Statelessness at the United Nations Compensation Commission

By Maria Jose Recalde Vela

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Abstract
Every wrongful act results in an obligation to redress the offense. Under the 'traditional' claims approach for internationally wrongful acts, when a state injures another state's national, it is the state of nationality that has the duty to request redress for the violations incurred by its nationals through diplomatic protection. However, this 'traditional approach' excludes stateless persons, who are not considered nationals by any state. After the Gulf War, Iraq was held liable by the UN Security Council (UNSC), which established the United Nations Compensation Commission (UNCC) to process claims for compensation of Iraq's victims. However, initially only states could file claims on behalf of their nationals, which excluded stateless persons from accessing compensation for the violations they suffered as a result of the war. The UNCC adopted several special procedures to address this issue. This paper explores the UNCC's approach concerning the stateless, and seeks to determine whether this approach could serve as a model for future mechanisms of a similar nature and also explores the changing nature of diplomatic protection and the role it has played and can play in the future of mechanisms of a nature similar to that of the UNCC.

[1] Diplomatic protection and diplomatic espousal are used synonymously in the literature on the matter. This paper will use the term diplomatic protection for the sake of clarity.

1. Introduction

The idea that wrongful acts must result in the obligation to make reparations finds its basis in international law. For example, the 1907 Hague Convention (IV) on the Laws and Customs of War on Land establishes under Article 3 that a "belligerent Party which violates the provisions of the [...] Regulations shall, if the case demands, be liable to pay compensation […]."[2] A similar provision is found in Article 91 of Additional Protocol I to the Geneva Conventions. The Permanent Court of International Justice (PCIJ), in its 1928 *Factory at Chorzow* case, established that under international law any wrongful act gives rise to the obligation to make reparations[3] for said act.[4] According to Gillard,[5] "the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions."[6] Furthermore, the *UN Basic Principles and Guidelines*,[7] a soft-law document, contains the basis for reparations for victims of internationally wrongful acts. The main goal of reparations is to "eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed,"[8] which can be done through restitution, compensation, and measures to ensure satisfaction, among others.[9] Clearly, under international law, the importance of reparations for internationally wrongful acts is well established, and reparations have a strong legal basis under international law.

International law was conceived as the law that regulates the interaction between states, establishing norms of behaviour in order to maintain international order. Consequently, under 'traditional' international law, "only States are subjects of international law with full rights and obligations."[10] In the present day, international law continues to be highly state-oriented and often, despite the fact that it is individual victims who suffer from violations of the laws of war, access to reparations for said violations continues to be highly state-dependent. However, the rule that only states are subjects of international law is, according to Mapp, "not absolute"[11] and recent developments in international law point towards an erosion of the central role that the state played under 'traditional' international law. This is evident in the domain of claims for various violations of international law, especially when the affected party are persons.

The 'traditional approach' to international claims states that any wrong done upon an individual is a wrong done upon the individual's state,[12] and therefore the state must vindicate its national by requesting reparations from the wrongdoing state. This means that victims of internationally wrongful acts depend on their state of nationality to file claims for reparations on their behalf against the state that caused them harm,[13] normally through diplomatic channels (diplomatic protection). It becomes clear that nationality is a key element of access to reparations for violations of the individual's rights.

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[2] International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, (18 October 1907).

[3] *Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland)* 'Merits' [1928] PCIJ Ser. A No. 17 p. 29; E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[4] However, it should be kept in mind that this decision did not relate to violations of the laws and customs of war.

[5] Gillard also points out that "violations of *all* rules of international humanitarian law give rise to an obligation to make reparation, and not only violations of the grave breaches provisions for which there is individual criminal responsibility" E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[6] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[7] Also known as the van Boven/Bassiouni principles. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.*

[8] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[9] See the van Boven/Bassiouni UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[10] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[11] W. Mapp, *The Iran-United States Claims Tribunal: The First Ten Years, 1981-1991 : an Assessment of the Tribunal's Jurisprudence and Its Contribution to International Arbitration* (Manchester University Press, 1993), p. 262

[12] P. De Greiff (ed.), *The Handbook of Reparations* (1st, OUP, 2006), p. 482.

[13] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

However, what happens to persons who do not hold the nationality of any state? Under the 'traditional approach' to international claims through diplomatic protection, "stateless victims are left entirely without any recourse."[14] However, during the 20th century international legal mechanisms in the form of human rights courts and other mechanisms of a similar nature began to develop, giving the individual standing—at least to some extent—before these international legal mechanisms. While human rights mechanisms are of a different nature than inter-state claims mechanisms—which have a traditional basis under the rules of diplomatic protection—these developments under international law which have contributed to the erosion of the role of the state as the main subject of international law also affected to some extent the area of diplomatic protection. The UNCC is a prime example of this, by following a different approach than that prescribed by 'traditional' norms on diplomatic protection based on "humanitarian grounds"[15] to address the challenges faced by stateless persons in availing themselves of diplomatic protection.

The UNCC[16] was created by the UN Security Council (UNSC) to manage approximately 2.7 million claims[17] of victims who suffered violations resulting from Iraq's invasion of Kuwait in 1990.[18] The creation of this organ was the UNSC's "first attempt to establish an international claims settlement agency against a state."[19] The creation of the UNCC set a significant precedent in international law[20] because it is the first time an international claims agency was created by the UNSC. Another important precedent set by the UNCC is that, according to Townsend, the UNCC "has left behind the formalities of classic diplomatic espousal for a more flexible approach"[21] by allowing United Nations (UN) agencies and states that would normally not be able to file claims on behalf of stateless persons to file claims on their behalf. This organ had to come up with a strategy to address the challenges that stateless persons faced regarding access to reparations in the form of compensation, since the 'traditional approach' would have excluded them. This paper will explore the 'traditional approach' to diplomatic protection, and will explore the approach undertaken by the UNCC, seeking to determine whether this model could be implemented in future mechanisms of a similar nature.

2. On diplomatic protection, nationality and statelessness

2.1. Nationality

The term nationality denotes the membership of an individual to a community, based on various shared factors[22] resulting in some form of legal recognition[23] of the individual's membership as part of the community. Nationality serves various important roles in international law.[24] This includes a key role in access to reparations, since it "determines the scope of application of basic rights and

[14] C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, CUP, 2012), pp. 92-93.
[15] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th, Routledge, New York 1997), p. 264.
[16] Up until 2012, the UNCC had received approximately 2.7 million claims. In C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, CUP, 2012), p. 141.
[17] C.L. Lim, 'On the Law, Procedures and Politics of United Nations Gulf War Reparations' (2000) 4 Sing. J.I.C.L. 435.
[18] By the year 2000, the UNCC had "awarded more than US$34 billion in compensation and has disbursed through claimant governments more than US$11 billion. The amount sought in the remaining claims is almost US$215.5 billion." As cited in C.L. Lim, 'On the Law, Procedures and Politics of United Nations Gulf War Reparations' (2000) 4 Sing. J.I.C.L. 435.
[19] G. Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 973 Loy. L.A. Int'l & Comp. L. Rev.
[20] Ibid.
[21] Ibid.
[22] K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).
[23] For example, through documents certifying the individual's nationality like a passport.
[24] R.D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50(1) Harv. Int. L.J. 1.

obligations of states vis-à-vis other states"[25] and determines the scope of application of treaties and of diplomatic protection.[26] Nationality is the legal link between individual and state, and since ('traditionally') only states are subjects of international law, nationality also serves as "the link between the individual and the law of nations,"[27] making it an indispensable legal concept. This membership results in various rights and duties owed by the individual to the state and by the state to the individual. On the state's part, this includes its duty to protect its nationals from violations perpetrated by other states, and when its nationals have been victimized by other states, the right to exercise[28] diplomatic protection on their behalf[29] for losses or injuries.[30]

Being in possession of a nationality gives an individual access to certain rights which are typically reserved to nationals of a particular state, which include the right to be protected by said state. However, approximately ten million people in this world—the world's stateless persons—do not possess the nationality of any state and therefore their ability to effectively access various rights—including that of availing themselves of protection of their state—is often challenged. By definition, a stateless person is an individual who is "not considered as a national by any State under the operation of its law."[31] Challenges stateless persons face include having "no right of entry, no voting rights, [being] frequently excluded from many types of work and are often liable to deportation."[32] These challenges make many of them fearful of coming forth to the authorities, which in turn can render them unable to file applications for compensation, since this often requires them to approach the authorities. Additionally, in the context of inter-state claims for internationally wrongful acts, "the 'traditional' position concerning stateless persons is simple; no state may claim on their behalf."[33] In fact, according to Hailbronner, "a state may not…protect foreign or stateless individuals, even if they have taken up prolonged residence on its territory."[34] Therefore, in line with the 'traditional approach', they cannot avail themselves of diplomatic protection[35] and its benefits, which includes having claims filed on their behalf.[36]

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[25] K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).

[26] Ibid.

[27] R.D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50(1) Harv. Int. L.J. 1.

[28] The ICJ has determined that diplomatic protection can only arise when there is a *genuine link* between state and individual in its landmark *Nottebohm Case.* "Liechtenstein brought a claim on his behalf (Nottebohm) against Guatemala before the International Court of Justice, but failed. The Court held that the right of protection arises only when there is a genuine link between the claimant state and its national, and that there was no genuine link between Nottebohm and Liechtenstein." in P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th, Routledge, New York 1997), p. 243.

[29] K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (1st, Cambridge University Press, 2011), p. 29.

[30] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 25 Ottawa L.R. 607.

[31] Article 1. UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, UNTS vol. 360.

[32] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th, Routledge, New York 1997), p. 264.

[33] Ibid. p. 264.

[34] K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).

[35] D.E. Arzt, 'The Right to Compensation: Basic Principles Under International Law' (Palestinian Refugee Research Net 1999), < http://prrn.mcgill.ca/research/papers/artz4.htm > accessed September 17th, 2015.

[36] It should be noted, however, that stateless individuals have the ability to access redress at the international and regional levels before human rights mechanisms, such as the Human Rights Committee (international level) and the European Court of Human Rights, the Inter-American Commission and Court, the African Commission on Human and People's Rights, among others. Individuals—as victims—also have access before the International Criminal Court. None of these mechanisms require the state of nationality to 'protect' the individuals. However, these mechanisms are within the domain of human rights law and international criminal law, while inter-state claims for internationally wrongful acts fall in a completely different area of international law.

2.2. The 'traditional approach'

The 'traditional' framework for diplomatic protection developed during the early years of international law, a time where the individual had no rights and played no role in the international legal order, which was highly state-centred.[37] For this reason, diplomatic protection was 'traditionally' considered an exclusive right of the state.[38] Therefore, if a national was injured outside of his/her state of nationality, protection could only be ensured through a 'fiction':[39] that an injury to a national is an injury to the state.[40] Diplomatic protection, which is strongly based in the writings of Vattel,[41] refers to a state's ability—and right[42]—to take up a claim on behalf of its nationals, which serves as a mechanism that ensures reparations for victims of a wrongful act.[43] A state's ability to exercise diplomatic protection is considered—under international custom[44]—an essential tool for the protection of its nationals in terms of their human rights and their property and economic resources, and at times can be "the only effective instrument for enforcing"[45] these rights. Diplomatic protection "can take the form of negotiation, mediation, conciliation (including through a conciliation commission), arbitration, adjudication…"[46] and when reparations are owed, payments—typically a lump sum[47]—are made by the liable state to the state[48] in its name, not in the victims' name. The state then usually (but not always) pays the victims.[49] It is therefore the state, rather than the individual, who controls the claims process[50] in the 'traditional approach' to diplomatic protection. Diplomatic protection is based on the premise that "an injury to a national is an injury to the state itself,"[51] which entitles the state to seek redress for the offense through diplomatic protection. Furthermore, when a state takes up a claim of one of its nationals, the claim is "automatically raised to the international plane resulting in international rights and obligations."[52] Traditionally, diplomatic protection

[37] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 25-26
[38] Ibid., p. 25
[39] The doctrine of the 'fiction' regarding diplomatic protection was developed by the PCIJ in its landmark *Mavrommatis* case
[40] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 25-26
[41] Vattel discussed the principle of diplomatic protection in his book *The Law of Nations, or the Principles of Natural Law* , stating that "Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen" E. Vattel, *The Law of Nations, or the Principles of Natural Law, Classics of International Law, Book II, Chapter VI*, p. 136 (ed. C. Fenwich transl. 1916) as cited in J Dugard, 'Articles on Diplomatic Protection' (United Nations Audiovisual Library of International Law 2006) <http://legal.un.org/avl/ha/adp/adp.html > accessed September 17th, 2015.
[42] However, the state does not have the *obligation* to take up a claim on behalf of one of its nationals against another state.
[43] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 25
[44] K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).
[45] Ibid.
[46] D.E. Arzt, 'The Right to Compensation: Basic Principles Under International Law' (Palestinian Refugee Research Net 1999), <http://prrn.mcgill.ca/research/papers/artz4.htm> accessed September 17th, 2015.
[47] F.E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 Harv. Negotiation L. Rev. 171.
[48] M. Frigessi di Rattalma & T. Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), p. 8.
[49] D.E. Arzt, 'The Right to Compensation: Basic Principles Under International Law' (Palestinian Refugee Research Net 1999), <http://prrn.mcgill.ca/research/papers/artz4.htm> accessed September 17th, 2015.
[50] M. Frigessi di Rattalma & T. Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), p. 8.
[51] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 23; see also A. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) EJIL, pp. 37-38
[52] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.

encompassed "both the economic interests and the treatment of individuals abroad"[53], the latter which would cover any violations of the individual's human rights.

There is a body of case law of fundamental value for legal doctrine on diplomatic protection. The PCIJ, in its landmark *Mavrommatis* case, elaborated on the concept of diplomatic protection, stating that "it is an elementary principle of international law that a State is entitled to protect its subjects when injured by acts contrary to international law committed by another State."[54] In turn, by resorting to diplomatic protection, "a State is in reality asserting its own rights"[55] and the respect for international law. For this reason, under the 'traditional approach', the state has the right to assert claims for violations—internationally wrongful acts—incurred by its nationals in the hands of another state. However, it should be kept in mind that *Mavrommatis* does not necessarily reflect current perspectives on diplomatic immunity, since the judgment on the case was issued in 1924, a time when states were the "single and most important subject(s) of international law."[56] At the time, the doctrine of the 'fiction' which gave the state the necessary *locus standi* to espouse a claim of its nationals was essential, since individuals had no other mechanisms to turn to which would bring them redress for the violations they suffered. Another landmark case of important significance for diplomatic protection is the *Panevezys-Saldutiskis Railway Case.* In this case, the PCIJ pronounced itself on the issue of nationality[57] and diplomatic protection stating that "it is the bond of nationality between the State and the individual which…confers upon the State the right of diplomatic protection."[58] In other words, without the existence of this bond of nationality, the state does not have the *locus standi* it needs in order to bring claims against another state.[59] Nationality is an essential element for the possibility of the state to exercise diplomatic protection, since without that bond, the 'fiction' of the injury against the state resulting from an injury towards one of its nationals would be impossible. For this reason, under the 'traditional approach', stateless persons would be excluded from benefitting from diplomatic protection. In *Nottebohm*, the International Court of Justice (ICJ) stated that "Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the State."[60]

However, there have been exceptions to this rule. The ICJ, as early as 1949 in its *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion*, stated that "there are cases in which protection may be exercised by a State on behalf of persons not having its nationality."[61] As it was previously mentioned, diplomatic protection was initially an exclusive right of the state.[62] While this

[53] F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, p. 5

[54] *Mavrommatis Palestine Concessions (Greece v. UK)* [1924] PCIJ ser. B No. 3, para. 21.

[55] *Mavrommatis Palestine Concessions (Greece v. UK)* [1924] PCIJ ser. B No. 3, para. 21; *Panevezys-Saldutiskis Railway Case (Republic of Estonia v. Republic of Lithuania)* [1939] PCIJ, Ser. A/B, No. 76, p. 16; see also, for example, the *Avena and Others Case* before the ICJ, where Mexico asserted "its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its nationals, as a result of the violation by the United States" *Avena and Other Mexican Nationals (Mexico v. United States of America),* 'Judgment' [2004] ICJ, (p. 35-36).

[56] F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, p. 1-2

[57] "This nationality must, according to leading opinion, be present both at the time when the practice in breach of international law took place as well as at the time protection is to be exercised." K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).

[58] *Panevezys-Saldutiskis Railway Case (Republic of Estonia v. Republic of Lithuania)* [1939] PCIJ, Ser. A/B, No. 76, p. 16

[59] H. Lauterpacht, in E. Lauterpacht (ed.) *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol. 1* (CUP, 1970), pp.401-402 as cited in C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 25 Ott. L.R. 607

[60] Nottebohm Case (Liechtenstein v. Guatemala) 'second phase' [1955] ICJ, ICJ Reports 1955, p. 24

[61] *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* [1949] ICJ, p. 181;

[62] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 25

continues to be true—since only states can exercise diplomatic protection over individuals—it is undeniable that the role of the state as the link between the individual and international law, and thus redress under international legal channels, has eroded. Developments in the areas of diplomatic protection, claims mechanisms and human rights law have contributed to this. The following sections (2.3 and 2.4) will discuss some of these developments, and section 3 will focus on the UNCC, which sets a valuable precedent in this field of international law.

2.3. Recent developments: draft articles on diplomatic protection

In the present day, the customary international law on diplomatic protection which developed throughout the 20th century has been largely codified by the International Law Commission (ILC) in its *Draft Articles on Diplomatic Protection.*[63] In its commentary to the Draft Articles, the ILC stated that through diplomatic protection, a state is asserting not only its own rights but also that of its national who has been injured by another state.[64] It is clear, therefore, that the 'fiction' of the state being injured by an injury to its nationals continues to be present. Draft Article 8, however, is "an exercise in progressive development of the law"[65], as it departs from tradition by allowing a state to exercise diplomatic protection over a non-national (a stateless person or a refugee). The condition is that the non-national in question is "lawfully and habitually resident in that State both at the time of injury and at the date of the official presentation of the claim."[66] Therefore, the *dictum* that no state can protect a stateless person "no longer reflects the accurate position of international law for both stateless persons and refugees. Contemporary international law reflects a concern for the status of both categories of persons."[67] However, it should be pointed out that the article mentions that a state *may* protect non-nationals, which reflects the fact that the state has discretion on the matter.[68] These articles were drafted long after the UNCC first began to function, and therefore the provisions in this article did not have any impact in the UNCC's framework or practice. It would be, however, interesting for future research on this topic to seek to determine whether the UNCC's practice influenced the Draft Articles in any way.

2.4. Diplomatic protection and its interaction with human rights

According to Vermeer-Künzli, there is "no doubt that the injury that stands at the basis of the exercise of diplomatic protection is an injury of individual rights."[69] The tenets of 'traditional' diplomatic protection can conflict with "the fundamental premises of human rights claims, notably the autonomy of the individual to seek redress for injury"[70] under international law,[71] regardless of nationality or lack thereof. At the same time, the increasing ability of individuals to access dispute settlement mechanisms confronts the 'traditional' doctrine diplomatic protection.[72] For example, stateless persons have been able to access justice and seek redress for violations suffered before various international legal mechanisms.[73] Since often the perpetrator of human rights abuses is the state of

[63] A. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) EJIL, pp. 37-38
[64] International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, p. 23
[65] Ibid., p. 48
[66] Ibid., p. 49
[67] Ibid., p. 48
[68] Ibid., p. 51
[69] A. Vermeer-Künzli, 'As If: The Legal Fiction in Diplomatic Protection' (2007) 18(1) EJIL, p. 40
[70] D.J. Bederman, 'State-to-State Espousal of Human Rights Claims' (2011) 1 Va J Int'l L 3, p. 5
[71] Ibid., p. 6
[72] F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, p. 1-2
[73] Such as the Inter-American Court of Human Rights (i.e. *Yean and Bosico case* and the *Expelled Dominican and Haitians case*), the European Court of Human Rights (i.e. the *Kim v Russia case*, *Karassev case*), the African Committee on the Rights and Welfare of the Child (i.e. *Nubian children case*) the African Commission on Human and People's Rights. This is true even

nationality or habitual residence, under international law the victim does not need to rely on his/her state of nationality or habitual residence to obtain redress before international legal mechanisms like regional human rights courts, UN semi-judicial mechanisms or international criminal tribunals. As a matter of fact, in many cases victims are bringing claims of human rights abuses *against* their state of nationality or habitual residence.

According to Orrego Vicuña, "The law of human rights…opened up a clear path for the direct access of the individual to international mechanisms for the assertion of claims".[74] However, due to the significant developments in human rights law, and the fact that it has developed into a legal domain of its own, "…the argument that this area of the law is different from that relating to diplomatic protection has also been suggested".[75] Orrego Vicuña suggests that, in light of the increasing role of the individual under international law and the ever decreasing role of the state in protecting its nationals for the purpose of seeking redress for human rights violations, diplomatic protection could remain to "safeguard of the economic interests of the individual."[76] Adding to this idea, according to Bederman, "diplomatic protection is largely indifferent to human rights claims; it is more concerned with the property interests of a national who is situated in a foreign State."[77] As it was previously mentioned, diplomatic protection encompassed the protection of the individual's economic interests and the individual's treatment.[78] While today diplomatic protection in the field of protecting the individual's treatment is no longer necessary due to the significant developments in the domain of human rights, diplomatic protection remains relevant regarding the protection of economic interests. At the time when the UNCC was created, human rights mechanisms were already in existence, and it would have been possible for the UNSC to create a mechanism like an *ad hoc* tribunal[79] to hear cases on the human rights violations suffered by the victims. However, as section 3 will show, the UNCC was created with a very specific mandate: to give financial compensation to victims for loss of income and property resulting from Iraq's belligerent invasion of Kuwait.

3. The United Nations Compensation Commission (UNCC)

3.1. The UNCC

On August 2, 1990, Iraq invaded Kuwait, resulting in an international armed conflict, the Gulf War. The violation of Kuwait's territorial sovereignty resulted in Iraq's international responsibility[80] for violations of the laws and customs of armed conflict (*jus in bello*) and for an act of aggression against another state. Acting under its powers in Chapter VII of the UN Charter, the UNSC established Iraq's liability[81] and set up the UNCC, which would grant *financial* compensation to victims who incurred

before international criminal tribunals, such as the International Criminal Court, which is the first international criminal tribunal which allows victims to participate in the proceedings and to seek and obtain redress for the violations suffered, irrespective of nationality or lack thereof. Furthermore, the Extraordinary Chambers in the Courts of Cambodia allows victims to participate as parties in the proceedings—as *partie civiles*—and stateless victims are currently parties to the proceedings in *case 004.*

[74] F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, p. 4

[75] Ibid., p. 5

[76] Ibid., p. 5

[77] D.J. Bederman, 'State-to-State Espousal of Human Rights Claims' (2011) 1 Va J Int'l L 3, p. 5

[78] F. Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, p. 5

[79] Which it later on did, with the creation of the ICTY and ICTR

[80] G. Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 973 Loy. L.A. Int'l & Comp. L. Rev.

[81] See also UN Security Council (UNSC) Res. 674 (29th October 1990), para. 8.; UN Security Council (UNSC) Res. 686 (2nd March 1991), para. 2(b); UN Security Council (UNSC) Res. 687 (3rd April 1991), para. 16; G. Townsend, 'The Iraq Claims Process: A

"any loss, damage or injury…as a [direct] result of the invasion and illegal occupation..."[82] and would be funded by the proceeds of Iraqi oil. The UNCC was not set up as a court or a tribunal,[83] since Iraq's liability had been determined by the UNSC, and is of an administrative rather than judicial nature.[84] The acts for which compensations were due included "arbitrary killings, torture, enforced disappearance, and the seizure and destruction of property"[85] among others. Claims are categorized into six categories (A-F), with categories A-C corresponding to claims by individuals.[86] Regarding individual claims, successful claims are paid to the government, and the government in turn compensates the individuals within six months.[87] Some authors have noted that the role of the state submitting claims to the UNCC on behalf of its nationals is an *administrative* role,[88] rather than a role of providing diplomatic protection in the 'traditional' (inter-state claims) sense. However, only states and international organisations have competence *ratione personae* to submit claims before the UNCC on behalf of individuals, corporations or on their own behalf.[89] Therefore, when "seeking compensation, individuals […] rely on their state of nationality"[90] which is in line with 'traditional' diplomatic protection. For this reason, stateless persons were initially unable to file claims for compensation.

The UNCC was based on three existing models, namely "(1) the Iran-U.S. Claims Tribunals, (2) a variety of government-sponsored compensation programs, (3) and a broad range of claims resolution facilities from other contexts."[91] These mechanisms follow the 'traditional' diplomatic protection approach, which requires the state of nationality to file claims on behalf of its nationals. Furthermore, The UNCC's procedural requirement of having states submit claims was largely based on the fact that processing individual claims would require the UNCC to process a very large number of claims, a process which can take an exceedingly long period of time and can result in "inequalities in the filing of claims disadvantaging small claimants."[92] However, in some respects, the UNCC has departed from the 'traditional approach' of diplomatic protection and has developed its own approach to fit its needs. One very obvious departure is the fact that its authority is based on UNSC resolutions, while the 'traditional' legal basis for diplomatic protection is a state's obligation to protect its nationals.[93] With these departures from the 'traditional' approach, even though it is based on mechanisms that follow

Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 973 Loy. L.A. Int'l & Comp. L. Rev.

[82] UN Security Council (UNSC) Res. 674 (29th October 1990), para. 8; However, "although this is not expressly spelled out it means losses arising out of Iraq's violation of jus ad bellum. The UNCC therefore does not look at whether a loss was caused by a violation of international humanitarian law. However, it is possible that the circumstances of the invasion and occupation, that many of the claims for which compensation is awarded, such as death, torture, personal injury, mental pain and anguish, hostage-taking, and loss and damage to real and personal property, are factually based on violations of international humanitarian law" in E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[83] C.R. Payne & P.H. Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (1st, OUP, 2011); United Nations Secretary General, *Report of the Secretary General pursuant to paragraph 19 of Security Council Resolution 687 (1991),* (1991) UN. Doc. S/22559 para. 20

[84] Ibid.

[85] C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (1st, CUP, 2012), p, 22.

[86] C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, CUP, 2012), p. 141.

[87] G. Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 973 Loy. L.A. Int'l & Comp. L. Rev.; H. Van Houtte, H. Das & B. Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed) *The Handbook of Reparations* (OUP, 2006), p. 362.

[88] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.

[89] D. Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2005) 4(1) The Law & Practice of International Courts and Tribunals 107.

[90] C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (1st, CUP, 2012), p. 22.

[91] F.E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 Harv. Negotiation L. Rev. 171.

[92] United Nations Secretary General, *Report of the Secretary General pursuant to paragraph 19 of Security Council Resolution 687 (1991),* (1991) UN. Doc. S/22559, para. 21

[93] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.

the 'traditional approach' and keeps elements of this approach, it is possible to say that the UNCC "is *sui generis* and its holdings *lex specialis*."[94] The following section will explore the UNCC's approach to addressing the challenges that statelessness posed for many victims of the invasion of Kuwait by Iraq.

3.2. Addressing statelessness at the UNCC

When the UNCC was created, there was a desire to ensure that all those who had been injured by the invasion of Kuwait by Iraq would "have recourse to a remedy, regardless of nationality, or more importantly, non-nationality."[95] It was clear that some individuals would not be able to have claims filed on their behalf, among which Palestinians represented the largest group. It was felt that the international community bore the responsibility to protect their interests,[96] and thus under Article 5.1 of the UNCC's Rules, it was permitted for a government to "[…] submit claims on behalf of its nationals and, at its discretion, of other persons resident in its territory."[97] Additionally, the UNCC allowed for a "widening of the definition of "resident", by allowing states to determine their own definition."[98] Some states were willing to adopt a more expansive definition, while other continued to adhere to the 'traditional' rule of diplomatic protection and submitted claims only on behalf of their own nationals.[99] Part of the requirements for individuals to be able to file claims through this mechanism was to legally reside in the country where they were at the moment of filing the application, meaning that many were unable to file claims. Since clearly some states might be unwilling or unable to submit claims on behalf of stateless persons, Article 5.2 of the Rules states that an appointed body or authority can submit claims on behalf of individuals who cannot have their claims submitted by their state.[100] Therefore, three UN agencies, the UN Development Programme (UNDP), UN Relief and Works Agency for Palestine Refugees (UNRWA) (whose mandate focuses on Palestinian refugees[101]), and UN High Commissioner for Refugees (UNHCR) were appointed to submit claims on behalf of stateless individuals.[102] For example, Canada[103] was willing to submit claims on behalf of stateless persons and refugees who had a claim to compensation before the UNCC, as long as these individuals met the residency criteria.[104] However, those who did not meet the criteria were able to file claims through UNHCR in Canada.[105]

In 2001, a "late claims"[106] program was established, taking care of Palestinians who had been unable to file claims during the regular period.[107] Under the late claims program, the Palestinian Authority

[94] F.E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 Harv. Negotiation L. Rev. 171.
[95] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.
[96] UNCC Governing Council, S/AC.26/1991/5 (23 October 1991), p. 4
[97] UNCC Governing Council, S/AC.26/1992/10 (26 June, 1992), p. 5
[98] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.
[99] Ibid.
[100] UNCC Governing Council, S/AC.26/1992/10 (26 June, 1992), p. 5.
[101] L. Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28 (2-3) Refugee Survey Quarterly 452.
[102] C.R. Payne & P.H. Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (1st, OUP, 2011), p. 9.
[103] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.
[104] Article 8 of the ILC's Draft Articles on Diplomatic Protection reflects this norm.
[105] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa LR 607.
[106] L.A. Taylor, 'The United Nations Compensation Commission' in C. Ferstman, M. Goetz, & A. Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), p. 202
[107] D. Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2005) 4(1) The Law & Practice of International Courts and Tribunals 107.

(PA) was able to submit approximately 46,400 claims.[108] The Working Group of the (Governing) Council of the UNCC "considered the request of the Permanent Observer Mission of Palestine to the United Nations Office at Geneva concerning the filing of a number of Palestinian 'late claims'."[109] The Working Group was concerned that many individuals would be left without redress, and recommended that the UNCC Governing Council "register the 1,318 claim files collected by the Palestinian Authority for filing with the Commission" and that the PA be allowed to submit claims on behalf of "other individuals who were similarly affected and unable to file claims within the filing deadline." It is apparent that these decisions were a result from an initial request by the PA, which showed its willingness to file claims on behalf of stateless persons under their jurisdiction. This was an unprecedented occurrence, as it appears that the PA was able to exercise state powers and submit claims, even though initially only states could file claims.[110] In 2004, a "special accelerated program"[111] was created for Bidoon stateless persons living in Kuwait.[112] While three UN agencies were able to file claims on behalf of Palestinians, "no government or international organisation took responsibility for filing claims on their [the Bidoon's] behalf."[113] However, Kuwait requested to the UNCC's governing council[114] to be allowed to file claims on their behalf.[115] Under this program, the government of Kuwait was able to submit approximately 32,000 claims on behalf of Bidoons.[116] It should be noted that the UNCC's Governing Council—as a norm—generally did not allow for late claims to be filed.[117] However, it is clear that special cases—like the cases of stateless individuals—were taken into account. As it was previously mentioned, the UNCC wanted to ensure that every victim of Iraq's belligerent act against Kuwait would be compensated, and these exceptions made this possible.

4. Discussion

The UNCC's work has been hailed as an innovative "departure from previous war reparations practice"[118] for its various special measures. However, the UNCC's practice has not changed the

[108] L.A. Taylor, 'The United Nations Compensation Commission' in C. Ferstman, M. Goetz, & A. Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), p. 202; United Nations Security Council, *Report and recommendations made by the Panel of Commissioners concerning the first instalment of Palestinian "late claims" for damages up to USD 100,000 (category C claims)* (2003) S/AC.26/2003/26, p. 4

[109] United Nations Security Council, *Report and recommendations made by the Panel of Commissioners concerning the first instalment of Palestinian "late claims" for damages up to USD 100,000 (category C claims)* (2003) S/AC.26/2003/26, p. 4

[110] Palestine has several of the characteristics required for statehood (territory, population, government, among others) and in the present day enjoys some degree of recognition as a state within the international community. Several states recognize Palestine as a state. Furthermore, in 2012 Palestine was upgraded to "non-member observer state" at the United Nations and has acceded to various international treaties, including the Rome Statute of the ICC which only allows states to become parties. However, Palestinians are often considered stateless persons, but not due to lack of a legal link with a state, but due to their state's lack of full-statehood. However, at the time when the UNCC was formed, this was not the case, and Palestine did not enjoy the level of recognition as a state as it does in the present.

[111] L.A. Taylor, 'The United Nations Compensation Commission' in C. Ferstman, M. Goetz, & A. Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), p. 202

[112] Ibid., p. 202.

[113] T.J. Feighery, C.S. Gibson, & T.M. Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (1st, OUP, 2014), p. 126

[114] One of the conditions was that, under paragraph 1.e, claimants "have not held the nationality of any State during the period from 1 January 1992 to 1 January 1996" in UNCC Governing Council, *Decision concerning the filing of "late" claims of the "Bidoon" taken by the Governing Council of the United Nations Compensation Commission at its 137th meeting, on 2 July 2004.* (2 July, 2004) S/AC.26/Dec.225.

[115] T.J. Feighery, C.S. Gibson, & T.M. Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (1st, OUP, 2014), p. 126.

[116] L.A. Taylor, 'The United Nations Compensation Commission' in C. Ferstman, M. Goetz, & A. Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), p. 202.

[117] F. Woolridge & O. Elias, 'Humanitarian considerations in the work of the United Nations Compensation Commission' (2003) 85(851) I.R.R.C. 555.

[118] Ibid.

international law of diplomatic protection[119] but rather has deviated from it, creating—at least in the domain of claims mechanisms—a new model to be applied in special circumstances. This is evident if compared with other claims mechanisms and tribunals of a similar nature which strictly required the state of nationality to bring claims on behalf of its nationals. The UNCC's departure is not absolute; it still required a state or an 'entity' to file claims on behalf of individuals. However, the fact that it did not strictly require the state of nationality to carry out this function, and sought solutions to ensure that those who could not have their state of nationality—due to their statelessness—file claims on their behalf through other 'entities' was new. In this sense, its practice was also not in line with the human rights mechanisms existing at the time. Furthermore, the UNCC predates mechanisms like the International Criminal Court (ICC) (see note 73) which, like human rights mechanisms, does not require a state to 'assist' the individual.[120] It also predates instruments like the ILC's Draft Articles on Diplomatic Protection which have incorporated exceptions to the norms regarding diplomatic protection of non-nationals.

The UNCC's model contains special elements which effectively addressed the challenges arising from the statelessness of some victims of the war. These elements, namely the fact that UN agencies were permitted to file claims on behalf of stateless persons, were an unprecedented development. Overall, the UNCC's approach can be deemed to be highly flexible, as it has given states the opportunity to file claims on behalf of individuals for whom they would normally be unable to file claims upon their request, as was the case with Kuwait filing claims on behalf of the Bidoon. This shows that the UNCC also takes the state's disposition into account. However, had Kuwait been unwilling to take on the task of filing claims on behalf of the Bidoon, it is possible that the UNCC would have appointed a UN Agency instead. Furthermore, even though Palestine's statehood is undecided, Palestine was given the power to file claims on behalf of some Palestinians. This further exemplifies the great flexibility of the UNCC's approach, since in the 'traditional' model, statehood is essential in claims processes. When a state was unwilling or unable to file claims, UN agencies were appointed to this task. This was, at the time, an innovative and unprecedented approach.

Furthermore, through the work of the UNCC, humanitarian considerations began to enjoy a more central role in war reparations processes, a trend which has continued to the present day and will most likely continue in the future.[121] In fact, according to Frigessi di Rattalma and Treves, all "these departures go in the direction of the humanization of the international law of state responsibility."[122] The individual, as a victim, is beginning to gain a more central role in the international law of state responsibility as the benefactor of compensation efforts, rather than as a means for the state to assert its rights vis-à-vis another state under international law. The UNCC's practice is in line with a trend that began to develop in the 20th century with the creation of human rights mechanisms, in the 1990's with the establishment of the two *ad hoc* tribunals and in the present day with the creation of mechanisms like the ICC and other tribunals like the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia. The UNCC has also been an important contribution to claims resolution practices.[123]

[119] C. Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 25 Ottawa. L.R. 607.

[120] However, it should be noted that while in human rights mechanisms such as regional human rights courts and UN semi-judicial mechanisms individuals are, as claimants, parties to the proceedings, victims are not parties, but participants, in the proceedings before the International Criminal Court.

[121] F. Woolridge & O. Elias, 'Humanitarian considerations in the work of the United Nations Compensation Commission' (2003) 85(851) I.R.R.C. 555; H. Van Houtte, H. Das & B. Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed) *The Handbook of Reparations* (OUP, 2006), p. 341.

[122] M. Frigessi di Rattalma & T. Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), p. 8.

[123] H. Van Houtte, H. Das & B. Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed) *The Handbook of Reparations* (OUP, 2006), p. 341.

According to McGovern, the UNCC should serve as a model for future claims commissions due to its ability to accommodate to the various types of claims[124] and to the various needs of the victims. While this would be indeed correct since its practice has ensured that—at least on paper—every victim, regardless of nationality or lack thereof was able to obtain redress, this research has shown that a mechanism of a similar nature might not be as relevant in the future as it was in 1991 when it was created. Various international human rights mechanisms exist today, in addition to various international criminal tribunals, perhaps a mechanism of this kind may not be the best alternative. Taking into account the fact that bringing justice to victims is an important part of any transitional justice mechanism, creating a mechanism that only compensates victims since liability has been established beforehand might not be the best mechanism to fulfil this task. However, if in the future, a situation where liability is once again established by the UNSC—which is one of the bodies, if not the only body, with the power to do this—and it decides to establish a mechanism to only compensate victims, then the UNCC's approach would be an important precedent to take into account, especially if stateless persons are among the victims.

5. Conclusion

Nationality will continue to be an important element of claims for internationally wrongful acts as long as states continue to be the main actors,[125] and so the 'traditional approach' will continue to be a challenge for stateless individuals regarding the vindication of their rights under international law[126] through diplomatic protection. However, the precedent set by the UNCC clearly shows that challenges posed by lack of nationality can be overcome through special measures in cases where nationality is a requirement for access to reparations, such as claims mechanisms. The UNCC's model—allowing states and UN agencies to file claims on behalf of stateless individuals—is an adequate model to follow in future mechanisms of a similar nature, in other words mechanisms of an exclusively compensatory nature, due to its humanitarian, flexible and adaptive approach to the issue of access to redress for stateless victims. The humanization of claims mechanisms, which has clearly been a key component of the UNCC's mechanism, will continue to contribute to the enforcement of the rights of victims by establishing special procedures to accommodate to their needs. However, mechanisms of this nature are not the only option, and it is unlikely that a similar mechanism will be needed in the future, considering the other options that exist under international law. What cannot be doubted, is that for all wrongs to be effectively righted, it is essential for restorative mechanisms to ensure that all victims, including stateless victims—the legal ghosts of the world—have access to redress for the violations they suffered.

[124] F.E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 Harv. Negotiation L. Rev. 171.

[125] K. Hailbronner, 'Nationality in Public International Law and European Law' in R. Bauböck (eds), *Acquisition and Loss of Nationality : Policies and Trends in 15 European Countries* (1st, AUP, 2006).

[126] E.C. Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) I.R.R.C. 529.