Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

QRP

The Diplomatic Protection of Refugees by Their State of Asylum: A Possible Scenario for the Day after the Russian-Ukrainian Conflict[1]

Alberta Fabbricotti[2]

Abstract

This article intends to verify the possibility of legitimizing the action in diplomatic protection of refugees vis-à-vis the State from which they have fled by the receiving State. This is a hypothesis that has no basis in traditional international law but which is advanced on the basis of new developments in international practice. The diplomatic protection of refugees by their State of Asylum is therefore the main thesis addressed by the present essay. The questions examined in this article involve various areas and institutes of international law. In particular, two codification projects elaborated by the International Law Commission are here considered: the Draft articles relating to the diplomatic protection of 2006 and the Draft articles on the international responsibility of States of 2001. Is it just a coincidence that both of these projects have not resulted in proper (binding) international conventions? As an appendix, it was deemed interesting to investigate the above thesis considering the huge mass of Ukrainians who fled from their country and who poured into most European countries. Regarding this exodus, the legal reasoning supporting the entitlement of the hosting States to exercise the diplomatic protection is particularly complex and has to unravel in two steps. The first step perlustrates the entitlement/capacity of the receiving State to exercise his right of diplomatic protection. The second step analyses the accountability, under the international law regime on State responsibility, of the State that invaded and occupied the territories from which the Ukrainians were forced to flee.

Key Words:

International Refugee Law; diplomatic protection; international responsibility of States; aggression; International Law Commission

1. Introduction

This essay is a revised version of my 2005 article (see Fabbricotti, 2005).[3] My main goal is to revisit Draft Article 8 of the text on diplomatic protection adopted by the International Law Commission (ILC) in 2006 (ILC 2006). This provision deals with the diplomatic protection of stateless persons and refugees by the State of residence/refuge. As an appendix, I will discuss about whether and how Draft Article 8 could apply in today's

[2] Dr. Alberta Fabbricotti is an associate professor of International Law in the Department of Legal and Economic Studies (DSGE), Law Faculty, at the University La Sapienza of Rome, Italy.
[3] A 2022 version of the present article was accepted as a chapter for publication in an edited volume on the law of refugees by Othon de Pontes Saraiva Filho O. & Homem de Siqueira J., to be published by Forum, Belo Horizonte, Brazil.

Fabricotti, A. (2023). The Diplomatic Protection of Refugees by Their State of Asylum
Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

emergency provoked by the massive flux of Ukrainians spreading to the territory of almost all European countries, especially the bordering States of Poland, Romania, Hungary and Slovakia. To date the number of refugees from Ukraine recorded across Europe is 8,087,952 (UNHCR, 2023). The legal response to the entrance and stay of Ukrainians in the European Union has been rapid, generous, and highly exceptional (on this sympathetic attitude, see Ramji-Nogales, 2022, 150-154). Yet, it seems appropriate to investigate on whether the receiving States have the right to exercise diplomatic protection in favour of the Ukrainian exiles.

2 Draft Article 8 on Diplomatic Protection

Draft Article 8 of the text on diplomatic protection provides that:

> "1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
>
> 2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
>
> 3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee."

Paragraphs 1 and 2 envisage that a State may exercise diplomatic protection in respect of a person who is stateless or has been recognized by that State as a refugee, if that person is lawfully and habitually resident in that State at the time of the injury and at the time the claim is officially made.

The following paragraph 3 clarifies that "[p]aragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee".

The drafting of these provisions proved to be extremely difficult, as the question of whether diplomatic protection can be exercised with respect to non-nationals of the claimant State is highly controversial. This is particularly true if one considers that the individuals concerned are stateless persons and refugees, i.e. two categories of persons that raise major political concerns in international relations. (In doctrine, on the question of the diplomatic protection of refugees by their host State, see also Reiterer, 1984; Ridi, 2013). Allowing this is particularly innovative, even revolutionary, when compared to the well-established rule of entitlement, which grants the right exercised through diplomatic protection only to the State of which the foreigner is a national. According to this traditional view, as expressed by the Permanent Court of International Justice in the Mavrommatis leading case, "[b]y taking up the case of one of its subjects and by resorting to diplomatic action [...] a State is in reality asserting its own right" (Permanent Court of International Justice, Judgement of 30/8/1924, Mavrommatis Palestine Concessions, Series A, No. 30, p. 12). The ILC itself admitted that Article 8 was an "exercise in progressive development of the law" (see ILC, 2004: 36), and thus did not reflect customary international law.

An exception to the general rule according to which a State might exercise diplomatic protection on behalf of its nationals was introduced in the 2006 Draft Articles for the benefit of stateless persons and refugees only, to take into account the concern of contemporary international law for the status of both categories of persons, which is evidenced by the 1961 Convention on the Reduction of Statelessness and the 1951

Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

Convention Relating to the Status of Refugees (ILC, 2004, at 45).

3 The Discussion about the Legal Character of Draft Article 8 on Diplomatic Protection

This progressive development approach is criticized by Alain Pellet (2004: 22; this concept is reiterated in Pellet, 2008):

> "[T]he new mania in the Commission of advocating 'diversity' in all and everything, and in particular, human rights and environment, can only be regretted. This way of thinking certainly attracts much sympathy and approval. But there are limits to this decentralised or "exploded" approach to international law [...]. This does not rule out exceptions when exceptions are indispensable, but these exceptions must be included in the general codification; and when they are not, they must be provided for in the treaties themselves, not decreed by specialists without regard to the need for clear, general, uniform, well-established and well-respected rules. And this is not all that constraining: after all, codified rules are only applicable when the special treaties themselves do not provide otherwise!"

Draft Article 8 was considered de lege ferenda at the time of adoption by the ILC. E.g., in Court of Appeal, Judgement of 12/10/2006, Al Rawi et al. v. Secretary of State for Foreign and Commonwealth Affairs and another, [2006] EWCA 1279, at para. 118, the Court held that Art. 8 was "not yet part of international law". ILC Rapporteur John Dugard (2021, paras 47-48) clarified that:

> "Traditionally diplomatic protection was limited to the protection of nationals only. This meant that stateless persons and refugees might not be granted protection by their State of residence [...]. The attitude of States to stateless persons and refugees has, however, undergone major changes and there is now considerable support for the extension of diplomatic protection to such persons. Consequently, in a clear exercise in progressive development, the ILC has proposed in Art. 8 Draft Articles."

Differently, Antonio Fortin argues that the meaning of the lack of national protection requirement of the refugee definition embodied in the Refugee Convention 1951 and in the Statute of UNHCR is often misunderstood in current discussions on international refugee law. According to one view, the protection to which the refugee definition alludes is 'internal protection', that is, the protection that the State must provide within its territory to victims or potential victims of persecution. In the view of Fortin, this view is not supported by the drafting history of the refugee definition, and is not consistent with the wording of the relevant texts. On the contrary, the term 'protection' in this context means 'diplomatic protection', that is, the protection accorded by States to their nationals abroad (Fortin, 2000).

Since 2006, there has been no evidence in international practice that this provision has been transformed into de lege lata.

4 The Main Limitation of Draft Article 8 on Diplomatic Protection

I will not dwell on a comparison between this article and the traditional theory of diplomatic protection, as this approach seems rather useless in the present context. Instead, I will focus on the main limitation on the exercise of diplomatic protection on behalf of a refugee by his or her host State, namely the subjective exclusion provided for in paragraph 3, which excludes the State of which the refugee is a national from the addressees of the claim. As we will see, this issue is relevant also for the debate regarding the diplomatic protection

Fabricotti, A. (2023). The Diplomatic Protection of Refugees by Their State of Asylum
Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

of the Ukrainians.

In order to describe the scope of the refugee rule enshrined in Article 8, one must first refer to the definition of diplomatic protection contained in the preceding Article 1 of the ILC project, which of course applies to all subsequent draft articles. "Diplomatic protection" is here defined as

> "diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State."

I will leave aside the somewhat curious fact that this general definition strictly adheres to the requirement of the nationality of the claimant and completely disregards the exception for stateless persons and refugees in Article 8. The text of Article 8 also does not bridge this "impasse", for example by a safeguard clause, but the gap is filled by Article 3:

> "1. The State entitled to exercise diplomatic protection is the State of nationality.
> 2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft Article 8"

Instead, let us focus on the most important requirement for the claim of diplomatic protection, namely the wrongfulness under international law of the act by which the national was injured.

5 The Relevance of ILC Draft Articles on State Responsibility

This leads us directly to the definition of "internationally wrongful act" contained in the Draft Article 2 on Responsibility of States adopted by the ILC in 2001. The topic of diplomatic protection is closely linked to the issue of State responsibility for injuries to individuals. Originally, the drafting of articles on diplomatic protection was even intended to be part of the study on State responsibility.

According to the State responsibility draft definition

> "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State."

It is well known among international law scholars that this definition contains two elements, often referred to as subjective and objective: the conduct in question must be attributable to the State under international law, and, for the State's air to be held responsible, the conduct must constitute a breach of an international legal obligation that was in force for that State at the time.

An internationally wrongful act always entails the responsibility of the author of that act. This principle of automatism, i.e. the determination of responsibility when an act contrary to international law is committed, is clearly set out in draft Article 1 on State responsibility and applies without prejudice to special circumstances, the occurrence of which precludes the wrongfulness of the act and thus the responsibility of the author of that act (see ILC, 2001: 168 ff., Chapter V. Circumstances precluding wrongfulness).

The question that arises at this point is whether or to what extent paragraph 3 of draft Article 8 on diplomatic protection fits into the general principles and rules of State

Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

responsibility discussed above. Paragraph 3 assumes that the conduct of the State of which the refugee is a national which has caused harm to the refugee may consist in a breach of an obligation under international law and, thus, in an act contrary to international law, but avoids referring to the consequences of responsibility. The latter point was probably considered completely irrelevant in order to deny the State of refuge the exercise of diplomatic protection vis-à-vis the State of which the refugee is a national. For Lina Panella (2008: 74), the exclusion of the State of citizenship of the refugee pursuant to paragraph 3 of draft article 8

> "is justified, for reasons of a political nature, since, in most cases, an individual who abandons his own country to take refuge in a foreign State can always advance reasons for resentment against its own State of origin, for which there could be a multiplication of international complaints and diplomatic protection could become an instrument of 'pressure' in international relations" (translation by the author).[4]

The ILC Commentary on paragraph 3 simply states that allowing the resort to diplomatic protection against the refugee's nation-State "would have contradicted the basic approach of the draft Articles, according to which nationality is the predominant basis for the exercise of diplomatic protection" (ILC, 2004: 37).

Indeed, this approach is consistent with draft Article 44 on State Responsibility, which states that: "[t]he responsibility of a State may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims". In this case, the nationality of claims provision is not only considered an admissibility requirement when raised before an international tribunal, but also as a general requirement for the assertion of responsibility in cases where it is applicable, namely in the field of diplomatic protection (ILC, 2001: 120).

6 The Human Rights Approach to Diplomatic Protection

For the combination of the above provisions, one could conclude that while the State of nationality of the refugee has committed an internationally wrongful act and is therefore responsible, even if only in principle, under international law, there is no room either for establishing this responsibility before an international court or for invoking it by another State through diplomatic protection. This sounds very much like non-justiciability or impunity!

This result is very much against the spirit and rationale of codification efforts in the field of diplomatic protection. In his first report, Special Rapporteur Dugard expressed the view that diplomatic protection was an essential tool for the protection of human rights (on this point, see Zieck, 2001; Gaja 2003; Condorelli 2003, at 19; Flauss, 2003; Dugard, 2005; Garibian, 2008; Leys, 2016; Heeps, 2017), i.e. a means to advance it. According to the Special Rapporteur, unlike human rights treaty remedies which are available only to a limited minority of individuals and, moreover, are often ineffective, diplomatic protection, as a customary rule of international law, applies universally and thus constitutes the best

[4] Original Italian text: "si giustifica, per ragioni di natura politica, in quanto, nella gran parte dei casi, un individuo che abbandona il proprio Paese per rifugiarsi in uno Stato straniero può sempre avanzare motivi di risentimento nei confronti del proprio Stato di appartenenza, per cui si potrebbe verificare un moltiplicarsi di reclami internazionali e la protezione diplomatica potrebbe diventare uno strumento di 'pressione' nelle relazioni internazionali".

Fabricotti, A. (2023). The Diplomatic Protection of Refugees by Their State of Asylum
Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

redress (Dugard, 2000: paras. 31, 32, 68). According to Dugard (2005: 77),

> "[w]hile the European Convention on Human Rights may offer real remedies to millions of Europeans, it is difficult to argue that the American Convention on Human Rights, or the African Charter on Human and Peoples' Rights, have achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, is not covered by a regional human rights convention. To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR), provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of states that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions."

Diplomatic protection as a means of promoting the protection of human rights therefore formed the premise of the first report and the draft articles therein, which already included a provision on refugees.

The Draft Articles are intended to complement, and not replace the rules and principles for the protection of the human rights of aliens. They are to be understood as different methods of achieving the common goal of human rights' protection. This is made very clear by Article 17, which states:

> "The present Draft Articles are without prejudice to the rights of States, natural persons or other entities to resort to actions or procedures under international law other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act" (Dugard, 2005: 91).

What remains rather undefined is whether refugees are entitled to an effective remedy under international human rights treaties against the State of their nationality. Is a State that has acceded to a human rights treaty, bound to comply with its associated standards in relation to a national if that national has fled abroad and has been granted refugee status by another State? To the extent that the treaty leaves room for individual petitions to a human rights body or court, this question should be rearranged: Is a petition filed by a refugee against his State of nationality admissible? This question can only be answered in the affirmative, since no valid legal argument can be advanced to exempt a party to a human rights treaty from continuing its obligations to a national after the latter has left its territory or from being liable retroactively for injuries suffered by the refugee at the time when he was still in his country of origin and thus subject to the territorial jurisdiction of that party. On the other hand, none of the procedural rules providing for the admission to courts or human rights institutions prevents the refugee from taking legal action against the State of his nationality.

If there is no legal impediment to the use of human rights treaties and monitoring mechanisms by refugees against the State of their nationality, then why do refugees not, but only exceptionally, use the available protection, namely the filing of individual complaints, to obtain some redress for injuries and pains suffered at the period before they fled? As far as I am aware, the overwhelming majority of cases involving refugees and decided by the UN Human Rights Committee, the UN Committee against Torture or the European Court on Human Rights have been about the right to non-refoulement, which is inferred by the prohibition of inhuman and degrading treatment, where the respondent State was the asylum seeker's host State. Only in a very few cases, have refugees brought a case against their State of nationality (Fabbricotti, 2005).

Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

Perhaps one explanation for this phenomenon is simply that the States responsible for the refugee flows avoid becoming parties to human rights treaties. Perhaps the standards of satisfaction or repayment established by human rights bodies in the event that the claim is successful are not 'just' enough to provide the refugee with an effective reparation for the violation suffered.

What is certain is that the protection of refugees against their State of nationality under human rights treaties is largely ineffective or inadequate. Of course, the implementation of human rights treaties prevents the phenomenon of refugees. However, once this goal of deterrence has failed, refugees appear to have no real means of redress vis-à-vis their home State. This is thus a domain where diplomatic protection could have worked better as a means of promoting human rights, according to the premises of the Dugard Report.

It is not at all surprising that this did not happen. This point is made very clear in the ILC's Commentary on paragraph 3 of Draft Article 8:

> "The paragraph is [...] justified on policy grounds. Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees" (ILC, 2004, at 37).

According to James Crawford (2017: 154, note 75):

> "Like most floodgates arguments this is unconvincing. Under the Articles, diplomatic protection is an entitlement not an obligation. Why should a State be deterred from accepting a refugee merely because it might thereby acquire an entitlement to claim?"

Apart from these general political considerations, it should also be borne in mind that the human rights approach to diplomatic protection suggested by Special Rapporteur Dugard was not universally shared within the ILC as can be seen from the views of three former members of the ILC, namely Gaja (2003), Pellet (2008) and Crawford (2017). For example, some ILC members objected that while the content of a State's obligations under international law of aliens often overlaps with its obligations under international human rights law, the content of the State's corresponding rights may differ (Gaja, 2003: 373).

The right to diplomatic protection, through the exercise of which the State traditionally seeks to secure certain treatment abroad for nationals (aliens for the State against which the claim is addressed) or their property, belongs only to the State of nationality. In contrast, human rights obligations do not give rise to a bilateral relationship between the territorial State and the State of which the individual is a national, as they are erga omnes in character, i.e. their observance can be claimed - and the responsibility of the State author of a breach invoked - by any State towards which the obligation exists (on this issue, see, for instance, Vermeer-Künzli, 2007). An erga omnes obligation may be owed to the international community as a whole (if the rule giving rise to the obligation is part of customary international law) or to several States that do not comprise the entire international community (if the rule is conventional). According to this view, human rights of an individual may be defended either by his State of nationality, by way of diplomatic protection, or - irrespective of nationality, provided that the rights claimed for are the content of erga omnes obligations - by any State (including the State of nationality) to which the obligation exists, without resorting to diplomatic protection action. This view relies on the obiter dictum of the International Court of Justice in the Barcelona Traction

Fabricotti, A. (2023). The Diplomatic Protection of Refugees by Their State of Asylum
Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

judgment on the merits:

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. In view of the importance of the rights involved, all the States can be held to have a legal interest in their protection; they are obligations erga omnes" (see ICJ, Judgment of 5/2/1970, Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970, p. 32, para. 33).

In the case of a refugee, the first of these options is obviously not feasible, as the individual whose human rights are being violated is a national of the responsible State. As for the second option, one must again refer to the ILC's Draft Articles on Responsibility of States (the issue of State responsibility for having caused refugees' flows is tackled by Czaplinski & Sturma, 1994). According to its Draft Article 48, any State is entitled to invoke the responsibility of another State, i.e. to require the latter to cease the wrong and give assurances of non-repetition and reparation, if the obligation breached is owed either to a group of States to which that State belongs and was established to protect a collective interest of the group or of the international community as a whole (Draft Articles on Responsibility of States, cited above).

From this, one might conclude that if the refugee's human rights are protected by erga omnes obligations,[5] then any State, including the State of asylum, may invoke the responsibility of the State of which the refugee is a national and which has breached those obligations and infringed those rights. This is, of course, something compared to the situation outlined above, which comes close to impunity. However, it is far from satisfactory.

Indeed, it is doubtful whether this provision is applied often enough to meet the need of refugees' protection. It is hard to imagine a State or several States not directly involved in the specific event that triggered the flow of refugees, or in the consequences of such a flow, asserting the responsibility of the refugee's State of origin. Responses such as described in Draft Article 48 are certainly not, and never will be, the usual way to redress the harm done to refugees by their national State.

The implications of Draft Article 48 are likely to be greater when one considers that the States that can invoke the responsibility include the State of refuge.

In my view, the State that has given refugee status to the individual whose human rights have been infringed may be considered, in the first instance, as the State injured by the act in violation of international law. Draft Article 42 on State responsibility introduces the concept of the *injured* State, i.e. the State that is primarily entitled to claim the responsibility of another State. Under this definition, the injured State is not only the State to which the breached obligation is owed individually, but also the State *specially affected* by the breach, even if the obligation is also owed to other States or to the international community as a whole, as well as any State that is part of a group of States if the breach of the obligation by one of the members of that group is of such character as to radically change the position of all the others with respect to the further performance of the

[5] This will be the case, in the opinion expressed by the International Court of Justice in the Barcelona Traction judgment, for rights originating from the outlawing of acts of aggression, and of genocide, as for basic human rights, including protection from slavery and racial discrimination. See I.C.J. Reports 1970, p. 32, para. 34.

Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

obligation (ILC, 2001: 294).

The State that recognized the individual as a refugee might well be considered "specially affected" by the internationally wrongful act committed by the national State of the refugee, since it bears the burden, viz. the consequences, of the breach.

Therefore the State of refuge, being "specially affected", i.e. "injured", by the breach within the meaning of Draft Article 42, may therefore invoke the responsibility of the State of nationality of the refugee, even if the erga omnes character of the obligation breached is lacking.

This being said, it remains rather unclear what the implementation of the claims under Draft Articles 42 and 48 on State responsibility entails. The ILC Commentary on these provisions states that

> "invocation [of responsibility] should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal" (ILC, 2001: 294).

How then can the State of asylum, or any other State entitled to do so under Draft Article 48, exercise its right to invoke the responsibility of the national State of the refugee, if, as we have seen above, claims (whether for the purpose of diplomatic protection or the institution of proceedings) under Draft Article 44 are barred to them because they would not be brought in accordance with an applicable rule on nationality of claims?

7 Application to the Case of the Russian-Ukrainian Conflict

It is not possible in this paper to examine this issue in depth. I would like to limit myself to making some remarks at the end of this essay on the possible application of Draft Article 8 on the diplomatic protection to the future, hopefully imminent, end of the Russian-Ukrainian conflict.

It is not easy to predict the territorial situation in which Ukraine will find itself after a hypothetical peace agreement ending the war. To date (February 2023), there are still many unknowns; it is not clear how far Russian occupation forces will penetrate Ukraine, nor whether the occupied territory will become an integral part of the Russian Federation or a self-proclaimed independent body (a new subject of international law) or whether the Ukrainians will be successful in repelling the invader. Admittedly, it is not self-evident that any peace agreement will be reached and that there will not be a de facto territorial change.

From an international law perspective, a great majority of States did not recognize the annexation of Ukrainian territories by Russia. An example is the Statement by the Members of the European Council of 30 September 2022: "We firmly reject and unequivocally condemn the illegal annexation by Russia of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions" (European Council, 2023). Non-recognition of legal situations comes from the customary obligation for all States not to recognize the effects of the use of force, a rule which is also codified in Article 41, para 2 of the Draft Articles on State responsibility. The UN General Assembly repeatedly condemned the aggression by the Russian Federation against Ukraine targeting this action as a violation of Article 2 (4) of the Charter.

Another example is the General Assembly Resolution adopted on 2 March 2022 (UNGA,

Fabricotti, A. (2023). The Diplomatic Protection of Refugees by Their State of Asylum
Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

2022), in which the General Assembly:

> "1. Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;
>
> 2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;
>
> 3. Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State;
>
> 4. Also demands that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders;
>
> 5. Deplores the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter;
>
> 6. Demands that the Russian Federation immediately and unconditionally reverse the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine."

Despite the great uncertainty of the situation, one would wonder how to manage and resolve the claims for recovery of status, restitution of property, reparation of damages etc. of hundreds of thousands, perhaps millions, of people who have been forced to flee Ukraine. Would States having received the fluxes of Ukrainian nationals be entitled to exercise an action in diplomatic protection against Russia? Would Draft Article 8 on diplomatic protection be applicable – at least in principle – to provide reparation for the immense material and moral losses of the Ukrainians?

One point needs to be clarified preliminarily, that of the legal status of expatriated Ukrainians. These people are not "refugees" within the international legal meaning (not under the 1951 Geneva Convention nor other international law regimes). The European Union qualifies them as displaced persons being entitled to temporary protection (EU Council Implementing Decision 2022/382 of 4 March 2022). However, the word "refugee" referred to in paragraph 2 of Draft Article 8

> "is not limited to refugees as defined in the 1951 Convention relating to the Status of Refugees and its 1976 Protocol but is intended to cover, in addition, persons who do not strictly conform to this definition" (ILC, 2006: 50).

In addition, paragraph 2 of Draft Article 8 sets down two criteria, namely the lawful-and-habitual-residence and the permanent residence, which are, at least the first of them, fulfilled by the Ukrainian exiles. Indeed, many of them reside lawfully in the host country since already one year or so, and it is likely that the stay will still last quite a long time.

Turning now to the very issue, the limit envisaged in paragraph 3 of Draft Article 8 seems hardly applicable *ratione personae* and/or *ratione temporis*. The act contrary to international law (in the case at hand, the illegal use of force with all its consequences) is referable to Russia, at a time when Russia is a State different from the State of nationality of the Ukrainian refugees. Furthermore, even if one of the possible outcomes of the war is the de facto annexation of Ukraine or part of it to the Russian Federation, the illegal act would have been committed at a time when the transfer of sovereignty or governmental power over the territory in question, with the consequent acquisition of a new nationality by the resident population, had not yet taken place. And this without going into an

ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

important issue already mentioned, namely, the recognition (which is unlikely) by the international community of the sovereignty of an entity other than Ukraine on the territory conquered by Russia.

At least in principle, therefore, and assuming that Article 8 of the codification draft on diplomatic protection now has positive legal value (*de lege lata* and no more *de lege ferenda*), nothing would prevent States that have taken in and given protection to exiled Ukrainians from taking diplomatic protection measures against Russia or against the hypothetical new entity claiming sovereignty over Ukrainian territory captured as a result of the still ongoing conflict. Russia or that other entity are not the "State of nationality of the refugee". Thus, the discussed *restriction ratione* personae envisaged in paragraph 3 would not be enforceable.

References

Barber, R. (2022). What does the 'responsibility to protect' require of States in Ukraine? *Journal of International Peacekeeping, 25*, 155-177.

Condorelli, L. (2003). La protection diplomatique et l'évolution de son domaine d'application. *Rivista di diritto internazionale, 1,* 5-26;

Crawford, J. (2017). The International Law Commission's articles on diplomatic protection revisited. In T. Maluwa, M. du Plessis, & D. Tladi (Eds.), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (pp. 135-171). Brill.

Czaplinski, W. & Sturma, P. (1994). La responsabilité des Etats pour les flux de réfugiés provoqués par eux. *Annuaire Français de Droit International, 40*, 156-169;

Dugard, J. (2000). *First report on diplomatic protection.* UN Doc. A/CN.4/506 and Add. 1. https://legal.un.org/ilc/documentation/english/a_cn4_506.pdf

Dugard, J. (2005). Diplomatic protection and human rights: The draft articles of the International Law Commission. *Australian Yearbook of International Law, 24,* 75-91.

Dugard, J. (2021). Diplomatic protection. In A. Peters (Ed.), *Max Planck Encyclopedia of Public International Law*, 2021. https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1028?rskey=UL3Cwo&result=3&prd=MPIL

European Council. (2023). Statement by the members of the European Council (30/9/2022). https://www.consilium.europa.eu/en/press/press-releases/2022/09/30/statement-by-the-members-of-the-european-council/

Fabbricotti, A. (2005). The diplomatic protection of refugees by their state of asylum. A few remarks on the exclusion of the State of nationality of the refugee from the addressees of the claim. *AWR Bulletin, 43*(52)/4, 266-272.

Flauss, J.-F. (2003). Protection diplomatique et protection internationale des droits de l'homme. *Revue Suisse de droit international et européen, 1*, 1-36.

Fortin, A. (2000). The meaning of "protection" in the refugee definition. *International Journal of Refugee Law, 12*(4), 548-576.

Gaja, G. (2003). Is a state specially affected when its nationals' human rights are infringed? In L.C. Vohrah, F. Pocar, Y. Featherstone, O. Fourmy, M. F. Graham, J. Hocking, & N. Robson (Eds.), *Man's inhumanity to man* (pp. 373-382). Kluwer Law International.

Gakis, S. (2022). L'activation de la directive "Protection temporaire". l'apport d'un instrument sui generis à la protection des personnes déplacées. *Revue Trimestrielle des Droits de l'Homme, 132*(4), 771-794.

Garibian, S. (2008). Vers l'émergence d'un droit individuel à la protection diplomatique?, *Annuaire français de droit international, 54,* 119-141.

Heeps, A. (2017). Diplomatic protection and human rights. Quo vadis. *King's Student Law Review, 8*(2), 1-17.

Quarterly on Refugee Problems, 2023, Vol. 62, Issue 1, 3-14
ISSN 2750-7882, Section: Research Articles
Open Access Publication, https://doi.org/10.57947/qrp.v62i1.45

ILC. (2001). Report of the International Law Commission. Fifty-third session (23 April – 1 June and 2 July to 10 August 2001). UN Doc. A/56/10. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/81/IMG/N0155781.pdf?OpenElement

ILC. (2004). Report of the International Law Commission. Fifty-sixth session (3 May – 4 June and 5 July – 6 August 2004). UN Doc. A/59/10. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/81/IMG/N0155781.pdf?OpenElement

ILC. (2006). Report of the International Law Commission. Fifty-eighth session (1 May – 9 June and 3 July – 11 August 2006). UN Doc. A/61/10. https://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf

Leys, D. (2016). Diplomatic protection and individual rights. A complementary approach. *Harvard International Law Journal Online, 57*, 1-14.

Panella, L. (2008). Il progetto di articoli della Commissione di diritto internazionale sulla protezione diplomatica: codificazione e sviluppo progressivo del diritto internazionale. *Rivista della Cooperazione Giuridica Internazionale, 28*, 54-83.

Pellet, A. (2004). Between codification and progressive development of the law. Some reflections from the ILC. *International Law Forum,* 6(1), 15-23.

Pellet, A. (2008). The second death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection. *The Law & Practice of International Courts and Tribunals, 7*, 33-58.

Ramji-Nogales, J. (2022). Ukrainians in flight. Politics, race, and regional solutions. *AJIL Unbound, 116,* 150-154.

Reiterer, M. (1984). The protection of refugees by their State of asylum. Abhandlungen zu Flüchtlingsfragen, Volume XVI. Braumüller.

Ridi, N. (2013). The exercise of diplomatic protection on behalf of R´refugees. In V. Sancin, & M. Kovič Dine (Eds), Responsibility to protect in theory and practice (pp. 653-678). GV Založba.

UNGA. (2022). Aggression against Ukraine. Resolution adopted by the General Assembly on 2 March 2022. UN Doc. A/RES/ES-11/1. https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement

UNHCR. (2023, Februar 27). Ukraine refugee situation. Operational data portal. https://data.unhcr.org/en/situations/ukraine

Vermeer-Künzli, A. (2007). A matter of interest: Diplomatic protection and State responsibility erga omnes. *International and Comparative Law Quarterly,* 56(3), 553-581.

Zieck, M. (2001). Codification of the law on diplomatic protection. The first eight draft articles. *Leiden Journal of International Law, 14*(1), 209-232.