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The section *Commentaries regarding the Activities of International Bodies in the Field of International Law,* presents the study of Senior Lecturer Ion Gâlea regarding the work of the International Law Commission related to Environmental Issues, which was presented during the Panel Discussion on the "International Law Responses to Challenges of the Global Environment", organized by the Embassy of Romania in The Hague, together with Leiden University – The Grotius Centre for International Legal Studies and the Romanian Branch of the International Law Association.

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I hope this new on-line issue of the RJIL will be found attractive by our constant readers, and all those interested in international law will enjoy these new contributions[1] of the Romanian and foreign scholars and experts in this field.

Professor Dr. Bogdan Aurescu
Member of the UN International Law Commission

[1] The opinions expressed in the papers and comments published in this issue belong to the authors only and do not engage the institutions where they act, the RJIL or the Romanian Branch of the International Law Association.

Abrevieri / Abbreviations

ADIRI – Asociaţia de Drept Internaţional şi Relaţii Internaţionale / Association for International Law and International Relations

AIEA / IAEA – Agenţia Internaţională pentru Energie Atomică / International Atomic Energy Agency

CAHDI – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

NATO – Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

TUE / TEU – Tratatul privind Uniunea Europeană / Treaty on European Union

UE / EU – Uniunea Europeană / European Union

UNSC – Consiliul de Securitate al Organizaţiei Naţiunilor Unite / United Nations Security Council

Articole
Articles

Peut-on Faire du Neuf avec du Vieux ? Remarques Cursives sur la Protection Diplomatique à L'aune du « Droit International des Hommes »

Apollin KOAGNE ZOUAPET*

Résumé: *Institution ancienne du droit international, la protection diplomatique semble revivre une seconde vie après des récents arrêts de la Cour internationale de Justice, et les Articles de la Commission de droit international des Nations Unies, adoptés en 2006. Ce regain d'intérêt pour la protection diplomatique a ranimé le débat sur la nature des droits qui sont exercés et protégés via cette action. En particulier, il est argué que, l'institution doit se moderniser pour répondre d'une part aux exigences du nouveau paradigme du droit international, qui est la protection de la personne humaine ; et d'autre part prendre en compte les évolutions du droit international en tirant les conséquences de la consécration des notions de jus cogens et obligations erga omnes. En s'appuyant essentiellement sur la pratique et le travail de codification de la Commission de droit international, ce article examine les conditions de mise en œuvre de la protection diplomatique afin de vérifier que les inévitables adaptations de l'institution ont conduit à un véritable changement. En filigrane, c'est une étude sur l'évolution de l'ordre juridique international et la nature réelle de celui-ci, au-delà des affirmations doctrinales, qui est conduite.*

Mots-clés: *protection diplomatique; Commission du Droit International; jus cogens; erga omnes.*

Abstract: *As an ancient institution of international law, diplomatic protection seems to be reviving a second life after recent judgments of the*

* *Docteur en droit (Université de Genève), Titulaire du Diplôme de l'Académie de Droit International de La Haye et actuellement Judicial Fellow à la Cour Internationale de Justice.* *L'auteur tient à remercier Landry Gilles Dossan pour sa relecture et ses commentaires sur la première version de ce travail*. Les opinions exprimées sont celles de l'auteur et reflètent d'aucune manière les opinions ou les vues de la Cour, ou de l'un de ses membres.

International Court of Justice, and the Articles of the United Nations International Law Commission, adopted in 2006. This renewed interest in diplomatic protection has revived the debate on the nature of the rights that are exercised and protected through this action. In particular, it is argued that the institution must modernize itself to meet the requirements of the new paradigm of international law, which is the protection of the human person, on the one hand, and to take into account developments in international law by drawing conclusions from the recognition of the concepts of jus cogens and obligations erga omnes on the other. Drawing essentially on the practice and codification work of the International Law Commission, this article examines the conditions for the implementation of diplomatic protection in order to verify that the inevitable adaptations of the institution have led to genuine change. In watermark, this is a study on the evolution of the international legal order and its real nature, beyond doctrinal statements, which is being conducted.

Key-words: *diplomatic protection, International Law Commission, jus cogens, erga omnes.*

I. Introduction

La présentation du droit international en deux « couches » distinctes est désormais classique dans le discours d'une partie de la doctrine : la première couche, traditionnelle, consiste en un droit régulant la coexistence et la coopération entre les membres de la société internationale, essentiellement les États et les organisations crées par les États ; tandis que la seconde est le droit constitutionnel et administratif de la communauté internationale composée de six milliards d'êtres humains. La première consistant en un droit de coordination, est caractérisée par le relativisme et une mise en œuvre décentralisée, souvent par l'auto-qualification et l'auto application faites par les sujets eux-mêmes; la seconde pour sa part est un droit de subordination, dont la mise en œuvre nécessite souvent des institutions[1]. Pour les tenants de cette thèse, cette apparition successive de ces « couches du droit international » s'est traduite par une évolution progressive de celui-ci : le « droit international des hommes » a pénétré dans

[1] M. Sassoli, « L'arrêt Yerodia : quelques remarques sur une affaire au point de collision entre les deux couches du droit international », *Revue Générale de Droit International Public (RGDIP),* tome 106, 2002, n°4, p.792. Voir dans le même sens, M. Sassoli, « State responsibility for violations of international humanitarian law », *Revue Internationale de la Croix-Rouge (RICR)*, vol.84, n°846, juin 2002, p.401.

l'« ancien droit international », procédant à une épuration progressive de celui-ci, et imposant sa supériorité normative dans le système des sources du « droit international des hommes » sur l'ancien droit international, pour autant que celui-ci subsiste[1]. L' « ancien » est normalement associé à la souveraineté des États et au soi-disant système de Westphalie, tandis que le « nouveau » viserait à protéger les valeurs de l'humanité en tant que telles ou de la « *communauté internationale dans son ensemble* »[2]. Le « centre de gravité du droit international» se serait ainsi déplacé dans la deuxième moitié du XXème siècle, sous une poussée éthique, de l'État souverain, vers l'humanité qui doit être préservée dans son environnement.

Traditionnellement, il est admis que le premier objectif du droit international est de limiter ou de pacifier les rapports de violence ; le second objectif - de réguler les rapports de violence en proposant d'autres voies que la guerre, et le troisième objectif, d'instaurer et de renforcer la coopération au sein de la société internationale, en mettant en valeur l'interdépendance entre les États. Aujourd'hui toutefois, pour de nombreux auteurs, le droit international est désormais affecté par une nouvelle évolution dont l'ambition est non seulement de dépasser la souveraineté étatique traditionnelle, mais aussi la coopération interétatique en introduisant des éléments de coopération supra étatique, en mettant en valeur l'interdépendance et en dessinant en filigrane, une forme de communauté internationale[3]. Le droit international moderne ne viserait plus ainsi seulement à assurer la coexistence des États souverains mais se préoccupe aussi de la coopération dans des questions qui touchent à des intérêts

[1] R. Kolb, « Du droit international des États et du droit international des hommes », *Revue Africaine de Droit International et Comparé (RADIC),* tome 12, 2000, p.231.

[2] C. Focarelli, « Immunité des États et Jus Cogens. La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des États étrangers », *RGDIP*, tome 112, 2008, N°4, pp. 762-794.

[3] A. Mahiou, *Le droit international ou la dialectique de la rigueur et de la flexibilité,* tiré à part du Cours général de droit international public de l'Académie de Droit International de La Haye, Leiden/Boston, Martinus Nijhoff Publishers, 2009, p.37, 44. On ne peut manquer de souligner à la suite du professeur Maillard Desgrées du Loû que les évolutions repérées ne sont peut-être que des évolutions de la doctrine comme nous le verro ns plus loin, des évolutions du discours répondant aux questions. « *Mais les évolutions du discours de la doctrine s'expliquent par l'évolution des faits. Elles sont liées au renouvellement des conditions dans lesquelles se posent les questions, conditions juridiques, politiques, concrètes.* » D. Maillard Desgrées Du Loû, « Rapport introductif », D. Maillard Desgrées Du Loû (dir.), *Les évolutions de la souveraineté*, Paris, Montchrestien, 2006, p. 15.

communs[1]. Au « droit international de coexistence » se joint désormais un « droit international de coopération » ; au « droit international des États », se joint un droit international à dessein cosmopolite, le « droit international du genre humain »[2]. Pour les défenseurs de cette nouvelle orientation du droit international, au rang desquels de nombreux juges y compris au sein d'une Cour considérée comme « conservatrice » comme la Cour internationale de Justice (CIJ), l'ordre juridique traditionnel, aujourd'hui dépassé, marqué par la prédominance des souverainetés étatiques n'a pas été capable d'éviter les violations massives des droits de l'homme dans toutes les régions du monde, ni les atrocités successives au cours du dernier siècle, ni l'intensification de la production et l'usage d'armements de destruction massive. De telles atrocités auraient réveillé la conscience juridique quant à la nécessité de re-conceptualiser les bases de l'ordre juridique international. La dynamique de la vie internationale contemporaine a alors abouti à discréditer la vision traditionnelle selon laquelle les relations internationales se régissaient par des règles dérivées entièrement de la volonté exclusive des États[3]. C'est ce mouvement éthique, véritable révolution copernicienne qui aurait affecté le régime de certaines institutions anciennes du droit international, telles les immunités[4] ou encore la protection diplomatique. Symboles de la prégnance

[1] On fixe généralement au lendemain des deux guerres mondiales le début de la profonde remise en cause de l'idée même de pouvoir souverain. « *Cette guerre a montré où pouvait conduire le déchaînement meurtrier de pouvoirs perdant la raison ; elle a aussi appris aux peuples d'Europe continentale une chose inouïe : les Etats peuvent mourir. Leur refondation ne pouvait donc pas s'opérer comme si de rien ne s'était passé. Pour être reconnu, le pouvoir allait devoir exhiber d'autres titres de légitimité que la simple affirmation de sa souveraineté ».* A. Supiot, *Homo juridicus Essai sur la fonction anthropologique du Droit,* Paris, Éditions du Seuil, 2005, p. 228. Pour le Professeur Alain Supiot, cette remise en cause du pouvoir ne s'est pas limitée à l'État. Dans l'entreprise comme dans la famille ou dans la sphère publique, les figures du pouvoir souverain ont été contestées, ouvrant la voie non pas, à une disparition des relations de pouvoir, mais à leur profonde transformation, qui s'est exprimée de deux façons sur le plan juridique : en premier lieu par un recul du pouvoir discrétionnaire au profit du pouvoir fonctionnel et en second lieu par un recul de la centralisation du pouvoir au profit d'une distribution des pouvoirs. Ibid., pp. 228-229.

[2] R. Kolb, *Droit international pénal*, Bale/Bruxelles, Helbing Lichtenhahn/Bruylant, collection de droit international public, 2008, p.17.

[3] Voir par exemple, *Réserves à la Convention pour la Prévention et la Répression du Crime de Génocide*, avis consultatif du 28 mai 1951, CIJ Recueil 1951, opinion dissidente de M. Guerrero, Sir Arnold McNair, MM. Read et Hsu Mo, p.46 ; A.A. Cançado Trindade, *Évolution du droit international au droit des gens*. *L'accès des individus à la justice internationale. Le regard d'un juge,* Paris, Pedone, Ouvertures internationales, 2008, p.142.

[4] Sur l'impact sur le droit des immunités, voir A. Koagne Zouapet, *Les immunités dans l'ordre juridique international. Le prisme de la constance,* thèse de doctorat en droit, Université de Genève, juin 2019, 439 p.

et l'omnipotence de l'État sur la scène internationale, ces institutions doivent progressivement s'adapter, sous peine de disparaître, à cette nouvelle orientation du droit international dont les valeurs promues se situent au-delà de l'Etat *uti singulis.* Prenant acte de l'internationalisation des droits humains, et visant la protection de la personne humaine à travers des notions comme le *jus cogens* ou les obligations *erga omnes*[1], le droit international moderne « *devient aussi un 'maître' des États; il cesse d'être un simple serviteur, un chétif valet. De sinécure, il devient aussi Dike sévère, portant épée* »[2].

Autrefois institution centrale du système des relations interétatiques, la protection diplomatique est généralement perçue comme une sorte de vieil outil désormais rarement utilisé et promis sans doute très prochainement à un rangement définitif au grenier des concepts d'antan[3]. Aujourd'hui, avec le développement des voies de recours directement ouvertes à l'individu en droit international, l'institution semble avoir perdu tout attrait et toute utilité. Il n'en est pourtant rien et l'institution a su se renouveler pour s'adapter aux évolutions du droit international. Il s'est d'abord agi d'une modernisation de ses moyens ; la protection diplomatique s'est élargie à une panoplie de démarches et actions internationales, y compris celles de nature préventive, que les États peuvent entreprendre, en utilisant n'importe quel canal, moyen ou procédure dans le but de protéger tant individuellement que collectivement leurs ressortissants affectés, ou

[1] Voir pour une défense de ce paradigme notamment, A.A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pedone, Iredies, collection doctrine(s), 2012, 368p. K. Parlett, « The individual and structural change in the international legal system », *Cambridge Journal of International and Comparative Law,* vol. 1, n°3, 2012, pp. 60-80.

[2] R. Kolb, *Réflexions sur les politiques juridiques extérieures,* Paris, Éditions A. Pedone, 2015, p.60. Dans le même sens, S. Villalpando, « The legal dimension of the international community: how community interests are protected in international law », *European Journal of International Law (EJIL)*, vol.21, n°2, 2010, pp.390-394.

[3] L. Condorelli, « L'évolution du champ d'application de la protection diplomatique », J-F. Flauss (dir.), *La protection diplomatique. Mutations contemporaines et pratiques nationales,* Bruxelles, Nemesis/Bruylant, 2003, p. 3. La protection diplomatique aurait également eu du mal à se développer de son histoire, celui d'une institution s'inscrivant dans une entreprise de domination impérialiste, imposée par les Etats développés et puissants aux pays plus faibles, notamment en Amérique latine. Voir A. Pellet, « La seconde mort d'Euripide Mavrommatis ? Notes sur le projet de la CDI sur la protection diplomatique », *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon,* Bruxelles, Bruylant, 2007, pp. 1364-1365 ; P. Okowa, « The International Court and the legacy of the Barcelona Traction Case», C.C. Jalloh, O. Elias (eds.), *Shielding humanity. Essays in international law in honour of Judge Abdul G. Koroma,* Leiden/Boston, Brill Nijhoff, p. 118.

risquant d'être touchés par les mesures illicites d'un autre État[1]. Ensuite sur la plan matériel, la protection diplomatique a été progressivement étendue au champ de la protection de la personne humaine, comme le souligne la CIJ : « *[e]n raison de l'évolution matérielle du droit international, au cours de ces dernières décennies, dans le domaine des droits reconnus aux personnes, le champ d'application ratione materiae de la protection diplomatique, à l'origine limité aux violations alléguées du standard minimum de traitement des étrangers, s'est étendu par la suite pour inclure notamment les droits de l'homme internationalement garantis*»[2]. À cet égard, il a été prétendu que l'universalité de la protection de la personne humaine « mondialise » la protection diplomatique prévue dans le droit international classique tout en la modifiant[3]. On aurait subséquemment une modification non seulement des finalités et des moyens de la protection diplomatique, mais aussi de ces conditions et de sa nature même pour lui permettre d'épouser le nouveau *telos* du droit international.

On a ainsi reproché à la Commission de Droit International des Nations Unies (CDI) de n'avoir pu tenir compte, dans son projet de codification, des nouvelles exigences du droit international dans l'aménagement du régime de la protection diplomatique. Ainsi, en dépit d'une définition qui permettait de s'éloigner de la fiction sur laquelle était assise la protection diplomatique[4], la CDI ne serait pas allée jusqu'au bout de cette logique en débarrassant le régime juridique de l'institution des oripeaux désormais inutiles afin de la renforcer[5]. Les principes coutumiers

[1] L. Condorelli, op. cit., pp. 5-6 ; I. Scobbie, « Invocation de la responsabilité pour la violation d' 'obligations impératives de droit international général' », P-M. Dupuy (dir.), *Obligations multilatérales, Droit impératif et responsabilité internationale des États,* Paris, Pedone, 2003, p. 139.

[2] *Ahmadou Sadio Diallo* (République de Guinée c. République démocratique du Congo), Exceptions préliminaires, arrêt du 24 mai 2007, CIJ Rec. 2007, p.599, §39. Voir également S. Garibian, « Vers l'émergence d'un droit individuel à la protection diplomatique ? », *Annuaire Français de Droit International (AFDI)*, 2008, vol.54, p.120.

[3] M. Pinto, « De la protection diplomatique à la protection des droits de l'homme », *RGDIP*, 2002, n°3, p.513.

[4] Aux termes de l'article premier des Articles sur la protection diplomatique, « la protection diplomatique consiste en l'invocation par un État, par une action diplomatique ou par d'autres moyens de règlement pacifique, de la responsabilité d'un autre État pour un préjudice causé par un fait internationalement illicite dudit État à une personne physique ou morale ayant la nationalité du premier État en vue de la mise en œuvre de cette responsabilité ». Dans le commentaire de cet article, la CDI a indiqué que celui-ci est formulé de manière à laisser ouverte la question de savoir si l'État qui exerce sa protection diplomatique le fait pour son propre compte ou pour celui de son national, ou les deux. *Annuaire de la Commission du droit international (ACDI),* 2006, vol. II (2), p. 25.

[5] A. Pellet, « La seconde mort d'Euripide Mavrommatis ? …», op. cit., p. 1398.

régissant la protection diplomatique n'appartenant pas au *jus cogens*[1], la Commission aurait ainsi dû renoncer à une coutume fort ancienne, pour effectuer « le dépoussiérage vigoureux d'une institution fondée sur des postulats dépassés »[2], adopter une lecture contemporaine de la protection diplomatique, et prendre en compte la réalité et la reconnaissance internationale des droits de la personne humaine comme l'a fait la Cour en 2007[3]. La question que s'est posée la CDI[4] et que nous nous posons dans le cadre de la présente analyse est de savoir si le régime de la protection diplomatique a réellement évolué dans le droit international contemporain. L'évolution, somme toute naturelle du droit international (comme toute branche du droit), que rappelle l'aphorisme *ubi societas, ibi jus,* a-t-elle abouti, au regard de la pratique internationale, à une adaptation du droit de la protection diplomatique aux valeurs prônées par le « droit international du genre humain » ? Peut-on parler aujourd'hui d'une mutation aboutissant à une application *pro persona humana* de la protection diplomatique ? Il ne s'agit pas de revenir sur les inévitables développements que connaissent toute règle et toute institution : le droit est en effet soumis au temps et celui-ci lui impose des changements. Il s'agit de s'interroger sur l'actualité des

[1] L. Condorelli, op. cit., p.9.

[2] A. Pellet, « Le projet d'articles de la CDI sur la protection diplomatique : une codification pour (presque) rien », M.G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflish,* Leiden, Brill/Nijhoff, 2007, p. 1147.

[3] Voir Pellet, « La seconde mort d'Euripide Mavrommatis ? …», op. cit., pp. 1366-1367 ; O. de Frouville, « Affaire Ahmadou Sadio Diallo (République de Guinée c. République Démocratique du Congo). Exceptions préliminaires : le roman inachevé de la protection diplomatique », *AFDI,* vol.53, 2007, p. 304 ; V. Pergantis, « Towards a 'humanization'of diplomatic protection ? », *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht*, vol. 66, n°, 2006, pp. 353-355 ; M. Ubeda-Saillard, « La diversité dans l'unité : l'arrêt rendu par la Cour Internationale de Justice le 30 novembre 2010 dans l'affaire Ahmadou Sadio Diallo », *RGDIP,* tome 115, n°4, 2011, p.905 ; D. Alia, « La CIJ, juge des droits de l'homme : dynamique propre à l'affaire Ahmadou Sadio Diallo ou mutation générale de la protection diplomatique ? », I. Mingashang (dir.), *La responsabilité du juriste face aux manifestations de la crise dans la société contemporaine. Un regard croisé autour de la pratique du droit par le professeur Auguste Mampuya,* Bruxelles, Bruylant, p. 867.

[4] Voir dans ce sens, J. Crawford, « The International Law Commission's Articles on diplomatic protection revisited », T. Maluwa, M. du Plessis, D. Tladi (eds.), *The pursuit of a brave new world in International Law. Essays in honour of John Dugard,* Leiden/Boston, Brill Nijhoff, p. 138; A. Vermeer-Künzli, « As if: the legal fiction in diplomatic protection», *EJIL,* vol.18, n°, 2007, p.40.

aspects les plus controversés de la fiction vatellienne[1] sur laquelle repose la protection diplomatique classique et réaffirmée dans l'énoncé célèbre de la Cour permanente de Justice Internationale (CPJI)[2]. Dans le contexte de ce qui est présenté comme le « droit international des hommes », trois conditions spécifiques de la protection diplomatique sont contestées : l'exigence du lien de nationalité (1), l'émergence d'un droit subjectif à la protection diplomatique (2), et le destinataire final de la réparation octroyée le cas échéant (3). L'examen de ces aspects pousse à s'interroger de façon générale sur la possibilité d'user de la protection diplomatique comme outil de protection de la personne humaine (4).

II. La disparition de l'exigence du lien de nationalité ?

La fiction sur laquelle est classiquement bâtie la protection diplomatique indique que l'État tire son droit d'action du lien spécifique, que représente la nationalité, qui le lie à la personne privée victime initiale. Selon les mots de la CPJI, « *[c]e droit ne peut nécessairement être exercé qu'en faveur de son national, parce que, en l'absence d'accords particuliers, (c'est le lien de nationalité entre l'État et l'individu qui seul donne à l'État le droit de protection diplomatique). Or, c'est comme partie de la fonction de protection diplomatique que doit être considéré l'exercice du droit de prendre en mains une réclamation et d'assurer le respect du droit international. Lorsqu'un dommage a été causé au national d'un pays tiers, une réclamation à raison de ce dommage ne tombe pas dans le domaine de la protection diplomatique que puisse accorder l'État et ne saurait donner ouverture à une réclamation que 1'État soit en droit d'endosser* »[3]. Cette règle a été reprise à l'article 3 (1) des Articles de la CDI

[1] «[q]uiconque maltraite un citoyen offense indirectement l'État, qui doit protéger ce citoyen». E. de Vattel, *Le droit des gens ou Principes de la loi naturelle (1758)*, Washington DC, Carnegie Institution, 1916, vol. I, livre II, chap. VI, p. 309, para. 71.

[2] «*en prenant fait et cause pour l'un des siens, en mettant en mouvement, en sa faveur, l'action diplomatique ou l'action judiciaire internationale, cet État fait, à vrai dire, valoir son droit propre, le droit qu'il a de faire respecter en la personne de ses ressortissants le droit international*». *Concessions Mavrommatis en Palestine*, arrêt du 30 août 1924, C.P.I.J. série A no 2, p. 12. Ce *dictum* a été repris dans l'affaire du *Chemin de fer Panevezys-Saldutiskis (Estonie c. Lituanie)*, arrêt du 28 février 1939, C.P.J.I. série A/B no 76, p. 16.

[3] *Chemin de fer Panevezys-Saldutiskis, arrêt, 1939, C.P.J.I. série A/B n^{o} 76*, p. 16. Dans le même sens, *Réparation des dommages subis au service des Nations Unies*, avis consultatif du 11 avril 1949, CIJ Rec. 1949, pp. 202-203. Voir pour un exposé de la consécration progressive de la règle par la jurisprudence, voir S. Touzé, *La protection des droits des nationaux à l'étranger. Recherches sur la protection diplomatique,* Paris, Éditions A. Pedone, 2007, pp. 339-348.

sur la Protection diplomatique: « L'État en droit d'exercer la protection diplomatique est l'État de la nationalité ». C'est une règle qui est valable tant pour les personnes physique que pour les personnes morales[1].

Ainsi, et contrairement à ce qui a été prétendu[2], le droit de tout citoyen européen à la protection des autorités diplomatiques de tout pays membre si son État national n'est pas représenté sur le territoire du pays tiers, consacré par l'article 46 de la Charte des droits fondamentaux de l'Union Européenne, et les articles 20 et 23 du Traité sur le fonctionnement de l'Union Européenne, ne consacrent pas une protection diplomatique reconnue à tous les États membres de l'Union Européenne (UE) à l'endroit de tous les « citoyens communautaires ». Au-delà du fait que la mise en œuvre d'un tel droit, implique nécessairement le consentement des États tiers (en vertu du principe *pacta tertii nec nocent nec prosunt)*, la lecture des dispositions laisse clairement voir qu'il s'agit davantage de protection consulaire que de protection diplomatique au sens où l'entend le droit international[3]. De fait, les États membres de l'UE ont toujours souligné de façon itérative qu'ils retiennent leurs droits souverains en matière de politique étrangère. Ceci vaut en matière de protection diplomatique et consulaire, comme l'ont rappelé certains États lors de la consultation de la Commission européenne pour l'élaboration du livre vert sur la question[4]. Le rapporteur spécial sur la protection diplomatique, suivi sur ce point par la CDI, a exclu de façon claire l'hypothèse d'une protection diplomatique exercée par l'UE en l'absence d'un lien de nationalité entre l'Union et ses citoyens. Pour le professeur John Dugard, un « *citoyen de l'Union européenne n'est pas un national de tous les États membres de l'Union, ce qui signifie que la citoyenneté de l'Union européenne ne satisfait pas à la condition de nationalité des réclamations aux fins de la protection*

[1] Pour une analyse de l'application de cette condition aux personnes morales, voir A. Tournier, *La protection diplomatique des personnes morales,* Paris, LGDJ, 2013, pp. 289-377.

[2] Voir par exemple M. Salazar Albornoz, « Legal nature and legal consequences of diplomatic protection. Contemporary challenges», *Anuario Mexicano de Derecho Internacional,* vol. VI, 2006, p. 391.

[3] A. Künzli, « Exercising diplomatic protection. The fine line between litigation, demarches and consular assistance », *Zaörv,* vol. 66, 2006, pp.340-344; Condorelli, « L'évolution du champ d'application de la protection diplomatique », op. cit., p.11, Touzé, op. cit., pp. 386-388.

[4] J-P. Cot, « La protection consulaire européenne : perspectives et problèmes », *La France, l'Europe et le Monde. Mélanges en l'honneur de Jean Charpentier,* Paris, Éditions A. Pedone, 2008, p. 283.

diplomatique »[1]. La condition de nationalité est donc le titre conférant le droit d'exercer la protection, le trait caractéristique de la protection diplomatique qui la distingue d'autres actions en responsabilité que pourrait exercer un État pour des violations causées à une personne privée, en droit international[2].

La CDI a toutefois essayé de faire évoluer la règle coutumière sur certains aspects. L'une des deux principales évolutions sur la question dans les Articles de la CDI concerne le critère de rattachement de la nationalité, beaucoup plus souple et le traitement des cas de multiples nationalités. La CDI a, sur le premier point, décidé de s'éloigner du critère du rattachement particulièrement exigeant établi par la CIJ dans l'affaire *Nottebohm*[3]. Ainsi, l'article 4 des Articles de la CDI n'exige pas de l'État qu'il prouve l'existence d'un lien effectif entre lui et son national, comme facteur additionnel de l'exercice de la protection diplomatique, même lorsque le national n'a qu'une seule nationalité. La Commission justifie cette solution, d'une part, par l'existence de facteurs qui limitaient la solution de la Cour dans l'affaire *Nottebohm* à cette circonstance particulière. D'autre part, cette solution découle directement d'une volonté de la CDI de tenir compte de l'évolution des réalités sociales: si la condition de l'existence d'un lien effectif était strictement appliquée, elle exclurait des millions de personnes du bénéfice de la protection diplomatique, en raison de la mondialisation économique et les migrations qui ont rendu les liens plus tenus entre de

[1] J. Dugard, Septième rapport sur la protection diplomatique, doc. A/CN.4/567, 7 mars 2006, p. 10.

[2] G. Gaja, « Quel préjudice pour un État qui exerce la protection diplomatique », D. Alland et al. (dir.), *Unité et diversité du droit international. Ecrits en l'honneur du professeur Pierre-Marie Dupuy,* Leiden/Boston, Martinus Nijhoff Publishers, 2014, p. 491 ; de Frouville, op. cit., pp. 310-311. M. Vasileios Pergantis souligne à cet effet à juste titre que le fait de citer la pratique de la Commission d'indemnisation des Nations Unies (UNCC) et du Tribunal Irano-américain, pour illustrer l'affaiblissement de la condition de nationalité, ignore souvent que comme l'indiquent ces organes eux-mêmes, ils n'agissent pas dans le cadre stricto sensu de la protection diplomatique. Pergantis, op. cit. pp. 368-370.

[3] Dans cet arrêt du 6 avril 1955 la CIJ a affirmé que: «*Selon la pratique des États, les décisions arbitrales et judiciaires et les opinions doctrinales, la nationalité est un lien juridique ayant à sa base un fait social de rattachement, une solidarité effective d'existence, d'intérêts, de sentiments jointe à une réciprocité de droits et de devoirs. Elle est, peut-on dire, l'expression juridique du fait que l'individu auquel elle est conférée, soit directement par la loi, soit par un acte de l'autorité, est, en fait, plus étroitement rattaché à la population de l'État qui la lui confère qu'à celle de tout autre État. Conférée par un État, elle ne lui donne titre à l'exercice de la protection vis-à-vis d'un autre État que si elle est la traduction en termes juridiques de l'attachement de l'individu considéré à l'État qui en a fait son national*». *Nottebohm (Liechtenstein c. Guatemala), deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 23.

nombreuses personnes et leur État de nationalité[1]. Sur le second point, l'article 7 admet la possibilité pour un État d'exercer la protection diplomatique contre l'autre État dont la victime a également la nationalité, si la nationalité prépondérante de la victime est celle du premier État. C'est une véritable avancée qui rompt avec une règle ancienne codifiée notamment à l'article 4 de Convention de La Haye de 1930 concernant certaines questions relatives aux conflits de lois sur la nationalité, qui interdisait à un État de nationalité de présenter une réclamation pour le compte d'un double national contre l'autre État de nationalité. Il s'agit là encore d'un progrès qui élargit le champ *ratione personae* de la protection diplomatique et qui vise à rapprocher la protection diplomatique à la réalité internationale contemporaine[2]. L'on peut également souligner dans la même logique l'assouplissement de la règle de la continuité de la nationalité énoncée à l'article 5[3].

Mais la principale « révolution » des Articles de la CDI sur la protection diplomatique vient sans doute de son article 8. Suivant cet article, un État peut désormais exercer la protection diplomatique à l'égard d'un réfugié ou d'un apatride si, « au moment où le dommage a été causé et à la date de la présentation de la réclamation », celui-ci a sa résidence légale sur le territoire de l'État qui l'exerce et si l'auteur du préjudice n'est pas l'État de nationalité du réfugié. Comme l'a souligné la Commission dans le commentaire de cette disposition, il s'agit d'un développement progressif plutôt que d'une œuvre de codification; la norme coutumière est bien l'exigence du lien de nationalité[4]. Il s'agit finalement dans ces hypothèses marginales, d'assurer la protection diplomatique a des personnes qui n'ont, soit pas d'États pouvant exercer une telle protection (cas des apatrides), soit un État dont ils ne peuvent, ni ne veulent réclamer la protection (cas des réfugiés). C'est pour souligner le caractère exceptionnel de cette règle introduite de *lege ferenda*, et ne pas affaiblir le principe, qui reste bien l'exigence d'un lien de nationalité, que la CDI exige un critère de rattachement particulièrement « haut », suivant son propre aveu, avec l'État

[1] *Annuaire CDI 2006,* op. cit. p.28. J. Dugard, « Diplomatic protection and human rights », *Australian Year Book of International Law,* vol. 24, 2005, pp. 84-85.

[2] Ibid. *Annuaire CDI 2006,* op. cit., p. 33. La CDI justifie cette solution d'une part par un retour à la solution qui existait avant 1930, et d'autre part par l'existence d'une abondante pratique jurisprudentielle arbitrale, consacrée par une décision de la Commission de conciliation italo-américaine dans une décision du 10 juin 1955. Ibid.

[3] Pour une critique sur ce point d'une avancée faite à « demi-mesure », voir Pellet, « Le projet d'articles de la CDI sur la protection diplomatique… », op. cit., pp. 1138-1140.

[4] *Annuaire CDI 2006,* op. cit. p.35. Une application stricte du droit d'action en réclamation conduisait jusque là dans la pratique à exclure une telle possibilité. Touzé, op. cit., p. 380, Crawford, op. cit., pp. 152-154.

pouvant exercer cette protection : le réfugié ou l'apatride doit avoir sa résidence légale et habituelle sur le territoire de l'État prétendant exercer la protection diplomatique à son endroit[1]. Il est donc incorrect d'affirmer sur la base de cet article 8 que : « [*n*]*ationality, then, is non exclusive in another sense : it is not then only bond of attachment between an individual and a state that may justify the exercise of diplomatic protection* » et y voir un affaiblissement de la condition de nationalité pour l'exercice de la protection diplomatique[2]. Le but d'une exception admise et reconnue comme telle n'est pas d'affaiblir la règle, mais au contraire d'éviter toute érosion de celle-ci en fixant en amont les seules hypothèses dans lesquelles elle ne s'appliquerait pas. C'est ce qu'a rappelé la CIJ à la Guinée dans son arrêt du 24 mai 2007 : le fait qu'il existe des stipulations conventionnelles ne suffit pas à démontrer que les règles coutumières de protection diplomatique auraient changé ; cela pourrait tout aussi bien se comprendre dans le sens contraire[3]. De plus, comme on l'a vu, la CDI a clairement indiqué, que l'exception ne visait nullement à remettre en cause l'exigence du lien de nationalité comme condition d'exercice de la protection diplomatique.

Par ailleurs même dans cette œuvre de développement, la CDI exclut la possibilité d'une protection diplomatique contre l'État national du réfugié[4]. La nationalité est ainsi à la fois une condition positive et négative pour l'exercice de la protection diplomatique. Elle permet en amont d'indiquer quel État peut agir en protection diplomatique, mais aussi en aval pour exclure certains États comme défenseurs à l'action. L'État de nationalité ne peut donc être défenseur à la protection diplomatique sauf dans des hypothèses exceptionnelles limitativement énumérées : en cas de double nationalité dans les conditions sus évoquées, pour les navires et les

[1] Ibid.

[2] A. Vermeer-Künzli, « Nationality and diplomatic protection », A. Annoni, S. Forlati (eds.), *The changing role of nationality in International Law,* London and New York, Routledge, 2013; pp. 90-92.

[3] La Cour répondait ainsi à l'argument d'une pratique générale conventionnelle d'octroi d'un droit de protection aux actionnaires à leur État de nationalité. *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2007, p. 615, para. 90.

[4] *Annuaire CDI 2006,* op. cit. p.36.

membres d'équipage[1], ou en cas d'exercice de la protection fonctionnelle par une organisation internationale[2].

Toutefois, cette règle coutumière sur l'exigence du lien de nationalité est contestée par de nombreux auteurs, qui revendiquent le droit pour tout État autre que l'État de nationalité, à exercer la protection diplomatique en cas d'un préjudice constitutif de violation d'une norme de *jus cogens*. Ce droit serait assis sur la reconnaissance en droit international d'un droit d'*actio popularis*, de *lege lata* au nom de l'obligation à la charge des États d'assurer le respect des normes du droit impératif, une telle obligation étant considérée comme ayant acquis valeur coutumière. La légitimation du droit de tout État d'agir en protection diplomatique à l'égard d'individus victimes d'une violation d'une norme de *jus cogens* a également été recherchée *de lege ferenda*, par appel au concept d'ordre public international. Il est ainsi affirmé, qu'en bonne logique, la défense des droits inhérents à cet ordre public peut difficilement, sous peine de contradiction, être réservée au seul titre de la nationalité de la victime[3]. La première objection à ce raisonnement est sans doute liée à la présomption affirmée que le droit au juge est une norme impérative du droit international[4] ; une telle règle impérative n'a pas encore été consacrée de manière indiscutable en droit international. En effet il reste encore à démontrer que la norme substantielle que contient une règle impérative induit également l'impérativité de la répression universelle de la violation de la norme substantielle. Autrement dit, il n'est pas établi de façon indiscutable en droit international que l'interdiction de la torture (norme de *jus cogens*) s'accompagne d'une norme

[1] Voir article 18 des Articles de la CDI sur la protection diplomatique ; Touzé, op. cit., pp. 389-394 ; Dugard, « Diplomatic protection and human rights », op. cit., p. 90, Condorelli, « L'évolution du champ d'application de la protection diplomatique », op. cit., pp. 25-26.

[2] F. Capone, « Victims' right to reparation and the residual application of diplomatic and/or functional protection », A. de Guttry et al. (eds), *The duty of care of international organizations towards their civilian personnel. Legal obligations and implementation challenges,* The Hague, Asser Press, 2018, p. 470.

[3] J-F. Flauss, « Vers un aggiornamento des conditions d'exercice de la protection diplomatique ? », *La protection diplomatique. Mutations contemporaines et pratiques nationales*, op. cit., pp. 47-48 ; J. Bröhmer, *State immunity and the violation of human rights*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, pp.154-156 ; Th. Touonang Tekendo, *Les obligations objectives en droit international*, thèse en vue de l'obtention du doctorat/Ph.D. en droit international public, Université de Yaoundé II, 2011-2012, pp.285-287 ; H. Thierry, « L'évolution du droit international public. Cours général de droit international public », *Recueil des Cours de l'Académie de Droit International (RCADI),* vol. 222 (1990-III), p. 105.

[4] Voir notamment Cançado Trindade, *Évolution du droit international au droit des gens*, op. cit., pp. 41, 95 ;

de même nature obligeant à réprimer de façon universelle tout auteur de la torture. Par ailleurs, contrairement aux normes impératives qui n'admettent pas par définition une quelconque dérogation, le droit au juge admet dans certaines hypothèses, certes exceptionnelles mais qui n'en existent pas moins, des dérogations. De nombreuses conventions internationales l'admettent comme l'a rappelé à plusieurs occasions la Cour Européenne des droits de l'homme[1].

Ensuite, une proposition du Rapporteur spécial, tendant à reconnaitre dans l'hypothèse sus évoquée une forme d'obligation à la charge de tous les États, aussi limitée soit-elle, a été rejetée en première lecture par la CDI. L'article 4 (1) proposé par le professeur John Dugard dans son premier rapport avançait que l'État de nationalité n'était pas obligé d'intervenir en protection diplomatique en cas de violation d'une norme de *jus cogens* si un autre État avait déjà actionné sa protection diplomatique[2]. Cette proposition a été rejetée par les membres de la CDI comme ne reflétant pas la pratique internationale. Ainsi que l'a affirmé le juge international[3], l'existence d'un lien de nationalité est une condition d'exercice de la protection diplomatique et participe de son ADN. Vouloir élargir le champ d'application de la protection diplomatique pour la défense des obligations *erga omnes,* aboutit peut être de fait à vouloir confondre deux mécanismes qui ont deux logiques, deux philosophies différentes. La controverse sur la question ne fait en réalité que souligner cet état de fait.

De ce point de vue, le commentaire de la CDI sur l'article 16 est quelque peu ambigu. La Commission y souligne en effet que le droit international coutumier permet aux États de protéger les droits des non-nationaux si un instrument conventionnel les y autorise, dans le cadre d'une procédure judiciaire. Elle précise que si l'obligation violée est due à la communauté internationale dans son ensemble, les conditions régissant l'exercice de la protection diplomatique n'ont pas à être satisfaites. De façon claire, elle indique que la condition de nationalité n'a pas à être respectée, sans réserver l'hypothèse où l'auteur du préjudice serait l'État national de la

[1] Cour Européenne des Droits de l'Homme, *Beer et Regan c. Allemagne,* requête n°28934/95, Grande chambre, arrêt du 18 février 1999, paras. 40, 53, 58 ; *Waite et Kennedy c. Allemagne,* requête n°26083/94, Grande chambre, 18 février 1999, paras. 50, 59, 63, 72 ; *Mary Forgaty c. Royaume Uni,* requête n°37112/97, Grande chambre, arrêt du 21 novembre 2001, paras. 32-34 ; *John Mac Elhinney c. Irlande,* requête n°31253/96, Grande chambre, arrêt du 21 novembre 2001, paras. 33-35 ; *Sulaiman Al-Adsani c. Royaume Uni,* requête n°35763/97, Grande chambre, arrêt du 21 novembre 2001, paras. 38, 54, 61, 66.

[2] J. Dugard, *Premier rapport sur la protection diplomatique,* 7 mars 2000, doc. A/CN.4/506, p.22.

[3] *Chemins de fer Panevezys-Saldutiskis*, op. cit. p.16.

victime[1]. Pour certains auteurs, il y a là une contradiction entre les Articles de la CDI sur la responsabilité de l'État pour fait internationalement illicite, dont l'article 44 exige que la demande doit être présentée conformément aux règles applicables en matière de nationalité des réclamations, et l'article 16 du Projet d'articles sur la protection diplomatique tel que commenté par la CDI[2]. Quoi qu'il en soit la possibilité consacrée pour les États d'agir en protection des droits des non-nationaux est clairement exclue dans le texte de l'article 16, comme pouvant être une protection diplomatique. Ainsi que la CIJ l'a indiqué dans l'affaire de la *Barcelona Traction*, une distinction doit être faite entre « *les obligations des États envers la communauté internationale et celles qui naissent vis-à-vis d'un autre État dans le cadre de la protection diplomatique* »[3]. La condition de nationalité permet ainsi de faire une distinction entre la protection diplomatique et l'action en vertu de l'article 48 des Articles sur la responsabilité de l'État pour faits illicites[4]. Comme le reconnaît avec dépit une auteure, « *the law of diplomatic protection had (and still has) very little to say about the treatment of nationals in their state of nationality or about general situations of abuse that do not involve nationals of a potential claimant state*»[5].

C'est le lien de nationalité qui permet également à l'État d'alléguer d'un préjudice justifiant son action. Dans le cadre de la protection diplomatique, l'État qui l'exerce au bénéfice de l'un de ses ressortissants, a bien un intérêt particulier : il est le seul qui peut réclamer que l'individu soit

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[1] *Annuaire CDI,* op. cit., p.51. De façon générale, l'on a reproché à la CDI de ne s'être pas interrogé sur les relations qui peuvent exister entre la protection diplomatique au sens strict qu'un État exerce en faveur de ses nationaux, parce qu'il est considéré comme « lésé », et celle que peut exercer un « Etat autre qu'un Etat lésé » « dans l'intérêt des bénéficiaires de l'obligation violée », si celle-ci est par exemple « due à la communauté internationale dans son ensemble ». Voir Pellet, « Le projet d'articles de la CDI sur la protection diplomatique… », op. cit., p. 1153.

[2] C. Le Bris, « Vers la 'protection diplomatique' des non-nationaux victimes de violation des droits de l'homme ? », *RTDH*, 23ème année, n°90, 1er avril 2012, p.337.

[3] *Barcelona Traction, Light and Power Company Limited, arrêt du 5 février 1970, CIJ Rec. 1970,* p.32, §33. La Cour précise d'ailleurs dans l'arrêt qu'en dépit de l'identification de certains droits de l'homme comme relevant du *jus cogens*, les instruments de protection des droits de l'homme ne confèrent pas aux États la capacité de protéger les victimes de violations des droits de l'homme sans distinction de nationalité, sauf aménagement spécial par accord régional. Ibid. §24.

[4] Voir G. Gaja, « Is a State specially affected when its nationals' human rights are infringed? », L.C. Vohrah et al. (eds.), *Man's inhumanity to man*, Leyde, Brill Nijhoff, 2003, pp. 376-382; A. Vermeer-Künzli « A matter of interest : diplomatic protection and State responsibility erga omnes », *ICLQ*, vol.56, part 3, july 2007, pp.554-556.

[5] A. Vermeer-Künzli, « Chapter 10. Diplomatic protection as a source of human rights law», D. Shelton (ed.), *The Oxford handbook of international human rights law,* Oxford, Oxford university Press, 2013, p. 253.

traité de la manière requise par le droit international[1]. Le critère de nationalité reste exigible en toute situation, même dans l'hypothèse de violation d'une règle impérative de droit international. Aucun autre État, en raison de l'inexistence d'un lien de nationalité avec la personne victime de la violation n'étant autorisé à agir par ce biais, la protection diplomatique de l'État de nationalité reste donc, sauf voie de droit ouverte à l'individu sur le plan international, le moyen privilégié, voire unique, d'invocation de la responsabilité de l'État étranger à la suite d'une violation d'une norme de *jus cogens* sur la personne d'un individu étranger[2]. Cette voie de droit disparaît, hors mis les cas exceptionnels évoqués ci-dessus, si l'auteur de la violation est l'État de nationalité de la ou des victimes. Bien que la possibilité de protéger des non-nationaux soit « hautement désirable », la pratique des États, hors accord conventionnel conférant un tel titre, est absente et il n'y a donc pas émergence d'une base coutumière pour ce droit[3]. Il y a sans doute là un indiscutable anachronisme entre l'évolution du droit international, la consécration des normes de *jus cogens* et des obligations *erga omnes,* et les moyens d'assurer leur effectivité ; plus exactement une inadéquation entre les moyens d'invocation de la responsabilité internationale et la nature des normes violées. Cela souligne la nature spécifique de l'ordre juridique international dans lequel les notions comme celle d'« ordre public » ne peuvent être implémentées de la même façon et avec les mêmes mécanismes que dans les ordres juridiques internes plus centralisés. La capacité de la victime à exiger la protection diplomatique de son État en cas de violation de ses droits, est une autre illustration des apories du système.

III. L'émergence d'un droit subjectif à la protection diplomatique?

Ainsi que l'a souligné le professeur Dugard dans son premier rapport, le débat concernant l'identité du détenteur du droit dans la protection diplomatique a d'importantes conséquences quant à l'étendue et l'efficacité de ce droit. « *Si le détenteur en est l'État, celui-ci peut le faire appliquer indépendamment des recours dont peut éventuellement se prévaloir l'individu devant une instance internationale. Si, d'un autre côté,*

[1] G. Gaja, « Droits des États et droits des individus dans le cadre de la protection diplomatique », *La protection diplomatique,* op. cit., p.66 ; D. Russo, « The individual right to compensation in the law of diplomatic protection», *Rivista di Diritto Internazionale,* vol. XCIX, 2016, p. 731.

[2] S. Touzé, op. cit., pp.265-266.

[3] I. Scobbie, op. cit., pp. 141-142.

c'est l'individu qui est le détenteur du droit, il devient alors possible d'arguer que le droit de l'État est un droit purement supplétif et procédural – c'est-à-dire un droit qui ne peut s'exercer qu'en l'absence de recours accessible à l'individu »[1]. Dans la logique du « droit international des hommes », la question se formule en termes d'obligation pour l'État d'exercer la protection diplomatique, et de droit pour l'individu à une protection diplomatique de la part de son État de nationalité. En effet, il serait plus logique au moins dans les hypothèses de violations graves de droits humains, de violation de normes impératives, ou d'obligations *erga omnes* que les individus bénéficient de la protection de leur État, et/ou que ceux-ci soient tenus d'agir dans la logique de protection des valeurs de la communauté internationale et de l'ordre public international.

La solution classique sur la question a été édictée par la CIJ en 1970 : « *dans les limites fixées par le droit international, un État peut exercer sa protection diplomatique par les moyens et dans la mesure qu'il juge appropriés, car c'est son droit propre qu'il fait valoir. Si les personnes physiques ou morales pour le compte de qui il agit estiment que leurs droits ne sont pas suffisamment protégés, elles demeurent sans recours en droit international. En vue de défendre leur cause et d'obtenir justice, elles ne peuvent que faire appel au droit interne, si celui-ci leur en offre les moyens. Le législateur national peut imposer à 1'Etat l'obligation de protéger ses citoyens à l'étranger. Il peut également accorder aux citoyens le droit d'exiger que cette obligation soit respectée et assortir ce droit de sanctions. Mais toutes ces questions restent du ressort du droit interne et ne modifient pas la situation sur le plan international.*»[2]. Selon cet énoncé, l'exercice de la protection diplomatique est soumise à la totale discrétion de l'État de nationalité qui ne peut y être contraint ni par la personne privée dont les droits sont violés, ni par les autres États, en raison de la nature de l'obligation violée. Cette approche de la Cour a été critiquée comme correspondant à une vision dépassée du droit international et de la fiction

[1] J. Dugard, *Premier rapport sur la protection diplomatique,* op. cit., para. 69.

[2] *Barcelona Traction, Light and Power Company, Limited*, op. cit. p.44, para. 78. La Cour poursuit en affirmant que « *L'État doit être considéré comme seul maître de décider s'il accordera sa protection, dans quelle mesure il le fera et quand il y mettra fin. Il possède à cet égard un pouvoir discrétionnaire dont l'exercice peut dépendre de considérations, d'ordre politique notamment, étrangères au cas d'espèce. Sa demande n'étant pas identique à celle du particulier OU de la société dont il épouse la cause, L'État jouit d'une liberté d'action totale. Quels que soient les motifs d'un changement d'attitude de sa part, le fait ne saurait en soi justifier l'exercice d'une protection diplomatique par un autre gouvernement, à moins qu'il n'y ait à cela un fondement distinct et valable* ». Ibid., para. 19.

Mavrommatis[1]. Une lecture « moderne » de la protection diplomatique, exige d'y voir une action en représentation de l'individu victime d'un préjudice, dans laquelle l'intérêt à agir de l'État est fondé sur la violation d'une obligation qui lui est propre. A cet égard, et dans une perspective de dédoublement fonctionnel, l'exercice de la protection diplomatique se comprend comme l'exercice d'une fonction internationale orientée vers la garantie des droits de ses ressortissants : l'État agit pour le compte d'une personne privée, et représente effectivement ses intérêts devant la justice internationale lorsqu'elle ne lui reconnaît pas le *locus standi*[2]. De ce point de vue, le véritable titulaire du droit en litige qu'est la personne privée, devrait avoir son mot à dire sur l'exercice de l'action, ou au moins bénéficier d'une action de l'État dans des cas particulièrement graves de violation de ses droits. Cette tendance doctrinale forte préconise que lorsqu'une demande de protection diplomatique a pour fondement une violation d'une norme impérative ou d'une obligation *erga omnes* commis par l'État de résidence, l'octroi de la protection diplomatique devienne obligatoire pour l'État requis. Il s'en suivrait alors un effacement du pouvoir discrétionnaire de celui-ci sur la décision d'accorder ou de ne pas accorder sa protection à son national lésé.

Sans doute sensible à ces arguments, le professeur Dugard dans son premier rapport, tout en réaffirmant à l'article 3 le pouvoir discrétionnaire de l'État d'exercer la protection diplomatique, a proposé de faire évoluer la règle, en limitant ce pouvoir discrétionnaire en cas de violation d'une norme impérative. L'article 4 (1) proposé prescrivait ainsi qu' « [*à] moins que la*

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[1] A. Pellet, « Le projet d'articles de la CDI sur la protection diplomatique », op. cit., pp. 1136-1137. La position de cet auteur illustre bien les différentes variations qu'il peut exister sur la question. Bien que souhaitant qu'il soit mis fin à la fiction vatellienne à la base de la protection diplomatique, il se dit cependant dubitatif sur l'opportunité de consacrer un droit à la protection diplomatique, fournissant des occasions de contentieux interne entre les États refusant d'exercer la protection diplomatique et leurs ressortissants qui la réclament. Ibid., p.1149.

[2] O. de Frouville, op. cit., p. 301; Dugard, « Diplomatic protection and human rights » op. cit., p.81; Touzé op. cit., p. 133. La jurisprudence de la CIJ montre que la Cour semble distinguer trois types d'actions : celles où l'État fait valoir un droit propre, en invoquant un préjudice qui lui a été directement causé par la violation d'une obligation qui lui est due ; celles où l'État fait valoir le droit d'un de ses ressortissants, lorsque le préjudice a été causé à cette personne par la violation d'une obligation qui lui était due ; et enfin une action mixte, où l'État invoque à la fois son droit propre et celui de la personne privée, le ou les faits internationalement illicites leur ayant simultanément porté préjudice. Voir notamment, *Barcelona Traction,* op. cit. ; p.46, paras. 85-86 ; *Affaire de l'Elettronica Sicula S.p.A (ELSI) (États-Unis d'Amérique c. Italie),* arrêt du 20 juillet 1989, CIJ Rec. 1989, p. 43 ; *LaGrand (Allemagne c. États-Unis d'Amérique),* arrêt, C. I. J. Recueil 2001, pp. 482-483, para. 42.

personne lésée ne puisse présenter une réclamation pour le préjudice subi devant une cour ou un tribunal international compétent, l'État dont elle a la nationalité a l'obligation juridique d'exercer, à la demande, la protection diplomatique à l'égard de cette personne si celle-ci en fait la demande si le préjudice est le résultat d'une violation grave d'une norme de jus cogens imputable à un autre État ». Cette proposition a été rejetée par les membres de la CDI comme non seulement n'étant pas du droit coutumier, mais allant bien au-delà des limites de ce qui pouvait être admis comme développement progressif du droit. De l'avis de nombreux membres de la Commission, la protection diplomatique n'est pas un droit individuel fondamental[1]. En effet, aucun instrument conventionnel relatif aux droits de l'homme, ni universel ni régional, ne consacre, en l'état actuel, une obligation pour les États parties d'exercer la protection diplomatique, ni un droit individuel à la protection diplomatique[2]. Le commentaire de l'article 2 du texte définitif des Articles le réitère : un État a le droit d'exercer la protection diplomatique au profit d'un de ses nationaux ; il n'a ni devoir, ni obligation de le faire. Si le droit interne d'un État peut l'obliger à exercer sa protection diplomatique au profit de ses nationaux, le droit international n'impose pas une telle obligation.[3] Par ailleurs, l'immense majorité des États ne semble nullement convaincue de l'utilité, ou à tout le moins l'opportunité, de transformer la compétence de protection diplomatique en compétence liée. Ils veulent s'accorder le droit de pouvoir apprécier quels sont les intérêts de l'État dans chaque cas, la protection diplomatique n'étant exercée que lorsque les « intérêts vitaux » de l'État ne seraient pas affectés

[1] Pour un exposé des débats au sein de la CDI, voir *Report of the International Law Commission on the work of its fifty-second session, 1 May - 9 June and 10 July - 18 August 2000, Official Records of the General Assembly, Fifty-fifth session, Supplement No.10,* doc. A/55/10, paras. 447-456. Le rapporteur spécial, tout en décriant une « opportunité manquée », reconnaît que sa proposition était faite de *lege ferenda* et avait une très faible pratique pour la soutenir. Dugard, « Diplomatic protection and human rights » op. cit., pp. 80, 83.

[2] Voir Commission européenne des droits de l'homme, décision du 2 mai 1978, *B. Russel, Peace Foundation Ltd c. Royaume Uni*, req. n°7597/75, DR14, p.117 ; décision du 9 décembre 1987, *G. Kapas c. Royaume Uni*, req. n°12822/87, DR 54, p.201 ; décision du 22 avril 1998, *A. Leschi et autres c. France*, req. n°37505/97, DR 93-A, p.120 ; Comité des droits de l'homme, 31 octobre 2007, *Herbert Schmidl c. Allemagne*, req. n°1616/2006. Lire également Flauss, op. cit., pp. 49-50, Touzé, op. cit., pp. 245-248, 267-170.

[3] *Annuaire CDI,* op. cit., p.27.

par une telle action[1]. Il n'y a donc pas, contrairement à ce que l'on a pu prétendre[2], la consécration même implicite d'une automaticité de la protection diplomatique, et donc une limitation du pouvoir discrétionnaire de l'Etat, même en cas de violation de *jus cogens,* ou d'obligations *erga omnes.*

On doit remarquer avec le professeur Olivier de Frouville que dans le cadre de la protection diplomatique, l'État exerce un droit procédural qui lui est propre, c'est-à-dire qu'il met en œuvre une voie de droit qui n'est pas accessible aux individus et qui relève de sa seule décision. Dès lors le problème se réduit à celui des obligations de l'Etat vis-à-vis des individus en matière de conduite de la politique étrangère, ou inversement, de droit des individus à l'égard de l'Etat dans ce domaine[3]. Si un droit à la protection diplomatique est susceptible d'être reconnu, ce ne sera uniquement que par le biais de la législation nationale de l'Etat protecteur, et aucunement, tout au moins en l'état actuel du droit international, à travers celui d'une norme internationale[4].

Dans son identification de la pratique sur la question, le Rapporteur Spécial de la CDI sur la protection diplomatique a identifié une trentaine de pays, dont la constitution consacre un droit individuel des nationaux à recevoir une protection diplomatique en cas de préjudice subi à l'étranger[5]. Mais il précise également que dans la plupart des cas, il est difficile de

[1] Le professeur Dugard admettait déjà une telle dérogation même dans le cadre de sa proposition d'une obligation d'agir en cas violation de *jus cogens.* Voir article 4 (2a) Premier rapport op. cit. Le rapporteur spécial admettait ainsi implicitement que même les exigences d'un « ordre public international », ne pouvaient conduire un État à agir contre ses « intérêts supérieurs ». Une telle clause dérogatoire, si elle était adoptée, est susceptible d'être comprise de manière très extensive, (en toute bonne foi ?) par l'État de nationalité. Voir Pergantis op. cit, p. 393 ; Flauss, op. cit. p. 58 ; Okowa, op. cit., p. 129.

[2] Le professeur Touzé tire en effet des articles 40 et 41 des Articles de la CDI sur la responsabilité des États pour faits internationalement illicites, une limite du pouvoir discrétionnaire de l'État et y voit l'exigence d'une automaticité de la protection diplomatique. Touzé, op. cit., pp. 236-237, 263-265,

[3] O. de Frouville, op. cit., p. 300. Voir pour une approche basée sur la distinction entre préjudice et dommage, H. Meunier, « Le fondement de la protection diplomatique : pour une nouvelle approche au moyen de la distinction entre préjudice et dommage », *AFDI,* vol. 59, 2013, pp. 223-255.

[4] S. Touzé, op. cit., p. 230.

[5] Sont dans ce cas l'Albanie, le Belarus, la Bosnie-Herzégovine, la Bulgarie, le Cambodge, la Chine, la Croatie, l'Espagne, l'Estonie, l'ex-République yougoslave de Macédoine, la Fédération de Russie, la Géorgie, le Guyana, la Hongrie, l'Italie, le Kazakhstan, la Lettonie, la Lituanie, la Pologne, le Portugal, la République de Corée, la République démocratique populaire lao, la Roumanie, la Turquie, l'Ukraine, le Viet Nam et la Yougoslavie.

savoir la portée exacte de la disposition et s'il ne s'agit pas d'un simple droit d'accès aux fonctionnaires consulaires à l'étranger ou, une simple clause de style, non opératoire ni exécutoire[1]. De nombreux auteurs ont pointé l'existence de décisions des juridictions nationales de certains pays, dans lesquels des juges nationaux ont affirmé qu'ils avaient le droit d'exercer un contrôle sur la manière dont la branche exécutive de l'Etat usait de son pouvoir discrétionnaire d'exercer ou non la protection diplomatique dans certains cas particuliers[2]. Au-delà de la généralité d'une telle pratique qui reste à démontrer, les défenseurs de cette idée ne citant de façon récurrente qu'une dizaine de décision de cinq pays[3], la conclusion tirée de ces décisions n'est pas totalement convaincante. D'abord, pratiquement toutes ces décisions ne contestent pas le pouvoir discrétionnaire de l'État pour accorder ou pas la protection diplomatique, mais très souvent commencent par le réaffirmer.

Ainsi par exemple, la Cour constitutionnelle allemande, tout en indiquant que les organes de la République Fédérale d'Allemagne ont une

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[1] J. Dugard, *Premier rapport sur la protection diplomatique,* op. cit., para. 80. Voir également Dugard, « Diplomatic protection and human rights » op. cit., p.81. De l'avis d'un analyste, « *cet ancrage constitutionnel ne reflète pas l'intention des constituants d'entériner précisément la protection diplomatique. Les dispositions constitutionnelles en questions sont délibérément formulées afin de ne pas établir des droits justiciables. Elles ne sont généralement pas exécutées par des lois de procédure et, sauf quelques exceptions, il n'existe pas de cas où ces dispositions ont été appliquées dans la pratique (…) l'on peut toujours invoquer au maximum un 'devoir moral' de l'État, mais pas son 'obligation juridique'* ». J. Malenovsky, « La pratique de la protection diplomatique dans les PECO, en République Tchèque en particulier », *La protection diplomatique. Mutations contemporaines et pratiques nationales,* op. cit., p. 98. Voir également E. Denza, « Nationality and diplomatic protection », *Netherlands International Law Review,* vol. 65, 2018, p. 467.

[2] L'une des décisions les plus citées est celle la Cour constitutionnelle sud-africaine dans l'affaire *Kaunda* : « *There may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be justiciable and a court would order the government to take appropriate action*». *Kaunda and Others v. President of the Republic of South Africa*, CCT 23/04, 4 August 2004, para. 69.

[3] Il s'agit notamment des décisions *Rudolf Hess* (Allemagne) *; HMHK v. The Netherlands, M.K. v. The Netherlands* (Pays Bas) *; Comercial F. SA v. Council of Ministers* (Espagne), *JAAC 61.75 et 68.78* (Suisse), *Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs* (Grande-Bretagne) ; *Samuel kaunda and Others v. The President of the Republic of South Africa and Other, Josias van Zyl and others v. The government of the Republic of south Africa and Others* (Afrique du Sud). Voir A. Vermeer-Künzli, « Restricting discretion: judicial review of diplomatic protection », *Nordic Journal of International Law,* vol. 75, pp. 286-306.

obligation de protéger les nationaux à l'étranger, a également réaffirmé que le gouvernement disposait pour cela d'une large discrétion, le contrôle de la Cour se limitant au contrôle d'un « *arbitrary treatment of a national which is totally incomprehensible from any reasonable standpoint including considerations of foreign policy* »[1]. En Grande-Bretagne, la *Court of Appeal* dans l'affaire *Abbasi,* a indiqué que le contrôle judiciaire du pouvoir discrétionnaire de l'État se limitait à s'assurer que l'autorité décisionnaire a bien pris en compte « *all relevant factors (…) be thrown into the balance* »[2]. C'est la même approche chez le juge sud-africain qui a rappelé qu'en raison des considérations politiques qu'implique la décision d'exercer ou pas la protection diplomatique dans un cas, les tribunaux n'étaient pas le forum adéquat pour traiter de la question. Par conséquent, en dépit de la doctrine des « *legitimate expectations* » des citoyens développée par la Cour constitutionnelle comme étant une contrainte sur la liberté d'action du pouvoir exécutif, le juge rappelle que cette doctrine ne crée aucun droit à la protection diplomatique. La branche exécutive dispose donc d'un pouvoir discrétionnaire et sa décision dans ce champ ne peut être remise en cause que « *if it can be shown that the decision was irrational or contrary to legitimate expectations* »[3]. Il n'existe en conclusion pas dans la pratique des États d'affirmation d'un droit à la protection diplomatique pour les nationaux, en dépit de ce l'on pourrait qualifier de « tendances encourageantes »[4]. Ce que ces décisions indiquent c'est que le pouvoir discrétionnaire ne signifie pas un pouvoir arbitraire.

En effet, il est incorrect de penser que parce qu'une décision est soumise au contrôle du juge, cela signifie qu'elle cesse d'être discrétionnaire[5]. Dire que l'Etat jouit d'un pouvoir discrétionnaire ne veut pas dire que ce pouvoir n'est pas soumis au droit. De nombreux pays, ayant notamment un droit de tradition romano-germanique, connaissent un

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[1] Federal Constitutional Court, Case n° 2 BVerfG 419/80, *Rudolf Hess Case,* paras. 395, 398, *ILR,* 1992, pp. 386-400.

[2] *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs,* EWCA Civ. 1598, 6 November 2002, paras. 99, 104.

[3] *Kaunda and Others* op. cit. paras. 67-80; High Court of South Africa (Transvaal Provincial Division), *Josias van Zyl and Others v. The Government of the Republic of South Africa and Others,* case n° 20320/2002, 20 July 2005, paras. 41, 93.

[4] P.H. Kooijmans, « Is the right of diplomatic protection a human right ? », *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz,* Napoli, Editoriale Scientifica, 2004, pp. 1979-1980; Denza, « Nationality and diplomatic protection», op. cit., p. 479; A. Vermeer-Künzli, « Restricting discretion : judicial review of diplomatic protection », *Nordic Journal of International Law,* vol. 75, pp. 281-283.

[5] Voir pour de telles conclusions, Pergantis, op. cit, p. 383 ; A. Vermeer-Künzli, « Restricting discretion : judicial review of diplomatic protection », op. cit., p. 306.

mécanisme de contrôle judiciaire du pouvoir discrétionnaire sans que cela aboutisse à remettre en cause la nature du pouvoir dont jouit l'administration[1]. Ce que le juge vérifie dans ces cas, ce n'est pas l'opportunité de la décision prise, ce qui est le cœur même d'un tel pouvoir, mais que l'exercice du pouvoir discrétionnaire ne résulte pas en un arbitraire, créant une inégalité flagrante entre les citoyens. C'est un contrôle de légalité qui n'amène pas le juge à substituer son appréciation à celle de l'autorité jouissant du pouvoir discrétionnaire ; le contrôle ne porte pas sur les appréciations en opportunité. Le procédé du juge consiste non pas à juger l'usage que le titulaire du pouvoir fait de celui-ci, mais de s'assurer que le cas qui lui est soumis a été examiné en tenant compte de tous les éléments pertinents. Le juge s'assure que l'État, dans l'exercice de son pouvoir discrétionnaire, a examiné « chaque cas individuellement afin d'adapter son appréciation et sa décision aux caractéristiques propres que le cas présente. [Il] ne peut pas se réfugier derrière des positions stéréotypées, des solutions passe-partout »[2]. Ce qui est sanctionné c'est l'erreur manifeste d'appréciation, c'est-à-dire une irrégularité manifeste, tellement évidente que sa grossièreté entame le contenu de la décision.

Si on admet l'existence d'un droit individuel à la protection diplomatique, il reste encore à trancher les implications d'un tel droit sur l'exercice de la protection diplomatique. La personne privée peut-elle renoncer à cette protection et par là même priver l'État de nationalité de la capacité d'exercer la protection diplomatique ? C'est toute la question posée par les fameuses « clauses Calvo » auxquelles le professeur Dugard avait consacré d'assez longs développements dans son troisième rapport[3]. La CDI, extrêmement divisée sur la question, a décidé de ne pas inclure dans

[1] Voir notamment W. Busane Ruhana Mirindi, *Le contrôle du pouvoir discrétionnaire de l'administration par le juge administratif congolais,* Thèse, Faculté Droit et de Criminologie, Université Catholique de Louvain, juillet 2010, 485p ; A. Sango, « Les tendances actuelles du contrôle juridictionnel de l'exercice du pouvoir discrétionnaire de l'administration en Afrique : étude comparée à partir des cas du bénin, du Burkina Faso et de la Côte d'Ivoire », *Afrilex,* disponible en ligne sur http://afrilex.u-bordeaux4.fr/les-tendances-actuelles-du.html, dernière consultation le 9 décembre 2019 ; C. Chauvet, « Arbitraire et discrétionnaire en droit administratif », J.G. Guglielmi (dir.), *La faveur et le droit, Paris,* Presses Universitaires de France, 2009, pp. 335-355.

[2] Busane Ruhana Mirindi, op. cit., p. 121.

[3] J. Dugard, *Troisième rapport sur la protection diplomatique,* doc. A/CN.4/523 et Add.1, 7 mars et 16 avril 2002, paras. 119-158. Du nom du juriste argentin Carlos Calvo qui l'a inventée, la «clause Calvo» est une stipulation contractuelle par laquelle un étranger renonce au droit qu'il pourrait avoir de prétendre à la protection diplomatique de son État de nationalité concernant tout différend conventionnel et de se limiter exclusivement aux recours judiciaires internes pour toutes plaintes qu'il pourrait avoir concernant le contrat. Ibid., para. 119.

son projet de disposition relative à la clause Calvo sans donner aucune explication claire[1]. Le professeur Touzé explique ce silence par le large consensus faisant droit à la caducité sur le plan international de ce type de clauses et leur relatif intérêt dans le droit contemporain de la protection diplomatique. Il est admis que cette clause n'a pour effet que de reformuler, sur le plan national l'exigence de l'épuisement des voies de recours internes avant la saisine de l'État susceptible d'agir en protection diplomatique. Autrement dit, la personne privée peut valablement promettre de recourir exclusivement aux tribunaux locaux et de ne rechercher en rien, en tout cas en ce qui concerne son contrat, la protection diplomatique de son État ; mais cela ne signifie nullement que cela aboutisse à priver cet État du droit d'exercer, s'il le juge opportun, la protection diplomatique[2].

Autre aspect de la question, l'État doit-il consulter, tenir compte des vues de la personne privée avant l'exercice de la protection diplomatique ? Sur le plan théorique au moins, l'État reste par principe libre d'apprécier l'opportunité de son action et peut se prévaloir, de façon autonome, des motifs généraux imposant selon lui, une action en responsabilité par le jeu de la protection diplomatique. Même si dans la pratique, l'action en protection diplomatique non-sollicitée est relativement rare, le droit international reconnaît une autonomie de l'action de l'État, indépendamment de considérations externes de nature « formelle » comme une demande d'action préalable sur la réclamation individuelle, ou substantielle tel le choix des motifs justifiant l'action[3]. La seule possibilité pour la personne privée de paralyser l'action de l'État, et sous réserve que l'on ne soit pas dans l'une des exceptions à la règle, est de refuser d'épuiser les voies de recours internes. En dehors de ce cas, le droit d'action en protection diplomatique de l'État est préservé et celui-ci peut en user malgré une réfutation préalable qui découlerait d'une opposition ponctuelle de l'individu ou du résultat d'un accord, ou d'une disposition insérée dans un engagement contractuel entre la personne privée et l'État étranger, et ayant pour objectif d'exclure l'application du droit international et/ou la protection diplomatique pour le règlement des différends susceptibles de surgir entre eux[4]. *A contrario,* l'État se voit reconnaître par le droit international la compétence pour renoncer *ex-ante* et de façon permanente à toute action en protection diplomatique en faveur de ses nationaux. Certains accords internationaux, notamment dans le domaine de la protection des

[1] A. Pellet, « Le projet d'articles de la CDI sur la protection diplomatique… », op. cit., p.1150

[2] S. Touzé, op. cit, pp. 238-243. Tournier, op. cit., pp. 476-482.

[3] S. Touzé, op. cit., p. 235 ; Meunier, op. cit. p. 249.

[4] S. Touzé, op. cit., pp. 237-238.

investissements ou instituant des tribunaux mixtes, démontrent assez nettement que l'État est discrétionnairement compétent pour renoncer de façon anticipée, voire définitive, à l'exercice de son droit d'action à la protection diplomatique[1]. Tout ceci souligne bien la marge de manœuvre dont dispose l'État, et l'absence de droit à la protection diplomatique au bénéfice des personnes privées.

Ainsi, même si on ne peut nier que se dessinent certaines tendances internes, elles ne sont, d'une part, ni générales et sont encore, d'autre part, limitées à l'affirmation de règles processuelles générales conférant à l'individu des garanties juridiques minimales, qui ne peuvent être assimilées à l'affirmation d'un réel droit subjectif à la protection diplomatique. La CDI a toutefois pris note de ce débat et affirme au regard des décisions judiciaires que l'« on peut raisonnablement penser que le droit international admet déjà, à la charge de l'État, l'existence d'une obligation d'envisager la possibilité d'exercer sa protection diplomatique au bénéfice d'un de ses nationaux qui a subi un préjudice important à l'étranger »[2]. Les termes choisis sont amplement révélateurs de la prudence et des doutes qui traversent la CDI : « raisonnablement penser », « obligation d'envisager la possibilité d'exercer », « préjudice important ». Il n'y a pas de doute, on est encore loin de l'affirmation d'un droit individuel et le pouvoir discrétionnaire de l'État reste intact ![3] Quoi qu'il en soit, la Commission a décidé d'inclure sous le titre « pratique recommandée », certaines pratiques des États qui, bien que n'ayant pas encore acquis le statut des règles coutumières et ne pouvant être transformées en règles juridiques dans le cadre du développement progressif du droit, sont néanmoins souhaitables, de l'avis des membres de la Commission, afin de renforcer la protection diplomatique comme instrument de protection des droits humains[4]. On peut dire qu'il s'agit des attributs dont doit se revêtir la protection diplomatique pour répondre aux exigences du « droits international des hommes ». L'article 19 des Articles sur la protection diplomatique invite par conséquent les États en droit d'exercer la protection diplomatique, de prendre dûment en considération la possibilité d'exercer la protection

[1] Ibid., pp. 248-255; L. Reed, L. Martinez, « Treaty obligations to honor arbitral awards and diplomatic protection », R.D. Bishop (ed.), *Enforcement of arbitral awards againnst sovereigns,* New York, JurisNet, LLC, 2009, pp. 26-27.

[2] *Annuaire CDI,* op. cit., p.55

[3] On avait déjà souligné à propos de l'article 4 du premier rapport de John Dugard, le « caractère en trompe-l'œil d'une disposition apparemment révolutionnaire ». Tout dépendra des mesures que les États adopteront aux fins de « subjectiviser » et de « justicialiser » au plan national l'exercice de la protection diplomatique en relation avec la violation du droit international impératif. Flauss, op. cit., p.56.

[4] *Annuaire CDI,* op. cit., p.54.

diplomatique lorsqu'un préjudice important a été causé à leur national d'une part ; et d'autre part de tenir compte autant que possible des vues des personnes lésées quand au recours à la protection diplomatique et la réparation à réclamer.

IV. Un droit individuel à la réparation obtenue ?

S'il devait être un jour cité comme un « grand arrêt » posant des principes jurisprudentiels nouveaux[1], l'arrêt de la CIJ du 19 juin 2012 dans l'affaire *Diallo* le devra sans nul doute, entre autres, à son fameux paragraphe 57. La Cour y fait précéder le dispositif d'une précision inédite : « la Cour tient à rappeler que l'indemnité accordée à la Guinée, dans l'exercice par celle-ci de sa protection diplomatique à l'égard de M. Diallo, est destinée à réparer le préjudice subi par celui-ci »[2]. Il n'en fallait pas plus pour qu'on y voie la consécration par la haute juridiction d'un droit à réparation des victimes en cas d'exercice de la protection diplomatique par leur État. La Cour faisait ainsi correspondre la protection diplomatique avec la philosophie du droit international contemporain plus centré sur l'individu. En adhérant en substance à la pratique recommandée à l'article 19 (c) des Articles de la CDI[3], la Cour ne ferait pas qu'indiquer qu'il serait convenable pour un État d'agir convenablement en transférant à la personne privée concernée l'indemnisation obtenue au vu des préjudices subis par celui-ci, mais marquerait de sa haute approbation l'idée de l'émergence d'une règle coutumière[4].

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[1] Voir E. Jouannet, « Existe-t-il des grands arrêts de la Cour Internationale de Justice ? », C. Apostolidis (dir.), *Les arrêts de la Cour Internationale de Justice,* Dijon, Éditions Universitaires de Dijon, 2005, pp. 168-197.

[2] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo),* indemnisation, arrêt, C.I.J. Recueil 2012, p. 344, para. 57.

[3] Suivant cet article, un État en droit d'exercer sa protection diplomatique devrait « transférer à la personne lésée toute indemnisation pour le préjudice obtenue de l'État responsable, sous réserve de déductions raisonnables ».

[4] Voir D. Russo, op. cit, pp. 741, 745. Elle affirme notamment que : « 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 ». M. Diaby Alia écrit à ce sujet : « La Cour contribue ainsi à l'érosion de la protection diplomatique qui n'est plus envisagé comme un droit propre de l'État. En ce sens, l'arrêt Diallo constitue un revirement de la fiction *Mavromatis* ». Alia, op. cit., p. 894. Voir également, A. Vermeer-Künzli, « Diallo : between diplomatic protection and human rights », *Journal of International Dispute Settlement,* vol.4, n°3, 2013, pp. 497-498.

En effet pour une partie de la doctrine, en dépit du pouvoir discrétionnaire dont jouissent les États pour exercer la protection diplomatique, cela n'implique nullement qu'ils puissent librement disposer du fruit de leur action, en particulier l'indemnisation obtenue. Ils doivent transférer cette indemnisation à la/aux victimes qui a/ont une légitime attente d'obtenir réparation une fois que la protection diplomatique a été exercée. Il serait inconcevable qu'un État entende s'enrichir indûment au détriment de ses nationaux[1]. Cette solution se justifie notamment par le fait que c'est le dommage subi par l'individu qui est à la fois la raison d'être de l'action en protection diplomatique et l'élément qui permet à la juridiction internationale de fixer une réparation adéquate. Il y aurait ainsi dans la pratique internationale des éléments indiquant l'émergence d'une telle obligation de transférer l'indemnisation reçue par l'État ayant exercé la protection diplomatique. Madame Russo cite à l'appui de cette thèse une décision de la Commission Germano-Américaine de 1928 et la pratique corrélative des États-Unis, ainsi que la position de certains États lors du débat sur le projet d'articles de la CDI à la Sixième Commission de l'Assemblée générale des Nations Unies[2]. On doit d'abord indiquer qu'il est peu convaincant de ramener l'action que peut mener un État dans le cadre des mécanismes régionaux de protection des droits de l'homme à une forme de protection diplomatique « déguisée »[3]. La protection diplomatique obéit à une logique et à une philosophie différente, de celle de la protection dans le cadre des mécanismes de protection des droits humains. C'est ce que traduit l'exigence de conditions particulières telles que l'exigence du lien de nationalité et l'interdiction de principe de toute action contre l'État de nationalité comme sus indiqué[4].

On peut ensuite s'étonner de l'approche méthodologique suivie: tirer la conclusion de l'émergence d'une règle coutumière d'une « pratique » aussi éparse et inconsistance est fortement discutable. Sur la base des mêmes éléments, la CDI a abouti à la conclusion contraire: il n'est pas du tout certain qu'il y ait une pratique convergente dans ce sens, de nature à

[1] D. Russo, op. cit. p. 726; Gaja, « Droits des et droits des individus dans le cadre de la protection diplomatique », op. cit., p. 69 ; Pellet, « La seconde mort d'Euripide Mavrommatis ? », op. cit., p. 1381 ; Touzé, op. cit., pp. 133.

[2] D. Russo, op. cit., pp. 733-736.

[3] Ibid., p. 742. C'est la même approche que semble suivre K. Yakushiji, « The International Court of Justice and diplomatic protection», S. Kadelbach et al. (eds.), *Judging international human rights,* Berlin, Springer, 2019, pp. 124-125.

[4] Voir dans le même sens que nous, Gaja, « Quel préjudice pour un État qui exerce la protection diplomatique ? », op. cit., pp. 490-491.

faire naître une règle coutumière[1]. Enfin, comme l'a indiqué la Cour permanente dans l'affaire relative à l'usine de Chorzów, « la réparation due à un État par un autre État ne change pas de nature par le fait qu'elle prend la forme d'une indemnité pour le montant de laquelle le dommage subi par un particulier fournira la mesure »[2]. Selon cette approche, le fait que le dommage subi par la personne privée fournisse la mesure de l'indemnisation accordée à l'État dans le cadre de la protection diplomatique, ne saurait signifier l'existence d'une obligation pour ce dernier de transférer à la personne privée l'indemnisation obtenue.

Pour revenir à l'arrêt de la CIJ du 19 juin 2012, l'on peut être aussi dubitatif et sceptique que le professeur Luigi Condorelli sur la portée et le sens de l'arrêt. D'abord, note-t-il, l'arrêt est officiellement sous-titré « Indemnisation due par la République Démocratique du Congo à la République de Guinée »). La formule « indemnisation due » à la Guinée, est également énoncée de nombreuses fois tant dans le corps de l'arrêt que dans son dispositif[3]. Il y a là une indication claire de celui à qui l'obligation de réparer est « due » dans le cadre de l'action diplomatique devant la CIJ : à l'État qui exerce la protection diplomatique. Ce n'est donc pas un hasard si la Cour suggère qui doit être le destinataire final de la réparation en dehors du dispositif de l'arrêt, « seul revêtu de l'autorité de la chose jugée »[4]. La *res judicata* ne couvre pas cette partie de l'arrêt et n'a ni de caractère contraignant, ni ne peut constituer un titre d'exécution pour obtenir le montant sollicité par le sieur Diallo, en tout cas pas devant une juridiction

[1] Voir commentaire article 19, *Annuaire CDI*, op. cit., p. 56. Voir pour rappel de la pratique dans le sens d'un droit de l'État de disposer discrétionnairement de l'indemnisation dans le cadre de la protection diplomatique des personnes morales, Tournier, op. cit., pp. 502-508.

[2] *Affaire relative à l'usine de Chorzów demande en indemnité)*, fond, Série A, n°17, 13 septembre 1928, p.28. La Cour ajoute que : « *Les règles de droit qui déterminent la réparation sont les règles de droit international en vigueur entre les deux États en question, et non pas le droit qui régit les rapports entre l'État qui aurait commis un tort et le particulier qui aurait subi le dommage. Les droits ou intérêts dont la violation cause un dommage à un particulier se trouvent toujours sur un autre plan que les droits de l'État auxquels le même acte peut également porter atteinte. Le dommage subi, par le particulier n'est donc jamais identique en substance avec celui que l'État subira ; il ne peut que fournir une mesure convenable de la réparation due à l'État* ». Ibid.

[3] L. Condorelli, « Protection diplomatique et réparation due : une glose », *Unité et diversité du droit international,* op. cit., p.477. Sur ce point on doit relever que le fait que la Cour ne mentionne pas le préjudice subi en propre par la Guinée, peut s'expliquer par la manière dont cet État a formulé ses réclamations tout au long de l'instance et notamment dans ses conclusions.

[4] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro),* arrêt, C.I.J. Recueil 2007, p. 94, para. 123.

internationale. On ne peut par conséquent suggérer que le droit d'action de la personne privée ne puisse être éteint que si son État lui reverse effectivement l'indemnisation obtenue via la protection diplomatique[1]. La solution défendue par la CIJ en 2012 ne semble pas épouser cette approche: « *Lorsque l'État ayant perçu ces sommes dans le cadre de ce qui devait constituer un règlement global à l'issue d'un conflit armé a décidé de les affecter à la reconstruction de son économie nationale et de ses infrastructures plutôt que de les répartir entre ceux de ses nationaux qui ont été victimes, il est difficile de déterminer dans quelle mesure le fait que les intéressés n'aient pas perçu une part des sommes en question les autoriserait à intenter une action à l'encontre de l'État ayant versé ces sommes à celui dont ils sont ressortissants* »[2].

Par ailleurs, il est acquis que la force obligatoire d'un jugement ne s'attache qu'au dispositif de celui-ci[3]. Certes la Cour a eu à affirmer que l'autorité de la chose jugée peut également couvrir le cas échéant, des questions dont on peut inférer que, tout en n'ayant pas été tranchées de manière expresse, elles l'ont été nécessairement par « implication logique »[4]. Néanmoins, « *on ne voit pas comment on pourrait soutenir en décidant d'abord, en 2010, que sur la RDC pèse l'obligation de fournir à la Guinée une réparation appropriée, sous la forme d'une indemnisation, pour les conséquences préjudiciables résultant des violations d'obligations internationales en la personne de M. Diallo, et en décidant ensuite, en 2012, quelle est la mesure de l'indemnisation due toujours à la Guinée, la Cour 'aurait nécessairement impliqué' que la Guinée a, à son tour, l'obligation internationale de verser à M. Diallo la somme d'argent qui doit lui être transmise par la RDC* »[5]. Une lecture attentive de l'arrêt et des termes choisis montre qu'il s'agit d'une simple recommandation faite par la Cour dans le même sens que l'article 19 des Articles de la CDI sur la protection diplomatique : un simple conseil à l'État protecteur, une attitude souhaitée,

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[1] Voir D. Russo, op. cit., pp. 138-139.

[2] *Immunités juridictionnelles de l'État (Allemagne c. Italie ; Grèce (intervenant)*), arrêt, C.I.J. Recueil 2012, p. 144, para. 102. Cet énoncé n'exclut pas la possibilité qu'un État soit tenu dans certaines circonstances, à fournir directement une réparation aux ressortissants d'un autre en vertu du droit international. Voir *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif; C.I.J. Recueil 2004, p. 198, para. 153.

[3] R. Kolb, *La Cour Internationale de Justice,* Paris, A. Pedone, 2013, p. 792.

[4] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro),* op. cit., p. 95, para. 126.

[5] L. Condorelli, « Protection diplomatique et réparation due : une glose », op. cit. pp. 478-479. Dans le même sens, Denza, « Nationality and diplomatic protection », op. cit., p. 470.

et non pas ce que celui-ci a l'obligation juridique internationale d'accomplir afin d'éviter sa responsabilité[1].

Il est sand doute excessif d'écrire au sujet de l'article 19 (c) des Articles de la CDI que « *[w]hereas this provision does not create legally binding obligations, it does create something short of an obligation and thus it creates something short of a corresponding rights. The latter clearly is the individual national's* »[2]. Il n'existe pas en l'état actuel en droit international un droit subjectif de la personne privée à se voir transférer l'indemnisation que son État national a pu obtenir à l'issue d'une action en protection diplomatique réussie. Il est évident que cette liberté relative à l'attribution de la réparation dont jouit l'État qui exerce la protection diplomatique ne peut pas se comprendre d'un point de vue logique : « *le parallélisme des formes exigerait qu'une fois la réparation obtenue à l'issue de la procédure, l'État effectue une novation à l'envers dans son ordre interne, en substituant à l'obligation de réparation de l'État responsable du préjudice à son égard en une nouvelle obligation de réparation dont il serait redevable à l'égard de l'individu* »[3]. La logique est-elle respectée ? La réponse fournie tant par la CDI, après examen de la pratique des États, que par la CIJ est pour l'heure négative. Une fois encore, l'évolution de la société internationale a pu pousser les États à adopter une tendance, une inclinaison, un penchant pour le versement de l'indemnisation obtenue aux victimes. Mais comme le souligne la CDI, « ceci ne constitue probablement pas une pratique établie. Les États qui limitent leur liberté de disposer comme ils l'entendent des indemnités reçues n'ont pas quant à eux le sentiment d'obéir à une obligation »[4]. Seul le droit interne de chaque État peut revoir le caractère discrétionnaire de celui-ci dans l'usage de la réparation[5], et faire ainsi de la protection diplomatique, un outil de protection des droits des nationaux à l'étranger.

V. Un outil spécifique de protection des droits humains ?

Dès son premier rapport et façon itérative ensuite, le second rapporteur spécial de la CDI sur la protection diplomatique a affirmé le rôle que pouvait jouer la protection diplomatique dans la protection des droits humains. Il souligne ainsi que « *[l]'idée que le développement des droits de l'homme a rendu la protection diplomatique désuète appelle une étude plus*

[1] L. Condorelli, « Protection diplomatique et réparation due : une glose », p. 480.
[2] A.Vermeer-Künzli, « As if: the legal fiction in diplomatic protection », op. cit., p. 62.
[3] O. de Frouville, op. cit., p. 300.
[4] *Annuaire CDI*, op. cit., p. 56.
[5] Voir S. Touzé, op. cit., pp. 327-330.

attentive. (..) Désormais, étrangers et nationaux jouissent de droits qui leur sont accordés en tant que personnes humaines et non en tant que nationaux d'un certain État. (...) Mais il faut admettre parallèlement que même si un particulier peut avoir des droits en droit international, ses recours restent limités »[1]. Alors que la Convention européenne des droits de l'homme peut offrir de véritables voies de recours à des millions d'Européens, écrit-il, il est difficile d'affirmer que la Convention américaine sur les droits de l'homme ou la Charte africaine des droits de l'homme et des peuples en font autant. En outre, la majorité de la population mondiale, qui se trouve en Asie, n'est couverte par aucune convention régionale en matière de droits de l'homme. Affirmer que les conventions universelles relatives aux droits de l'homme, notamment le Pacte international relatif aux droits civils et politiques, offrent aux particuliers des recours efficaces pour faire respecter leurs droits fondamentaux relève de la fantaisie, laquelle, contrairement à la fiction, n'a pas sa place dans le raisonnement juridique. La triste vérité est qu'une poignée d'individus seulement, dans les quelques États qui admettent les recours individuels auprès des organes de contrôle nés de ces convenions, ont pu ou pourront disposer de voies de recours satisfaisantes sur la base des textes en question[2]. Il conclut en affirmant, « *[l]e droit relatif aux droits de l'homme ne se résume pas aux conventions conclues en la matière. Il existe toute une série de traités et de coutumes, y compris celle de la protection diplomatique, qui forment ensemble les normes internationales relatives aux droits de l'homme. (...) La protection diplomatique, même si elle n'a pour objet que de protéger des particuliers contre un gouvernement étranger, est par contre une règle coutumière de droit international d'application universelle, susceptible d'offrir un recours plus utile. La plupart des États prendront beaucoup plus au sérieux la demande d'exercice de la protection diplomatique d'un autre État que la plainte déposée contre eux auprès d'un organe de contrôle du respect des droits de l'homme* »[3]. La protection diplomatique a sur cette base, été qualifiée d'instrument de protection des droits humains avant la lettre[4].

Toutefois, bien que partageant l'idée de l'utilité de la protection diplomatique dans le cadre de la protection des droits de la personne

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[1] Dugard, *Premier rapport sur la protection diplomatique,* op. cit., p. 228, para. 22.

[2] Ibid., para. 25.

[3] Ibid., para. 31. Dans le même sens, J. Dugard, « Chapter 73. Diplomatic protection », J. Crawford et al. (eds), *The law of international responsibility,* Oxford, Oxford University Press, 2010, pp. 1052, 1069.

[4] A. Vermeer-Künzli, « Chapter 10. Diplomatic protection as a source of human rights law », D. Shelton (ed.), *The Oxford handbook of international human rights law,* Oxford, Oxford University Press, 2013, p. 250, 273.

humaine, notamment dans les hypothèses où les personnes privées n'ont pas accès aux mécanismes internationaux de protection, il nous semble excessif d'affirmer qu'une plainte déposée par un État sur la base de la violation d'une obligation *erga omnes* est une forme de protection diplomatique[1]. Il serait en effet difficile d'affirmer que la saisine par la Gambie de la Cour aux fins de faire constater la violation par l'Union du Myanmar de ses obligations au regard de la Convention sur la prévention et la répression du crime de génocide, pourrait être assimilée à une action en protection diplomatique des Rohingya[2]. Ni la Gambie dans sa requête introductive d'instance, ni la partie défenderesse lors des débats devant la Cour n'ont évoqué une telle idée[3]. Il en est ainsi, parce que la condition de nationalité reste un élément essentiel de l'action en protection diplomatique comme il a été indiqué précédemment. La protection diplomatique, en tant qu'instrument de protection des droits humains, est d'abord un outil de protection des droits des nationaux, et exceptionnellement des apatrides et réfugiés. On peut convenir avec le professeur Condorelli que les États pourraient montrer qu'ils se préoccupent avec le même empressement, et par les mêmes types de « représentations », du sort de tout individu à l'étranger, quel que soit sa nationalité : ce serait là indiscutablement un progrès phénoménal vers une société internationale plus juste. Mais, souligne aussi l'éminent auteur, c'est un fait que dans la réalité des relations internationales contemporaines les choses sont malheureusement loin d'aller ainsi.[4] Par ailleurs, dans des actions comme celle de la Gambie devant la Cour internationale de justice, ce qui est visé pratiquement toujours, ce n'est pas la réparation du préjudice subi par les victimes, mais leur cessation : elles répondent donc à une logique qui n'est pas exactement celle de la protection diplomatique.[5]

Cette précision faite, il ne faut pas croire que l'octroi aux particuliers du droit d'accès aux moyens internationaux de règlement des différends implique nécessairement que la protection diplomatique n'a plus aucun rôle à jouer : bien au contraire. Il se peut en effet, qu'un tel accès soit construit

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[1] Ibid.

[2] Voir *Requête introductive d'instance et demande en indication des mesures conservatoires (république de Gambie c. république de l'Union du Myanmar)*, 11 novembre 2019, disponible sur https://www.icj-cij.org/files/case-related/178/178-20191111-APP-01-00-FR.pdf, dernière consultation 11 décembre 2019.

[3] Voir les comptes rendus des audiences relatives aux mesures conservatoires demandées par la Gambie, disponibles sur https://www.icj-cij.org/fr/affaire/178, dernière consultation 11 décembre 2019.

[4] L. Condorelli, « L'évolution du champ d'application de la protection diplomatique », op. cit., p. 23.

[5] Ibid., p.24.

de façon à aboutir, non pas à l'abolition de cette dernière, mais à l'imposition d'une démarche préalable ; en somme non pas comme moyen destiné à remplacer la protection diplomatique, mais comme moyen visant à éviter dans toute la mesure du possible que le besoin en soit ressenti, en sauvegardant toutefois sa fonction essentielle d'*ultima ratio*[1]. En matière de règlement des différends liés aux investissements par exemple, la Convention de Washington[2], tout en ouvrant un droit d'accès aux particuliers contre les États à l'arbitrage CIRDI, interdit aux États d'exercer la protection diplomatique dans l'intérêt de son ressortissant puisque celui-ci peut justement avoir recours à l'arbitrage international. Toutefois, cette obligation de ne pas recourir à la protection diplomatique disparait « *si l'autre État contractant ne se conforme pas à la sentence rendue à l'occasion du différend*»[3]. Ainsi, dans le domaine couvert par la Convention de Washington, la protection diplomatique permet à l'État de continuer à garantir la protection des droits patrimoniaux de ses nationaux, au cas où le mécanisme direct prévu par la Convention ne fonctionnerait pas.

La protection diplomatique peut également être un outil irremplaçable pour la mise en œuvre des droits de l'homme et la protection de la personne humaine, notamment face à l'obstacle procédural que constitue l'immunité[4]. En dépit de l'attribution d'un droit de recours individuel aux individus, le droit d'un État de s'inquiéter des violations infligées à ses citoyens par un autre État est incontestable. Bien que la pratique dans ce sens ait été plutôt marginale, l'État dont le ressortissant s'est vu opposer une immunité pourrait recourir à la protection diplomatique dans une perspective de compensation. Dans les affaires *Fogarty* et *Al Adsani*, le gouvernement défendeur a ainsi fait valoir que l'immunité de juridiction accordée à l'État étranger était compensable par la protection diplomatique que l'État pouvait exercer au profit du national dont le droit d'action au plan interne était paralysé par le for de l'immunité. Bien que la Cour Européenne des droits de l'homme n'ait pas souscrit explicitement à cet argument, il a été proposé dans un tel cas de figure d'admettre la protection diplomatique comme palliatif à l'immunité, à la condition que la protection de la personne humaine soit mise au service de la résorption du caractère discrétionnaire de la protection diplomatique[5].

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[1] Ibid., pp. 16-17.

[2] Convention pour le Règlement des Différends relatifs aux Investissements entre États et Ressortissants d'autres États (Washington, 18 mars 1965).

[3] Article 27 Convention de Washington du 18 mars 1965.

[4] Nous reprenons ici les principales conclusions de notre thèse sur ce point. Koagne Zouapet, op. cit., pp. 222-229.

[5] J.-F. Flauss, op. cit., p. 53 ; Bröhmer, op. cit., p.4.

Cette idée n'est pas nouvelle et la protection diplomatique a été considérée par de nombreux auteurs comme le substitut à l'absence de recours crée par l'application de l'immunité de juridiction. Sir Robert Phillimore affirmait ainsi dans l'arrêt *The Charkieh* : «*The object of international law in this as in others matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in case where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state*»[1]. En raison de la continuation de l'imputation entre le droit interne et le droit international, la protection diplomatique est en effet un moyen de relayer une action interne, mise en échec par l'immunité de juridiction, sur le plan international; le « fait du bénéficiaire de l'immunité » étant analysé de la même manière par le droit de la responsabilité internationale et par le droit international des immunités. C'est bien parce qu'un fait a été qualifié au plan interne de « fait de l'État étranger/organisation internationale » que le droit des immunités interdit d'engager la responsabilité de l'État ; mais c'est aussi en raison de cette qualification que la responsabilité internationale pourra être mise en œuvre à travers la protection diplomatique[2].

Par cette voie, les États peuvent ainsi veiller à ce que les immunités accordées aux États étrangers et particulièrement aux organisations internationales qu'ils accueillent sur leur territoire, ou auxquelles ils sont parties, n'engendrent pas d'injustice pour les justiciables[3]. Cela ne serait finalement qu'une juste application de la protection diplomatique, dont la CDI a précisé qu'elle était dans son essence une mesure corrective conçue pour remédier à un fait internationalement illicite qui a été commis[4]. Cette voie n'est cependant pas une voie de recours venant combler le vide crée par l'immunité de juridiction devant les juridictions internes, mais comme une voie de substitution, voire même cumulative. En effet, au vu de ce qui a été relevé précédemment, la protection diplomatique ne pourrait constituer un substitut parfait à la protection juridictionnelle, en raison notamment du caractère discrétionnaire de son exercice, qui fait primer des considérations

[1] Cité par M. Cosnard, *La soumission des États aux tribunaux internes. Face à la théorie des immunités des États*, Paris, Pedone, 1996, p. 236.

[2] M. Cosnard, *La soumission des États aux tribunaux internes,* op. cit., pp. 221-223.

[3] F. Capone, op. cit., p. 473 ; Vermeer-Künzli, « As if : the legal fiction in diplomatic protection », op. cit., pp. 67-68.

[4] *Annuaire CDI 2006*, op. cit., p.26.

politiques sur les considérations de droit[1] ; à moins que, ne réussisse à émerger progressivement en droit international, un droit à la protection diplomatique au bénéfice du national, voire de tout individu dont les droits sont violés, y compris par son propre État. Mais on l'a vu, on en est encore loin.

VI. Conclusion

Verre à moitié vide ou à moitié plein? L'appréciation dépend finalement de la position de l'observateur, de ses convictions et de la conception que l'on se fait du droit international et de certaines de ses institutions comme la protection diplomatique ou les immunités. Si les conditions d'utilisation de la protection diplomatique ont été influencées par le développement plus ou moins contrôlé de la protection de la personne humaine et de ce que l'on a pu qualifier de « droit international des hommes », ses conditions d'exercice ont indubitablement été également affectées. Néanmoins, il faut convenir qu'en l'état actuel du droit international positif, l'incidence de ce « droit international des hommes » sur les conditions de mise en œuvre de la protection diplomatique, sans être insignifiante, n'est nullement comparable au bouleversement souhaité par certains, y compris les rapporteurs spéciaux de la CDI qui se sont succédés sur la question[2]. Les articles de la CDI sur la question révèlent cet état de choses. Prenant acte de la pratique des États, et veillant à ne pas aller au-delà de ce que lui permettrait le développement progressif du droit, la Commission a pris en compte l'évolution de la société internationale et des dynamiques qui la traversent, sans toutefois remettre en cause les assises de l'institution.

Il y a en effet chez ceux qui souhaitent un renouvellement de la protection diplomatique une part de volontarisme assumé. Changer le fondement et l'approche traditionnels de la protection diplomatique permettra, disent-ils, d'améliorer le régime de la protection diplomatique dans l'intérêt de l'individu[3]. Mais on peut légitimement s'interroger sur la pertinence et la nécessité d'une telle approche. Adapter la protection diplomatique à l'évolution de la société internationale ne saurait signifier lui faire perdre son essence, ce qui en constitue la philosophie et la logique. L'on doit accepter qu'il soit des limites que l'adaptation ou la réforme d'une

[1] Voir L. McGregor, « Torture and state immunity: deflecting impunity, distorting sovereignty », *EJIL*, vol.18, n°5, November 2007, p.909.

[2] Flauss, op. cit., p. 32.

[3] H. Meunier, op. cit., p. 250.

institution ne saurait franchir. La protection diplomatique peut contribuer à la protection de la personne humaine, à l'émergence tant souhaité d'un « droit international du genre humain », mais en restant dans les limites de ce qui lui permet de rester ce qu'il est : un instrument de protection des droits des nationaux par l'État dont celui-ci peut user à discrétion. « *Does this finding constitute a regression for the human rights cause? We do not believe so; in our view, there are other mechanisms that could serve this cause much more effectively*»[1].

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[1] V. Pergantis, op. cit., p. 397.

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Participation in Scientific Research, Access to Reproductive Rights and the Right to Sexual and Reproductive Health: the Approach of the UN Committee on Economic, Social and Cultural Rights in *S.C. and G.P. v. Italy* Communication

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Abstract**:** *On the 7th of March 2019, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted its views on a communication which was submitted to it by S.C. and G.P., Italian nationals, against Italy. The authors complained that several actions of the Italian authorities – Italy being one of the States Parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) – interfered with and constituted a breach of theirs rights under article 10 (the right to the widest possible protection of the family), article 12 (right to the enjoyment of the highest attainable standard of physical and mental health – often referred to as the right to health) and article 15 (the right to benefit from scientific progress and its applications) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).*

Being one of the few communications in which, so far, the CESCR adopted views and being also the first one to have a submission under article 15 of the Covenant, the aims of this paper are those of presenting the facts of case, the claims, the submissions and the arguments of the authors, as well as the views of the Committee – which limited its findings to a violation of article 12, alone and in conjunction with article 3 – and to discuss the approach and the concrete solution which was adopted by the Committee in this communication.

Thus, the paper will first summarize the facts of the communication (Section II); it will continue with the claims and submission of the authors

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(Section III); it will then touch upon and briefly analyse the qualification of the communication by the Committee, the admissibility criteria and the views adopted (Section IV) finally, it will conclude by evaluating the communication in the context in which the CESCR is just building up its own jurisprudence under the ICESCR and OP-ICESCR and in light of a work-in-progress new General Comment on the relation between economic, social and cultural rights and science (Section V).

Key-words: *reproductive rights, right to health, participation in scientific research, sexual and reproductive health, access to reproductive rights, informed consent, the right to enjoy the benefits of scientific progress and its applications, CESCR jurisprudence, scientific research, regulation of in vitro fertilization, research on human embryos, genetic disorders, assisted reproductive technology, pre-implantation genetic diagnosis, ESC rights and science.*

I. Introduction

On the 7th of March 2019, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted its views on a communication, against Italy, which was submitted to it by S.C. and G.P., Italian nationals.

The authors complained that several actions of the Italian authorities – Italy being, since 20th of February 2015, one of the States Parties to the *Optional Protocol of the International Covenant on Economic, Social and Cultural Rights* (*OP-ICESCR*) – interfered with and constituted a breach of theirs rights under article 10 (the right to the widest possible protection of the family), article 12 (right to the enjoyment of the highest attainable standard of physical and mental health) and article 15 (right to enjoy the benefits of scientific progress and its applications) of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).

Being one of the few communications in which, so far, the CESCR adopted views and being, also, the first one to have a submission under article 15 of the Covenant, the aims of this paper are those of presenting the facts of case, the claims, the submissions, the arguments of the authors and the views of the Committee – which limited its findings to a violation of article 12 of the *ICESCR* – and to discuss the approach and the concrete solution which was adopted by the Committee in this caseThus, the paper, which follows the exact structure of the views adopted by the Committee, will first summarize the facts of the communication (Section II); it will continue with the claims,

submissions and the arguments of the authors (Section III); it will then touch upon and briefly analyse the qualification of the claims by the Committee, the admissibility criteria and the views of the CESCR (Section IV) and, finally, conclude by evaluating the communication in the context in which the CESCR is just building up its own jurisprudence under the *ICESCR* and *OP-ICESCR* and in light of a work-in-progress new General Comment on the relation between economic, social and cultural rights and science (Section V).

II.The facts of the communication

In 2008, S.C. and G.P. – a woman and a man of Italian nationality, both of legal age – referred to, in the following paragraphs, as the authors of the communication, visited a private clinic in Italy specialized in assisted reproductive technology and sought assistance to conceive a child. In this respect, the woman, S.C. underwent two in vitro fertilization (IVF) cycles.

Thus, in 2008, a first IVF cycle was carried out. In the context of this cycle, because the authors had reasons to fear of a very high risk that their embryos were affected by genetic disorders – namely the multiple hereditary osteochondromas[1] – they requested the clinic that: firstly, at least six embryos be produced through the in vitro fertilization procedure; secondly, that those embryos be subject to pre-implantation genetic diagnosis (PGD),[2] to identify possible "genetic disorders" and thirdly, that the embryos with such disorders not be transferred into the uterus of S.C.

At the time, all matters related to the in vitro fertilization procedure were regulated by the *Italian Law in Assisted Reproductive Technology (ART), Law no. 40/2004* which, among others, contained provisions which: prohibited any clinical and experimental research on human embryos; limited the number of embryos to be produced during IVF to three; prohibited the performance of the PGD; mandated the simultaneous transfer in the uterus of all embryos, regardless of their viability or genetic disorder and prohibited the cryopreservation of embryos.

[1] The multiple hereditary osteochondromas, also known as hereditary multiple exostoses, was explained by the authors as being a hereditary genetic disorder that causes bones deformations through youth and adolescence. They submit that the disorder is not only painful, but that it is also emotionally distressing because the deformities are visible to the naked eye. It is highly transferable, with a high penetrance, and has severe detrimental effects on human health.

[2] PGD – Pre-implantation Genetic Diagnosis – it is a procedure whereby embryos are first created in a controlled environment outside the woman' s body where they are screened to identify if affected by a genetic disorder before being transferred to the woman's uterus.

Consequently, referring the authors to the provisions of the law, the clinic replied that theirs requests were not authorized under Law no. 40/2004 and, therefore, could not be accepted.

The authors filed a case against the clinic before *Tribunale di Firenze* (Court of Florence). On the 18th of July 2008, *Tribunale di Firenz*e ruled provisional measures and ordered the clinic to carry out the PGD testing. Moreover, it referred the matter to the Italian Constitutional Court and asked for a constitutionality test in respect of many of the Law no. 40/2004 provisions.

While waiting for the Italian Constitutional Court to deliver its judgment, three embryos were produced. The clinic performed the PGD testing (in accordance with the provisional measures ordered by *Tribunale di Firenze*) and discovered that all three embryos were affected by genetic disorders, namely by multiple hereditary osteochondromas. The clinic decided not to transfer the three embryos into S.C. s' uterus.

On the 8th of May 2009, the Italian Constitutional Court found parts of the Law no. 40/2004 as being incompatible with the Italian Constitution and with the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*) and narrowed the scope of application of the law. More precisely, it declared as unconstitutional articles 14.2 (which imposes the creation of a maximum of three embryos per in vitro fertilization cycle and the duty to transfer all of them simultaneously into the uterus) and 14.3 (which does not provide that the transfer of embryos should be made without prejudice to the health of the woman) of Law no. 40/2004.

In October 2009, at the same clinic, the author (S.C.) underwent the second IVF cycle. This time, taking due account of the Italian Constitutional Court decision, *ten embryos* were produced. Six of the embryos underwent the PGD testing. Only one, out of the six tested embryos, was determined to be free of the hereditary multiple osteochondromas but was graded "average quality", thus having a low chance of nesting if transferred into the uterus. The other four embryos which were produced could not be tested due to technical reasons.

The staff of the clinicasked S.C. to subject herself to the IVF procedure, namely to accept that the only embryo free of the hereditary multiple osteochondromas but which was of "average quality", to be transferred into her uterus. Initially, S.C. declined to have the "average quality" embryo transferred into her uterus. However, the staff of the clinic insisted that, according to their understanding of Law no. 40/2004, consent to transfer embryos into the uterus can only be revoked before fertilization has taken

place. Moreover, the clinic personnel threatened S.C. with a lawsuit if she insisted on not having the embryo transferred. Finally, because of this threat, S.C. agreed to have the ”average quality” embryo transferred into her uterus, but she eventually suffered a miscarriage.

The other nine remaining embryos were cryopreserved.

The authors requested the clinic to surrender the nine cryopreserved embryos (PDG tested or not) in order to be able to donate them to be used for scientific research.

The clinic refused the authors request holding that article 13 of the Law no. 40/2004 prohibited all research performed on embryos.

On 30 March 2012, the authors filed a lawsuit against the clinic and the State party, before the *Tribunale di Firenze* and requested the Court: firstly, to order the clinic to surrender the embryos; secondly, to determine the validity of S.C.'s decision not to have the embryos transferred into her uterus and thirdly, to pay a pecuniary compensation.

On 7 December 2012, as a matter of urgency, the *Tribunale di Firenze* referred the matter to the Italian Constitutional Court, pursuant to article 700 of the Code of Civil Procedure, and called upon it to determine the compatibility of articles 6.3 (regarding the revocation of the consent before fertilization) and 13 (regarding the prohibition of research on embryos) of Law no. 40/2004 with the Italian Constitution.

On 22 March 2016, the Italian Constitutional Court delivered its judgement and found that *Tribunale di Firenze*'s request is inadmissible,[1] as follows: *firstly*, it stated that the claim concerning the irrevocability of the consent was moot, after S.C. eventually agreed to have the embryo transferred into her uterus; *secondly*, it stated that the claim relating to the possible withdrawal of S.C.'s consent in the context of future in vitro fertilization treatments was speculative; *thirdly*, found that the conflict had multiple ethical and juridical implications related to the balance between the right to enjoy the benefits of scientific progress, and its applications (and the related benefits), and the rights of the embryo, and that those issues divided jurists, scientists and society. Moreover, the Court stated that legislators were the proper authority to strike the balance between the rights of the embryo and the right to enjoy the benefits of scientific progress and its applications, and not the Constitutional Court itself. Thus, it called on legislators to consider "the views and calls for action (…) deeply rooted at any given moment in time within the social conscience".

[1] Italian Constitutional Court, Judgment no. 84 of 22nd of March 2016.

On the 20 of March 2017, the authors submitted, under *the OP-ICESCR* – to which Italy was a State party since the 20 of February 2015 – a communication to the UN CESCR. In support of their communication, the authors argued that they have exhausted all domestic remedies, since the decision of the Italian Constitutional Court is final and not subject to appeal. Concerning the requirement established in article 3 (2) (b) of the *OP-ICESCR*, the authors claim that although the main events occurred prior to 20 February 2015, the date of entry into force of the Optional Protocol for the State Party, the decisions adopted thereafter reflect a continuing violation of their rights.

III. The claims, submissions and arguments of the authors before the CESCR

The authors of the communication formulated, before the CESCR, *four claims*. Thus, they submitted that: III.1. that the State Party has violated their right, under article 15 (1) (b) of the *ICESCR,*[1] to enjoy the benefits of scientific progress and its applications because, *by prohibiting research on embryos, Law no. 40/2004 interferes with scientific progress, slowing down the search for a cure for various diseases and that the Covenant incorporates a right for every person to take part in scientific research*; III.2. that the State Party has violated their right under article 15 (2), (3) of the *ICESCR*[2] because the State Party *blocks the research on embryos without a legitimate purpose;* III.3. that the State Party has violated their right to health under article 12 (1) and (2) (c) and (d) of the *ICESCR,*[3] because *Law no. 40/2004 cannot provide for adequate physical and mental*

[1] Article 15 (1) (b) of the *ICESCR* states: *(1) The States Parties to the present Covenant recognize the right of everyone: (...) (b) to enjoy the benefits of scientific progress and its applications*.

[2] Article 15 (2) (3) of the *ICESCR* states: *(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

[3] Article 12 (1) (2) (c), (d) of the *ICESCR* states: *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (...) (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of a sickness.*

health; and III.4. that the State Party has violated their rights under article 10 of the *ICESCR*[1] because *it failed to provide the widest possible protection and assistance to the authors, as a family*, as well as to other couples in Italy who are or will be in similar situations.

The authors provided to the CESCR a very complex motivation of these four claims and raised a series of issues to which the Committee had to deliberate upon such as: restrictions/prohibition on the research on human embryos, the right of the authors to participate in scientific research, ownership over the embryos produced during an IVF cycle, to name just a few of them.

III.1. *Firstly*, the authors claim that the State Party has violated their *right* under article 15 (1) (b) of the *ICESCR* t*o enjoy the benefits of scientific progress and its applications* because, *by prohibiting research on embryos, Law no. 40/2004 interferes with scientific progress, slowing down the search for a cure for various diseases*. They submitted that S.C. is an asymptomatic carrier of hereditary multiple osteochondromas and nine out of ten of the embryos the authors have produced were either affected by this genetic disorder or could not be tested. Unless a cure for hereditary multiple osteochondromas is found, their chances of conceiving a child are slim. S.C. also has family members who are affected by the illness.

Moreover, the authors also considered that *this prohibition prevented them from participating in scientific research through the donation of their unused embryos*. In this respect, the authors argued that even if the wording of the ICESCR does not mention, explicitly, a right of everyone to participate in scientific research, such a right steam from the holistic interpretation of the *Universal Declaration of Human Rights* and of articles 15 (2) and 15 (3) of the Covenant. In view thereof, the authors consider that

[1] Article 10 of the *ICESCR* states: The States Parties to the present Covenant recognize that: *(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.*

the Covenant protects the right of everyone to participate in scientific research.

As far as the clinic's refusal to surrender to them the unused embryos – so that they donate them to scientific research – the authors reminded the CESCR of the *Parrillo v. Italy Case*. In this case the European Court of Human Rights[1] considered that the complainant's ability to exercise a choice regarding the fate of the embryos concerned an intimate aspect of her personal life, related to her self-determination, and that the application of Law no. 40/2004 had resulted in interference with the applicant's right to private life.

III.2. *Secondly*, the authors claim that the State Party has violated their right under article 15 (2), (3) of the *ICESCR* because the State party *blocks the research on embryos without a legitimate purpose* and *it is not fulfilling the duty to develop science and disseminate scientific developments*.

While acknowledging that freedom of research is not absolute, the authors submit that it can only be restricted to protect other rights. Or, in the present case there is no contradicting right to be protected as the embryos concerned will never grow and have been left forever in a frozen limbo.

Moreover, the authors argued that *the right to enjoy the benefits of scientific progress includes accessing medical technology necessary to exercise the right to private life and reproductive freedom to found a family*, as the Inter-American Court of Human Rights established in *Artavia Murillo et al. v. Costa Rica Case*.[2]

III.3. *Thirdly*, the authors claim that the State Party has violated their right to health under article 12 of the Covenant, in particular 12 (1) and (2) (c) and (d), because *Law 40/2004 cannot provide for adequate physical and mental health*.

They argued that: 1. *the Law 40/2004 is arbitrary* and introduces a restriction that is not reasonable or justified, as the ban on research does not distinguish between viable and non-viable embryos. The authors and draw the Committee's' s attention to *S.H. and others v. Austria* Case, in which the

[1] ECHR, *Parrillo v. Italy* Case, Application no. 46470/11, Judgment of 27 August 2015, para. 159.

[2] IACHR, *Artavia Murillo et al. v. Costa Rica* Case, Communication no. 257, Judgment of 28 November 2012, para. 146.

European Court of Human Rights[1] observed that artificial reproductive treatments were an area in which contracting States must constantly review their legislation. Or, Italy has failed to develop and adapt its legislation on this issue; 2. the law prohibits scientific research on embryos, even when they are affected by genetic disorders that make them not transferable; 3. *the Law hinders scientific research* on hereditary multiple osteochondromas and, as a result, the authors right to health is violated (since they cannot attempt to conceive again, unless a cure for hereditary multiple osteochondromas is found); and 4. *the law does not specify* whether *consent to transfer an embryo into the uterus can be withdrawn after fertilization* thus, S.C.'s right to health was violated when she was forced to endure transfer into her uterus of an embryo against her will and was not given the opportunity to withdraw her consent. The transfer of the embryo resulted in a miscarriage, which causes long-term physical and long-term psychological effects. Moreover, the authors argue that this uncertainty regarding whether or not consent to transfer can be withdrawn after fertilization has prevented them from trying to conceive again, thus violating their right to health, and in particular reproductive health.

III.4. *Fourthly*, the authors claim that the State Party has violated their rights under article 10 of the *ICESCR* because *it failed to provide the widest possible protection and assistance to the authors, as a family*, as well as to other couples in Italy who are or will be in similar situations.

The authors further claim that if a woman cannot decline the transfer into her uterus of an embryo that, on the basis of objective criteria, is deemed to have "low chances of success", and if she does not want to take the high risk of a miscarriage, then she cannot freely decide the number, spacing and timing of her children. The continuing silence of the State party on the question of the withdrawal of consent to embryonic transfer after the IVF violates the rights of S.C., as well as of any woman in a similar situation, to choose if, when and how to establish her family.

In terms of *reparations* sought, the authors requested that:

1. the State Party takes *measures to ensure non-repetition* – either replacing Law 40/2004 with *a new law* that takes into consideration

[1] ECHR, *S.H. and others v. Austria* Case, Application no. 57813/00, Judgment of 3 November 2011, para. 118.

all international human rights obligations that the State party has committed to, and all relevant decisions of the Constitutional Court of Italy, the European Court of Human Rights and the Committee or, alternatively, *amended some of the provisions of the existing law* to ensure non-repetition (for example, articles 13 and 14.1 of the Law no. 40/2004 must contain a definition of embryo that allows research and experimentation on blastocysts and embryos up to 14 days after fertilization or when they are affected by a genetic disorder or are otherwise non-transferrable into the uterus; article 6 must specify that consent to transfer an embryo into the uterus can be withdrawn);

2. the State Party *compensate* them for the *physical, psychological and moral suffering;*
3. the State Party *reimburse their legal costs*.

IV. The qualification of the authors' claims by the CESCR. The admissibility criteria. The legal questions and the views of the CESCR

IV.1. The qualification of the communication by the CESCR

In my opinion, one of the most interesting part of this view – even if the Committee declared that a claim under article 15 is inadmissible – is the one in which the CESCR qualified the claims of the authors as this part actually points out one of the recent preoccupations of the Committee namely the one related to the clarification of the scope of application of article 15 of the *ICESCR*. To be more precise, this qualification is done in a context in which the Committee undertakes a vey innovative approach in its new draft General Comment which aims to bring light as to the relation and interaction between ESC rights and science.[1]

Thus, in the communication before it, the Committee noted that – even if the authors themselves formulated theirs claims in a slightly different logic – in reality they raised, in their communication, *two different claims with very different legal grounds.*

In the Committee' s opinion, the *first* claim is that the authors' right to health, alone and in conjunction with the protection of family, has been

[1] See for other details, about the process but also about the contents of the new draft General Comment *Science and economic, social and cultural rights*, 2nd of January 2020: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/DraftGeneralComment_Science.aspx

violated because: 1. S.C. was compelled, against her will, to have transferred into her uterus an embryo with low possibilities of nesting and that she eventually suffered a miscarriage and 2. that the uncertainty created by the law regarding whether the consent to the transfer can be withdrawn after fertilization prevented the authors from trying to conceive again through an IVF procedure. This claim raises issues under article 12 and article 10 of the *ICESCR*.

As far as the *second* claim is concerned, this has to do with the prohibition faced by the authors to donate their nine remaining embryos, to scientific research and that raises issues on a possible interference with the author right to enjoy the benefits of scientific progress and its applications, restricting freedom of reach and thus constituting a violation of the authors right to health. Thus, the Committee considered that this claim raises issues under article 15 and under article 12 (2) (c) and (d) of the Covenant.

If the first claim, as qualified by the Committee, was found to be substantiated and thus the Committee dealt with its merits, in respect of the second one, the Committee took the opposite view and considered it to be insufficiently substantiated, thus inadmissible and did not discussed the merits.

Because this second claim was dealt with by the CESCR under the admissibility criteria, we will also explain the Committee's rationale when discussing the admissibility criteria, namely in the following sub-section.

IV.2. The admissibility criteria

In accordance with article 3 of the *OP-ICESCR*, before considering any claim contained in a communication, the Committee must decide whether or not the communication is admissible.[1]

[1] Article 3 of the *OP-ICESCR* states that: *1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies in unreasonably prolonged. (2) The Committee shall declare a communication inadmissible when: a. it is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; b. the facts that are subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; c. the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; d. it is incompatible with the provisions of the Covenant; e. it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; e. it is an abuse of the right to submit a communication; or when g. it is anonymous or not in writing.*

In the present communication, even if the State Party has not challenged any of the admissibility criteria under the Optional Protocol in respect of the authors' communication, nevertheless the Committee followed its well established practice – independently of whether this was or was not raised by the State Party – of dealing with each of the admissibility criteria that need to be fulfilled under the *OP-ICESCR* (para. 6.2.).

If many of the admissibility criteria were quickly considered as fulfilled (for example, the exhaustion of domestic remedies), some of them were discussed by the Committee in greater length and in much detail (for example, the admissibility *ratione temporis* or the substantiation of the claim).

When discussing the admissibility *ratione temporis* of the communication the Committee departed from two main statements of the situation: firstly, that other human rights treaties include a similar *ratione temporis* provision – giving rise to various interpretations and therefore it deems useful to clarify the meaning of this condition of admissibility – and secondly, from the existence of its already established jurisprudential lines as to the admissibility *ratione temporis* under the Optional Protocol.

Thus, the Committee noted that, in order to determine whether a communication satisfies the admissibility criteria established in article 3 (2) (b) of the Optional Protocol, it is necessary to distinguish between the facts allegedly amounting to a violation of the Covenant, and the consequences or effects that flow from those facts.

In this respect the CESCR reiterated its previously formulated views.[1]

Consequently, firstly, the Committee has noted, that an act that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time.[2] Therefore, when the facts constituting a violation of the Covenant occurred before the entry into force of the Optional Protocol for the State party concerned, the mere fact that their consequences or effects have not been extinguished, after the entry into force, is not sufficient grounds for declaring a communication admissible *ratione temporis*. If no distinction were made between the acts

[1] See for details L.-M. Crăciunean-Tatu, *Admissibility* ratione temporis *of an individual communication: synthesis of the UN Committee on Economic, Social and Cultural rights Case-Law* in *AULB* no. 2/2017, p. 189-195.

[2] CESCR, *Merino Sierra v. Spain* Case (E/C.12/59/D/4/2014), para. 6.7.; CESCR, *Alarcón Flores et al. v. Ecuador* Case (E/C.12/62/D/14/2016), para. 9.7. See also *Yearbook of the International Law Commission 2001*, vol. II, Part Two, draft articles on responsibility of States for internationally wrongful acts, commentary on art. 14 (extension in time of the breach of an international obligation), p. 60, para. 6.

that gave rise to the alleged violation and its ongoing consequences or effects, the *ratione temporis* admissibility criteria established in the Optional Protocol, relating to the Committee's competence to consider individual communications, would be virtually irrelevant[1] (para. 6.5.).

Secondly, it continued with a definition of facts – for the purposes of article 3 (2) (b) of the Optional Protocol – and presented a much elaborated (when compared with previous views) explanation of these facts. Thus, in the CESCR opinion: "*facts are the sequence of events, acts or omissions* which are attributable to the State party and may have given rise to the alleged violation of the Covenant. (…) *the judicial or administrative decisions of the national authorities are also considered to be part of the facts when they are the outcome of proceedings directly related to the initial events, acts or omissions that gave rise to the violation and could have provided reparation for the alleged violation in accordance with the law in force at the time"* (para. 6.6.).[2]

With respect of the admissibility criteria related to the *substantiation* of certain parts of the communication, as previously mentioned the Committee noted that all claims raised by the authors are related to two facts: first, the transfer of the authors' embryo into S.C.'s uterus without her consent; and second, the refusal by the clinic to surrender the embryos so that they could be donated for use in scientific research. The first fact fulfills all the admissibility criteria. Instead the second one does not, being insufficiently substantiated. Thus, the Committee declared the communication inadmissible, for not being sufficiently substantiated, in relation to the claim that the prohibition on donating the embryos violated the rights of the authors under article 15 of the Covenant.

The rationale of the Committee was as follows.

The Committee departed in its analysis from the fact that it may not – with the consequence of the communication being inadmissible – examine a communication *in abstracto* and thus assess whether an action or an omission of a State party is compatible with the Covenant, unless such action or omission has affected the author of the communication. The main argument is that the provisions of article 2 of the *OP-ICESCR* follow such an approach and restrict the *locus standi* for submitting communications" to the *victims* of a violation of any of the economic, social and cultural rights

[1] *Alarcón Flores v. Ecuador* Case, para. 9.7.

[2] See for details, in respect of previous definitions of facts in the views of the CESCR, L.-M. Crăciunean-Tatu, *Repere din jurisprudența Comitetului ONU pentru Drepturile Economice, Sociale și Culturale* [*Brief Overview of the United Nations Committee on Economic, Social and Cultural Rights' Jurisprudence*] in *AUVT* no. 2/2018, p. 18-19.

set forth in the Covenant by that State Party".[1] Even though the Optional Protocol does not specifically substantiate the victim status, that provision was explained, in this case, by the CESCR, as referring to *real/actual* or *potential victims* of a violation of the rights enshrined in the Covenant.[2]

Or, in the present case, the authors had not "provided sufficient evidence that there was a probable, or at least a reasonable, link between the donation of these specific embryos and the development of better treatments for the disease or the reduction of the probability of its hereditary transmission, that would benefit them personally" (otherwise, their claim would have been admissible – seems to suggest the CESCR). Moreover, the Committee continues by saying that:" the petition does not substantiate the existence of this link (…) it does not provide any minimum level of evidence that the donation of these specific embryos would produce any concrete benefit for the authors in relation to hereditary multiple osteochondromas. It is not even clear at all that the embryos would be used in research on this disease. Thus, the argument about the benefits for the authors remains speculative" (para. 6.16).

As to the argument that the authors want to donate the embryos to scientific research, in general, – even if that research does not have any meaningful possibility of benefiting them directly – and that the restriction (on the possibility of donating their embryos) imposed by Law no. 40/2004, violates their right to participate in scientific research – which they consider to be part of the Covenant – the Committee considered that: "it is not necessary to analyze, on this occasion, whether or to what extent the Covenant incorporates a right for every person to take part in scientific research", that, in any case, "the burden is on the authors to show that they really intended to take part in a scientific endeavor" and that "the authors do not substantiate in any meaningful manner that a donation of an embryo is really a form of participation in scientific research" (para. 6.17.).

IV.3. The legal questions and the views of the CESCR

In the light of its own qualification of the claim and its conclusion on the relevant facts, CESCR considered that the communication raises *two central legal questions* – both questions were raised under the rights protected by

[1] Article 2 of the *OP-ICESCR* states that: *Communications may be submitted by or on behalf of the individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.*

[2] CESCR, *S.C. and G.P. v. Italy* Case, Communication no. 20/2017, para. 6.15.

article 12, taken alone or in conjunction with article 10 of the *ICESCR* – and *two preliminary legal questions* – which were considered important to answer before the Committee answers to the central ones.

The central legal questions were: 1. *whether the transfer of an embryo into S.C.'s uterus without her consent was a violation of her right to the highest attainable standard of physical and mental health* (article 12 of the *ICESCR*); and 2. *whether the uncertainty, created by the law***,** regarding whether consent to the transfer of embryos can be withdrawn after fertilization, *constitutes a violation of the authors' right to the highest attainable standard of health* under article 12 and *to the protection of their family* under article 10.

As far as the preliminary questions were concerned, the Committee considered that these two were: 1. which is the *scope of the right* to the highest attainable standard of physical and mental *health* and its *relation with gender equality*; and 2. which are the *restrictions* that are allowed to *article 12.*

To answer these two preliminary legal questions the CESCR *firstly*, *clarified the scope of article 12* and established that *the right to the highest attainable standard of physical and mental health incorporates the right to sexual and reproductive health.* This right (to sexual and reproductive health) is indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment".[1] The Committee also recalls that "the right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health".[2] Additionally, "violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health. Such violations include State interference with an individual's freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard (…). Laws and policies that prescribe involuntary, coercive or forced medical interventions,

[1] CESCR, *General Comment no. 22/2016 on the right to sexual and reproductive health*, para. 10.

[2] Ibid., para. 5.

including forced sterilization or mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect".[1]

Secondly, the CESCR *discussed this article in relation with the non-discrimination provision* – in this case, on the basis of sex – as guaranteed in article 2 (2) of the Covenant, *and with the equality of women and men*, as guaranteed in article 3 of the Covenant. In the Committee' s opinion, these two provisions require the removal of both direct and indirect discrimination, and the ensuring of formal as well as substantive equality. Seemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive equality requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health"[2]. Thus, the Committee recalled that, as part of State party's obligations under article 3, "it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality".[3]

Thirdly, the *restrictions* which are allowed *to the right to the highest attainable standard of health* were discussed. The CESCR departed from the fact that article 12 of the Covenant is not absolute and may be subject to such limitations as permitted by article 4 of the Covenant. Then recalled that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. And concluded that, a State party imposing a restriction on the enjoyment of a right under the Covenant has the burden of justifying such serious measures in relation to each of the elements identified in article 4 and that such restrictions must be in *accordance with the law*, including international human rights standards, *compatible with the nature of the rights* protected by the Covenant, *in the interest of legitimate aims pursued*, and *strictly necessary* for the promotion of the general welfare in a democratic society.[4]

After founding its replies to the preliminary questions, the CESCR continued with the two central legal questions.

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[1] Ibid., paras. 56–57.

[2] Ibid., paras. 26–27.

[3] CESCR, *General Comment no. 16/2005 on the equal right of men and women to the enjoyment of all economic, social and cultural rights*, para. 18.

[4] CESCR, *General Comment no. 14/2000 on the right to the highest attainable standard of health*, para. 28.

The *first* question was *whether the transfer of an embryo into S.C.'s uterus without her consent was a violation of her right to the highest attainable standard of physical and mental health* (article 12 of the *ICESCR*).

In this respect the Committee discussed the lack of consent to and the forced transfer of the „average quality„ embryo into S.C.'s uterus and was of the opinion that forcing a woman to have an embryo transferred into her uterus, clearly, constituted a forced medical intervention. Moreover, recalling that the right to health includes the right to make free and informed decisions concerning any medical treatment a person might be subjected to and that laws and policies that prescribe involuntary, coercive or forced medical interventions violate the State's responsibility to respect the right to health, the Committee concluded that, in the circumstances of the case, the facts presented before it constitute a violation of S.C.'s right to health, as enshrined in article 12 of the Covenant.

As far as the relation of article 12 read in conjunction with article 2 of the *ICESCR* was concerned, the Committee recalled that the requirement of equality between women and men, as guaranteed by article 3 of the Covenant, requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health, and that seemingly neutral laws can perpetuate already existing gender inequalities and discrimination against women. Or, the Law no. 40/2004, as interpreted in the authors' case, restricts the right of women undergoing the treatment to waive their consent, leading to the possibility of forced medical interventions or even pregnancies for all women undergoing IVF treatments. It considers that, even if, on the face of it, this restriction on the right to withdraw one's consent affects both sexes, it places an extremely high burden on women. The Committee notes that the possible consequences on women are extremely grave, constituting a direct violation of women's right to health and physical integrity.

Thus, the Committee concluded that the transfer of an embryo into S.C.'s uterus without her valid consent constituted a violation of her right to the highest attainable standard of health and her right to gender equality in her enjoyment of her right to health, amounting to a violation of article 12, read alone and in conjunction with article 3, of the Covenant.

The *second* question was *whether the uncertainty, created by the law,* regarding whether consent to the transfer of embryos can be withdrawn after fertilization, *constitutes a violation of the authors' right to the highest attainable standard of health* under article 12 and *to the protection of their family* under article 10.

As experienced by the authors, S.C. was unable to withdraw her consent after fertilization, and the authors have reasons to fear that they might experience a similar situation if they attempt an in vitro fertilization again. Consequently, the Committee acknowledged that the authors are prevented from accessing IVF treatments and considered that the Law no. 40/2004 imposes a restriction on the authors' right to health, as it prevents their access to a health treatment that is otherwise available in the State party.

Consequently, the next issue under discussion was if this restriction complies with the limitations provided for in article 4 of the Covenant, namely with the nature of the right under discussion. The Committee has found that the prohibition on withdrawing one's consent to the transfer of an embryo constitutes a violation of the right to health, as it can lead to forced medical interventions or even forced pregnancies. This prohibition touches upon the very substance of the right to health and goes beyond the kind of restriction that would be justified under article 4 of the Covenant. This prohibition, or at least the ambiguity concerning the existence of this prohibition, is at the origin of the author's inability to access in vitro fertilization treatments. Consequently, the Committee has found that the restriction is not compatible with the nature of the right to health and that the facts presented before it discloses a violation of article 12 of the Covenant in respect of both authors.

Having found that the restriction on the authors' access to IVF treatment violates the authors' rights under article 12 of the Covenant, the Committee considered that it is not necessary to examine the authors' claims under article 10.

Consequently, the CESCR made two type of recommendations, in respect of the authors and general recommendations.

As far as *the authors* are concerned, Italy has to provide them with an *effective remedy*, including by: (a) establishing the appropriate conditions to enable the authors' right to access IVF treatments with trust that their right to withdraw their consent to medical treatments will be respected; (b) ensuring that S.C. is protected from any unwanted medical intervention and that her right to make free decisions regarding her own body is respected; (c) awarding S.C. adequate compensation for the physical, psychological and moral damages suffered; and (d) reimbursing the authors for the legal costs reasonably incurred in the processing of the present communication.

As far as the *general recommendations*, the CESCR asked the Italy to provide *guarantees of non-repetition* and ensure that its legislation and the enforcement thereof are consistent with the obligations established under the

Covenant. In particular, the State party has the obligation to: (a) adopt appropriate legislative and/or administrative measures to guarantee the right of all women to take free decisions regarding medical interventions affecting their bodies, in particular ensuring their right to withdraw their consent to the transfer of embryos into their uterus; (b) adopt appropriate legislative and/or administrative measures to guarantee access to all reproductive treatments generally available and to allow all persons to withdraw their consent to the transfer of embryos for procreation, ensuring that all restrictions to access to these treatments comply with the criteria provided in article 4 of the Covenant.

V. Conclusions

To conclude, the communication is interesting to read and discuss, at least,[1] because of *five of its contributions* brought to the building up and the evolvement of the CESCR' jurisprudence.

In short, these contribution might be: *firstly* and *secondly*, a preliminary discussion on the *scope of application of article 15* of the *ICESCR* including the existence, in article 15, of distinct *right of every individual to take part in scientific research* (even if the Committee did not found a violation of this provision), in a general context in which one of the recent preoccupations of the Committee is to clarify the scope of application of article 15 of Covenant, including by providing a better understanding and explanation as to what are the relations and interactions between science and economic, social and cultural rights; *thirdly*, a substantiation of the *victim status*, as referring to real/actual or potential victims of a violation of the rights enshrined in the Covenant; *fourthly*, a *more elaborated definition of facts,* for the purposes of article 3 (2) (b) of the Optional Protocol; and *fifthly*, the reminder that artificial reproductive treatments are an area in which contracting States must constantly review their legislation as to be able to fulfill their obligations under the *ICESCR*.

[1] Some other contributions such as the discussion of article 12 in relation with the non-discrimination provision – in this case, on the basis of sex – as guaranteed in article 2 (2) of the Covenant, and with the equality of women and men, as guaranteed in article 3 of the Covenant, as well as the access to reproductive rights and the existence, in the contents of article 12, of a right to sexual and reproductive health, are also worth mentioning.

As far as the *first and second* contributions are concerned, as mentioned before, this the first communication under article 15 and it comes in the moment in which the Committee undertakes a very innovative approach in its new draft General Comment which aims to bring light as to the relation and interaction between economic, social and cultural rights and science.[1]

The *third* contribution, explains and elaborates on the provisions of article 2 of the *OP-ICESCR*. Thus, even though the Optional Protocol does not specifically substantiate the victim status, that provision was explained, in this case, by the CESCR, as referring to *real/actual* or *potential victims* of a violation of the rights enshrined in the Covenant.[2]

The *fourth* contribution, which elaborates, for the purposes of article 3 (2) (b) of the Optional Protocol, the definition of facts states that: ”facts are the sequence of events, acts or omissions which are attributable to the State Party and may have given rise to the alleged violation of the Covenant. As the Committee has noted in previous Views, **th***e judicial or administrative decisions of the national* authorities are also considered to be part of the

[1] See for other details, about the process but also about the contents of the new draft General Comment *Science and economic, social and cultural rights*, 2nd of January 2020: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/DraftGeneralComment_Science.aspx

This Draft affirms the existence of both a right of every individual to participate in science as well as the existence of a distinct human right to science. To quote from the draft, ”this understanding is corroborated by the *travaux préparatoires* concerning the drafting of article 15 of the Covenant and its relationship with the UDHR. The UDHR is in general relevant to establish the scope of all the rights enshrined in the Covenant, not only because the preamble explicitly mentions the UDHR but also because both Covenants were an effort by the international community to develop in binding treaties the UDHR. In that sense, article 27 of the UDHR, which recognizes a right to take part or participate in scientific advancement and its benefits, should be taken into account. Further, a strictly dichotomous approach whereby scientists would have an extensive right to participate in and contribute to scientific development, but the general population would merely have the right to enjoy passively the benefits of scientific progress and its applications, is incompatible with the principles of participation and inclusiveness underlying the Covenant and a systemic reading of Article 15 in the broader context in which it appears. Thus, doing science does not only concern scientific professionals but also includes citizen science (ordinary people doing science) and the dissemination of scientific knowledge. State Parties must not only refrain from preventing citizen participation in scientific activities but must also facilitate such participation”. Thus, in this context, a right to science will be: ”a set of rights, entitlements, liberties, duties or obligations related to science, analyzed in this General Comment, might be brought together in a single broad concept named the human right to science, in the same way that, for example, the human right to health encompasses a set of rights and freedoms. This approach and name have already been adopted by the Special Rapporteur on Cultural Rights by UNESCO, by some international conferences and summits and by some important scientific organizations and publications”.

[2] CESCR, *S.C. and G.P. v. Italy* Case, Communication no. 20/2017, para. 6.15.

facts *when they are the outcome of proceedings directly related to the initial events, acts or omissions* that gave rise to the violation and could have provided reparation for the alleged violation in accordance with the law in force at the time.[1]

Finally, the reminder, to States Parties, that artificial reproductive treatments are an area in which they must constantly review their legislation as to be able to fulfill their obligations under the *ICESCR*.

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[1] See for details, L.-M. Crăciunean-Tatu, *Repere din jurisprudența Comitetului ONU pentru Drepturile Economice, Sociale și Culturale* [*Brief Overview of the United Nations Committee on Economic, Social and Cultural Rights*' *Jurisprudence*] in *AUVT* no. 2/2018, p. 18-19.

Comentarii privind activitatea organizațiilor internaționale în domeniul dreptului internațional

Commentaries regarding the Activities of International Bodies in the Field of International Law

The Work of the International Law Commission related to Environmental Issues

Ion GÂLEA[1]

Abstract: This brief study exposes in an evolutionary manner the work of the International Law Commission related to environment. It approaches the topic in a chronological manner and from a horizontal point of view, having in mind that not all topics concern directly the environment. Thus, the works related to law of the sea, international waterways, transboundary aquifers, state responsibility are covered, even if there is only an indirect link between environmental protection and these topics. Moreover, the paper analyzes the recent works related to protection of the atmosphere and protection of environment in case of armed conflict.

Key-words: *International Law Commission, environment, pollution, resources.*

I. Introduction

Codification and progressive development of international law are the key words of the mandate of the International Law Commission (hereinafter "ILC").[2] The two notions comprise also a process – the process of evolution

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[2] See Arthur Watts, *The International Law Commission, 1949-1998. Vol. I, The Treaties*, Oxford University Press, 1999, p. 1-21; R. Jennings, *The progressive development of international law and its codification,* BYBIL, vol. 24 (1947), p. 301-329.

of international law, through adaptation, interpretation of existing principles and formation of customary international law, in order to respond to changes in society. International normativity is never a "certain thing": it has been "construed as a *continuum*".[1] International law is subject to constant change, to constant process of identification: it is also a matter of "more or less".[2] It is just the case of the environmental issues: evolutions in technology, evolutions in the impact that the human community has on the planet as a whole, are factors that require evolution of law.

At the first glance, it might appear that environmental issues are a recent concern of the ILC. Nevertheless, even from the first Survey of International Law in Relation to the Work of Codification of the International Law Commission of 1949,[3] it was pointed out, in the section concerning "Obligations related to territorial jurisdiction" – that:

> "*In the same category of duties grounded in the exclusive jurisdiction of States over their territory may be considered the obligation of the State to prevent its territory from causing economic injury to neighbouring territory in a manner not permitted by international law. The award in the Trail Smelter Arbitration case—in which it was held that a State is responsible for injury done to the neighbouring territory by noxious fumes emanating from works operated within the State—provides an instructive example of this category of duties. They comprise the obligation to take measures both of a preventive nature and of active co-operation with other States […]. They cover the duties of States with regard to the use of the flow of international and non-national rivers in such matters as the pollution of and interference with the flow of rivers*.".[4]

However, concerns for protection of the environment were only in an incipient phase at the time of the beginning of the activities of the ILC. The first 14 topics selected by the Commission in 1949[5] did not include any reference to aspects that might directly concern environmental protection.

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[1] Jean d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules,* Oxford University Press, 2013, p. 1.

[2] *Ibid,* also quoting M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*, Cambridge University Press, 2005, p. 393.

[3] Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission - Programme of work, doc. A/CN.4/1/Rev.1 Memorandum Sumbitted by the Secretary General, 1949.

[4] *Ibid*., p. 34-35, para. 58.

[5] ILC, Doc. A/CN.4/13 and Corr. 1-3 Report of the International Law Commission on the work of its first Session, 12 April 1949 , Official Records of the General Assembly, Fourth Session, Supplement No. 10, Yearbook of the ILC, 1949, vol. I, p. 281, para. 16.

However, an important number of topics covered in an indirect manner the protection of the environment, in the early years of the activity of the Commission: law of the sea, state responsibility, international waterways, and international aquifers. Over the years, international environmental law evolved, alongside with international concerns over protection of the environment (and alongside with the continuing "deteriorating state of the global environment").[1] The International Law Commission, on its turn, attempted to cover topics which with more direct relevance for the environmental protection, as protection of the atmosphere and protection of the environment in case of armed conflicts.

The present study has the purpose to outline, in an evolutionary and chronological manner, the work achieved by the International Law Commission in the field of environmental protection. It attempts to evaluate whether the contribution of the ILC is materialized in a more decisive manner by the crystallization of general concepts and principles of a horizontal nature, rather than by the achievement of "final results of certain topics".

The study will be divided in three parts. The first will analyse "early" topics, which covered the protection of the environment in a horizontal manner; the second will cover the topic of state responsibility, from which very important general principles of environmental protection were derived and the third part will deal with the most recent topics that cover the issue of the environment in a more direct manner.

II. Topics covering the environment in a horizontal manner

Even from the beginning of its work, the International Law Commission touched upon elements of environmental protection in an indirect manner, on the topics of the law of the sea, international waterways and, subsequently, international aquifers.

Law of the sea

In the 1950s, the law of the sea was on the agenda of the International Law Commission (regime of the high seas and regime of the territorial sea). The topic was completed in 1957, with the proposal to convene an international conference of plenipotentiaries. The ILC has proposed draft articles on

[1] R. E. Kim, K. Bosselmann, *International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements*, Transnational Environmental Law, vol. 2, Issue 2, October 2013, p. 285-309.

territorial sea and on the high seas[1], and it is to be noted that article 48 concerning the high seas proposed the establishment of a general obligation to prevent pollution at high seas.[2] The article was incorporated, in essence, in articles 24 and 25 of the 1958 Convention on the High Seas.[3] At the same time, the Commission devoted eight articles to "conservation of living resources at high seas",[4] but they were not taken over in the 1958 Convention. Nevertheless, they might have served as a "point of departure" for negotiations that led to what became Part XII of UNCLOS (protection and preservation of marine environment).

International waterways

A topic that was inscribed on the agenda of the ILC for more than 20 years was "the law of non-navigational uses of international waterways". The Commission included this topic in its programme of work in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. The work begun by the several Special Rapporteurs: Richard D. Kearney, Stephen M. Schwebel, Jens Evensen and Stephen C. McCaffrey, was continued by Mr. Robert Rosenstock who was appointed Special Rapporteur for the topic by the Commission at its forty-fourth session in 1992.[5]

The Commission adopted, in 1994, 33 Draft articles, which were recommended as a basis for the elaboration of a convention.[6] The articles represented an elaborated work of codification, on the basis of a high number of specific river regimes throughout the world, multilateral conventions, documents of international organizations or works of the ILA

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[1] Arthur Watts, *op. cit.*, p. 31-108.

[2] ILC, Doc. A/CN.4/104 Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, Yearbook of ILC, 1956, vol. II, p. 285

[3] *UNTS, 1963, vol. 450, I, p. 12, no. 6465.*

[4] ILC, Doc. A/CN.4/104 Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, Yearbook of ILC, 1956, vol. II, P. 286-291.

[5] ILC, Report of the International Law Commission 1994, Doc. A/CN.4/SER.A/1994/Add.l, Yearbook of the ILC, vol. II, Part II, p. 88, para. 210, 211; see also J. Bruhacs, *The law of non-navigational uses of international waterways,* Martinus Nijhoff Publishers, 1993, p. 77-80; Stephen C. McCaffrey, *The Path to the UN Watercourses Convention and Beyond,* in Laurence Boisson de Chazournes, Makane Moïse Mbengue, Mara Tignino, Kolman Sangbana (ed.), *The UN Convention on the Law of the Non-Navigational Use of International Watercourses. A Commentary,* Oxford University Press, 2018, p. 1-18.

[6] ILC, Report of the International Law Commission 1994, Doc. A/CN.4/SER.A/1994/Add.l, Yearbook of the ILC, vol. II, Part II,., p. 89, para. 219.

(as the ""Helsinki Rules on the Uses of the Waters of International Rivers"). The general principles contained by these articles included: i) equitable and reasonable utilization and participation (regarded by the ILC as a "fundamental principle" and "well-established rule",[1] ii) the obligation to exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse State,[2] iii) general obligation to cooperate and exchange of data and information; iv) obligation to exchange information and notify planned measures with possible adverse effects, as well as to conduct consultations and negotiations related to planned measures. The Draft articles contained a section related to protection and preservation of ecosystems[3] - including the obligation to prevent, control and reduce pollution that may cause a significant harm.[4] The ILC also proposed a mechanism for settling disputes, which comprised, inter alia, a Fact-finding commission. At the same session, in 1994, the ILC adopted a resolution on transboundary groundwater, which recommended the principles of the draft articles on non-navigational uses of waterways to be applied also to groundwaters[5] – which later served for starting a new topic.

The works of the Commission on non-navigational uses of waterways were crucially important not only because they served as a basis for the adoption of the Convention on the Law of the Non-navigational Uses of International Watercourses,[6] but for the work in support of identification and future crystallization of customary law on the matter. The Convention entered into force in 2014 and yet only 36 States are parties to it.

Shared natural resources (Transboundary aquifers)

[1] *Ibid.* p. 97, para. 2.

[2] *Ibid.*, p. 103.

[3] *Ibid.*, p. 119,

[4] For the topic of inland waterways pollution, see also Slavko Bogdanovic, *International Law of Water Resources. Contribution of the ILA (1954-2000),* Kluwer Law International, 2001, p. 64, 109, 313-327.

[5] Resolution on Confined Transboundary Groundwater, adopted by the ILC at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session on the topic *Law of the non-navigational uses of international watercourses*. The report, which also contains the text of, and commentaries on, the draft articles on the law of the non-navigational uses of international watercourses, appears in *Yearbook of the International Law Commission, 1994*, vol. II, p. 135.

[6] Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014; see General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49), UNTS vol. 2999 (2014), no. 52106

It was only in 2000 when Robert Rosenstock proposed the introduction of the topic "Shared natural resources of States". The proposal for the introduction of the topic mentioned, as a general statement, that "*The environment in general and the global commons raise many of the same issues but a host of others as well. There can be no doubt that sustainable development requires optimal use of resources*".[1] Moreover, it is useful to point out that the initial proposal questioned whether the Commission should consider taking on both the topic of "General principles of environmental law" and a topic on "Shared natural resources".[2] In 2002, the Commission decided to include the topic in the long programme of work and appointed as special rapporteur Mr. Chusei Yamada.[3] Between 2003 and 2008 the Special Rapporteur adopted 5 reports. It is to be noted that the Commission focused its attention on groundwaters. Having in mind the position of States[4] and following the position of the Special Rapporteur, the Commission narrowed the topic to „Law of transboundary aquifers", leaving aside „Oil and gas".[5]

As a final outcome, the ILC adopted in 2008 the Draft articles on the law of transboundary aquifers.[6] The merit of the document is to be able to ballance the divergent position of States – some opted for a legally binding document, some for a non-binding set of draft articles – in order to help the

[1] ILC, Doc. ILC(LII)/WG/LT/L.1/Add.1, Report of the Working Group on the Long-Term Programme of Work, 25 July 2000, p. 17.

[2] ILC, Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of Work of the Commission, Report of the International Law Commission on the work of its fifty-second session, Doc. A/55/10 (2000), Yearbook of the International Law Commission, 2000, vol. II, p. 141.

[3] ILC, Doc. A/CN.4/SER.A./2002/Add. 1, Summary of the Work of the Commission in its 54th Session, Yearbook of the International Law Commission, 2002, para. 20, 100; see also Rene Marti-Nagle, Stephanie Hawkins, *Trasnboundary Aquifers,* in Mara Tignino, Christian Bréthaut (ed.), *Research Handbook on Freshwater Law and International Relations,* Edward Elgar Publishing, 2018, p. 305-335, 320.

[4] ILC, Doc. A/CN.4/580 Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur, 6 March 2007, p. 2, para. 4-5.

[5] *Ibid.,* p. 3, para. 15.

[6] ILC, Draft articles on the law of transboundary aquifers, Text adopted by the International Law Commission at its sixtieth session, in 2008, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/63/10).

As the views of Governments on the final form of the draft articles were divided, the Commission decided to recommend to the General Assembly a two-step approach, consisting of the General Assembly: (a) taking note of the draft articles to be annexed to its resolution and recommending that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (b) considering, at a later stage, the elaboration of a convention on the basis of the draft articles- p. 22, para. 3.

identification of possible norms of customary international law under cristallysation. Thus, principles like equitable and reasonable utilization, the obligation not to cause significant harm (article 6 – which includes the obligation to take appropriate measures in case that a harm is produced) certainly serve in a decisive manner the continuing shaping of international law.[1]

A significant development is represented by the introduction of a „general obligation to protect and preserve the ecosystems within a transboundary aquifer and also the outside ecosystems dependent on the aquifer",[2] as well as a general obligation to general obligation to prevent, reduce and control pollution of their transboundary aquifers that may cause significant harm to other aquifer States through the transboundary aquifers and the aquifer-related environment.[3]

Article 15 of the Draft articles establishes general obligations in case of planned activities that might have significant adverse effects upon other States: the obligation to assess the significant adverse effects, the obligation to notify concerned States and the obligation to consult and negociate with concerne States.[4]

The relevance of the two above mentioned topics for the advancement of the customary international law is beyond doubt. It could be pointed out that, even if interpreted a bilateral treaty, the ICJ mentioned in 2010 that the respective treaty:

> "*has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been*

[1] Gabriel Eckstein, Francesco Sindico, *The Law of Transboundary Aquifers: Many Ways of Going Forward, but Only One Way of Standing Still,* Review of European Community and International Environmental Law, vol. 23 (I), 2014, p. 32-42, 40 – the authors indicate that the Draft Articles have been invoked by national jurisdictions, such as Decision of the Supreme Court of Justice of Costa Rica, Constitutional Chamber, Voto N. 10-006922 (16 April 2010), paragraph LXVIII – in this sense, the authors quote N. Boeglin, *Acuíferos Transfronterizos: Respuestas Desde el Derecho Internacional y Vacíos en Centroamérica*, Boletín Geológico y Minero, vol. 123, no. 3, (2012), p. 240.

[2] *Ibid,* p. 33, article 10.

[3] *Ibid.*, p. 34, article 12.

[4] *Ibid.*, p. 37.

exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works".[1]

III. State Responsibility

The "International responsibility" was included, even from 1949, on the provisional list of topics suitable for codification. Nevertheless, even from 1973, the General Assembly recommended that the ILC "undertake at an appropriate time a separate study on the topic of international liability for injurious consequences arising out of performance of other activities".[2] In 1997, the Commission decided to split the issue of prevention from the issue of allocation of loss following state liability.[3] Thus, two topics appeared, in the end, relevant for the general issue of environment protection: prevention of transboundary damage from hazardous activities and international liability in case of loss from transboundary harm arising out of hazardous activities.[4]

Prevention of transboundary damage

The Articles on Prevention of Transboundary Harm from Hazardous Activities were adopted by the International Law Commission in 2001.[5] The Articles are presented, practically, in the form of a draft Convention: they consist of a preamble and nineteen articles: Scope (article 1); Use of terms

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[1] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, ICJ Reports 2010, p. 14, 83, para. 204.

[2] UN General Assembly, Resolution 3071 (XXVIII), 30 November 1973, para. 3 c).

[3] ILC, Doc. A/CN.4/483 Report of the International Law Commission on the work of its forty-ninth session, 12 May 18 July 1997, Official Records of the General Assembly, Fifty-second session, Supplement No.10, Yearbook of the Internatioanl Law Commission, 1997, vol. II, p. 16, para. 110-111.

[4] Malgosia Fitzmaurice, *International Responsibility and Liability, Oxford University Press, 2008, 2012,* p. 22-24; Alain Pellet, *The Definition of Responsibility in International Law,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 3-16; James Crawford, *The System of International Responsibility,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 17-26.

[5] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), p. 34; see also Pemmaraju Sreenivasa Rao, *Introduction,* Articles on Prevention of Transboundary Harm from Hazardous Activities, available at http://legal.un.org/avl/ha/apthha/apthha.html (accessed 15 August 2019).

(article 2); Prevention (article 3); Cooperation (article 4); Implementation (article 5); Authorization (article 6); Assessment of risk (article 7); Notification and information (article 8); Consultations on preventive measures (article 9); Factors involved in an equitable balance of interests (article 10); Procedures in the absence of notification (article 11); Exchange of information (article 12); Information to the public (article 13); National security and industrial secrets (article 14); Non-discrimination (article 15); Emergency preparedness (article 16); Notification of an emergency (article 17); Relationship to other rules of international law (article 18); Settlement of disputes (article 19)[1].

The draft articles are very important for the further configuration of customary international law. Principles like prevention, cooperation, the obligation to conduct authorization and assesment of risk, as well as the obligation to notify, could be part of an emerging trend towards cristalizing norms of customary international law.[2] Nevertheless, the Articles also contain innovative proposals related to settlement of disputes – a Fact-finding Commission is envisaged in this sense.

As the Commission pointed out:

> *„Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration) and confirmed by ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons as now forming part of the corpus of international law*".[3]

The International Court of Justice recognized that acknowledged that the principles of prevention, notification and assessment (conducting environmental impact assessment) are now part of customary international law, having their source in the principle of due dilligence, according to which a State must not "allow knowingly its territory to be used for acts contrary to the rights of other States".[4] Indeed, the principles of the ILC

[1] Ibid.

[2] Michael Montjoie, *The Concept of Liability in the Absence of an International Wrongful Act,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 504-513, 512.

[3] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, 2001, part. II, p. 148, para. 3.

[4] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, ICJ Reports 2010 (I), pp. 55-56, para. 101; *Corfu Channel (United Kingdom v. Albania),* Merits, Judgment, ICJ Reports 1949, p. 22; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Judgment, ICJ Reports 2015, p. 665, 706, para. 104.

Draft Convention had an important impact on the future development of the law – as the International Court of Justice acknowledged:

> „*If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk*".[1]

Liability in case of loss arising out of Hazardous Activities

The Interantional Law Commission contiued the work on the topic of liability for injurious consequences and concluded in in 2006, when it adopted the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[2]

The principles – which are merely recommendation for measures to be implemented in domestic law – act as a safety net, even if it has been affired that the work on this topic has not been "as influential to international law as the work programme on State Responsibility".[3] As the Commission points out, they are presented „in the context of the relevant provisions of the Rio Declaration on Environment and Development ("Rio Declaration").[4] One of the purposes of the principles, according to point 3 (b), is „*to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement*".[5] The principles include the duty to provide prompt and adequate compensation (principle 4), the duty to take response measures

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Judgment, ICJ Reports 2015, p. 665, 705-706, para. 104.

[2] ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10); Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 59.

[3] Benoit Mayer, *The International Law on Climate Change,* Cambdridge University Press, 2018, p. 82.

[4] *Ibid.*, p. 59, para. 1.

[5] ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 72.

(principle 5), as well as the duty to provide domestic judicial and administrative remedies (principle 6).[1]

IV. Topics with direct connection to environment protection

In 2011, two topics which are intrinsically related to environment protection have been recommended to be included in the long term working programme: "protection of the atmoshphere" and "protection of environment in relation to armed conflicts".[2] The two topics were included in the programme of work in 2013.[3] It would be interesting to point out the words of Shyina Murase, when proposing the topic "protection of the atmosphere" to be included in the long-term programme of work:

> "*It is important to ensure that the International Law Commission be fully engaged with the international community's present-day needs. While the Commission's draft articles on international watercourses and on transboundary aquifers contain some relevant provisions regarding the protection of the environment, the Commission has not dealt with any topic in the field of international environmental law since the conclusion of the topic on liability (in other words, the prevention of transboundary harm and allocation of loss), which appears to be a significant omission at a time when the world is undergoing critical environmental degradation. It is therefore proposed that the Commission consider for its future work the topic "Protection of the atmosphere*".[4]

Protection of the atmosphere

The decision to include the topic "protection of the atmosphere" on the programme of work of the ILC was accompanied by the following understanding:

> "(*a*) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change,

[1] See also Alan Boyle, *Liability for Injurious Consequences of Acts not Prohibited by International Law*, in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 103-124.

[2] ILC, Report of the International Law Commission on the Work of its 63-rd Session, 2011, Doc. A/66/10, Yearbook of the International Law Commission, 2011, vol. II, p. 189, 211.

[3] ILC, Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013) Doc. A/68/10, Yearbook of the International Law Commission, 2013, vol. II, para. 168.

[4] *Ibid.,* p. 189.

ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;

(*b*) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" gaps in the treaty regimes;

(*c*) Questions relating to outer space, including its delimitation, are not part of the topic;

(*d*) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Special Rapporteur's reports would be based on such understanding."[1]

The special rapporteur appointed by the ILC, Shyina Murase, elaborated until now five reports. According to the special rapporteur, the purpose of this project is progressive development and codification of international law in a fourfold manner: "i) First, the project aims to identify the status of customary international law, established or emerging, examining the gaps and overlaps, if any, in existing law relating to the atmosphere; ii) Second, it aims to provide appropriate guidelines for harmonization and coordination among treaty regimes within and outside international environmental law. The issue of trade and the environment will prove to be a challenge in that area; iii) Third, the proposed draft guidelines will help to clarify a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere; iv) Fourth, the project aims to establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere".[2]

[1] *Ibid.*, para. 168.

[2] ILC, Doc. A/CN.4/667, 14 February 2014, First Report of Special Rapporteur S. Murase, Protection of the atmoshpere, p. 8, para. 13.

At the 70th Session in 2018, the Drafting Committee addopted the texts and titles of 12 draft guidelines and preamble on first reading.[1] It would be noted that, on one side, the document contain general statements – as the ones in the preamble of the Draft Guideline:

> "*Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, […] Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole*".[2]

Nevertheless, important elements which may serve to the codification or on-going crystallization of norms of customary international law are to be identified: general obligation to protect the atmosphere (guideline 3); environmental impact assessment (guideline 4); sustainable use of the atmosphere (guideline 5), equitable and reasonable utilization of the atmosphere (guideline 6), prudence and caution with respect to large scale modifications (guideline 7). The guidelines also contain correct – but rather general – statements related to cooperation among States, national implementation, compliance and dispute settlement.

The guidelines raise one of the most important questions of international law – interrelation between different sets of norms (guideline 9). Nevertheless, no new or clear answer is provided:

> "[different sets of norms]…should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law".[3]

At its 3450th meeting, on 9 August 2018, the Commission decided to transmit the draft guidelines on the protection of the atmosphere, through the Secretary-General, to Governments and international organizations for

[1] ILC, Doc. A/CN.4/L.909, Protection of the atmosphere, Texts and titles of draft guidelines and preamble adopted by the Drafting Committee on first reading, 6 June 2018.

[2] *Ibid.*, p. 1.

[3] *Ibid.*, p. 3.

comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.[1]

Protection of the environment in relation to armed conflicts

Although concerns regarding the protection of the environemnt in case of armed conflicts were longstanding,[2] the International Law Commission inscribed the topic on the current programme of work in 2013. With respect to the second topic – protection of the environment in relation to armed conflicts, in 2013 the ILC appointed Ms. Marie Jacobsson as special rapporteur.[3] She presented three reports, in 2014, 2015 and 2016. Subsequently, Ms Marja Letho was appointed as special rapporteur and she presented two reports, in 2018 and 2019.

As a starting point, it would be useful to quote Specal Rapporteur Marie Jacobsson, in her first preliminary report report:

> „The protection of the environment in armed conflicts to this point has been viewed primarily through the lens of the law of armed conflict. However, this perspective is too narrow, as modern international law recognizes that the international law applicable during an armed conflict may be wider than the law of armed conflict. […] Accordingly, applicable rules of the *lex specialis* (the law of armed conflict) coexist with other rules of international law".[4]

This issue was largely addressed in the debates within the 6th Committee: Several States commented on the issue of complementarity, or the interplay of different areas of international law. While it was agreed that international humanitarian law was *lex specialis* during an armed conflict, speakers also

[1] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, p. 158, para. 76.

[2] See, for example, Robert E. Linhard, *Protection of the Environment during Armed Conflict and other Military Operations,* in R. Grunawalt, J.E. King, R.S. McClain (ed.), *Protection of the Environemnt during Armed Conflict,* International Law Studies, vol. 69, Naval War College, 1995, p. 57-63.

[3] ILC, Report of the International Law Commission Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), Doc. A/68/10, Yearbook of the International Law Commission, 2013, vol. II, p. 72, para. 131.

[4] ILC, Doc. A/CN.4/674, Preliminary report of the *Special Rapporteur*, Ms. Marie G. Jacobsson, *Protection of the environment in relation to armed confclitcs,* 30 May 2014, paras. 2, 5.

saw a need to address human rights and environmental obligations within the scope of the topic.[1]

The approach of the first Special Rapporteur was „*that the topic be approached from a temporal perspective*, rather than from the perspective of particular regimes of international law, such as environmental law, the law of armed conflict and human rights law. It is thus proposed that the Commission proceed to consider the topic in three temporal phases: before, during and after an armed conflict (phase I, phase II and phase III, respectively). The proposed approach is intended to make the topic more manageable and easier to delimit".[2]

At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic as Ms. Jacobsson was no longer with the Commission, and decided to appoint Ms. Marja Lehto as the new Special Rapporteur.[3]

In 2016, the Commission provisionally adopted draft principles 1, 2, 5 and 9 to 13, and commentaries thereto, and took note of draft principles 4, 6 to 8, and 14 to 18 (principles applicable after an armed conflict), which had been provisionally adopted by the Drafting Committee. In 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18 as well as commentaries thereto. Also at the seventieth session, the Commission took note of draft principles 19, 20 and 21 (principles applicable in situation of occupation) provisionally adopted by the Drafting Committee at the same session.[4]

The general principles provisionally adopted util present are worth mentioning: the general obligation to take effective measures for the protection of environment in relation to armed conflicts (principle 4), designation of protected areas (principle 5), an innovative rule related to protection of the environment of indiginous people (principle 6), as well as general recommendations to include provisions related to environment in presence of force agreements (principle 7) and obligations related to peace operations (principle 8).

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[1] ILC, Doc. A/CN.4/728, Second report of the *Special Rapporteur*, Ms. Marja Lehto, *Protection of the environment in relation to armed confclitcs,* 21 March 2019, p. 2, para. 3.

[2] *Ibid.*, p. 17, para. 58.

[3] ILC, Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), doc. A/72/10, Yearbook of the International Law Commission, 2017, vol. II, p. 211, para. 255, 262.

[4] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, p. 240, para. 168-171.

In March 2019, the special rapporteur Ms. Marja Letho presented her second report, which focuses on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts. It focuses on illegal exploitation of natural resources and unintended environmental effects of human displacement.[1]

This second report is accompanied by the formulation of new draft principles, related to the: *corporate due dilligence, Mertens clause, Environmental modification techniques, pillage, responsibility and liability, corporate responsibility, human displacement.*

The Commission is expected to continue its work on this topic in 2020.

V. Conclusion

The role of the International Law Commission for the process of codification and progressive development of international law is well known. It is an important brick in the development of international law in the field of protection of environment – as our planet, international law is a living instrument, that evolves continuously.

As the ICJ has put it even from 1997, in the *Gabcikovo-Nagymaros* case,

> *„Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done with- out consideration of the effects upon the environment. Owing to new scieritific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past*".[2]

It is expected that the International Law Commission continues its work. Thus, in 2018, the Commission decided to include in the long-term programme of work the topic „Sealevel rise in relation to international law".

At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term

[1] ILC, Doc. A/CN.4/728, Second report of the *Special Rapporteur*, Ms. Marja Lehto, 21 March 2019.

[2] ICJ Reports, 1997, p. 78, para. 140.

programme of work.[1] In 2019, the Commission decided to include the topic in its programme of work and established „an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria".[2] Three issues will be covered by the Study Group: law of the sea, statehood, protection of persons affected by sea-level rise.[3]

The importance of this topic is related to the conceptual approach that the Commission will have to adopt, in order to identify the responses that international law provide to changes in the environment and the society. As the 2030 Agenda for Sustainable Development recognizes, "*Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea-level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries [...]. The survival of many societies, and of the biological support systems of the planet, is at risk*."[4] As emphasized by members of the Study Group," sea-level rise has become a global phenomenon and thus creates global problems, impacting on the international community as a whole".[5]

The role of the International Law Commission will continue to be to identify and follow the continuous evolution of international law. International law is a living instrument, that follows and shapes changes in the international community. The whole work of the Commission with respect to environment – from approaching the topic in a horizontal manner to focusing on detailed topics like protection of the atmosphere or protection of

[1] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, para. 369.

[2] ILC, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), A/74/10, Yearbook of the Interantional Law Commission, 2019, vol. II, p. 340, para. 265.

[3] *Ibid.*, p. 340, para. 269; Bogdan Aurescu, *The Legal Effects of the Sea-level Rise on the Work Programme of the UN International Law Commission,* Romanian Journal of International Law, no. 20 (July-December 2018), pp. 72-82.

[4] UN General Assembly Resolution A/RES/70/1, 25 September 2015, para. 14; see also ILC, Syllabus, Recommendation of the Working-Group on the long-term programme of work, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Annex B, p 326, para. 2.

[5] ILC, Syllabus, Recommendation of the Working-Group on the long-term programme of work, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Annex B, p 326, para. 1.

environment in relation to armed conflicts – proves the evolutionary chacarter of the international law and of the approaches of the ILC. International law is likely to correspond to the phrase of Galileo Galilei „*eppur si muove*" – it evolves continuously. Thus, it will be for the ILC to follow and discover this[1] continuous evolution.

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[1] James Crawford, *Hasard, ordre et changement: le cours du droit international,* Martinus Nijhoff, 2015, p. 148.

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Studii și comentarii de jurisprudență și legislație
Studies and Comments on Case Law and Legislation

Restitution in Kind in Investment Disputes: The Spectrum of the Libyan Nationalization Cases

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Abstract: The issue of primary remedies available in international law is still very much open, as international case-law has yet to reach consensus on this matter.

A particular manifestation of this relates to the availability of restitution in kind or specific performance as a remedy of international law in investment disputes. The aim of this article is to analyse restitution in kind as a remedy in investment disputes, particularly looking at the classic Libyan Nationalization Cases.

Key-words: *Remedies, Restitution in Kind, Investment Arbitration*

I. Introduction

The Libyan Nationalization Cases pose an interesting dilemma: the same question of whether a claimant is entitled to restitution in kind against a responding State has been answered differently by the three different *ad-hoc* arbitral tribunals.

Moreover, the three arbitral awards create a spectrum which ranges between a complete denial of the availability of restitution in kind to a complete acceptance. It is for this reason that these arbitral awards are still of great importance for investment disputes, as *"the awards were just as (if not more) important in terms of defining the future direction of investor State*

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relations."[1] The views taken by the arbitrators in these three cases are still cited in instances where claims regarding restitution in kind and specific performance are submitted. Although they have not provided one clear answer to the question at hand, they have helped shape the various approaches to restitution in kind in the context of international investment arbitration.

II. The Libyan Nationalization Cases

The present Section addresses the three Libyan Nationalization Cases, which are the following: *Libyan American Oil Company v. The Government of the Libyan Arab Republic*; *Texaco Overseas Petroleum Company v. the Government of the Libyan Republic*; and, *BP Exploration Company v. the Government of the Libyan Arab Republic*, and the approach taken in each of them relation to restitution in kind in investment law.

As such, the following Subsections shall provide a brief presentation of the facts and an analysis of the findings of the Tribunals in each of the three cases.

II.1. Libyan American Oil Company v. The Government of the Libyan Arab Republic[2]

Brief Presentation of the Facts

The *Libyan American Oil Company v. The Government of the Libyan Arab Republic* case consisted of an *ad hoc* investment arbitration filed in relation to the unlawful nationalization of the Libyan American Oil Company ("LIAMCO") Petroleum Concessions, by the Government of the Libyan Arab Republic ("Libya").

On 12.12.1955 Libya entered into three Petroleum Concessions with LIAMCO relating, *inter alia*, to the extraction of petroleum from certain land areas in Libya over a period of fifty years, renewable for an additional ten years.

On 01.09.1973, and later on 11.02.1974, Libya issued two Nationalization Laws effectively transferring to the State all the properties, privileges,

[1] M. Waibel, *The Backlash Against Investment Arbitration, Perceptions and Reality* (Kluwer Law International 2010), p. 565.

[2] *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Arbitral Award dated 12.04.1977, available at < https://jusmundi.com/en/document/decision/en-libyan-american-oil-company-v-the-government-of-the-libyan-arab-republic-award-tuesday-12th-april-1977>.

assets, rights, shares, activities and interests of LIAMCO under the respective Petroleum Concessions.

In accordance with Clause 28 of the Concession Agreements, LIAMCO initiated *ad hoc* arbitral proceedings, filing a claim against Libya in respect of the premature repudiation of the Concession Agreements, some thirty-two years before the expiry of the period of the concessions.

The claimant argued that the nationalization of the Petroleum Concessions was illegal from an international law perspective, thus requesting relief in the form of restitution in kind and, in the alternative, the payment of damages, as compensation.

LIAMCO sought declaratory relief, requesting the Arbitral Tribunal to find that Libya's title to the concession rights was invalid. LIAMCO further claimed that *restitutio in integrum* should be reached through restitution in kind, thus requesting: "*the restoration to LIAMCO of its concession rights; and the transfer to LIAMCO of the benefits of the exercise of its concession rights by the National Oil Company of Libya (...)*",[1] characterizing the breach of international law that Libya had committed as unlawful expropriation as a result of the nationalizations.

The Arbitral Tribunal analysed the arguments brought forward by the Parties and considered that restitution in kind was not applicable in this case.

As a first step in its analysis, the Arbitral Tribunal provided a comparison between the principles of Libyan law and the general principles of international law. The starting point consisted of the finding that *"according to these general common principles [i.e.* the principles of municipal law of Libya and the general principles of international law*], obligations are to be performed, principally, in kind, if such performance is possible*".[2]

In other words, the premise of the Tribunal's argumentation was the acknowledgement of the principle that restitution in kind and specific performance are primary remedies in Libyan law and in international law, but that this general rule is not applicable where restitution in kind or specific performance are impossible.

After determining the general rule, the Tribunal turned to the assessment of the threshold of *impossibility* to specifically perform a contract or to provide restitution in kind. Citing V. Friendman, the Tribunal noted that the impossibility of performance is common in international law as:

[1] Ibid., para. 169.
[2] Ibid., para. 264.

> *"it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States*".[1]

As such, the Tribunal considered that restitution in kind and specific performance constituted the primary remedies in international law, with the exception where these remedies were ordered against a State. Therefore, the impossibility to award restitution in kind was assessed by observing the party against whom this remedy was directed and not the object of the dispute.

The Tribunal thus rejected Claimant's claim for restitution in kind and also rejected the declaratory relief sought, essentially stating that "*they are practically incapable of compulsory execution".*[2] Finally, the Tribunal granted Claimant's claim for monetary indemnification.**Analysis of the Case**

Despite the Arbitral Tribunal's finding in the LIAMCO v. Libya case, a preferable approach would have been, when analyzing *impossibility*, to focus on the objective reasons underlying a decision on what remedies are available, rather than considering the subject against whom such remedy is ordered. In other words, international courts and tribunals should assess whether restitution, in a given circumstance, could be awarded materially, disregarding whether or not one of the parties could be compelled by such an award.

The LIAMCO Tribunal further argued that restitution would presuppose the cancelation of the nationalization measures and that such cancelation would violate the sovereignty of the State.

In other words, the Tribunal considered that both material restitution and judicial restitution were considered to infringe the sovereignty of the State, which for this Tribunal entailed that restitution and specific performance were considered as impossible.

However, in its analysis of the impossibility of restitution, the Arbitral Tribunal failed to focus on the material/judicial possibility of restitution or specific performance. The question of whether restitution was materially or judicially possible was neither asked nor answered explicitly. The Tribunal simply argued that even if, in principle, restitution in kind and specific performance are the primary remedies in international law, the principle of State sovereignty would stop such remedies from being awarded.

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[1] Ibid., para. 268.
[2] Ibid., para. 375.

This statement might be considered as contradictory. Awards and judgments in public international law necessarily entail a State party to the dispute. Affirming that restitution in kind is a primary remedy in international law, but then arguing that it is not applicable against a State, directly goes against the first statement made. The latter conclusion would render the first inapplicable, and would further lead to the argument that restitution in kind is never available in public international law cases considered broadly (and here we include investment arbitration), as by definition a State will always answer as respondent. The case law of international courts and tribunals, and particularly the case law of the International Court of Justice contradicts this outcome, as the International Court of Justice has granted restitution in kind throughout its jurisprudence.

The principle of State sovereignty is indeed one of the fundamental characteristics that define a State. However, if the principle of State sovereignty would have the above-suggested effects in international law, States would be entitled to act and to enact legislation, be it illegal from an international point of view, without the corresponding obligation to repair the injury caused through restitution in kind.

Nevertheless, the Tribunal in LIAMCO found that compensation is an available remedy. However, if matters would be interpreted in the same restrictive manner, as in this particular arbitral case, monetary compensation would amount to the only available remedy under these circumstances.

Certain commentators seem to agree with the outcome of this case and, in their analysis, they consider that the Tribunal's solution amounts to the most sensible oneThe following has been stated in this respect:

> *"la position adoptée sur ce point dans la sentence Liamco nous parait la seule admissible: toute restitutio in integrum des concessionaires dans leurs droits à la suite d'une nationalisation, constituerait une ingérence intolerable dans la souveraineté des Etats."*[1]

In our view, the above-mentioned assessment should not be as strong as suggested. It is true that States have some prerogatives that individuals do not have. However, it would seem rather drastic to consider that the principle of State sovereignty would have the effects that it had in this case with respect to restitution in kind.

[1] B. Stern, '*Trois Arbitrages, Un Meme Problème, Trois Solutions, Les nationalisations petrolieres libyenes devand l'arbitrage international'* (1980) Rev. Arb. p. 39.

The International Court of Justice has granted judicial restitution, as well as material restitution, and, as such, it recognized and applied these remedies. In this sense, State sovereignty does not seem as strong before the International Court of Justice as it seems before investment tribunals.

As such, it would be procedurally inaccurate to consider that when a State faces another State, the powers are divided equally and all remedies can be awarded, while when a State faces an individual the balance of powers switches towards the State. It is surprising precisely because the entire purpose of investment arbitration is to level the playing field between States and individuals or private entities.

Following the reasoning applied by the LIAMCO Tribunal, an individual or private entity would not be able to request restitution in kind in any case when facing a State, simply because such remedy would be off limits on the basis of State sovereignty.

Such a blanket refusal to apply what is considered to be a primary remedy in international law appears rather restrictive, and seems to attribute to State sovereignty an exaggerated array of effects.

State sovereignty has been interpreted in different ways by different authors. Some authors considered in this sense that State sovereignty does not mean that the State can say "I do what I want",[1] and rightly so. In assessing the dangers of allowing States to breach their obligations, without the corresponding obligation of restitution in kind, it has also been observed that "*to allow states to undo their commitments means in practice to forbid them from making undertakings in the future".*[2]

These arguments provide important input with respect to the future of the the interpretation of remedies of international law, if the principle of State sovereignty would be interpreted as allowing a wrongful act to be committed against a private entity without implying an obligation for restitution or specific performance. The trust that investors have in the relationship with the State can only rely upon the ability to make meaningful promises, as Jan Paulsson puts it.[3] And if a State could legally invoke the principle of State sovereignty, in order to argue that restitution in kind or

[1] J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 341.

[2] P. Mayer, 'La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat' (1986), J Doit Int'l 5, as cited in J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 349.

[3] J. Paulsson, 'The power of States to make Meaningful Promises to Foreigners' J Int. Disp. Settlement (2010), p. 343.

specific performance, although considered primary remedies in international law, are just shapes without substance, the trust of investors might be lost.

States have not explicitly committed through Bilateral Investment Treaties ("BIT") and state contracts or conventions that restitution in kind would be a remedy under international law, and neither is there such a necessity. Article 26 of the Vienna Convention on the Law of Treaties provides that *"every treaty in force is binding upon the parties to it and must be performed by them in good faith"*.

Therefore, it can be argued that the investors have legitimate expectations that States will subject themselves to the remedy of specific performance and restitution in kind, as this would amount to the performance of the treaty in force.

Schreuer confirms this view, and argues as follows, in this sense:

> *"[e]xpectations can be created through the general regulatory framework prevalent in a country. Expectations can also be created through specific transactions or governmental assurances. In some cases the expectations stemmed from the general regulatory framework as well as specific commitments contained in licenses".*[1]

Expectations could also be created through conventions and treaties, and, unless otherwise agreed, investors have the legitimate expectation for specific performance and restitution in kind to be granted and respected. If specific performance and restitution in kind are materially impossible or if granting these remedies would presuppose a burden out of proportion, monetary relief should suffice. While it is true that, generally, investors do not seek restitution in kind or specific performance and focus on compensation, it cannot be considered that the right for specific performance or restitution in kind should not be available.

If all Tribunals would adopt the LIAMCO approach, the claims of investors through which they request restitution in kind or specific performance might never be granted, even when the right to such remedies exists, as such claims would be rejected at the offset as an interference with State sovereignty.

The outcome of this case describes one approach that tribunals had at a time when investment disputes were in an emerging phase. However, the view of the LIAMCO Tribunal should not be considered as the absolute

[1] C. Shreuer and U. Kriebaum, 'At What Time Must Legitimate Expectations Exist' (http://www.univie.ac.at/intlaw/pdf/97_atwhattime.pdf), last visited 10 April 2020, p. 8.

interpretation of the effects of State sovereignty on *restitutio in integrum* achieved through restitution in kind.

Indeed, other Tribunals have embraced different views on this subject, as the following Subsections shall provide.

II.2. Texaco Overseas Petroleum Company v. the Government of the Libyan Republic[1]

Brief Presentation of the Facts

The arbitration in the present case bears a factual matrix similar to that of the first case studied herein, *i.e.* LIAMCO v. Libya. The dispute in this case originated from fourteen Deeds of Concession concluded between the Texaco Overseas Petroleum Company and California Asiatic Oil Company ("the Companies"), on the one hand, and the Government of the Libyan Republic ("Libya"), on the other hand, in the period between 1955 and 1968.

By two Decrees, issued in 1974 and 1975 respectively, Libya essentially nationalized the entirety of all the properties, rights and assets relating to the fourteen Deeds of Concession.

Pursuant to Clause 28 of the Deeds of Concession, the Companies initiated *ad hoc* arbitral proceedings against Libya seeking an award finding, *inter alia,* "*that Libya be held to perform the Deeds of Concession and fulfill their terms*".[2]

The arbitral tribunal in the Texaco Overseas Petroleum Company case stated that *restitutio in integrum* is the applicable principle of international law (the same conclusion that the LIAMCO Tribunal reached) and that this case would be the case where it should apply. The Tribunal concluded that restitution in kind should be awarded.

The structure of the analysis followed by the Arbitral Tribunal in reaching its decision was similar with the structure followed by the Tribunal in the LIAMCO case. However, the conclusion was vastly different.

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[1] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, available at <https://www.academia.edu/35005891/Texaco_Overseas_Petroleum_Company_and_California_A>, last visited 10 April 2020.

[2] Ibid., para. 17.

The Tribunal first analyzed the principles of Libyan law with respect to *restitutio in integrum.* The Tribunal concluded that "*by application of the principles of Libyan law, breach of a contract by a party thereto justifies the judgment of restitutio in integrum against that party*".[1] Further, the Tribunal turned to the principles of international law with respect to *restitutio in integrum*. In its analysis, the Tribunal looked to the jurisprudence established by the Permanent Court of International Justice ("**PCIJ**") in the Chorzow Factory case[2] and the Mavrommatis Jerusalem Concessions case,[3] as well as the ICJ's judgment in the Temple of Preah-Vihear Case, among others.[4] Further, the Tribunal made reference to arguments of the legal scholars of the time.

The Arbitral Tribunal's conclusion was that:

> "*for the general reasons mentioned above, this Tribunal must hold that restitutio in integrum is, both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual obligations and that it is inapplicable only to the extent that restoration of the status quo ante is impossible.*"[5]

Analysis of the Case

The decision reached in the Arbitral Tribunal in this case was subject to criticism.

First, the Tribunal's reliance on scholarly writings was criticized, as it was considered that the number of authors quoted in its award was "too small".[6] By this argument, it would appear that the critics of the award implied that the analysis rendered by the Tribunal was not sufficiently reliable.

Second, other authors stated that the scholarly writings quoted in this case were taken out of context and that they were not "unequivoqual". Therefore, the criticism put forth was that even if arguments were made that restitution represents the object of redress, the scholars in question regarded restitution

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[1] Ibid., para. 96.

[2] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits [1928] P.C.I.J., Ser. A, No. 17.

[3] *Mavrommatis Jerusalem Concessions Case* [1925] P.C.I.J., Ser. A, No. 5.

[4] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Merits, Judgment of 15 June 1962: I.C. J. Reports 1962, p. 6.

[5] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, para. 109.

[6] B. Stern, '*Trois Arbitrages, Un Meme Problème, Trois Solutions, Les nationalisations petrolieres libyenes devand l'arbitrage international'* (1980) Rev. Arb. p. 37.

as an "unusual remedy". Finally, it has been pointed out that even if restitution was considered as the primary remedy in international law, in disputes involving territory or water rights a mere offer of money could be regarded as a sufficient settlement.[1]

Despite these criticisms, a distinction must be drawn between legal arguments and opinions. It is the legal argument that should be the basis of an award and not an opinion. While it is true that some of the authors cited by the Texaco Tribunal regarded restitution as an unusual remedy, the general consensus was that it represents a primary remedy in international law.

The Texaco Tribunal's conclusion that restitution in kind represented the applicable remedy for the breach of binding concession agreements reflects the interpretation given by the PCIJ of said principle in the Chorzow Factory Case that:

> "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear (...)*".[2]

The Arbitral Tribunal noted that restitution in kind or specific performance should be *"discarded when there is absolute impossibility of envisaging specific performance, or when an irreversible situation has been created"*.[3]

However, the Tribunal concluded that this was not the case, since *"the performance of its obligations by the defendant seems to depend on the defendant itself and it should, in all likelihood be possible for the Libyan Government to take the necessary measures to restore the situation"*.[4]

Considering the above arguments put forth by the Texaco Tribunal, it becomes evident that it undertook a legal analysis that the LIAMCO Tribunal failed to pursue: the analysis of the material impossibility or the judicial impossibility of restitution in kind or specific performance.

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[1] M. Sornarajah, *The Pursuit of Nationalized Property*, (Martinus Nijhoff Publishers 1986) p. 145.

[2] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits 1928, PCIJ, p. 47.

[3] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. the Government of the Libyan Arab Republic*, para. 112.

[4] Ibid.

The Texaco Tribunal considered that the inapplicability of restitution in kind could only be caused by "*an absolute impossibility, beyond its control, that eliminated the possibility of restoring things to the previous state"*[1] by the Respondent.

In other words, the Arbitral Tribunal in the Texaco case put forth a definition of impossibility of restitution in kind, that, unlike the LIAMCO Tribunal, took into account the concrete factual circumstances of the particular case in order to determine whether restitution was impossible, rather than simply considering the party against whom restitution was ordered.

In this respect, not only does the interpretation given in the Texaco award resemble the practice of the PCIJ, but it also illustrates the actual structure of the text of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001 ("ILC Articles on State Responsibility").

Indeed, Art. 35 (b) of the ILC Articles on State Responsibility establishes that restitution is an obligation of the State, to the extent that restitution is not *materially* impossible.

The award in the Texaco case is one of the most cited awards when restitution in kind and specific performance are the contemplated remedies by arbitral tribunals. Moreover, in the context of that time, this award was rather a statement award arguing that restitution is an available remedy under international law and should be awarded when it is possible.

II.3. BP Exploration Company v. the Government of the Libyan Arab Republic[2]

Brief Presentation of the Facts

The facts of the BP Exploration Company ("BP**"**) v. the Government of the Libyan Arab Republic ("Libya") case bear similarities with the cases discussed above.

In December 1957, Mr. Nelson Bunker Hunt, a citizen of the United States of America, was granted a Deed of Concession, *i.e.* Concession 65, which granted the exclusive right for 50 years to search for and extract petroleum within a designated area, and to take away and dispose of the same.

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[1] Ibid.

[2] *BP Exploration Company v. the Government of the Libyan Arab Republic*, Award on the Merits of 10.10.1973, available at < https://jusmundi.com/en/document/decision/en-bp-exploration-company-libya-limited-v-government-of-the-libyan-arab-republic-award-wednesday-10th-october-1973 >, last visited on 10 April 2020.

In November 1960, Mr. Hunt assigned an undivided one-half interest and title in Concession 65 to BP Exploration Company (the **"**BP Concession").

In December 1971, Libya passed a law providing that the activities of BP in Oil Concession 65 were nationalized (the "BP Nationalization Law").

As such, BP initiated arbitral proceedings pursuant to Clause 28 of the Concession Agreement, and requested that the Arbitral Tribunal render a declaratory Award, declaring, *inter alia*, that "*[t]he Claimant is entitled to be restored to the full enjoyment of its rights under the Concession Agreement*".[1]

The BP Tribunal proceeded with its legal analysis following the same structure as the LIAMCO and Texaco Tribunals, *i.e.* the Tribunal firstly analyzed the availability of restitution in kind and specific performance under Libyan Law.

BP's case on this point relied on Art. 159 of the Libyan Civil Code, which provided that *"in bilateral contracts (contrats synnallagmatiques) if one of the parties does not perform his obligation the other party may, after serving a formal summons on the debtor, demand the performance of the contract or its rescission, with damages, if due, in either case.*"[2]

The Tribunal's conclusion on this point rested on its consideration that it *"has not been in a position to form an opinion in this respect except on the basis of the argument presented by the Claimant which appears less than exhaustive"*,[3] such that "*no certain conclusions as to the position of Libyan law can be drawn on the material available*".[4]

Despite the conclusion reached by the Tribunals in the LIAMCO and Texaco cases, the BP Tribunal did not consider that the principle of the primacy of restitution is applicable in Libyan law. This conclusion is somewhat surprising, when considering the clear language contained in the above-cited legal text.

On the other hand, the Tribunal did not consider the issue of Libyan law any further as it found that "*(...) nor is it necessary to pursue the research on Libyan law further on account of the conclusions presented below as to public international law, which is a second necessary link in the argument*".[5]

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[1] Ibid., para. 86.
[2] Ibid.
[3] Ibid., para. 121.
[4] Ibid., para. 125.
[5] Ibid.

To put it differently, the BP Tribunal appeared unconvinced by the provisions of Libyan law with regard to the availability of restitution in kind, but in its own words, considered that there was no point in further researching Libyan law for a solution, as it had already drawn its conclusions from an analysis of public international law.

In this vein, the Tribunal turned to the interpretation of the Vienna Convention on the Law of Treaties, on the basis that "*[w]hile the concept of "treaty" used in the Convention is restricted in its scope, certain of the provisions of the Convention have analogous application to international agreements in general which are governed by international law*".[1]

Specifically, the Tribunal observed Art. 26[2] of the Vienna Convention, which enshrines the principle of *pacta sunt servanda,* and reached the conclusion that it does not entail that specific performance or restitution should be granted as remedies.

Moreover, the Tribunal considered that "*[t]he Convention, however, conspicuously lacks any rules on remedies*"[3] and proceeded to look at further provisions within the Vienna Convention, stating that *"a fleeting reference in Article 65 Paragraph 5, to a 'party claiming performance of the treaty or alleging its violation' cannot be construed as a considered incorporation of specific performance as a remedy."*[4]

The Tribunal found that the Convention does not have any particular rules on specific performance and that the primacy of restitution cannot be implied. Therefore, the Tribunal concluded that public international law outside the Convention should be resorted to, in order to determine the availability of restitution in kind/specific performance.

As such, in its analysis of public international law outside the Convention, the Tribunal clarified that:

> *"with regard to the question of the availability of the remedies of specific performance and restitution in integrum in customary international law, it is important to stress that the inquiry below will be restricted to the general field of economic interests and especially long-term contracts of commercial or industrial*

[1] Ibid., para. 126.

[2] Art. 26 of the Vienna Convention on the Law of Treaties: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*."

[3] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 129.

[4] Ibid.

character and property and other assets employed in industrial undertakings."[1]

A summary of the opinion of the BP Tribunal on public international law provided by scholarly writings explained that the Arbitral Tribunal:

> *"examined the practice of international tribunals in respect of customary international law distinguishing between cases relating to state territory or other vital interests and cases concerning economic interests. He noted that no tribunal had ever awarded specific performance or restitution in integrum in a case of a second kind. He therefore decided that notwithstanding the famous dictum in the Chorzow Factory case and a number of other pronouncements, damages were the primary remedy in public international law.*"[2]

In consideration of all of the above, the Tribunal stated that it "*is unable to find that there exist principles of the law of Libya common to principles of international law pursuant to which the BP Concession is still in law valid and subsisting and the remedy of restitutio in integrum available to the Claimant*."

Finally, the Tribunal, by a "*rule of reason*"[3], determined that "*when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprise and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages*".[4]

Analysis of the Case

The BP Tribunal essentially found that restitution in kind was not an available remedy for the Claimant in the present proceedings, concluding that monetary compensation was the sole relief which could be granted in the circumstances.

Therefore, this Tribunal's decision is on the opposite pole of the Texaco Tribunal's decision. In the same way that we concluded that the award in

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[1] Ibid., para. 134.

[2] C. Greenwood, 'State contracts in international law, The Libyan Oil Arbitrations' (1982 53 BYBIL) 67.

[3] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 200.

[4] Ibid.

Texaco was a statement, the same argument could be made regarding this decision, but in the opposing direction.

The BP Tribunal considered that the principle stating that restitution in kind and specific performance are primary remedies in international law is not applicable.

Some authors support the view that this Tribunal followed and argue as follows in this sense:

> *"the tribunal in BP v. Libya focused on the field of economic interest and particularly on long term commercial and industrial contracts. He said that the relevant issues with regard to remedies in this area could be fundamentally different from those in other areas such as sovereignty over territory. He examined not only the jurisprudence of judicial and arbitral decisions but also state practice in the area of expropriation and concluded that there was no support for the proposition that restitution was the primary remedy in international law available at the option of the injured state in cases of nationalization.*"[1]

On this particular point, we consider that it is not for arbitral tribunals to assess the economic interests of the parties, as this is reserved for the parties themselves. To deny restitution in kind arguing that it is in the best interest of the parties (including the claimant that requested restitution in kind) may even amount to giving a decision *infra petita*.

Moreover, to argue that restitution in kind would not be the primary remedy in international law with this reasoning is tantamount to a wrongful interpretation of the law *ab initio*. The law should be interpreted through legal reasonings, and not economic ones. Once a rule is settled in a legal environment the only possibility to exclude it would be by demonstrating its illegality or inapplicability, and not its usefulness from an economic perspective.

Turning to the Tribunal's assessment of the provisions of the Vienna Convention, the tribunal stated that the principle provided in Art. 26 is the rule of *pacta sunt servanda*. The Tribunal considered that the Convention did not state any rules on the remedies that are available for the aggrieved parties and concluded that this gap should be filled by *"customary international law, and particularly the case law of international tribunals,*

[1] C. Gray, 'The choice between restitution and compensation' 2, EJIL (1999), p. 418.

must answer the question of what remedies are available without the benefit of guidance from the Convention."[1]

The argument that the Convention lacks specific rules on remedies is correct, in principle. However, the principle of *pacta sunt servanda* should be interpreted as meaning that the parties should respect the obligations that they have undertaken and that a party has a right to expect that their counterparty will perform their obligations in the manner in which they have committed themselves. The consequence of this is that, when a party fails to perform accordingly, the natural remedy would be precisely to order the breaching party to perform their obligations, as established through a treaty.

When a party fails to respect its obligations and the aggrieved party does not have recourse to restitution in kind or specific performance, this in itself can amount to a breach of the principle of *pacta sunt servanda*. As long as restitution in kind or specific performance are not materially impossible, a breach of an obligation followed by a remedy other than restitution in kind or specific performance primarily, would constitute a deviation from *pacta sunt servanda*, since the parties agreed specifically on the performance of the contract.

Therefore, the provisions of Art. 26 of the Vienna Convention could, in themselves, be interpreted as establishing that States have an obligation to specifically perform a treaty and that, as such, specific performance and restitution in kind, when possible, should be granted.

It has been stated, and rightfully so, that pursuant to Art. 26 of the Vienna Convention a State has a duty to perform the treaty in good faith: *"in the Gabcikovo-Nagymaros Project Case the ICJ emphasized that good faith performance implies that "it is the purpose of the treaty, and the intentions of the parties in concluding it, which should have prevailed over its literal application".*[2]

In other words, not only do parties have to comply with their obligations in the way that they were stated in the treaty, but they also have to act in good faith, so as not to defeat, but rather to preserve, the object and purpose of the treaty. In other words, *"a party may act in a manner that is inimical to the object and purpose of the treaty even though the act itself is not expressly prohibited by its provisions*".[3]

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[1] *BP Exploration Company v. the Government of the Libyan Arab Republic*, para. 129.

[2] O. Dorr and K. Schmalenbach, *Viena Convention on the Law of Treaties a Commentary* (Springer-Verlag Berlin Heidleberg 2012), p. 445.

[3] Ibid., p. 446.

Finally, the BP Tribunal's reliance on the fact that tribunals had not awarded specific performance or restitution in kind cannot serve as an argument in itself to deny an award on these remedies.

III. Restitution in Kind in ICSID Arbitration

The availability of restitution in kind in investment law is linked with the power of investment tribunals to order such remedy. The possibility to award restitution in kind and specific performance specifically by ICSID tribunals was addressed by Christoph Schreuer, who has, in this issue, responded in the affirmative.[1]

It would seem that ICSID arbitral tribunals generally support the fact that restitution in kind is available in international law as a primary remedy.

For instance, in the case between *Burlington Resources Inc and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*, the Tribunal stated that Art. 35 of the ILC Articles on State Responsibility applies in international law and that restitution and specific performance are available, provided that these remedies are not materially impossible or disproportionate. However, the Tribunal made a reservation, pointing out that a view has been expressed that restitution or specific performance would not be applicable in international law where an agreement for natural resources has been terminated or cancelled by a sovereign State.[2] Further analysis on this matter was not developed since this case did not deal with natural resources.

The view that restitution in kind is the primary remedy unless materially impossible is the view provided not only by the ILC Articles, but also by the

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[1] C. Schreuer: *ICSID Convention A Commentary* (Cambridge University Press, 2001), p. 325: *"ICSID Tribunals have almost always granted relief in the form of pecuniary damages. Is this due to a limitation contained in the ICSID Convention? Is it due to a limitation inherent in litigation against States? Can ICSID Tribunals issue injunctions and order specific performance, or are they restricted to granting monetary awards?".*

[2] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, p. 22, para. 70: *"with respect to international law, article 35 of the ILC Articles on State Responsibility provide for restitution which includes specific performance unless it is materially impossible or wholly disproportionate. Whether specific performance is impossible or disproportionate is a question to be dealt at the merits stage. It is true that the view has been expressed that the right to specific performance is not available under international law where a concession agreement for natural resources has been terminated or cancelled by a sovereign State. […] this is not the case."*

Chorzow Factory Case dictum.[1]

Several other Tribunals have regarded this issue in a similar manner. In *CMS Gas Transmission Company v. The Argentine Republic*, the Tribunal stated that:

"restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation".[2]

This argument reinforces the rule that restitution in kind and specific performance should be the primary remedies in international law. States, however, do not support this view and argue against the primacy of restitution in kind in investment disputes. One argument that has been used by respondent States is that restitution in kind has never been awarded in a BIT investment dispute, or that in other disputes relating to investments it has been rarely awarded. This is rather a factual argument and not a legal one. Merely stating that tribunals have not awarded restitution in many cases cannot serve as a legal argument. Whether or not restitution is a remedy of international law is a matter of legal reasoning, and not of popularity.

In this sense, in the European Media Ventures v. The Czech Republic case (at the setting aside stage before the High Court of Justice), Mr. Justice Simon stated that "it is clear that, despite being rare, restitution and declaratory relief are available remedies in international law".[3] In other words, the fact that restitution and declaratory relief are rarely awarded in investment disputes could not serve as an argument to reject a request for such a remedy.

Reinforcing this argument, the Tribunal in the *Occidental Petroleum* case, quoting the Award in *Maffezini*,[4] stated that the fact that other tribunals had not ordered restitution or specific performance *"is not a reason to refuse*

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[1] *Case Concerning the Factory at Chorzow (Germany vs Poland),* Judgment on the Merits [1928] P.C.I.J., Ser. A, No. 17, 47.

[2] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case no. ARB/01/8, Award, 115.

[3] *The Czech Republic v. European Media Ventures SA*, Neutral Citation Number: 2007 EWHC 2851 (Comm), United Kingdom High Court of Justice, Queen's Bench Division, Commercial Court, Decision on Application to Set Aside, p. 14.

[4] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2, para. 5: "*The lack of precedent is not necessarily determinative of our competence to order provisional measures*".

such a remedy"[1].

The sole limitations of restitution in kind and specific performance are the ones that the claimant in the *Helnan International Hotels A/S v. The Arab Republic of Egypt* argued, by stating that *"there exist only two limitations to the Tribunal's power to award non-pecuniary compensation. This is so where restitution is impossible and where restitution does involve a disproportionate burden*."[2]

In the *Micula v. Romania* case, the respondent State submitted a separate preliminary objection on the issue of restitution in kind as a remedy in international law. First, the State argued that *"the restitution remedy is unavailable to Claimants as a matter of international law, and Claimants' prayer for relief must be confined to monetary damages*",[3] thus challenging the availability of restitution in international law.

The Government of Romania argued that the claimant must prove a link between the cause of action and "any reparation attendant to it: restitution may be a form of reparation under international law but why should it be appropriate or possible as a remedy in this very case?"[4] Therefore, the respondent State primarily challenged the availability of restitution in kind and, in the alternative, the applicability of restitution in kind.

On this matter, the Tribunal found that "under the ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitutio, i.e. re-establishing the situation which existed before a wrongful act was committed"[5] therefore confirming the fact that restitution in kind is available in ICSID investment disputes.

On the other hand, the *Occidental Petroleum* case constitutes an example of a different approach with respect to restitutio in integrum. The claimant relied on the primacy of the remedy of restitution, arguing that "*international law jurisprudence recognizes that, unless restitution is impossible, it is the preferred remedy for internationally wrongful acts by a*

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[1] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures, 36.

[2] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case no. ARB/05/19, Award, p. 20.

[3] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, p. 47.

[4] Ibid., p. 48.

[5] Ibid.

State".[1]

Respondent's position on this issue was that: "the 'right' that Claimants seek to preserve by means of their requested provisional measures is non existent. There is no right to specific performance of a natural resources concession agreement that has been terminated or cancelled by a sovereign State; the lawful remedy in the event of wrongful or illegal action by the State is payment of monetary compensation".[2]

The respondent State argued that specific performance or restitution in kind was never ordered by an investment tribunal and that, in its view, the reason for such a lack of awards on restitution was that *"a sovereign State may not be ordered against its will to restore to a private investor an investment or concession that it has terminated or expropriated. In such circumstances, the State can only be required to pay monetary compensation".*[3]

In this case, the Tribunal considered that a right to specific performance or restitution in kind is not presumed and that the party requesting it must prove it. Concluding, the tribunal considered that the claimant did not prove that it had such a right. For this reason, *inter alia,* the Tribunal rejected the relief for restitution in kind/specific performance in this case.[4]

IV. Conclusion

The opinions expressed by the Arbitral Tribunals in the Libyan Nationalization Cases form a spectrum of interpretation of the applicability of restitution in kind and specific performance in investment disputes.

On one end of the spectrum, the Texaco Tribunal acknowledged the primacy of restitution in kind. On the other end of the spectrum, the BP Tribunal stated that the primacy of restitution does not apply in international law. In the middle of the spectrum, the LIAMCO Tribunal determined the primacy of *restitutio in* integrum, but found insurmountable conditions to its application.

The views expressed in the above-mentioned cases, as contradictory as they may seem, proved in any case to be forward looking, since case-law is still divided with respect to the availability of restitution in kind as a primary

[1] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on provisional measures, 14.

[2] Ibid., p. 18.

[3] Ibid.

[4] Ibid. 48-49.

remedy in international law.

ICSID tribunals have also considered different approaches in relation to the availability of restitution in kind, relying on the differing conclusions established in the Libyan Nationalization Cases.

Although there is no unitary application of restitution as a remedy in international law, there is perhaps one more element which must be borne in mind, namely, the practical outcome of a case.

This consideration was best described in scholarly writings in relation to the outcome of the Texaco Case, in the following manner:

"[t]his outcome [the outcome of the award in the Texaco Case] is often cited as a failure of an award for performance. This is correct only in part. In fact, the award made by Professor Dupuy, opened the way to negotiations which led after a relatively short period to a settlement between the parties. In the two other parallel cases the claimants were awarded substantial amounts of money as damages. However, the monetary awards in these other cases travelled the world in attempts for enforcement with little success."[1]

This pragmatical view of the issue has merit. The end result of any arbitration or litigation is the settlement of a dispute and the satisfaction of the party which had been wronged.

Applying this definition to the outcomes of the Libyan Nationalization Cases, it appears that, ironically, practical relief was obtained by the claimant who was granted restitution in kind, due to the fact that this constituted a basis for negotiation, while in the other two cases, the enforcement of the awards in relation to the monetary relief granted proved less effective. Restitution in kind is the naturally occurring remedy when a breach of an obligation occurs, of course, to the extent that this remedy is not impossible or overly burdensome.

In a similar vein, Professor Schreuer characterizes legal disputes as follows:

> *"The dispute will only qualify as legal if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed. Consequently, it is largely in the hands of the claimant to present the dispute in*

[1] M. E. Schneider, 'Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice', in M E Schneider and J Knoll (eds.), "Performance as a Remedy: Non-Monetary Relief in International Arbitration", ASA Special Series No. 30, (JurisNet 2011), 46.

legal terms."[1]

We submit to the above view insofar as it states that a dispute shall qualify as legal when remedies such as restitution and compensation are available, as it does the justice of placing restitution and compensation on the same procedural legal footing. It implies, and rightly so, that it is in the very nature of a legal dispute that the parties are able to request, and at the same time be granted by international courts and tribunals, *inter alia,* restitution in kind.

A dispute where this remedy would be prohibited *ab initio* would no longer constitute a legal dispute.

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[1] C. Schreuer, *ICSID Convention A Commentary* (Cambridge University Press, 2001) 105.

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Contribuţia doctorandului şi masterandului / PhD and Master Candidate's Contribution

The Human Right to Glaciers: Expanding the International Human Right to Water

Roxana POPA[1]

Abstract: *The aim of this article is to provide a brief but conclusive analysis of the current international legal framework that protects the fundamental right to water. While glaciers constitute one form of water and are partly covered by international conventions, this approach is insufficient given the urgency of the climate crisis and its global impact. While the international right to water has been thoroughly discussed and analysed, academic focus is yet to touch upon glaciers' place in the international legal framework. Due to structural and material differences between liquid water and glaciers, the right to glaciers should be specifically protected under international law, particularly given its interdependence with the widely-recognised fundamental right to water.*

Key-words: *glaciers; fundamental right; right to water; economic, social and cultural rights.*

I. Introduction

This paper will show that, while the right to water has gained significant legal importance and is now recognized as an internationally enforceable fundamental right, glaciers and the periglacial environment, or the planet's ice reserves and the surrounding ecosystems, are excluded from laws and regulations related to the right to water. It will be argued that, given their

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importance and contribution to the world's fresh water reserves, the right to water should be expanded to cover and protect glaciers.

To that purpose, the importance of glaciers will firstly be looked at and the currently applicable international legal framework will be analysed, after which the discussion will turn to whether the right to water confers sufficient protection. Lastly, the Argentinian legislative framework that protects glaciers will be analysed, and it will be found that, given its inflexibility, and in order to put an end to climate deterioration, the human rights framework should instead be applied to provide international protection for glaciers.

II. Glaciers: importance and current legal framework

Glaciers are an essential natural resource which stores the majority of the 2% of the world's water that is fit for human consumption or for agriculture. They provide local environments with water reserves that feed rivers and water tables that are the source of potable water and essential for irrigation and industry. Not only do millions depend on them directly, they are also a great contributor to the Earth's ability to remain cool by absorbing heat.[1] Consequently, glaciers lie at the foundations of the right to water and sanitation, and are essential for the protection of the right to life and health. Moreover, its hindrance would lead to further climate deterioration, which in turn affects the majority of both first and second generation rights.

It is widely believed that glaciers are made up of water in one of its forms, ice, and therefore the legal protection afforded to water would also cover glaciers. However, water in its solid form is substantially different in structure, temperature and mass, and some glaciers survive in a solid state for years, if not hundreds of years, and are not interacted with directly, as opposed to running water. Moreover, glaciers act as a mechanism for the preservation of water.[2] Yet, instead of protecting the ice, the focus is on reducing the causes that lead to its melting, a much more challenging and lengthy process. Protecting and even generating glaciers is possible, and Switzerland has been able to successfully reduce glacier melt by 70

[1] Jorge Daniel Taillant, *Glaciers: The Politics of Ice*, Oxford University Press, 2015, pp. 24-31.

[2] Jorge Daniel Taillant, "The Human Rigt to Glaciers", *Journal of Environmental Law and Litigation*, vol. 28(59) (2013), pp. 66-67.

percent.[1] Consequently, through inexpensive solutions, important fundamental rights could be protected in the face of climate change.

Given this urgency and importance, the current international legislative framework, a piecemeal approach, is insufficient. The UN Watercourse Convention[2] includes glaciers in its definition of "a system of surface and groundwaters",[3] but this only covers glaciers when part of an international watercourse and its implementation is impeded by scientific considerations. Similarly, the ILC considered the creation of a legal regime governing glaciers aimed at the prevention of water pollution,[4] but this would not cover glaciers as individual elements, but an integrated water system.[5]

A different approach was taken by Italy and Switzerland in relation to their land boundary, in which the *sui generis* character of glaciers was recognised: their movement can have an impact on the state boundary line and are similar navigable waters. However, even this approach will not be applicable for all glaciers, only for those across international boundaries.[6] Consequently, while international law is not silent in relation to glaciers,[7] the different approaches adopted do not cover all glaciers, and even those protected do not count as separate actors, but a collective resource. It is, therefore, surprising, given their importance and known deterioration, that the majority of states, as well as the international community, have not adopted a conclusive framework of protection, as simply mapping them onto the current environmental law and human rights law framework is insufficient, particularly given their scientific complexity and that of the intricate ecosystems they support.

III. Glaciers and the right to water

Globally, the lack of access to water and sanitation are at alarmingly low levels. The right to water, therefore, concerns safe water sources at close

[1] Julissa Treviño, "This Swiss Town is Protecting its Glaciers with a Blanket", *Smithsonian Magazine*, 12 March 2018 <https://www.smithsonianmag.com/smart-news/swiss-town-glacier-blanket-180968451/> last visited on 13 May 2019.

[2] United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 12 UNTS 52106, entered into force 17 August 2014.

[3] Ibid, Article 2(b).

[4] International Law Commission, *Summary Record of the 1789th Session,* UN Doc A/CN.4/SR.1789 (24 June 1983), para. 6.

[5] Laurence Boisson de Chazournes, *Fresh Water in International Law*, Oxford University Press, 2013, p. 44.

[6] Ibid, p. 45.

[7] Jennifer Cox, "Finding a Place for Glaciers within Environmental Law: An Analysis of Ambiguous Legislation and Impractical Common Law", *Appeal: Rev Current L & L Reform*, vol. 21 (2016), p. 30.

proximity to houses, storm water management and waste disposal. Its ultimate aim is to ensure that water becomes free of discrimination and affordable for every household.[1] Thus, the right to water is of extraordinary importance, but it does not concern the source of the water, but its distribution, and is insufficient in its scope to ensure that these goals are met.

The right to water is not listed in the founding human rights instruments, but has gained significant traction, it being, possibly, despite in its early years, the paradigm universal right, as water is the essential condition to sustaining life.[2] However, even if its future goals, the right to water does not address protecting the source of potable water: the 2030 Agenda for Sustainable Development[3], while an important step in the development of the distribution of water, does not touch upon glaciers, despite aiming for the protection and restoration of water-related ecosystems, such as mountains, forests, wetlands, rivers and lakes.[4]

Thus, the protection of glaciers or their connection to communities affected by climate changed is rarely talked about.[5] While the right to water and sanitation is essential, it completely ignores that most of this water comes from isolated but endangered ice bodies in high mountains where most people will never reach.[6] Knowledge of these environments is extremely limited to a group removed from broader nature conservation discussions and, even more so, water management.[7] Consequently, not only are the two areas distinct, but the legal regime applicable to water management does not cover glaciers, which constitute the source of most drinking water.

Nevertheless, the right to water is still new and the necessary characteristics of policy required are evolving,[8] and expanding the scope of this right to cover the preservation of glaciers is a possibility. Domestically, legislation has also been adopted in order to protect glaciers, mainly where mining activities have damaged them, in Argentina, with similar provisions being

[1] Norbert Brunner et al., "The Human Right to Water in Law and Implementation", *Laws* vol. 4(1) (2015), pp. 413-414.

[2] The Rt Hon Lady Justice Arden, "Water for all? Developing a Human Right to Water in National and International Law", *International and Comparative Law Quarterly*, vol. 65(1) (2016), pp. 788-789.

[3] United Nations General Assembly, 'Transforming our world: the 2030 Agenda for Sustainable Development', UN Doc A/RES/70/1 (21 October 2015).

[4] Ibid.

[5] J.D. Taillant, *Glaciers: The Politics of Ice*, *supra,* p. 300.

[6] J.D. Taillant, *The Human Right to Glaciers, supra,* p. 74.

[7] Ibid.

[8] Ibid, p. 301.

discussed in Chile and Kyrgyzstan.[1] The next section will focus on the Argentinian instrument, while keeping in mind that not only the content, but also the circumstances of the three projects are highly similar.[2]

IV. Glacier law in Argentina

The Argentinian National Glacier Act[3] is the first legislative instrument in the world dedicated to the preservation of glaciers. It takes three important steps to that purpose: it recognizes that glaciers are a public good, it creates a National Glacier Inventory, and prohibits potentially damaging developments, such as mining, from taking place in glacial or periglacial environments.[4] The purpose is to protect these "strategic freshwater reserves for human consumption, for agriculture and as sources for watershed recharge; for the protection of biodiversity; as a source of scientific information and as a tourist attraction. Glaciers constitute goods of public character.".[5] This process proved to be highly informative, as no glacier inventory had ever existed and no account had been taken of anthropogenic activity concerning glaciers in the past. Most Argentinians were not aware of the large number of glaciers (upwards of 25,000) and could only name one.[6] This shows that this instrument had correctly established the fundamental steps needed in order to ensure glacier protection, starting with raising awareness and collecting information.

However, glacier protection laws have been argued to overlook the dynamics of glaciers and prevent or delay actions needed to mitigate hazards, such as artificial drainage of glacial lakes, thereby creating risks for local populations.[7] Moreover, despite having been created to protect water resources, the consistent changes in the periglacial environment caused by climate change were not properly addressed. This means that the long-term impact of such legislation can remain limited, as they can be turned into

[1] Pablo Iribarren Anacona, "Glacier protection laws: Potential conflicts in managing glacial hazards and adapting to climate change", *Royal Swedish Academy of Sciences*, vol. 47 (2018), p. 835.

[2] Ibid, p. 839.

[3] Argentine National Congress, Buenos Aires, 30 September *2010: Minimum Standards Regime for the Preservation of Glaciers and the Periglacial Environment [ANGA].*

[4] J. Cox, *op. cit.,* p. 34.

[5] J.D. Taillant, *The Human Right…, supra,* p. 75.

[6] Ibid., pp. 75-76.

[7] P.I. Anacona, *op. cit.*, p. 835.

static instruments because of their rigidity and due to the challenges posed by changes in the rapidly advancing or retreating glaciers.[1]

For example, the instrument only minimally addresses glacial hazards. Construction other than for scientific research and preventing risk is prohibited by article 6(b), but the actions allowed or prohibited and their risks are not defined. Therefore, an Environmental Impact Statement would be required on a case-by-case basis when a hazard is suspected, yet this process could extend for months or even years during which lives could be put at risk. This same rigidity is likely to unintentionally hinder adaptation to climate change conditions by restricting local communities from altering glacial landscapes. For example, it may be in the best interest of the local communities to use glacial lakes as reservoirs for drinking water due to decreased rainfall and increasing temperatures.[2] Consequently, while aiming to decrease harmful activities, these instruments can restrict necessary changes in glacial environments.

Human rights, on the other hand, rely on flexibility to retain their legitimacy over time in an increasingly diverse and changing society:[3] a great example being the emergence of the right to water itself or the living instrument approach adopted by the European Court of Human Rights that aims to allow its foundational instrument to keep up with present day conditions.[4] Thus, by applying an expanded right to water that would include the protection of glaciers, faced with a hazardous situation, the focus would shift from the short-term protection of glaciers to ensuring the survival of the communities and ecosystems dependent on them, while, at the same time, ensuring the protection of glaciers as *sui generis* actors that sustain these communities.

V. Conclusion

To conclude, this paper has argued that glaciers, being different from water and not covered by the protection conferred by the right to water, should be expressly protected by the international legal framework. While legislation has been adopted domestically, it has not provided the necessary flexibility that would, on the international level, lead to the improved long-term

[1] Ibid., p. 839.
[2] Ibid., p. 841.
[3] Seth D. Kaplan, *Human Rights Through Thick and Thin Societies: Universality Without Uniformity*, Cambridge University Press, 2018, p. 29.
[4] Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, Oxford University Press, 2015, p. 131.

preservation of not only the most important source of potable water, but also an important resource that contributes to climate stability. Therefore, due to the inherent flexibility of the human rights framework, the right to water should be expanded so as to extend its protection to the preservation of glaciers and glacial ecosystems.

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Recenzie de carte / Book Review

"Actualité du Droit des Mers Fermées et Semi-Fermées"

Liviu DUMITRU[1]

Actualité du droit des mers fermées et semi-fermées collects contributions that were presented during a workshop co-organized by the *Centre de droit International de Nanterre* and the Romanian branch of the International Law Associations, in Bucharest, on 30 and 31 May 2016; the working language of the event was French. The participants to the workshop and contributors to the collection are both leading and younger scholars and practitioners (mainly from France and Romania, but including representatives of other countries as well), reflecting a variety of backgrounds.

As to the structure of the book, the articles could be divided in two main groupings. One category of contributions deals with specific seas, and describe the particular legal regimes, in terms of the establishment of maritime boundaries by agreement or by recourse to international jurisdiction, as well as in terms of specificities of governance. The second group of articles are those that analyse horizontal issues that are common to all enclosed or semi-enclosed seas.

The introductory article by Jean-Marc Thouvenin and François Andia starts from the definition of „enclosed and semi-enclosed sea" as provided in Article 122 of the United Nations Convention on the Law of the Sea of 1982 (the Montego Bay Convention), and presents the main issues that the definition entails, in particular in respect to the application to the Caspian Sea.

Pierre Boussarque and Alexandra Bellayer-Roille focus on the legal effects entailed by the qualification of a sea as closed or semi-closed. They also raise the question whether such qualification could have legal effects not expressly provided in the Montego Bay Convention; the answer seems to be in the negative – the authors review in this respect the treatment of the Black

[1] *Liviu Dumitru has graduated from the Faculty of Law of the University of Bucharest. He is currently the director of the International Law and EU Law Directorate within the Ministry of Foreign Affairs of Romania.* The opinions expressed in this paper are solely the author's and do not engage the institution she belongs to.

Sea by the International Court of Justice in the judgment in the *Maritime Delimitation in Black Sea (Romania v. Ukraine)* case, the argument put forward by the Philippines in respect of the South China Sea in the arbitral procedures initiated against China, as well as the French conventional practice in the Mediterranean and the Caribbean seas.

Cosmin Dinescu has provided two contributions. The first presents the delimitation by treaties in the Baltic Sea, realizing an overview of the historical process of maritime delimitation in the region. The author identifies the main common features, as well as the most important factors that have influenced this process. A second contribution by the same writer focuses on the *Maritime Delimitation in Black Sea (Romania v. Ukraine)* case*,* decided by the International Court of Justice, describing in detail the geographical, historical and legal background of the case, as well as the reasoning of the Court. The writer also queries whether we are to witness a jurisdictional practice in the Black Sea, as several maritime boundaries are still not settled, and argues the seizing of the ICJ by Romania may serve as a model.

Bogdan Aurescu has reviewed in his article the agreements concerning maritime delimitation already concluded in the Black Sea. The author starts by going over the various geographical, legal and political specificities that distinguish the Black Sea. He proceeds with a description of background and main provisions of the treaties concerning the establishment of maritime boundaries between the riparian States, namely the several agreements between Turkey and the Soviet Union (in force between Turkey and the successor States) as well as the Agreement between Turkey and Bulgaria. The author identifies several characteristics of these agreements, such as the primacy of equidistance, the lack of relevance of the non-geographical factors, and the concern with preserving the interests of third countries. A final part of the contribution is dedicated to prospective agreements, noting the challenges that confront the riparian countries that have not yet settled their boundaries.

Alina Orosan covers the area of the Red Sea. The article describes in detail the conventional system of protection of the Red Sea and the Gulf of Aden, which has at its center the Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment (1982) and its various protocols. The author concludes that the institutional framework for the protection of environment is rather clear and well-developed, but it would benefit from making operational the three Protocols to the Regional Convention, the ratification of which has been pending for more than a decade.

Hadi Azari describes in his contribution the legal regime of the Persian Gulf. The author describes the characteristics of the region that have impacted the legal regime – such as the fact, that, since World War II, the Persian Gulf and the surrounding countries have provided an important part of the fossil fuel production. He overviews the attempts by the riparian to establish a governance system, and notes that they have been only partially successful, but have nevertheless resulted in the conclusion of the Kuwait Regional Convention for Co-operation on the Protection of the Environment against Pollution (1978). In a second part of the contribution Azari gives an account of the maritime delimitation practice in the Persian Gulf, analysing such factors as the use of equidistance as the preferred method, the influence of the presence of islands and of the hydrocarbon resources.

Nathalie Ros' article is dedicated to the governance of the Mediterranean, and it explains comprehensively, how the regional cooperation between the riparian States works. It describes in details the system created by the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1976) and its Protocols. The author argues that this framework forms a legal system that is global and integrated, and that has incorporated the modern environmental principles, such as the „polluter pays principle" and the „precautionary principle". Ros acknowledges nevertheless certain limits of the system, both of a legal and of political nature, such as the lack of unanimity – not all the Mediterranean States are parties to the Barcelona convention and its seven protocols. Another issue dealt with is the stakes of the fisheries regulation – the writer discusses the role played by such actors as the General Fisheries Commission for the Mediterranean, or the European Union.

Radu Șerbanescu highlights in his contribution on the subject of the governance in the Black Sea the role played by the Convention on the Protection of the Black Sea against Pollution (the „Bucharest Convention") a legal instrument that establishes the regional framework for the Protection of the environment in the Black Sea. He describes the provisions of the Convention and its relationship with the Protocol of 2009 on the Protection of the Maritime Environment of the Black Sea from Land Based Sources and Activities. Șerbanescu presents in the final section of the article most recent developments in the cooperation of the riparian States and of the activities of the Black Sea Commission, a body created by the Bucharest Convention.

The topic dealt with by Carmen Achimescu is the governance of the Caspian Sea. She introduces the reader to the specific historical background, stemming from the Cold War realities, when a practice of unilateral

exploitation of the resources was started, at the initiative of the USSR. The author notes that the issue of the delimitation of has only arisen after the dissolution of the USSR, when the new independent states were keen to consolidate their economic independence by the conclusion of bilateral agreements allowing for the division of the economic resources of the Caspian. She presents the provisions of these bilateral agreements, arguing that the issues particular to the Caspian could be solved only by agreements between the five riparian States – which was eventually achieved with the conclusion of Convention on the Legal Status of the Caspian Sea, following the conference in Aktau in 2018.

Elena Lazăr has submitted a contribution concerning the governance of the Baltic Sea. She starts from reviewing the historic context as well as the geographical and morphological characteristics of the Baltic. The writer presents how the institutional governance is organized, the centerpiece of which is represented by the Baltic Marine Environment Protection Commission, otherwise known as the Helsinki Commission (HELCOM), an intergovernmental organization reuniting the riparian States. Other topics dealt with are the institutional and administrative structures created by each State to deal with Baltic matters, as well as the opportunities presented by the „Three Seas Initiative", which includes the 12 EU Member States located between the Adriatic, the Baltic and the Black Seas.

This reviewer has also submitted a paper on the subject of the delimitation by way of agreement in the Caspian Sea.

Adrien Foulatier has two contributions; one titled *La délimitation en mer Méditerranée entre négociations and unilatéralisme* analyses the practice of States riparian to the Mediterranean, concluding that it is placed midway between two methods: one is the classic method, namely the establishment of maritime boundaries by way of the conclusion of delimitation agreements; the other consists in the unilateral proclamation of *ad hoc* maritime areas, which are not directly recognized by the Montego Bay Convention, but regulate competences recognized by it. The second article written by Adrien Foulatier reviews the decisions rendered by international courts concerning maritime delimitation in the Mediterranean.

Nabil Hajjami's topic is the institutional governance in the enclosed and semi-enclosed seas. The author identifies geographical proximity and complexity of navigation among the main factors that make necessary a special regime for these maritime spaces. The principle of good-neighbourliness is particularly important in these areas, due to their restricted dimensions and the interconnectedness of activities conducted by States. Another characteristic identified by the author is the vulnerability of

these seas, due to the specific environmental factors, such as a low rate of renewal of waters; this results in an imperative for the riparian States to closely coordinate their activities. In the view of the author, the conservation of the maritime environment is a horizontal issue common to all enclosed and semi-enclosed seas. A final part reviews the structures involved and the instruments used for the governance of these maritime spaces.

Alina Miron focuses on the requests made by States to the International Court of Justice to be permitted to intervene in maritime delimitation cases involving in enclosed or semi-enclosed seas. She notes from the outset that, unlike the jurisprudence concerning maritime delimitation, the one concerning requests from intervention resists any attempt at systematization. The author argues that one of the most challenging issues in relation to such requests is to determine whether the jurisdiction of Court is founded on the agreement of the parties. She explains the evolution in the assessment by the Court of its competence and of the interests of the third States in such cases. A very useful table compiling the cases when third States have made requests to intervene is appended to the article.

The contribution by Ion Gâlea is concerned with security in the enclosed and semi-enclosed seas. The article focuses on recent developments in relation to the issue of fighting the illegal traffic of people in the Mediterranean, in particular the EUNAVFORMED Sophia naval operation and the challenges related to its legal basis. A second part of the contribution concerns the situation in Eastern Mediterranean created by the refusal of Turkey to recognize the government of Cyprus and the establishment of the so-called „Turkish Republic of North Cyprus"; the article analyses the implication from the perspective of the establishment of maritime boundaries; a second sub-section is dedicated to the legal complexities, from the international law of the sea perspective, created in the Black Sea by the annexation of Crimea and Sevastopol by the Russian Federation.

The book does a lot to advance the research on a topic of international law that is in full development. Its added value lies in the detailed case studies of treaties, jurisprudence of the international courts and of various governance structures and instruments in place for coordinating the management of enclosed and semi-enclosed seas. The authors, who are first-hand practitioners, with outstanding experience, draw on a large field of state practice and jurisprudence of international courts to support their findings. In particular for the practitioners of Law of the Sea the book is a useful read as it provides a cartography of the main issues raised by legal regime of these maritime space.