Codification of the Law on Diplomatic Protection: the First Eight Draft Articles

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Abstract. The ILC has initiated the codification of the law relating to diplomatic protection. Two reports have so far been submitted, a preliminary one and a first one in which eight draft articles are proposed. An analytical synopsis of the preliminary report will be followed by a short outline of the object and purpose of the draft articles as well as of the comments of the Commission which discussed the articles during its 52nd session. In the conclusion the contours of diplomatic protection as may be inferred from the work done so far are sketched.

1. INTRODUCTION

In 1953, the International Law Commission (hereinafter: ILC, alternatively the Commission) decided, at the request of the General Assembly, to undertake the codification of the principles of international law governing state responsibility. The first Rapporteur on the subject, Mr. García-Amador, took as point of departure the responsibility of states for damage caused to the person or property of aliens – the part of state responsibility the Rapporteur deemed most ripe for codification – which included the choice to codify that what became later *usus*, pursuant to H.L.A. Hart's distinction, to refer to as 'primary rules.'[1] Although a number of reports were submitted by the Rapporteur, the conviction gradually grew that it was undesirable to confine the subject of state responsibility to that for injury to aliens. From 1962 onwards, the ILC accordingly proceeded to codifying secondary rules pertaining to state responsibility in general which entailed that the earlier subject of responsibility for injury to aliens was left aside.

Now that the codification of the law on state responsibility is nearing its completion, the ILC deemed 'diplomatic protection', almost half a century since it was first suggested, once again, ripe for codification. In contradistinction to the point of departure of Rapporteur García-Amador, state responsibility for injury to aliens, the choice to designate the topic concerned as 'diplomatic protection' seems to immediately confine the

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1. H.L.A. Hart, The Concept of Law (1981), Chapter V.

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envisaged work to codification of secondary rules, wholly in line with the course followed with respect to state responsibility at large. Despite the fact that diplomatic protection is considered 'most ripe' for codification, it is not a subject which is considered with equanimity, to the contrary, it appears to invite such qualifications as 'controversial,' 'archaic,' and even 'obsolete.' Qualifications which induce the question as to what extent codification is desirable and if it should not yield to an exercise in progressive development, more in tune with contemporary legal values.

In 1997, pursuant to a resolution of the General Assembly,[2] a Working Group was established by the ILC to examine the topic of diplomatic protection. Its findings,[3] which were endorsed by the Commission,[4] are worth mentioning here for they indicate the initial direction of the Commission as regards diplomatic protection. As regards its scope, the Working Group decided that the Commission should focus on the consequences of an internationally wrongful act which has caused an indirect injury to the state, hence should be limited, similar to the approach taken with respect to state responsibility in general, to codification of secondary rules. As far as the content of the rules is concerned, four major areas would have to be addressed, respectively the basis for diplomatic protection, claimants and respondents in diplomatic protection, the conditions under which diplomatic protection may be exercised, and the consequences of diplomatic protection.

Following the preliminary work by the Working Group, two reports were submitted to the Commission: a preliminary one by Special Rapporteur Mr. Mohamed Bennouna,[5] and a first report,[6] which includes eight draft articles on the subject, prepared by Special Rapporteur Mr. John Dugard, who succeeded Mr. Bennouna when the latter was elected to serve as a judge in the International Criminal Tribunal for the Former Yugoslavia. The content of both reports will be discussed for their different approach of the topic: the first one challenges the institution of diplomatic protection on account of its fictitious basis which is considered to be outdated; the second one salvages the institution as traditionally practiced while simultaneously giving it a much broader scope and function than ever before with a view to strengthening and encouraging it. An approach which, of necessity, involves the more adventurous course of 'progressive development'.

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2. UN Doc. A/Res/51/160 (1996), para. 13.
3. *See* UN Doc. A/CN.4/L.548 (1997).
4. *See* UN Doc. A/52/10 (1997), para. 171.
5. UN Docs. A/CN.4/484 (1998) & A/CN.4/484/Corr.1; the report was discussed by the Commission in the spring of 1998, *see* UN Doc. A/53/10, Chapter V; subsequently an open-ended Working Group was established by the Commission which was chaired by Rapporteur Bennouna. For its report, *see* UN Doc. A/CN.4/L.553 (1998); it was endorsed by the Commission, *see* UN Doc. A/53/10 (1998), para. 110. Both reports were considered by the Sixth Committee of the General Assembly, *see* UN Docs. A/C.6/53/SR. 13; 18; 19; 20; 32 and 34.
6. UN Docs. A/CN.4/506 (2000); A/CN.4/506/Corr.1.

The first eight draft articles, the text of which has been annexed for easy reference, have already been discussed by the Commission during its 52nd session (spring and summer 2000).[7] In an addendum to the first report, yet another draft article has been proposed:[8] on account of the fact that discussion of this article has been deferred by the Commission to its next session,[9] it has not been included in the present overview. Discussion of the first two reports will be followed by a few concluding observations in which an attempt will be made to outline the emerging concept of 'diplomatic protection' as currently envisaged by the Commission. In particular, the question will be addressed as to what extent it retains the traditional view of diplomatic protection and in what respect new ground is broken.

2. The Preliminary Report by Rapporteur Bennouna

A substantial part of the preliminary report prepared by Rapporteur Bennouna is devoted to a critical review of the traditional view of diplomatic protection. The traditional view consists of what has been described by the Permanent Court of International Justice as follows:

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. The question […] whether the […] dispute originates in an injury to a private interest […] is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.[10]

According to the traditional view, the original right of the individual is substituted by that of his state of nationality, thus, in the words of the Rapporteur, "eclipsing the claim of the individual."[11] In order to substantiate the observation that the traditional view of diplomatic protection largely revolves around a legal fiction, its more strenuous aspects are highlighted: although the state is enforcing its own right, its claim is based on the original one of the individual, likewise any compensation which is due to the state of nationality on account of the injury it suffered is often calculated on the basis of the injury inflicted on the individual concerned despite the fact that the damage either one sustained can hardly be considered identical,[12] to which it may be added that the state who is awarded

7. *See* the Report on the work of the ILC on its 52nd session, UN Doc. A/55/10, Chapter V.
8. UN Doc. A/CN.4/506/Add.1. For the text of draft Article 9, *see* the Annex to this article.
9. UN Doc. A/55/10, para. 411.
10. Case of the Mavrommatis Palestine Concessions (1924), PCIJ, Series A no. 2, at 12.
11. UN Doc. A/CN.4/484, at para. 17.
12. *See* UN Doc. A/CN.4/484, at 7.

damages is nevertheless under no international obligation to subsequently forward (part of) it to its injured national. From the point of view of the state, the classical requirement of 'continuity of nationality' hardly fits the assumptions of the traditional view since it would seem that the state of nationality is injured at the time when the injury occurs, irrespective of any subsequent change of nationality on the part of the individual involved. Equally difficult to accommodate is the so-called 'clean hands rule', on the basis of which the injuring state is (partly) exonerated on account of any fault on the part of the injured individual.

Apart from the strenuousness of the traditional view, it is in particular the recognition of the (human) rights of the individual at the international level,[13] which induced the Rapporteur to question the relevance of diplomatic protection in its traditional sense: a recognition which distinctly exposes the inappropriateness of substituting individual rights by those of the state. At the same time, those individual rights establish a legal right to act for all states, not just the state of nationality.[14] These observations induced the Rapporteur to ask the Commission to answer the question: "[w]hen bringing an international claim, is the State enforcing its own right or the right of its injured national?"[15] the answer to which may profoundly affect one of the limits set earlier to the work of the Commission by the Working Group, to wit, to confine the work to codification.[16]

13. *But also* rights of foreign investors, some instances of international dispute settlement, *see* UN Doc. A/CN.4/484, at 11–13.
14. A reflection of the *obiter dictum* to that effect of the International Court of Justice in the case of the Barcelona Traction, Light and Power Company, Limited (1970), ICJ Rep. 1970, para. 33.
15. *Cf.* the interim report on "the changing law of nationality of claims" by Francisco Orrego Vicuña, which was submitted to the ILA Conference (London 2000) (Committee on Diplomatic Protection of Persons and Property) in which it is observed that "it is increasingly the right of the individual that is asserted in its own merits and no longer that of the sponsoring State." In this respect reference could also be made to the overlap between diplomatic protection and inter-state complaint procedures in human rights treaties (such as, *e.g.*, Article 33 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms), especially when the complaining state uses this procedure on account of injury inflicted on a national abroad, thus appears to enforce its own rights rather than bring an alleged violation of the public order of Europe before the Court, *cf.* Case of Denmark *v.* Turkey, 5 April 2000, 25 *NJCM-Bulletin* (2000), at 1108, 1109.
16. Another question which was posed by the Rapporteur concerned the second limit set to the work by the Working Group: "Does confining consideration of the topic to secondary rules mean that only secondary rules should be discussed, or chiefly secondary rules?" A question which was induced by various observations – as regards nationality, the 'clean-hands rule' – which all served to underline the difficulty of maintaining a rigid distinction between primary and secondary rules in particular when secondary rules touch upon and/or require elucidation of the relevant primary ones.

3. The First Report by Rapporteur Dugard

3.1. Introduction

The report which has been prepared by Rapporteur Dugard consists of an introduction and eight draft articles which are each accompanied by extensive explanatory notes. The present set draft articles includes a description of 'diplomatic protection,' it outlines the action which may be undertaken in the exercise of diplomatic protection, and it addresses questions as to the nationality of claims. Although this enumeration does not immediately disclose it, it reflects a choice on the part of the Rapporteur to address the most controversial issues first in order to clear the way for a smooth completion of the remainder of the work.[17] A choice which, particularly now that the Rapporteur has addressed these issues in a rather unorthodox manner, resulted in enticing, thought-provoking proposals.

3.2. The introduction of the subject by Rapporteur Dugard

The introduction to the first report not only serves to outline the history and scope of diplomatic protection, but also suggests how it may be used as a means to advance the protection of human rights. A suggestion which entails a rejection of the criticism formulated by Rapporteur Bennouna, but also García-Amador, as regards some aspects of diplomatic protection as traditionally understood.

The various developments which have resulted in transforming the individual into a subject of international law with standing to enforce his human rights at the international level have been adduced to buttress the claim that diplomatic protection has outlived its usefulness and is by now obsolete. The right of a state to exercise diplomatic protection should therefore, so the argument runs, be confined to those cases in which the individual has no international means of redress at his disposal, moreover, not proceed on the basis of the outdated fiction that the state is thereby enforcing its own right but rather as agent for the individual. The Rapporteur considers this argument flawed on account of its disdain for the use of fictions in law and its exaggeration of the present state of international protection of human rights. While the individual may have rights under international law, his remedies are limited. To argue the contrary "is to engage in a fantasy which, unlike fiction, has no place in legal reasoning:"[18]

> The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these

17. *See* UN Doc. A/55/10, paras. 417, 432, and 449.
18. UN Doc. A/CN.4/506, para. 25.

> conventions, have obtained or will obtain satisfactory remedies from these conventions.[19]

To which is added that the current position of the alien is no better:

> […] aliens may have rights under international law as human beings, but they have no remedies under international law – in the absence of a human rights treaty – except through the intervention of their national State.[20]

These observations lead the Special Rapporteur to conclude that

> [u]ntil the individual acquires comprehensive procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged.[21]

In that respect it is worth noting that the Special Rapporteur considers diplomatic protection part of human rights law,[22] and a compelling one at that: unlike the remedies under human rights treaties which are only available to a happy few and which are, moreover, often ineffective, diplomatic protection as a customary rule of international law applies universally and constitutes the most effective remedy at that.[23] Diplomatic protection as a means to advancing the protection of human rights constitutes, therefore, the premise of the first report,[24] hence of the draft articles.

3.3. The first eight draft articles and the comments thereon by the Commission[25]

3.3.1. Draft Articles 1 and 2:[26] *diplomatic protection, scope and means*

Apart from the emphasis on diplomatic protection as an instrument in the protection of human rights, it would seem that the draft articles envisage, at least not foreclose, a transformation of 'diplomatic protection' into a rather different, more comprehensive, institution from what it used to be,

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19. *Id.*, as well as for reference to the relevant human rights conventions.
20. UN Doc. A/CN.4/506, para. 28.
21. UN Docs. A/CN.4/506, para. 29; *see also* para. 32; A/55/10, para. 415.
22. UN Doc. A/CN.4/506, paras. 31, 32.
23. UN Docs. A/CN.4/506, paras. 31, 32, 68; A/55/10, paras. 415, 442.
24. UN Doc. A/55/10, para. 415.
25. Unfortunately the (provisional) summary records of the meetings of the Commission in which the draft articles were discussed were not available at the time of writing (fall 2000) so that the findings of the Commission could only be inferred from the 'summary of debates' as included in the Report on the work of the ILC on its 52nd session; *see* UN Doc. A/55/10.
26. As regards draft Article 1: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 33–46; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 421–427. As regards draft Article 2: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 47–60; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 433–438.

even though draft Article 1 would not seem to immediately disclose it for it takes 'diplomatic protection' to refer to

> action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.[27]

The extension of the scope of diplomatic protection beyond action taken in reaction to an internationally wrongful act may be inferred from the explanatory note to draft Article 1. A first indication of a more comprehensive notion of 'diplomatic protection' is the observation that the doctrine of diplomatic protection is closely related to, rather than part and parcel of, state responsibility for injury to aliens.[28] A second one is the reference which is made to both the 1961 Convention on Diplomatic Relations and the 1963 Convention on Consular Relations.[29] Although both Conventions contain, in the enumeration of diplomatic and consular functions, a reference to 'protecting in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law,' it would seem that, in particular as far as the latter Convention is concerned, this protection does not readily include diplomatic protection in the traditional meaning of the term. Lastly, the Rapporteur observes, without taking sides, that legal scholars tend to use the term 'diplomatic protection' in a broad sense. To illustrate the nature of the action which might be undertaken by a state in the exercise of diplomatic protection, the Rapporteur quotes Dunn, who refers to

> all cases of official representation by one Government on behalf of its citizens or their property interests within the jurisdiction of another, for the purpose, *either of preventing some threatened injury in violation of international law*, or of obtaining redress for such injuries after they have been sustained.[30]

The actual wording of draft Article 1 notwithstanding, some of the actions described, and the quoted phrase is a case in point, proceed at a time when it is either clear that no international obligation has been violated or still a moot point whether or not such an obligation has been violated by the state hosting the alien, in particular when the traditional requirement of prior exhaustion of local remedies is taken into consideration, that is, if

27. The description does not cover 'functional protection,' *i.e.* the equivalent of diplomatic protection as exercised by international organizations on behalf of their respective staff members, *see* UN Doc. A/55/10, para. 419.
28. UN Docs. A/CN.4/506, para. 33; A/55/10, para. 419.
29. UN Doc. A/CN.4/506, para. 36, even though they are adduced as codification of 'diplomatic protection' as described in the Mavrommatis case (*see* para. 2 *supra*).
30. UN Doc. A/CN.4/506, para. 43 (emphasis added); *see also* paras. 77, 80, 83, and 127.

that should be taken as a substantive rather than a mere procedural one.[31]

The substance of any action which might be contemplated, is elaborated in draft Article 2. This concerns the threat or use of force. The threat or use of force is prohibited as a means of diplomatic protection except when the protection of nationals can only be accomplished by a rescue action involving the threat or use of force. Such would be the case if the injuring state is unwilling or unable to secure the safety of the nationals of the protecting state and if those nationals are exposed to immediate danger. The use of force in such a rescue attempt should be proportionate, moreover, be terminated as soon as the mission is accomplished.

Even though the explanatory note to Article 1 subjects any action which may be undertaken in the exercise of diplomatic protection to the restrictions imposed on countermeasures in the draft articles on state responsibility, the possibility envisaged in draft Article 2 would seem to constitute an attempt to break new ground by allowing the use of force as an ultimate means of exercising diplomatic protection. Even though both Rapporteur García-Amador and Rapporteur Bennouna unambiguously excluded the use of force as contrary to the prohibition as contained in Article 2 paragraph 4 of the Charter of the United Nations, an exclusion the Rapporteur characterizes as 'laudable,' he considers it takes little account of contemporary international law, in particular that on self-defence: by virtue of the reference to the 'inherent' right to self-defence in Article 51 of the Charter, pre-Charter customary international law relating to self-defence, which includes forceful intervention to protect nationals abroad, still applies unaffected by the prohibition of Article 2 paragraph 4.[32] In addition, the Rapporteur refers to state practice since 1945 in support of military intervention to protect nationals abroad, Entebbe (raid) style, an incident which is actually adduced as a model. The Rapporteur, therefore, considers allowing the possibility of such rescue actions of nationals

31. It is still not clear which approach will be taken for the Commission decided the draft articles on state responsibility, which include this requirement, should not prejudge the issue as regards diplomatic protection. As regards draft Art. 46*ter* (state responsibility) which includes the requirement in paragraph 2 sub (b) ("The responsibility of a State may not be invoked […] if […] (b) the claim is one to which the rule of exhaustion of local remedies applies, and any effective local remedies available to the person or entity on whose behalf the claim is brought have not been exhausted"), it was suggested to replace this provision by a more neutral formula which would serve to avoid prejudging the question of which approach to the exhaustion of local remedies rule (*i.e.* the substantive or procedural), should be favoured, hence would not limit the freedom of action of the Commission in relation to the topic of diplomatic protection. An alternative suggestion was to maintain the provision on account of its being applicable also outside the field of diplomatic protection, and include a general saving clause relating to the law on diplomatic protection, *see* UN Doc. A/55/10, at 81.
32. UN Doc. A/CN.4/506, para. 57.

(which may include non-nationals),[33] despite the admitted possibility of abuse of such a right,[34] to reflect state practice more accurately than an absolute prohibition on the use of force.

The comments of the Commission focused on the word 'action' both in its temporal and substantive dimensions. As far as the scope of diplomatic protection is concerned, opinions differed as to whether it should, apart from actions taken in response to wrongful acts that have already occurred, also comprise those taken by a state of nationality to prevent injury to its national.

As far as actual action such as envisaged in draft Article 2 is considered, it will not come as a surprise that the proposal to take recourse to the threat or actual use of force in exceptional circumstances was not acceptable to the Commission. Its inclusion was considered objectionable, in particular also in view of the fact that the contemporary ban on the use of force historically derives to some extent from the prior prohibition to use force in the exercise of diplomatic protection. The use of force should not be included, not even by way of exception, particularly not in view of the draft articles (state responsibility) on countermeasures which expressly forbid the use of force contrary to the UN Charter, but also in view of the general principle of non-intervention in the internal affairs of states. Another view held that the question of the use of force was not part of the topic of diplomatic protection, hence fell outside the scope of the mandate of the Commission: diplomatic protection was related to the law of responsibility and was essentially concerned with the admissibility of claims.[35]

The possibility left open by the Rapporteur that diplomatic protection would extend beyond the traditional concept of diplomatic protection by encompassing any kind of (pre-emptive) protective acts on the part of the state in behalf of its nationals abroad, particularly also that known as 'consular assistance,' has not met with the favour of the Commission. The initial comments already would seem to point into the direction of the traditional narrow scope of diplomatic protection, and this has meanwhile been confirmed by the findings of the open-ended 'Informal Consultation' which was established by the Commission:[36] the commentary to the draft articles, in particular draft Article 1, should make it clear that the draft articles do not cover the protection of diplomats, consuls or

33. In case the majority of the beneficiaries of an Entebbe-styled rescue mission are non-nationals, the use of force would qualify as an instance of 'humanitarian intervention' rather than 'self-defence;' *see* UN Doc. A/CN.4/506, para. 60.
34. The right may not be invoked to protect the property of aliens; *see* UN Doc. A/CN.4/506, para. 59.
35. *See also infra* note 41.
36. For the report of the 'Informal Consultations,' which were chaired by the Special Rapporteur, *see* UN Doc. A/55/10, at 173 *et seq*. This Informal Consultation was requested in particular to (re)consider draft Articles 1, 3, and 6: the Commission subsequently considered the report of this Group and thereupon referred draft Articles 1, 3, and 5 to 8 to the Drafting Committee together with the report of the Informal Consultations.

other state officials acting in their official capacity nor the promotion of a national's interest not made under a claim of right.[37]

For various reasons, this confinement to the traditional scope is to be preferred. First, it consigns and confirms 'diplomatic protection' as an aspect of state responsibility in general which could not have been the case with the, albeit implicit, proposal of the Rapporteur in view of the fact that many of the actions which would, as a result, have been labelled 'diplomatic protection' would, more often than not, not be directed against the state hosting the foreign national nor be in response to an unlawful act on the part of the host state, but rather constitute an attempt to mitigate any hardships resulting from otherwise lawful acts, such as detention of the alien for crimes committed on the territory of the host state. Another reason why retaining the traditional concept is to be preferred has to do with the traditional discretion states enjoy as regards the exercise of diplomatic protection.[38] If the concept of diplomatic protection would have been extended along the lines suggested by the Rapporteur while simultaneously maintaining its discretionary nature, a category of acts, those which are currently exercised under the umbrella term 'consular assistance' might have fallen prey to that same discretion, stifling the recent, albeit tentative, tendency to consider providing consular assistance an obligation rather than a discretionary power.[39]

As regards the action which may be undertaken in the exercise of diplomatic protection, the proposal that states could by way of *ultimum remedium* take recourse to the use of force to rescue endangered nationals was unambiguously rejected by the Commission. Apart from the arguments adduced by the Commission, it could be added that this suggestion is undesirable on account of the fact that it would open the door for gunboat diplomacy and abusive practices similar to those which have rendered the whole institution of diplomatic protection controversial and unpalatable for those states which stood at the receiving end.[40] In that respect it could

37. UN Doc. A/55/10, para. 495. Apart from that, the articles will not cover functional protection by international organizations either, *id.*
38. A discretion which, the attempt to limit it by the Rapporteur in case of violations of peremptory norms notwithstanding, has been maintained, *see infra*.
39. On the basis of Art. 36, para. 1 sub (b) of the 1963 Convention on Consular Relations, *see*, *inter alia*, the two Cases concerning the Vienna Convention on Consular Relations, resp. the Breard case (ICJ order of 9 April 1998) and the LaGrand case (ICJ order of 3 March 1999); V.S. Mani, *The Right to Consular Assistance as a Basic Human Right of Aliens. A Review of the ICJ Order dated 3 March 1999*, 39 Indian Journal of International Law (1999), at 431–446.
40. *Cf.* the observation by judge Padilla Nervo, in a separate opinion in the case of the Barcelona Traction, Light and Power Company, Limited (1970), ICJ Rep. 1970, at 246: "[th]e history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a Government to make the reparations demanded."

be added that it also carries a hint of imparity and thus recalls the era of unequal relations in so far as it would favour the mighty, hence emphasize the factual inequality of states to the detriment of their formal equality. However, consideration of this revolutionary proposal by the Commission served to further clarify the nature of 'diplomatic protection' for the Commission emphasized in response that 'diplomatic protection' designates procedural initiatives (and peaceful ones at that),[41] and is concerned with the admissibility of claims rather than the various mechanisms which may serve to assist and/or protect individuals abroad which include such diverse ones as consular assistance and peacekeeping.[42]

3.3.2. Draft Articles 3 and 4:[43] *whose right(s) is (are) asserted?*

Draft Article 3 purports to address the question as to whose rights are asserted when the state of nationality invokes the responsibility of another state for injury caused to a national:[44] "[t]he State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State." Even though Article 3 seems to identify the holder of the right to exercise diplomatic protection rather than answer the question as to whose rights are asserted when this right is exercised, it should be taken to imply that the state is thereby asserting its own right and does not act 'on behalf' of its injured national (the actual wording of Article 3 notwithstanding) since the Rapporteur considers Article 3 a reflection of the exercise of diplomatic protection as traditionally understood including the fact that it revolves around the fiction that an injury to a foreign national is an injury to his state of nationality.

Draft Article 4 elaborates the reference to the discretionary nature of diplomatic protection made in Article 3. It in particular seeks to limit the scope of that discretion by formulating an obligation to exercise diplomatic protection in case the injury inflicted upon a foreign national is the result of violation(s) of peremptory norms. Although the Rapporteur

41. Three options were formulated in the report of the Informal Consultations to accomplish this *desideratum*: 1. "Diplomatic protection means a procedure taken by one State in respect of another State involving diplomatic action or judicial proceedings [or other means of *peaceful* dispute settlement?] […] in respect of an injury to a national caused by an internationally wrongful act attributable to the latter State;" 2. "Diplomatic protection is a process in which a State takes up the claim of its national, etc. [thereafter substantially the same as Option one];" 3. "Diplomatic action is a process involving diplomatic or judicial action [or other means of peaceful dispute settlement] by which a State asserts rights on behalf of its nationals at the international level for injury caused to the national by an internationally wrongful act of another State *vis-à-vis* that State;" *see* UN Doc. A/55/10, para. 495.
42. UN Doc. A/55/10, para. 436.
43. As regards draft Article 3: for the proposals of the Rapporteur, *see* UN Docs. A/CN.4/506, paras. 61–74; A/55/10, paras. 440–443, 446; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 444–445. As regards draft Article 4: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 75–93; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 450–455.

considers diplomatic protection an effective remedy for the protection of the human rights of aliens, this does not, as could already be inferred from draft Article 3, entail considering it an individual human right. The Rapporteur observed that state practice seems inconclusive as regards diplomatic protection as something to which the individual is entitled as a matter of right in particular since it is not clear whether any such right goes beyond a right of access to consular officials abroad. However, in view of "signs in recent State practice […] of support for the view that States have not only a right but a legal obligation to protect their nationals abroad,"[45] the Rapporteur nevertheless concludes that diplomatic protection should be considered in terms of an obligation. A conclusion which induced the limitation on the traditional discretion as formulated in draft Article 4. Because this limitation constitutes 'progressive development,' it has been confined to those cases where the national involved has no remedy, and then only when it concerns violations of peremptory norms. In addition, states are given a wide margin of appreciation by the express reference to national and international interests which may override this obligation even though the use of this margin is made subject to municipal (judicial) review. And, lastly, the duty to exercise diplomatic protection is restricted to nationals with a genuine link to the state of nationality.[46]

The comments of the Commission focused on the wording of draft Article 3 for its bearing on the otherwise uncontroversial content of the provision, a wording which should be adjusted in order to keep the subject matter within its proper bounds, *i.e.* that of international responsibility, and in keeping with traditional theory in particular the fiction on which it rests that it is the state which suffers damage in the person of its national. It was suggested to delete the reference to the discretionary nature of the right to exercise diplomatic protection in Article 3 in order not to prevent states from enacting legislation that would oblige them to exercise diplomatic protection. Even though the Commission did not want to bar the possibility of municipal restrictions of the discretion involved,[47] it did resist the attempt made in draft Article 4 to limit the discretionary nature of diplomatic protection in international law. Some members of the Commission considered the state practice adduced by the Rapporteur to

44. UN Doc. A/CN.4/506, para. 61; *but see* UN Doc. A/55/10, para. 440 in which the question addressed in draft Article 3 is identified by the Rapporteur as "whether the right of protection was one pertaining to the State or to the individual" whilst in para. 441 it is again taken as addressing the question as to whose right is asserted when diplomatic protection is exercised.
45. UN Doc. A/CN.4/506, para. 87.
46. *See also* draft Art. 5, *infra*: although the Rapporteur does not consider 'effectiveness' a condition which should apply to those who possess just one nationality, draft Art. 4, para. 2 sub (c) would seem to constitute an exception to that view, *see* UN Doc. A/55/10, para. 93.
47. *See also* the considerations of the Informal Consultations, UN Doc. A/55/10, at 174.

buttress the opinion that diplomatic protection is a duty "an optimistic assessment of the actual materials available."[48] In addition, it was stated that the duty as laid down in Article 4 did not indicate to whom it was owed, to the individual concerned or the international community as a whole? It was observed that diplomatic protection was not recognized as a human right and could not be enforced as such. In that respect the Commission emphasized that a distinction should be made between human rights and diplomatic protection.[49] As far as the envisaged duty was concerned, it was noted that Article 4 comprised a contradiction by making the obligation to exercise diplomatic protection conditional on the request of the injured individual to that effect: "if the State had a duty, then it had to perform it."[50] In addition, the reference to *ius cogens* was subjected to scrutiny. Apart from the lack of a clear understanding of the meaning and scope of *ius cogens*, it was observed the formulation of Article 4 contradicted the principles of state responsibility under which not only the state of nationality but any state had the right and duty to protect the individual in case of violations of peremptory norms. Perhaps on account of this, the subject matter of Article 4 was observed to constitute part of the broader topic of state responsibility rather than diplomatic protection.

It would seem that the proposals of the Rapporteur – retaining the traditional view of diplomatic protection in Article 3 on the one hand, and undermining it to a certain extent in Article 4 on the other – have been accepted by the Commission only to the extent that they concur with the traditional view, since the possibility to consider states duty-bound to exercise diplomatic protection, in particular when doing so should be considered as the corollary of a subjective right of the individual to that effect, has clearly not been accepted.

48. UN Doc. A/55/10, para. 450.
49. The need to distinguish between diplomatic protection and the protection of human rights had already been expressed by the Commission in response to the introduction of the subject by the Rapporteur. The Commission made it clear it did not endorse this emphasis on diplomatic protection as an instrument for ensuring that human rights are not infringed. In that respect it was added that even though the concept of diplomatic protection can be considered to extend to the protection of the human rights of individuals, it is only the state of nationality which can intervene in cases of diplomatic protection whilst in case of human rights violations, any state could do so irrespective of the nationality of the victims; *see* UN Doc. A/55/10, para. 422.
50. UN Doc. A/55/10, para. 453.

3.3.3. Draft Articles 5, 6, 7, and 8:[51] *the nationality of claims*

The notion 'state of nationality' is, for the purpose of diplomatic protection of natural persons, defined in draft Article 5 as "the state whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization."[52] Apart from limitations set by treaty obligations, granting its nationality to individuals is in principle a question which belongs to the exclusive jurisdiction of the state. However, international custom and general principles of law do prescribe limits when nationality constitutes the title to the exercise of diplomatic protection (since to exercise diplomatic protection is to place oneself on the plane of international law)[53] by indicating which linkages are required between state and individual to secure the admissibility of any claim. As regards the requirement of a 'genuine' or 'effective' link such as has been pronounced in the Nottebohm case,[54] particulary in cases of naturalization, the Rapporteur does not consider this requirement a general principle which would apply to diplomatic protection. Instead of emphasizing the famous genuine link passage in the pertinent judgment, the Rapporteur points to other considerations of the Court in order to demonstrate that the predominant concern of the Court was to establish whether or not the nationality of Liechtenstein acquired by Nottebohm could be validly invoked against Guatemala rather than against any other state. The genuine link passage should, therefore, be confined to the peculiar facts of the case. As far as the requirement is stated to be a rule of customary international law in cases not involving dual or plural nationality, the Rapporteur adds, it enjoys little support and it would, moreover, seriously undermine the traditional doctrine of diplomatic protection if applied strictly, on account of the fact that the nationality of many people does not correspond with an effective link with the state of nationality, for instance on account of residence abroad, as a result of which they would be excluded from the benefit of diplomatic protection.

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51. As regards draft Article 5: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 94–120; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 459–470. As regards draft Article 6: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 121–160; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 473–479. As regards draft Article 7: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 161–174; for the comments of the Commission, *see* UN Doc. A/55/10 paras. 482–484. As regards draft Article 8: for the proposals of the Rapporteur, *see* UN Doc. A/CN.4/506, paras. 175–184; for the comments of the Commission, *see* UN Doc. A/55/10, paras. 487–493.
52. Note that this provision only concerns natural person: it is still not clear whether or not legal persons will be included in the draft articles; *see* UN Doc. A/55/10, paras. 469, 470. However, during the Informal Consultations it was agreed that the draft articles should endeavour to also cover the protection of legal persons, on the understanding the Commission may reconsider this issue; *see* UN Doc. A/55/10, para. 495.
53. Nottebohm case (1955), ICJ Rep. 1955, at 20, 21.
54. *Id.*, at 23.

With respect to dual or plural nationals, the requirement of an effective link is, according to draft Article 6, applicable: the state of nationality may exercise diplomatic protection on behalf of an injured national against a state of which the injured person is also a national in case the individual's dominant or effective nationality is that of the claimant state. Dual or multiple nationality is considered by the Rapporteur, even though numerous attempts have been made to eliminate it, 'a fact of international life' and diplomatic protection on behalf of a dual or multiple national should, therefore, be possible. Even though state practice, judicial decisions and doctrine are divided on this point, the Rapporteur considers the weight of authority to support the dominant nationality principle in matters involving dual nationals, and draft Article 6 should accordingly be taken as reflecting the current position in customary international law. As far as determination of the dominant or effective nationality is concerned, *i.e.* as to what constitutes dominancy or effectiveness, the Rapporteur observes that the indeterminacy the notion suffers has to a large extent been eliminated by the jurisprudence of the Iran-US Claims Tribunal in which the factors which should be taken into consideration have been elucidated.[55] In addition, the Rapporteur refers to the safeguard formulated by the same tribunal, known as the 'A/18 *caveat*,' on the basis of which the non-dominant nationality of the claimant will remain relevant when the merits of a claim will be considered.

When the exercise of diplomatic protection on behalf of dual or multiple nationals is geared towards states of which the individual concerned is not also a national, the requirement of an effective link is, however, not applicable: any state of which a dual or multiple national is a national may exercise diplomatic protection on behalf of that national against a state of which he is not also a national (and two or more states of nationality may also jointly exercise diplomatic protection on behalf of a dual or multiple national). The Rapporteur observes that conflict over the requirement of an effective link in cases of dual nationality involving third states is best resolved by a compromise which requires the claimant state to demonstrate that there exists a *bona fide* link – apparently a less demanding requirement than proof of an effective link[56] – between it and the injured person and not by applying the effective nationality principle (for unlike diplomatic protection by the state of nationality on behalf of a dual national against the other state of nationality of the dual national involved, no 'clear conflict of laws' is at stake).[57] Although the possibility of diplomatic protection by either state of nationality is unqualified in draft Article 7,

55. Weighing the different factors would nevertheless still seem to involve an element of arbitrariness. *Cf.*, *e.g.*, the enumeration considered compelling by the majority in the interlocutory award in the Ebrahimi case (1989) as regards the question of the effective nationality of Mrs. Ebrahimi with the enumeration of factors contained in the dissenting opinion of Judge Parviz Ansari, 22 IRAN-U.S. C.T.R., at 144–150.
56. *See* UN Doc. A/CN.4/506, para. 170.
57. *See* UN Doc. A/CN.4/506, para. 172.

the Rapporteur nevertheless considers it 'a compromise rule,' but it is hard to see what the compromise consists of now that the exercise of diplomatic protection is unqualified by any demand as to *bona fides* or effectiveness.

Nationality is wholly discarded when it concerns diplomatic protection on behalf of *de facto* and *de jure* stateless persons as envisaged in draft Article 8, a progressive, and from the human rights point of view important, proposal. *In lieu* of nationality, the *locus* of legal residence establishes the legal interest of the claimant state. The Rapporteur considers the traditional requirement of nationality of claims, since it fails to take account of the position of both stateless persons and refugees, "out of step with contemporary international law."[58] Even though the relevant international instruments follow the traditional requirement,[59] the substance of refugee law would seem to provide a sufficient basis for the contrary view. In this respect the Rapporteur refers on the one hand to the intention of the refugee to sever his relationship with the country of origin when he applies for asylum,[60] and on the other to the preparedness on the part of the state of refuge to protect the refugee as may be inferred from the grant of asylum. In case of *de facto* and *de jure* stateless persons, the Rapporteur, therefore, suggests to apply 'residence' in lieu of 'nationality' as the relevant link, subject to the proviso that any claim should only concern injuries suffered after the person concerned became a legal resident of the claimant state,[61] which obviously excludes claims against the country of origin for injuries sustained prior to flight.

The Commission *grosso modo* accepted the draft Articles on the nationality of claims, occasionally refining the proposals, in some respects suggesting new ones. The comments with regard to draft Article 5 concentrated on the notion of 'effective nationality,' geared on the one hand to the question of nationality of claims and on the other to the issue of opposability.

As regards the nationality of claims, the Commission considered the observation of the Rapporteur that maintaining the requirement of 'effective nationality' would entail undermining the traditional doctrine overstated. It was observed, contrary to the observation by the Rapporteur,

58. UN Doc. A/CN.4/506, para. 175.
59. However, the provision adduced by the Rapporteur – para. 16 of the Schedule to the 1951 Convention on the Status of Refugees – concerns diplomatic and consular assistance and protection rather than diplomatic protection in the traditional sense.
60. Considering the fact that an individual is not capable of waiving the right of the state to exercise diplomatic protection, it would seem appropriate not to refer to the conscious severance of links with the state of origin (nationality) by the refugee but instead to the acts or omissions on the part of the state of origin (nationality) which gave rise to a well-founded fear of persecution (*cf.* the definition contained in the 1951 Convention on the Status of Refugees) and necessitated flight.
61. It is not clear why the latter phrase has been added since claims against the state of origin would be barred by an analogous application of the rule of 'continuity of nationality,' *see* draft Art. 9, para. 4.

that the principle of 'effective nationality' could be useful in those cases where people would be hard-pressed to prove their nationality in providing a basis for the evidence of nationality that would otherwise not be available. In addition, it was observed by some members that the 'place of residence' created a link with the host state that was just as effective as 'nationality' to establish the legal interest of a state, and would, therefore, provide a basis for diplomatic protection even if it digressed from traditional doctrine. 'Residence' should therefore, in the consideration of Articles 5 to 8, not be considered as just an accessory but as an actual linking factor. Nonetheless, the importance of 'habitual residence,' it was added in response by some members, should not be overemphasized in the context of diplomatic protection: the habitual place of residence, in case it is not in the state of nationality would not, for instance, entitle that state to exercise diplomatic protection, except in case of *de facto* or *de jure* stateless persons, nor would the state of nationality lose the right to exercise diplomatic protection in case his national habitually resides abroad.

The Commission proposed to delete the reference to modes of acquisition of nationality in Article 5 since the issue at stake was one of opposability rather than acquisition of nationality. It was proposed that the draft articles should assume that states are free to grant nationality to individuals and to leave any challenging the right of a state to protect a national to other states. If this course would be followed, however, the state(s) entitled to challenge a claim on account of its nationality, which would presumably focus on the existence of an effective link between the claimant state and its injured national, would have to be identified. The issue of opposability, which thus may entail questioning the nationality of a claim in terms of 'effective link,' differs from the proposal of the Rapporteur insofar as he suggested not applying this and related notions to those who just possess one nationality, but it seems to accord with the view of the Rapporteur with regard to nationality which has been acquired by means of naturalization considering the qualification *bona fide* which was added to naturalization in draft Article 5.

With regard to draft Article 6, apart from the consideration that its substance should follow that of Article 7, the Commission was divided as to whether it could be taken as reflecting (current thinking in) international law. In addition, opinions were divided on the question whether or not to adhere to the classical rule of the non-responsibility of the state in respect of its own nationals. However, it would seem that the majority did not accept the argument that it should be adhered to on account of the fact that dual nationality entails advantages so that its disadvantages should be suffered as well. In this respect it was observed by the Rapporteur that in some instances dual nationality was the consequence of the impossibility to denounce one's nationality. Anyhow, although it would seem the debates are inconclusive as yet, a revised provision may well retain the substance of Article 6 with a few modifications. For instance, it was preferred to

refer to 'dominant' rather than 'effective' nationality because it implied that one of the two nationality links was stronger than the other whilst two nationalities could be considered to be equally 'effective.' Or, in a similar vein, the emphasis should not be put so much on the dominant nationality of the claimant state but on the lack of a genuine link between the dual national and the respondent state.

Although the Commission generally favoured Article 7, concern was expressed about its formal approach to nationality now that the principle of effective nationality was not considered applicable. It was suggested that should the principle of effective nationality be set aside, an escape clause should be inserted in Article 7 in order to prevent it from being used to exercise diplomatic protection by states without an effective link with the dual or multiple national involved. As regards the proposed possibility of two states of nationality exercising diplomatic protection simultaneously but separately against a third state, it was suggested that the third state should be entitled to apply the principle of dominant nationality in order to deny one of the claimant states the right to exercise diplomatic protection. This suggestion, if taken up, would also take care of the difficulties the Commission foresaw when one of the two states would waive or not pursue its claim whilst the other would pursue the claim.

The Commission did accept, some dissenting members notwithstanding, the proposal to extend diplomatic protection to *de facto* and *de jure* stateless persons, suggesting draft Article 8 might be split in two paragraphs, one on stateless persons the other on refugees. The manner of acceptance is worth noting:

> It was generally agreed that article 8 represented progressive development of international law. But such a progressive development of international law was warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. Article 8 reaffirmed the role of the institution of diplomatic protection in achieving a basic goal of international law, that of civilized co-existence based on justice, and demonstrated in exemplary fashion how the Commission could, at the right time and in an appropriate context, fulfil one of its primary tasks, that of the progressive development of international law.[62]

Nevertheless, the need to retain the discretionary nature of diplomatic protection was emphasized in this context in order to avoid turning the better into the enemy of the good, that is, diplomatic protection should not be taken to imply the subsequent grant of nationality in order not to create a disincentive for states to admit refugees. In the same vein, *i.e.* in terms of burdens on the part of the states hosting refugees, the suggestion was made that the exercise of diplomatic protection should fall to UNHCR. As regards the criterion which would take the place of 'nationality' as the

62. UN Doc. A/55/10, para. 487.

basis for the exercise of diplomatic protection, it was suggested 'legal residence' should be taken to require residence of a certain duration before it could trigger diplomatic protection, another suggestion was to replace 'legal residence' with the notion of 'effective link.'

As far as the nationality of claims is concerned, it would seem considerable progress has been made on the basis of the proposals of the Rapporteur. First of all, the Commission has contributed to the proposals by suggesting 'effective nationality' may constitute evidence of the nationality of an injured person. Secondly, it suggested 'residence,' or rather 'the place of residence,' may constitute not just an accessory but an independent linking factor. However, neither the bearing nor the beneficiaries of this last-mentioned suggestion are clear: does it apply beyond the case of *de facto* and *de jure* stateless persons to, for instance, migrant workers whose effective nationality would seem to be that of the state where they habitually reside even if they do not possess its formal nationality but still retain the nationality of the country of origin?[63]

As far as the intricacies involved in case of dual or multiple nationality are concerned, it would seem the debates are still inconclusive, even if the Commission was clear that the possibility that either one of the states of nationality presses a claim against the other should not be rejected merely on account of the fact that disallowing it would not be unfair considering the advantages dual nationals derive from their multiple citizenship. As far as those advantages are concerned, draft Article 7 is a case in point: given the discretionary nature of diplomatic protection, the chance that the claim of a dual national against a third state will be espoused by the state of nationality is doubled (an advantage which should be considered a side-effect of the fact that an injury to a dual national constitutes an injury to both states of nationality as a result of which both states are entitled to exercise diplomatic protection). Meanwhile draft Article 6 has been accepted by the Informal Consultation, subject to adding safeguards in order to prevent the possibility of abuse, since it was considered to accord with current trends in international law.[64]

As regards the possibility of extending diplomatic protection to *de facto* and *de jure* stateless persons, the condition of nationality has been discarded as manifestly inapplicable, clearly so in case of stateless persons, somewhat less obvious in case of refugees who often still possess a nationality, a nationality which cannot, however, be considered an effective one. The possibility foreseen in draft Article 8 gives nevertheless

63. A question which is similar to that raised in the Nottebohm case, albeit in a contemporary setting. Although the commentary of the Rapporteur would yield a negative answer, the answer becomes less straightforward to give if the proposal to consider the *locus* of residence an independent linking factor is taken into consideration.

64. The safeguards which were suggested were either to emphasize the qualification contained in draft Art. 9, para. 4 insofar as it affects Art. 6, or to emphasize that the national should not have an effective link with the respondent state or to include in a separate provision a definition of 'dominant' or 'effective nationality,' UN Doc. A/55/10, at 175.

rise to some questions. Would 'legal residence' in case of refugees exclusively refer to residence granted upon formal admission as a refugee or would it also extend to residence which is granted on humanitarian grounds to asylum seekers who do not qualify for admission as refugees? Although the nationality of refugees can be considered ineffective for the reasons set out by the Special Rapporteur rather than on account of the fact that it is highly unlikely the state of nationality will consider espousing a claim of one of its citizens who fled and took refuge abroad, would that state nevertheless still be entitled to espouse the claim of a national who enjoys asylum elsewhere,[65] in general, *i.e.* against third states, and against the state of refuge in particular?

4. Some Concluding Observations

Throughout the first report, diplomatic protection is emphasized as an important instrument in human rights law. Even though the Rapporteur has chosen to address the most controversial aspects of diplomatic protection first, which may account for the somewhat unusual interposition of the proposal contained in draft Article 2, these apparently do not comprise the fact that diplomatic protection has always been a right of states which is invoked to vindicate their own rights rather than those of their injured nationals. In other words, the emphasis on diplomatic protection as an instrument and part of human rights law, in particular as an enforcement mechanism, seems to predominantly serve to underline its contemporary usefulness in the face of criticism which emphasizes its obsoleteness. Particularly so, since the recurrent emphasis on diplomatic protection as an instrument of human rights law could equally have resulted in answering the question posed most recently by Rapporteur Bennouna as to whose right is enforced when a state exercises diplomatic protection, by stating that it concerns the enforcement of individual rights, hence could have resulted in discarding the traditional fiction on which diplomatic protection rests by designating the state as the representative or agent of the individual. Pragmatism probably induced the Rapporteur not to discard

65. The Rapporteur referred in this respect to Grahl-Madsen who suggested that the state of nationality of the refugee loses its right to exercise diplomatic protection in behalf of the refugee (UN Doc. A/CN.4/506, para. 176). Without wishing to detract in any way from the conclusion reached by Grahl-Madsen, it would seem that the point of departure constituted the desire to ensure the integrity of asylum, *i.e.* ensuring "that the refugee will find genuine protection in his place of asylum," which is accomplished "by assuring both the refugee and his state of refuge that the state of origin has lost any right to act 'on behalf' of its exiled national" (A. Grahl-Madsen, *Protection of Refugees by their Country of Origin*, 11 YJIL 362–395 (1986), at 395), whilst the question raised here derives from the overall context of the draft articles and focuses on the state of nationality and the extent to which 'legal residence' may trump 'nationality'.

diplomatic protection as traditionally understood,[66] in particular its fictitious basis, and to merely translate this emphasis in a few modifications of diplomatic protection while leaving its traditional structure intact. Only the attempt to formulate an obligation to exercise diplomatic protection when violations of peremptory norms are at stake may be considered a corollary of the emphasis referred to in the sense that it challenges the traditional fictitious basis of diplomatic protection, but only if is taken to constitute a subjective right of the individual with a corresponding obligation on the part of the state of nationality rather than an obligation owed to the international community as a whole.

Although the concern with human rights, in particular the general lack of effective remedies, has not been carried to its logical extreme, it did no doubt induce the more innovative proposals of the Rapporteur, such as in particular the possibility to exercise diplomatic protection on behalf of *de facto* and *de jure* stateless persons. A proposal which too leaves the traditional concept of diplomatic protection wholly intact for it just substitutes 'legal residence' for 'nationality' to establish the legal interest of a particular state in those cases where the condition of nationality is either manifestly inapplicable simply because the injured person does not possess a nationality or is insufficient to establish the legal interest of the state of nationality considering the conscious severance of all ties with that state (in response to preceding acts or omissions on the part of the state of nationality which compelled the national concerned to seek refuge abroad) in favour of the state which assumed the responsibility to protect the refugee in accordance with international refugee law (a responsibility which would as a result be expanded to include diplomatic protection). Similar to the case of refugees whose nominal nationality is discarded in favour of another linking factor as a result of which diplomatic protection in their behalf is possible by the host state, the proposal as regards dual (or multiple) nationals in Article 6 too lifts the veil of 'nominal' nationality. This time in order to escape from the consequences of the traditional rule of non-responsibility of the national state in favour of diplomatic protection by the state whose nationality is the effective or rather the dominant one, hence in favour of the injured individual who would otherwise have been excluded from the benefit of diplomatic protection.

In short, the concern with human rights, hence with the predicament of

66. Perhaps in view of the fact that the majority of states supported the traditional view as appeared from the discussions of the preliminary report by the first Special Rapporteur in the Sixth Committee of the General Assembly. *Cf.*, by way of illustration, the statement by the representative of the United Kingdom: "[o]n the topic of diplomatic protection, his delegation was perplexed or even disappointed. The idea put forward by the Special Rapporteur that diplomatic protection should be recognized not as an inter-State institution of international law but as an arrangement under which the State acted as agent for its injured national would not be codification at all but a radical reformulation and it was hard to see what benefit would flow from it;" *see* UN Doc. A/C.6/53/SR.14, para. 8.

the individual, serves as a normative yardstick to adjust some of the, from the point of view of the injured individual, harsher aspects of the traditional concept of diplomatic protection. It should be added that this yardstick is wholly in accordance with the original purpose of 'diplomatic protection,' namely, to mitigate the disadvantages and injustices to which natural and legal persons are subjected.[67] It would seem that, despite the dismissal of the emphasis on diplomatic protection as an enforcement mechanism within human rights law, the Commission nevertheless contributed to revising the traditional concept of diplomatic protection in the same vein as the Rapporteur. The suggestions to substitute 'nationality' by that of 'effective nationality' to accommodate the difficulty of proving one's nationality, and to consider 'residence' an independent rather than an accessory linking factor are cases in point. As a result of the combined efforts of the Rapporteur and the Commission, the emerging concept of 'diplomatic protection' may be characterized as one which, while retaining the structure of the traditional blue-print, nevertheless accommodates contemporary values regarding the human person within and on the basis of that structure, as a result of which diplomatic protection extends to persons who in the past, however deserving their cases, were left to fend for themselves.

Annex: Text of Draft Articles 1–9 on Diplomatic Protection[68]

Draft Article 1

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.
2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Draft Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;
(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

67. As stated by the Commission, *see* UN Doc. A/53/10, para. 73.
68. The text of draft Articles 1 to 8 has been taken from UN Doc. A/CN.4/506; that of draft Art. 9 from UN Doc. A/CN.4/506/Add.1.

(c) The nationals of the protecting State are exposed to immediate danger to their persons;
(d) The use of force is proportionate in the circumstances of the situation;
(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Draft Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to Article 4, the State of nationality has a discretion in the exercise of this right.

Draft Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.
2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;
(b) Another State exercises diplomatic protection on behalf of the injured person;
(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Draft Article 5

For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization.

Draft Article 6

Subject to Article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Draft Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in Article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.
2. Two or more States of nationality, within the meaning of Article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Draft Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

Draft Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.
2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.
3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.
4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.