although the articles on diplomatic protection have not been translated into treaty form, there is no doubt that they are today seen as the definitive statement of the rules of customary international law on this subject. This is shown by the manner in which they were cited by the International Court of Justice in the *Diallo* case (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, paras. 39, 91-94) and the impact they have had on legal writing (see, for example, C.F. Amerasinghe, *Diplomatic Protection* (2008)).

Some of the issues considered by the ILC have received the attention of

courts. In *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227, pp.199-200, paras 551-552) an arbitration tribunal held that it was not necessary for a party to prove nationality until the making of the award: for the requirement of continuous nationality to be satisfied it was sufficient to prove nationality from the date of the injury to the date of the official presentation of the claim. This finding followed the ILC articles 5 and 10 and rejected the ruling in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3 (2003), 42 *International Legal Materials* 811, pp. 847-849) holding that nationality should continue until the making of the award. In *Diallo*, the International Court of Justice considered article 11(b) of the ILC draft articles which allows the State of nationality of shareholders to protect shareholders when the State of nationality of the corporation was itself responsible for causing injury to the corporation, and incorporation in that State was required as a condition for doing business there. Whether this is a customary rule of international law was left open by the Court (*Ahmadou Sadio Diallo*, paras. 91-93).

Diplomatic protection remains an important part of the forensic arsenal available to aliens who have been injured abroad. It is true, as the International Court of Justice observed in *Diallo* (para. 88), that the role of diplomatic protection has “somewhat faded” in respect of investment disputes, and that human rights conventions provide international mechanisms for bringing complaints against governments responsible for violating the rights of aliens. On the other hand, as shown by the *Diallo* case, in which the Republic of Guinea brought proceedings against the Democratic Republic of the Congo premised on diplomatic protection in respect of both injury to Mr Diallo’s person and injury to his rights in a corporation, diplomatic protection serves as a residual remedy. Moreover, the ineffectiveness of the remedies offered by human rights conventions means that injured individuals are better advised to seek the protection of their national State than to invoke the relief offered by individual complaints to human rights monitoring bodies. That this is so is demonstrated by the fact that injured aliens generally appeal to their national State for assistance and if this is refused petition the courts of their national State to intervene on their behalf (there have been several attempts to persuade courts to order the government to exercise diplomatic protection in South Africa. See J. Dugard, *International Law: A South African Perspective*). The ILC missed an opportunity to advance the relevance of diplomatic protection when it failed to fashion a right to diplomatic protection in respect of nationals subjected to the violation of peremptory norms abroad. Possibly, if the articles are translated into treaty form, States will be encouraged by article 19 of the articles and the “responsibility to protect” doctrine proclaimed by the General Assembly in its 2005 World Summit Outcome Document (resolution 60/1 of 16 September 2005) in respect of serious international crimes, to endorse a right to diplomatic protection.

Related Materials

A. Legal Instruments

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965

B. Jurisprudence

Mavrommatis Palestine Concessions (Greece v. U.K.), Judgments, P.C.I.J. Reports 1924, Series A, No 2

Nottebohm case (second phase) (Liechtenstein v. Guatemala), Judgment, I.C.J. Reports 1955, p. 4

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, I.C.J. Reports 1970, p. 3

Iran-United States Claims Tribunal, Case No. A/18, *Iran-U.S. C.T.R.*, Vol. 5 (1984)

The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3 (2003), 42 *International Legal Materials*.811, pp. 847-849

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582

Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227, 30 November 2009

C. Documents

General Assembly resolution 60/1 of 16 September 2005 (World Summit Outcome)

D. Doctrine

C.F. Amerasinghe, *Diplomatic Protection* (USA, Oxford University Press, 2008)

E. Vattel, *The Law of Nations, or the Principles of Natural Law*, Classics of International Law, Book II, Chapter VI at 136 (ed. C. Fenwick transl. 1916)

Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, Banks Law Publishing Co., 1919)

J. Dugard, *International Law: A South African Perspective*, 4th ed. (Juta Academic, 2013)