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Item 79 of the preliminary list*

Diplomatic protection

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Comments and information received from Governments

Report of the Secretary-General

I. Introduction

1. The International Law Commission adopted the draft articles on diplomatic protection at its fifty-eighth session, in 2006.¹ In its resolution [61/35](#), the General Assembly took note of the draft articles as adopted by the Commission and invited Governments to submit comments concerning the Commission's recommendation that the Assembly elaborate a convention on the basis of the articles.² By its resolutions [62/67](#), [65/27](#), [68/113](#) and [71/142](#), the Assembly commended the articles on diplomatic protection presented by the Commission to the attention of Governments and invited them to submit any further comments concerning the recommendation by the Commission to elaborate a convention on the basis of the articles in writing to the Secretary-General. The Assembly examined, at its sixty-fifth session, in 2010, sixty-eighth session, in 2013, seventy-first session, in 2016, and seventy-fourth session, in 2019, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments,³ as well as views expressed in the debates held at the sixty-second, sixty-fifth, sixty-eighth, seventy-first and seventy-fourth sessions of the Assembly, the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the above-mentioned articles.

2. In its resolution [74/188](#), the General Assembly again recalled its resolution [62/67](#) and the decision of the International Law Commission to recommend to the Assembly the elaboration of a convention on the basis of the articles on diplomatic protection. It also emphasized the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (a), of the Charter of the United Nations, and noted that the subject of diplomatic protection was of major importance in relations between States. The Assembly

* [A/77/50](#).

¹ See [A/61/10](#), para. 49.

² See [A/62/118](#) and [Add.1](#). The text of the articles was subsequently annexed to resolution [62/67](#).

³ See [A/65/182](#) and [Add.1](#), [A/68/115](#) and [Add.1](#), [A/71/93](#) and [A/74/143](#).



commended once again the articles on diplomatic protection to the attention of Governments, decided to include in the provisional agenda of its seventy-seventh session the item entitled “Diplomatic protection” and invited Governments to focus their statements, in the light of the written comments of Governments, as well as views expressed in the debates held at the sixty-second, sixty-fifth, sixty-eighth, seventy-first and seventy-fourth sessions of the Assembly, on the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles, and also to identify any difference of opinion on the articles.

3. In the same resolution, the General Assembly invited Governments to submit in writing to the Secretary-General any further comments, including comments concerning the recommendation by the International Law Commission to elaborate a convention on the basis of the articles on diplomatic protection. By a note verbale dated 9 January 2020, the Secretary-General invited Governments to submit those comments no later than 1 June 2022. He reiterated that invitation by a note verbale dated 13 January 2022.

4. As at 29 July 2022, comments had been received from Brazil, Canada, Czechia and El Salvador. Those comments are reproduced below, organized according to comments on any future action regarding the articles on diplomatic protection (sect. II) and on the articles (sect. III).

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

Brazil⁴

[Original: English]
[1 June 2022]

Brazil reiterates its support for the elaboration of a convention on the basis of the draft articles on diplomatic protection, as recommended by the International Law Commission.

The Brazilian Government is of the opinion that such a convention will promote legal clarity and predictability. It will enhance the rule of law and contribute to the codification and progressive development of international law.

In the Brazilian perspective, the lack of progress regarding the draft articles undermines the authority and importance of the contribution of the International Law Commission to the topic and may have a “decodification” effect in a long-established area of international law.

As recognized by the International Law Commission itself, diplomatic protection and State responsibility traditionally go hand in hand. Brazil is convinced that parallel conventions on these issues would represent a major development towards the consolidation of the law on international responsibility.

Canada

[Original: English]
[1 June 2022]

Canada wishes to express its appreciation to the International Law Commission for its contribution to the harmonization and development of the law and practice of diplomatic protection.

⁴ For previous comments, see [A/62/118](#).

As an essential tool for States to protect the rights of their nationals from violations of international law, Canada recognizes the vital role diplomatic protection plays, including when violations of human rights are committed against their nationals.

Noting in particular the worrying trend of countries arbitrarily arresting, detaining and sentencing foreign nationals to exercise leverage over foreign Governments, contrary to international law, Canada believes that a strong and robust system of rules related to diplomatic protection, as articulated by the Commission's draft articles on diplomatic protection, is an important asset for States who wish to intervene on behalf of their nationals who have been subjected to such practice, including to secure their release.

Given the close connection between diplomatic protection and State responsibility, Canada wishes to convey that it is essential for these two areas of international law to continue to be aligned. In the absence of a clear consensus on the elaboration of a convention on the basis of the International Law Commission's articles on responsibility of States for internationally wrongful acts, Canada therefore considers the commencement of negotiations on a convention based on the draft articles on diplomatic protection to be premature.

Canada is also concerned that there is unlikely to be international consensus as to certain aspects of the current draft articles and, therefore, believes that engaging in the process of negotiating a convention at this time may undermine the influence and value of the draft articles by opening up debate on their contents.

Canada believes that the International Law Commission's work on the draft articles is valuable in clarifying and developing customary international law on diplomatic protection. Canada views the draft articles as serving a useful purpose in informing and assisting in the settlement of State practice in this important area over time.

Czechia⁵

[Original: English]
[1 June 2022]

The Czech Republic presented its written comments on the topic of diplomatic protection to the Secretary-General in 2007,⁶ and subsequently reiterated them.⁷ The Czech Republic is still of the opinion that the draft articles, in their non-binding form, can adequately serve to consolidate the rules in this sphere of international law and shape relevant State practice.

The non-binding form of the articles makes it possible to strengthen, through State practice and decisions of judicial and arbitration bodies, basic principles of diplomatic protection, as well as develop its progressive elements contained in the draft articles. The non-binding form also helps avoid the risk of "reverse codification", i.e. the possibility that the potential convention, based on the articles, would be ratified only by a small number of States, which could weaken the rules of diplomatic protection contained in the articles.

Further, the Czech Republic believes that the content and the form of the articles on diplomatic protection are closely connected with those of the articles on responsibility of States for internationally wrongful acts. Therefore, the Czech

⁵ For previous comments, see [A/62/118](#), [A/65/182](#) and [A/71/93](#).

⁶ See [A/62/118](#).

⁷ See [A/65/182](#) and [A/71/93](#).

Republic is of the opinion that the final form of the draft articles on diplomatic protection should correspond to the final form of the articles on responsibility of States for internationally wrongful acts. In this regard, the Czech Republic refers to its already expressed view that the draft articles on responsibility of States for internationally wrongful acts should (at least at this stage) remain in their non-binding form.

El Salvador⁸

[Original: Spanish]
[1 June 2022]

The Republic of El Salvador is concerned that 16 years have now passed since the International Law Commission transmitted the draft articles for the consideration of the General Assembly and recommended the elaboration of a convention on diplomatic protection.

In view of that extended period, and given that diplomatic protection continues to be a part of State practice, El Salvador believes that it would be appropriate for the draft articles to be incorporated into a binding international instrument. For that purpose, the necessary intergovernmental processes should be implemented to guarantee transparent and equitable consultations on the wording of articles for such an instrument. The aim should be to reconcile differences of approach among States, facilitate the negotiation process and, ultimately, strengthen the protection which States can extend to their nationals and enhance the exercise of diplomatic protection by the States that make up the international community.

III. Comments on the articles on diplomatic protection

El Salvador⁹

[Original: Spanish]
[1 June 2022]

El Salvador recognizes that diplomatic protection is premised on the sovereign equality of States and consists of the action taken by one State in respect of another with a view to protecting, within the limits permitted by its own legal order, its nationals who have been injured as a result of an internationally wrongful act attributed to another State.

Diplomatic protection is thus closely related to and complemented by another topic before the Sixth Committee, namely the responsibility of States for internationally wrongful acts: it applies when the national of one State has been affected by an internationally wrongful act performed by another State. It is therefore important to take into consideration the provisions of the draft articles on responsibility of States, especially as regards the nature of the obligation, the conduct of the State and the act being attributable to the State.

From a historical point of view, diplomatic protection was invoked most frequently at a time when no other means existed for the recognition and reparation of injury caused to nationals of another State.

In view of developments in international law, particularly with regard to the protection of human rights, affected individuals can now make international claims

⁸ For previous comments, see [A/68/115/Add.1](#), [A/71/93](#) and [A/74/143](#).

⁹ For previous comments, see [A/68/115/Add.1](#), [A/71/93](#) and [A/74/143](#).

when their rights are violated by another State or its representatives. However, notwithstanding such significant advances in the progressive development of international law, El Salvador believes that diplomatic protection remains an important remedy for the protection of persons whose rights have been violated in another State. Diplomatic protection is thus an important tool for the protection of human rights.

However, difficulties have arisen in State practice, particularly when it comes to determining the scope of application of such protection and the conditions for its exercise, including when it affects natural persons.

Elements that have required thorough assessment include, first and foremost, the condition related to the nationality of the natural or legal persons involved, and the ensuing range of scenarios, including cases of multiple nationalities; the disconnect between the criteria of incorporation and effectiveness for the purpose of determining the nationality of legal persons; and cases of persons who do not have a formal link of nationality with the State in which they habitually reside.

For those reasons, El Salvador appreciates and commends the work that was done to formulate the draft articles on diplomatic protection annexed to General Assembly resolution [62/67](#). The draft articles provide a framework to resolve questions and issues regarding the application of diplomatic protection. Cases in point are chapters II and III, which address the nationality of natural and legal persons and the cases of refugees and stateless persons.

As regards the regulation of such provisions, it should be noted that diplomatic protection does not constitute interference in the internal affairs of other States, including the State in which the internationally wrongful act was committed. For that reason, the draft provisions seek to define, in a balanced manner, the right of a State to extend diplomatic protection to one of its nationals.

However, with regard to draft article 2, El Salvador believes that the right to exercise diplomatic protection should be more directly linked to the conditions set out in draft article 19. The aim would be to state more clearly that, although diplomatic protection is a discretionary right of States, it cannot be exercised without due regard for the protection of the individual's human rights. It is therefore essential for that right to be contemplated from two points of view: first, the subjective, substantive right of the individual, and second, the protective function of the State.
