

# The International Law Commission's activity on the Topics on State Responsibility not Covered by the ARSIWA

Prof. JUDr. Pavel Šturma, DrSc.  
Charles University in Prague, Law Faculty

# Content

---

- Distinction between State responsibility and liability
- Concept of diplomatic protection
- Development of DP
- Draft Articles on DP by the UN International Law Commission (2006)
- Perspectives of DP in contemporary International Law
- International liability: origins of the concept
- Draft Articles on prevention of transboundary harm
- Draft Principles on allocation of harm

# 1. Distinction between State responsibility and liability

---

- Distinction made by the International Law Commission in 1973 - 2 concepts for 2 codification topics
- State responsibility = State responsibility for internationally wrongful acts (governed by rules of general customary IL)
  - Secondary obligations
  - Cessation of unlawful conduct
  - Full reparation of all material and moral damage
  - Modern approach (State-to-State damage) vs. traditional approach (damage to foreigners – diplomatic protection)
- Liability = international liability for injurious consequences of activities not prohibited by international law
  - Primary obligations (special treaty regimes)
  - Not prohibited (lawful) activities - possibility of continuation
  - Partial compensation for material damage only

## 2. Concept of diplomatic protection

---

- Diplomatic protection = invocation of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State
- Link to regimes of treatment of aliens (foreigners)
- DP = invocation by a State, through diplomatic action or other means of peaceful settlement
- A State has the right to exercise diplomatic protection (i.e. no right of an individual to diplomatic protection)

# 3. Development of DP

---

- Jay Treaty (1791)
- 19<sup>th</sup> Century – arbitration treaties and mixed claims commissions
- Stabilization of customary rules
- Vattelien fiction (Emmerich de Vattel, 1758): “whoever ill-treats a citizen indirectly injures the State, which must protect that citizen”
- Mavrommatis Palestine Concessions case (Greece v. UK), P.C.I.J., 1924
- Panevezys-Saldutiskis case (Estonia v. Lithuania), P.C.I.J., 1933
- Pragmatic approach of the International Law Commission, no comprehensive theoretic definition, just elements of DP

## 4. Articles on DP by the International Law Commission

---

- Traditional concept with elements of progressive development of IL
- General provisions
- Nationality
  - Natural persons
  - Legal persons
- Local remedies
- Miscellaneous provisions

## 4. Articles on DP by the International Law Commission (2)

---

- In principle, the State entitled to exercise diplomatic protection is the State of nationality
- Natural persons – nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law (effective nationality – ICJ, Nottebohm case, 1955)
- Continuous nationality of a natural person – from the date of injury to the date of the official presentation
- Exception: person who is national of the State at the date of the official presentation of the claim but was not a national at the date of injury if he lost the previous nationality for a reason unrelated to the claim
- DP shall not be exercised by the present State of nationality against a former State of nationality of that person

## 4. Articles on DP by the International Law Commission (3)

---

- Problem of multiple nationality
- Stateless persons and refugees
- Legal persons – most cases of DP
  - State of nationality = State under whose law the corporation was incorporated, or the seat of management (ICJ, Barcelona Traction, 1970)
  - Continuous nationality of a corporation
  - Protection of shareholders
  - Other legal persons
- Exhaustion of local remedies
  - Exception to the local remedies rule
- Recommended practice – development rules



## 5. Recent example of diplomatic protection

---

- ICJ, Ahmadou Sadio Diallo (Republic of Guinea v. DR of the Congo), Judgment of 30 November 2010
  - Arrest, detention and expulsion measures (*refoulement*)
  - Property rights and rights of associé and gérant of a company (rejected): traditional approach, no substitution for the dipl. protection of a company
  - Violation of human rights of Mr. Diallo (African Charter of HPR, ICCPR): broader scope of application of DP!
  - Violation of Art. 36 of the Vienna Convention on Consular Relations (obligation to inform the arrested person of his rights “without delay”)
  - Compensation for non-material and material injury

## 6. Perspectives of DP in contemporary International Law

---

- Codification or progressive development ?
- Treaty or non-binding document ?
- Relation to other rules of IL
- Human rights protection
  - Ex. European Court of Human Rights
  - Both foreigners and nationals
  - Art. 1, Add. Protocol to ECHR, right to property
- Protection of International Investments
  - BITs, rights of investors of the other State party
  - ICSID Convention (precludes diplomatic protection)
  - International arbitration, higher compensation

# 7. International liability: the initial phase of the ILC's work

---

- Original idea - complementary to the draft articles on State responsibility
  - Article 35 of the draft articles (1st reading): reservation on compensation in the event of (certain) circumstances precluding wrongfulness
- Amended concept - Transboundary damage from hazardous activities
  - Damage to the environment
  - Risk activities
  - Emphasis on prevention, compensation in the background
- Analysis of IL status - an ambiguous picture
  - Lack of customary rules of international law
  - General principle of law ?
  - *Sic utere tuo ut alienum non laedas*

# 7. International liability: the initial phase of the ILC's work (2)

---

- Sparse international case law
  - ICJ, Corfu Channel case (1949)
  - Trail Smelter Arbitration Award (1941)
  - Lac Lanoux Arbitral Award (1957)
- Other State practice
  - Kosmos 954 (1978) - ex gratia payment
  - Chernobyl case (1986) - no compensation
- International treaties
  - Convention on International Liability for Damage Caused by Space Objects (1972)
  - Unification of civil liability
    - Nuclear damage; Oil pollution in the sea; Environmentally hazardous activities
  - *Pacta de contrahendo* - future liability rules (e.g. UNCLOS)

## 7. International liability: the initial phase of the ILC's work (3)

---

- On the Commission's agenda - since 1980, changing Special Rapporteurs (3) and concepts
- 1996 draft articles - 3 basic premises:
  - Freedom of action by the State on its territory
  - Respect for the sovereignty and equality of other States
  - The victim of harmful consequences should not bear the losses alone
- Main features of the design of the articles
  - Primary (treaty) obligations
  - Liability for risk and damage
  - Failure to prevent does not relieve the obligation to indemnify
  - If compensation is paid, the activity can continue
  - Partial compensation, cost-sharing between States and other forms of assistance

## 8. Draft articles on the prevention of transboundary damage from hazardous activities

---

- Rejection of the 1996 proposal and the new ILC concept
- Splitting the topic into prevention and liability (loss sharing)
- Adoption of draft articles on prevention of transboundary damage from hazardous activities (2001)
  - Definition of risk activities
  - Preventing or minimising harm beyond the boundaries
  - Cooperation between States
  - Early notification and information
  - Consultation on preventive measures
  - Exchange of information on activities
  - Principle of non-discrimination
  - Plans for dealing with emergency situations
  - Immediate notification of an emergency

## 9. Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

---

- Outcome of the Commission's work (2003-2006)
- Draft preamble and 8 principles
- Scope of application - to transboundary damage caused by activities not prohibited by international law which involve a risk of causing - physical consequences - significant transboundary damage
- Definition of damage = significant damage caused to persons, property or the environment
- 2 basic objectives:
  - ensuring prompt and adequate compensation for victims of transboundary harm
  - protecting the environment in the event of transboundary damage
  - Shift from international to civil liability
  - A vague standard of liability: strict liability?

# Conclusion

---

- Questions and comments ?
- Thank you for your attention !