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# The Position of Individuals in International Law: An ILC Perspective

Giorgio Gaja\*

## Abstract

*According to the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, any state to which an erga omnes obligation is owed may claim reparation in the interest of an individual who is the victim of an infringement and the beneficiary of the obligation. The ILC Articles on Diplomatic Protection should have specified that also the state of nationality may seek reparation only in the interest of the injured individual when his or her rights have been infringed.*

While certain instruments adopted by the International Law Commission (ILC) reflect views that are relevant in an analysis of the position of individuals as holders of rights in international law, it would be difficult to maintain that the ILC has taken a comprehensive approach on this matter. Nor could one say that the ILC perspective is fully coherent, although some attempts by authors to point out incoherencies in the ILC's work have probably gone too far.

In 2001 the ILC made a clear reference to the existence of rights granted to individuals under international law. This was in Article 33(2) of the Articles on the Responsibility of States for Internationally Wrongful Acts and the related commentary.<sup>1</sup> According to that paragraph, individuals may acquire rights as a consequence of state responsibility: Part Two of the Articles on State Responsibility is said to be 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State'.

\* Professor of International Law, University of Florence; member of the International Law Commission. This contribution has its origin in a symposium held in honour of Antonio (Nino) Cassese. On that occasion I said how much I admired his extraordinary commitment to the protection of fundamental rights of individuals under international law. In accordance with Nino's wish, these words are not reproduced here. Email: gaja@unifi.it.

<sup>1</sup> Yearbook of the International Law Commission (2001), vol. ii, Part Two, at 94–95.

Article 48 of the same Articles adds that in the case of breach of an obligation *erga omnes* or *erga omnes partes* any state is entitled to invoke the responsibility of another state; performance of the obligation to make reparation may then be requested ‘in the interest of the . . . beneficiaries of the obligation breached’. It is clear that those beneficiaries include individuals, for example when their human rights are infringed.<sup>2</sup>

It is noteworthy that the ICJ never stated in so many words that any state may invoke responsibility for the breach of an *erga omnes* obligation of which an individual may be seen as a beneficiary. However, when examining applications by states concerning alleged genocide or racial discrimination essentially to the detriment of their nationals, the Court did not say that the applications were admissible only in so far as nationals were involved, nor did it specify that, in its view, states were exercising diplomatic protection.<sup>3</sup> A different approach was taken by the ICJ with regard to part of Uganda’s counterclaim against the Democratic Republic of Congo. Although human rights were arguably involved, the Court viewed this claim as based ‘on the internationally minimum standard relating to the treatment of foreign nationals who are present on a State’s territory’, and that therefore it pertained to the exercise by Uganda of ‘its rights to diplomatic protection with regard to its nationals’.<sup>4</sup> This part of the judgment, which led to the rejection of the claim, was criticized in Judge Simma’s separate opinion.<sup>5</sup>

The definition of diplomatic protection that was adopted in 2006 by the ILC in the Articles on that subject conveys the idea that the individual for whose benefit the state of nationality exercises diplomatic protection is the injured entity. Article 1 refers to the invocation by a state of ‘the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State’.<sup>6</sup> The commentary explains that the state exercising diplomatic protection seeks to protect rights which pertain to individuals.<sup>7</sup> In the *Diallo* judgment the ICJ found that customary international law ‘reflected’ this definition.<sup>8</sup>

When the State of nationality exercises diplomatic protection on behalf of some of its nationals, reparation should be requested for the benefit of the individuals concerned, even if one may regard that state as also ‘injured’ within the meaning of Article 42 on State Responsibility.<sup>9</sup> Individuals would primarily be affected and reparation should essentially cover their injury.

The Articles on State Responsibility do not imply that, when a state of nationality is also regarded as injured, reparation would necessarily be claimed solely for the benefit

<sup>2</sup> This was expressly stated in the commentary, *ibid.*, at 127–129.

<sup>3</sup> One may refer to the judgments in the *Bosnia v. Serbia*, *Croatia v. Serbia* and *Democratic Republic of Congo v. Rwanda* cases and to the order for provisional measures in the *Georgia v. Russian Federation* case, all not yet reported.

<sup>4</sup> [2005] ICJ Rep 276 (at para. 333).

<sup>5</sup> *Ibid.*, at 347–350 (at paras 35–41).

<sup>6</sup> UN Doc A/61/10, at 24.

<sup>7</sup> *Ibid.*, at 25 (para. 4).

<sup>8</sup> Not yet reported, at para. 39.

<sup>9</sup> Yearbook of the International Law Commission, *supra* note 1, at 117.

of that state.<sup>10</sup> However, had the ILC more comprehensively considered the injured individuals as beneficiaries in the Articles on State Responsibility, the text should have specified that reparation could be sought by the state of nationality only in the interest of individuals in so far as the injury affected those individuals. Moreover, in the Articles on Diplomatic Protection the ILC should have been more coherent with the definition given in Article 1. It should have gone beyond what is provided in Article 19, to the effect that states entitled to exercise diplomatic protection 'should take into account, wherever feasible, the views of injured persons with regard to . . . the reparation to be sought' and 'transfer to the injured person any compensation obtained for the injury from the responsible State'.<sup>11</sup> The ILC should have stated that, in so far as a claim concerns an injury suffered by an individual, reparation should accrue to the injured individual.

When human rights are infringed, one may query whether diplomatic protection *stricto sensu* is exercised, since the state of nationality is not the only state entitled to invoke responsibility.<sup>12</sup> The ILC does not appear to have made a distinction in this regard.<sup>13</sup> It is also true that in the *Diallo* case the ICJ held that 'the scope *ratione materiae* of diplomatic protection . . . widened to include, *inter alia*, internationally guaranteed human rights'.<sup>14</sup> However, when human rights are at stake the requirement of nationality should not apply, nor should the state of nationality have an exclusive right to invoke responsibility. For instance, in the *Diallo* case the ICJ's analysis of the requirement of nationality with regard to corporations<sup>15</sup> appears to be premised on the assumption that the injury suffered by Diallo as a shareholder did not come under the protection of human rights.

It is not to be assumed that the ability of an individual to exercise his or her rights is affected by the fact that international law provides a state with a remedy with regard to the individual's injury. This point was made by the ILC in Article 16 on diplomatic protection, according to which rights of natural or legal persons 'to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles',<sup>16</sup> that is by the fact that a state is entitled to exercise diplomatic protection.

<sup>10</sup> This was suggested by Papa, 'Protezione diplomatica, diritti umani e obblighi *erga omnes*', 91 *Rivista di Diritto Internazionale* (2008) 669, at 702–705.

<sup>11</sup> UN Doc A/61/10, at 94.

<sup>12</sup> I refer to my contribution, 'Is a State Specially Affected When its Nationals' Human Rights are Infringed?', in L.C. Vohrah *et al.* (eds), *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese* (2003), at 373–382. The view that a state exercises diplomatic protection *stricto sensu* also when human rights are allegedly infringed was expressed especially by Condorelli, 'La protection diplomatique et l'évolution de son domaine d'application actuelle', 86 *Rivista di Diritto Internazionale* (2003) 5, and, more recently, by Vermeer-Künzli, 'Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* Case', 20 *Leiden J Int'l L* (2007) 941, at 942.

<sup>13</sup> This results, in particular, from Art. 1 and the related commentary, UN Doc. A/61/10, at 24–25.

<sup>14</sup> *Supra* note 8, at para. 39.

<sup>15</sup> *Ibid.*, at paras 76–94.

<sup>16</sup> UN Doc A/61/10, at 86.

Conversely, when a treaty provides for remedies which are directly actionable by individuals, these are generally not intended to be exclusive of remedies available to states under international law.

The ICJ has not yet examined the question whether the existence on the international plane of remedies for individuals affects the ability of a state to invoke international responsibility for the same injury. The question did not arise before the Court in relation to an alleged genocide or racial discrimination because the respective treaties do not provide for remedies open to individuals.

At the present stage of evolution of international law, when remedies may be regarded as open both to individuals and to states, a double protection for individuals' rights, especially human rights, appears to be important for their effective protection.