The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument

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General Conclusions

The protection of nationals abroad has survived the passage of time. From the writings of Vattel until the adoption of the draft articles on diplomatic protection by the International Law Commission, the issue of diplomatic protection has continuously been part of international law. The law has changed: the use of force for the purpose of the protection of nationals abroad has been abandoned, new mechanisms for the protection of individuals in general have emerged and the individual enjoys rights under international law independent of his or her nationality. Yet, despite this development, the international legal system has not succeeded in providing a new universally applicable binding mechanism for the protection of individual human rights. Hence the continuing importance of diplomatic protection.

In the present study, a normative assessment of diplomatic protection has been presented to answer the question of what position diplomatic protection has today and it has been demonstrated that, first, diplomatic protection as characterised in this thesis is by no means incompatible with current international law and, second, that it has been resorted to – and should be resorted to – for the protection of human rights of the individual. Starting out from the position that protection of individuals against serious violations of human rights is desirable and that the international community recognises the importance of certain fundamental rights, based on an analysis the most important documents in the field of diplomatic protection, the position outlined above has been defended, with the purpose to define and clarify the law on diplomatic protection and its use as a human rights instrument. The remainder of this conclusion consists of two parts: a summary of the arguments presented and some thoughts on further development in the field of diplomatic protection.

1 Summary

Chapter I presents a modern interpretation of the legal fiction in diplomatic protection. Legal fictions are an indispensable instrument for the application of law and in a broader sense for the maintenance of the rule of law. By pretending that injury to an individual constitutes an injury to the state of nationality of that individual, the individual is provided protection that would

otherwise be unavailable. Even if this conclusion is relatively straightforward, demonstrating the exact function of the legal fiction in this process is not. A close analysis reveals that the fiction facilitates at least three transitions. First, and perhaps foremost, the individual injury is transformed into the state's right to exercise diplomatic protection. Second, the violation of a primary rule prompts the exercise of a right based on a secondary rule. The ILC's attempt to progressively develop the law on diplomatic protection has added a third dimension to the operation of the fiction in diplomatic protection. To accommodate the concern that the law of diplomatic protection be too much centred on states and disallow a central role of the individual, the ILC included Article 19 encouraging states to exercise diplomatic protection in serious situations, to consider the wishes of the individual with respect to the modes of exercise of diplomatic protection and to transfer compensation received to the individual. From the point of view of the fiction, this recommendation has an interesting effect: while it is a secondary norm of international law, the provisions short of an obligation create something short of a right belonging to the individual and not the state. This way, the fiction returns to the individual.

As has been pointed out, the provision is somewhat incongruous within the regime of the draft articles on diplomatic protection and from a legal point of view, it is susceptible to criticism. This criticism is presented in Chapter I. While this criticism is legally pertinent, a note should be added here with respect to considerations of policy. The sometimes strong objections to the law on diplomatic protection mostly stem from dissatisfaction with the way in which it represents a state-centred world. To prevent irrelevance in a world that is, slowly, moving away from the model in which states are the only actors, it was a wise decision to attempt to attribute a greater role to the individual, even if the way in which this was done may not have been ideal. It remains to be seen whether states will accept this recommendation. Statements by UN member states in the Sixth Committee in 2006 suggest that there is in any event no general acceptance of this provision.[1] It would certainly benefit the injured individual and may enhance the mechanism as a whole. If individuals feel that their state of nationality can really protect them in case of violations of their international (human) rights, they may appeal to their state of nationality more often and these states may in turn increase their activities on behalf of their nationals abroad. One may question whether an increase of international litigation is desirable, but protection against violations, in particular of serious violations, of international law vis-à-vis individuals is something international law should always support.

1 See various statements made to the Sixth Committee, ranging from outright rejection of the provision (e.g. South Africa and the United Kingdom, both in A/C.6/61/SR.10) to warmly welcoming it (e.g. The Netherlands and Norway (on behalf of the Nordic Countries), UN Doc. A/C.6/61/SR.9 and A/C.6/61/SR.10 resp.)

Chapter II continues the debate on the position of the law of diplomatic protection in current international law. By analysing the modes in which diplomatic protection is exercised and by distinguishing it from consular assistance, this position is clarified. A surprising number of scholars and institutions fail to distinguish clearly between the two mechanisms available for protection of and assistance to nationals abroad. While some of these cases show error or ignorance, the argument can be made that the distinction is not in the interest of the individual and that what matters is the protection.[2] While this appears to be an attractive line of reasoning, in the spirit of human rights law putting the individual first, the converse is true. By obscuring the line between diplomatic protection and consular assistance one risks unlawful intervention in the domestic affairs of the host state, which will ultimately result in a hostile attitude towards any action on behalf of foreigners. Clarity in this respect will have the opposite effect. Once a protecting state has demonstrated that its national has been injured by an act attributable to the host state and that there are no local remedies left to exhaust, the protection exercised will be all the more acceptable and effective.

Since diplomatic protection is conditioned upon the exhaustion of local remedies and the nationality of claims, the question has arisen whether these conditions would not be too demanding in case of violations of peremptory norms, especially considering their *erga omnes* character. Invocation of responsibility in such cases is after all not limited to the exercise of diplomatic protection: the Articles on State Responsibility provide for the invocation of responsibility by states other than the injured state *erga omnes*. The ensuing question is how the law of diplomatic protection relates to this aspect of the law of state responsibility, especially since both fields of law have been considered by the ILC resulting in two sets of (draft) articles. Chapter III discusses these issues. Matters are further complicated by the general requirement in the Articles on State Responsibility applicable to claims based on indirect injury. Claims by non-injured states bear strong resemblance to indirect claims, but if both kinds of invocation of state responsibility are subject to the same conditions, there is no real distinction because the invoking state is then limited to one, the state of nationality. Whereas this may be in favour of the law on diplomatic protection, it is not a very satisfactory outcome. The analysis in chapter III shows that a claim brought *erga omnes* is a claim with a different legal character than one brought in the exercise of diplomatic protection. The former is a direct claim based on a direct legal interest, whereas the latter is an indirect claim with a legal interest created through the bond of nationality.

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2 See, for instance, C. Forcese, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law', 37 George Washington Int'l Law Review 469-500 (2005), at 472-473 and 'The Capacity to Protect: Diplomatic Protection of Dual Nationals in the "War on Terror"', 17 EJIL 369-394 (2006), at 374-375. The author seems to make no such strict distinction.

A claim *erga omnes* is a claim based on an obligation that is owed to the community as a whole, including the claimant state. If we wish to enhance mechanisms for the protection of individuals, in particular in the case of serious or large scale human rights violations, we should endeavour to maintain a variety of mechanisms, including the invocation of state responsibility *erga omnes* and the invocation of state responsibility through the exercise of diplomatic protection, because this gives states a choice of means and the possibility to use the mechanism most suitable for a particular situation. When the state of nationality is in a position to respond to the serious violations of the human rights of its nationals, diplomatic protection is an effective mechanism. Yet, the state of nationality may not always be in such a position. If the violations are of such a nature to be a concern of the international community, this should not bar invocation of responsibility.

Chapter IV discusses the ICJ's approach to diplomatic protection, in particular in *Avena*. Whereas other decisions, such as *Nottebohm*, *Interhandel*, *Barcelona Traction* and *LaGrand*, have generally been considered to constitute the leading cases on diplomatic protection, the way in which the Court dealt with, or rather did not deal with, the issue of diplomatic protection in *Avena* is particularly striking. Based on the nature of diplomatic protection as discussed in Part I, the Court's approach is criticised and it is shown what kind of claim Mexico brought forward in *Avena* and what international law prescribes for such a claim. The purpose of this analysis is not merely to criticise the Court, but rather to show what the effects are of incorrect legal reasoning by the world's highest judicial organ. As stated, this is in a way a re-opening of Pandora's Box that it took so long to close. If states can pretend to present a direct claim, when the subject matter is not a violation of an obligation *erga omnes*, the willingness of other states to accept such a claim will wane. Diplomatic protection in disguise will not serve the interests of the individual and one may question whether it serves the interest of the claimant state. It is thus of paramount importance that the nature of the claim be characterised appropriately, even if this means that compliance with additional conditions is required. Chapter IV is followed by a Chapter discussing the ICJ's decision in *Diallo*. While this decision may not be of prime importance for the development of international law in general it shows significant support for the ILC draft articles and the general approach in these draft articles. In particular, the Court confirmed the relevance of diplomatic protection for the protection of human rights and accepted the definition of diplomatic protection which resulted from the modifications to draft article 1. Other issues were unfortunately not dealt with in a comprehensive manner. As in *Avena* the Court did not enter into a detailed and in-depth discussion of the exhaustion of the local remedies nor did it really consider the Congolese domestic legal situation regarding incorporation.

In the last Chapter, claims brought by individuals who felt that their interest was not addressed, or not addressed adequately, have been analysed.

The point of departure in this chapter is the question whether states have an obligation to exercise diplomatic protection and whether this exercise is subject to judicial review by national courts. Even though the decisions discussed in this Chapter stem from a variety of countries, they show remarkable similarities. One would expect the judges to decline ruling on the issue, because the exercise of diplomatic protection is traditionally considered a discretionary power of the executive of a state. Surprisingly, the national judicial organs in question, without exception, entered into the merits of the claim, reviewed the activities undertaken by the respective states on behalf of the individual national concerned and concluded, based on this analysis, that the government had met its obligations vis-à-vis the individual. While it may be disappointing that no court went as far as to condemn the government, the fact that there was judicial review is promising. Some courts explicitly stated that the decision could have been different under different circumstances.

Even if a conclusion that states have a duty to exercise diplomatic protection and that individuals have a corresponding right to claim such protection cannot be drawn from these decisions, the trend that emerges from these decisions is promising. It should be added that individuals are not always in a good position to determine what kind of protection, if at all, must be exercised. Governments, and in particular the ministry of foreign affairs, are usually more familiar with diplomatic channels and in a better position to decide what measures would be most effective. In addition, not all claims by individuals are necessarily well-founded. Nevertheless it is important that these decisions show that individuals are in a position to challenge the decision of their national government and that governments are thereby forced to consider principles such as the prohibition of arbitrary decision-taking and the legitimate expectation of the individual.

2 Further Considerations and Developments

In the previous Chapters, specific elements and applications of diplomatic protection have been discussed. Some underlying thoughts will now be addressed. First, the view is expressed that the legal nature of diplomatic protection allows it to be resorted to more often. Second, an argument is presented that the peremptory nature of fundamental human rights norms may support the development in the direction of an obligation to exercise diplomatic protection in case of violations of such norms.

Martti Koskenniemi has stated that 'law is both an instrument of policy and a momentary system of binding standards.'[3] This statement also applies to diplomatic protection: it is used to promote certain policies and considered

3 Koskenniemi, *From* Apology *to* Utopia*, the Structure of International Legal Argument*, Cambridge 2005, at 20.

a discretionary right, yet it is premised on legal conditions and influenced by other rules of international law. As an instrument for the protection of human rights, this combination has given rise to criticism since the concept of human rights and the discretionary power of states sometimes seem irreconcilable. While there may be good reasons for allowing a margin of appreciation by states, one may legitimately ask whether an instrument with such characteristics is suitable as human rights instrument, especially if the decision whether or not to exercise diplomatic protection may largely depend on political considerations of the state and not on the seriousness of the situation of the individual. Should a mechanism that through its discretionary nature may allow states to prioritise their policies rather than the well-being of their nationals be supported?

Perhaps there is no single answer to this problem. Riphagen has stated that '[p]ositive law has always been, is, and always will be, a product of *wishful thinking*, the "wish" being "political" and the "thinking" being "legal".'[4] Even if one cannot always avoid the political element, one can emphasise the legal element to the effect that the instrument is neutralised. In this thesis, I have attempted to show the legal nature of diplomatic protection and to demonstrate that its conditions are subject to rules of international law. This ensures that the admissibility of a claim brought in exercise of diplomatic protection can at all times be assessed. Such verification will avoid abuse since it offers a means to reject unjust claims. On the domestic level, considerations of fairness, legitimate expectation and constitutional rights in turn give the national judiciary a means to evaluate the (non-)exercise of protection. An emphasis on the legal nature has an additional effect: by being a customary international law mechanism that is based on legal conditions, it may be invoked by states regardless of their position in international relations. The *Diallo* case is a promising example in this respect. Perhaps this view is too idealistic, and perhaps Martti Koskenniemi is right when he attacks 'the idea that international law provides a non-political way of dealing with international disputes.'[5] Yet, even if some residue of politics is inevitable in international law, the legal nature of diplomatic protection – and an emphasis on this legal nature – will minimise the influence of political considerations on this mechanism. Even if the channels through which it is exercised may be political channels, this does not necessarily influence the legal nature of the protection. The *decision* to exercise diplomatic protection is a legal decision, which is justifiable on legal grounds even if the means by which it is exercised is political. If it is not interpreted as a political statement, but rather as a legal response to a breach of international law that is independent from political relations, it will be more easily available. In addition, diplomatic protection is not limited

4 W. Riphagen, 'Techniques of International Law', 246 Recueil des Cours 235-386 (1994), at 245 (emphasis in original).

5 Koskenniemi, *From* Apology *to* Utopia, Cambridge 2005, at 69.

to international litigation. Therefore, it is available to states (and against states) who do not wish to subject themselves to existing dispute settlement mechanisms. Another aspect is that political preferences may change much more quickly than legal regimes. In general, the latter requires either amendment or abandonment of a treaty or evidence of change in practice and *opinio juris*. It takes more than the withdrawal of diplomatic representatives. A legal mechanism thus has a more permanent status than one based on political considerations. Hence, it is, again, important to stress and enhance the legal nature of diplomatic protection.

In many of the previous Chapters, I have entered a plea for taking the protection of individual rights seriously and for recognising the role diplomatic protection could play in this regard. This plea is not part of the legal argument presented throughout the preceding chapters. It is rather a motivation for the legal analyses, which refuted the assertion that certain characteristics of diplomatic protection make it an instrument unsuitable for the protection of human rights. To strengthen this argument further, it would be interesting to assess the *effectiveness* of the exercise of diplomatic protection, in particular in relation to the effectiveness of human rights protection through other mechanisms such as the existing human rights courts and the individual complaints procedures before UN Treaty Bodies. Such an assessment however, raises a series of methodological questions and insurmountable problems with regard to the comparability and representativeness of collected materials, indeed of the very issue of gathering information. Although statistics may exist with respect to the effect of decisions issued by the UN Treaty Bodies and human rights courts such as the ECtHR,[6] no such information is available with respect to diplomatic protection. Diplomatic protection is often exercised through quiet diplomacy and only major disputes that are brought before international tribunals are made public.[7] It is thus impossible to answer the question of effectiveness based on empirical data.

Yet, the nature of diplomatic protection gives an indication of its effectiveness, in particular compared to other mechanisms. First, diplomatic protection is available to all states regardless of whether these states have signed a treaty providing for human rights protection. The claim underlying the exercise of diplomatic protection may arise from a violation of customary international law, a bilateral treaty, a multilateral treaty or any other source of international law. The UN Treaty Bodies and regional human rights courts are only available to individuals within the jurisdiction of the states that have explicitly accepted

6 See D. Donoho, 'Human Rights Enforcement in the Twenty-First Century', 35 Ga. J. Int'l & Comp. L 1-52 (2006) , at 17-27 for an estimation of compliance with decisions by the various international human rights institutions. See also L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 Yale Law Journal 273-391, at 295-297 and 344-345 (1997).

7 See Introduction, section 2.A.

the jurisdiction of such courts and bodies. Secondly, the exercise of diplomatic protection is not limited to adjudication. While states exercising diplomatic protection are required to comply with the local remedies rule and the nationality of claims rule, they need not go through court procedures. Negotiations between an Ambassador and a Minister of Foreign Affairs are also among the means available for the protection of individuals. Diplomatic protection is an inherently flexible means of dispute settlement. If the situation is politically sensitive and there is a wish not to disclose the details, mechanisms for this purpose are available, but if states wish to go through adjudication and to leave the decision to a third party, this is also possible. The choice of means may also induce compliance and in such cases states are generally more inclined to accept a settlement if they were able to 'exercise a degree of control over the process.'[8] Thirdly, enforcement of the settlement of the claim is not solely in the hands of a court, if the settlement is achieved though adjudication. Diplomatic protection is part of the law of state responsibility. Therefore, the available means for inducing compliance with international law are available ranging from retorsions to countermeasures. Thus, if negotiations on the claim fail, states may resort to sanctions, or if it is a matter of large scale and widespread violations, they may turn to the UN Security Council.

One remark should be made. The vast majority of cases brought before the UN Treaty Bodies and the regional human rights courts are claims by individuals against their state of nationality, which is fundamentally different from the exercise of diplomatic protection. However, none of these instruments prohibits claims by nationals of one state against another state, as long as the injury occurred within the jurisdiction of the host state. It is in comparison to such claims that diplomatic protection has the advantages outlined above.

When considering the future of diplomatic protection, it will be interesting to see how it will develop vis-à-vis the notion of peremptory norms. It has been established that claims based on peremptory norms can be issued both by the state of nationality and by other states *erga omnes*. The question now is to what extent an obligation exists to exercise diplomatic protection in case of a violation of a peremptory norm. Presently, states and the ILC have not supported this idea. As an example, it will be recalled that this idea was brought forward in the *Abbasi* case, where counsel on behalf of Mr Abbasi argued that the right to access to court, enshrined in Article 6 of the ECHR, forces states to exercise diplomatic protection, in particular in case of violations

8 J.G. Merrills, 'The Means of Dispute Settlement', in: M.D. Evans (ed.), *International Law*, Oxford 2006, 533-559, at 542. See however the discussion on this between Posner and Yoo on the one hand and Helfer and Slaughter on the other in E.A. Posner & J.C. Yoo, 'Judicial Independence in International Tribunals', 93 California Law Review 1-74 (2005) and L.R. Helfer & A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 California Law Review 899-956 (2005).

of *jus cogens*. In addition, Dugard suggested in his First Report that there should be an obligation to exercise diplomatic protection in case of violations of peremptory norms. While such proposals were rejected by the court and the ILC respectively, one could take this argument one step further. Even if the content of peremptory norms is not always clear, the criterion that distinguishes such norms from other norms is their peremptory and cogent nature. Contrary to what one might expect, however, this cogent nature cannot overrule states' consent to dispute settlement, as was made clear by the ICJ in the *Congo-Rwanda* case and further elaborated in the separate opinion of Judge *ad hoc* Dugard to that decision.[9] This has allowed several courts to avoid entering into the merits of cases concerning allegations of violations of peremptory norms. However, what would happen if there were consent to the dispute settlement mechanism? Can states in such a situation insist on the discretionary nature of diplomatic protection? A narrow interpretation of the concept of peremptory norms would perhaps answer this affirmatively: only the prohibition contained in the norm is peremptory, not the secondary obligations such as addressing violations of the norm or offering a remedy.[10] However, a more generous approach to peremptory norms is feasible and would find support in the Articles on State Responsibility and the *Wall Advisory Opinion*. Both refer to the obligation on all states not to recognise situations resulting from breaches of peremptory norms and the obligation to 'cooperate to bring [it] to an end'.[11] I would argue that this applies *a fortiori* to an (indirectly) injured state. In addition, while the draft articles on diplomatic protection do not contain a provision requiring states to accept the exercise of diplomatic protection against them, 'this must be implied', as it is stipulated in the Commentary, provided the exercise meets the requirements of diplomatic pro-

9 See *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002)* (Democratic Republic of the Congo *v.* Rwanda), Judgment of 3 February 2006, available at www.icj-cij.org, paras. 64 and 125; Separate Opinion Judge *ad hoc* Dugard, at para. 14; See also Ch. III, section 2.A.

10 See the discussion on this point presented by Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 78-82, who argues against the position that peremptory norms do not entail subsequent obligations. See on a related point the Separate Opinion of Judge Guillaume to the *Arrest Warrant* case, who argued that Belgium had no right under international law to issue its arrest warrant despite the relevant crime being a crime against humanity. In his line of reasoning, no right to respond, nor indeed an obligation, exists based on the peremptory nature of the crime. E. de Wet argued in turn that 'the consensus about the normative superior quality of the prohibition of torture does not yet encompass the consequences to be attributed to jus cogens norms within the national legal order. Stated differently, the consensus has not yet progressed to a level where it would include an optimization of the efficient enforcement of jus cogens norms, such as a peremptory obligation to grant the victims of torture a legal avenue for claiming compensation', E. de Wet., 'The Prohibition on Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law', 15 EJIL 97-121 (2004), at 120.See further Shelton, 'Normative Hierarchy in International Law', 100 AJIL 291-323 (2006);

11 Articles on State Responsibility, Art 41 and *Wall Advisory Opinion*, dispositif sub D, at 202.

tection.[12] Hence, if the claimant state complies with the nationality of claims and the local remedies rule, there will be consent with respect to the mechanism for the settlement of the dispute at hand: diplomatic protection. It will be recalled that the exercise of diplomatic protection per se does not require consent to jurisdiction of a specific judicial forum. The question then becomes the following: how can states refuse to exercise protection against a violation of a peremptory norm if the mechanism for such protection is available and may not be rejected by the respondent state? As I said above, states and bodies such as the ILC, which continue to stress the discretionary nature of diplomatic protection, will mostly answer this question negatively. It is to be hoped that the notion of enhanced importance of protection against violations of peremptory norms will force them to reconsider this question, to realise that diplomatic protection is a relatively easily accessible mechanism and to answer the question positively. It would certainly be a logical sequence to the trend outlined in Chapter VI.

Even if the development of the law does not go in this direction, the protection of individuals by means of diplomatic protection will retain its importance. As long as individuals are not endowed with the capacity to truly claim their rights under international law in the international arena, the exercise of diplomatic protection will continue to be necessary. The present analysis has demonstrated that diplomatic protection as a legal instrument has a clearly defined position in international law and that this position enables it to contribute to the protection of individuals against violations of their international (human) rights.

12 ILC Report 2006, at 30.