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Diplomatic protection

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Comments and information received from Governments

Report of the Secretary-General

Addendum

I. Introduction

As at 30 August 2013, the Secretary-General had also received written comments from Colombia (dated 11 June 2013), El Salvador (dated 16 July 2013) and Portugal (dated 25 July 2013).

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

Colombia

[Original: Spanish]
[11 June 2013]

The provisions of the draft articles are general in nature and, as such, their application is not limited to any one specific case. In that regard, they have, prima facie, the capacity to produce rules of general international law.

In light of the foregoing, if the treaty to be adopted receives a high number of ratifications, the provisions of the international instrument could, progressively and through incorporation in State practice, become international custom.

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El Salvador

[Original: Spanish]
[16 July 2013]

With regard to the final form of the draft articles on the subject, the Republic of El Salvador remains willing, as it has stated at previous sessions,[1] to undertake the necessary efforts to ensure that those articles result in 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 of the human rights of all persons and to guarantee the effective right of all States to protect their nationals and their legitimate interests in the area of international relations.

In sum, El Salvador is in favour of the orientation of the draft articles and their focus on the peaceful settlement of international disputes, and therefore endorses their content without ruling out — as indicated above — the possibility of discussing certain necessary adjustments to the text in order to strengthen its effectiveness and ensure its optimal application.

Portugal

[Original: English]
[16 July 2013]

The International Law Commission completed a set of 19 draft articles on diplomatic protection in less than 10 years, since the topic was first identified as suitable for codification and progressive development. This proves that the topic was indeed ripe and adequate for codification and that the Commission is a useful institute in contemporary international relations.

Portugal has already had the occasion to welcome the development of the draft articles, as well as the recommendation by the Commission for the elaboration of a convention based on the draft articles.[2]

Portugal is in agreement with the draft articles in general and with their suitability as a basis for an international convention, regardless of the fact that during the debates of the Sixth Committee it voiced its disagreement with regard to certain aspects, in particular those concerning both the scope and the particular contents of the draft articles.[3] Those and other issues could be discussed within the body preparing the convention.

Portugal is of the opinion that the draft articles on diplomatic protection and those on State responsibility could form part of parallel conventions since the two subjects traditionally go hand in hand, as recognized by the International Law Commission itself. This would represent a major step for the consolidation of the law on international responsibility.

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[1] See A/C.6/62/SR.10, paras. 12 and 13, and A/C.6/65/SR.16, para. 16.
[2] See A/C.6/61/SR.10, paras. 61 and 71, A/C.6/62/SR.10, paras. 6 and 7, A/C.6/65/SR.16, para. 13, A/62/118 and A/65/182.
[3] See A/C.6/61/SR.10, paras. 61-70.

III. Comments on the articles on diplomatic protection

Colombia

[Original: English/Spanish]
[11 June 2013]

Since they have sufficient support in State practice and *opinio juris*, the following draft articles are, prima facie, of a customary nature: 1 (Definition and scope); 2 (Right to exercise diplomatic protection); 3 (Protection by the State of nationality); 4 (State of nationality of a natural person); 6 (Multiple nationality and claim against a third State); 7 (Multiple nationality and claim against a State of nationality); 9 (State of nationality of a corporation); 10 (Continuous nationality of a corporation); 12 (Direct injury to shareholders); 14 (Exhaustion of local remedies); 15 (Exceptions to the local remedies rule), paragraphs (a), (b) and (d); 16 (Actions or procedures other than diplomatic protection); 17 (Special rules of international law); and 18 (Protection of ships' crews).

As a consequence, any convention concluded would have a declaratory effect in relation to the aforementioned provisions, and they would not entail the assumption of new obligations by the Colombian State.

The draft articles on diplomatic protection are a compilation of the general practices of international law in the exercise of such protection. However, some of those articles correspond to the International Law Commission's role in the progressive development of international law. In that regard, a legal analysis of those draft articles that have been formulated *de lege ferenda* and lack sufficient basis in State practice and *opinio juris* is presented below.

Article 5, paragraph 1 — Continuous nationality of a natural person

Draft article 5, paragraph 1, stipulates that a State may exercise diplomatic protection only in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. The provision under consideration, however, provides for a legal presumption of continuity if it is established that the person was a national at the date of injury and at the date of the official presentation of the claim.

In that regard it should be noted that, as stated by the Commission, international tribunals and doctrine have required that the same nationality be shown only at those two dates, without envisaging the need to verify whether the person retained that nationality continuously.

The Commission therefore states that draft article 5, paragraph 1, is an exercise in progressive development, aimed at formulating a satisfactory response that reconciles the conflicting interests (see paragraph (2) of the commentary to draft article 5):

> Paragraph 1 asserts the traditional principle that a State is entitled to exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim. State practice and doctrine are unclear on whether the national must retain the nationality of the claimant State between these two dates, largely because in practice this issue seldom arises. For these reasons the Institute of

> International Law in 1965 left open the question whether continuity of nationality was required between the two dates. *It is, however, incongruous to require that the same nationality be shown both at the date of injury and at the date of the official presentation of the claim without requiring it to continue between these two dates. Thus, in an exercise in progressive development of the law, the rule has been drafted to require that the injured person be a national continuously from the date of the injury to the date of the official presentation of the claim. Given the difficulty of providing evidence of continuity, it is presumed if the same nationality existed at both these dates. This presumption is of course rebuttable*[4] (emphasis added).

As explained above, the progressive development proposed by the Commission consists in maintaining the requirement for continuous nationality and, at the same time, recognizing the existence of a presumption that must be rebutted by the respondent State, i.e. the State alleged to have caused the injury to the national of the claimant State.

It should be noted, however, that this exercise in progressive development does not ignore traditional practice in the area of diplomatic protection. Indeed, the proposal in the commentary enshrines a requirement based on the case law of international tribunals. Its purpose is to fill the legal vacuum recognized by doctrine and international case law. As a consequence, the aforementioned provision provides for development on a smaller scale with a view to clarifying the scope of what is already a requirement in practice.

Article 8 — Stateless persons and refugees

The purpose of draft article 8 is to take account of advances in international law in relation to the legal recognition and protection of stateless persons and refugees, on the basis of the provisions of the most relevant international instruments, in particular the 1951 Convention relating to the Status of Refugees, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

This draft article thus regulates a modern phenomenon that was not analysed by the courts and tribunals that historically dealt with claims relating to diplomatic protection. As a consequence, since it has insufficient legal support in State practice and *opinio juris*, it must be seen as an exercise in progressive development by the International Law Commission.

It should be noted in that regard that draft article 8 is the proposal for progressive development that most drastically departs from customary law governing the exercise of diplomatic protection. In making provision for the exercise of this right in respect of stateless persons and refugees, draft article 8 sets aside one of the essential requirements for diplomatic protection: nationality.

It should, however, be noted that the extension of this State prerogative to persons without a bond of nationality must meet the following special requirements.

First, in place of the nationality requirement, establishment of lawful and habitual residence is required for the exercise of diplomatic protection in respect of

[4] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 49.

a refugee or stateless person. Second, in the case of refugees, the host State must have conferred refugee status on the individual, in accordance with its domestic law and existing international law.

In addition, draft article 8, paragraph 3, clearly provides that the State of refuge may not bring a claim against the refugee's State of nationality. The Commission provides the following explanation in its commentary to the draft article:

> To have permitted this would have contradicted the basic approach of the present draft articles, according to which nationality is the predominant basis for the exercise of diplomatic protection. The paragraph is also justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.[5]

This prohibition is supported by article 5, paragraph 3, under which it would be impossible for diplomatic protection to be exercised against the refugee's State of nationality, and by article 7.

It should be noted, however, that the concepts of "predominant nationality" found in article 7 and "date of injury" contained in article 5 could give rise to claims for diplomatic protection against a refugee's State of nationality by a State that, after offering refuge, decides to confer nationality.

This situation would arise in cases of continuing or repeated injury. Indeed, as stated by the International Law Commission, in a case of continuing injury, the date of injury need not be a precise date but could extend over a period of time.[6] It would therefore be reasonable to assert that a refugee who has obtained a new nationality may continue to be affected by the acts committed by the State of his or her original nationality.

In that regard, it should be recalled that in order to exercise diplomatic protection in respect of a refugee, his or her lawful and habitual residence must be established. Moreover, it should be emphasized that habitual residence is in itself one of the criteria that determines which nationality is predominant.

As explained above, in cases where the rights of a refugee who has been granted a new nationality continue to be violated, the State of refuge would be entitled to bring a claim for diplomatic protection against the original State of nationality. This possibility runs starkly counter to the general principle that precludes the exercise of this right against the State of nationality.

Article 15 — Exceptions to the local remedies rule

Draft article 15 covers exceptions to one of the essential requirements for the exercise of diplomatic protection: the exhaustion of local remedies.

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[5] Ibid., para. 10 of the commentary to draft article 8.

[6] "The first requirement is that the injured national be a national of the claimant State at the date of the injury. *The date of the injury need not be a precise date but could extend over a period of time if the injury consists of several acts or a continuing act committed over a period of time*" (emphasis added). Ibid., para. (3) of the commentary to article 5.

According to the commentary to the draft article, paragraph (c) concerns situations in which the individual has voluntarily assumed the risk that any injury suffered will be subject to the domestic procedures of the host State. However, given that there is no support for this provision in State practice, it must be seen as an exercise in progressive development by the Commission. Moreover, this office indicates that, having scrutinized the commentary to this paragraph, it has been unable to infer a clear purpose for its inclusion.

For its part, the Commission recognizes, in the following terms, that paragraph (d) of article 15 is an exercise in progressive development of one of the exceptions to the local remedies rule, which aims to shed light on the situations in which it would be manifestly impossible to pursue such remedies:

> This paragraph, which is an exercise in progressive development, must be narrowly construed, with the burden of proof on the injured person to show not merely that there are serious obstacles and difficulties in the way of exhausting local remedies *but that he is "manifestly" precluded from pursuing such remedies*. No attempt is made to provide a comprehensive list of factors that might qualify for this exception[7] (emphasis added).

It is clear that this paragraph uses progressive development in order to clarify the procedural aspects of the claim without creating new substantive obligations for the exercise of diplomatic protection.

Article 19 — Recommended practice

The phrasing of article 19 is unusual in the context of multilateral treaties in that it is worded in hortatory or recommendatory terms, rather than establishing obligations that are legally binding on States.

It should be noted that this provision codifies the duty of States to give due consideration to the possibility of exercising diplomatic protection, even in cases where international law does not recognize any rule that obliges States to exercise such protection.[8]

The possibility that the aforementioned provision could result in an obligation for the Colombian State to examine all claims for diplomatic protection, in line with standards yet to be defined, must therefore be carefully considered.

El Salvador

[Original: Spanish]
[16 July 2013]

The Republic of El Salvador attaches great importance to the draft articles on diplomatic protection, which are the product of a thorough study conducted by the International Law Commission with a view to contributing to codification and

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[7] Ibid., para. (11) of the commentary to article 15.

[8] In that regard, Malcolm Shaw points out that: "There is under international law, however, no obligation for states to provide diplomatic protection for their nationals abroad, although it can be said that nationals have a right to request their government to consider diplomatic protection and that government is under a duty to consider that request rationally." In *International Law*, 6th ed. (Cambridge, Cambridge University Press, 2008), p. 809.

progressive development by formulating provisions that reflect State practice and also address emerging issues on the topic.

Diplomatic protection is a classic concept in international law, but it must be configured in a way that is coherent and consistent with the regulatory system of which it is now part: an international system consisting of a set of principles and rules that govern cooperative relations among States and the status of other subjects of international law.

Diplomatic protection has played an important role since its earliest history, having grown out of the affirmation of the equality of States at a time when the rights of individuals were not recognized under international law. Consequently, it became the only viable way to ensure recognition of, and reparation for, injury caused by another State.

Today, however, diplomatic protection should be seen as just one of various means of guaranteeing the rights of individuals in the international community and protecting State interests, as it coexists with other concepts such as the law of State responsibility and the jurisdiction of international tribunals, without this signifying any incompatibility among them. It is this important protective function that ultimately maintains the centrality of diplomatic protection as an effective instrument in international law.

In view of the foregoing, it may be said that the draft articles on diplomatic protection do not limit the basic rule of the international responsibility of States, which consists in recognizing that whenever a State commits an internationally wrongful act, the corresponding international responsibility will arise and, accordingly, when the wrongful act is committed against a foreign national, it will immediately give rise to an obligation to cease such conduct and to make full reparation for the injury caused, whether in the form of restitution, compensation or satisfaction.

Furthermore, it is important to note that in the domestic policy area, diplomatic protection is of such significance that it has been enshrined in article 99 of the Constitution of the Republic, as follows:

> Foreigners shall not have recourse to diplomatic channels, except in cases of denial of justice, and after having exhausted all available legal remedies. A judicial judgment unfavourable to the claimant does not constitute a denial of justice.

By referring to denial of justice as a factor that may result in the application of diplomatic protection, this constitutional provision reaffirms that it is an eminently remedial or corrective action that may be exercised once the wrongful act has been committed by the State.

In the same way, the requirement of exhaustion of local remedies is reflected in the draft articles prepared by the Commission, since recourse must be made to the available means of seeking redress in the domestic sphere before an international claim is presented. The above is without prejudice to the internationally recognized legitimate exceptions to this requirement, such as undue delay, unavailability of local remedies, manifest inability of the person to pursue available remedies, or an express waiver by the State.

With regard to the operation of diplomatic protection, it is deemed essential, in each specific case, to analyse the various facts giving rise to its implementation, in particular, the seriousness of the injury and the views of injured persons with regard to the exercise of protection and the reparation sought, as recognized in draft article 19.

While the International Law Commission has already indicated in the commentary to the draft articles that the discretionary right of a State to exercise diplomatic protection should be understood in the context of draft article 19 (Recommended practice), the Republic of El Salvador is of the view that this link has not been sufficiently well established, bearing in mind that "Recommended practice" has been included at the end of the text under "Miscellaneous provisions", as if it were of lesser importance.

If a satisfactory balance is truly to be achieved between the discretionary nature of diplomatic protection and regulation of the appropriate factors that should govern its exercise, the text of article 2 (Right to exercise diplomatic protection) should be linked to article 19 (Recommended practice), and the possibility of redrafting article 19 and repositioning it in the text could even be considered, with the aim of ensuring that the sound guidelines outlined by the International Law Commission in the draft articles are adequately implemented, as suggested in the corresponding commentary.