Permanent Mission of the State of Qatar to the United Nations

Translated from Arabic

I. General observations

The committee notes that the draft articles cover many issues, each of which involve considerations and scenarios that give rise to a number of practical and legislative issues. They must be studied thoroughly, in accordance with the relevant laws and procedures of a given State. The extent to which these provisions can be applied in a given State and what the implications of doing so are for the State, should they be applied, must also be studied. There are many issues that are attendant to the application [of these provisions], and they can be summarized as follows:

- Diplomatic protection for multiple or dual nationals, State protection for non-nationals, such as stateless persons, and diplomatic protection for refugees and residents
- Diplomatic protection for legal persons, corporations and others, including the specification of the nationality of a corporation, as well as multinational corporations, protection of shareholders and the definition of legal persons other than corporations
- Protection of ships' crews

II. Detailed observations

1. Article 1 does not specify precisely when a State may invoke diplomatic protection, nor does it precisely define injury and its concept and what constitutes an internationally wrongful act. It therefore necessary to define these or develop a mechanism that clarifies these important issues, which constitute the basis of these draft articles.

2. Article 3, paragraph 1, provides that the State of nationality is entitled to exercise diplomatic protection. That notwithstanding, a general exception is set out, but not in paragraph 1, whereby diplomatic protection may be exercised by a State in respect of a person who is not its national in accordance with draft article 8. That article concerns stateless persons and refugees, which is a matter that might have adverse repercussions given the presence of large number of refugees in different countries and the presence of stateless residents in a large number of States, thus expanding the rights of those States with regard to the application thereof.

3. With regard to the continuous nationality of a natural person, article 5, paragraph 2, provides that a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not its national at the date of injury. It important to clarify the aforementioned paragraph and eliminate the conflict between it and the definition of diplomatic protection in article 1 of the draft articles, which provides that diplomatic protection applies when an injury is caused to a natural or legal person. It is necessary to stress that [the person] continues to enjoy the nationality of the requesting State from the time of injury until the claim is presented and a decision or judgment has been issued, because the practical matter addressed by the aforementioned paragraph puts before us various issues that entail negative repercussions in practice. This could lead to double standards, overlaps and procedural problems in the implementation of diplomatic protection by two States. It is possible for the State of which the person was a national at the time of the injury to initiate the procedures for diplomatic protection only for the person to acquire another nationality in the meanwhile. In such circumstances, should the State put a stop to those procedures? It may be necessary to review this article, in order to prevent a person from changing nationality and becoming the national of a State that is more influential in respect of international relations. Resolving this issue by adopting the principle of continuous nationality makes the conditions for invoking diplomatic protection more credible.

4. The issue of multiple nationality and claims against a third State, including the possibility of two or more States of nationality jointly exercising diplomatic protection in respect of a dual or multiple national, is addressed in article 6. It is important that the International Law Commission re-examine this article in greater depth, taking into account the differing legislation of States, and

make sure that it is formulated in a manner that is clearer and also consistent with the legislation of States and the practical context of its application, such that it establishes precisely one State as having the right to [invoke] protection or that it sets out criteria that prevent will prevent any problems that might arise from the submission of separate claims by two or more States. In that connection, we propose the following criteria:

- The two States of nationality agree to submit a joint application
- The two States of nationality agree that one of them will submit the application

5. The issue of multiple nationality and claim against a State of nationality is addressed in article 7, which provides that diplomatic protection may not be exercised in the case of [a person with] multiple nationalities unless the nationality of the State presenting the claim is predominant over the nationality of the State responsible for an internationally wrongful act. However, a definition of "predominant nationality" and the criteria for determining the predominant nationality and the entity qualified or competent to determine that nationality are not included in the article. Accordingly, in this case, it is not appropriate to apply the predominant nationality criterion, because the two or more States of which the person is a national are of an equal legal status. The phrase "unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim" should therefore be deleted from the article. In addition, it is necessary to clarify what is meant by "predominant nationality".

6. Article 8 relates to the protection of stateless persons and refugees.

(a) Pursuant to paragraph 1, a State may exercise diplomatic protection in respect of a stateless person who is lawfully and habitually resident in that State.

(b) Pursuant to paragraph 2, a State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, but without specifying those standards, provided that [such protection] is not [exercised] against the State of nationality of the refugee.

The scope here is very broad, whereby the exercise of the right of diplomatic protection [by a State] in respect of another State is such that it encompasses stateless persons and refugees in any State, as well its own nationals. The article does not take into account the situation in all States and is not balanced in that regard, in particular because, in paragraph 2, the legal status of refugee is bestowed by the protecting State without taking into account the concept of refugee under international law. There are States in many regions that have a very large number of stateless residents and refugees, thereby expanding the right of those States to use the concept of diplomatic protection and make demands of other States not only in respect of the rights of their own nationals. Accordingly, the International Law Commission must review the provisions of this article and re-examine them in greater depth, with a view to arriving at appropriate, objective conditions for protecting stateless residents and refugees, in accordance with international rules and the conditions in and situations of States. The terms in this article must be clarified, such that the responsibilities of States causing injury and the rights of States calling for diplomatic protection are made clear. This is especially necessary because the terms make the text obscure and unclear.

7. Article 9, which concerns the State of nationality of a corporation, provides that the State of nationality of a corporation is the State under the law of which the corporation was incorporated. However, it also provides that when the corporation is controlled by nationals of another State and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality. This article needs to be re-examined, because it might have negative consequences in practical terms and owing to the difficulty of clearly resolving the aforementioned issues in view of the expansion of commercial and economic activities around the world. Corporations adopt various operating structures, in accordance with the law of the State of incorporation, when they commence operations. Those considerations must be taken into account, including:

(a) Establishing a corporation and then relocating some of its management to other countries, because companies strive to reduce costs, while the headquarters remains in the country of incorporation and is governed by that country's laws.

(b) With regard to the control of a corporation by the nationals of another State, despite the corporation's State of nationality, the criterion for and concept of control should be clearly defined, in particular because corporations have specific percentages [for control] that are established in accordance with the relevant laws of each country. In addition, there is a need to clarify whether the term "control" means acquiring a greater proportion of the corporation's shares or managing and operating the corporation.

(c) Lack of significant activities in the country of incorporation: what is being proposed in the article is unclear and very broad, making it difficult to define a concept or criterion or make specific assessment in that regard, because each company and the nature of its activity is different and affected by economic market factors.

(d) A conflict of competence might arise if the State in which financial management and control is exercised is considered to be the State of nationality, especially because the corporation has a specific nationality, as set out in its commercial register [entry] and articles of incorporation and in accordance with the law that applies to it. In addition, this is something that is difficult assess, in particular because some corporations do not have a financial control department but rather contract with specialized financial companies to perform that function.

Accordingly, it is important to clearly and accurately specify the State of nationality of the corporation and to take into account all practices in this regard. There are many possible variations of this situation, such as the case in which a foreign corporation establishes and owns a national corporation. In this case, for example, the corporation holds the nationality of a certain country, by virtue of its registration and incorporation, but is wholly owned by a foreign corporation. The article does not address this question.

8. Article 10 concerns the continuous nationality of the corporation. Several matters are addressed therein, such as the date of injury and the date of the presentation of the claim. As the committee noted in its observation No. 3, the nationality of the corporation should be continuous from the time of injury until the claim is presented and a decision or judgment has been issued. The term “predecessor State” is unclear and ambiguous. This matter should therefore be clarified. In addition, the expression “both these dates” should be clarified and amended.

9. Articles 11 and 12 concern the exercise of diplomatic protection by the State of nationality in respect of shareholders if injury is caused to a corporation. This raises the question of the usefulness of granting special diplomatic protection to shareholders when they are not considered to be natural persons, who enjoy diplomatic protection in accordance with the general provisions. These two articles may need to be re-examined. In addition, it is necessary to re-examine this matter and the attendant obligations and consequences from a variety of practical perspectives, such as the dissolution, termination or merger of a corporation. It is also necessary, in this case, to clarify the relationship of shareholders and the extent to which they are affected, in particular because a corporation takes decisions as authorized by the shareholders, depending on the type of the corporation and its charter.

10. Article 13 concerns other legal persons (other than corporations), which is a broad and imprecise concept that covers a variety of entities. State practice in this regard is inconsistent, as some States may deem that some certain entities have a legal personality, while other States do not. The article should therefore be re-examined, with the aim of specifying a precise reference standard for defining legal persons other than corporations and studying each case and the effectiveness of its application. For example, non-governmental organizations (NGOs) have legal personality. It should be noted that such organizations have full independence from governments and States. If the articles were to also cover the exercise of diplomatic protection by States with regard to NGOs, the exercise of that right by the State in which the organization was established and under the laws of which it operates might weaken [the organization’s] independence, and that will have a negative effect on the organization’s ties at the international level. In addition, this might give rise to practices that will have a negative effect on Qatar, in particular with regard to human rights NGOs and the politicization of such organizations. We should also like to point out a basic issue: a specific criterion and a classification are needed in respect of what is meant by legal persons (other than corporations), because the draft text in its current form is vague and covers a wide range of entities. It is necessary to define a precise reference criterion for legal persons, taking into account the differences in law and practices among States, in particular given that certain respondent States may not recognize the legal personality of some entities that would like to enjoy diplomatic protection, thereby hindering their ability to avail themselves of local remedies as legal persons.

11. Articles 14 and 15 deal concern exhaustion of local remedies and exceptions to the [local remedies] rule. These articles might have negative implications for the internal sovereignty of the

State, in general, and provide a pretext for interference by other States in the internal affairs of the State, in particular with regard to litigation procedures and related matters.

12. Article 15 contains exceptions to the exhaustion of local remedies rule. A State has the right not to exhaust local remedies where:

(a) there are no reasonably available local remedies to provide effective redress;

(b) there is undue delay in the remedial process;

(c) the injured person is manifestly precluded from pursuing remedies.

This an essential article that may be used in negative manner against States, because it gives another State the right to decide and determine whether local remedies are not available in States, or that there is delay in that regard. The article is drafted in a broad manner, rendering article 14 ineffective and non-implementable in practice. In addition, it will promote the violation of the basic condition for the exercise of the right to diplomatic protection, namely, the exhaustion of local remedies. Moreover, these exceptions could lead to the issuance of conflicting international judicial decisions. International courts must consider each case on the basis of the facts and circumstances when determining whether local remedies have been exhausted. There is no precise standard that can be relied upon when considering the exceptions set out in the present article. Subparagraph (e) is the only acceptable provision, given that it conforms with the general principles of law.

13. Articles 16 and 17 do not add new provisions. There is no need to reaffirm the rights of States, natural persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, as this is an established right of States and individuals under the rules of international law. If the intended meaning is that States and individuals have the right to invoke international human rights treaties, that would not be adding anything new, either. The invocation by States or individuals of international human rights law provides greater assurance than diplomatic protection, because [international human rights law] contains appropriate and flexible rules that are helpful and give a person his rights when his fundamental rights and freedoms have been violated. Another essential issue is the duplication of claims. These aspects need to be reviewed and studied thoroughly. It should be stipulated that it is not possible to submit duplicate claims and to combine several claims in relation to the same injury.

14. Article 18 concerns the protection of ships' crews in the event of an injury to the vessel. This issue is very broad. It needs to be studied and its rules should be precisely defined. The wording of the article is vague and gives the right [to exercise diplomatic protection] not only to the State of nationality of the ship's crew, but also to the State of nationality of the ship. It is important that this issue be studied in the light of practical realities, in particular with regard to the transfer of ownership of a ship and of its registration to another State, the laws and regulations in force in each State and practice, and in accordance the relevant United Nations conventions.

15. Article 19 concerns recommended practice for States with regard to exercising the right of diplomatic protection. [The article] is general in nature and does not address all aspects of the matter, nor does it contain clear rules and procedures with regard to the exercise of the right of diplomatic protection.

Opinion

In view of the above, we believe that the International Law Commission must consider these draft articles in a deeper and more detailed fashion, in particular because the subject matter covers legal, political, technical and commercial aspects that give rise to several possibilities in practice. The draft articles are very broad and not detailed. Some of them might conflict with the purposes and application of diplomatic protection, which is a legal procedure aimed at protecting the nationals [of State], but for political purposes, such as the non-acceptance of local remedies in a particular State by the State claiming protection. There is no criterion for delaying the decision and judgment. In addition, stateless residents and refugees fall within the scope of the protection of the State in which they reside, and there is also the possibility of conflict between States regarding the nationality of corporations, in particular in relation to the issue of protecting shareholders and whether there is actually a need for this. Accordingly, it is important for the International Law

Commission to re-examine the draft articles and formulate them in a way that takes into account the foregoing in a clear and detailed manner, in order to apply diplomatic protection effectively and transparently on the basis of the purpose and objective thereof, which is to secure redress for injury.

It should be noted that, when considering and interpreting the question of redress, the question of [what constitutes a] wrongful act should be studied and clarified, in particular given that acts and responsibility [therefor] are the basis of the topic. The criteria for claiming diplomatic protection should be clearly and precisely defined, taking into account the various laws of the multilateral international community. The procedures that must be followed by the State claiming diplomatic protection should be clearly and precisely stated, in order to avoid confusion and ambiguity in the text, which might lead to the abuse of or provide a pretext for abusing the exercise of the right of diplomatic protection. In addition, we should like to draw attention to a fundamental issue, namely, the need to stipulate procedures in these draft articles for exercising and claiming diplomatic protection.