4. The position of individuals in public international law through the lens of diplomatic protection: the principle and its transfiguration

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In this contribution we endeavour to examine the legal status of individuals from the perspective of diplomatic protection, with the purpose of ascertaining whether the asserted evolution of the latter has had any impact on the international personality of the former. To this end, we will firstly sketch two different definitions of the international personality, and then the main features of diplomatic protection, in its traditional construction as well as in its 'transfigured' form, will be scrutinized.

1. GENERAL REMARKS

Generally speaking, the individual is seen by international law in two different, yet complementary, perspectives. In the first, which can be labelled 'traditional', the individual is taken into consideration as an 'object', that is, an extension of States' jurisdiction; viewed from this angle, they can be the source of a dispute between States as they crystallize the collision between their sovereignties. Therefore, international law is not at all concerned with individuals outside this specific situation; indeed, the regime which applies to them is governed by the national jurisdiction of the State of which they are nationals; in other words, the relationship between a national and its State belongs to the latter's *domaine réservé*.

The second approach, which can be termed the new approach, or *nouvelle vague*, since it came chronologically after the first one, is tacked on to it, without, though, replacing it. We are talking of the widely known – and highly publicized – law related to human rights. According to this perspective – which encompasses the wide and deeply specialized body of rules related to the human rights – a person is protected not as an appendix of a State's sovereignty, but as a holder of human dignity vis-à-vis any State, including, most importantly, the one of which he (or she) is a national.

The two approaches underline, beyond their fundamental differences, the emergence of the individual on the stage of International Law, whose status evolved from that of an 'object' (a mere accessory of his/her own State) to 'subject'. From the diplomatic protection – which best highlights the first approach – through the protection of minorities, up to the international protection of human rights, this legal development shows the penetration of international law into the State's own national jurisdiction, and, at the same time, the latter's shrinking.[1] What was once governed by the State's national jurisdiction is from then onwards determined by International Law, the rules of

which are created – directly and indirectly – by States that have then willingly given up their exclusive legal regulation with regard to individuals to International Law.

2. INTERNATIONAL LEGAL PERSONALITY: A FICTION, YET AN INDISPENSABLE ONE

Sir Robert Jennings wrote wisely that attempts that have been made in the past to define this hazy concept have left 'room for dubiety'.[2] Still, we do need this concept, and, in its wake, a list of subjects must be established. It goes without saying that this list varies according to the definition, so that we can have as many lists as concepts. Therefore, it is safe to say that this question relates to the dogmatics of Law, since its resolution depends upon the dogma that has been chosen. Of course, this does not mean that the dogma of the definition can be arbitrarily selected and construed – there are several axioms that exist in the scientific literature. Without going into technicalities, we can offer two of them here, in the light of which we will examine the international legal personality of the individual as it appears in the mechanisms of diplomatic protection. The first axiom can be labelled as 'democratic' (or extensive), since it allows a large number of candidates to be admitted onto the international legal scene, whilst the other can be named as 'elitist' (or restrictive), as it involves meeting higher requirements . Before reviewing each of these, we should remind ourselves, in the wake of the ICJ's famous 1949 advisory opinion, that firstly, '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community', and, secondly, 'the development of international law… and the requirements of international life [have] already given rise to instances of action upon the international plan by certain entities which are not States'.[3] Therefore, even if we adopt a fixed axiom of definition of international personality, the list which flows from it is not correspondingly mummified, but on the contrary will vary according to the needs of the international community.

3. THE EXTENSIVE DEFINITION OF INTERNATIONAL PERSONALITY

As for this axiom, to 'possess international personality' amounts – according to the famous ICJ's *ratio decidendi* – to enjoying the 'capacity … [to]bring an international claim against … another direct subject of international law'.[4] This legal capacity is thus recognized by a customary law rule and vested with all unchallenged subjects of the international order. This formulation flows from an analogy with the municipal order; even though it contains a slight hint of tautology, it is widely resorted to, in order precisely to distinguish, within the context of the legal position of the individual, between the beneficiary of a right and its (true?) holder. In the *Lac Lanoux Case*, the Arbitral Tribunal correctly stresses this distinction:

> L'Accord du 27 mars 1972 est un traité conclu entre deux Etats souverains qui crée des droits et des obligations réciproques dans le chef de ces deux Etats. S'il est vrai que, selon la terminologie utilisée par l'Accord, le droit de 'continuer à pêcher' est destiné à profiter à des 'bâtiments de pêche' (article 3), à des 'embarcations de pêche' (article 4, a) et à des 'chalutiers' (article 4, b), les Etats signataires de l'Accord n'en sont pas moins les seuls titulaires de ces droits de pêche au plan du droit international public et les seuls sujets de droit habilités à en exiger le respect au bénéfice de leurs ressortissants respectifs.[5]

Therefore, the acid test of the international personality resides in the actual and universal (i.e. *erga omnes*) 'capacity to maintain its own rights by bringing international claims'.[6] This capacity must then be embodied in a general rule of international law, or alternatively enshrined in an international treaty so widely ratified and adhered to that it has yielded a corresponding general norm.

4. THE RESTRICTIVE DEFINITION OF INTERNATIONAL PERSONALITY

It has been suggested that there are three capacities[7] which have to be possessed by a legal entity for it to be considered as a subject of international law – the capacity to: (a) make a treaty;[8] (b) establish diplomatic relations;[9] and (c) bring an international claim on a general (and not exclusively treaty) basis.[10] One of the main reasons which leads us to define these three requirements flows from the empirical observation that all the actual (and undisputed) subjects of international law – be they States, international organizations, national liberations movements, insurgents, the ICRC, Vatican, etc. – possess at least, regardless of their differences in nature, origin and the 'extent of their rights',[11] the aforementioned capacities. They could not play on the international legal stage without them. Hence, the fulfilling of these three qualities reveals their independence vis-^-vis other subjects of international law; the (actual) horizontal structure of the international order make these capacities the true test of their real international legal personality. For example, whilst the State has an original independence in its sovereign status, international organizations are independent because this quality is recognized by a customary international law rule (generated by treaty-practice), and so on for the other subjects. Independence is, then, for all subjects of international law what sovereignty is for the State: the measure and the essence of international personality.

5. INTERNATIONAL LEGAL ORDER AND THE INDIVIDUAL: SYSTEMIC PREMISES

International Law remains, even today, fundamentally an inter-State legal order deeply rooted in the territorial obsession. The legal position of individuals, notwithstanding recent and epochal developments, cannot be scrutinized but on this historical and empirical determination. From a historical standpoint, modern international law has emerged as a *ius inter potestates* (i.e. law between sovereign entities). One of the main features – if not the principal one (see Art. 2(1) of the UN Charter) – is 'the right to

exercise therein [in regard of a portion of territory], to the exclusion of any other State, [all] the functions of a State'.[12] Accordingly, States are recognized by International Law to be vested with the legal power to regulate the social phenomena within their boundaries and to respect reciprocally such a right vis-à-vis other sovereign States. Therefore, International Law does not take into account the individual by him/herself, but as an object entirely submitted to the sovereign power of its State. However, when an individual finds him/herself in the territory of a State of which he/she is not a national (and is thus an alien), their legal position falls within the province of international law. Indeed, the law must resolve a paramount conflict between two different, yet flowing from the same source (i.e. sovereignty), State jurisdictions, namely the territorial and personal. Thus, the mere presence of an individual in a foreign territory engenders a divorce between these two jurisdictions (which are then no longer united with respect to the rights held by an alien). Hence, both States are bound, each on its own side, to exercise their power, leading thus to a conflict of sovereignties: a typical conflict of competing exercise of jurisdictions. This legal puzzle has been solved by a set of customary international law rules, largely determined by a voluminous jurisprudence, which has established respective rights and obligations for both States, as well as by a highly sophisticated mechanism called 'diplomatic protection'. Broadly speaking, the national State has on one hand the right to require, in its own interest, that the other States respect their international duties (related to aliens), but on the other, it must refrain from directly protecting its own nationals on other States' territory, especially if such measures involve the use of force. The foreign State must, on one hand, abide by the aforementioned international legal obligations, yet on the other it has the right to submit any alien to its territorial jurisdiction. By way of consequence, it has the right require that the other States do not intervene in order to rescue their nationals.

Therefore, the traditional approach amounts to a conflict of sovereignties, and the individual barely plays any role in it. Hence, traditional International Law does not protect technically the individual as such, but the State's interest or right infringed *through* its own national. In other words, the individual legal position is regulated by International Law only if he or she is an alien, that is, an object belonging to the State. To sum up, States are under the obligation to respect and ensure respect of aliens – be they persons or corporations – which are under its jurisdiction vis-à-vis any violation of rights pertaining to that specific set of rules called the 'droit des étrangers'. In the oft-quoted *Island of Palmas Case*, the sole arbiter declares:

> Territorial Sovereignty … involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States, in particular the right to integrity and inviolability in peace and in war, together with the rights each State may claim for its nationals in foreign territory.[13]

The general and paramount duty of the State – as delineated by this excerpt – clearly supports the functional character of sovereignty, its social aim being the Empire of Law on any parcel of a State's territory. Hence, due to its fundamentally horizontal structure, International Law appears to be like a legal system obsessed by the recognition of territorial jurisdictions.

6. DIPLOMATIC PROTECTION: THE PRINCIPLE

The mechanism of diplomatic protection applies each time a person – but not an organ of a State nor any other person in this official capacity – suffers damage on a foreign territory. If the individual cannot get appropriate satisfaction through the exhaustion of local remedies (tribunals or other organs of the foreign State), then this mechanism allows the State of which the person is a national to 'take up the case of its subject'. At first glance, then, by resorting to diplomatic protection, the national State 'is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law'.[14]

Since the authoritative statement of Vattel,[15] it was (is it still?) considered that a State suffers from the injury caused to its national abroad; this conclusion is founded on a 'fiction'. This 'fiction' in fact allows the State to seek reparation for this injury through the mechanism of diplomatic protection, for it cannot – by virtue of the equality of States – either intervene on foreign territory or interfere with the administration of justice of the other State. Indeed, the exclusiveness of State functions – attached to the very principle of sovereignty – prevent the State from acting in such a way, lest it violate the paramount principle enshrined in Art. 2(1) of the United Nations Charter (*supra* section 5).

The *opinion iuris commune* in this regard has not undergone dramatic changes, as the ICJ has reiterated in a well-known *dictum* the distinction between 'the obligations of a State towards the international community as a whole [such as, for instance, those related to human rights], and those arising vis-à-vis another State in the *field of diplomatic protection*'.[16]

Thence no duty – in the international legal order – compels the State to exercise diplomatic protection at the request of its nationals.[17] Conversely, the mainstream doctrine and jurisprudence – confirmed by the practice of States – consider that any renunciation by an individual (through a contract or similar bargain with a foreign State) of diplomatic protection is void, since the State can override it and take up their national's case, albeit against their will[18] (the so-called 'Calvo Clause'). Diplomatic protection has become through the ages – replacing notably the ancient and more intrusive mechanism of 'reprisals' – the main tool by which States protect their (nationals') interests, without thus resorting to the use of force. This mechanism represents then a 'civilized' way of settling disputes through diplomatic channels by way of the engagement of State responsibility. According to the prevailing view, the admissibility of a claim under diplomatic protection is subject to the fulfilment of three conditions: (a) a link of nationality between the person injured and the claimant State; (b) the exhaustion of local remedies; and (c) the alleged wrongful act arising out of the violation of any right related to aliens (or any other specific obligation thereto).[19] An abundant jurisprudence has, since the end of the 19th century, helped to consolidate the body of rules in the matter of diplomatic protection.

7. THE 'TRANSFIGURED' DIPLOMATIC PROTECTION

One can hardly rebut that only recently has the ICJ nuanced its construction of diplomatic protection. The first breach took place in the *LaGrand Case* when the Court declared, with regard to Article 36 (1)(b) of the 1963 Vienna Convention on Consular Relations, that this provision manifestly 'creates *individual rights*, which … may be *invoked* in this Court *by the national State* of the detained person'.[20] The definitive interpretation of the aforementioned provision would ultimately be given by this same Court three years later in the oft-cited *Avena Case*. The ICJ, after having recalled the previous case, affirmed that Mexico (the Applicant) not only had 'contend[ed] that *it had itself suffered, directly and through its nationals*', but likewise, that it had '*espouse[d]* the individual claims of its nationals through the procedure of diplomatic protection'.[21] This was due to the specificity of this provision, that, at the same time, clearly embodies the individual's rights ('The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph'),[22] as well as those of the Contracting Party – namely (under Article 36 (1)(c)) the right of the sending State to provide consular assistance to its detained national. The Court then added that in these 'special circumstances of interdependence of the rights of the State and of individual rights',[23] we are faced with a claim to guarantee these distinct rights, albeit they are infringed by the same acts. In one case, Mexico 'espouses' its nationals' claims while in the other it submits to the Court its own claim for the USA had allegedly violated its *own rights* enshrined in Article 36(1)(c) of the 1963 Vienna Convention. Furthermore, the Court underlined that this interdependence means that 'violations of rights of individuals under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual'.[24] The State's representation on the international level of its own nationals' rights resembles that of parents with regard to a minor, a *pupillus*.

It has already been submitted that diplomatic protection is traditionally built upon a fiction – that is, the suffering of a State through its injured national – yet the ILC itself has underlined that, even in the past, this fiction

> was no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments.[25]

The ICJ reflected this (new) enlarged conception of diplomatic protection in the recent *Ahmadou SadioDiallo Case*, where it was stated that 'the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights'.[26]

Be that as it may, the widening of the scope of diplomatic protection has not transfigured its essence, as it still remains today a tool in the hands of the national State. Borrowing the wording of the ILC in this respect, this '*means*' – moreover an imperfect one (for the discretionary power of the State to avail itself of) – does not in any way constitute an enforceable right for the individual, and certainly not in the

international terms. Even the ILC cannot but confess that it 'recommends to States that they should exercise that right [i.e. to bring a claim through diplomatic protection] in appropriate cases'.[27]

8. THE INDIVIDUAL'S POSITION IN THE LIGHT OF THE 'EXTENSIVE DEFINITION' OF THE INTERNATIONAL LEGAL PERSONALITY

It appears obvious that individuals cannot by any means be considered as subjects of international law in the light of the 'restrictive definition' of international personality (*supra* section 4). No demonstration is needed to say that the individual does not possess the three legal capacities, except, maybe, the last one, namely the capacity to 'bring an international claim', but only on a regional level and thanks to a treaty.[28] This feature is precisely the 'only' requirement that must be met by any candidate according to the 'extensive definition' of international personality (*supra* section 3). We will then examine if under this angle *and* taking into account the 'transfigured' signification of diplomatic protection, the individual can be considered as a subject, albeit in a limited way, of public international law.

First of all, it is undisputed – since at least the beginning of the 20th century – that international treaties can create international 'rights and obligations enforceable by national courts',[29] as the PCIJ had affirmed in an oft-quoted case. In this vein, the ILC rightly maintained that the 'State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights'.[30]

Furthermore, the ICJ's recent statements in the *LaGrand* and (notably) *Avena Cases* have revealed that, in addition to human rights, other treaty rights[31] – such as for instance consular rights – can be conferred in such a way as to consider the individual their ultimate beneficiary. The lack of such an International Court of Human Rights, before which any individual would enjoy a *ius standi*, explains why diplomatic protection has come to play the role of guaranteeing human rights. In this connection, while the International Criminal Court allows the international community to judge and punish those individuals who have committed specific international crimes, implicitly recognizing the individual a *ius standi* for international duties; nothing, on the contrary, exists on the universal plan for the individual rights. This discrepancy engenders some unfairness as to the legal position of the individual: States can bring international claims against them, while they cannot avail themselves of the same *locus standi* when their (human) rights are at stake.

As the ICJ had said in the aforementioned *Barcelona Traction Case*: 'Should the natural or legal persons on whose behalf it [i.e. the State] is acting consider that *their rights* are not adequately protected, *they have no remedy in international law*.'[32]

Yet, this does not entail, either logically or legally, the titularity of these rights upon the individuals, as they still have to 'beg' the diplomatic protection of their own State. Indeed, even if we admit that the State 'takes up the case' of its national with the

purpose of protecting the latter's infringed rights – and not its own – one can hardly sustain that the individual has a full legal personality, as it lacks *ultimately* the 'capacity to act', which is indisputably the acid test of legal personality. Even the PCIJ, in the aforementioned case (*Jurisdiction of the Courts of Danzig*), fell short of asserting that individuals – in the quite specific circumstances of the Free City of Danzig – could avail themselves of these treaty rights in the international terrain. In this respect, the ILC rightly distinguishes – in the wake of the ICJ's findings in the *Avena case* – between 'direct' and 'indirect' claims, the former relating directly to the State's rights, the latter pertaining to the individual's rights. In addition, the ILC stresses that in some cases, as for example in *ELSI Case*, one can be faced with a 'mixed claim', thus calling for a determination on 'whether the direct or the indirect element is preponderant'. To this end, the criteria will range from 'the subject of the dispute, the nature of the claim and the remedy claimed'.[33] For instance, if the injured person is an organ of the State, the claim will be direct, but, on the contrary, if the State 'takes up its national's claim', the claim will be considered as an indirect one. This is of course instrumental in assessing whether the claim's admissibility is subject to the rule requesting the exhaustion of local remedies. Furthermore, the latter obligation is hardly compatible with its asserted full international personality, as the *par in parem non habet iurisdictionem* principle clearly shows. In fact, this requirement reveals the individual's lack of independence in relation to the offending State, thus submitting him or her to the State's territorial jurisdiction. Likewise, it stresses the fundamental principle of the equality of States that crushes the individual. All the foregoing clearly shows that diplomatic protection has been transfigured, not in its essence but in its aims,[34] as it has become a powerful, though still *discretionary* tool at the disposal of the States purporting to protect human rights 'in the person of its subjects' … only! This discretionary power (*supra* section 6) of which the national's State is vested for the exercise of diplomatic protection hinders the true titularity of rights, of which the State is nonetheless the real beneficiary.

Therefore, it is not risky to maintain that diplomatic protection has become a tool allowing the State to: (a) protect its own rights whenever one of its nationals has suffered any injury abroad; and (b) protect *its national rights* since the individual national has no international capacity.

At the end of this concise, and, in many respects, fragmentary overview of the international personality of the individual from the angle of diplomatic protection, we can hardly maintain that the individual is a full subject of international law. In fact, while we have observed a tremendous change in the array of rights directly created by treaties (and other sources of international rules) of which the individual is a beneficiary, nothing, or almost nothing, has changed with regard to the instruments at his or her disposal to enforce them at the international level. Indeed, the very fact that diplomatic protection has been given the function of protecting the individual's human rights represents, paradoxically, the proof that no other true judicial means exist (on the universal plan) that can be implemented *autonomously* by the person.

NOTES

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1. *Nationality Decrees Issued in Tunisia and Morocco*, Permanent Court of International Justice (PCIJ), Advisory Opinion, Series B, No. 4 (1923), 24.
2. 'General Course on Principles of International Law', RCADI 121 (1967-II): 346.
3. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949: 178.
4. Ibid., at 177, 178.
5. 'Case concerning filleting within the Gulf of St. Lawrence between Canada and France, Decision, 17 July 1986', *RIAA* XIX, sect. 26: 240. 'Agreement dated 27 March 1972 is a treaty concluded between two sovereign States which creates reciprocal rights and obligations for both States. Should it hold true that, according to the wording used in the agreement, the right to "pursue fishing activities" is meant for the benefit of "fishing buildings" (article 3), "fishing boats" (article 4a) and "trawler men" (article 4b), the signatory States are nonetheless the only holders of these rights and able to request the respect of the agreement for the benefit of their respective nationals.'
6. *Supra* note 3, at 179.
7. See C. Dominice, 'La personnalité juridique dans le système du droit des gens' (1996), *L'ordre juridique international entre tradition et innovation. Recueil d'études* (1997): 70; G. Distefano, 'Observations éparses sur les caractères de la personnalité juridique internationale', *Annuaire français de droit international* LIII (2007): 117–124.
8. '… Through the capacity to conclude treaties with States on a level of parity an international organization receives a valid entry ticket to the world of international relations at the level of international law', C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', *RCADI* 281 (1999): 131; 'Strunsky-Mergé Case (United States of America v. Italy), Decision of the Arbitral Commission (10 June 1955)', *RGDIP* 63 (1959-I): 131.
9. Sir R. Phillimore, *Commentaries upon International Law* (London: Butterworth, 1879), Vol. II, Part I, sect. 114, 157.
10. *Supra* note 3, at 177.
11. Ibid., at 178.
12. 'Island of Palmas Case (Netherlands and United States), Arbitral Award of 4 April 1928', RIAA II: 838 (emphasis added).
13. Ibid., at 839.
14. *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, PCIJ, Judgment, Series A, No. 2 (1924), 12.
15. E. De Vattel, *The Law of Nations*, translated from French (1758), Book 2, Chapter VII, 84.
16. *Barcelona Traction* (*Belgium v. Spain*; 2nd phase), Judgment, I.C.J. Reports 1970: sect. 33, 32 (emphasis added).
17. See Article 2 of the ILC Draft Articles on Diplomatic Protection, UN Doc. A/61/10. Article 19(b), the chapeau of which ('Recommended Practice') clearly suggests that it represents 'an exercise in progressive development', and affirms that the 'State 'should' in the exercise of diplomatic protection, 'take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought'. See in this vein *Barcelona Traction*, ibid., note 18, sect. 78, 45, where the Court, well aware of the deficiencies of the universal judicial system of protection of individual's rights, be they human rights or any others, stresses the persistent discretionary power of the State.
18. However, this will pose some technical problems at the stage of the exhaustion of local remedies, since the national is not (and cannot be) bound to solicit them, thus finally preventing its own State from filing a diplomatic protection against the foreign State.
19. It is worth noting that the ILC has not, quite correctly, considered that the so-called 'clean hands' condition (propounded by a small minority of authors) is required by customary international law.
20. *LaGrand (Germany v. United States)*, Judgment, I.C.J. Reports 2001: § 77, 494 (emphasis added).
21. *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004: § 40, 35–36 (original emphases).
22. Article 36(1)(b) (emphasis added).

23. *Supra* note 21, at § 40, 36. See likewise (in the lapse of time between the *LaGrand* and *Avena* cases), *Arrest of Warrant of 11 April 2000 (D.R. Congo v. Belgium)*, Judgment, I.C.J. Reports 2002: § 40, 19.
24. *Supra* note 21, at § 40, 36.
25. *Supra* note 17, at 25–26.
26. *Ahmadou Sadio Diallo (Republic of Guinea v. D.R. Congo)*, Judgment, (Preliminary Objections), I.C.J. Reports 2007: § 39.
27. *Supra* note 17, at 30.
28. We are obviously referring to the system of protection of human rights established by the European Convention on Human Rights, allowing for individuals to bring a claim before the Court of Strasbourg against any State party to it, including their own State. Within this context, the individual is freed from control by any State (provided that it is party to the Convention) with regard to an important, albeit limited, set of rights immediately enforceable before a jurisdictional body, thus obtaining a reparation from the wrongful State. In this respect, it is not incorrect to maintain that the individual is a limited (and derived) subject of regional international law.
29. *Jurisdiction of the Courts of Danzig*, PCIJ, Advisory Opinion, Series B, No. 15 (1928), 18.
30. *ILC's Commentary on State Responsibility Draft Articles*, Article 33, UN Doc. A/56/10, 95.
31. The Arbitral Tribunal (Tax regime governing pensions paid to retired UNESCO officials residing in France) (France – UNESCO), Decision, 14 January 2003, *RIAA* XXV: § 82, 261, so said: 'La règle selon laquelle les dispositions d'un traité peuvent créer des droits subjectifs dans le chef des particuliers. Les Parties ont toutes deux reconnu l'existence de cette règle. Cette règle appartient au droit international contemporain. Elle a été souvent appliquée par la Cour internationale de Justice.' ('The rule according to which treaty provisions can create (subjective) rights for the private individuals. Both Parties have recognized the existence of this rule. The latter belongs to contemporary international law. It has often been applied by the International Court of Justice.')
32. *Supra* note 16, at § 78, 45 (emphasis added).
33. *Supra* note 17, at 74–76. See in this respect, *Factory at Chorzów (Germany v. Poland)*, PCIJ, Judgment (Merits), Series A, No. 17 (1928), 28.
34. In this respect, yet with a more radical conclusion, see the thorough and in-depth analysis of S. Touzé, *La protection des droits des nationaux à l'étranger. Recherches sur la protection diplomatique* (Paris: Pedone, 2007).