

Chapter VII

DIPLOMATIC PROTECTION

A. Introduction

207. At its forty-eighth session (1996), the Commission identified “Diplomatic protection” as one of three topics appropriate for codification and progressive development.¹⁵⁵ In the same year, the General Assembly, in paragraph 13 of its resolution 51/160 of 16 December 1996, invited the Commission to examine the topic further and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session (1997), the Commission, pursuant to General Assembly resolution 51/160, established at its 2477th meeting a Working Group on the topic.¹⁵⁶ The Working Group submitted a report at the same session, which was endorsed by the Commission.¹⁵⁷ The Working Group attempted (a) to clarify, as far as possible, the scope of the topic and (b) to identify issues that should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic, which the Commission recommended be used as the basis for the submission of a preliminary report by the Special Rapporteur.¹⁵⁸

208. Also at its forty-ninth session, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.¹⁵⁹

209. In paragraph 8 of its resolution 52/156, of 15 December 1997, the General Assembly endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

210. At its fiftieth session (1998), the Commission had before it the preliminary report of the Special Rapporteur.¹⁶⁰ At the same session, the Commission established an open-ended Working Group to consider possible conclusions that might be drawn on the basis of the discussion on the approach to the topic.¹⁶¹

211. At its fifty-first session (1999), the Commission appointed Mr. Christopher John Robert Dugard Special

Rapporteur for the topic,¹⁶² after Mr. Bennouna was elected a judge of the International Tribunal for the Former Yugoslavia.

212. At its fifty-second session (2000), the Commission had before it the Special Rapporteur’s first report¹⁶³ containing draft articles 1–9. The Commission deferred its consideration of chapter III to the next session, due to lack of time. At the same session, the Commission established an open-ended informal consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.¹⁶⁴ The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5–8 to the Drafting Committee, together with the report of the informal consultation.

213. At its fifty-third session (2001), the Commission had before it the remainder of the Special Rapporteur’s first report on draft article 9, as well as his second report.¹⁶⁵ Due to lack of time, the Commission was able to consider only those parts of the second report covering draft articles 10 and 11, and deferred to the next session consideration of the remainder of the report, concerning draft articles 12 and 13. At the same session the Commission decided to refer draft articles 9–11 to the Drafting Committee.

214. At the same session, the Commission also established an open-ended informal consultation on article 9, chaired by the Special Rapporteur.

215. At its fifty-fourth session (2002), the Commission had before it the remainder of the second report of the Special Rapporteur, concerning draft articles 12 and 13, as well as his third report,¹⁶⁶ covering draft articles 14–16. At that session, the Commission decided to refer draft article 14 (a), (b), (d) (to be considered in connection with paragraph (a)) and (e), to the Drafting Committee. It further decided to refer draft article 14 (c) to the Drafting Committee, to be considered in connection with subparagraph (a).

216. During these sessions, the Commission also considered the report of the Drafting Committee on draft articles 1–7 [8]. It adopted articles 1–3 [5], 4 [9], 5 [7], 6

¹⁵⁵ *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, pp. 97–98, para. 248 and annex II, addendum 1, p. 137.

¹⁵⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

¹⁵⁷ *Ibid.*, para. 171.

¹⁵⁸ *Ibid.*, pp. 62–63, paras. 189–190.

¹⁵⁹ *Ibid.* p. 63, para. 190.

¹⁶⁰ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 309.

¹⁶¹ The conclusions of the Working Group appear in *ibid.*, vol. II (Part Two), p. 49, para. 108.

¹⁶² *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 17, para. 19.

¹⁶³ *Yearbook ... 2000*, vol. II (Part One), p. 205, document A/CN.4/506 and Add.1.

¹⁶⁴ The report of the informal consultations is contained in *ibid.*, vol. II (Part Two), pp. 85–86, para. 495.

¹⁶⁵ *Yearbook ... 2001*, vol. II (Part One), p. 97, document A/CN.4/514.

¹⁶⁶ *Yearbook ... 2002*, vol. II (Part One), p. 49, document A/CN.4/523 and Add.1.

and 7 [8]. The Commission also adopted the commentaries to the aforementioned draft articles.¹⁶⁷

217. The Commission also established an open-ended informal consultation, chaired by the Special Rapporteur, on the question of the diplomatic protection of crews as well as that of corporations and shareholders.

218. At its fifty-fifth session (2003), the Commission had before it the fourth report of the Special Rapporteur.¹⁶⁸ The Commission considered the first part of the report, concerning draft articles 17–20, at its 2757th to 2762nd, 2764th and 2768th meetings, from 14 to 23 May and on 28 May and 5 June 2003, respectively. It subsequently considered the second part of the report, concerning draft articles 21 and 22, at its 2775th to 2777th meetings, on 15, 16 and 18 July 2003.

219. At its 2762nd meeting, the Commission decided to establish an open-ended Working Group, chaired by the Special Rapporteur, on article 17, paragraph 2.¹⁶⁹ The Commission considered the report of the Working Group at its 2764th meeting.

220. The Commission decided, at its 2764th meeting, to refer article 17 to the Drafting Committee, as proposed by the Working Group,¹⁷⁰ and also articles 18–20. Subsequently, it further decided, at its 2777th meeting, to refer articles 21 and 22 to the Drafting Committee also.

221. The Commission considered the report of the Drafting Committee on draft articles 8 [10], 9 [11] and 10 [14] at its 2768th meeting. It provisionally adopted draft articles 8 [10], 9 [11] and 10 [14] at the same meeting.¹⁷¹

222. At its fifty-sixth session (2004), the Commission had before it the fifth report of the Special Rapporteur.¹⁷² The Commission considered the report at its 2791st to 2796th meetings, from 3 to 11 May 2004. In response to a request from the Commission, the Special Rapporteur prepared a memorandum¹⁷³ on the relevance of the clean hands doctrine to the topic. Owing to a lack of time, the Commission deferred consideration of the memorandum to the following session.

223. At its 2794th meeting, on 6 May 2004, the Commission decided to refer draft article 26, together with the alternative formulation for draft article 21 as proposed by the Special Rapporteur, to the Drafting Committee. The Commission further decided, at its 2796th meeting, on 11 May 2004, that the Drafting Committee should consider elaborating a provision on the connection between the protection of ships' crews and diplomatic protection.

¹⁶⁷ The text of the draft articles with the relevant commentaries appear in *ibid.*, vol II (Part Two), pp. 67–76, paras. 280–281.

¹⁶⁸ *Yearbook ... 2003*, vol. II (Part One), p. 3, document A/CN.4/530 and Add. 1.

¹⁶⁹ *Ibid.*, vol. II (Part Two), p. 27, paras. 90–92.

¹⁷⁰ *Ibid.*, para. 92.

¹⁷¹ The text of the draft articles with the relevant commentaries appear in *ibid.*, pp. 35–41, para. 153.

¹⁷² *Yearbook ... 2004*, vol. II (Part One), p. 43, document A/CN.4/538.

¹⁷³ Subsequently issued as the sixth report of the Special Rapporteur (*Yearbook ... 2005*, vol. II (Part One), p. 1, document A/CN.4/546).

224. Also at its fifty-sixth session, the Commission adopted on first reading a set of 19 draft articles together with commentaries on diplomatic protection.¹⁷⁴ At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2006.

B. Consideration of the topic at the present session

225. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/546). The Commission considered the report at its 2844th to 2846th meetings, from 25 to 31 May 2005.

1. CLEAN HANDS DOCTRINE

(a) Introduction by the Special Rapporteur

226. The Special Rapporteur noted that while the importance of the clean hands doctrine in international law could not be denied, the question before the Commission was whether it was sufficiently closely linked to the topic of diplomatic protection to warrant its inclusion in the draft articles on the topic. His conclusion was that it did not obviously belong to the field of diplomatic protection and that it should not, therefore, be included in the draft articles.

227. He observed that it had been argued in previous sessions of the Commission that the clean hands doctrine should be included in the draft articles because it was invoked in the context of diplomatic protection in order to preclude a State from exercising diplomatic protection if the national it was seeking to protect had suffered injury as a result of his or her own wrongful conduct. Three arguments had been made in support of that position.

228. First, it was contended that the doctrine did not belong to the realm of inter-State disputes, that is, those involving direct injury by one State to another rather than injury to a national. In response, the Special Rapporteur provided a brief survey of the jurisprudence of ICJ,¹⁷⁵ to illustrate the fact that, while the Court had never asserted that the doctrine belonged to the realm of a State claim either for direct or for indirect injury, the clean hands doctrine had most frequently been raised in the context of

¹⁷⁴ *Yearbook ... 2004*, vol. II (Part Two), p. 18, para. 59.

¹⁷⁵ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136 at pp. 163–164, paras. 63–64; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment*, I.C.J. Reports 2003, p. 161 at pp. 176–178, paras. 27–30; *LaGrand (Hungary v. United States of America), Judgment*, I.C.J. Reports 2001, p. 466 at pp. 488–489, paras. 61–63; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment*, ICJ Reports 2004, p. 12 at p. 38, paras. 45–47; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, I.C.J. Reports 1997, p. 7 at p. 76, para. 133; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment*, I.C.J. Reports 2002, p. 3 at p. 159, para. 35 (dissenting opinion of Judge *ad hoc* Van den Wyngaert); and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment*, I.C.J. Reports 1986, p. 14, at pp. 392–394 (paras. 268–272 of the dissenting opinion of Judge Schwebel). See also the sixth report of the Special Rapporteur, para. 5.

inter-State claims for direct injury to a State. In no case had the Court relied on or upheld the doctrine. It had, instead, always found the doctrine inapplicable. Likewise, in no case had it stated or suggested that the argument was inapplicable in inter-State claims and that it applied only to cases of diplomatic protection.

229. Secondly, it was suggested that if the individual seeking diplomatic protection had himself violated the domestic law of the respondent State or international law, then the State of nationality could not protect him. In response, the Special Rapporteur observed that once a State took up a claim of its national in relation to a violation of international law, the claim became that of the State, in accordance with the Vattelian fiction recognized in the *Mavrommatis Jerusalem Concessions* case,¹⁷⁶ and the misconduct of the national ceased to be relevant; only the misconduct of the plaintiff State itself might become relevant. He cited the examples of the *LaGrand*¹⁷⁷ and *Avena*¹⁷⁸ cases, where the foreign nationals had committed atrocious crimes but their misconduct had not been raised by the respondent State to defend itself against the charges of failure to grant them consular access. In addition, the State of nationality would seldom protect one of its nationals who had behaved improperly or illegally in a foreign State, because in most circumstances no internationally wrongful act would have been committed.

230. Thirdly, it was contended that the clean hands doctrine had been applied in cases involving diplomatic protection. In response, the Special Rapporteur noted that relatively few cases could be cited in favour of the applicability of the clean hands doctrine in the context of diplomatic protection, and that, upon analysis, those that were cited did not support the case for its inclusion.¹⁷⁹ He noted further that while some writers nevertheless maintained that the clean hands doctrine belonged in the context of diplomatic protection, they offered no authority to support their views; and many other writers were highly sceptical about the doctrine. In addition, during the debate in the Sixth Committee of the General Assembly at its fifty-ninth session, most delegations had made no comment on the clean hands doctrine, and those that had commented had agreed that the clean hands doctrine should not be included in the draft articles on diplomatic protection.

(b) Summary of the debate

231. General support was expressed for the Special Rapporteur's conclusion that the clean hands doctrine should not be included in the draft articles. The doctrine had been raised primarily in the context of claims for direct State injury, which was beyond the scope of diplomatic protection,¹⁸⁰ and the few cases falling within the

scope of diplomatic protection did not constitute sufficient practice to warrant codification. Nor could its inclusion be justified as an exercise in the progressive development of international law. Furthermore, support was expressed for the Special Rapporteur's suggestion in his sixth report (para. 16) that it was more appropriate for the doctrine to be invoked at the stage of the examination of the merits, since it related to the attenuation or exoneration of responsibility rather than admissibility; and it was suggested that such a possibility could be expressly recognized in the draft articles. Another suggestion was to insert a proviso stating that the draft articles were without prejudice to the application of general international law to questions of admissibility.

232. Others were of the view that the Special Rapporteur had gone too far in suggesting that the clean hands doctrine could lead to exoneration of responsibility at the stage of the merits, and preferred that it be limited to attenuation. It was pointed out that the application of the doctrine, or that of good faith, could yield different results in different situations, and would not necessarily deny the complaining party the right to seek in every single instance a suitable remedy, even if its own wrongful conduct had elicited the wrongful response. Reference was also made to article 39 of the draft articles on responsibility of States for internationally wrongful acts.¹⁸¹

233. Notwithstanding their support for the Special Rapporteur's conclusions, some members took issue with the Special Rapporteur's reasoning. For example, the Commission was cautioned against stretching too far the *Mavrommatis*¹⁸² principle that an injury to a national is an injury to the State itself; it would not be incongruous to consider that the "clean hands" of the individual could constitute a precondition for diplomatic protection, exactly as the exhaustion of local remedies was up to the private individual and not the State.

234. In addition, some members maintained that in referring to the consular notification cases (*LaGrand* and *Avena*),¹⁸³ by way of illustrating the point that the "unclean" hands of the individuals concerned played no role in diplomatic protection, the Special Rapporteur was employing too vague a conception of the clean hands doctrine because he failed to examine the relationship between the unlawful act of the individual and the internationally wrongful act of the State. The question was whether the individual who benefited from diplomatic protection was himself or herself responsible for the breach of the rule of international law that the host State was accused of violating.

235. According to another view, the lack of practice did not necessarily preclude the adoption of some version of the doctrine by way of progressive development of the law. The key difficulty involved proper identification of the doctrine, as there existed at least the two following different legal positions described by the same phrase:

¹⁷⁶ *Mavrommatis Jerusalem Concessions*, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5, p. 12.

¹⁷⁷ See footnote 175 above.

¹⁷⁸ *Ibid.*

¹⁷⁹ See *Ben Tillett (Belgium v. Great Britain)*, C. G. Fenwick, *Cases on International Law* (Chicago, Callaghan, 1935) p. 181; and *Virginus in J. B. Moore, A Digest of International Law* (Washington D.C., United States Government Printing Office, 1906), vol. II, p. 895. See also the sixth report of the Special Rapporteur, paras. 12–13.

¹⁸⁰ See the draft articles on diplomatic protection adopted by the Commission on first reading (footnote 174 above), arts. 1 and 15.

¹⁸¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 109.

¹⁸² See *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 12.

¹⁸³ See footnote 175 above and the sixth report of the Special Rapporteur, para. 9.

(a) where the alleged illegality would, in principle, form part of the merits, and (b) where it is invoked *ex parte* by a respondent State simply by way of prejudice as a principle of international public policy constituting a bar to the admissibility of the claim. Each case called for contextual analysis and careful characterization.

(c) *Special Rapporteur's concluding remarks*

236. The Special Rapporteur observed that the clean hands doctrine was an important principle of international law that had to be taken into account whenever there was evidence that an applicant State had not acted in good faith and that it had come to court with unclean hands. It was to be distinguished from the *tu quoque* argument, which allowed a respondent State to assert that the applicant State had also violated a rule of international law, and was instead to be confined to cases in which the applicant State had acted improperly in bringing a case to court. He further acknowledged the various criticisms that had been raised regarding his treatment of the doctrine in his report, and observed that some members had rightly noted that the report omitted a consideration of the doctrine in the case concerning *Certain Phosphate Lands in Nauru*.¹⁸⁴

2. OTHER ISSUES

(a) *Summary of the debate*

237. As regards the draft articles adopted on first reading in 2004,¹⁸⁵ the view was expressed that the draft articles had been prematurely transmitted to the General Assembly, since the draft dealt only with the conditions for the exercise of diplomatic protection. No guidance was given on questions such as who could exercise such protection, how it should be exercised, what were the consequences of its exercise, how to evaluate harm in cases involving the exercise of diplomatic protection, and the justification of the rule, under article 2 of the draft articles, that only a State had the right to exercise diplomatic protection, while an individual had no actual right to be compensated, even if the State responsible discharged its obligations in terms of compensation, as well as the general question of the degree of control that an individual should have in respect of an international claim, that is, the extent to which an individual or legal person could require a Government to make a claim in the first place.

238. In addition, reservations were again expressed as to the resort to the Mavrommatis principle in the draft articles. In particular, while there was agreement with the position that diplomatic protection was a right of the State, it was maintained that the State's right to ensure respect for international law in the person of its national was an outdated concept. While it may have been relevant in 1924—at the time of the *Mavrommatis Palestine Concessions* decision—it seemed unacceptable, 80 years later, to adhere to a fiction that had been created in response

¹⁸⁴ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240 at p. 255, paras. 37–38. See also *Preliminary Objections of the Government of Australia* (December 1990), I.C.J. Pleadings, vol. I, part V, chap. 2, sect. I, pp. 162–163, paras. 400–406.

¹⁸⁵ See footnote 174 above.

to a specific historical context while ignoring subsequent developments in the law, particularly as regards the status of individuals, and their protection, under international law. Under that view, the Commission had missed an opportunity to clarify that when a State exercised its right to exercise diplomatic protection, it did so on behalf of its national and not in order to ensure respect for its own right in the person of that individual.

(b) *Special Rapporteur's concluding remarks*

239. Regarding the suggestion that the draft articles include a consideration of the consequences of diplomatic protection, the Special Rapporteur recalled that the draft articles adopted on first reading focused on what was the accepted scope of diplomatic protection, both in the Sixth Committee and among most academic writers, that is, the nationality of claims and the exhaustion of local remedies. He observed further that article 44 of the draft articles on responsibility of States for internationally wrongful acts had also contemplated only these two issues,¹⁸⁶ and that the commentary to that provision had made it clear that these matters would be taken up in the supplementary study on diplomatic protection.¹⁸⁷

240. In addition, the Special Rapporteur was of the view that it was not necessary to deal with the consequences of diplomatic protection since they were already covered by the articles on the responsibility of States for internationally wrongful acts, with one exception, namely, whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection. While he agreed that that was an important issue, the options open to the Commission were either simply to codify well-established rules (even if that meant adopting what many members regarded as a retrogressive rule: that the State was not obliged to transfer money to the injured person) or to engage in progressive development and enunciate a new rule whereby the State was obliged to pay over to the injured individual money that it had received by way of compensation. In the light of the Commission's decision not to adopt a provision compelling States to exercise diplomatic protection on behalf of an individual, he had not detected a general willingness on the part of the Commission to engage in progressive development in respect of the payment of monetary compensation received by the State. His preference, therefore, was neither expressly to codify what many regarded as an unfortunate principle nor to attempt to develop progressively a new principle that would be unacceptable to States, but rather to leave the matter open in the draft articles so as to allow for further development in the law.

241. As regards the Mavrommatis principle, the Special Rapporteur recalled that it was generally acknowledged to be a fiction, with serious implications for the individual. For example, because the claim for diplomatic protection was seen to be that of the State and not of the individual, it was generally accepted that the State enjoyed discretion as to whether or not to bring the claim. He recalled that in his first report¹⁸⁸ he had proposed making it obligatory

¹⁸⁶ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 29.

¹⁸⁷ *Ibid.*, p. 121, footnotes 683 and 687.

¹⁸⁸ See footnote 163 above.

for States to exercise diplomatic protection where a norm of *jus cogens* had been violated in respect of the individual, but the proposal had been rejected on the ground that that would have meant engaging in progressive development. He acknowledged that the Mavrommatis principle was inconsistent and flawed in that, for example, it was

not easy to reconcile with the principle of continuous nationality or with the exhaustion of local remedies rule. Yet, notwithstanding its flaws, the Mavrommatis principle was the basis of customary international law on the subject of diplomatic protection and for this reason it had been retained.