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Item 79 of the preliminary list*
Diplomatic protection

Diplomatic protection

Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.[1] In its resolution 61/35, the General Assembly took note of the draft articles as adopted by the Commission and invited Governments to submit comments concerning the Commission's recommendation that the Assembly elaborate a convention on the basis of the articles.[2] By its resolutions 62/67 and 65/27, the Assembly commended the articles on diplomatic protection presented by the Commission to the attention of Governments and invited them to submit any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles in writing to the Secretary-General. The Assembly examined, at its sixty-fifth session, in 2010, and sixty-eighth session, in 2013, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments,[3] as well as views expressed in the debates held at the sixty-second, sixty-fifth and sixty-eighth sessions of the Assembly, the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles.

2. In its resolution 68/113, the General Assembly again recalled its resolution 62/67 and the decision of the International Law Commission to recommend to the Assembly the elaboration of a convention on the basis of the articles on diplomatic protection. It also emphasized the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations, and noted that the subject of diplomatic protection

* A/71/50
[1] See A/61/10, para. 49.
[2] See A/62/118 and Add.1. The text of the articles was subsequently annexed to resolution 62/67.
[3] See A/65/182 and Add.1 and A/68/113.

was of major importance in relations between States. The Assembly commended once again the articles on diplomatic protection to the attention of Governments and decided to include in the provisional agenda of its seventy-first session the item entitled "Diplomatic protection" and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second, sixty-fifth and sixty-eighth sessions of the Assembly, to continue to examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles and to identify any difference of opinion on the articles.

3. In the same resolution, the General Assembly invited Governments to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the International Law Commission to elaborate a convention on the basis of the articles on diplomatic protection. By a note verbale dated 21 January 2014, the Secretary-General invited Governments to submit those comments no later than 1 June 2016. He reiterated that invitation by notes verbales dated 21 January and 18 December 2015.

4. As at 17 June 2016, the Secretary-General had received written comments from Australia, Austria, the Czech Republic, El Salvador, Qatar and Togo. Those comments are reproduced below, organized according to comments on any future action regarding the articles on diplomatic protection (sect. II) and on the articles (sect. III).

II. Comments on any future action regarding the articles on diplomatic protection

Australia

[Original: English]
[9 June 2016]

Australia has welcomed the adoption by the International Law Commission of the articles on diplomatic protection and the commentaries thereto. To the extent that the articles articulate important aspects of customary international law, they provide useful guidance to States and international bodies and are valuable in their current form.

We wish to take this opportunity to reiterate the points that Australia has made at Sixth Committee discussions on behalf of Australia, Canada and New Zealand during the sixty-fifth session of the General Assembly, in 2010.[4] We do not believe that it would be appropriate to adopt a convention based on the articles at this time. We believe that the process of negotiating such a convention could undermine the influence and value of the articles by opening up debate on their contents.

The articles on diplomatic protection are closely bound to the articles on responsibility of States for internationally wrongful acts. This is recognized in the Commission's commentaries to the articles on diplomatic protection, which note that many of the principles contained in the articles on State responsibility are relevant to diplomatic protection, in particular, the provisions dealing with the legal

[4] See A/C.6/65/SR.16.

consequences of an internationally wrongful act. In the absence of a clear consensus on the elaboration of a convention on the basis of the articles on State responsibility, it would be premature to begin negotiations on a convention on the basis of the articles on diplomatic protection.

In addition, aspects of the articles on diplomatic protection go beyond the understanding of Australia of customary international law relating to diplomatic protection. Article 8 on stateless persons and refugees is one example in which this is the case. The Commission's commentaries acknowledge that article 8 is "an exercise in progressive development of the law". Australia agrees that there is no established rule of customary international law that recognizes the ability of States to exercise diplomatic protection in respect of stateless persons or refugees. To the extent that the articles contain elements relating to the development of customary international law, and not simply its codification, there is unlikely to be international consensus on whether those elements should be made the subject of a convention.

Australia continues to consider the Commission's work on the articles to be valuable in clarifying and developing customary international law on diplomatic protection. We view the articles as serving a useful purpose in informing and helping to settle State practice in this important area over time.

Austria

[Original: English]
[1 June 2016]

Owing to the close connection between the articles on diplomatic protection and those on responsibility of States for internationally wrongful acts, the position of Austria with regard to the recommendation of the International Law Commission to elaborate a convention on diplomatic protection remains unchanged. Austria has already expressed its views in its statements before the Sixth Committee at the sixty-first, sixty-second and sixty-fifth sessions of the General Assembly and in written comments presented in 2010.[5]

Austria would prefer to wait and place this item on the agenda again after a few years in order to assess the possibility of taking the necessary steps towards the elaboration of a convention by convening an ad hoc committee, a preparatory committee or a codification conference.

Czech Republic

[Original: English]
[24 March 2016]

The written comments of the Czech Republic on the topic of diplomatic protection were presented to the Secretary-General in 2007[6] and reiterated in 2010.[7] Since that date, there have been no major developments requiring a change of position.

[5] See A/C.6/61/SR.9, A/C.6/62/SR.10, A/C.6/65/SR.16 and A/65/182.
[6] See A/62/118.
[7] See A/65/182.

El Salvador

[Original: Spanish]
[31 May 2016]

The Republic of El Salvador considers that, while international law has evolved considerably over the past century, diplomatic protection has the merit of having developed out of the affirmation of the equality of States as a means of ensuring the recognition of and reparation for injuries to nationals of another State at a time when there was no other effective means of doing so.

Diplomatic protection now exists alongside other concepts, such as the law of State responsibility and the jurisdiction of international tribunals. However, John Dugard, one of the special rapporteurs appointed by the International Law Commission for this issue, has stressed its importance, stating that, "although individuals today enjoy more international remedies for the protection of their rights than ever before, diplomatic protection remains an important weapon in the arsenal of human rights protection".[8]

In view of the important protective function of diplomatic protection, the Republic of El Salvador considers that the articles could become a legally binding international instrument so long as the instrument is formulated in a manner that takes into account the need to strengthen the protection that States may provide to their nationals.

In sum, El Salvador supports embarking on the work necessary to adopt a binding international instrument that will improve the use of diplomatic protection, and it will continue to closely monitor progress in that regard during the next session.

Qatar

[Original: Arabic]
[24 February 2014]

Qatar has no objection to the recommendation of the International Law Commission on the drafting of a convention on the basis of the articles on diplomatic protection. In the case of the adoption of a convention by the General Assembly, it would be presented later on to States to sign or ratify in accordance with the established practice under their national legislation.

Togo

[Original: French]
[13 May 2016]

Analysis of the 19 articles on diplomatic protection shows that, in general, they reflect the current status of international practice and case law. They clearly lay down the main principles that should guide the effective exercise of diplomatic protection. In this regard, if the articles were to form the basis of a convention, they would undoubtedly constitute a significant codification and development of international law on diplomatic protection, alongside the many instruments governing diplomatic and consular relations that have already been adopted through

[8] See *Yearbook of the International Law Commission, 2000*, vol. II, Part One (United Nations publication, Sales No. E.03.V.7 (Part 1)), p. 215, para. 32.

the Commission's efforts. Those instruments, in order of adoption, are: the Vienna Convention on Diplomatic Relations of 18 April 1961; the Vienna Convention on Consular Relations of 24 April 1963; the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973; and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004.

III. Comments on the articles on diplomatic protection

El Salvador

[Original: Spanish]
[31 May 2016]

A convention on this subject should establish a more direct link between article 2 (right to exercise diplomatic protection) and article 19 (recommended practice) in order to establish more specific guidance on the proper exercise of diplomatic protection.

Togo

[Original: French]
[13 May 2016]

While Togo considers the articles to be useful, it should be noted that the text has a number of shortcomings that warrant further scrutiny if it is to be truly exhaustive.

Definition of diplomatic protection

There are two main reasons why the proposed definition appears too narrow:

(a) Diplomatic protection may be sought only where an act is attributable to a State. This raises the question of what would happen if such an act were attributable to a national of the State in question;

(b) Diplomatic protection may be sought only if the national is the victim of the wrongful act. The individual must not have contributed, by his or her own conduct, to the injury that he or she suffered. What if he or she is being prosecuted in the foreign State for an act that is against the national law of that State? Is the "clean hands" doctrine not, in that case, a substantial obstacle to the exercise of diplomatic protection? Given that it is possible for a national to be wrongly accused, the failure to exercise diplomatic protection in such a case could place the individual in a difficult position, in particular when there is no guarantee of fair and impartial justice in the State alleged to be responsible.

Concept of an internationally wrongful act

While the articles refer to internationally wrongful acts, no definition is proposed for this term. Although the Commission's articles on responsibility of States for internationally wrongful acts propose a definition, the concept should be reproduced or clarified in the articles on diplomatic protection. In this connection, it is necessary to establish the criteria or conditions under which an act is attributable

to a State in order to avoid creative interpretations both by the State that committed the wrongful act and the State that seeks to protect its national.

The articles refer only to internationally wrongful acts, which could suggest that diplomatic protection would not apply if the injury was not caused by a breach of an international obligation of the State. The scope of diplomatic protection is thus clearly restricted and should be broadened.

Right or obligation to exercise diplomatic protection

Under article 2, the exercise of diplomatic protection is presented as a right of the State. There can, therefore, be no doubt that diplomatic protection falls within the sovereignty of each State, as has been mentioned, and, more specifically, involves the exercise by the State of a form of "personal" jurisdiction. On that basis, it is undeniable that the exercise of diplomatic protection is a "right" of the State.

However, should it not also be an "obligation" of the State to guarantee diplomatic protection to its nationals and, by extension, their right to seek it?

The legal construct of diplomatic protection is such that the State of nationality of the injured person is never obliged to extend its protection to that person. It is for the State to decide whether it is appropriate to exercise its protection on the basis of its political interest at the time. To support this position, it has been argued that, when a State of nationality exercises diplomatic protection, it is defending its own interest more than that of the person directly injured by the act of another State. This explains the requirement for prior exhaustion of local remedies.

Nevertheless, it must be recognized that the fundamental principle of diplomatic protection, as expounded by the Swiss jurist Emmerich de Vattel in 1758, was that it was more of an obligation than a right. He stated that "whoever ill-treats a citizen indirectly injures the State, which must protect that citizen". In that regard, the recognition of diplomatic protection as a citizen's right and an obligation of the State is a question of logic and common sense and is supported by recent developments in international law. Today, sovereignty is seen as a question of responsibility and is no longer considered a right that is exercised purely on a discretionary basis. Accordingly, at the high-level plenary meeting of the sixtieth session of the General Assembly, the principle of the responsibility to protect, whereby each State must take all measures necessary to protect its citizens from violations of their fundamental rights, was recognized.

On the basis of these comments, it would be fitting, in the proposed draft United Nations convention on diplomatic protection, to introduce a change by allowing citizens to demand protection from their State, before international courts if necessary, if the State fails to exercise it.

Concept of predominant nationality

Article 7 provides that, in the case of multiple nationality, diplomatic protection may be exercised only if the nationality of the State making the claim is predominant over the nationality of the State responsible for an internationally wrongful act. However, the article does not specify the meaning of "predominant nationality".

What are the criteria for determining predominant nationality? That question requires an answer.

Multiple nationality and claims against a State of nationality

The principle laid down in article 7 is that diplomatic protection may not be exercised if the victim is a national of both the State alleged to be responsible for the wrongful act and the State intending to exercise diplomatic protection. Without prejudice to the comments made above under the concept of predominant nationality, Togo has some reservations regarding that provision.

As it stands, the provision could constitute a significant impediment to the exercise of diplomatic protection, and the single exception allowed does nothing to resolve the problem. Togo is of the view that it would be appropriate to decide on a case-by-case basis whether diplomatic protection should be precluded. Such matters cannot be decided in advance and should be considered by international judicial bodies, if necessary. Doing so would prevent declarations of inadmissibility from being issued on the basis of the article.

Moreover, given that diplomatic protection is a necessity, it would be best if article 7 established that the exercise of protection in the case of multiple nationality was the rule and that the preclusion of protection was the exception.

This position is supported by a careful examination of article 15, in that a number of factors may lead to deviation from the principle set out in article 7.

Protection of shareholders in a corporation in the case of an injury to the corporation

While the principle of prioritizing the State of nationality of the corporation over the State of nationality of the shareholders with regard to the right to exercise diplomatic protection is justified, it must be noted that the exceptions provided for are insufficient. What would happen if the State of nationality of the corporation, for political or other reasons, did not deem it necessary to exercise diplomatic protection? The International Court of Justice, in its judgment of 5 February 1970 in the *Barcelona Traction* case,[9] was inflexible on this point. It ruled that the claim brought by the State of nationality of the shareholders (Belgium) was inadmissible, given that the State of nationality of the corporation (Canada) had decided not to exercise diplomatic protection. However, the International Law Commission should aim for progressive development in this area, especially because the situation of shareholders in such cases may be truly regrettable. Even if the injury is suffered by the corporation, it can be difficult in some cases to distinguish the injury to the corporation from the injury to the shareholders in that corporation.

Exhaustion of local remedies rule

While the rule that local remedies must be exhausted before diplomatic protection may be exercised ensures respect for the sovereignty of the State alleged to be responsible, the possibility of cases arising in which it is difficult to draw a distinction between injury to the national and direct injury to the State of nationality should not be ignored. It would therefore be advisable to include a paragraph clarifying the legal regime applicable in that eventuality. Furthermore, there are many other circumstances in which this rule could not be applied but that are not mentioned in this article.

[9] *Case concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgments, I.C.J. Reports 1970*.

It is generally agreed that local remedies need not be exhausted when injury has been caused by transboundary environmental harm (as when radioactive fallout from the explosion at the Chernobyl nuclear plant was felt in Scandinavia) or from the shooting down of an aircraft that has accidentally strayed into a State's airspace (as occurred when Bulgaria shot down an El-Al flight that had accidentally entered its airspace).

Conclusion

The articles examined above represent the hope of contemporary international law for a tool to further peace between nations, which is essential for development. However, there is a need for boldness. In particular, diplomatic protection should be made into a tool to benefit individuals. The aim should be to establish diplomatic immunity as a universal human right, while taking into account the fact that this is a very sensitive issue that must be managed with a great deal of wisdom and prudence, given that it has an impact on State sovereignty.

Subject to the comments above, Togo finds that the articles have contemporary relevance.