

UNIT 12.- THE POWERS OF THE STATE OVER INDIVIDUALS

1.- GENERAL ASPECTS: THE POWERS OF THE STATE OVER ITS NATIONALS. 2. DIPLOMATIC PROTECTION: A) CONCEPT AND CHARACTERISTICS; B) CONDITIONS FOR ITS EXERCISE; C) DISTINCTION OF RELATED FIGURES; D) DIPLOMATIC PROTECTION IN SPANISH LAW. 3.- THE POWERS OF THE STATE OVER FOREIGNERS. 4.- SPECIAL REGIMES: ASYLUM SEEKERS AND REFUGEES.



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1.- General aspects: the Powers of the State over its nationals.

- Under international law, the State exercises jurisdiction over persons (personal jurisdiction of the State):
 - ❖ having its nationality: natural or legal persons + vessels or aircrafts flying its flag, and space objects registered under the State name.
 - ❖ or being on its territory: limits imposed under international law for foreigners.
 - Bond of nationality: conditions established by domestic law.
 - ❖ **NATURAL PERSONS:** The attribution of nationality is a discretionary competence of the State, a matter within its exclusive jurisdiction.
 - ✓ [ICJ Nottebohm case \(Liechtenstein v. Guatemala\)](#) April 6, 1955.
 - ✓ [PCIJ Advisory Opinion of February 7, 1923 , on the nationality decrees promulgated in Tunisia and Morocco.](#)
- BUT:
- ✓ must respond to an **effective link** between the State and the person on whom it is conferred.

- ✓ requirements derived from international human rights standards (Art. 15 UDHR).

Nationality conflicts: formulation of rules on the acquisition and loss of nationality

- ✓ Positive conflicts: double nationality cases.

- ✓ Negative conflicts: statelessness.

- ❖ **LEGAL ENTITIES:** same criteria that natural persons but legal problems regarding diplomatic protection of transnational companies.

- ✓ commonly accepted criterion is that the company has the nationality of the State under whose laws it is incorporated (place of incorporation), which generally coincides with that of the registered office. ICJ Judgment in the case of Barcelona Traction, Light and Power Company (Belgium v. Spain) February 5, 1970.

- ✓ 2006 ILC draft articles on diplomatic protection (art. 9) adds that, "where the company is controlled by nationals of another State or States, does not carry on substantial business in the State of incorporation and has its seat of management and financial control in another State, that State shall be considered the State of nationality".

- ❖ **VESSELS, AIRCRAFTS AND SPACE OBJECTS:** nexus assimilated to the nationality bond.

- ✓ Ships: Law of the Sea requires existence of an effective link between the ship and the flag (problems: flags of complacency). Tribunal on the Law of the Sea: Obligation of the flag State to exercise effective control over ships but recognizes the unchallengeable nature of national legislation on the flagging of ships.

2.- Diplomatic protection

a) concept and characteristics

- States have the right to defend its nationals against damages caused by another State in violation of international law. Rules concerning the exercise of diplomatic protection are based on two fundamental principles:
 - ❖ Diplomatic protection constitutes a State-to-State relationship;
 - ❖ its exercise involves the assertion of a right belonging to the State and not to the individual concerned.
- Customary concept whose elements have been clarified by international jurisprudence and codified by the [ILC 2006 draft articles adopted in 2006](#).
 - ❖ **Art. 1 definition:** "diplomatic protection consists in the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or juridical person who is a national of the former State with a view to the implementation of that responsibility".
 - ❖ Fundamental features: [PCIJ 1924 Judgment of the Mavrommatis concessions case in Palestine \(Greece v. United Kingdom\)](#):

- ✓ *"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, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law".*
- Definition: It is the protection exercised by the State in favor of its nationals "injured by acts contrary to international law committed by another State" and in respect of which the national "has been unable to obtain satisfaction by ordinary internal means".
 - ❖ Starting point: unlawful act or omission of the State which constitutes a breach of its international obligations and which has injured a national of another State.
 - ❖ It is exercised by "diplomatic or judicial action", meaning the usual methods recognized by international law for the establishment, presentation and settlement of claims between States.
- Consequences of the "State-to-State" consideration:
 - ❖ from the perspective of international law, the injured State may decide at its discretion whether or not to exercise diplomatic protection in favor of the individual concerned, as well as the continuation or withdrawal of its defense.
 - ❖ Could the individual could waive the exercise of diplomatic protection in his/her favor by the State of which he/she is a national? Conventional solutions.

b) Conditions for the exercise of diplomatic protection

- Customary rules clarified by international jurisprudence and codified by the ILC 2006 draft articles:
 - ❖ **Nationality of the claim:** the protected person must be a national of the protecting State.
 - ✓ 2006 ILC draft articles: nationality bond and the possibility of protection of stateless persons and refugees (art. 8).
 - ✓ Characteristics of the nationality invoked by the protecting State:
 - ❑ Effectiveness: effective link between the State exercising diplomatic protection and its national.
 - ❑ Continuity: when the wrongful act occurs, when the diplomatic claim is brought against the State and when the claim is finally settled.
 - ❑ Exclusivity: traditional rule regarding DP of double nationals.
 - ✓ Legal persons: same conditions but difficulties regarding characteristics of nationality (protection of shareholders of a corporation that doesn't have its nationality in three cases ONLY (i) the corporation had ceased to exist; (ii) the corporation actually had the nationality of the State causing the wrongful injury; or (iii) that the wrongful act of the State had injured rights belonging to the shareholders and not to the corporation (such as the right to vote or the right to receive dividends).

□ ILC draft articles:

○ Natural persons (art. 4-5):

- a State of nationality means a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.
- Continuity of the nationality: from the date of injury to the date of the official presentation of the claim (presumption).
 - **Exception:** person who is a national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.
- Particularities in cases of multiple nationalities:
 - any State of nationality may exercise diplomatic protection in respect of that national against a State of which that person is not a national.
 - Possibility of jointly exercise of diplomatic protection.
 - Changes of the traditional rule regarding the DP against one of the states of nationalities if the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

○ Legal persons: Art. 9-12

- the State of nationality means the State under whose law the corporation was incorporated.

- **EXCEPTIONS**, when the corporation is controlled by nationals of another State(s) and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.
- Continuity of the nationality: from the date of injury to the date of the official presentation of the claim (presumption).
 - Particularities:
 - ⊖ Cases of a corporation acquiring the nationality of the responsible State after the presentation: the original state will no longer be entitled to its representation.
 - ⊖ Cases of non-existent corporations after the presentation of the claim: the State continues to be entitled to exercise diplomatic protection if the corporation has ceased to exist as the result of the injury.
- State of nationality of shareholders: any rights? Entitled only if:
 - The corporation has ceased to exist for a reason unrelated to the injury; or
 - The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there; or
 - Violation of IL causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself.

❖ Exhaustion of local remedies:

- ✓ Justification of the rule: [ICJ Interhandel case \(Switzerland v. United States of America 1959](#),
*“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred **should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.** A fortiori the rule must be observed when domestic proceedings are pending, (...), and when the two actions, (...), are designed to obtain the same result”*.
- ❑ Exceptions:
 - when the remedies are manifestly ineffective, irrelevant or futile.
 - when the pursuit of domestic remedies is unreasonably prolonged.
- ✓ ILC Draft: art. 14-15
 - ❑ “Local remedies” means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.
 - ❑ Exceptions:
 - there are no reasonably available local remedies to provide effective redress;
 - the local remedies provide no reasonable possibility of such redress;

- there is undue delay in the remedial process which is attributable to the State alleged to be responsible;
 - there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
 - the injured person is manifestly precluded from pursuing local remedies; or
 - the State alleged to be responsible has waived the requirement that local remedies be exhausted.
- ❖ **Clean hands?** the proper conduct of the individual concerned: if the injury caused to the individual derives from the latter's irregular conduct and, moreover, there is a causal link between the improper conduct and the injury suffered, the exercise of diplomatic protection would not be admissible.
- ✓ Not accepted by international case-law.
 - ✓ Balance of State responsibility.

c) Distinction from other figures

- Consular protection (CP) of nationals
 - ❖ Lodging a claim with the local authorities on behalf of the national affected by a violation.
 - ❖ Three main differences:
 - ✓ CP may be exercised even if there is no violation of international law by the territorial State, but only if there is a violation of its domestic law.
 - ✓ The claim is made by the Head of the Consular Post and is not submitted to the Government of the territorial State but to the organ that committed the violation.
 - ✓ It does not require the prior exhaustion of domestic remedies by the individual concerned.
- Functional protection (FP):
 - ❖ right of an international organization to bring a claim for the protection of its agents who, in the exercise of their functions, have been injured by acts contrary to international law committed by a State.
 - ❖ Not based on nationality (DP) but on the status as an agent of the Organization.
 - ❖ Recognized in [ICJ Advisory Opinion on Reparation for injuries suffered in the Service of UN \(1949\)](#)

d) Spanish regulations on diplomatic protection

- It is not a right recognized by the Constitution.
- Competence of the Ministry of Foreign Affairs (request by the national).
 - ❖ LO Council of State 3/1980: art. 21: Consultation to the Council of State before the claim is presented. (opinion is mandatory but not binding).
 - ❖ Jurisprudence Supreme Court: the adequate protection of nationals is part of the "essential tasks of the State under the Constitution", but still the exercise of diplomatic protection in each specific case depends on the discretionary decision of the State.
 - ❖ [Couso Case](#).

3.- The Powers of the State over foreigners

- Definition: those who do not have the nationality of the State in which they are located...
 - ❖ They have the nationality of another State; or
 - ❖ They have no nationality (stateless persons).

a) Foreigners' Regime

- Bond of territoriality: the law of aliens essentially belongs to the domestic sphere of competence of the State and its regulation therefore has a predominantly internal dimension.
- But lately, process of internationalization: growing international regulation in this area (conventions), as well as the impact of international norms relating to the protection of human rights.
 - ❖ First manifestation of S^y: admission to the territory.
 - ✓ General IL: Discretionary competence of the State (national legislation of conditions).
 - ❖ Permanence in the territory:
 - ✓ General IL: Discretionary competence of the State (national legislation of conditions and obligations of treatment).

- ❖ Expulsion from the territory:
 - ✓ General IL : Certain limits to State action in this area
 - ❑ Illegal aliens: Basic requirements of international norms relating to the protection of human rights, which must be reflected in national legislation.
 - ❑ Aliens legally residing in the territory: firmer limits of the State's discretion,
 - procedural requirements, such as the granting of a hearing and a right of appeal in favor of the alien whose expulsion is contemplated.
 - [Art. 13 of the International Covenant for Civil and Political Rights](#), 1966: decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.
- Special treatment of EU citizens in EU member States: freedom of movement.

b) Standards of treatment of foreigners

- Obligations of the State regarding foreigners accepted in the territory: STANDARDS—set of rights and obligations that make up the foreigner's status.
- Various criteria or typical models:
 - ❖ “National treatment” standard: State would only be obliged to treat aliens in the same way as it treats its nationals.
 - ❖ “Standard of reciprocity”: foreigners in the territory will be treated in the same way as nationals are treated in the other State.
 - ❖ "most-favored-nation clause“ treatment: each State party automatically grants to the nationals of the other States the rights that it has conventionally granted to the nationals of a third State (Some international treaties, mainly of a commercial nature).
 - ❖ “International minimum standard“: the criteria for the treatment of foreigners is marked by the minimum requirements of international law. Evolution of treatment through case law and doctrine as being the criteria applicable. What includes?
 - Fundamental civil rights, but not political rights or economic, social and cultural rights:
 - Civil rights contained in the International Covenant on Civil and Political Rights of 16 December 1966, which the States Parties undertake to "respect and ensure to all individuals within their territory and subject to their jurisdiction" (Art. 2) and which may not be derogated from in any case (Art. 4):

- ⊖ right to life (Art. 6).
- ⊖ the prohibition of torture and cruel, inhuman or degrading treatment or punishment, including the prohibition that no one may be subjected without his or her free consent to medical or scientific experimentation (Art. 7).
- ⊖ the prohibition of slavery or servitude (Art. 8, paragraphs 1 and 2).
- ⊖ the prohibition of imprisonment solely on the ground of inability to fulfill a contractual obligation (art. 11).
- ⊖ the principle of legality (art. 15).
- ⊖ the right to recognition as a person before the law (art. 16); and
- ⊖ the right to freedom of thought, conscience and religion (art. 18).

4. Special regimes: asylum seekers and refugees

a) Territorial asylum

➤ Reception that a State may grant to persons suffering persecution and constitutes a power inherent in the exercise of sovereignty.

❖ UN level:

✓ [Article 14 UDHR](#): (1) *Everyone has the right to seek and to enjoy in other countries asylum from persecution.* Right to seek but not right to obtain.

✓ [Work of the UN](#).

✓ [GA Resolution 2312 \(XXII\)](#), December 14, 1967 Declaration on Territorial Asylum.

Principles:

❑ the granting of asylum is a peaceful humanitarian act and, as such, may not be considered by another State as unfriendly;

❑ if a State finds it difficult to grant asylum or to continue to grant it, other States, individually or jointly through the United Nations, shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden of the first State;

❑ no person may be turned back at the border, expelled back to the country in which he or she is being persecuted (this is the so-called *principle of non-refoulement*).

✓ [ILC question of asylum](#). Discontinued.

b) Status of refugees

➤ International action in favor of refugees--end of World War I: League of Nations High Commissariat to protect Russian (1919), Middle Eastern (1928) and German (1933) refugees.

➤ UN:

- ❖ Establishment of the United Nations High Commissioner for Refugees (UNHCR) by GA Resolution 319 (IV) of December 3, 1949.
- ❖ [Geneva Convention Relating to the Status of Refugees](#), June 28, 1951 + [Protocol Relating to the Status of Refugees](#) of January 31, 1967.
 - ✓ The 1951 Refugee Convention: limited to protecting European refugees after World War II.
 - ✓ The 1967 Protocol modified the geographical and temporal restrictions by expanding the scope of protection to all persons suffering persecution on the grounds defined in the Convention.
 - Definition: any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
 - Limitations: The convention does not apply to:
 - ⊖ Persons under the assistance and/or protection of UN organs or agencies other than the UNHCR.

- Persons that have taken nationality of the country.
- Persons considered as being suspects of committing a war crime, crimes against peace, crimes against humanity; or committed a serious non-political crime prior to the admission; or considered guilty of acts contrary to the purposes and principles of the UN.
 - Status of persons: provisions relating to their documentation (arts. 25, 27, and 28) and the rights to which they are entitled in the host country.
- ❖ Emergence of other situations of a more collective nature, giving rise to the so-called collective refuge for humanitarian reasons (mass refugees). Problems for the application of the individual regulations.



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