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Diplomatic protection

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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](#), [65/27](#) and [68/113](#), 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, sixty-eighth session, in 2013, and seventy-first session, in 2016, 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 [71/142](#), 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

* [A/74/50](#).

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](#), [A/68/115](#) and [Add.1](#) and [A/71/93](#).



protection 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-fourth 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, sixty-eighth and seventy-first 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 16 January 2017, the Secretary-General invited Governments to submit those comments no later than 1 June 2019. He reiterated that invitation by a note verbale dated 7 January 2019.

4. As at 3 July 2019, comments had been received from Cuba, El Salvador and Iraq. 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

Cuba

[Original: Spanish]
[30 May 2019]

Cuba takes this opportunity to express its appreciation to the International Law Commission for its valuable contributions to the efforts to elaborate a convention on diplomatic protection and reiterates its readiness to work with all Member States to use these contributions in the development of international instruments.

Cuba considers that the adoption of a convention on diplomatic protection would make it possible to harmonize and integrate all existing practices and jurisprudence on the topic, including the decisions of the International Court of Justice. Cuba attaches great importance to these draft articles, particularly because they reflect the norms and principles of customary State practice.

Cuba considers that a convention based on the draft articles would contribute to the codification and progressive development of international law, in particular the consolidation of the norms concerning conditions that must be met before diplomatic protection can be requested.

Unfortunately, not all States use diplomatic protection appropriately as a subsidiary mechanism for protecting the rights of their nationals; States sometimes use it as an instrument to apply pressure on certain specific States and to promote their transnational economic interests.

The exercise of diplomatic protection is a sovereign right of States and diplomatic protection is a vitally important institution for promoting the rule of law at all levels and protecting human rights and fundamental freedoms more effectively. The recognized applicability of diplomatic protection to refugees and stateless persons is invaluable in protecting the rights of these highly vulnerable groups.

However, not all States have signed the international instruments on refugees, which should be taken into account when elaborating the future convention.

Cuba considers that an international convention on diplomatic protection would also strengthen the right of a State to invoke, through diplomatic action or other means of peaceful settlement, the responsibility of another State for an injury caused by an internationally wrongful act.

Cuba considers that the draft articles on diplomatic protection are closely linked to the draft articles on the responsibility of States for internationally wrongful acts. The purpose of diplomatic protection is to protect the rights of individuals in the event of an internationally wrongful act of another State, which is covered by the draft articles on the responsibility of States for internationally wrongful acts. Accordingly, both sets of draft articles are of equal importance in ensuring better compliance with international law.

El Salvador

[Original: Spanish]
[31 May 2019]

Diplomatic protection has the merit of having been developed from the affirmation of the equality of States as the means for the recognition and reparation of injury caused to nationals of another State, at a time when there were no other effective means. Diplomatic protection therefore remains an important tool for the protection of human rights.

Owing to this important protective function, the Republic of El Salvador believes that the draft articles under consideration could viably be transformed into a binding international instrument, provided that the need to strengthen the protection that States may provide to their nationals is not overlooked.

In short, El Salvador wishes to reiterate its support for the continuation of work towards the adoption of a draft convention on the topic, which would represent an agreement governed by international treaty law, with legal effects that would ensure greater certainty and use of diplomatic protection. El Salvador will therefore continue to closely follow any progress made at the next session.

III. Comments on the articles on diplomatic protection

Cuba

[Original: Spanish]
[30 May 2019]

It would be advisable for the future convention to specify whether the State possessing capacity to claim, in the case of an individual with multiple nationalities, is the State with which the individual has an effective link.

Cuba considers that this topic helps in particular to strengthen the rule of law at the national level since, as the draft articles stipulate, all local remedies must be exhausted before diplomatic protection can be exercised. This matter should be included in the future convention.

Cuba also believes that clear consideration should be given as to whether the conduct of the individual in respect of whom the right to protection is being exercised was contrary to the domestic law of the State against which the claim is being brought

or contrary to international law, since those factors could influence protection and the consequences of that protection.

It is significant that the draft articles do not specifically cover one of the requirements that must be met before a State can offer diplomatic protection, according to both doctrine and jurisprudence, that is, the individual in question must have acted transparently and must not have committed a wrongful act that could justify a legitimate reprisal by the State.

El Salvador

[Original: Spanish]
[31 May 2019]

El Salvador recognizes that diplomatic protection is an instrument for the application of international norms and has been a subject of the progressive development of international law over the past century.

Basically, diplomatic protection consists of action taken by one State against another to claim compliance with international law in respect of certain individuals having specific links with the State. However, despite this conceptual meaning, difficulties arise in international practice, particularly when it comes to determining the conditions for the exercise of such protection.

For example, problematic cases may be identified in practice with regard to the nationality of the individual, such as cases of persons who do not have a formal link of nationality with the State in which they habitually reside, and cases where the individual concerned has dual nationality, as well as cases involving the continuous nationality criterion that must be taken into consideration before a claim can be presented.

Another question that arises in practice and that needs to be addressed is that of the nationality of legal persons, specifically, the definition of the criteria of incorporation and effectiveness for the purpose of determining the nationality of such persons.

El Salvador supports the efforts that have been made to formulate a draft binding international legal instrument on the topic, with a view to resolving and regulating such situations. In that connection, El Salvador notes with satisfaction that the draft articles annexed to resolution [62/67](#) contain provisions regulating the standards through which such issues may be addressed. Examples include draft article 5, which contemplates the continuous nationality of a natural person; draft article 8, which refers to cases in which a State may exercise diplomatic protection in respect of a stateless person or a person recognized as a refugee; and draft article 9, which sets out, as a general rule, the criterion of incorporation as a means of determining the predominant nationality of a legal person and, subsidiarily, the criterion of effectiveness.

However, with regard to draft article 2, El Salvador believes that it is necessary to establish more directly that the right to exercise diplomatic protection should be in accordance with the conditions set out in draft article 19, which establishes the recommended practice for States. The aim would be to state more clearly that the fact that diplomatic protection is a discretionary right of States does not mean that it can be exercised without due regard for the protection of the individual's human rights. Draft article 19 therefore seeks to create more appropriate conditions for a practice that is binding on States.

Iraq

[Original: Arabic]
[4 January 2019]

It is important to distinguish between diplomatic protection and consular protection with regard to the nature and effects of the protection and the party responsible for its exercise.

Iraq suggests redrafting article 4 of the draft articles to read as follows: “For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person bears or has acquired through naturalization, succession of States or in any other manner, not inconsistent with international law”.

Iraq wishes to underscore the principle that, as is stated in article 5, the person should have continuous nationality of the State that intends to exercise diplomatic protection at the time of injury and the time of the presentation of the claim.

It should be emphasized that the acquired nationality cannot prevent the perpetrator from being subject to the jurisdiction of the State of which they are a national when the wrongful act occurs.

There is a need to provide greater detail when preparing the final draft of article 6, paragraph 2. It should be possible for one of the person’s States of nationality to be given priority, if it is the State of effective nationality or predominant nationality. Such a provision would ensure balance with draft article 7, in the light of the concept of predominant nationality cited above. Iraq suggests adding a reference to an important indicator of effective nationality, namely, the fulfilment of a governmental function, particularly at a high level.

Article 13 refers to “other legal persons”, meaning universities, municipalities, institutions and so on. The provisions of that article can be supported because they are important for the protection of institutions abroad, other than diplomatic and consular missions, such as schools and banks. It is important to identify the legal persons, as these are not limited to companies: they also include universities, educational institutions, religious endowments (*awqaf*), charitable institutions, local governments and any entity granted legal personhood by law.

It would have been appropriate to provide more clarifications regarding the conditions for international responsibility. Those conditions are important, as they largely underpin the question of international responsibility. Such an approach would ensure the proper drafting of a clear, specific and accurate legal text.

The draft articles could have considered the extent to which the heirs of a deceased person can request compensation for an injury to that person, even though the courts have not settled on a firm approach to the question.

It is essential for the draft articles to include a clear provision regarding the “clean hands doctrine”; the conduct of the injured person should not have been contrary to the law and should not have contributed to the occurrence of the injury.