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THE INJURED INDIVIDUAL’S RIGHT TO COMPENSATION IN THE LAW ON DIPLOMATIC PROTECTION

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1. About ten years after the adoption of the ILC articles on diplomatic protection, the UN General Assembly has included the question of the elaboration of a Convention in its 2016 agenda (1). One of the main current challenges of the law on diplomatic protection is the scope of discretion when a State exercises diplomatic protection. This question is linked to the ambiguous function of diplomatic protection and to the difficulty of considering an injured individual as the holder of rights to which a State gives effect by bringing its international claims.

The existence for the State of nationality of a duty to exercise diplomatic protection and of a correspondent right to protection for the injured individual is controversial. There are provisions in the Constitutions of certain Eastern European States guaranteeing diplomatic protection to their citizens for injuries suffered abroad, but it is doubtful whether they confer an enforceable right (2). During the drafting of the ILC articles and in recent consultations, some States asserted that a State enjoys discretion on whether to act in protection of its nationals, even though “subject to its internal laws” (3). In fact, there is a tendency to limit States’ discretion under domestic law, such

(1) Resolution of the UN Assembly General 68/113 of 16 December 2013.
(2) For example, article 61 of the Constitution of Russia and article 36 of the Constitution of Poland.
(3) This was the position of the United Kingdom, UN doc. A/CN.4/561, p. 28. See also the position of Norway, on behalf of the Nordic countries, UN doc. A/CN.4/561, p. 36, and of the United Kingdom, UN doc. A/C.6/68/SR.15, p. 9 (“the apparently non-binding draft article 19 (Recommended practice) seemed inappropriate for inclusion in a treaty and risked undermining the discretion which States had to decide whether or not to exercise diplomatic protection”).
as under the doctrine of legitimate expectation in the United Kingdom (4). Another view considered the existence of a duty to exercise diplomatic protection when citizens have suffered gross violations of human rights and do not have access to international organs capable to afford reparation (5). The Constitutional Court of South Africa, for example, declared that the government has a duty to exercise diplomatic protection in case of “gross abuse of human rights norms” to the detriment of its citizens (6). However, the recognition of a right to diplomatic protection under international law is still debated.

Assuming that States maintain a certain amount of discretion on whether to exercise diplomatic protection, this does not imply that they may freely dispose of any consequence of a wrongful act injuring one of their nationals and, in particular, of a sum obtained from successful claims. When States decide to exercise diplomatic protection, they give rise to an expectation for individuals to obtain compensation.

This explains why, notwithstanding their reluctance to relinquish discretion on whether to exercise diplomatic protection, States have noted the importance to enhance the position of the individual as the effective beneficiary of reparation (7).

This is also a consequence of the advent of human rights law, which has broadened the function of diplomatic protection by enhancing the centrality of individuals. Diplomatic protection has progressively become an instrument for the protection of human rights against violations committed by States other than the State of nationality. In his fifth report on diplomatic protection, the special rapporteur John Dugard maintained that “the customary international law rules on diplomatic protection that have evolved over several centuries, and the more recent principles governing the protection of human rights, complement each other and, ultimately, serve a common goal — the protection of human rights” (8). This view is reflected in certain

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(5) This position was upheld by Italy (see UN doc. A/CN.4/561, p. 28).


(7) According to El Salvador, for example: “Today, however, diplomatic protection should be seen as just one of the various means of guaranteeing the rights of the individuals in the international community”, UN doc. A/68/115/Add. 1, 30 August 2013, p. 6. See, also, the position of Poland UN doc. A/68/115, 26 June 2013, and that of Saudi Arabia, UN doc. A/C.6/68/SR.15, p. 7.

comments delivered by Governments (9) and in the recent case-law of the International Court of Justice (ICJ) and the European Court of Human Rights that will be discussed in further sections of this article.

It is not clear to what extent the ILC intended to confirm the traditional function of diplomatic protection, according to which the national State asserts its own right to have its citizens treated fairly by third States. The question of the rights involved in diplomatic protection was deliberately left unsettled by the ILC when it adopted in article 1 a deliberately ambiguous definition of diplomatic protection. The commentary explains that the provision “is formulated in such a way to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its nationals — or both” (10).

Considering diplomatic protection as a procedure for implementing rights pertaining to individuals — even if not necessarily defined as human rights — would contribute to characterize the position of individuals as actual beneficiaries of diplomatic protection. At the same time, should the national State be considered under a duty to transfer compensation, or a share of it, to its injured national, one may wonder whether this means that the latter is the actual holder of the right to reparation (11).

The wording of draft article 19 (c) of the articles on diplomatic protection, saying that States “should” transfer the money, seems to exclude that individuals have a right to receive compensation. It leaves the question open to further developments of practice.

These questions will be discussed in order to ascertain whether individuals hold a right to receive compensation and whether this leads to overcome the traditional approach to diplomatic protection. A clarification on this point is not only of theoretical importance, and may have practical implications, such as those concerning the effects of a State’s waiver of a claim concerning an injury to one of its nationals, or the risk of multiplication of claims and double recovery.

(9) See, for example, UN doc. A/CN.4/561, p. 35 (Netherlands), UN doc. A/68/115 (Poland), UN doc. A/68/115/Add. 1 (Colombia, El Salvador).


(11) The theory of a fiction founding diplomatic protection was argued by the special rapporteur Mr. Bennouna in the preliminary report on diplomatic protection: “In fact, the traditional view is based largely on a fiction of law” (Preliminary report on diplomatic protection, by Mr. Mohamed Bennouna, UN doc. A/CN.4/484, p. 313, para. 21).
2. Under traditional international law, aliens had to be granted a minimum of rights. If the host State did not respect this standard, it would incur international responsibility towards their national State. Individuals did not have the right to bring a claim to compensation; the national State was the only entity entitled to seek reparation for the injuries suffered by individuals abroad. Since individuals were not recognised as subjects of international law, the national State had the exclusive right to make a claim for the benefit of its citizens against ill-treatments and denials of justice perpetrated by host States.

This view was well illustrated in a 1931 award of the General Commission for United States-Mexico reparation claims: “The relation of rights and obligations created between the States upon the commission by one of them of an act in violation of international law, arises only among those States subject to the international juridical system. There does not exist, in that system, any relation of responsibility between the transgressing State and the individual for the reason that the latter is not subject to international law” (12).

Under the classical theory, the claimant State exercising diplomatic protection asserted its own right to ensure that its citizens are treated by third States according to the international minimum standard. According to Vattel, “Quiconque maltraite un citoyen offense indirectement l’État, qui doit protéger ce citoyen ...” (13).

Therefore, diplomatic protection was conceived as a procedure to enforce the right of the State. It was not premised on a mechanism of surrogacy, but on the assumption that the State suffers an indirect injury, stemming from the violations perpetrated against its citizens.

The best known theorization of this approach was made by the PCIJ in the Mavrommatis Palestine Concessions case: “It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. 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 right — the right to ensure, in the person of its subjects, respect for the rules of international law” (14).

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(14) P.C.I.J. Publications, Series A, No. 2, p. 12. The same approach was taken by the ICJ in relation to international organizations. In the advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations, the Court stated...
Under this theory, the State was entitled to claim compensation for its own injury. This implied that the State exercises total control over the claim. It could deal with it independently of the will of the individual and waive it at any time for prevailing national interests. It had, also, the power to dispose freely of the sum obtained as reparation. All this was a consequence of the function of protection of rights of States assigned to diplomatic protection according to the State-centric framework of the international community.

The special link between the injury of the State and that of the individual affected two aspects of the claim to compensation. One is the requirement of continuous nationality, according to which the injured individual must have been one of the State’s nationals from the time of the injury to that of the claim. The bond of nationality justifies the claim that the State derives from the wrongful act perpetrated against individuals.

The other aspect is that the amount of compensation is normally measured according to the harm suffered by the individual. This had been envisaged by the PCIJ (15). Analogously, the ICJ has declared that “in assessing this reparation it is authorized to include the damage suffered by the victim or by persons entitled through him” (16). This criterion has normally been adopted and has nearly gained general application, even if the ILC articles on diplomatic protection do not state it.

Some developments occurred after the second World War. The advent of human rights law and international investment law strengthened the idea that rules of international law may confer rights on individuals, even in the absence of procedural legal standing. Moreover, by virtue of some treaties, individuals themselves are entitled, under certain conditions, to bring claims for compensation against the responsible States. This weakens the traditional assumption according to which only States may hold the right to receive compensation under general international law.

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Some authors considered that the development of human rights law was rendering diplomatic protection obsolete (17).

However, in the field of human rights law dispute settlement mechanisms present a limited effectiveness, since they are optional in most treaties and accepted only by a minority of States. In most cases, individuals lack direct legal standing to claim compensation for violation of human rights. Moreover, several human rights monitoring mechanisms do not lead to binding decisions. Hence, in most cases, the sole procedure to claim compensation for injuries suffered by individuals remains diplomatic protection (18). Indeed, diplomatic protection has proved to be a useful instrument for claiming redress for human rights violations (19).

In recent ICJ cases the claimant States asserted violations of human rights (20) and in the *Diallo* case the Court expressly affirmed that “the standard of treatment of aliens” covers, *inter alia*, “guaranteed human rights” (21).

At the same time, the treatment of aliens has not been fully absorbed by human rights law. In the *LaGrand* case, the ICJ asserted that article 36, para. 1 (*b*), of the Vienna Convention on Consular Relations attributes “individual rights” that the national State may invoke before the Court. The relevant provision states that “the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner”. Although the Court in the *LaGrand* case recognized that Germany vindicated a right

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(19) As was noted: “Despite its compromised history, the main objective of diplomatic protection is after all to remedy to an injury or damage produced to an individual, exactly as in the case of human rights’ protection mechanisms” (Milano, *Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?*, Netherlands Yearbook of Int. Law, vol. 35 (2004), p. 89).


pertaining to the individual, it did not consider necessary to deal with the additional argument developed by Germany, according to which the individual’s right in question was an aspect of due process and, therefore, was a human right \( (22) \).

While it is certain that standards relating to human rights are included in the treatment of aliens and elevate the level of protection of aliens, it would be difficult to argue that the rules on the treatment of aliens have been fully absorbed by human rights law \( (23) \). There are some standards of treatment that cannot be invoked by States other than the State of nationality.

Nevertheless, the recognition of rights of individuals which are enforceable by their State of nationality is likely to affect the traditional theory of diplomatic protection. Since diplomatic protection has been progressively accepted as an instrument for the protection of rights belonging to individuals, the question of the right to receive compensation needs to be reconsidered.

3. The question of the right to compensation was left aside by the ILC in the early discussion leading to the draft articles on diplomatic protection. Different reasons influenced this approach. First, the issue was considered to lay beyond the scope of the articles, for the reason that the ILC did not intend to deal with the consequences of the exercise of diplomatic protection, which were covered by the articles on State responsibility. Moreover, in accordance with the traditional view, the question of the distribution of the sum obtained as compensation was regarded as pertaining to domestic jurisdiction.

In his preliminary report on diplomatic protection, the special rapporteur Mohamed Bennouna considered the question as part of the wider topic of the discretionary power to exercise diplomatic protection on the assumption that compensation follows the State’s choice to resort to diplomatic protection. This approach is, also, reflected in article 19 of the final text, which deals with both topics. However, the same special rapporteur noted that with regard to the specific issue of the disposal of compensation State practice after 1950 was significantly evolving “towards the establishment of judicial review of the transfer of

\( (22) \) \textit{I.C.J. Reports}, 2001, p. 494, para. 77. A different view was expressed by the Inter-American Court of Human Rights in its advisory opinion OC-16/99, 1 October 1999, http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf.

the sum received by States” (24). In particular, he referred to constitutional provisions in States, such as China, Russia and other Eastern European Countries, establishing the duty of the national State to transfer the sum received for compensation to the injured individuals (25). Notwithstanding these premises, he considered it premature to deal specifically with the topic and took the view not to suggest any provision limiting the States’ discretion in the field of diplomatic protection (26). The underlying theory according to which diplomatic protection involves rights of States was not called into question.

It was not until the very last stage of codification that the ILC reconsidered the question (27). As was remarked in the commentary to article 19 (c), a significant amount of practice indicated that States normally transfer compensation to the injured individuals. Some Western States had introduced commissions for the distribution of lump-sums obtained as a result of diplomatic protection in order to secure “an independent and impartial quasi-judicial process” (28), such as the Foreign Claims Settlement Commission of the United States, the Foreign Compensation Commission of the United Kingdom and the ad hoc commissions established by France for distribution of sums obtained under specific agreements. These commissions are independent bodies of a “quasi-judicial” character, rendering decisions on claims to compensation made by nationals.

In spite of this trend, the ILC took a cautious approach, considering the scarcity of practice and the fact that the decisions of the compensation commissions were not subjected to judicial review. For this reason, article 19 does not recognise a right of individuals to compensation and only says that States should “take into account the views of the injured persons... with regard to the reparation to be sought” and “transfer to them any compensation obtained... subject to any reasonable deduction” (29).

However, the practice of the United Kingdom shows that although the decisions of the compensation commissions are generally not subjected to appeal, in certain cases some review has been guaranteed

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(24) Preliminary report on diplomatic protection, by Mr. Mobamed Bennouna, cit., p. 315, para. 46.
(26) Ibidem.
(28) See the fifty-first annual report of the Foreign Compensation Commission for 2006, Cm 7188, para. 1.
(29) Draft articles on diplomatic protection with commentaries, cit., p. 75.
in favour of individuals. In *Anisminic v. Foreign Compensation Commission*, for example, the House of Lords declared that the decision of the Foreign Compensation Commission rejecting Anisminic’s application for compensation had misinterpreted the criteria and was therefore a nullity (30). The finding of the Commission was therefore reversed in favour of the individual.

The *Sachsenhausen* case provides another interesting example of review. This case arose from complaints about the refusal of the Foreign Office to pay compensation to a number of victims of Nazi persecutions under the Anglo-German agreement of 1964. The case was taken for investigation to the Parliamentary Commissioner for Administration, which concluded that the British authorities had unfairly refused redress. Compensation was then awarded to all the complainants (31).

While the two cases mentioned above were not considered by the ILC, the Commission referred to the 1996 *Lonrho Exports Ltd v. Export Credits Guarantee Department* to raise doubts on the existence of rights of individuals. In this case, the High Court of Justice of England and Wales held that the plaintiff, Mr. Lonrho, creditor of Zambia, could not take advantage of the money received by the UK Government since this was property of the State. However, this finding was due to the circumstances of the case. In particular, the Court considered that Lonrho had already been reimbursed 95% of the amount of its losses under the export credit agreement, which was entered before the conclusion of the lump-sum agreement. The High Court held that Lonrho was not entitled, under the terms of the export agreement, to recover the rest. However, this particular decision was based on the terms of the export credit agreement and therefore should not be given a general significance.

Some elements of practice confirm the emergence of a legal duty. A decision of the United States-German Mixed Claims Commission, for example, held that, whenever a State brings a claim on behalf of its nationals, any sum paid for compensation does not become part of a national fund. According to this decision, “it is not believed that any case can be cited in which an award has been made by an international tribunal in favour of the demanding nation ...in which the nation receiving payment of such award has, in the absence of fraud or

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(30) 2 AC 147 [HL].
mistake, hesitated to account to the national designated, or those claiming under him, for the full amount of the award received” (32).

The practice of the United States is in line with this construction. The United States Foreign Claims Settlement Commission has administered various programmes of compensation, including claims for losses suffered by nationals as a result of military operations, nationalizations and other takings of property by foreign governments or other unjust damages suffered by United States nationals (33). The Commission has the function of adjudicating claims and issuing final decisions on distribution of compensation. It also provides upon request technical assistance to the United States Government in conducting international claims settlement negotiations and, also, in evaluating the proposal of new claims legislation. The Commission normally examines standard forms of injured nationals and, if necessary, seeks additional information or evidence on essential requisites (such as United States nationality, ownership...). It then issues a “proposed decision” that is forwarded to the claimant who has a “right” to file an objection in writing if he or she believes that there are grounds for a more satisfactory decision. He or she may also request an oral hearing to present evidences and arguments. Thereafter, the Commission renders a final decision but petitions to reopen the case may be allowed in favour of individuals. The whole procedure seems to be designed to favour the claimants to obtain compensation. The activity of the Commission intensified following the increasing number of compensation programmes (34). Recently, it issued a final report on the first and second programme on Libya based on the agreement concluded in 2008 which included a provision for the settlement of United States nationals’ claims arising out of terrorist acts (35). Other programmes of the Commission are still pending and there are future programmes already under consideration (36).

At the same time, the United States legislation provides for the right of the State Department to be reimbursed for costs arising from diplomatic protection. In particular, the Department might deduct and

retain 1,5% of payments of at least 100,000 dollars and 1% of payments above 5 million dollars received from foreign governments as a result of the pursuit of claims on behalf of United States nationals (37). The sum so retained flows into the International Litigation Fund available for expenses relating to preparing or prosecuting proceedings before an international tribunal or a claim against a foreign government.

This practice explains why the ILC inserted in article 19 (c) on diplomatic protection the provision according to which a State may retain “reasonable deductions” from the sum obtained in compensation (38). However, this retention should be measured against the costs effectively suffered by the State.

The elements discussed above show that State practice has consistently evolved, even after the adoption of the draft articles on diplomatic protection, toward accepting that individuals are the effective beneficiaries of the sum obtained in compensation.

During the elaboration of the draft articles, statements made by Governments suggested that the question was no longer considered as an internal matter of the State. Austria, for example, stated that “a further issue that deserves particular consideration is the problem of the relation between the individual whose rights are protected and the State exercising the right to diplomatic protection... it should be ensured that the injured individual in whose interest the claim was raised will benefit from the exercise of diplomatic protection” (39). The emergence of an obligation to distribute sums to the aggrieved individuals has been described by another State in the following terms: “the established principle on which international practice used to be based required that international reparation for injury was always owed to the State and not to the individual... In modern times, however, this principle has come under examination in many States, which acknowledge that there is some obligation on them to disburse compensation received to the injured national and that the injured individual in whose interest the claim was raised should benefit from the exercise of diplomatic protection” (40).

(39) UN doc. A/CN.4/561, para. 5, p. 35.
The same attitude results from comments delivered in the latest consultation launched by the Sixth Committee on the possible conclusion of a convention on diplomatic protection (41). A number of States endorsed the “recognizable trend” towards giving individuals a more significant role in diplomatic protection and considering that the latter may evolve in a human rights protection instrument through which States ensure “their nationals’ rights” (42). It might also be meaningful that those States that had criticised article 19 for limiting their discretion on deciding whether to exercise diplomatic protection have not questioned the paragraph concerning the disposal of compensation in favour of the victims (43).

The progressive recognition that individuals may hold rights under current international law and, in particular, under the law on the treatment of aliens has been influencing the States’ attitude toward compensation and emphasizing the position of the individuals as the ultimate beneficiaries. By perceiving to act on behalf of individuals, States are gradually recognizing to be bound to transfer compensation to the aggrieved individuals. Theoretically, this is a normal consequence of the general principle prohibiting unjustified enrichment, which is common to most domestic legal systems. It has also been applied by international arbitrators in order to reverse situations where accretion of wealth of one party to the detriment of another party did not have legal justification (44). As diplomatic protection is increasingly considered to be exercised on behalf of individuals, the State of nationality has no legal justification for retaining the money paid in compensation. Any retention could be qualified unfair enrichment to the detriment of its nationals and would be considered legally unjustifiable.

(41) See, for example, the comment of Lebanon arguing the need for a specification of the “legal consequences for persons and assets” granted diplomatic protection (UN doc. A/68/115, 26 June 2013).


(43) See, for example, the view of the delegates of the United Kingdom (UN doc. A/68/115, 26 June 2013) and of El Salvador (UN doc. A/68/115 Add. 1, 30 August 2013).

(44) It has been described as a “borderline concept between law and ethics” which derives from various judicial techniques that have been employed to counterbalance situations where the enrichment of a party was unfair (O’CONNELL, Unjust Enrichment, American Journal of Comparative Law, 1956, p. 4). See, for example, the Edna case in American Journal of Int. Law, 1940, p. 737. For a general view of unjustified enrichment as a principle of international law see SCHREUBER, Unjustified Enrichment in International Law, American Journal of Comparative Law, 1974, p. 281.
4. The drafting of recent lump-sum agreements confirms the increasing centrality of individuals as beneficiaries of compensation. At the same time, there are still elements of ambiguity. In particular, these agreements normally provide for the power of the State to dispose freely of the sums and include a waiver clause, which may preclude future claims on the same subject matter.

In principle, provisions declaring that the State has the exclusive right to distribute the sums might seem ambiguous because they could either refer to the choice of the criteria for eligibility, without questioning that individuals are the effective beneficiaries of the agreements, or imply that the sums are property of the State. According to the first interpretation, they would aim at preventing the counterpart from interfering in the distribution of the sums, while, in the latter meaning, they could also prevent an individual from claiming a share of compensation under the agreement.

In a controversial passage of the 2012 Jurisdictional Immunities judgment, the ICJ held that, “where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality” (45). This reasoning seems to support the second interpretation of the clause, implying a wider scope of State’s discretion.

However, a significant number of recent lump-sum agreements specify which “individuals” (who are nationals of the claimant States) are eligible, implying that they are the actual beneficiaries. An agreement concluded in 2015 between the Government of the United States and the Government of the French Republic, for example, refers expressly to the individuals as “beneficiaries” of the sums paid for compensation (46).

The European Court of Human Rights considered that provisions reserving to the State the power to distribute the sums do not prejudge the position of individuals as holders of the right to receive a share of compensation. In the Beaumartin v. France case related to the agree-

(46) Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs.
ment under which the French Government obtained reparation from Morocco for damages sustained by French nationals, the Court held that the French nationals could assert a right to a share of compensation “even though it was for the French authorities to determine, through a compensation committee set up by decree, how the compensation was to be apportioned” (47).

The Beaumartin case also supports the view that lump-sum agreements involve rights of individuals. This basic assumption should also affect the interpretation of provisions under which a State provides for the waiver of a claim. In this regard, the question arises whether a waiver prejudices those claims that might be brought by, or on behalf of, individuals who have not effectively benefited from compensation schemes.

Under a general principle of law, a waiver does not affect rights pertaining to persons other than its author, except in case of their acceptance. Therefore, assuming that individuals hold a right to receive a share of compensation implies that their consent is required in order to extinguish the claim. For this reason, States may not validly waive a claim that individuals themselves — or States other than the State of nationality — may prefer in order to seek redress for the injuries that they have suffered from the wrongful act, except when they have expressly or tacitly accepted the waiver. The conferral of a share of compensation, for example, may entail acquiescence and trigger the effect of the clause. Instead, individuals should not be affected by a waiver, when they have not given their consent.

According to this principle, the settlement of the case by the State of nationality affects only the position of this State and of those individuals who have been effectively compensated. On the contrary, the waiver should not impair the rights of those individuals who have not benefited from the agreement with the consequence that they could always seek redress toward the State responsible for its wrongful act.

Recent practice supports this construction. An example is given by article 6, para. 2, of the agreement between the Government of the United States and the Government of the French Republic which declares that the settlement exhausts any claim regarding holocaust in the relationship between the contracting States. According to article 6, para. 3, “any payment to an individual under this agreement” constitutes a final comprehensive settlement of all holocaust deportation claims “by that individual”. This wording, that frequently appears in

(47) Beaumartin v. France, app. no. 15287/89, para. 28.
recent agreements, suggests that, in principle, the scope of the State’s waiver only affects those victims that have effectively obtained a share of compensation.

The principle according to which the waiver does not automatically frustrate the claim of individuals who unfairly remained excluded from the compensation programme was also upheld by the Korean Supreme Court (48). On the question of claims of Korean victims of forced labour, in a judgment under the 1965 Settlement agreement between Korea and Japan, this Court affirmed that it would be contrary to principles of modern law to consider that the national State can extinguish its citizens’ rights without their consent by concluding a treaty.

Lump-sum agreements involve rights pertaining to individuals even in cases where the economic condition of the responsible State could prevent individuals from receiving a sum proportional to the injury suffered. In certain cases, the large number of claims deriving from war conflicts or crimes against humanity cannot be comprehensively satisfied, without seriously undermining the process of peacebuilding and the economic recovery of the countries involved. As the recent experience of the Eritrea-Ethiopia Claims Commission shows, full reparation may be limited for humanitarian purposes and compensation considerably reduced in order to ensure that people are not deprived of their basic needs of subsistence (49).

In similar situations, the need arises for finding alternative ways of reparation for injuries caused by serious violations of humanitarian law when compensation might be smaller than what, in the abstract, should be owed to the victims. Satisfaction may be invoked in alternative or in addition to compensation. It was, for example, requested in addition to compensation by the Democratic Republic of Congo in the case brought against Uganda. In its memorial to the Court, the DRC asked for “un montant ...global ou plus clairement décomposé en une indemnisation couvrant les dommages stricto sensu et une satisfaction comprenant des dommages-intérêts correspondant à la gravité des violations, de manière à compenser l’atteinte à l’honneur de la République démocratique du Congo mais aussi de dissuader l’Ouganda de ré-

cidiver à l’avenir” (50). In this case, the global sum claimed as satisfaction for injuries suffered by individuals should be employed to restore moral damages.

The Inter-American Court of Human Rights has elaborated extensively the concept of non-pecuniary damages and its case-law offers interesting elements (51). In cases where the payment of compensation exceeds the possibilities of the respondent State, the Court evaluates the actions taken as compensatory measures, which “offer the injured party a satisfaction that transcends the financial sphere” (52). These may include investigations, inquiries and other initiatives taken in order to establish the truth, the publication and public dissemination of the judgement, the undertaking of projects to recover the historical memory, including the naming of streets after the victims or the establishment of monuments in their memories (53). The appropriate compensatory measures might vary according to the circumstances of the case, the attitude of the State, the violations involved but they should, in any case, be designed to benefit the aggrieved individuals.

5. Recent international jurisprudence contributes to shape a right of individuals to receive compensation from the responsible State.

This tendency diverges from the traditional approach according to which reparation was designed to restore rights of States, even though compensation might have been calculated on the basis of the damages suffered by the injured individuals (54).

In particular, the traditional approach was challenged by the 2012 Diallo judgment on compensation owed by the Democratic Republic of the Congo to the Republic of Guinea (55). In this case the Court affirmed that compensation that was owed by the respondent State to Guinea was intended to provide reparation for the individual’s in-
jury (56). The Court’s statement implies that Mr Diallo was the subject injured by the wrongful act and, therefore, entitled to receive compensation. According to this interpretation, not only should compensation be measured against the damages suffered by the individual, but, also, the latter should benefit from compensation.

The recent Cyprus v. Turkey judgement of the European Court of Human Rights reinforces this finding (57). The Court quoted the ICJ Diallo judgment and held, for the first time, that article 41 of the European Convention of Human Rights (ECHR) on “just satisfaction” applies also to certain inter-State applications based on article 33 of the ECHR. The Court argued that there may be two different kinds of inter-State complaints. Contracting States have the right either to address systemic failures of other contracting States, or to protect the right of a group of identifiable individuals who are injured by the alleged violations. In the first case, the applicant State complains about general issues regarding another State (like administrative practice) and vindicates the “public order of Europe” (58). In the latter case, the State contests violations committed against certain individuals and may be entitled to receive compensation “for the benefit of individual victims” (59). The Court spelt out clearly that it is the individual, and not the State, who is directly harmed and primarily “injured” by a violation of one or several Convention rights (60). Then, after referring to the analogy between diplomatic protection and human rights complaints, the Court concluded that “just satisfaction” “should always be done for the benefit of individual victims” (61).

The practice of inter-state applications for violations of human rights is limited. Cyprus v. Turkey is the first ECHR inter-state case where the question of compensation was raised. A similar principle was earlier affirmed by the African Commission on Human Rights. In the Congo v. Burundi, Rwanda, Uganda case, the Commission recommended that “adequate reparations be paid, according to the appropriate ways, to the Complainant State for and on behalf of the victims ...which suffered these violations” (62).

(57) Cyprus v. Turkey, appl. no. 25781/94, 12 May 2014.
(58) Ibidem, para. 47.
(59) Ibidem, para. 45.
(60) Ibidem.
(61) Ibidem.
Certainly, human rights complaints cannot be identified with diplomatic protection *stricto sensu*, since contracting States may bring a claim concerning the violation of human rights for individuals regardless of nationality and even against their State of nationality. At the same time, considering their similar function, inter-State human rights applications might be considered as a form of “disguised diplomatic protection” (63). In both cases the State may vindicate injuries and violations of rights pertaining to individuals, who, for this reason, should be entitled to receive compensation from successful claims.

According to the judgment in *Cyprus v. Turkey*, the claimant State will have to transfer the money paid for compensation to the victims under the control of the Committee of Ministers (64). The latter, that is currently examining the case, has recalled that “the Court indicated that these amounts should be distributed afterwards by the Government of Cyprus to the individual victims under the supervision of the Committee of Ministers within eighteen months of the date of the payment or within any other period considered appropriate by the Committee of Ministers” (65).

Given the general wording of the judgment, its impact on future similar cases should also be considered. One of these may be the case of *Georgia v. Russia*, concerning the arrest, detention and expulsion from Russia of large numbers of Georgian nationals. The Grand Chamber, in its 2014 judgment on the merits, reserved the question of the application of article 41, holding that it was not ready for decision and inviting the Parties to submit their observations on the matter (66). Similarly, the question might arise in the two *Ukraine v. Russia* cases, lodged in 2014, the first one concerning the events leading up to and following the assumption of control by the Russian Federation over the Crimean peninsula from March 2014 (67), and the second regarding the alleged abduction and transfer to Russia of three groups of chil-

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(66) *Georgia v. Russia*, app. no. 13255/07, 3 July 2014, p. 58, para. 238.

(67) *Ukraine v. Russia*, app. no. 20958/14.
dren (68). Unavoidably, the prospect of obtaining “just satisfaction” encourages inter-state applications and may, also, lighten the European Court’s judicial load from numerous individual claims. At the same time, as will be discussed in the next section, the ambiguous relationship between inter-state and individual applications could determine the risk of duplication and incoherence among decisions on the same matters.

6. The developments described in the previous sections challenge the traditional view that the State exercising diplomatic protection is “specially affected” by the wrongful act and, therefore, is asserting its own right to compensation.

This question was left open by the ILC. The articles on international responsibility of States state in article 33, para. 2, that the provisions on the content of responsibility do not cover “any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. This text does not rule out the possible existence of the right of individuals to compensation, but specifies that the matter is not covered by the articles. An implicit reference to individuals may be found in article 48, providing that any State other that the injured State is entitled to claim compensation “in the interest of the injured State or of the beneficiaries of the obligation breached” (69). The reference to possible beneficiaries of compensation clearly includes the individuals injured by the internationally wrongful acts. However, it is doubtful whether article 48 is relevant for diplomatic protection since, according to the traditional view, the claimant State is considered the injured subject. In the Mavrommatis case, the presence of interests of individuals was said to be irrelevant from a legal point of view. According to the Permanent Court “the question, therefore, whether the . . . dispute originates in an

(68) Ukraine v. Russia II, app. no. 43800/14.

injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint” (70).

Recently, this approach has been questioned by some authors who have recognised that diplomatic protection involves a “plurality of interests” (71) and that there may be rights and injuries of individuals alongside those of claimant States (72). Yet, theoretically, this might not necessarily exclude that claimant States are “specially affected” (73).

Even those authors arguing that diplomatic protection is based on a fiction, whereby the rights and injuries at stake are those of the individuals and the State acts, in reality, as a mere representative of them, maintained that the fiction should be preserved in the interest of the individuals. According to this opinion, given that individuals have few remedies under current international law, it would be important to consider that the State is directly injured by the wrongful act and entitled to receive compensation (74). Yet, there is no evidence that the fiction would encourage States to claim compensation, especially considering the trend toward the recognition of a right of individuals to receive compensation. Instead, it is evident that the fiction may represent an obstacle to the compensation of individuals’ injuries and precludes reparation when the national State has waived the claim (75).

A different solution would be to consider that the rights involved in diplomatic protection depend on the State’s presentation of the claim. In the *Avena* case, for example, the ICJ affirmed that the claimant State may submit a claim “in its own name” for the “violation of rights which it claims to have suffered both directly and through the violation of individual rights” (76). However, the Court found that this claim was not to be construed as diplomatic protection *stricto sensu*. For this reason, the Court affirmed that there was no need to comply with the rule of previous exhaustion of local remedies. The relevant

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(73) *Gaja, Quel préjudice pour un État qui exerce la protection diplomatique?*, *ibidem*, p. 487.


passage, albeit laconic, suggests that the State of nationality may bring a direct claim for an injury suffered by itself in addition to a claim based on diplomatic protection \(^{(77)}\). In this case, the claims involved are conceptually and legally different and should be dealt with under distinct headings.

However, by distinguishing possible direct claims of the State from diplomatic protection *stricto sensu*, the *Avena* judgement implies that when States exercise diplomatic protection, they normally act on behalf of their citizens. This is confirmed by the *RDC v. Uganda* case, where the Court assumed that the counter-claim of Uganda concerning the violation of the international minimum standard of its nationals related to an “injury to the particular individuals in question and did not relate to a violation of an international obligation by the DRC causing a direct injury to Uganda” \(^{(78)}\). This assumption was made independently from a particular characterization of the claim by the State. The Court went on affirming that Uganda was attempting to exercise diplomatic protection with regard to its nationals and should have met the conditions necessary for the exercise of diplomatic protection as recognized in general international law, in particular the requirement of Ugandan nationality and the prior exhaustion of local remedies.

A general evaluation of the recent jurisprudence of the Court, therefore, suggests that diplomatic protection regards injuries suffered by individuals that the national States may vindicate in front of the Court on behalf of their citizens. Consequently, the individuals themselves should be regarded as the holders of the right to reparation.

At the same time, this does not rule out that a State may invoke, in addition, its own right to receive compensation for damages suffered in connection with the violation of rights of its citizens. This may occur, for example, in case of multiple and continuous violations only targeting its citizens and therefore amounting to a disguised discrimination, as the State may consider to have suffered a moral damage. Instead, it is difficult to argue that the State of nationality may suffer economic damages from the violation of the right to property of its citizens. In the *Barcelona Traction* case, for example, the ICJ questioned whether the injury caused to the investors of a certain State directly involves the economic interest of the latter, since such investments are part of its

\(^{(77)}\) See Milano, *Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?*, cit., p. 129.

\(^{(78)}\) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, cit., para. 333.
national economic resources (79). In the end, the Court did not uphold this view and concluded that this construction is “quite different from and outside the field of diplomatic protection” (80).

The qualification of the State exercising diplomatic protection as a legal representative of the injured individuals might call into question the relationship between diplomatic protection and other additional complaints concerning the same injuries.

As the ECHR practice shows, a State’s claim could be made in addition to individuals’ applications relating to the same facts. This might cause a multiplication of cases involving the same injuries (81). The two Ukraine v. Russia cases are paradigmatic: there are currently 256 individual applications lodged against both Ukraine and Russia for the same violations to which the inter-State case before the Court refers (82). Although the applicants are not the same, the object of the case and the alleged wrongful acts are identical.

Multiplication of claims may occur also in case of direct claims of States involving injuries suffered by individuals (83). In the recent “The Arctic Sunrise” case, for example, the claims brought by the Netherlands on behalf of the ship, its owners, the crew and other people on board were considered to be “direct claims” of the Netherlands. Under the arbitral award, the Netherlands have been entitled to compensation also in relation to the arrest, detention and prosecution of the people on board, considered as part of the ship. On March 2014, the activists submitted a complaint to the European Court requesting remedies for the violation of article 13 (freedom of expression) and article 5 (prohibition of unlawful detention) of the European Convention con-

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(83) “The Arctic Sunrise” case concerned measures taken by the Russian Federation against a vessel flying the flag of the Netherlands operated by campaigners of Greenpeace protesting against oil drilling operations in Arctic waters (Arctic Sunrise (Netherland v. Russia), Award of 14 August 2015, http://www.pcacases.com/web/sendAttach/1438, accessed 21 January 2014). Although technically this is not a case of diplomatic protection, it raises similar issues. On this point, see the comment of Harrison, Current Legal Developments. The Arctic Sunrise Arbitration (Netherlands v. Russia), Int. Journal of Maritime and Coastal Law, 2016, p. 145 ss.
cerning the same facts for which compensation had been already awarded by the arbitral tribunal (84).

Interpreting diplomatic protection as an instrument for the protection of individuals theoretically excludes the need for parallel claims concerning the same injuries. Once the rights involved in diplomatic protection are qualified as rights of individuals, there is no theoretical obstacle to consider that the State acts on behalf of its nationals and for their benefit. In any case, individuals should be properly involved in the proceedings and in the possible settlement of the case, in order to exclude the need for concurrent claims.

7. The theory of diplomatic protection was premised on the traditional approach assuming that international law addresses the relationships among States without affecting the legal position of individuals. However, this construction needs to be updated. Although it is still correct that international law mostly governs the conduct of States, there are certain fields where not only international rules give rise to individual rights, but also those rights have shaped (or reshaped) the content of secondary rules on State responsibility. This is what happened to the law on the treatment of aliens where the prominence of the position of individuals and the incidence of human rights law have contributed to redirect the function of diplomatic protection in favour of individuals, moulding their right to receive compensation.

In the draft articles on diplomatic protection, the question of the right to receive compensation was blurred with the principle according to which States retain the discretionary power to act for the protection of their nationals. However, the two questions should be logically distinguished. A discretion of States to exercise diplomatic protection does not entail that diplomatic protection only consists in a claim by a State. The present analysis has highlighted that recent practice and jurisprudence reflect a more complex understanding of the relationship between the States of nationality and aggrieved individuals, based on the progressive acceptance that individuals hold a right to receive compensation in case of successful diplomatic protection.

Theoretically, the role of national States flows from the “asymmetric” evolution of international law whereby the emergence of individual rights is not always accompanied by procedural guarantees and remedies. Therefore, States may act in protection of their nationals to overcome the lack of specific remedies. Coherently, when those rem-

(84) See para. 394 of the award.
edies are instead available, such as in the context of certain human rights treaties, compensation is always awarded to the individuals or — in case of inter-states complaints — for their benefit.

Therefore, once national States decide to exercise diplomatic protection, individuals may claim a share of compensation and should not be prejudiced by a settlement that they have not accepted. This also implies that, in case of a waiver by a State of its claim, the aggrieved individuals that have not been compensated should remain entitled to claim reparation, by taking advantage of all the procedural opportuni- ties available at the current stage of development of international law.

DEBORAH RUSSO

Abstract. — This paper discusses the right of individuals to receive compensation for injuries suffered in consequence of an internationally wrongful act. Analysing recent practice, it argues that the duty of States to provide for compensation for the benefit of individuals has developed with the progressive recognition of diplomatic protection as a procedural instrument to vindicate violations of rights pertaining to individuals. According to the paper, State discretion to act in protection of its nationals does not exclude that, once the State chooses to exercise diplomatic protection, the function of protection is exercised on behalf of the individuals. Therefore, the State cannot waive a claim without the express or tacit acceptance of the injured individuals. Individuals who have not benefited from any settlement can always claim compensation by taking advantage of all procedural opportunities available at the current stage of development of international law.