DIPLOMATIC PROTECTION

[Agenda item 6]

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Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, Special Rapporteur

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Introduction

1. The discussions to which the report of the Working Group on diplomatic protection gave rise, both in the Commission and during the debate in the Sixth Committee of the General Assembly,[1] have highlighted the two defining aspects of the topic, which will need to be considered on a preliminary basis so that the Commission can give the Special Rapporteur the guidance he needs to continue the study entrusted to him.

2. First there is the legal nature of diplomatic protection, i.e. of the holder of the underlying right. It has been argued that owing to the development of the rights of the individual, who is increasingly recognized as a subject of international law, the Commission should reconsider classic law in this regard, as was forcefully stated by PCIJ in the *Mavrommatis Palestine Concessions* case.[2]

3. Secondly, it has been said that the Working Group's proposal to limit the topic to the codification of secondary rules could give rise to difficulties when certain issues are taken up, such as "the 'clean hands' rule which was really on the borderline between primary and secondary rules".[3]

4. Accordingly, after a review of the historical development of the institution of diplomatic protection, the present report analyses the relevant rules.

5. The topic under consideration chiefly involves codification; its customary origins are established, as was stressed by the Working Group, referring to the *Mavrommatis Palestine Concessions* judgement, which states: "*It is an elementary principle of international law*[*] that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[4]

6. This "principle" was contemplated very early on since reference is often made to the first theoreticians of international law, particularly Vattel, who said: "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."[5]

7. This can be seen as either a relic of feudal law under which the lord's protection was given in return for the allegiance of his subjects (nationality), or one of the extensions of the "social contract" theories which were in vogue at the time to legitimize the State, which linked social peace and the recognition of sovereign authority.

8. The quotation from Vattel, however, foreshadows one of the main criticisms of the institution, namely, that it is in essence discriminatory because only powerful States are able to use it against weaker States. According to this view, it is therefore profoundly inegalitarian, since the possibility of the individual having his cause internationalized depends on the State to which he is linked by nationality. Moreover, diplomatic protection has served as a pretext for intervention in the affairs of certain countries. Judge Padilla Nervo denounced this situation in these terms:

> The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.[6]

9. The Latin American countries, which were the first to suffer the damaging effects of this corruption of diplomatic protection, attempted a legal response known as the Calvo doctrine, named after an Argentine statesman (1824–1906), whereby the alien contractually declines diplomatic protection from his State of origin. Discussions which this doctrine has engendered will be reverted to below.

10. At all events, diplomatic protection has been regarded from the outset 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.[7] It is indeed a mechanism or a procedure for invoking the international responsibility of the host State, and some authors have felt that the study of that responsibility should include diplomatic protection.[8] However, the State-to-State relationship is distinctive in this case because it arises from the injury suffered by the nationals of one State in the territory of another State. In order to reconcile the personal and territorial jurisdictions involved, priority is accorded to the latter State to repair the harm (under the principle of exhaustion of local remedies) before the first State brings an international claim on behalf of its national.

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[1] For the debate at the forty-ninth session of the Commission, see *Yearbook … 1997*, vol. I, 2513th meeting, p. 272, para. 1. For the debate in the General Assembly, see *Official Records of the General Assembly, Sixth Committee, Fifty-second Session*, 16th–25th meetings (A/C.6/52/SR.16–25), and corrigenda.

[2] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*. See, in particular, the statements by Messrs Lukashuk and Pellet in the Commission (*Yearbook … 1997*, vol. I, 2513th meeting, p. 273, para. 7, and p. 275, para. 27 respectively).

[3] Statement by Mr. Simma at the forty-ninth session of the Commission (*Yearbook … 1997*, vol. I, 2513th meeting, p. 274, para. 21).

[4] *Mavrommatis Palestine Concessions* case (footnote 2 above), p. 12. See also the report of the Working Group on diplomatic protection established by the Commission at its forty-ninth session (*Yearbook … 1997*, vol. II (Part Two), p. 60).

[5] Vattel, *Le droit des gens, ou Principes de la loi naturelle* (*The Law of Nations or the Principles of Natural Law*), book II, chap. VI.

[6] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 246, separate opinion of Judge Padilla Nervo. For his part, De Visscher felt that "nineteenth century imperialism kept private enterprise and diplomacy in step" (*Theory and Reality in Public International Law*, p. 269).

[7] "When the citizen leaves the national territory he enters the domain of international law ... By receiving the alien upon its territory, the state of residence admits the sovereignty of his national country and recognizes the bond which attaches him to it." (Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, p. 26.)

[8] See Jessup, *A Modern Law of Nations: An Introduction*, pp. 97–98; and Briggs, "La protection des individus en droit international: la nationalité des réclamations", p. 9.

11. The State retains, in principle, the choice of means of action to defend its nationals, while respecting its international commitments and the peremptory norms of international law. In particular, it may not resort to the threat or use of force in the exercise of diplomatic protection.

12. However, as noted by the Working Group, diplomatic protection sensu stricto is very different from the diplomatic mission or consular functions exercised by the sending State in order to assist its nationals or protect their interests in the receiving country,[9] especially when these actions consist of obtaining certain concessions in respect of access to contracts or markets, guaranteeing nationals the right to defence, or facilitating certain procedures for them. In such cases there is no question of a claim against another State following a violation of international law.

13. While, in the actual exercise of diplomatic protection, the State retains the choice of means, it still needs to be determined on which right the State's action is based, its own right or that of the individual. The answer to this question determines the legal nature of diplomatic protection (see chapter I below). Then in chapter II consideration will need to be given to the nature of the rules involved in diplomatic protection, as they pertain to the status of aliens under international law (primary rules) and to mechanisms for protecting that status in inter-State relations (secondary rules).

[9] Article 3 of the Vienna Convention on Diplomatic Relations lists the "functions of a diplomatic mission". Article 5 of the Vienna Convention on Consular Relations defines "consular functions".

CHAPTER I

The legal nature of diplomatic protection

14. The traditional view of diplomatic protection will be presented first, as well as criticisms of it, and then the question will be asked whether they give rise to new proposals in conjunction with the development of human rights and the strengthening of individual prerogatives at the international level, while bearing in mind domestic law.

A. The traditional view

15. This view was clearly described by PCIJ 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.[10]

16. At the outset there is clearly a dispute between the host State and a foreign national whose rights have been denied and who ultimately suffered a denial of justice when he sought reparation for material and/or moral injury. If this individual is unable to internationalize the dispute and take it out of the sphere of local law, his State of nationality, by contrast, can espouse his claim by having him, and the dispute, undergo a veritable "transformation". Indeed, since only a State can invoke the responsibility of another State (since the individual is denied the status of subject of international law), the espousal of the claim enables the claimant to claim respect for his own right on the basis of the nationality link.

17. On the basis of a dualist approach towards relations under international law and under domestic law, the traditional view thus emphasizes the State of nationality while eclipsing the claim of the individual which is at the origin of it. Thus the immediate injury to the State as such (its territory and its agents, for example) is set against the indirect injury which is caused to it through its nationals in foreign territory and engages its personal jurisdiction. Reuter asked as early as 1950 whether this distinction was still relevant, at a time when the property of nationals was often included in the national wealth of their State.[11] And that question is even more to the point now, at a time of rapid privatization of the means of production and "globalization". But the answer is not as simple as it appears because it raises the difficult problem of the link between property and a particular country, which will be taken up later in connection with the subject of the protection of legal persons and their shareholders.

18. In formulating the principle of exhaustion of local remedies[12] in its draft articles on State responsibility, the Commission took into account the doctrinal debate

[10] *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 12.

[11] Reuter, "Quelques remarques sur la situation juridique des particuliers en droit international public", pp. 540–541.

[12] Article 22 (Exhaustion of local remedies) of chapter III (The breach of an international obligation) of the draft articles on State responsibility reads as follows:

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

between those who regard the principle as simply a procedural rule and those who regard it as a substantive rule. On the second hypothesis, adopted by the Commission, the responsibility of the host State arises only after local remedies have been exhausted by individuals. This is because the latter, as direct beneficiaries of the obligation of result relative to the treatment accorded to them under international law, enforce their own rights before local courts first. It is not clear from the Commission's commentaries, however, how such a right is transformed following local proceedings into a right of the State of nationality, so as to revert to the logic of diplomatic protection.

19. In the traditional view, the endorsement of a claim is a discretionary right of the State of nationality, which has complete latitude to accept or reject it "without being required to justify its decision in any way whatsoever, e.g., without having to rely on the unfounded nature of the claim or on its foreign policy needs".[13]

20. If the State of nationality decides to bring a claim, it has a choice of means of settlement of the dispute between it and the territorial State, including amiable composition, by accepting the latter's payment of a lump sum as reparation. When all is said and done, the manner in which the individual himself is ultimately compensated is of little importance from the standpoint of international law.

21. In fact, the traditional view is based largely on a fiction of law. If the State of nationality is deemed to be enforcing its "own right" at the international level (by reference to the celebrated "standard minimum" treatment accorded to aliens under international law), such a right is frequently modelled on the right accorded to the national concerned at the local level, as ICJ pointed out in the *Barcelona Traction* case:[14]

> In the present case it is therefore essential to establish whether the losses allegedly suffered by the Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

22. Moreover, it is the damage inflicted on the foreign national which serves to determine the responsibility of the host State and to assess the reparation due to the State of nationality. PCIJ explained this relationship in the following terms:

> The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure ... The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.[15]

23. Here, indeed, is where the fiction resides: the Court feels obliged to proclaim, by begging the question, the lack of identity between the two kinds of damage, while recognizing that one (the damage suffered by an individual) will be used to calculate the other (which remains fictitious) and hence the reparation due to the State of nationality. Dubouis protested that the famous dictum consisting of the judgment rendered in the *Factory at Chorzow* case was nothing other than the skilful sleight of hand of a talented illusionist.[16]

24. Moreover, how can the need for continuity of nationality of an individual from the time when the damage occurs until the submission of the claim, or even the final decision, be justified in the traditional view? As De Visscher pointed out: "If the wrong inflicted upon the national of a State was in itself an injury to that State, the right to intervene acquired at that moment could not be lost owing to a subsequent change in the nationality of the injured individual."[17]

25. Likewise, the conduct of the individual is taken into account in determining the responsibility of the host State; the fault of the (real) victim may thus be invoked either to diminish such responsibility or to exonerate the State in question (the "clean hands" rule).

26. Scelle went so far as to describe diplomatic protection as a "fictitious innovation ... insubstantial and illusory", adding: "Not only does the *fictitious* personality of the State swallow up the *real* personality of the individual, but the result of this legerdemain is that the original and real subject of law is completely eliminated, and the initial *legal* relationship is replaced by a *political* relationship."[18]

27. Even though it takes as its starting point a concept of international law which rejects the subjective right of the State based on the nationality link and argues for an objective right of intervention by reference to the international community,[19] Scelle's criticism is nonetheless relevant, in that it reveals all the contrivances of the legal construction in question.

28. Latin American doctrine, in the wake of the Calvo doctrine, deemed it inadmissible that an individual "claimant entitled to assert the right or interest which has been injured"[20] could not of his own accord decline protection from his State of nationality. In so doing, the individual would agree to be bound by the principle of equality with

(*Yearbook … 1977*, vol. II (Part Two), p. 11. For the commentary to this article, see pages 30–50, ibid.)

[13] Berlia, "Contribution à l'étude de la nature de la protection diplomatique", pp. 63–64.

[14] *I.C.J. Reports 1970* (see footnote 6 above), pp. 32–33. The Convention on International Liability for Damage Caused by Space Objects provides in article XII that reparation in respect of damage shall be such "as will restore the person, natural or judicial ... to the condition which would have existed if the damage had not occurred". See Dupuy, *La responsabilité internationale des États pour les dommages d'origine technologique et industrielle*, pp. 51 and 55.

[15] *Factory at Chorzow, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 28.

[16] Dubouis, "La distinction entre le droit de l'État réclamant et le droit du ressortissant dans la protection diplomatique (à propos de l'arrêt rendu par la Cour de cassation le 14 juin 1977)", p. 624.

[17] De Visscher, op. cit., p. 273.

[18] Scelle, "Règles générales du droit de la paix", pp. 660–661.

[19] ICJ drew a distinction between "the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection" in the *Barcelona Traction* case, *I.C.J. Reports 1970* (see footnote 6 above), p. 32.

[20] *Yearbook ... 1956*, vol. II, document A/CN.4/96—International responsibility: report by F. V. García Amador, Special Rapporteur, p. 193, para. 106.

nationals who are subject to the sole jurisdiction of their courts. The debate, however, did not remain at the theoretical level, since the laws of some countries went so far as to make the aforesaid doctrine one of the requirements for the validity of contracts signed with aliens. In fact, the whole controversy surrounding the Calvo doctrine comes back to the central question of the nature of the right in question (and therefore of its claimant) in the exercise of diplomatic protection by the State.

29. To the extent that the objective is to limit abuses by powerful countries, which are also the major exporters of capital, it is not surprising that the Calvo doctrine should have reappeared in other guises and in a different formulation during the 1970s, in the demands of developing countries for a new international economic order. What was at issue was reserving controversies concerning the status of foreign property to the sole jurisdiction of the national courts of the host country concerned.[21]

30. It should be noted, however, that many States upheld this argument in international forums, while at the same time concluding investment promotion agreements which recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to its nationals and investors.

31. What is at issue, however, are agreements which are part of the overall framework of bilateral relations between the States concerned and which, as will be seen below, frequently provide for individuals themselves to have access to international arbitration.

32. In any event, diplomatic protection was saddled with a heavy emotional and political burden which rendered it suspect, as if it were merely a pretext for manipulating the property and actions of foreign nationals, who were relegated to the role of a Trojan Horse. It was, however, the fact of conferring a certain share of legal personality on the individual, as the direct beneficiary of international rules and claimant of the right to bring claims under them, that led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

B. Recognition of the rights of the individual at the international level

33. Such recognition has been granted in certain areas where the national framework has proved to be inadequate, in that it no longer meets the needs of human societies, such as the inherent rights of the individual without distinction as to nationality, the rights of foreign investors and the settlement of certain international disputes.

Inherent rights of the individual

34. Since the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights,[22] there has been a trend towards recognition of the rights of the individual through a number of large general multilateral treaties.[23] This has given rise to a number of legal consequences which are completely outside the framework of the traditional view of diplomatic protection.

35. The State can no longer claim to enclose the individual within its exclusive sphere of national competence, since the international order bestows rights on him directly and places all States under an obligation to ensure that those rights are respected. Under certain conditions, individuals can even obtain a hearing and defend their rights before international bodies or committees established by international human rights treaties (the right of petition). The dualist approach taken by the original promoters of diplomatic protection is therefore no longer appropriate in such cases; what is being witnessed, rather, is a continuity between international mechanisms and national legislation in the field of human rights.

36. Moreover, when the State intervenes on behalf of an individual, it is not necessarily motivated by a subjective interest based on the nationality link; it is deemed to be acting in the objective interest of the international legal order. In its *obiter dictum* in the *Barcelona Traction* case, ICJ held that "rules concerning the basic rights of the human person" are "obligations *erga omnes*", creating an interest in acting on the part of all States.[24]

37. As has been noted with regard to human rights treaty rules and the possibility open to States to demand absolute adherence to them: "The innovation which this procedure constitutes relative to traditional diplomatic procedure is measured at the theoretical level." Indeed, what is at stake here is the interest of the community in protecting "the common values which the system enshrines".[25] The individual joins in the proceeding instituted before the European Court of Human Rights, and is even given an opportunity henceforth to refer a matter directly to the Court.[26]

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[21] Lillich, "The diplomatic protection of nationals abroad: an elementary principle of international law under attack", pp. 359–365. The author refers, in particular, to the Charter of Economic Rights and Duties of States, adopted on 12 December 1974 by the General Assembly in its resolution 3281 (XXIX), article 2, paragraph 2 (*c*), of which provided that:

> "… In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[22] See resolution 217 A (III) of 10 December 1948.

[23] Such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[24] *I.C.J. Reports 1970* (footnote 6 above), p. 32, paras. 33–34.

[25] Sudre, *Droit international et européen des droits de l'homme*, p. 74. Article 24 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) authorizes any State party to refer to the European Commission any alleged breach of the provisions of the Convention by another State party. According to the Commission, "a State which intervenes under article 24 'should not be regarded as acting to enforce its own rights, but rather as submitting to the Commission a question which involves public order in Europe'" (decision of 11 January 1961, *Austria* v. *Italy*, cited by Sudre, op. cit., p. 281).

[26] Protocol No. 9 to the European Convention on Human Rights.

Rights of foreign investors

38. Bilateral investment promotion and protection agreements have proliferated since the 1960s. Nearly 300 of them have now been concluded between capital-exporting countries and capital-importing countries on the basis of prototypes prepared generally by the first group (mainly France, Germany, the United Kingdom of Great Britain and Northern Ireland, and the United States of America).[27] According to Laviec, "these recent means of protection also appear as alternatives for avoiding the pitfalls of diplomatic protection, whose decline they reflect".[28]

39. Indeed, in these agreements investment per se is defined, as are the rights relating thereto which guarantee its security; customary law is clarified and supplemented (transfers of earnings and capital, compensation in the event of expropriation). A large number of these bilateral agreements provide that in the event of a dispute between an investor and a host State, either party may refer it for settlement to ICSID.[29] A foreign investor can thus have direct access to an arbitral tribunal in a dispute with the host State. Accordingly, in this context, he may be considered to have international legal personality.

40. In consenting to arbitration, the parties to a dispute waive all other remedies. In this way, both the demand of the host State that local remedies be exhausted and the exercise of diplomatic protection by the State of nationality are put aside. In other words, where the right of the individual is recognized directly under international law (the bilateral agreements referred to above), and the individual himself can enforce this right at the international level, the "fiction" no longer has any reason for being.

Settlement of international disputes

41. States have instituted ad hoc international tribunals for the settlement of disputes between one State and the nationals of another State. To begin with, in the nineteenth century, there were the mixed commissions, the first of which was established by the Anglo-American Treaty of 8 February 1853.[30] After the First World War, an agreement between the United States of America, Austria and Hungary provided for the selection of a commissioner who would give a verdict on all claims presented by the United States on behalf of its nationals who had suffered losses attributable to those countries during the First World War.

42. More recently, the Iran-United States Claims Tribunal was established by the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981.[31] Nearly 4,000 judgements have already been rendered by this Tribunal in cases mainly involving disputes between foreign nationals and one or another of the host countries. In these cases, too, local remedies and diplomatic protection are declined and individuals are authorized to enforce their rights directly before an international court.

43. Lastly, mention should be made of the manner in which the Security Council decided to regulate the consequences of Iraq's liability for "any direct ... injury to foreign Governments, nationals and corporations" directly attributable to its invasion and occupation of Kuwait.[32] The implementation of the decision concerning such liability was entrusted to the United Nations Compensation Fund and UNCC under the supervision of a Governing Council composed of the members of the Security Council and located at the United Nations Office at Geneva.[33] The procedure is a hybrid, nonetheless, since it includes judicial guarantees; tripartite commissions composed of independent commissioners are entrusted with studying the claims and making proposals to the Governing Council, which must approve them in every case.

44. Claims may be submitted to UNCC by States or international organizations on behalf of the individuals or corporations concerned, and the agreed compensation is then liquidated through them. In this instance, States are regarded to some extent as agents acting on behalf of individuals before the bodies charged with settling the dispute between them and the country liable for the damage. Some States even give their nationals advances pending settlement of the claims in question, "[c]onfirmation, if any was still needed, of the gap between the solutions adopted in this conflict and the traditional mechanisms of diplomatic protection".[34]

C. Domestic law and the legal nature of diplomatic protection

45. At this stage it is not a question of reviewing all legal systems as they relate to diplomatic protection but, rather, simply recalling their main features and trying to identify trends.

46. The discretionary power of the State to exercise diplomatic protection has been recognized under domestic law; accordingly, it has been concluded that decisions as to whether to bring a claim, choice of legal remedies, acceptance of lump-sum agreements, and arrangements for distributing settlements are not amenable to judicial review. However, with respect to the last-mentioned point, starting in the 1950s, a trend in practice was noted towards the establishment of judicial review of the transfer of the sum received by the State. For example, France, the Unit-

[27] A study carried out in 1988 by the United Nations Centre on Transnational Corporations, entitled *Bilateral Investment Treaties* (United Nations publication, Sales No. E.88.II.A.1), counted 265 of them.

[28] Laviec, *Protection et promotion des investissements: étude de droit international économique*, p. 5.

[29] ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, under the auspices of the World Bank.

[30] Rigaux, "Les situations juridiques individuelles dans un système de relativité générale: cours général de droit international privé", p. 120.

[31] ILM, vol. XX, No. 1 (January 1981), pp. 230–233.

[32] Resolution 687 (1991) of 3 April 1991, para. 16.

[33] Resolution 692 (1991) of 20 May 1991, para. 3.

[34] Cottereau, "Responsabilité de l'Iraq: aperçu sur les indemnisations urgentes des personnes physiques", p. 166. A total of 2.8 million claims have been submitted by individuals.

ed Kingdom and the United States set up judicial commissions to distribute lump sums received from certain Eastern European countries after the Second World War.

47. It would be premature to conclude from that practice that "discretionary" State jurisdiction has become "mandatory",[35] but this trend nonetheless demonstrates "how 'unsound' and unsatisfactory, if not archaic, 'diplomatic protection' is".[36]

48. Now, domestic legislation mostly allows recourse to the domestic courts in order to guarantee the transfer of the sum received by a Government and to review its distribution. However, it is rarely a question of the right of the individual to benefit from diplomatic protection from his State of nationality and, consequently, of an obligation or a duty incumbent on the State of nationality in that connection. Even if such obligation is referred to by some constitutional texts,[37] it is actually much more a moral duty than a legal obligation, since the intention of the State of nationality is clearly influenced by political considerations and the degree of appropriateness, depending on the nature of the diplomatic relations in question. The obligation must at least be in keeping with the overriding interests of the State of nationality.[38]

D. What are the rights involved in diplomatic protection?

49. It has certainly been established that the State has a "procedural" right to bring an international claim in order to protect its nationals when they have suffered injury as a result of a violation of international law. And the State may agree to limit that right or even to waive it in its treaty practice with other countries.

50. However, the question must still be asked, in keeping with the traditional view, whether in taking such an approach the State is enforcing its own right or whether it is simply the agent or representative of its national who has a legally protected interest at the national level and thus a right.[39] According to whether one opts for the right of States or for the right of the national, one is placing emphasis either on an extremely old custom, which gave sovereignty more than its due, even resorting to a fiction, or on progressive development and adoption of custom, taking account of reality by means of international recognition of human rights.

51. The choice to be made is of course not academic, since it will have an impact on the legal regime of diplomatic protection. When the State invokes a right of a national it is obliged, in one way or another, to involve the national at the level of procedure and of any transaction that takes place. It is also conceivable, in such a case, that the State cannot bring an international claim against the will of the national concerned. Accordingly, when a national declines diplomatic protection from his State of nationality, he is not infringing the rights of the State but, rather, merely availing himself of his own right.

52. The Special Rapporteur has shown how the attribution of rights to individuals by means of treaties may go so far as to allow individuals direct access to international machinery and courts to guarantee observance of such rights. But can individuals be regarded, from the perspective of general international law, as claimants of rights to which States can simply give effect by bringing international claims? This is what is at issue in the current legal debate on diplomatic protection, and the Special Rapporteur would appreciate guidance on this matter for the purpose of preparing future reports on the subject.

53. Thus, if one were to transpose the "Mavrommatis" proclamation,[40] one would say that when the State espouses its nationals' cause it is enforcing their right to fulfilment of international obligations regarding the treatment of foreign natural or legal persons. One might object to such a formulation, which is more in keeping with recent trends in international law, on the basis of international responsibility, where the breach of an international obligation by a State is linked to the existence of a subjective right benefiting another State. However, the Special Rapporteur is aware that it is increasingly accepted that a State can have obligations with respect to individuals who have rights recognized under international law. It is hard to see, in the circumstances, who would object to the State of nationality, which has a duty to protect its nationals, espousing their cause and bringing an international claim on their behalf. While acknowledging that "this issue should be given in-depth consideration", Dominicé adds that "there does not appear to be any obstacle in principle to such an argument".[41]

54. The Special Rapporteur would therefore appreciate it if the Commission could answer the following question: when bringing an international claim, is the State enforcing its own right or the right of its injured national?

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[35] Berlia, loc. cit., p. 66. The author cites the agreements concluded by the three countries in question with Yugoslavia and Czechoslovakia between 1948 and 1951.

[36] Carreau, *Droit international*, p. 467.

[37] For example, in the Constitution of the People's Republic of China and the Constitutions of the Russian Federation and some Eastern European countries.

[38] In their decisions, the German courts have recognized the duty to protect nationals, subject to that proviso. See Bernhardt, ed., "Diplomatic protection", p. 1052.

[39] As ICJ put it in the *Barcelona Traction* case, *I.C.J Reports 1970* (see footnote 6 above), p. 32, para. 35.

[40] See footnote 2 above.

[41] Dominicé, "La réparation non contentieuse", p. 221. The author refers to lump-sum agreements "dealing with the issue of claims of nationals of the State that obtains the settlement instead of the State that undertakes to pay it". The responsibility of the State would then be entailed with respect to the individual claimant under international law.

CHAPTER II

The nature of the rules governing diplomatic protection

55. Should the exercise in question be confined, as recommended by the Commission's working group, to codification of relevant secondary rules? At the initiative of Mr. Roberto Ago, such a limitation won acceptance in the case of the preparation of the draft articles on State responsibility and made it possible to remove the obstacles to progress on the draft.[42] However, the distinction between obligations of States in particular areas of their relations (primary rules) and obligations of States that arise from the breach of primary rules, such as the right to reparation (secondary rules), is not as rigid as it might seem. The Commission felt the need to divide primary obligations into obligations of conduct and obligations of result, and even obligations to ensure a particular type of treatment for foreign individuals, in order to draw a number of conclusions regarding State responsibility, although in that particular instance it confined itself to general categories and avoided considering the content of the material law in question. That approach was not disavowed throughout the work in question:

> [F]or the reasons repeatedly mentioned by the Commission, consideration in the draft of the principle of the exhaustion of local remedies and its various aspects must at all costs stop short of an examination of the content of "primary" rules of international law, such as those relating to the treatment of aliens, efforts to define which proved fatal to earlier attempts at codification of the topic of international responsibility.[43]

56. The Commission in fact decided, during consideration of the topic of international responsibility, to start by codifying the aspect that it regarded as lending itself best to such an exercise: "Responsibility of States for damage done in their territories to the person or property of foreigners."[44]

57. The Special Rapporteur, Mr. V. F. García Amador, did indeed choose to deal first of all with primary rules, namely "principles and rules of a *substantive* nature, i.e. only with *acts and omissions* which give rise to the international responsibility of the State for injuries caused to aliens", initially leaving aside all principles and rules (secondary rules) of a procedural or adjective character:

> [R]ules governing the exhaustion of local remedies, the waiver of diplomatic protection by the foreign individual concerned or his national State, modes and procedures of settlement (including the principle of the nationality of the claim and the rules concerning the capacity to bring an international claim), prescription and other exonerating, extenuating or aggravating circumstances and the form and measure of reparation.[45]

58. It is precisely in view of this initial experience that the Working Group proposed that the codification of diplomatic protection should not cover secondary rules, which were dealt with in the second part of the plan proposed by the Special Rapporteur, without prejudice to elements relevant to the draft articles on the law of international responsibility. In fact, the more comprehensive approach taken by the Special Rapporteur led to an impasse, since he proposed codification of entire areas of international law, beyond the sphere of responsibility sensu stricto, including the conduct of State organs, human rights, public debts, expropriation acts, contracts between States and individuals, and acquired rights.

59. It can therefore be agreed that it is entirely appropriate, when dealing with the topic of diplomatic protection, to limit ourselves to "secondary rules", in order to avoid the inevitable "spilling-over" that occurs as a result of any review of issues relating to international responsibility.[46]

60. Once the Commission has taken that precaution it should be able to discuss "primary rules" in the context of general categories and, where necessary, with a view to appropriate codification of "secondary rules" that are of direct relevance to the topic. In particular, this would be the case where the aim is to define the nationality link of natural or legal persons, which permits the bringing of an international claim or grounds for exoneration from responsibility on the basis of the conduct of individuals. The "primary rule" would not be under consideration as such but only to the extent that it relates to the "secondary rule". Accordingly, it would not be the granting of nationality that is being considered in this case, but its applicability to another State; similarly, it would not be the individual's compliance with the host country's legislation that would be under consideration, but the circumstances in which the individual's conduct constitutes a ground for exonerating the host country.

61. This relationship between primary and secondary rules was emphasized by Brownlie, who, after quoting the decision rendered by the Iran-United States Claims Tribunal in case A/18 ("In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim"), adds: "This proviso clearly refers to situations in which reliance upon the other nationality would involve elements of fraud, or estoppel, or fundamental considerations of equity, such as the principle of clean hands."[47] Here there are opportunities to consider primary rules in order to establish to what extent a State has the right to bring a claim for the protection of its nationals, as well as to assess the State's responsibility.

62. The Special Rapporteur therefore believes that the time for watertight compartments and Manichaean

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[42] Pellet, "Remarques sur une révolution inachevée: le projet d'articles de la CDI sur la responsabilité des Etats", p. 8.

[43] *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (52) of the commentary to article 22 (Exhaustion of local remedies).

[44] *Yearbook ... 1956*, vol. II, document A/CN.4/96, annex 1, p. 221.

[45] *Yearbook ... 1957*, vol. II, document A/CN.4/106, p. 105, para. 3.

[46] Bennouna, "Le règlement des différends peut-il limiter le 'droit' de se faire justice à soi-même?", pp. 63–64.

[47] Brownlie, "International law at the fiftieth anniversary of the United Nations: general course on public international law", pp. 109–110. For case A/18, see *International Law Reports*, vol. 75 (1987), pp. 176–194.

approaches to international law is past. What is now being dealt with is continuity, both in a local and international context and as between States and the community,[48] with the emphasis varying according to the particular field in question.

63. Here, too, the Special Rapporteur would appreciate guidance from the Commission on confining consideration of the topic of diplomatic protection to secondary rules of international law. Does confining consideration of the topic to secondary rules mean that only secondary rules should be discussed, or chiefly secondary rules?

[48] Simma, "From bilateralism to community interest in international law".

64. If the second alternative is chosen, there is no question of reverting to the approach initially proposed to the Commission by Mr. García Amador; since neither the status of foreigners nor investment law is to be codified. However, the Commission may well need to consider a number of primary rules, as general categories, in order to define the nationality of physical and legal persons and its applicability, and to assess the conduct of physical and legal persons in respect of the host country, with a view to determining the extent of that country's responsibility.

65. The question is therefore whether the Commission is going to take a rigorous or a flexible approach to secondary rules as they relate to the topic of diplomatic protection.