

## Summary

This thesis deals with one of the modern topics of international law - diplomatic protection. It provides for its comprehensive assessment from a wider and deeper perspective on the background of the codification process, which culminated in 2006, when the International Law Commission (ILC) adopted 19 Draft Articles on Diplomatic Protection.

In the current state of international law, diplomatic protection is based on customary international law. It is an instrument to protect nationals (be it a natural or legal person) by their state of nationality, if they injured by another (host) state in violation of international law. Under the current definition, diplomatic protection means the invocation (through peaceful means) by a state of the responsibility of another state for an injury caused to a national by an internationally wrongful act of that another state. The aim of diplomatic protection is to implement this responsibility. The application and exercise of diplomatic protection is considered to be a sovereign, discretionary right of the state, although the thesis points out the some recent developments in international law towards the need to recognize the rights and interests of the individual, as well as the constitutional practice of some states guaranteeing its citizens a (domestic) right to diplomatic protection.

This thesis gives a historical account on the development of diplomatic protection through its different stages up to the gradual stabilization at the turn of the 19<sup>th</sup> and 20<sup>th</sup> century. It highlights characteristic features that accompanied this development and in this context the significance of the threat and use of force as a frequent mean to exercise diplomatic protection within the context of broader geopolitical interests of states. This work highlights the importance of arbitration proceedings, particularly that of the mixed claim commissions in the late 19<sup>th</sup> and early 20<sup>th</sup> century, which contributed to stabilization of the substantive requirements and conditions of diplomatic protection. The same emphasis is also given to jurisprudence, namely the decisions of the Permanent Court of International Justice and later the International Court of Justice. The thesis gives detailed account on key judgments of the two

permanent courts and their impact on the development of diplomatic protection. In addition to the classical cases, such as *Mavrommatis*, *Nottebohm* or *Barcelona Traction* judgements, it gives a special attention to the most recent ICJ judgement on the topic of diplomatic protection – in *Diallo* case, which has demonstrated a clear interaction with already adopted ILC Draft Articles on Diplomatic Protection.

In classical sense, diplomatic protection is based on a legal fiction, known as Vattel's fiction, named after the international legal theorist and philosopher E. Vattel, to the effect that the injury caused to a national of another states causes an indirect injury to the state itself. Fiction is subject to a critical scrutiny, but this work concluded that the question of fiction itself is not currently relevant for the success of the institute as such. Diplomatic protection is identified as a set of secondary rules, i.e. rules governing the application of responsibility in the event of the breach of primary rules. Primary rules that are relevant in cases of diplomatic protection stem from alien law, a branch of international law governing obligation of state in treatment of aliens. The thesis provides a brief overview of the development of primary rules, starting from minimum standard treatment, through denial of justice as to the modern concept of rights of aliens as part of the human rights law.

Diplomatic protection is exercised through peaceful means. This study describes various levels and forms of these means, from diplomatic negotiations or diplomatic notification to binding dispute settlement before international judicial bodies. Dissertation formulates a position on the question on the threat or use of force in exercising diplomatic protection.

The main focus of the dissertation is on the codification work of the ILC – the Draft Articles on Diplomatic Protection of 2006; a Slovak translation thereof is found in the Annex. Particular provisions of Draft Articles are thoroughly analyzed with a focus on those rules that reflect the customary international law, as well as those where the ILC suggested progressive development of international law.

In the framework of substantive requirements of diplomatic protection, the theses gives a particular attention to two conditions for admissibility of the claim for

exercising diplomatic protection – nationality (of claim) and exhaustion of local remedies. With regard to the nationality, it gives an account of the nationality of natural persons and separately nationality of legal persons (corporations). A special attention is given to the condition of continuous nationality and to some specific categories of individual, e.g. having double or multiply nationality. In case of corporations a particular importance is paid to the distinction between the diplomatic protection of the state of incorporation of a corporation and diplomatic protection of the state of nationality of shareholders.

This thesis takes under scrutiny the relation between diplomatic protection and international human rights law. It points out the development of human rights through last 60 years, as well as its influence on the treatment of aliens and thus on the primary rules relevant for exercising diplomatic protection. Despite the fact that regional and particular human rights mechanisms recognize in limited scope right of individuals to address international bodies with their claims against other states; however they do not reach by far the universality of diplomatic protection. Diplomatic protection was recognized as one of the effective means for protection of human rights of aliens.

Protection of investments and its relation and comparison with diplomatic protection is also a subject of this thesis. International protection of investment, taking into account its specificities, surpassed in development diplomatic protection. In this context especially the development of the bilateral investment treaties system together with establishment of the permanent center for settlement of investment disputes (ICSID) or other particular or sectorial bodies with similar competencies seem to have particular importance. Taking into account the special relation, international investment protection can be considered *lex specialis* with regard to diplomatic protection.

Another relation – between diplomatic protection and consular assistance shows many similarities. It is however clearly defined that both of them have much more differences than in common, particularly with respect to means to exercise, legal basis and degree of cooperation with the host state, as well as to substance and character of the occurred injury. Interesting situation is in case, when consular assistance

transforms into exercise of diplomatic protection, or in case of mixed claims where both injury to the right of an individual as well as direct injury to the right of a state occurs.

Adopting the Draft Articles on Diplomatic Protection, the ILC recommended to the UN General Assembly, the next logical step of completion of the full codification of the topic – adoption of an international convention on diplomatic protection, transforming the customary law into the treaty law. This dissertation is similarly to the General Assembly's position critical to a speedy preparation of an international convention. It presents clear advantages of delaying the future works on an international convention, taking into account among others the codification process of rules on international responsibility of states.

Dissertation concludes that diplomatic protection is currently viable peaceful mean of protection of human rights of aliens with a clear perspective to the future. Its aim was also to present to Slovak and Czech professional legal community diplomatic protection as modern and viable topic of international law and as an effective mean for reparation of injury caused to an individual by an alien state.