Universiteit Leiden
The Netherlands

The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument

Vermeer-Künzli, A.M.H.

Citation

Vermeer-Künzli, A. M. H. (2007, December 13). *The protection of individuals by means of diplomatic protection : diplomatic protection as a human rights instrument*. Retrieved from https://hdl.handle.net/1887/12538

Version:	Corrected Publisher's Version
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The Protection of Individuals by means of Diplomatic Protection

The Protection of Individuals by means of Diplomatic Protection

Diplomatic Protection as a Human Rights Instrument

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van de Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 13 december 2007
klokke 16.15 uur

door

Anna Maria Helena Vermeer-Künzli

geboren te Middelstum in 1979

Promotiecommissie:

Promotor:	prof. dr. C.J.R. Dugard
Referent:	prof. dr. J. Klabbers (University of Helsinki, Finland)
Leden:	prof. dr. J.R. Crawford (University of Cambridge, United Kingdom)
	prof. mr. P.A. Nollkaemper (Universiteit van Amsterdam)
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Druk: PrintPartners Ipskamp

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

ISBN 978-90-9022-487-9

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Acknowledgments

When I started as a PhD student, some told me it would be a lonely process. I have never experienced it as such. In the past four years, there have been many who have provided indispensable support and friendship.

My colleagues at the Public International Law section of Leiden University have been a fantastic group to work with. I have in particular enjoyed the friendship and support of my fellow-PhD students, some of whom have by now completed their thesis and obtained their degree: Antoine, Armin, Ay Ling, Bas, Daniëlla, Eloisa, Helen, Herke, Lennert, Lisa, Meehea, Mireille, Rosanne, Otto, Thomas, Silvia, Vid, and Zsuzsanna. Their company has made the task of writing this thesis a lot easier and a lot more fun.

At the Law Faculty in Leiden, PhD students not only have the benefit of a supervisor. They are in addition supported by the *E.M. Meijers Instituut*. I am grateful to the members of this Institute for their help and support. In particular I would like to thank Kees Waaldijk for listening to me when I needed advice and to Riekje Boumlak for always being at the other end of a phone-line and for taking care of many administrative procedures. Special thanks also go to Laura Lancée. Her help in finding funding for the realisation of all my plans to go abroad has been indispensable.

One does not start on a doctoral thesis without prior education. In my case, it was preceded by a MA degree in Classics. I am grateful for the education I received at the Departments of Classics and Philosophy of the University of Leiden. There are three people I wish to thank in particular, because of the respective influence they had: dr Marlein van Raalte and Prof. Ineke Sluiter, for teaching me the fundamentals of academic research, and Prof. Herman Philipse, for teaching me how to read and write.

In the course of my PhD-project, I have had the opportunity to visit some of international law's most renowned institutions. As assistant of Professor John Dugard, I have visited the International Law Commission in Geneva several times. There I met Arnold Pronto, legal officer to the UN in New York. We had many fascinating discussions about all kinds of topics and I hope we will continue to discuss law and life in future. My visits to the ILC in Geneva would not have been possible without the financial support of the Netherlands Organization for Scientific Research (NWO) and the Van Vollenhoven Stichting of the Law Faculty of Leiden University. In fall 2006, I have spent two months at the Lauterpacht Research Centre in Cambridge, a visit which has been financially supported by the Leids Universiteits Fonds (Clavareau). This visit

not only allowed me to write without interruption, a rare opportunity in academic life, but also to enjoy all the benefits and pleasures of the Lauterpacht Centre. The 11 o'clock coffee break in the kitchen at the Centre proved to be a fertile place for the floating of ideas, about law, but also about American politics, cricket, Halloween and pub-quizzes. And there is very little that can beat the beauty of Cambridge as a source of inspiration, especially in fall.

All of the Chapters of this thesis, with the exclusion of the Introduction and the General Conclusions, have been published in various international law journals. I thank the executive editors of those journals for their efforts and for their courtesy to allow me to reprint the papers in my dissertation: Anny Bremner of the European Journal of International Law; Orla Fee of the International and Comparative Law Quarterly, Carin Laurin of the Nordic Journal of International Law, Douwe Sikkema of the Leiden Journal of International Law and Jasmin Wendt of the Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.

A PhD defence in the Netherlands is impossible without the assistance of two *paranimfen*. Hagar Heijmans and Laura Rijkhold Meesters have accepted to be my *paranimfen* and I am delighted to have them standing by my side during the defence. Their friendship has been invaluable to me, especially in times when I needed it most.

Although I personally think that the last person I will thank should also be the first, tradition has it that one's loved ones come at the very end of acknowledgments. So, finally, I am infinitely grateful to Koen. The patience with which he would listen to all my stories, even if he had heard them once (or twice) before and the support he would give me when I had difficult decisions to take were incredible. Even if we do not share the expertise we need from nine to five, because law and physics are two very different disciplines, we do share our life. Living this life together has been the most wonderful source of inspiration of all.

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List of Abbreviations

AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public and International Law
ASIL	American Society of International Law
BVerfG	Bundesverfassungsgericht (German Constitutional Court)
CAT	Convention Against Torture
cf	*confer*
CFI	(European) Court of First Instance
Doc.	Document
DRC	Democratic Republic of the Congo
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
et al.	*et alii*
EU	European Union
EC	European Community
ECJ	European Court of Justice
e.g.	*exempli gratia*
et seq.	*et sequens*
GA	(United Nations) General Assembly
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
Ibid.	*Ibidem*
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Tribunal for the Former Yugoslavia
Id.	*Idem*
i.e.	*id est*
ILA	International Law Association
ILC	(UN) International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
LJIL	Leiden Journal of International Law
NJW	Neue Juristische Wochenschrift
Nordic JIL	Nordic Journal of International Law
N. Yb. I. L.	Netherlands Yearbook of International Law
para(s).	paragraph(s)
PCIJ	Permanent Court of International Justice
RES	Resolution

R.G.D.I.P.	Revue générale de droit international public
R.I.A.A.	(United Nations) Reports on International Arbitral Awards
SC	(United Nations) Security Council
UK	United Kingdom
UN	United Nations
UNMIK	United Nations Mission in Kosovo
UNTS	United Nations Treaty Series
US	United States
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WTO	World Trade Organisation
Yb	Yearbook
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZÖR	Zeitschrift für Öffentliches Recht

Introduction

> 'It is hard to draw definite legal conclusions about a subject which is half diplomatic and half legal and about which nations feel so strongly'[1]

Ever since the existence of international relations between them, states have facilitated the protection of their nationals abroad against violations of their rights under international law through the exercise of diplomatic protection. With the strengthening of such relations and the crystallisation international law in general and rights of individuals in particular, the law on diplomatic protection developed into customary international law. It is now a well-established part of the law on state responsibility. Yet the application of this mechanism and its purpose is subject to debate. The recent development in the International Law Commission (ILC) resulting, in 2006, in the adoption of the Draft Articles on Diplomatic Protection, has fuelled this debate and incited scholars and states to reconsider their positions on this field of law. In his First Report on Diplomatic Protection, ILC Special Rapporteur John Dugard suggested that diplomatic protection could, and should, be used as a mechanism for the protection of human rights.[2] He stated that '[a]s an important instrument in the protection of human rights, it should be strengthened and encouraged.'[3] Similar views inspired the drafting and adoption of the provision allowing protection of refugees and stateless persons by their state of residence and the last provision recommending states to consider the wishes of the injured individual.[4] This last provision recommends states to accept that they are obliged to protect their nationals in case of serious violations of human rights.[5] Diplomatic protection should thus be available

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1 L.M. Summers, 'The Calvo Clause', 19 Virginia Law Review 459-484 (1933), at 482.

2 This study focuses on the exercise of diplomatic protection on behalf of natural persons in case of violations of their individual rights under international law. Even though protection has frequently been exercised on behalf of corporations, such protection has not been included in the scope of the present research. Only when relevant for the development of the law in general, reference will be made to instances of protection of legal persons, but the issue is generally excluded.

3 Dugard, First Report, at 9 (para. 29).

4 Draft Articles on Diplomatic Protection, Arts. 8 and 19 respectively.

5 It reads: 'A State entitled to exercise diplomatic protection according to the present draft articles, should:
a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury occurred;

as a mechanism for the protection against the violations of human rights of individuals when they are abroad. The notion that diplomatic protection should aim to protect human rights has not been universally accepted. Questions have been raised with respect to the suitability of diplomatic protection as a mechanism for the protection of individual rights if its exercise is entirely subject to the discretion of states. Another point of criticism is that diplomatic protection is a mechanism that strong states use against weak states and is of no avail to the weaker states in this world. Indeed, the decision whether or not to exercise protection is usually dependent on the political will of the state to do so and not on the seriousness of the situation of the individual concerned. In addition, it only protects foreign nationals and not others who may suffer from the same situation. Diplomatic protection is thus discriminatory, which contradicts one of the fundamental principles of human rights protection. In short, diplomatic protection is still considered by some as an old-fashioned mechanism that no longer corresponds to present day international law.

These opposing views prompted the question of what exactly is the position of diplomatic protection in current international law. Has diplomatic protection lost its value or is it yet another human rights instrument that should be approached as all other human rights instruments? This study answers neither question affirmatively. However, a balance should be struck to avoid both irrelevance and 'droit de l'hommisme'.[6] In his Gilberto Amado lecture to the ILC in 2000, Pellet has rephrased this position. Citing David, who argued that diplomatic protection is no longer of importance as a mechanism for the protection of human rights,[7] Pellet answered that diplomatic protection would be important as a human rights instrument if 'plutôt que de la diluer dans les mécanismes généraux de protection des droits de l'homme, on s'efforçait à la fois de l'encadrer plus étroitement et de l'utiliser à meilleur escient que jadis pour obtenir réparation des atteintes aux droits de l'homme subis par les ressortissants de l'État s'en prévalant.'[8] This is exactly what I endeavour

b) take into account, whenever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.' See Draft Articles on Diplomatic Protection.

6 A. Pellet 'La Mise en Oeuvre des Normes Relatives aux Droits de L'Homme, "Souveraineté du Droit" contre Souveraineté de l'État ?', in: H. Thierry and E. Decaux, *Droit International et Droits de l'Homme, la pratique juridique francaise dans le domaine de la protection internationale des droits de l'homme*, Paris 1990, 101-140, at 126.

7 E. David, 'Droits de l'Homme et Droit Humanitaire', in: *Mélanges Fernand Dehousse*, Paris/Brussels 1979, 169-181, at 179.

8 A. Pellet 'Droits de l'Hommisme' et Droit International', Gilberto Amado Memorial Lecture, held on 18 July 2000, International Law Commission (United Nations, 2000), at 9: rather than to dilute it into a general mechanism for the protection of human rights, one should endeavour both to give it a stricter framework and to use it more consciously than in the past in order to obtain reparation for violations on human rights suffered by nationals of the state claiming it.

to achieve in this study: 'encadrer' and encourage to 'utiliser à meilleur escient': define diplomatic protection in current international law and suggest how it could be applied more consciously. As will be outlined in more detail below (section 3), the first part of this thesis delimits and discusses the framework within which diplomatic protection operates and the second part examines its application calling both for its enhancement and for prudence in doing so. For reasons explained below, it is clear that a reassessment of the law on diplomatic protection especially for the protection of individual (human) rights is necessary and this is the central purpose of the present study. It will be argued that the 'death of diplomatic protection' has been exaggerated and that criticism which has been raised against diplomatic protection cannot be upheld. The question of whether the ILC's Special Rapporteur was right in emphasising the function of diplomatic protection as an instrument for the protection of individual human rights will be answered in the affirmative: through a normative analysis of the nature of diplomatic protection and judicial decisions on this topic, it will be shown that diplomatic protection is a valuable instrument for the protection of individual (human) rights.

This Introduction has two purposes. First, it will provide a general introduction to the law on diplomatic protection by presenting (some of) its history, the *status quaestionis* and some general remarks on its relation to human rights. Secondly, this Introduction will present the methods and introduce the structure of this study.

1 History of Diplomatic Protection

The protection of nationals, diplomatic protection, is almost as old as international law itself. The Swiss legal scholar Emmerich de Vattel wrote in the 18th century that an injury to a national constituted an indirect injury to the state and that this state would have the right to protect its national against the delinquent state.[9] Since the phenomenon of diplomatic protection is premised on the existence of states and the distinction between nationals and aliens, diplomatic protection in the technical sense of the word only emerged after the introduction of the West-Phalian system of states and nationals.[10] The origins of protection of nationals can be found earlier,[11] but even if these systems of protection applied to individuals with allegiance to another sover-

9 See *infra* Chapter I for the full citation and analysis.

10 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 3. See also Brownlie, *Principles of Public International Law*, Oxford 2003, at 500.

11 See e.g. C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, Dordrecht 2001, at 35.

eign, they were different from what is now called diplomatic protection and this only acquired its definite features in the 18th century.[12]

In the 19th and early 20th century, a flurry of activity occurred in the field of diplomatic protection. The monographs by Borchard, Freeman and Dunn, which appeared early in the 20th century all included numerous references to state practice. However, the picture they described is primarily that of the protection of nationals of 'strong' states against 'weak' states. The typical example would be protection exercised by France, the United Kingdom or the United States on behalf of one of their nationals against a Latin American state such as Venezuela for alleged denial of justice or expropriation of property. The means by which states exercised this protection was not yet limited by the prohibition on the use of force or the obligation to settle disputes peacefully and, to put it mildly, there were numerous cases of abuse of power.[13] In the mid 19th century, many Latin American countries were wary of these interventions, which resulted in the emergence of the Calvo doctrine and subsequent Calvo Clause.[14] The application of the Calvo Clause has mostly affected foreign investment and not foreign individuals who suffered violations of their international personal human rights, which puts it largely beyond the scope of the present study. Yet, it has influenced legal thinking about diplomatic protection, which warrants a brief overview.

A. The Calvo clause and the principle of national treatment

The Argentine jurist Carlos Calvo developed a doctrine that soon gained much popularity throughout Latin America and which became know as the Calvo

12 See Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 3-6 and Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, Dordrecht 2001, at 35-36 and the sources referred to by both. No attempt will be made here to give a full history of diplomatic protection. The most comprehensive study in this regard is still Borchard's *Diplomatic Protection of Citizens Abroad*, New York 1919. Other extensive descriptions of the history of diplomatic protection can be found in the work of Dunn, Freeman and Lillich.

13 See e.g. D.R. Shea, *The Calvo Clause, a Problem of Inter-American and International Law and Diplomacy*, Minneapolis 1955, 11-14. See however R.B. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens', in: R.B. Lillich (ed), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville 1983, 1-61, who argued that the alleged abuse was not as serious as is often contended (at 3).

14 See generally Shea, *The Calvo Clause*, Minneapolis 1955, at 9-32. See also C.K. Dalrymple, 'Politics and Foreign Direct Investment: the Multilateral Investment Guarantee Agency and the Calvo Clause', 29 Cornell Int'l Law Journal 161-189 (1996), at 163-164 for a brief overview of the course of events; L.M. Summers, 'The Calvo Clause', 19 Virginia L. R. 459-484 (1933), at 459-460. See additionally P.H. Laurent, 'State Responsibility: a Possible Historic Precedent to the Calvo Clause', 15 ICLQ 395-421 (1966) for an interesting account of indemnities claimed from Belgium in the first half of the 19th Century. Belgium in the event paid the indemnities, but claimed that no international responsibility was incurred and that no international claims could be presented.

doctrine and led to the emergence of the so-called Calvo Clause. Under the Calvo Clause, foreigners may seek redress for any alleged wrong within the local (judicial) system only and may not request diplomatic protection.[15] Such a clause would be included in any contract between the host state and a foreigner or a foreign corporation. Some Latin American states inserted such clauses in their constitution, thereby applying it generally to all foreigners doing business within their borders.[16] It was argued that foreigners travelling abroad necessarily assume a certain risk and undertake such travelling at their own choosing. The same would apply to investment: individuals investing in another state do so because of the profitable circumstances. In doing so, they willingly subject themselves to the laws and regulations of the host state, and forfeit the right of their state of nationality to demand the application of laws other than the host state's domestic laws. This would generally justify the doctrine and the insertion of the Clause in particular. As Borchard stated, 'it posits the principle that no nation ought to intervene, diplomatically or otherwise, against another, to enforce its citizen's private claims'.[17]

Related to the Calvo Clause is the principle of national treatment.[18] This principle dictates that foreigners and nationals be treated equally and it advocates against two possible advantages foreigners may have vis-à-vis nationals. First, foreigners, by means of diplomatic protection, would have a mechanism to resort to that is unavailable to nationals. Secondly, and more controversially, the 'international minimum standard' may be more advanced than the national standard of human rights, thereby giving foreigners a better treatment than nationals enjoy. At first sight, this may indeed seem unfair and it may seem to privilege foreigners, which would be particularly unfair if a foreigner with the nationality of a powerful developed state does business in a developing state. Yet, there is one fundamental flaw in this line of reasoning: foreigners hardly ever receive the same treatment as nationals. McDougal, Lasswell and Chen, listing a large number of disadvantages foreigners en-

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15 See generally, Shea, *The Calvo Clause*, Minneapolis 1955, at 16-20. See also Garcia Amador, First Report, at 201 (para.145)-202 (para. 150) and 206 (para. 174)-208 (para.182.).

16 Shea, *The Calvo Clause*, Minneapolis 1955, at 24-27; Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 792-810 and 836-854; M.R. Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law', 33 Marq. Law Review 205-219 (1950); D. Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investment', 26 Law & Pol. Int'l Bus. 1169-1200 (1995), at 1172 and 1181-1183 for references to such legislation.

17 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 792.

18 It has sometimes been said that '[b]y waving the right to the special privilege of diplomatic protection the [Calvo] Clause merely formalizes this rule of equality into a contractual commitment.' See D.E. Graham, 'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection', 6 Tex. Int'l L. F. 289-308 (1971), at 290. See also D. Manning-Cabrol, 'The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investment', 26 Law & Pol. Int'l Bus. 1169-1200 (1995), who argues that the principle underlying the Calvo Clause is the principle of equality of treatment.

counter in the host state, may perhaps be exaggerating, but the fact remains that foreigners usually do not enjoy the same civil and political rights (such as the right to vote) as nationals.[19] 'National treatment' will thus not amount to equal treatment, but implies that foreigners cannot have more rights and protection than nationals can, even if they usually have less. The application of the 'international minimum standard' and the rejection of the national treatment doctrine were most famously proclaimed in the *Neer* and *Roberts* claims.[20] In the latter, the Claims Commission stated that

> [f]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.[21]

Without discussing in detail the content and scope of the 'international standard of treatment', which is generally considered not to be clearly defined,[22] the existence of such a standard and its application in the context of diplomatic protection has been generally accepted.[23] Although international human rights law has not replaced the international minimum standard in its entirety, it has certainly influenced the acceptance of the standard and the improvement of the national situation.[24]

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19 M.S. McDougal, H.D. Lasswell and Lung-Chu Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights', 70 AJIL 432-469 (1976). The right to vote may seem to be not particularly relevant for daily enjoyment of human rights. However, not being allowed to vote, foreigners cannot meaningfully participate in or influence the government of the host state. More importantly, the host state's politicians do not need to seek their support in elections. This should be compensated by the possibility of support from their state of nationality. See also E.J.S. Castrén, 'Some Considerations upon the Conception, Development, and Importance of Diplomatic Protection' 11 Jahrbuch für Internationales Recht 37-48 (1962), at 41.

20 *Neer* claim, at 61; *Roberts* claim, at 80. See also A.V. Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', 40 AJIL 121-147 (1946), at 126.

21 *Roberts* claim, at 80.

22 See on this point Garcia Amador, First Report, at 202 (para. 154). See also J. Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect' 98 AJIL 874-890 (2002), at 886.

23 See generally Roth, *The Minimum Standard of International Law Applied to Aliens*, Leiden 1949. See also Brownlie, *Principles of Public International Law*, Oxford 2003, at 502-505; Shaw, *International Law*, Cambridge 2003, at 734-736; and Higgins, *Problems and Process, International Law and how we use it*, Oxford 1994, at 159.

24 See on this point particularly R.B. Lillich, 'Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live' 70 AJIL 507-510 (1976), at 509 who stated that '[g]iven the present state of international human rights law, substantively and procedurally, this writer has little trouble rejecting the preempting rationale and urging the continued relevance of the traditional law governing the Responsibility of States for Injuries to Aliens. The new international human rights norms obviously should supplement,

Despite some popularity in Latin American states, the Calvo Clause and the national treatment doctrine have failed to attract universal support.[25] While states may have had political motives to reject such doctrines, they are primarily inconsistent with international law, as was found by the US-Mexican Claims Commission in the *North American Dredging Company* claim. In this case, the Claims Commission was requested to decide upon the validity of an agreement between the US corporation and Mexico in which the corporation promised not to request diplomatic protection. In the decision, a balance was sought between the freedom of a corporation to decide on the contents of a contract and the right of its state of nationality to exercise protection: '[u]nder the rules of international law may an alien make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage'.[26] As the decision shows, the Calvo Clause is incompatible with the nature of diplomatic protection: '[the corporation] did not and could not affect the right of [its] government to extend to [it] its protection in general or to extend to [it] its protection against breaches of international law'.[27] The rights protected in the exercise of diplomatic protection may belong to the individual national, but the right to exercise diplomatic protection belongs to the state of nationality.[28] Any argument that individuals can willingly and bona fide contract out of resort to diplomatic protection can thus not be upheld. It is incompatible with the principle of delegation of powers: the individual does not hold the right to exercise diplomatic protection and since he or she is not the holder of this right, he or she cannot denounce it. It will not be the individual who resorts to diplomatic protection, but his or her state of nationality. Some have argued that the individual has fully fledged international legal personality and that therefore the individual can renounce an international right.[29] This line of

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rather than supplant, traditional law' and Higgins, *Problems and Process*, Oxford 1994, at 159, who suggests that '[t]he national's standards must be moved up to those required for the foreigner under international law; they must not be tied down in misery together.' See however also Garcia Amador, First Report, who vigorously argued that the 'international minimum standard' should be abolished in view of developments in human rights law, at 202-203 (paras. 151-159).

25 See D.E. Graham, 'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection', 6 Tex. Int'l L. F. 289-308 (1971), at 304.

26 *North American Dredging Company* claim, at 29.

27 *Id.*, at 31.

28 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, 805-806. See also *infra* Chapter II and Chapter VI section 2.

29 For reflections of such views see Shea, *The Calvo Clause*, Minneapolis 1995, at 282-283; D.E. Graham, 'The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection', 6 Tex. Int'l L. F. 289-308 (1971), at 292 and 305-306; M.R. Garcia-Mora, 'The Calvo Clause in Latin American Constitutions and International Law', 33 Marq. Law Review 205-219 (1950), at 215-216; Garcia Amador, First Report, at 197 (para. 123) and 208 (para. 182).

reasoning is however untenable. Even if the individual has international legal personality, he or she still does not have the rights that are specifically assigned to another legal person. The rights and duties that would be the individual's rights and duties do not include the right to exercise diplomatic protection. It is thus irrelevant whether the individual has international legal personality for the purpose of the validity of the Calvo Clause.

Secondly, the underlying principle of national treatment, which would justify the Calvo Clause, also encounters critical objections. As has been argued above something can be said for restricting preferential treatment of foreigners, but since no real equal treatment between foreigners and nationals exists, this is not an argument against diplomatic protection. It will be further demonstrated below that the existing conditions for the exercise of diplomatic protection (the existence of an internationally wrongful act, exhaustion of local remedies and nationality of claims) give sufficient guarantees against abuse of diplomatic protection.

Only one aspect of the Calvo Clause is reconcilable with international law. Since the Calvo Clause demands resort to national remedies, as opposed to international proceedings, the Clause bears some similarity with the local remedies rule. It is this aspect of the Clause that has been accepted only and the reasonability of offering the host state the possibility of redressing the wrong through its domestic judicial system has been acknowledged.[30]

B. The International Law Commission and diplomatic protection

Shortly after its creation, the ILC started its work on the law of state responsibility, a project that would continue for almost 50 years and find its conclusion in 2001 with the adoption of the Articles on State Responsibility. Until Roberto Ago convinced the ILC that the project should focus on secondary rules of state responsibility, and not the primary, the reports submitted to the ILC by its Special Rapporteur Garcia Amador discussed the responsibility for injury to aliens, in other words, the law of diplomatic protection. Due to a lack of agreement in the ILC, these reports were hardly discussed.[31] When Garcia Amador departed and Roberto Ago was appointed Special Rapporteur, the state responsibility project took a different turn and solely dealt with the secondary rules on state responsibility. The codification and progressive development on the law of diplomatic protection was abandoned and only resumed in 1998 with the Preliminary Report of Mohamed Bennouna and the seven subsequent Reports of John Dugard. Whereas Bennouna only mentioned the work of Garcia Amador while describing the *status quo* of the topic in the

30 See e.g. A.V. Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', 40 AJIL 121-147 (1946), at 131.

31 ILC Yearbook 1957 (Vol. I), A/CN.4/SER.A/1957, at 154-172 and 181.

ILC, Dugard discussed Garcia Amador's approach frequently in his First, Second and Third Reports. Although not always approving of the position advocated by Amador, Dugard clearly appreciated the extensive research presented by Garcia Amador. He continued to explore the law of diplomatic protection and presented the ILC with seven reports between 2000 and 2006.

Garcia Amador and Bennouna questioned the relevance of diplomatic protection in current international law. Garcia Amador attempted to create a synthesis between the international minimum standard and the doctrine of national treatment,[32] which did not find much support in the ILC and the project was abandoned with his departure from the ILC. Bennouna's approach in turn was not overly supportive of the mechanism. In his Preliminary Report, he raised a number of questions, which if answered in the negative would create insurmountable objections to the project. These questions include the position of the individual, the discriminatory nature of diplomatic protection and the measure of discretion invested in states with respect to the decision (not) to exercise protection.[33] With the departure of Bennouna from the ILC, these questions became largely irrelevant, or were rephrased and answered, when Dugard was appointed Special Rapporteur.

In 2004, the ILC adopted a set of draft articles on first reading, submitted these to the UN member states, and allowed them to comment on the draft. This process resulted in 2006 in the adoption of the draft articles on second reading, a set of 19 articles laying down the secondary rules on diplomatic protection on behalf of natural and legal persons. While the draft articles largely codify customary international law, they also contain some progressive development. Without listing all 'new' elements, some innovations should be mentioned: the definition in Article 1 is a departure from the traditional definition as given *Mavrommatis*; the requirement of continuous nationality was added; Article 8 provides for the protection of refugees and stateless persons; and Article 19 contains a recommendation that invites states to consider the relevance of diplomatic protection in case of significant injury, to consider the views of the individual and to transfer any compensation obtained to the individual.[34]

Diplomatic protection, has received some scholarly attention in recent years, but not in the form of a monograph, and generally no attention has been given to the question of how conclusions with respect to one aspect influence other

32 Garcia Amador, First Report, at 202-203 (paras. 151-159).

33 Bennouna, Preliminary Report, at 10-11 (paras. 33-37); 14.-15 (paras 49-54); 3 (para. 8); and p. 13 (para. 47) respectively.

34 There is also quite some progressive development in the provisions applicable to protection of legal persons, in particular on the nationality of corporations and the protection of shareholders, but this is beyond the scope of the present research, except in so far as it is dealt with in Chapter V in relation to *Diallo*.

aspects.[35] Thus, one frequently finds arguments revolving around the premise that diplomatic protection is a discretionary right of the state. Yet, what exactly this means or how this should be reconciled with the principle that individuals have acquired rights under international law remained obscure. This also applies to the question of what exactly constitutes diplomatic protection. Authors who strongly support the discretionary nature of diplomatic protection tend to sever diplomatic protection from human rights protection.[36] Some authorities maintain that diplomatic protection arises whenever state responsibility is invoked, but that it is irrelevant through which channel it is invoked. Others are of the opinion that only international litigation qualifies for diplomatic protection.

This question is related to another point of criticism of diplomatic protection: that of enforcement. This criticism has two elements. First, unlike other human rights instruments, diplomatic protection hardly ever aspires to address the general human rights situation in the host state. If it would, such ambition will pose a serious threat to the diplomatic relations between the host state and the state of nationality of the injured individual, even if the injured individual was one of many and if the injury resulted from a general disrespect for human rights. This in turn may threaten the success of the exercise of diplomatic protection, which for lack of enforcement jurisdiction of the protecting state is to some extent dependent on the relations between the two states involved. Diplomatic protection was not, and is not, designed to address the general human rights situation.[37] Yet, that does not mean that it is unsuitable as an instrument against violations of individual rights. The fact that it fails to address one element of human rights enforcement, that is, approaching the situation in general, is not to say that it cannot be successful in another. Every successful complaint against a violation of an individual right is one step in the right direction even if improvement of the situation in general requires other steps contained in other mechanisms. Most human rights

35 This lack of clarity is also shown by the request made by many states in the Sixth Committee regarding the future of the ILC Draft Articles. While the ILC recommended that the Draft Articles be turned into a treaty, many states expressed the view that it was too early for that and that they needed more time to consider various elements of the ILC draft. See statements to the Sixth Committee of the GA, UN Doc. A/C.6/61/SR.9 (Italy, Austria), A/C.6/61/SR.10 (Germany, United States, United Kingdom, Romania, France), A/C.6/61/SR.12 (Morocco, Switzerland, Nigeria), A/C.6/61/SR.19 (Algeria, Sierra Leone).

36 For such views see A.M. Aronovitz, 'The Procedural Status of Individuals in Diplomatic Protection and in the European Convention on Human Rights: A Comparative Study', 28 Comparative Law Review 15-53 (1995), at 26-36; V. Pergantis, 'Towards a "Humanization" of Diplomatic Protection?', 66 ZaöRV 351-397 (2006).

37 It should also be recalled that the exercise of diplomatic protection should not amount to a violation of the principle of non-intervention in the domestic affairs of another state, which would be the case if it did not comply with the requirements of nationality of claims and exhaustion of local remedies.

systems are multi-facetted and combine a number of different enforcement methods,[38] and sometimes a piece-meal approach is better that nothing.

Secondly, some exercises of diplomatic protection have been rather lengthy. One may rightly wonder whether procedures before the ICJ such as in *Diallo*, where it took almost 10 years to reach a decision on the admissibility of the dispute and where the decision on the merits, let alone implementation of that decision, may take another couple of years, are the most adequate procedures to address urgent human rights situations.[39] One should bear in mind, however, that litigation is certainly not the only means available in the exercise of diplomatic protection and it would not be fair to assess the value of diplomatic protection for the enforcement of human rights by only one of its features. As will be argued in Chapter II, states may resort to a multitude of activities, some of which may have immediate effect. For instance, a letter by the Minister of Foreign affairs of the state of nationality of the injured individual may have a decisive influence on the treatment of this individual in the host state. Such letters in themselves may not constitute human rights instruments and, if they are confidential, they do not have the function of publicly 'naming and shaming'. They nevertheless address the situation of an individual whose rights have been violated in a speedy manner and thereby contribute to the enforcement of individual rights in this particular case. In fact, Steiner writes that

> [w]hat came to mind about international *protection* was the range of pressures applied by international bodies or by States against delinquent States – critical diplomatic notes, investigative reports, and recommendatory resolutions; judgments by courts or other dispute resolution bodies; threats to withhold trade or aid; boycotts and embargoes; military interventions – in the effort to arrest violations and increase the likelihood of compliance.[40]

Diplomatic protection falls squarely within the range of measures available for the enforcement of individual rights. Enforcement of individual rights through the vehicle of the state, while not addressing the general situation, may still improve the life of one individual. This in itself is a venerable goal.

It has also been claimed that human rights apply to all individuals regardless of their nationality and that therefore states have no interest, or at least no special interest, in protecting their nationals abroad. Such individuals would

38 For the UN Treaty Bodies see J. Crawford, 'The UN Human Rights Treaty System: a System in Crisis?', in P. Alston & J. Crawford, *The Future of UN Human Rights Treaty Monitoring*, Cambridge 2005, at 1-12. The same applies *mutatis mutandis* for regional human rights courts.

39 A similar comment is justified in relation to the situation of the LaGrand brothers. The procedures at the ICJ could not prevent the execution of their sentences.

40 H.J. Steiner, 'International Protection of Human Rights', in M.D. Evans (ed.), *International Law*, Oxford 2006, 753-782, at 754 (emphasis in original).

fall under the general human rights protection system.[41] Gaja is perhaps one of the strongest proponents of this view. He stated that '[i]t would certainly be clearer if one … refrained from using the term "diplomatic protection" when a State makes a claim for the protection of human rights.'[42] Yet, this implies that diplomatic protection is a mechanism not suitable for the protection of human rights, which is difficult to reconcile with recent international practice. On the one hand, the decision of the EU to include diplomatic protection in its Charter on Fundamental Rights shows the perceived relevance of diplomatic protection for the protection of human rights. Even if this Charter's provision is difficult to support, as will be demonstrated in Chapter II, section 2.E, it shows that the EU member states consider diplomatic protection as something that belongs within the realm of human rights protection. In addition, and perhaps more importantly, practice demonstrated by claims based on diplomatic protection such as *LaGrand*, *Avena* and *Diallo* before the ICJ and other claims before national courts are a clear indication of the role of diplomatic protection for the protection of individual (human) rights. Contrary to the opinion of some authors,[43] it clearly shows that states can use diplomatic protection as a last resort where their nationals have been unable to secure redress for internationally wrongful acts. In this respect, it is a powerful mechanism, where other mechanisms fail.[44]

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41 See for instance G. Gaja, 'Is a State Specially Affected when its Nationals' Human Rights are Infringed?' in: L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague 2003, 373-382; E. David, 'Droits de l'Homme et Droit Humanitaire', in: *Mélanges Fernand Dehousse*, Paris/Brussels 1979, 169-181, at 176-180; See also A.A. Cançado Trindade, 'The Procedural capacity of the Individual as Subject of International Human Rights Law: Recent Developments', in: Karel Vasak, *Karel Vasak amicorum liber : human rights at the dawn of the twenty-first century*, Brussels 1999, p 521-544, who argues that the only way to secure human rights for individuals is by granting them full legal standing. But see T.E. Carbonneau, 'The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement', 25 Virginia Journal of Int'l Law 99-123 (1985), who argues against conflating human rights law and diplomatic protection to the detriment of the latter.

42 G. Gaja, 'Is a State Specially Affected when its Nationals' Human Rights are Infringed?' in: L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague 2003, 373-382, at 382.

43 These opinions will be addressed throughout this study. For just a few examples, see G. Gaja, 'Is a state specially affected when its nationals' human rights are infringed?', in: L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague 2003, 373-382; V. Pergantis, 'Towards a "Humanization" of Diplomatic Protection?', 66 ZaöRV 351-397 (2006);

44 H. Lauterpacht has stated that the mere possibility of diplomatic protection already ensures better treatment of aliens: 'the significance and value of diplomatic intercession lie not only in the actual instances – numerous as they are – of representations, complaints, formal claims and other methods of intercession. They lie in the availability of that protection, the power which lies behind it and in the resulting respect and security enjoyed by the subject as a normal accompaniment of his stay abroad.' H. Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', 9 Cambridge Law Journal 330-348 (1946), at 336.

C. The Rights of Individuals and diplomatic protection

Ever since one of the earliest references to diplomatic protection, in the 18th century by Emmerich de Vattel, states have had the right to protect their nationals abroad, but the modalities of this right and indeed its nature have not remained immune from other developments in international law. Most importantly, the growing importance of the individual as an actor in international law and the development of other mechanisms for the protection of their rights are to be taken into account in any assessment of the current status of diplomatic protection. Through the frequent invocations of diplomatic protection before the PCIJ and the ICJ[45] and the works of Borchard, Freeman, Dunn, Brierly, Jessup, Lillich and more recently Flauss, Ress and Stein and the ILC Special Rapporteur John Dugard, we are reminded of the fact that diplomatic protection continues to be recognised as an established part of international law until the present day. Whereas in Borchard's time, individuals had no means to address injuries they sustained abroad and had little or no alternative to turning to their state of nationality for protection, the various human rights courts and other institutions that accept private claims have changed this in recent times. Individuals have acquired a more influential role in international law and participate on many levels.[46] They have acquired rights and mechanisms exist through which they can claim these rights, in particular through the invocation of international human rights in domestic courts and through international human rights mechanisms such as the European Court of Human Rights and the various UN Treaty Monitoring Bodies. This development has led some to believe that diplomatic protection, indeed the law on state responsibility for injury to aliens, has become obsolete.[47] Others have forcefully argued that it would be unwise to throw away the baby with the bathwater. Lillich has stated that '[t]o argue that a limited but nevertheless relatively effective regime governing aliens should be scrapped for an

45 From PCIJ cases like the *Mavrommatis Palestine Concessions* case (Greece *v.* United Kingdom), 1924 PCIJ Series A, No. 2 and the *Panevezys-Saldutiskis* case (Estonia *v.* Lithuania) 1939 PCIJ Series A/B no. 76 to ICJ decisions in the *Nottebohm* case (Liechtenstein *v.* Guatemala), ICJ Reports 1955, the *Elettronica Sicula S.p.A. (ELSI)* case (United States of America *v.* Italy), ICJ Reports 1989, and more recently the *LaGrand* case (Germany *v.* United States of America), ICJ Reports 2001 and the *Ahmadou Sadio Diallo* case (Preliminary Objections) (Republic of Guinea *v.* Democratic Republic of the Congo), Judgment of 24 May 2007 (See Chapter V). Diplomatic protection arguably played a role in *Avena and Other Mexican Nationals* (Mexico *v.* United States of America), Judgment of 31 March 2004 (See Chapter IV).

46 Higgins, *Problems and Process*, Oxford 1994, 48-55.

47 Garcia Amador, First Report, at 203 (para. 153), stated that 'diplomatic protection, and the principle underlying it, do not appear to constitute the most efficient means of protecting the rights and interests of aliens'. See also G. Gaja, , 'Is a state specially affected when its nationals' human rights are infringed?', in L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague 2003, at 373-382; V. Pergantis, 'Towards a "Humanization" of Diplomatic Protection?', 66 ZaöRV 351-397 (2006).

unrealized ideal one covering all persons hardly seems consistent with a genuine concern for the promotion and protection of human rights.'[48] He has taken this argument even further when he said that '[m]any legal commentators and some States now regard this body of international law as old, antiquated and of limited contemporary relevance. Nothing could be further from the truth.'[49] Dugard, very much in the spirit of Lillich, has presented a similar argument.[50] Flauss, who has extensively researched the relation between diplomatic protection and the European human rights system, concludes that while the general rules on diplomatic protection have influenced the human rights system (e.g. the local remedies rule and the possibility of inter-state complaints), both mechanisms continue to exist separately.[51] This scholar has also analysed the extent to which states support individual claims of their nationals against other states and concludes that this practice is a soft kind of diplomatic protection: 'une forme molle de protection diplomatique.'[52] In this study, this aspect will not be discussed extensively, although the European practice will occasionally be referred to.

The question is not so much whether diplomatic protection is discriminatory, because it clearly is: it only benefits one group of individuals, the distinguishing criterion being nationality. Apart from the position that improving the situations of foreigners within a state may have the spin-off effect of improving the general situation, there is an additional argument in favour of not putting too much emphasis on this aspect of diplomatic protection. As has already been mentioned above, the situation of foreigners is generally not equal to that of local nationals and that it is thus not unreasonable to offer

48 R.B. Lillich, 'The Current Status of the Law of State Responsibility for Injuries to Aliens', in: R.B. Lillich (ed), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville 1983, 1-61, at 9.

49 *Id.* at 1.

50 Dugard, First Report, at 10, paras. 31-32. See also T.E. Carbonneau, 'The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement', 25 Virginia Journal of Int'l Law 99-123 (1985).

51 J.-F. Flauss 'Protection Diplomatique et Protection Internationale des Droits de l'Homme', 13 Revue Suisse de Droit International 1-36 (2003); *Id.*, 'Contentieux Européen des Droits de L'Homme et Protection Diplomatique', in: L. Condorelli (et al.), *Libertés, Justice et Tolérance : Mélanges en Hommage au doyen Gérard Cohen-Jonathan*, Brussels 2004, 813-838.

52 J.-F. Flauss, 'Contentieux Européen des Droits de L'Homme et Protection Diplomatique', in: L. Condorelli (et al.), *Libertés, Justice et Tolérance : Mélanges en Hommage au doyen Gérard Cohen-Jonathan*, Brussels 2004, 813-838, at 824. While the two procedures are similar in the sense that they are subject to similar criteria – the local remedies rule and the violation of international law – they are different in the sense that a claim brought before the European Court of Human Rights by an individual against another state is not an inter-state claim in the true sense of the word, and does not become one when the individual enjoys the support of his or her national state (or indeed a third state). The fiction is not applied to these cases: the individual is continues to be the claimant and retains control over the claim.

them an extra means for protection against the violation of their human rights.[53]

In the present analysis, as has been mentioned, the emphasis will be on the protection of individual rights. Most individual rights are human rights: the prohibition on torture, the right to a fair trial and the prohibition on arbitrary detention, to mention just a few. Therefore, reference is largely made to human rights to denote the rights that are protected through diplomatic protection. However, some individual rights are not considered human rights. This applies to individual rights under the VCCR, as stated by the ICJ in *La-Grand*,[54] and also to rights under investment treaties. Yet, it is perhaps fair to say that even those rights that are not human rights strictly speaking will affect rights that are: a violation of individual rights under the VCCR may be conducive to an unfair trial and illegal expropriation or violation of rights under investment treaties may result in a violation of the right to property, in particular when combined with a denial of justice.

Individual rights are to be distinguished from the rights of states. It is exactly on the dividing line between these rights that diplomatic protection operates. As will be argued in Chapters I and III, the legal fiction in diplomatic protection is a vehicle to transform individual rights into the right of a state to present a claim. The relation between the individual and the state is always a complex one.[55] While it would be beyond the scope of this thesis to define the position of the individual in international law, some remarks must be made regarding the violation of international law that constitutes the subject matter of the claims and the question of to what extent these rights are individual or even human rights. This thesis addresses the use of diplomatic protection in current international law, and will argue that diplomatic protection can be used as an instrument for the protection of human rights. This function of diplomatic protection is however a relatively modern one. Most earlier claims before the PCIJ and ICJ demonstrated a strong link between the violation of the rule concerned and the interest of the claimant state. In cases such as *Mavrommatis*, *Interhandel* and the like, which concerned issues of investment or other economic activity, the state of nationality of the injured individual had an economic interest in the claim. Another type of earlier claims concerned the international minimum standard. While there is some overlap between the international minimum standard and human rights law,[56] there are important conceptual differences between the two, which explain this aspect of the development of the law on diplomatic protection. First, invocation of the international minimum standard was considered an exception to the

53 See *supra*, Section 1.A.

54 *LaGrand*, at 494 (para. 77).

55 See e.g. A. D'Amato, 'The Relation of the Individual to the State in the Era of Human Rights', 24 Texas Int'l Law Journal 1-12 (1989).

56 See *supra* section 1.A.

principle of non-intervention while human rights in general were considered to belong to the domestic affairs of a state[57] and not something to protect through diplomatic protection. Second, the enjoyment of the rights protected by the international minimum standard was premised on nationality. Borchard provides a clear example of this line of reasoning:

> whatever the rights the individual has in a state not his own are derived from international law, and are due him by virtue of his nationality. As a matter of fact, the alien derives most of his rights – fundamental or human rights and others – by grant from the territorial legislature, international law fixing a minimum which cannot be overstepped.[58]

Later on, he explains this further by stating that '[t]his state [that is, the claimant state], in demanding redress, does not represent the individual who has sustained the injury, and does not give effect to his right, but to its own right, the right namely that its citizen may be treated by other states in the manner prescribed by international law.'[59] Individuals thus did not have an independent right to treatment according to the minimum standard but were only entitled to such treatment by virtue of their nationality. The consequence of this framework, as Borchard stated, was that states, when claiming a violation of the international minimum standard were much closer to claiming their own rights than they are today when claiming a violation of human rights. Even if the exercise of diplomatic protection is still premised on the nationality of claims rule, the enjoyment of the underlying right is no longer dependent on this nationality. With the strengthening of human rights in international law, the role of the international minimum standard diminished. Writing in a transition period after the adoption of the Universal Declaration on Human Rights, traces of this process can be found abundantly in Garcia Amador's reports to the ILC. Troubled by the apparent conflict between the international minimum standard and the prohibition of discrimination based on nationality, he attempted to reformulate the law and integrate the protection of human rights and the international minimum standard into a new legal rule designed to provide universal protection of human rights regardless of nationality.[60] In fact, he suggested that the international minimum standard should be interpreted and applied in accordance with human rights standards as they emerge form the various human rights documents.[61] Although Garcia

57 See *infra* Chapter VI, section 2. See also C.J.R. Dugard, *International Law, a South African Perspective*, Landsdowne 2005, at 309.

58 Borchard, *Diplomatic Protection of Citizens Abroad*, at 13.

59 *Ibid.*, at 18.

60 Garcia Amador in his Second and Third Reports, ILC Yb 1957, at 113-114 and ILC Yb. 1958, at 49, para. 8 resp.

61 Garcia Amador, Second Report, ILC Yb 1957, at 114-116. It was partly due to the inclusion of the primary norms into the project that the ILC could not reach consensus.

Amador's project has not been particularly successful, his reports clearly show the development away from the international minimum standard and towards individual human rights.[62] In the exercise of diplomatic protection, states now protect rights to which their nationals are entitled qua human being and in which the protecting state not only has a direct interest.[63] In this respect, *LaGrand* and *Avena* are somewhat in between. The right to be informed of the possibility of consular assistance is clearly only applicable to foreign nationals. In this, it does not differ from the international minimum standard. Yet, Germany and Mexico both argued that they invoked this right of their nationals as a human right. The ICJ avoided this argument, not because it thought that human rights were incapable of being invoked through diplomatic protection but because it would not consider the question of whether the right at hand constituted a human right.[64] There may be other considerations leading states to the conclusion that they should not exercise diplomatic protection on behalf of their nationals abroad, but this will not be influenced by the view that it would constitute interference in the domestic affairs of the host state.

2 METHODS

This study presents a normative approach to international law. This normative assessment has two characteristics: first, the emphasis is on the nature of the law on diplomatic protection and its development rather than on implementation of these rules. Second, the central issues are approached from an international law perspective and domestic law will only be resorted to when it implements international law. The central arguments are presented based primarily on the nature of the relevant rules.[65] For clarification and interpretation of these rules, recourse has been sought to other rules of international law (treaties and custom), legal scholarship, doctrine and case law. As will be explained below, state practice is hardly available. To the extent that state

62 See on this point also Higgins, *Problems and Process*, at 51-55.

63 For instance, the part of *Diallo* that concerned the expulsion and imprisonment of Mr. Diallo and many of the cases presented in Chapter VI. Admittedly, in those cases, the states not always acknowledged that they had exercised diplomatic protection or refused to do so, but the issue never was that the rights that were allegedly violated were not capable of being invoked through diplomatic protection.

64 *LaGrand*, at 494 (para 78). *Avena*, at 60-61 (para 124), see *infra* Part II, introduction to Chapter IV.

65 On the debate on normative approaches and empirical approaches to international law see generally Koskenniemi, *From* Apology *to* Utopia*, the Structure of International Legal Argument*, Cambridge 2005; See also F. Castberg, 'La Méthode du Droit International Public', 43 Recueil des Cours 309-383 (1933) (for a deductive approach) and G. Schwarzenberger, 'The Inductive Approach to International Law', 60 Harvard Law Review 539-579 (1947) (for an inductive approach).

practice, or indeed *opinio juris*, is available, issues of selectivity prevent the drawing of general conclusions. The exception to this is the approach taken in Chapter VI, which discusses to the knowledge of the author, the majority of relevant national court decisions.

Not all issues relating to diplomatic protection are discussed in the present study. The study focuses on the protection of natural persons, with particular emphasis on the protection of human rights. This means that matters related to protection of legal persons are largely left aside.[66] The selection of topics has also been inspired by the central purpose of this thesis: to reassess the law on diplomatic protection, with particular emphasis on the ILC Draft Articles, to address criticism raised against this mechanism and to demonstrate that it can function as a mechanisms for the protection of individual (human) rights. Aspects of the law on diplomatic protection that do no touch on these questions, which concern the very nature of diplomatic protection, have not been selected. Thus, the legal fiction and the relation between diplomatic protection and state responsibility *erga omnes* are included, while questions of nationality are not discussed separately. Similarly, analysis and discussion of the local remedies rule is not presented in a separate chapter, but only in relation to the nature and exercise of diplomatic protection.

A. Sources

The law on diplomatic protection, a part of the law on state responsibility, consists primarily of customary international law. It has been subject to codification by the ILC, yet so far without resulting in a binding international convention. Due to its customary status, not all states consider it necessary to start negotiations on a convention.[67] In addition, UN Member States have expressed the wish to join the fate of the ILC draft articles on diplomatic protection to that of the Articles on State Responsibility.[68] Although the rules on diplomatic protection may appear well established under international law, their interpretation and application in modern international law requires resort

66 This choice has also excluded an in-depth discussion of the relation between diplomatic protection for issues related to investment and the relation between diplomatic protection and procedures in the context of the International Centre for the Settlement of Investment Disputes.

67 The UN GA has merely decided to 'Draw the attention of Governments to the importance for the International Law Commission of having their views on … the draft articles and commentary on diplomatic protection', see A/RES/60/22 Report of the International Law Commission on the work of its fifty-seventh session (2006), at 2.

68 See various statements to the Sixth Committee of the GA, UN Doc. A/C.6/61/SR.9 (Italy), A/C.6/61/SR.10 (Argentina, United Kingdom, Portugal, Greece), A/C.6/61/SR.11 (Hungary, Czech Republic), A/C.6/61/SR.11 (India, Switzerland).

to a variety of (subsidiary) sources.[69] In particular, the fragmentation of international law and the proliferation of mechanisms for protection necessitate a re-evaluation of diplomatic protection vis-à-vis such development. The analysis and interpretation of these sources have provided the foundation for the present research and its conclusions.

States often exercise diplomatic protection through silent diplomacy and not all instances of protection will have the shape of public international law litigation. It is therefore difficult, if not impossible, to list the activities undertaken by states to establish state practice.[70] Even if state practice of some states may be available to the author, this will not be a representative quantity which would justify the inference of a general rule.[71] Yet, it is possible to acquire such information indirectly, through decisions by national courts. In Chapter VI, these have been used as a basis to show that there is a trend allowing judicial review of diplomatic protection, thereby decreasing its discretionary nature on national level, and of courts urging their respective governments to duly consider the exercise of diplomatic protection, in particular in situations of serious human rights violations. Some of these materials have also been used in Chapter II to develop the concept of 'action' for the purpose of diplomatic protection.

In addition to national courts, international courts and tribunals on numerous occasions admitted or rejected claims based on diplomatic protection. These range from early 20th century mixed claims commissions that decided the *Neer* and *Roberts* claims to the most recent ICJ procedures in the case of *Avena* and *Ahmadou Sadio Diallo*. The arguments of the respective parties and the reasoning of the courts and tribunals have contributed to the development and clarification of the law on diplomatic protection, its nature and the way in which it can or should be exercised. For the present research, the decisions of the World Court are particularly relevant. In Chapters II, III, IV and V such decisions are analysed with the purpose of establishing the relation between the law of diplomatic protection and current general international law. The most recent decisions are discussed in separate chapters. In Chapter IV, the ICJ's decision in *Avena* is criticised in comparison with its earlier decisions, in particular in

69 The sources used in this study find their origin in or are applicable to states and individuals. For the purpose of this study, these are the primary subjects of international law. While a large number of documents used in this study have been produced by various UN bodies, they primarily relate to other subjects (states and individual) and not to the UN proper. International Organisations, and the law emanating from them, are thus not considered extensively.

70 See on this point G. Perrin, 'La Protection Diplomatique des Sociétés Commerciales et des Actionnaires en Droit International Public', 32 Revue Juridique et Politique Ind. Et Coop. 387-409 (1978), at 391, who remarks that establishing positive law on diplomatic protection through the practice of states will always be a very difficult task due to the confidential nature of most procedures in the exercise of diplomatic protection.

71 Even states, in the comments to the Sixth Committee of the GA would not refer to their activities in this field to support theid views on the ILC Draft Articles.

LaGrand. Chapter V follows with an analysis of its decision in *Diallo*. Since many of the earlier decisions are the subject of extensive writings of legal scholars, it is often not necessary to present an additional analysis of these decisions. Except when existing analyses prove inadequate for the present purpose, will reference be made to the work of others. This applies in particular to Chapter IV and the article by Enrico Milano on the ICJ and diplomatic protection.[72]

Another source that has been relied on is the documents related to the ILC projects on diplomatic protection and state responsibility. These have both resulted in a series of reports prepared by the respective Special Rapporteurs, a set of (draft) Articles and Commentaries thereto, comments and observations by states on earlier versions of the draft Articles and ILC Reports and Yearbooks reproducing the discussions during the ILC's sessions. In addition to the written work of the ILC, three extensive visits to the Commission's sessions in 2004 and 2006 have provided further insight in the ILC's approaches, in particular to diplomatic protection. While the work of the ILC is not always satisfying, nor indeed conclusive, it offers a wealth of information and often invites a variety of responses by scholars and states. The documents produced by the ILC are thus of particular relevance because they combine, to a certain extent, scholarly opinions, state practice and *opinio juris*. The views of the Special Rapporteur and other members of the ILC clearly are scholarly opinions. They are however more than just individual scholarly opinions: the outcome of the ILC is a collective effort and therefore represents more than one opinion.[73] The various reports also record state practice from UN member states, as do the governments' comments and observations. In addition, the latter show, to some extent, existing *opinio juris*. The ILC materials therefore constitute a source with considerable authority. On this point, Watts stated that

> [o]n particular topics, the authority which underlies its work (even on the basis of draft Articles adopted only on first reading) has been influential in consolidating the law; and more generally, its intellectual approach to establishing coherent bodies of rules in different areas has given an overall solidity to international law.[74]

Whereas this view may not apply to all areas, in its projects on State Responsibility and Diplomatic Protection, the ILC has certainly had the purpose of creating a 'coherent body of rules'. In all Chapters, the draft articles on diplomatic protection and the accompanying Commentaries have provided the basis for discussion, where they are an exercise of progressive development, or considered evidence of the *status quo* where they codify customary international

72 E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?', 35 Netherlands Yb. I. L. 85-142 (2004).

73 See *Id.*, at 15.

74 A. Watts, *The International Law Commission 1949-1998*, Oxford 1999, at 7 (footnotes omitted).

law.[75] At some stages, the views of the ILC have been questioned, in particular when doubts exist with respect to the customary nature of the rule subject to 'codification'.

The relative weight that has been attributed to the different sources varies: in Part I, the work of the ILC and legal doctrine play a central role, whereas in Part II the starting point for the discussion is constituted by (inter)national judicial decisions. In analysing the various documents, decisions and opinions of legal scholars, various hypotheses have been tested and questions have been answered. Where the materials were inconclusive or contradictory, I have suggested solutions. Yet, in all chapters, an attempt has been made to draw conclusions upon and consequences from the law as it stands or is perceived to stand. These conclusions and consequences may require further development of the law, or at least acknowledgment that certain obligations entail other obligations. This method comes to the fore most clearly in Chapter VI, where the conclusion that there is a growing tendency to restrict the discretionary nature of diplomatic protection is based on state practice as evidenced by national court decisions.

As will be further explained in section B below, an attempt has been made to refrain from entering into questions regarding the validity of some of the underlying concepts. Yet this does not mean that this study is void of conceptual development. It has been my intention to demonstrate a human rights oriented approach to diplomatic protection, through legal analysis and emphasis on existing rules and procedures. In a way, this is a positivist approach with an idealist purpose. It is my strong conviction that idealist causes, such as the advancement of human rights, are best served by technical and analytical arguments which cannot fail to convince even the fiercest opponents.

B. Assumptions

Any legal exposé contains a number of assumptions. In this particular study, some of the principles and opinions relied on qualify as assumptions. It is not my intention to discuss the validity of these assumptions, since such a discussion would require in-depth analysis clearly beyond the scope of the present

75 It should be noted that in principle the distinction between 'progressive development' and 'codification' is not always clear, especially since 'codification' of customary international law usually implies rephrasing the law, which in turn may develop the law. In addition, the contents of a customary rule of international law may not always be clear. The attempt to *clarify* the rule by codifying it, may also require *development* of the rule. However, in the Reports of the Special Rapporteur on diplomatic protection and the Commentaries to the draft articles on diplomatic protection, it is usually indicated whether a proposed rule is considered to constitute a codification of customary international law or an exercise of progressive development.

research. I will just outline some of the general assumptions that stand at the basis of this thesis. Others will be mentioned in the relevant chapters.

The present research approaches diplomatic protection as a means to advance individual human rights. Without entering into any question of the nature of human rights, such as what exactly constitutes torture or racial discrimination, it will be assumed that human rights are part of international law and that the advancement of human rights is desirable. This is not to say that any method for the advancement of human rights is acceptable. Indeed, the means of such advancement need close scrutiny to ensure that they do not create more problems than they intend to solve.[76] Yet, through the exercise of diplomatic protection, human rights can be advanced and promoted, diplomatic protection being a mechanism the lawfulness of which is capable of being reviewed. The desirability of such advancement is thus not subject to debate.

Another, perhaps more controversial, assumption is the existence of peremptory norms or norms of *jus cogens*.[77] Such norms will be referred to frequently, although no attempt will be made to define such norms in details. The discussion relies on examples of such norms given by others, in particular the ILC. In addition, although Chapter III discusses the concept of obligations *erga omnes* in some detail, again the very existence of such obligations will be assumed. Both peremptory norms and obligations *erga omnes* are frequently subject of debate: sceptics deny the existence of *jus cogens* by pointing to non-compliance with some of the most important norms and to the failure of the international community to enforce compliance. Others maintain that legal systems necessarily have fundamental values that are non-derogable and that violation of such norms will always be recognised as such.[78] States in the process of committing an act of aggression against another state will usually argue that what they are doing is not aggression, because if it were they would be in violation of the norm.[79] It should be noted that the ICJ and the ILC have

76 See D. Kennedy, *The Dark Sides of Virtue*, *Reassessing International Humanitarianism*, Princeton 2004. See also F.F. Hoffmann, 'Human Rights, the Self and the Other: reflections on a pragmatic theory of human rights' in: A. Orford (ed.), *International Law and its Others*', Cambridge 2006, at 221-244.

77 Throughout this study, the terms 'peremptory norms' and '*jus cogens*' will be used interchangeably. See *infra* Chapter III, note 2.

78 For an overview, see the excellent analysis of D. Shelton, 'Normative Hierarchy in International Law', 100 AJIL 291-323 (2006).

79 For an overview of such issues see e.g. A. d'Amato, 'It's a Bird, it's a Plane, it's Jus Cogens!', 6 Connecticut JIL 1-6 (1990); A.J.J. de Hoogh, 'The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective', 42 AJPIL 183-214 (1991); D. Shelton, 'International Law and Relative Normativity', in: M.D. Evans (ed.), *International Law* Oxford 2006, 159-185; C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Dordrecht 2006, in particular A. Pellet, 'Conclusions', at 417-424; Orakhelashvili, *Peremptory Norms in International Law*, Oxford

accepted the concepts of both *jus cogens* and obligations *erga omnes*.[80] Peremptory norms are a necessary part of the international *ordre public*, as Orakhelashvili has stated:

> peremptory norms operate as a public order protecting the legal system for incompatible laws, acts and transactions. … It seems that the general concept of public order most suitably reflects the basic characteristics of *jus cogens*. This concept … is the most suitable, if not the only, analogy that can be adapted, without the disruption of the inherent character of the concept itself, to the decentralized character of the international legal system.[81]

Since these norms are fundamental to the international legal order, mechanisms for protection against and invocation of responsibility for violations of such norms require attention and should, if possible, be enhanced. While the very concept of peremptory norms and the question of what constitutes the international *ordre public* both deserve further analysis, such analysis is beyond the scope of the present study.

A third assumption that should be mentioned is that states still are the primary actors in international law. This is not to say that individuals, NGOs and other non-state actors have no influence on international law or that they do not have an important role to play. Indeed, strong responses to violations of fundamental human rights are only desirable if one acknowledges that many of these rights, if not all, are designed to apply to individuals. Yet, diplomatic protection is an enforcement mechanism, that is, a dispute settlement mechanism, that functions on the inter-state level. Inter-state claims will bear more weight than claims of individuals against (foreign) states, in particular when no effective, legally binding mechanisms exist or when possibilities of redress are limited.[82] The fact that states are still the primary actors in international law justifies an investigation into the law regulating a specific area of their activities: diplomatic protection.

2006, 32-35. See also Seiderman, *Hierarchy in International Law, the Human Rights Dimension*, Antwerp 2001.

80 *Genocide* case, para. 162; *Congo-Rwanda* case, paras. 64 and 125; *East Timor* case, at 102 (para. 29). For the ILC see the Articles on State Responsibility, Articles 41 and 48 and accompanying Commentaries.

81 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, 10-11. See also Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, 139-145. But see Seiderman, *Hierarchy in International Law, the Human Rights Dimension*, Antwerp 2001, at 47-50.

82 See in particular the conclusions of Chapters I, II, and V.

3 STRUCTURE

This thesis consists of six chapters, which present legal analyses of the most important aspects of diplomatic protection. Part I (chapters I-III) discusses the nature of diplomatic protection in current international law. Part II (chapters IV-VI) presents an overview and analysis of the application of diplomatic protection in international practice. All of these chapters have been published or have been accepted for publication as articles in various international legal journals. A thesis based on published work necessarily has a somewhat different structure than one that is not. Even if the current division of chapters is justifiable for its content, it is undeniable that the fact that all chapters are separate articles has influenced the structure. As will explained below, this is particularly noticeable with respect to Chapter IV and V.

In the first chapter, the legal fiction underlying diplomatic protection will be explored. Some have argued that the role of individuals in current international law is such that states can no longer legitimately espouse their claims. The legal fiction in diplomatic protection allows states to present a claim based on injury to its national to another state. It thereby lifts the claim to the international level and allows the application of a secondary right (i.e. the right to exercise diplomatic protection) to the violation of a primary right causing the injury to the individual. The legal fiction is quintessential to this procedure, and without it diplomatic protection cannot be exercised. In considering the legal fiction, some issues require special attention. These include the local remedies rule, the continuous nationality rule, the question of compensation, and, most important, the question of whose rights are protected in the exercise of diplomatic protection. If diplomatic protection is premised on a legal fiction, a state cannot *in reality* claim its own rights (as it was stated in *Mavrommatis*). It will claim the rights of its individual national through the fiction that facilitates such espousal.

Having established the nature of diplomatic protection, the second chapter explores the modalities of the exercise of diplomatic protection and distinguishes diplomatic protection from consular assistance. A surprisingly high number of scholars and states fail to distinguish clearly between these two mechanisms. While diplomatic protection and consular assistance are both at the disposal of states for the protection of their nationals abroad, there are significant differences between the two, as is shown by the existence of two different treaties governing the international relations facilitating such protection. Some scholars have argued in favour of a less sharp distinction. What matters, according to such argument, is the protection offered and not the name it bears.[83] However, if the exercise of diplomatic protection is not in conformity with its conditions – the exhaustion of local remedies and the nationality

83 See e.g. C. Forcese, 'The Capacity to Protect: Diplomatic Protection of Dual Nationals in the "War on Terror"', 17 EJIL 369-394 (2006), at 374-375.

of claims – it will violate the principle of non-intervention. Consular assistance, which is not subject to these conditions as strictly as diplomatic protection, is therefore limited in scope. Observance of these rules is mandatory to avoid unlawful interventions. In this chapter, a separate section is dedicated to diplomatic protection and consular assistance within the European Union (EU), as provided for in various EU treaties and other documents.[84] These provide for the protection of an EU citizen by another EU member state of which he or she is not a national, in case the state of nationality is not represented in the host state. It will be argued that consular assistance by an EU member other than the state of nationality of the individual concerned may be permissible, but that this does not apply to diplomatic protection. Any agreement concluded between EU member states is not binding upon other states and cannot overrule the customary requirement of nationality of claims. Non-compliance with this rule while exercising diplomatic protection results in an interference in the domestic affairs of the host state. While clarifying these issues, a clear picture of the modalities of the exercise of diplomatic protection emerges, which answers the question of what does and what does not constitute diplomatic protection.

Diplomatic protection is part of the law on state responsibility. It constitutes one of the mechanisms for invocation of the responsibility of one state by the state of nationality of an injured individual. As has been explained above, diplomatic protection is not the only mechanism available for protection of rights of individuals. Neither it is the only mechanism for invocation of state responsibility for serious human rights violations. Under Article 48 of the ILC Articles on State Responsibility, states may invoke the responsibility of another state *erga omnes* when it concerns the breach of a peremptory norm that is owed to the community as a whole. Since this kind of invocation potentially operates in the same field as diplomatic protection, it is necessary to analyse the relation between these two mechanisms. One would expect that invocation of responsibility *erga omnes* is not subject to the prerequisites of diplomatic protection (the nationality of claims rule and the local remedies rule) and that it may therefore be more accessible. Yet the Articles on State Responsibility do not unequivocally support this interpretation. The Articles on State Responsibility maintain the traditional distinction between direct and indirect injury, but they do not explicitly clarify whether invocation *erga omnes* is an invocation for direct injury or for indirect injury. If it is the latter, then the provision on indirect injury applies, which requires compliance with the nationality of claims rule and the local remedies rule. If this line of reasoning is the correct one, Article 48 of the Articles on State Responsibility is a dead letter, because all attempts to apply it will be thrown back on the traditional requirements of diplomatic protection. On the other hand, if invocation of responsibility *erga*

84 See Art. 20 EC Treaty; Art. 46 of the Charter of Fundamental Rights of the European Union and Art. I-10 of the Treaty Establishing a Constitution for Europe.

omnes is not an indirect claim, one could legitimately ask what function is then left for diplomatic protection. These issues are explored in the third chapter. By analysing the nature of invocation of state responsibility *erga omnes*, comparing this nature to the nature of the exercise of diplomatic protection and by analysing the framework set up by the ILC for both the law on state responsibility and the law on diplomatic protection in the respective sets of (draft) articles, it is concluded that the two mechanisms can and should coexist. Invocation *erga omnes* is based on direct injury: it concerns obligations that are directly owed to the international community including the claimant state. This is thus different from diplomatic protection, which is based on indirect injury since the obligation the violation of which underlies the claim is owed to the individual national. Only after application of the legal fiction does it become the state of nationality's claim.

While it may not always seem necessary to make such distinctions, they are relevant for the purpose of establishing the present use and function of diplomatic protection. The issues related to the nature of diplomatic protection and its position in contemporary international law are discussed in the first part of this thesis. In the second part, the application of diplomatic protection in practice is scrutinised. In chapter four, the ICJ's approach to diplomatic protection in *Avena* is discussed against the background of its other decisions on similar matters. It is argued that the ICJ failed to recognise the nature of Mexico's claim. While unnecessary, this is also undesirable. Diplomatic protection is a legal instrument that has suffered much from politicised applications. In order to avoid such abuse, it is important to comply very strictly with the conditions for the exercise of this instrument and to investigate carefully whether these conditions are fulfilled. Chapter four demonstrates how this should have been done in *Avena*. A similar analysis it presented in Chapter five regarding *Diallo*. These two decisions have some elements in common, yet there are important differences, particularly in the way in which the Court applied the law on diplomatic protection. Even if they have been decided by the same Court, their possible influence on the development of this field of law is a different one. They are therefore discussed separately. While in *Avena* the Court decided not to treat the claim as one based on diplomatic protection, in *Diallo* there was no doubt about the basis of the claim and the decision shows clear support for the Draft Articles including some of the progressive development in the Draft Articles. In particular, the ICJ's confirmation of draft article 1 and the protection of direct rights of shareholders in the latter case is significant.

Much of international litigation has its origins in the exercise of diplomatic protection. The issue is however not limited to international litigation. National courts have increasingly been asked to pronounce upon the question of whether a national government could lawfully refuse to exercise diplomatic protection on behalf of one of its nationals. As is shown in chapter six, the ensuing decisions show an interesting development. Where the fiction in

diplomatic protection transforms the claim into an inter-state claim on international level, individuals have increasingly attempted to regain control over the procedures, and with some success. Even though to date no court has ruled that a state is obliged to exercise diplomatic protection, all courts in the decisions discussed in chapter six have judicially reviewed the decisions taken by the executive on the (non-) exercise of diplomatic protection. Many have also issued a warning: should the government in future fail to comply with its standards of protection, the courts would not hesitate to give a ruling in favour of the individual national. These decisions show a limitation on the discretionary nature of diplomatic protection and recognition of the importance of the mechanism in protecting the rights of individuals abroad.

The sixth chapter is followed by a general conclusion, which summarises the main conclusions of the preceding chapters and presents an overall conclusion regarding the function of diplomatic protection in contemporary international law and answers the question why we should continue to use this mechanism. An answer to this question is that diplomatic protection is firmly embedded in international law, with limitations and conditions. Due to the existence of such limitations and conditions, diplomatic protection is a mechanism that can be subjected to review. The legality of the exercise of diplomatic protection can thus be established. While this will protect the respondent states against abuse, the exercise itself will protect individuals against human rights violations. As Lillich has stated, '[i]n short, states whose conduct measures up to international standards have little to fear from diplomatic protection, while its abolition would leave alien claimants without even nominal procedural safeguards under the existing international legal order'.[85]

85 R.B. Lillich, 'Diplomatic Protection of Nationals Abroad: an Elementary Principle of International Law under Attack', 69 AJIL 359-365 (1975), at 362. See similarly Shea, *The Calvo Clause*, Minneapolis 1955, at 20.

PART 1

Diplomatic Protection in Current International Law

I As If: the Legal Fiction in Diplomatic Protection

'Wie kommt es, dass wir mit bewusstfalschen Vorstellungen doch Richtiges erreichen?'[1]

INTRODUCTION

In May 2006 the ILC adopted on second reading its draft articles on diplomatic protection. These articles largely codify existing customary international law on the protection of nationals abroad by means of diplomatic protection. As is well known, and clearly stated in the commentary to the articles adopted on second reading, diplomatic protection is premised on a fiction: the injury to an individual is treated as if it constitutes an injury to the individual's national state, thereby entitling the national state to espouse the claim.[2] The legal fiction underpinning diplomatic protection has, however, led to debate in the ILC, and was raised as a point of discussion in the comments and observations by states on the draft articles prior to the second reading. In order to determine the value of the fiction we must explore what function the fiction has within diplomatic protection. Legal systems are almost by definition imperfect and it often happens that unforeseen events pose challenges to the existing systems. Sometimes the solution is to change the system. At other times, the device of the legal fiction is applied. Something that fits ill with the existing paradigm is treated as if it were something else, in particular as if it were something that is covered by existing rules and regulations. The protection of individuals in an era where they did not exist under international law – by means of diplomatic protection – was made possible by resort to this fiction.[3] Draft article 1 of the ILC draft articles on diplomatic protection adopted on first reading reflected strongly this fictive nature and was a faithful copy of the dictum in the *Mavrommatis Palestine Concessions* case.[4] It stipulated

1 Hans Vaihinger, *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit*, Leipzig 1922, at XII. This Chapter was published as an article entitled 'As If: the Legal Fiction in Diplomatic Protection', in 18 EJIL 37-68 (2007).

2 See ILC Report 2006, Commentary to draft Art. 1: '[o]bviously it is a fiction', at 25.

3 *Id.*, at 25.

4 *Mavrommatis Palestine Concessions* Case (Greece *v.* United Kingdom), PCIJ, Series A, No.2 (1924).

that states adopt in their own right the injury sustained by their national.[5] In *Mavrommatis* the Permanent Court of International Justice stated that:

> 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 right, the right to ensure, in the person of its subjects, respect for the rules of international law.[6]

The regime reflected in *Mavrommatis* clearly shows the operation of the legal fiction. The decision in *Mavrommatis* relies on what is often called the 'Vattelian' fiction. Writing in 1758 the Swiss jurist Vattel stated:

> Quiconque maltraite un Citoyen offense indirectement l'Etat, qui doit protéger ce Citoyen. Le Souverain de celui-ci doit venger son injure, obliger, s'il le peut, l'aggresseur à une entière réparation, ou le punir; puisqu'autrement le Citoyen n'obtiendroit point la grande fin de l'association Civile, que est la sûreté.[7]

Although Vattel's views on the nature of international law and the necessity of states' consent may be questioned, the fictitious nature of diplomatic protection is appropriately described: the state pretends to suffer an injury through injury suffered by one of its nationals as a result of an internationally wrongful act. At this stage, it is important to emphasise the indirect nature of the injury. Vattel clearly considered an injury to a national as an indirect injury since it is contrasted to direct injury in the paragraph containing the 'famous' quotation: the paragraph starts with a description of direct injury and then continues with indirect injury. In this respect, it is curious to note that Vattel dedicated quite a few lines to the question of state responsibility for acts of individuals, which is only incurred in the case of implied or express approval of wrongful conduct of nationals of a state by that state.[8] The limitation to the responsibility of a state for acts of individuals is another indication of the fictitious nature of diplomatic protection, as will be pointed out below. In interpreting Vattel's position, it is clear that the initial violation of the law is not a violation of the right of a state. While it is certainly true that states partly assert their own rights in exercising diplomatic protection, they only do so through a fiction that transforms the violation of the primary rights of the individual national

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5 Diplomatic Protection – titles and texts of the draft articles on Diplomatic Protection adopted by the Drafting Committee on first reading, International Law Commission 56th session, A/CN.4/L/647 (2004), at 1.

6 *Mavrommatis*, at 12.

7 E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle*, à Leiden aux Dépens de la Compagnie, 1758, Vol. I, book II, para. 71. For translation see: E. de Vattel, *The Law of Nations* (1758), (reprint of the translation by J. Chitty of 1854), New Jersey 2005.

8 *Ibid.*, paras. 74-8. This, of course, is also a fiction: the state assumes responsibility as if the act was committed by it and not by one of its nationals/citizens.

concerned to the secondary right of his or her national state to present claims.[9] The right they assert is the right to exercise diplomatic protection. Although the statement by Vattel taken together with the findings of the Permanent Court in *Mavrommatis* are sometimes interpreted to imply that indeed injury to a national in reality directly offends the state, this Chapter will demonstrate the flaws in this interpretation, even if both supporters and critics of diplomatic protection seem to rely on this line of thought. There can be no doubt that the injury that stands at the basis of the exercise of diplomatic protection is an injury of individual rights. It should be borne in mind that this does not exclude the possibility of so-called 'mixed claims'. A mixed claim is a claim based on both direct and indirect injury, such as occurred in the *LaGrand* and *Avena* cases before the ICJ. It is only for the part of the claim that is based on indirect injury that resort is sought to diplomatic protection and that the conditions for the exercise of diplomatic protection, such as the exhaustion of local remedies and the nationality of claims rule, are applicable. Even if the claim also contains elements of direct injury, the conditions for the exercise of diplomatic protection will be applicable to the indirect part of the claim.[10] Under international law, claims based on direct injury do not require the instrument of diplomatic protection but can be brought directly.[11]

An appeal to self-defence has sometimes been expressed in the context of protection of nationals, in particular in situations involving a substantial group of nationals or rescue operations involving resort to the use of force in the exercise of protection of nationals.[12] As Okowa has stated

> [t]here is a presumption that nationals are indispensable elements of a State's territorial attributes and a wrong done to the national invariably affects the rights of the State.[13]

This position is however difficult to support. The general understanding of the espousal of an individual claim by his or her national state is that indeed

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9 It should be noted that not all aspects of diplomatic protection are fictitious. There is little fiction in the requirement that local remedies be exhausted and even if nationality belongs to those legal constructs that are intangible (despite a passport being proof of it), it is not a fiction in the same way as the espousal of the claim is.

10 *Interhandel* (Preliminary Objections), at 6 and *ELSI* case, at 15.

11 A discussion of 'mixed claims' as such is beyond the scope of the present Chapter. For these issues reference is made to Dugard, Second Report, paras. 18-31 and *infra* Chapter IV, section 2.B.

12 For instance by the United States in its attempts to rescue their nationals held hostage in Iran. See on this J.R. d'Angelo, 'Resort to Force by States to Protect Nationals: the U.S. Rescue Mission to Iran and its Legality under International Law', 21 Virginia Journal of Int'l Law 485-519 (1981). See generally N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity*, Dordrecht 1985.

13 P. Okowa, 'Issues of Admissibility and the Law on International Responsibility', in: M.D. Evans, *International Law*, Oxford 2006, at 483.

it is premised on a fiction and not on a direct injury. As Brierly has stated, while

> a state has in general an interest in seeking that its nationals are fairly treated in a foreign country, … it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too.[14]

It is also difficult to reconcile with the requirements applicable to diplomatic protection (exhaustion of local remedies and nationality of claims) which do not apply if a state is *in reality* claiming its own right. Even if injury to its national may *affect* the rights of his or her national state, this is only because through the operation of the fiction the violation of the individual right entitles the state to exercise diplomatic protection and to demand reparation. As a consequence, instances of protection of nationals involving the use of force have generally been interpreted as diplomatic protection rather than an exercise of self-defence.[15]

The fiction underlying diplomatic protection has been subject to debate in the ILC. A request to reconsider draft article 1 particularly in the light of the fiction came from the Italian government and was supported by a number of ILC Members.[16] The debates in the ILC showed views vacillating between the position that states are protecting their own rights and the position, advocated by the Italian government, that the fiction should be abandoned since diplomatic protection does not involve any state's rights and that the individual should have complete control over the procedure. As will be shown, the ILC has tried to find a balance by retaining the fiction in draft article 1 but adding an exhortatory provision in draft article 19.[17] This solution may advance the position of the individual and thereby constitute a progressive step away from the rigid *Mavrommatis* régime. It does not however affect the fictitious nature of diplomatic protection.

This Chapter aims to present the positions relating to the question of whose rights are being protected in the exercise of diplomatic protection and attempts to elucidate the debate by showing that it is helpful in this respect to distinguish primary and secondary rules of international law, as has been the approach of the ILC. It will further demonstrate that the legal fiction does not

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14 J.L. Brierly, *The Law of Nations*, Oxford 1963, at 276-7. See also E.J.S. Castrén, 'Some Considerations upon the Conception, Development, and Importance of Diplomatic Protection', 11 Jahrbuch für Internationales Recht 37-48 (1962), at 45.

15 See Dugard, First Report, paras. 47-60. In this context it is important to note that the use of force for the purpose of diplomatic protection was not prohibited in the late 19th and early 20th century. See on this point E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York 1919, at 448. The ILC has however decided not to endorse this view and has rejected the use of force as a means of diplomatic protection. See Draft Articles on Diplomatic Protection, draft article 1.

16 Government Comments and Observations Add.2, at 1.

17 To be discussed more in detail *infra*, section 3.B.1.

only or merely transform an individual right into the right of a state but that it facilitates the application of secondary rules of international law to the violation of a primary rule. Since the distinction between primary and secondary rules with respect to diplomatic protection is not as evident as in other fields of law and the manner in which the distinction is made, this function of the legal fiction is not always clear. However, as will be argued, the question of the fiction itself has a limited bearing on the question of whose rights are being protected. The fiction is no more than a means to an end, the end being the maximal protection of individuals against violations of international (human rights) law.

The next section of this Chapter will define legal fictions in general and discuss their function and application in law. The relation between the primary and secondary rules of international law and the effect this distinction has on diplomatic protection and the legal fiction will be explored in the following section. In section 3, the application of the fiction in diplomatic protection will be clarified by discussing the work of the ILC on this issue. Special Rapporteur Bennouna raised some questions with regard to the fiction in his Preliminary Report and his successor Special Rapporteur John Dugard has explained the views of the ILC on the fiction and its insertion into the Draft Articles on Diplomatic Protection. The unsatisfactory discussion of this issue in the ILC has invited scholars and states to comment on the fictitious nature of diplomatic protection and in turn caused renewed attention by the ILC for this issue in its 58th session in 2006. In the conclusion, it will be demonstrated that the fiction is still a necessary tool for the protection of individual rights, particularly considering the limited agency individuals have under international law.

1 Fictions in Law

The use of legal fictions is ubiquitous in law. Fictions are partly unavoidable since law is a construct, an attempt at formalising reality. Well known is the fiction applied to the unborn child: *nasciturus pro iam nato habetur*.[18] In public international law, apart from the fiction in diplomatic protection, (collective) non-recognition,[19] pretending that a ship is part of the flag-state's territory[20]

18 See generally J.J.A. Salmon, 'The Device of Fiction in Public International Law', 4 Ga. J. Int'l & Comp. L. 251-77 (1974); H. Nientseng, *La Fiction en Droit International*, Paris 1923 (Dissertation); Ch. Perelman and P. Foriers (ed.), *Les Présomptions et les Fictions en Droit*, Bruxelles 1974.

19 By collective non-recognition, an entity is denied statehood because it does not comply with certain international norms, such as the prohibition on aggression or the prohibition on slavery. The fictitious element of this practice is particularly clear when one considers the fact that existing states that commit violations of such norms are reprimanded but usually not denied statehood, while 'new' state will be. See on collective non-recognition generally C.J.R. Dugard, *Recognition and the United Nations* Cambridge 1987. See also P.K.

and pretending there is consensus when there are no objections[21] are legal fictions. Legal fictions are derived from Roman law and find their origin in religious context: an example given by Honsell is the religious offering of artificial animals instead of real ones.[22] In the early stages of Roman law, the application of fictions allowed the Roman *praetors* to apply existing rules to situations that were not foreseen when the rules were drafted.[23] The fiction thus operated as a mechanism for transition: short of rules that apply to the situation at hand, rules are being applied *as if* the situation is another, which is covered by existing rules. Legal fictions are tools for the application of the law.[24] They are 'l'un des expédients … du développement du droit.'[25] More philosophically van de Kerchove and Ost have said that

> [l]oin de représenter un dysfonctionnement de la discursivité juridique, les fictions ne font que pousser à la limite l'efficace propre d'un discours que s'est, tel le récit ou le performatif, résolument installé dans « sa » réalité. Les juristes classiques feignent de croire que les fictions sont du réel méconnu ou dénaturé, et qu'il devrait être possible de s'en passer pour atteindre, sans détours ni artifices, la réalité telle qu'elle est. Mais dès lors que cette réalité échappe nécessairement puisqu'elle n'est jamais que le produit d'une nomination conventionnelle, la fiction apparaît moins comme un défaut que comme un révélateur de la nature du discours juridique.[26]

Menon, 'Some Aspects of the Law of Recognition Part VII: the Doctrine of Non-Recognition', 69 Revue de Droit International 227 (1991), who stated that non-recognition is 'not an absence of their [i.e. the non-recognised states'] legal status and capacity for relations predicated upond them', at 227.

20 See *Lotus* case, at 25. But see criticism of Judge Finlay in his dissenting opinion to this judgment, at 50-58.

21 E.g. votes in the UN Security Council: under Art. 27(3) of the UN Charter all matters other than procedural require the 'concurring' vote of all permanent members. Abstentions in these matters do not block the decision and therefore 'count' as concurring votes. See on this matter N.M. Blokker and H.G. Schermers, *International Institutional Law*, Boston/Leiden 2003, at paras. 821, 824 and 1339 and J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2002, at 230-231.

22 H. Honsell, *Römisches Recht*, Berlin 2002, at 13.

23 R. Dekkers, *La Fiction Juridique, étude de droit romain et de droit comparé*, Paris 1935, at 117 *et seq.*

24 It is not within the scope of the present study to enter into the question of instrumentalism. For instrumentalism reference is made to R.S. Summers, *Essays on the Nature of Law and Legal Reasoning*, Berlin 1992; M. Koskenniemi, 'What is International Law for?', in: M.D. Evans *International Law*, Oxford 2006, at 64-78 and K. van Aeken, 'Legal Instrumentalism Revisited', in: L.J. Wintgens, *The Theory and Practice of Legislation*, Ashgate 2005, at 67-92. Koskenniemi and van Aeken include bibliographies.

25 R. Dekkers, *La Fiction Juridique,* Paris 1935, at 87.

26 M. van de Kerchove and F. Ost, *le Droit ou les Paradoxes du Jeu*, Paris 1992, at 160-161: far from representing a dysfunctioning of the law's discursivity, fictions merely push the limits of very efficacy of a discourse, in narrative or performance, firmly established in "its" reality. Classical jurists pretend to believe that fictions constitute an underestimated or unnatural reality, and that it is possible to bypass them, without deviations and artificial constructs, in order to grasp reality as it is. But, since reality is necessarily elusive being nothing more

However, not all conceptual constructions are legal fictions. First, legal fictions should be distinguished from presumptions. A classic presumption is the individual's knowledge of the law: all individuals are presumed to know the law. The most important difference between fictions and presumptions is that fictions always conflict with reality whereas presumptions may prove to be true.[27] Secondly, the legal fiction discussed in this Chapter should be distinguished from a concept like 'legal personality', which is also sometimes called a fiction because of the element of 'pretending' the two 'fictions' have in common. Yet, the fictive element in 'legal personality' is not so much that it is an express twist of reality or an assimilation of one thing to something it is not, but rather its non-tangible nature. 'Legal personality' is virtual rather than fictitious.

A. The nature of legal fictions

Dekkers, who has offered a useful model for the understanding of the nature of legal fictions, has described three characteristics of legal fictions: they are imprecise, necessary and limited.[28] The lack of precision is due to the fact that they are always forced and always knowingly present a false situation by pretending something is something else: 'on n'assimile que les choses qui ne s'assimilent pas toutes seules.'[29] The assimilation is thus imperfect. One of the main reasons for the imperfection is that the assimilation only occurs one way. To give one standard example from Roman law: the stranger is treated as a citizen but not vice versa. The necessity for legal fictions arises out of lack of an applicable regime for a particular situation. If there are no laws on inheritance from or by strangers, we pretend that the strangers are citizens to include them in an existing regime. It is particularly for this reasons that fictions are a means to an end. As Dekkers puts it:

> [l]a fiction propre vise à ménager par la pensée une route artificielle vers une solution de droit directement inaccessible, ou plutôt à emprunter abusivement la seule route qui y conduise.[30]

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than the product of conventional nomination, the fiction will appear not as a deficiency but rather as the manifestation of the nature of legal discourse (translation by the author).

27 See H. Vaihinger, *Die Philosophie des Als Ob*, Leipzig 1922, at 258; Dekkers *La Fiction Juridique*, Paris 1935, at 24-37; P. Foriers, 'Présomptions et Fictions', in: Ch. Perelman and P.Foriers, *Les Présomptions et les Fictions en Droit*, Bruxelles 1974, at 7-8.

28 Dekkers, *La Fiction Juridique*, Paris 1935, at 39.

29 *Id.*, at 40.

30 *Id.*, at 47: the genuine fiction envisages to lead by a mentally invented artificial route to a legal solution that is not directly accessible, or rather to take abusively the only route that leads there (translation by the author).

Finally, fictions are limited. The fiction applies to one field of law or one set of rules but not to another. The fiction that strangers are citizens is only applicable with respect to, for instance, inheritance. Applying the fiction to these matters does not imply that they also have all the other rights citizens have, such as the right to vote. Or, to return to diplomatic protection, the fiction that injury to an individual is an injury to the individual's national state does not also imply that the responsibility of an individual is the same as the responsibility of a state. As mentioned above, legal fictions are a device to apply an existing regime to a (new) situation or compilation of facts that is not (yet) governed by its own regime but for which regulation is deemed necessary. They are a reaching out to establish inclusion.

However, if a new, more adequate, regime is established for this situation, the fiction will be abandoned. The transitional character of fictions is particularly evident if we consider the example of immunity for embassy premises: the immunity and inviolability to embassy premises has in the past been ensured by applying the legal regime applicable to the territory of the sending state thus excluding the jurisdiction of the receiving state.[31] Nowadays, since diplomatic immunities are approached on a more functional basis, the fiction is abandoned and immunity and inviolability is ensured by an argument of necessity derived from the function of diplomatic relations: immunity is necessary in order for diplomatic relations to be enjoyed undisturbed. Rather than a blanket provision where the entirety of the embassy is considered to be beyond the jurisdiction of the receiving state, a new and more adequate regime for immunities is now provided for in the Vienna Conventions on Diplomatic Relations and Consular Relations, specifying where immunities apply and where they do not.

While the establishment of the Vienna Conventions concerning Diplomatic and Consular Relations may provide a clear abandonment of the fiction, there is however an inherent difficulty concerning the transitional character of legal fiction which is made clear by Dekkers:

> ceux qui ne connaîtront ou n'admettront pas l'explication directe [i.e. an argument dismissing the fiction and replacing it by something else] continueront à prétendre que le cas envisagé constitue un exemple typique de fiction. Ceux qui, au contraire, admettront cette explication, auront tendance à dire, non seulement qu'il n'y a *plus* de fiction dans ce même cas, mais qu'il n'y en a *point*, voire même qu'il n'y en a *jamais eu*.[32]

31 I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 343.

32 Dekkers, *La Fiction Juridique*, Paris 1935, at 200 (emphasis in original): those who do not know or do not accept the direct explanation will continue to consider that the case at hand constitutes a typical example of a fiction. On the contrary, those who accept this explanation, have a tendency to say not only that there is *no longer* a fiction in the same case, but that there is *no* fiction *at all*, or even that *there never was* a fiction. (translation by the author).

The point is that the acceptance of a fiction depends largely on the perceived status of the subject of the fiction in law. Thus, those who believe that individuals have complete and full agency under international law will reject the legal fiction in diplomatic protection (and say in fact that it never existed and that the Court in *Mavrommatis* was wrong), while those who consider the state as primary actor in the international field and who reject to a large extent the individual as an entity with international legal personality will maintain the fiction as a desirable, and necessary, tool for the protection of individual rights. Indeed, recent developments in international law have led some scholars, primarily French, to believe that the fiction in diplomatic protection has lost its relevance and that it should be abandoned.[33] As mentioned above, this discussion has again gained relevance through the work of the ILC, since the drafting of the Articles on Diplomatic Protection has come to an end. As will be described below, both states, in their comments and observations to the Draft Articles, and individual members of the ILC have raised the issue of the fiction, since the Draft Articles adopted on first reading and the Special Rapporteur seem to adhere to the fiction as she was laid down in Vattel's writing and the *Mavrommatis* decision.

B. Vaihinger's Philosophy of As If and Kelsen's response

We have seen that legal fictions operate as assimilation: something is treated *as if* it were something else. In this respect, it is interesting to address the views of Hans Vaihinger on fictions and Hans Kelsen's response to Vaihinger. In the early years of the 20th century, the German philosopher Hans Vaihinger wrote an extensive treatise on fictions in general: *Die Philosophie des Als Ob. System der theoretischen, praktischen und religiösen Fiktionen der Menschheit.* His hypothesis was that human beings are unable to know everything surrounding them and that they continuously create concepts of reality, and pretend that these are true. Fictions are an instrument 'das uns dazu dient, uns in der Wirklichkeitswelt besser zu orientieren'[34] or, in other words '[o]hne solche

33 See e.g. A. Pellet, 'Le Projet d'Articles de la C.D.I. sur la Protection Diplomatique, une codification pour (presque) rien', in: Kohen, M.G. (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch*, Leiden 2006, p. 1133-1156, at para. 18; C. Dominicé, 'Regard Actuel sur la Protection Diplomatique', in: *Liber Amicorum Claude Reymond, Autour de l'Arbitrage*, Paris 2004, at 75. *Id*. 'La Prétention de la Personne Privée dans le système de la Responsabilité Internationale des Etats', in: *Studi di Diritto Internazionale in onore di Gaetano Arangio-Ruiz* Vol. II, Napoli 2004, at 742-3; L. Dubois, 'La Distinction entre le droit de l'Etat réclamant et le Droit du Ressortissant dans la Protection Diplomatique', 67 R.C.D.I.P. 614-640 (1978), but note that he also states that '[c]omme tant d'autres cette fiction s'imposerait parce qu'elle est utile et non dépourvu de tout lien avec la réalité', at 629 (1978).

34 Vaihinger, *Die Philosophie des Als Ob,* Leipzig 1922, at 23.

Abweichungen [i.e. fictions] kann das Denken seine Zwecke nicht erreichen'[35] the purpose being to know and understand reality. According to Vaihinger, legal fictions are a special kind of symbolic (analogical) fiction, which rely on analogy as opposed to abstractions that are fictive because they expressly ignore certain details or characteristics,[36] or artificial classifications, such as Linnaeus' system, that are fictive because they suppose an order on the outside world that does not exist in reality.[37] While a diversion from reality, fictions are as indispensable to law as axioms are to mathematics:

> [w]eil die Gesetze nicht alle einzelnen Fälle in ihren Formeln umfassen Können, so werden einzelne besondere Fälle abnormer Natur so betrachtet, *als ob* sie unter jene gehörten.[38]

In Vaihinger's view, fictions are thus a tool used to enhance our understanding and knowledge of reality. In 1919 Hans Kelsen wrote an essay in response to Vaihinger's book in which he expressed his profound disagreement with Vaihinger's views on fictions in general and legal fictions in particular.[39] He pointed out that law and legislation are not designed for the purpose of knowledge or understanding but rather constitute an act of will (*Willenshandlung*).[40] According to Kelsen, this means that legal fictions are a *fremdcörper* in Vaihinger's *philosophy of as if*, and that their raison d'être is not what Vaihinger thinks it is. At the outset it should be noted that this does not necessarily entail that Vaihinger's analysis of legal fictions per se is erroneous. Whether or not one agrees with Vaihinger that the purpose of fictions is the understanding of reality, Vaihinger correctly noted that fictions are a twist of reality and that they are a means to an end. They are a legal mechanism to apply legal rules to a given, unregulated, situation.

Kelsen's analysis of the examples of fictions given by Vaihinger was designed to show that these are by their very nature not fictions. First, he argued that it is not correct to treat the case in which the law grants a foreigner the same rights as a citizen as a legal fiction. One should rather consider that the legal framework has been expanded to also include foreigners.[41] The

35 *Id.*, at 49.

36 The example of the latter given by Vaihinger is Adam Smith's economic theory, which pretends according to Vaihinger, that all economic drive is derived from human egoism thereby ignoring factors such as custom and benevolence. *Id.*, at 30.

37 *Id.*, at 25-27.

38 *Id.*, at 46 (emphasis in original) and similarly at 70.

39 H. Kelsen, 'Zur Theorie der juristische Fiktionen', in: H. Klecatsky, R. Marciæ & H. Schambeck, *Die Wiener Rechtstheoretische Schule, ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross*, Vienna 1968, 1215-1241. Kelsen refers to the second edition of Vaihinger's book, which was published in 1913. The edition used for the present purposes is a later edition, which does however not deviate from the second edition.

40 *Id.*, at 1222-1223.

41 *Id.*, at 1229.

inclusion of persons or entities within an existing framework that originally did not envisage covering these entities or persons broadens the application of the law. It is important to note however that the element of expansion does not deprive this situation from its fictitious nature. Indeed, the broadening of the law's application is achieved through the instrument of the fiction. The positions of Kelsen and Vaihinger are therefore not as difficult to reconcile as Kelsen suggested. Perhaps an explanation for their difference of opinion is that while for Kelsen the result determined the outcome of his analysis, Vaihinger was more concerned with the mechanism itself.

A different point of critique by Kelsen was directed against the fiction that 'the king can do no wrong' put forward by Vaihinger as a classical example of fictions in neo-Kantian style.[42] Kelsen argued that this is not a fiction but that the king in reality can do no wrong because the law is not applicable to the king. Doing wrong is not inherently wrongful. It is only wrongful if a *Rechtsnorm* says so. If the king is beyond the law, it means that in reality he can do no wrong.[43] There are however two difficulties with this line of reasoning. First, it is not true that the king can do no wrong in reality. The point is that the king cannot be held responsible for his wrongful acts, but this is not to say that no one can be held responsible for the king's doing or that he is beyond the reach of the law. Vaihinger has explained this by reference to the situation where it is legally pretended that the speeches of the king are issued by his ministers.[44] This clearly constitutes a twist of reality, a denial of a truth, in short: a fiction. If an official speech of the king contains racist elements, this will be in violation of the laws of his country but the prime minister will be held responsible as if it were the prime minister who had given the speech. Secondly, a similar issue concerns the powers of ruling bodies to take binding decisions and the extent to which they are subject to review. Kelsen argued that the maxim that the king can do no wrong reflects reality: the king is inherently unable to take a decision that is in violation of the law, since there is no review. He would be de facto beyond the law.[45] Perhaps the best current example of this is provided by the UN Security Council and the extent to which, if at all, it is limited in its decision-making. Article 25 of the UN Charter obliges UN member states to 'carry out the decisions of the Security Council in accordance with the present Charter'. The Security Council is in its turn obliged to act in accordance with the purposes and principles of the United Nations under Article 24(2). The Charter does not

42 Vaihinger, *Die Philosophie des Als Ob*, Leipzig 1922, at 696-7.

43 Kelsen, 'Zur Theorie der juristische Fiktionen', Vienna 1968, at 1227.

44 For instance, under the Dutch constitution, the prime minister is responsible for acts of the Queen. See Wet van 28 October 1954, houdende aanvaarding van het Statuut voor het Koninkrijk der Nederlanden [Law of 28 October 1954, containing the adoption of the Statute of the Kingdom of the Netherlands], Art 2(1).

45 Kelsen, 'Zur Theorie der juristische Fiktionen', Vienna 1968, at 1227.

explicitly provide for review of the decisions by the Security Council.[46] However, the question of review and responsibility should be clearly distinguished from the question of initial illegality. Since the Charter itself limits the powers of the Security Council, any decision in breach of those purposes and principles would be an act *ultra vires*. The question of whether anyone can actually hold the Security Council responsible or provide some kind of review is another matter. This applies in the same way to the example discussed by Kelsen and Vaihinger: the king can do no wrong. It is submitted that this does not reflect reality, but is a fiction applied to put the entity in question beyond responsibility.

More complicated is Kelsen's criticism on the fiction of legal personality. As pointed out above, legal personality is not a fiction properly speaking: its fictitious nature is derived from its intangibility rather than its conflict with reality. While this does fall within the scope of Vaihinger's *philosophy of as if*, since his philosophy includes all abstractions and intellectual and mental constructs, it is not a legal fiction properly speaking. Kelsen correctly noted that this kind of 'fiction' belongs to legal theory, rather than to legislation or legal practice,[47] but he has found another difficulty with this fiction as a legal fiction: as long as legal personality is a reflection of something else (*ein Spiegelbild*), it is not necessarily to be rejected.[48] In law, however, legal personality exists separately from the physical entity that owns the personality and has been hypostatised into a natural entity within the reality of law. The independent existence of legal personality alongside its origin, the 'real' person, renders the fiction unacceptable. It is, in Kelsen's words, an 'eigenartige Duplikation des Rechtes' or a tautology.[49] It seems however that Kelsen did finally accept the existence of legal personality and its fictitious nature, but only with the inclusion of a caveat: one should always be aware of the fictive nature of legal personality and of the fact that it is duplication of something else, to avoid internal contradiction in the legal system itself.[50]

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46 The issue of Security Council review has extensively been discussed in recent years. It is beyond the scope of the present study to provide an exhaustive list of publications on this issue. For a general introduction, see D. Akande, 'The International Court of Justice and the Security Council: is there room for judicial control of decisions of the political organs of the United Nations?' 46 ICLQ 309-343 (1997); E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, Oxford 2004; S. Lamb, 'Legal Limits to the United Nations Security Council', in: G.S. Goodwinn-Gill, S. Talmon (eds), *The Reality of International Law – Essays in honour of Ian Brownlie*, Oxford 1999, 361-388; *Prosecutor* v. *Dusko Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case no. IT-94-AR72 of 2 October 1995, at paras 14-22 and *Prosecutor* v. *Dusko Tadic* (Jurisdiction), Case no. IT-94-IT, Trial Chamber decision of 10 August 1995.

47 Kelsen, 'Zur Theorie der juristische Fiktionen', Vienna 1968, at 1221.

48 *Id.*, at 1221.

49 *Id.*, at 1220.

50 *Id.*, at 1220-1222.

However, while Kelsen did not object strongly to the use of fictions in legal theory, he has considered them particularly problematic if applied in legislation or legal practice: '[d]ie juristische Fiktion kann nur eine fiktive Rechtsbehauptung, nicht eine fiktive Tatsachenbehauptung sein.'[51] Since the judiciary lacks the power to expand the law as it sees fit, it may have to resort to a fiction to solve a case at hand. However, in reality this is problematic. The 'reality' that fictions belong to is the *Rechtsordnung* and because fictions contradict this reality emphasis should be on their provisional and correctable nature. Legal fictions are not a detour leading ultimately to the reality of law but a deviation that 'vielleicht zu demjenigen führt, was der Fingierende für nützlich und zweckmäßich hält, niemals aber zum Gegenstand der Rechtswissenschaft: dem Recht.'[52] This implies that correction should be possible and often will be necessary. Vaihinger however has said that unlike other fictions, legal fictions do not require correction, which Kelsen has considered unacceptable not only for fictions that belong to legal theory such as legal personality, but in particular for fictions applied in legal practice.

Taking into account Vaihinger's insistence on the contradictory nature of fictions and yet his emphasis on the purpose of fictions, Kelsen concluded that '[r]echtstheoretisch ist somit eine Fiktion des Gesetzgebers unmöglich, eine Fiktion des Rechstanwenders gänzlich unzulässig, weil rechtszweckswidrig'[53] Legal fictions are not only inconsistent with reality but also with the legal system in which they operate. Consequently, they obviate the purpose of any legal system. According to Kelsen, again, Vaihinger's fictions cannot exist in Vaihinger's world.

While one may find Kelsen's criticism enlightening, since it does discuss the very nature of fictions, it does not convincingly show that legal fictions do not or should not exist at all. When discussing legal fictions, it is necessary not only to see the outcome of the process but also to study the process by which this outcome was facilitated. One should inquire what is actually achieved by resorting to a legal fiction and how this is done. The fact that a certain outcome seems 'real' such as 'the king can do no wrong' does not imply that fictions were or should be absent. As Hart has said, the fact that there is no sanction does not imply that the rule itself does not exist,[54] meaning that the fact that an entity fictitiously cannot be held responsible does not preclude its obligation to comply with the law. In addition, when the application of a fiction establishes a transformation, such as the foreigner who is treated as if he or she were a citizen, this transformation is not eternal, indefinite nor irreversible. Legal fictions may well provide the only way to a certain end. Within the framework of diplomatic protection this is clearly the case:

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51 *Id.*, at 1230.
52 *Id.*, at 1232.
53 *Id.* at 1233.
54 H.L.A. Hart, *The Concept of Law*, Oxford 1961, at 212-3.

as long as individual agency under international law is limited, the fiction in diplomatic protection will be indispensable.

2 The Fiction in Diplomatic Protection and the Distinction between Primary and Secondary Rules of International Law

A. Introduction

International law generally distinguishes between primary and secondary rules. This distinction is relevant with respect to the legal fiction in diplomatic protection since it is exactly through the operation of the fiction that a state has the right to espouse a claim (a secondary rule) based on injury to an individual national arising out of the violation of a right under international law of this individual (a primary rule). The fiction thus facilitates the transformation from a primary rule into a secondary rule. Whereas this supports the position that the state is in reality not claiming its own right but only exercises a secondary right, any ambiguity of the distinction between primary and secondary rules or indeed of the status of the rights involved in diplomatic protection has a bearing on the fiction.

In what follows the hybrid nature of diplomatic protection with respect to the distinction between primary and secondary rules will be discussed in particular with respect to the function of the legal fiction. The first section will discuss the requirement of the occurrence of an internationally wrongful act. In the second section, the relation between the concept of denial of justice and the requirement to exhaust local remedies will be explored. One minor issue will just be mentioned here. As has been pointed out by Bennouna, the rules on nationality, which were largely developed within the framework of diplomatic protection, belong to the primary rules of international law, while the nationality of claims rule itself is part of the secondary rules.[55] This is a first, albeit minor, indication that some elements of diplomatic protection are somewhat in between the primary and the secondary rules of international law.

B. The law of state responsibility: a set of secondary rules

Diplomatic protection is part of the law of state responsibility. In 1962 Roberto Ago, who was to be appointed Special Rapporteur to the ILC in 1963, introduced the distinction between primary and secondary rules of international law to the ILC with respect to the law of state responsibility, thereby abandoning F.V. Garcia Amador's approach which had included a study on the

55 Bennouna, Preliminary Report, at para 60.

substantial rules regarding the treatment of aliens.[56] Thus, under the law of state responsibility 'the focus is upon principles concerned with second-order issues, in other words the procedural and other consequences flowing from a breach of a substantive rule of international law.'[57] For the theoretical underpinning of the distinction, reference is usually made to Hart's *Concept of Law*, in which he has said that primary rules 'impose duties' and 'concern actions involving physical movement or changes' whereas secondary rules 'confer powers' and 'provide for operations which lead not merely to physical movement or change but to the creation or variation of duties or obligations.'[58]

Despite the convenience of categorising, it is difficult to give precise definitions of the terms 'primary' and 'secondary' norms. One way to describe the distinction is by reference, more common in civil law systems, to the distinction between substantive law and procedural law. Secondary rules are in addition sometimes considered necessary for a legal system by bringing unity to the compilation of primary obligations that otherwise would be juxtaposed without structure.[59] The secondary rules are the 'meta'-rules that lay down the consequences arising out of a violation of the primary rules, the modalities of change of the primary rules and – wherever applicable – the hierarchy between these rules. They are *about* other rules of law and become relevant *after* the breach of another rule. The primary rules are those that concern the rights and obligations of states, such as the prohibition on the use of force, *pacta sunt servanda*, the prohibition of genocide, the right to declare a foreign diplomat a *persona non grata* etc. The secondary rules are necessary to enforce the primary rules, to facilitate change or lay down the rules of adjudication.[60] Since the ILC Articles on State Responsibility are considered to contain secondary rules of international law,[61] diplomatic protection, being a part of the law on state responsibility, in particular the responsibility for injury to aliens, has likewise been placed under the secondary rules and the

56 See Yearbook of the ILC, 1963, (Vol. II), p. 228 para. 5. Although Ago has generally been applauded as the designer of this distinction, it was hardly new. It had been advocated before in the Receuil des Cours at the Hague Academy in the 1920s: in 1925 Charles de Visscher, in the chapter entitled 'La Codification du Droit International', wrote '[il existe] entre les règles de droit une distinction qui, à notre avis, est absolument fondamentale. C'est la distinction … entre les règles *primaires* ou *normatives* et les règles *secondaires, constructives* ou *techniques*' 6 Receuil des Cours 329-452, at 341 (emphasis in original). He continued by explaining that the secondary rules' function is to enforce the primary rules, to lay down competences and to regulate sanctions, at 342-344. It is also part of Hart's concept, see *infra* note 58 and accompanying text.

57 M.N. Shaw, *International Law*, Cambridge (CUP) 2003, at 694.

58 H.L.A. Hart, *The Concept of Law*, Oxford 1994, at 79.

59 See K.C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law: some reflections on current trends', in: L.A.N.M. Barnhoorn & K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law*, The Hague 1995, at 31-2.

60 See on this point H.L.A. Hart, *The Concept of Law*, Oxford 1994, at 77.

61 Articles on State Responsibility, at 59, para. 77.

ILC in its project on the draft articles on diplomatic protection has been consistent in this approach.[62]

The secondary nature of state responsibility is however not always clear. Some rules are both primary and secondary. For instance, if a state violates a rule of diplomatic law versus another state, which is a violation of a primary rule, the latter state will be entitled to respond and to resort to countermeasures, which is a secondary rule. However, it may not react in kind since diplomatic law is excluded from the realm of countermeasures under Art 50(2)(*b*) of the Articles on State Responsibility, which reflects the dictum of the ICJ in the *Tehran Hostages* case.[63] This indicates that the rules on diplomatic and consular relations operate both on the primary and on the secondary level. In his Reports to the ILC as Special Rapporteur on State Responsibility, James Crawford repeatedly referred to the distinction and particularly to issues transgressing the distinction between primary and secondary rules. While the distinction proper is not within the scope of the present discussion,[64] special complexities arise with respect to some elements of state responsibility and diplomatic protection.

In his First Report Crawford defended the distinction by pointing to the advantages, such as that

> [g]iven rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification.[65]

In the Second and Third Reports, specific issues pertaining to (the ambiguity of) the distinction were revealed. Two of such issues are particularly relevant as they also play a significant role in the law of diplomatic protection. State responsibility only arises after the occurrence of an internationally wrongful act which 'constitutes a breach of an international obligation of the State'.[66] However, as Crawford noted, '[i]n determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which

62 See Bennouna, Preliminary Report, at paras 55-65; Dugard, First Report, at para. 35; Dugard, Seventh Report, at para. 3; and again ILC Report 2006, at 22-24 and 26.

63 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America *v*. Iran), Judgment of 24 May 1980, ICJ Reports 1980, p. 3, at para. 53.

64 See for instance J.A. van Detta, 'The Irony of Instrumentalism: using Dworkin's Principle-Rule Distinction to Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Product Injury Cases', 87 Marq.L.Rev. 425-523 (2004), who has stated that 'substantive law has among its goals the regulation of private conduct that exceeds prescribed parameters' but that 'without procedure, the substantive law remains, at best, hortatory and indeterminate' (at 447) thereby arguing against the rigidity of distinction and adhering to Dworkin's model emphasising principles (at 438-449).

65 Crawford, First Report, at para. 15.

66 Articles on State Responsibility, Article 2(b).

fall clearly within the scope of the primary rules' thereby aggravating the strict separation of primary and secondary rules.[67] He suggested however that the draft articles 'are intended to provide a framework for that consideration.'[68] It should thus not be interpreted to threaten the distinction. A similar issue arises in the context of diplomatic protection: it can only be exercised in response to an internationally wrongful act. The occurrence of an internationally wrongful act is both a criterion of admissibility and the primary rule, being part of the merits of the claim. In most claims concerning diplomatic protection, the questions of nationality and local remedies will be dealt with first since failure to comply with the nationality of claims rule or the requirement to exhaust local remedies will render the claim inadmissible. If both criteria are fulfilled, the merits phase will consider the occurrence of an internationally wrongful act. However, if it is decided that in fact there was no internationally wrongful act, one may question what will be the grounds of dismissal: will the case be held inadmissible or unfounded? In practice, it may not be very relevant to make this distinction, but it is submitted that it does affect the distinction between primary and secondary rules.

C. Local remedies and denial of justice

More complicated is the matter of exhaustion of local remedies, which is also particularly relevant to the exercise of diplomatic protection since it is one of its conditions. Whereas the local remedies rule clearly is a criterion of admissibility, it is closely related to the concept of denial of justice. The latter, however, has generally been regarded as part of the primary rules. The occurrence of a denial of justice as a primary rule has a bearing on the requirement to exhaust local remedies as a secondary rule but the two are not always easily distinguishable. As Freeman already noted

> [t]he relationship between the local remedy [sic] rule and the State's duty of providing an adequate judicial protection for the rights of aliens is so close as to promote continuous confusion.[69]

He went on to say that in certain cases 'the denial of justice creates at once the grounds *and* the conditions of the claim's presentation.'[70] In a similar manner, Crawford has recognised that there is some ambiguity: 'the refusal of a local remedy will itself be internationally wrongful'[71] and 'the failure

67 Crawford, Second Report, at para. 3.
68 Ibid.
69 A.V. Freeman, *International Responsibility of States for Denial of Justice*, New York 1970 (original publication: London 1938), at 406.
70 *Id.*, at 406 (emphasis in original).
71 Crawford, Second Report, at para. 138.

to provide an adequate local remedy is itself the relevant internationally wrongful act … for example, where the injury to the alien is caused by conduct non attributable to the State, or where the violation involves a breach of due process standards … which occurs at the time of seeking the remedy.'[72] However, since he referred to denial of justice as an example of a 'complex act' giving rise to state responsibility he clearly placed it under the primary rules.[73] In this, he was preceded by scholars such as Borchard,[74] Freeman[75] and Roth[76] and succeeded by Paulsson.[77] Although they also discussed the nature of denial of justice and the question of which failure in the judiciary would amount to a denial of justice, they have all stressed the fact that the occurrence of a denial of justice engages state responsibility of the host state.

Amerasinghe has attempted to disentangle the two concepts. He noted that 'the fact that the process of internal remedies results in a decision which is contrary to international law or is in violation of the international obligations of the host state cannot appropriately and is not to be characterized as a denial of justice.'[78] In such a case 'after the exhaustion of local remedies the final decision taken is simply not one which an international tribunal in prospect would take in the case concerned.'[79] If however, the denial of justice is the international wrong underlying the claim in exercise of diplomatic protection, the local remedies rule applies to this wrong. The injured individual is required to exhaust local remedies *with respect to the denial of justice* and this is thus the cause of action before local courts.[80] The implication of this is that the occurrence of a denial of justice does not affect the requirement to exhaust local remedies and that the two rules exist separately.

This, of course, is theoretically correct. After the occurrence of an internationally wrongful act, local remedies must be exhausted before an international claim can be brought. In addition, a denial of justice is relatively easy to repair by proper administration of justice. Paulsson has taken this line of

72 *Id.*, at para. 145 (footnotes omitted).
73 *Id.*, at para. 97 and again at para. 126.
74 E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York 1919, at 330.
75 See A.V. Freeman, *International Responsibility of States for Denial of Justice*, New York 1970, who stated that 'responsibility arising out of denial of justice is purely a *substantive* matter', at 410 (emphasis in original).
76 A.H. Roth, *The Minimum Standard of International Law Applied to Aliens*, Leiden 1949, who wrote that 'the violation of these substantive rights [i.e. the right not to suffer a denial of justice] by the State organs entails the State's responsibility' at 178. Similarly at 181.
77 J. Paulsson, *Denial of Justice in International Law*, Cambridge 2005, at 40 stated that '[i]t is no longer seriously possible to contend that the nature of national judicial bodies is so different from other governmental instrumentalities that the state is insulated from international liability on account of judicial conduct' and he then referred to the ILC Articles on State Responsibility.
78 C.F. Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 98.
79 *Id.*, at 98.
80 *Id.*, at 99-102.

thought even further and has stated that while the requirement to exhaust local remedies may be waived in other instances, it is a pertinent rule in cases of allegations of denial of justice, since such a denial cannot be established until remedies have been exhausted. He stated that 'it is in the very nature of the delict that a state is judged by the final product.'[81] He justified this strictness by reference to the principle of non-interference:

> it avoids interference with the fundamental principle that states should to the greatest extent possible be free to organise their national legal systems as they see fit…. If aliens are allowed to bypass those mechanisms and bring international claims for denial of justice on the basis of alleged wrong-doing by the justice of the peace of any neighbourhood, international law would find itself intruding intolerably into internal affairs.[82]

Yet, even Paulsson admitted that there is an element of reasonableness since '[t]he victim of a denial of justice is not required to pursue improbable remedies'[83] and he continued by demonstrating that it is far from easy to determine when this improbability applies.[84] He concluded that a test based on reasonable availability and effectiveness would be most viable.[85] Clearly, Paulsson did not consider this matter from the perspective of the distinction between primary and secondary rules and only allowed a denial of justice to constitute a mitigating factor for the requirement to exhaust local remedies.

The ILC considers the local remedies rule to be a rule of procedure rather than of substance: state responsibility arises after the commission of an internationally wrongful act, regardless of exhaustion of local remedies, but diplomatic protection can only be exercised after the exhaustion of these remedies.[86] While this emphasises the secondary nature of the local remedies rule, it does not in itself clarify the relation between the local remedies rule and denial of justice. Dugard, in his reports to the ILC on diplomatic protection, has discussed the issue of denial of justice and exhaustion of local remedies. Aware of the ambiguities, he has called for some flexibility.[87] He echoed a concern raised by his predecessor Bennouna, who had asked the ILC for guidance on this topic. Although Bennouna agreed with the approach taken by the ILC, he had also stressed that too much rigidity would be undesirable.[88] He felt that it is not

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81 J. Paulsson, *Denial of Justice in International Law*, Cambridge 2005, at 108.
82 *Id.*, at 108.
83 *Id.*, at 113.
84 *Id.*, at 113-119.
85 *Id.*, at 118.
86 Dugard, Second Report, paras 63-66. See also C.F. Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 419-421 and R. Pisillo Mazzeschi, 'Exhaustion of Domestic Remedies and State Responsibility for Violations of Human Rights', 10 Italian Yb of Int'l Law 17-43 (2001).
87 Dugard, Second Report, para 9. See also Dugard, Third Report, at para. 21.
88 Bennouna, Preliminary Report, para. 62-4.

always easy to clearly distinguish primary and secondary rules of international law and although he concluded that diplomatic protection doubtlessly belongs to the latter, he was reluctant to exclude any discussion on primary rules.[89] Dugard in his turn concluded that:

> [c]ircumstances of this kind [ie the 'intimate connection' between the concept of denial of justice and the local remedies rule], coupled with the fact that denial of justice may be seen both as a secondary rule excusing recourse to further remedies (associated with the "futility rule" …) or as a primary rule giving rise to international responsibility, suggest that the attempt at maintaining a rigid distinction between primary and secondary rules followed in the study on State responsibility should not be pursued with the same degree of rigidity in the present study.[90]

Amerasinghe has correctly noted that the occurrence of a denial of justice is not a prerequisite for the exercise of diplomatic protection and that not every malfunctioning of the judiciary amounts to a denial of justice.[91] However, Dugard's concerns apply to cases in which a denial of justice did occur, particularly if this was in addition to another internationally wrongful act and occurred in the process of exhausting local remedies for the first injury. Amerasinghe would then require the injured individual to bring another claim against the host state in local courts seeking redress for the denial of justice. Again, in theory this may be right. In practice however, one should consider that this puts the threshold for the exhaustion of local remedies too high. In particular the Italian government, in its comments and observations to the draft articles on diplomatic protection, has raised this point. It considered denial of justice as an exception to exhaust local remedies when it suggested that an express reference should be included in draft article 16(b) [now article 15(b)] of the articles on second reading since it was not easily inferred from paragraph a of the same Article.[92] This suggestion did not receive sufficient support in the ILC. Nonetheless, this was not because the members felt that denial of justice would not create an exception to the local remedies rule but because the concept of denial of justice was considered to belong to the primary rules of international law and thus should not be referred to here.[93] Even if the distinction between primary and secondary rules entailed the exclusion of the concept of denial of justice, the draft articles cover the situation described by the Italian government. Draft article 15 quite strongly relies on the *reasonableness* of the exhaustion of local remedies: an exception will apply

89 *Id.*, at paras 55-65.
90 Dugard, Second Report, para 10.
91 *Supra*, notes 78 and 79 and accompanying text.
92 Government Comments and Observations, Add. 2, at 5
93 The ILC deliberately omitted the term: the draft articles adopted on second reading do not contain the term 'denial of justice', neither do the commentaries to the relevant articles. See commentary to draft article 15(a) and (b), ILC Report 2006, at 77-80.

where this is unreasonable. It will be recalled that this was also advocated by Paulsson.[94] An example of unreasonableness is the absence of a voluntary link between the individual and respondent state, for instance in the case of transboundary pollution or radioactive fallout.[95] Similarly, the exhaustion of local remedies is not necessary when the local judiciary is 'notoriously lacking independence' or when there is no 'adequate system of judicial protection.'[96] These instances are both included in the concept of denial of justice.[97] This leads to the conclusion that under certain circumstances an individual who has suffered a denial of justice cannot reasonably be expected to repeat the exercise of going through the local judiciary for the purpose of exhausting the local remedies.[98] Nonetheless, the implication is again that a primary rule and a secondary rule conflate into one and that the distinction between primary and secondary rules is obscured.

D. Conclusion

The two conditions of diplomatic protection discussed in the preceding sections have in common that they operate both on the primary and on the secondary level. This could be taken to question the very distinction between secondary and primary rules and it is necessary to explore how and to what extent this affect the position of the legal fiction in diplomatic protection. Whereas this will be done more extensively below in the Conclusion, after discussion of the ILC's approach to the matter, some preliminary remarks must be made.

The legal fiction is a mechanism of transition, transforming the individual's primary right into his or her national state's secondary right. This transition is effected in two ways. An individual right is transformed into the right of a state and a primary right is transformed into a secondary right. Yet, these transitions do not operate on a parallel level. Whereas the primary rights only

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94 *supra* note 83 and accompanying text.

95 See draft article 15(c) and the commentary thereto which stipulates that this exception applies when 'it would be unreasonable and unfair to require an injured person to exhaust local remedies … because of the absence of a voluntary link or territorial connection between the injured individual and the respondent State.' Commentary to Art. 15(c), para. 7, ILC Report 2006, at 80-81.

96 ILC Report 2006, at 79.

97 See e.g. Freeman, *International Responsibility for States for Denial of Justice*, London 1938, at 50-51; Paulsson, *Denial of Justice in International Law*, Cambridge 2005, at 163-167, 170-173, 200-202.

98 Perhaps the clearest example would be the *Aksoy* case before the European Court of Human Rights. In this case, the failure of the public prosecutor to take up Mr Aksoy's complaint was used both to allow an exception to the local remedies rule and to establish a violation of Art. 13 of the European Convention on Human Rights. See *Case of Aksoy* v. *Turkey* [ECtHR], Judgment of 18 December 1996, Application no. 21987/93, Reports 1996-VI, at paras. 41-56 and 95-100.

belong to the individual and the right to exercise diplomatic protection belongs to his or her national states, some of the underlying rights and obligations within the secondary rules also belong to the individual. The legal fiction entitling the state to exercise diplomatic protection thus operates at a rather late stage: only after local remedies have been exhausted and after the occurrence of an internationally wrongful act has been established. It thereby brings a combination of primary and secondary rules into the realm of the secondary rules. Indeed, in applying the fiction as the element raising the claim from one level to the other, it channels various ambiguities into a right that is more easily definable. The resulting right is the right of a state: the right to claim responsibility of another state and to demand reparation for the injury. As will be further elaborated in the conclusion, this transition is necessitated by the incapacity of the individual to claim his or her own right under international law vis-à-vis another state. As long as individuals lack sufficient standing and influence in the international field, reliance on their national state will continue to be of major importance, which is only possible through the legal fiction in diplomatic protection.

3 The Fiction and the International Law Commission

As already mentioned, the question of the fiction in diplomatic protection has repeatedly been discussed within the framework of the ILC draft articles on diplomatic protection. ILC Special Rapporteur Mohamed Bennouna drew attention to the question in his Preliminary Report; it was raised again by his successor Special Rapporteur John Dugard in his First and Seventh Report; it is dealt with in the Commentary to the draft articles on first reading; it has been raised by various states in their comments to the draft articles prior to the second reading and individual members of the ILC in discussing these articles; and, finally, it was discussed by the drafting committee during the second reading of the draft articles.

A. The Preliminary Report

In his preliminary report to the ILC,[99] Special Rapporteur Bennouna was clearly troubled by the fiction, in particular by the question of whose rights were being protected and whose right diplomatic protection itself actually was. A clear sign of Bennouna's confusion is the way in which he has quoted Vattel: 'Anyone who mistreats a citizen *directly* offends the State'.[100] The word 'in-

99 Bennouna, Preliminary Report.

100 *Id.*, para 6 (emphasis added). Bennouna relies on a translation provided in *The Classics of International Law*, 1916.

directly' in the original text is here replaced by 'directly'. This, it is submitted, is more than a mere typographic error. It is indicative of a misunderstanding of the operation of the fiction in diplomatic protection as explained by Vattel. Hence, it is not surprising that the report does not introduce the main concepts related to diplomatic protection but rather asks for guidance by the ILC on most of the topics concerned. In addition, Bennouna's discussion shows an ambivalence *vis-à-vis* the topic of diplomatic protection as such, attempting to find a balance between views rejecting diplomatic protection as imperialist and old-fashioned and views promoting the mechanism as an instrument for the protection of human rights.[101] He therefore asked for guidance by the ILC on the question whether as state 'when bringing an international claim, is … enforcing his own right or the right of its injured national.'[102] As he described it the first dispute arises between an individual and the host state of which the individual is not a national. However, then 'his state of nationality … can espouse his claim by having him, and the dispute, undergo a veritable "transformation".'[103] Although Bennouna recognised that this process is based on a legal fiction[104] he seemed to question the status of the rights concerned based on a perceived 'duality': diplomatic protection both concerns the rights of an individual and the rights of a state. This duality has also been noted by Dubois who wrote that

> [c]ette vision est en complète harmonie avec la thèse dualiste qui repose sur une séparation rigide entre l'orde juridique international, celui des relations entre Etats, et l'ordre juridique interne dans lequel seul l'individu est sujet de droit.[105]

As discussed above, Bennouna found that various requirements of diplomatic protection are difficult to reconcile with the position that the state of nationality of the injured individual is the sole claimant and that this state is in fact acting in its own right. While this 'duality' can be explained as indicated above meaning the right of the individual that has been violated and the right of the state to exercise protection, this difficulty prevented Bennouna from presenting any conclusions in the Preliminary Report and he left the matter to his successor.

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101 He refers to for instance to Judge Padilla Nervo (para 8), G. Scelle, (para 26), D. Carreau (47) (*contra*) and P.C. Jessup (para 10), R.B. Lillich (note 21) (*pro*). See also para. 50 of the Preliminary Report.

102 *Id.*, at para. 54.

103 *Id.*, at para 16.

104 *Id.*, at para 21.

105 Dubois, 'La Distinction entre le Droit de l'Etat réclamant et le Droit du Ressortissant dans la Protection Diplomatique', 67 R.C.D.I.P. 614-640, at 621 (1978).

B. From the First Report to the second reading of the Draft Articles in the ILC

John Dugard addressed the issue of the fiction in his First Report.[106] He has stressed that while fictions clearly are a twist of reality they should not be dismissed out of a 'disdain for the use of fictions in law',[107] in particular when the 'institution, like diplomatic protection' relying on a fiction 'serves a valuable purpose', that is, the protection of human rights.[108] Short of other, more effective, mechanisms for the protection of individual (human) rights, the Special Rapporteur strongly urged not to throw the baby out with the bath-water.

In the commentary to draft article 3 in the First Report the Special Rapporteur discussed the fiction in more detail.[109] The question raised here is 'the question of *whose* rights are asserted when the State of nationality invokes the responsibility of another State for injury caused to its national.'[110] Referring to Vattel and the *Mavrommatis* decision, the commentary to this draft article concludes by supporting the traditional view in which the state asserts its own right. While admitting the difficulties with this position[111] and after discussing options offered by others,[112] the Special Rapporteur remained convinced of the utility of the traditional view.[113] Since this position has caused some criticism by states in their observations and comments and also by some members of the ILC, it has partly been abandoned in the draft articles adopted on second reading, which has affected the wording in Article 1 in particular.

B.1 Mavrommatis, pretending and reality: the wording of draft article 1

The *Mavrommatis Palestine Concessions* case may be the most cited authority on diplomatic protection, but it presents us with a difficulty that is not easy to overcome and that has been a source of confusion with respect to the question of whose rights are protected in the exercise of diplomatic protection.

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106 Dugard, First Report, at paras. 17-32.
107 *Id.*, at para. 18.
108 *Id.*, at para. 21.
109 Draft article 3 provides: 'The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right' in: Dugard, First Report, at para. 61. This provision has been modified on second reading and now reads 'The State entitled to exercise diplomatic protection is the State of nationality.' The reference to the discretion has disappeared. See Draft Articles on Diplomatic Protection, Art. 3.
110 Dugard, First Report, at para. 61 (emphasis in original).
111 *Id.*, at paras. 65-6
112 *Id.*, at paras. 69-72.
113 *Id.*, at para. 73.

The adherence by the ILC to this decision constitutes a continuation of this problem. As explained above, a legal fiction is an express twist of reality, a denial of a truth. Thus, if one agrees with the position that diplomatic protection is premised on a fiction, one cannot simultaneously maintain that a state is *in reality* claiming its own right. The very fiction in diplomatic protection is that a state *pretends* to claim its own right while *in reality* it is the right of its individual national that is at stake. The only right the state has is the right to exercise diplomatic protection, which is a different right than the violated right that is asserted by taking up the claim. While this was clearly acknowledged by the Special Rapporteur in his Seventh Report, the language in draft article 1 in the same report continued to refer to the state's own right.[114] The reason given for retaining the *Mavrommatis* formula was that

> [i]n the light of the fact that the draft articles are premised on the soundness (if not accuracy) of the *Mavrommatis* rule (see, in particular, article 1), little purpose would be served by an examination of criticisms of the rule at this stage.[115]

The ILC, however, did re-open the debate pursuant to criticism received by states and members of the ILC.

Italy, in its comments and observations to the draft articles, has stated that

> draft article 1 … adopts a wording which is too traditional, especially when it speaks of a State "adopting in its own right the cause of its national". The wording implies not only that the right of diplomatic protection belongs only to the State exercising such protection, but also that the right that has been violated by the internationally wrongful act belongs only to the same State. However, the latter concept is no longer accurate in current international law.[116]

Other states, in their comments and observations, also pointed to the relationship between the protecting state and its national, but they did not go as far as Italy.[117] While Italy did not question the discretionary right of a state here,[118] it objected to the idea that states are protecting their own rights when exercising diplomatic protection and suggested that draft article 1 should refer both to the rights of the individual and to the rights of the state.[119] Italy's

114 Dugard, Seventh Report, at paras. 3 and 8-14.

115 *Id.*, at para. 3.

116 Government Comments and Observations, Add. 2, at 2.

117 Government Comments and Observations, at 8 (Austria) and 10 (The Netherlands).

118 It is interesting to note that Italy did suggest an exception to this discretion in case of violations of peremptory norms. See Government Comments and Observations, Add. 2, at 2-3.

119 Italy proposed the following wording: 'Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation *of its own rights and the rights of its national* in respect of an injury to that national arising from an internationally wrongful act of another State' in: Government Comments

reasoning however is complexing since it relies not only on the *LaGrand* decision, but also on *Avena*. In fact, it derived the wording of its proposal for article 1 from that decision.[120] While *LaGrand* clearly confirmed that individual rights exist and that diplomatic protection is the proper mechanism for claiming these rights without pretending that they are in reality a state's own rights, *Avena* is more complicated. In *Avena*, the ICJ dismissed the exercise of diplomatic protection and treated the protection on behalf of the Mexican nationals as a claim based on direct injury. The Court's decision on this point is particularly confusing. It presents us with an overdrawn interpretation of the words 'in its own right' of *Mavrommatis* and denies the individual any role.[121] Since the Italian proposal for a new draft of this article retains the duality, implying that some primary rights of the state are also protected by the exercise of diplomatic protection, it does not particularly elucidate the matter. As opposed to *Mavrommatis* both *LaGrand* and *Avena* were mixed claims involving both direct and indirect injury. Now, clearly, when a state is claiming its own rights it will not be required resort to diplomatic protection, since the violation of a state's own rights results in direct injury. If one really wishes to emphasise the individual rights underlying diplomatic protection, mixed claims do not provide the best instance to derive the language from and the inclusion of 'in its own right' is not helpful.

Despite the lack of clarity in the Italian proposal the underlying idea, that of the right of the individual and of abandoning too much focus on the state as the supreme holder of all international rights, received quite some support in the ILC. As a result, the drafting committee reconsidered the wording of Article 1. It decided not to adopt the proposal put forward by Italy, but it did modify Article 1. It now reads:

> For the purpose of the present draft articles, diplomatic protection consists of 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 legal person that is a national of the former State with a view to implementing such responsibility.[122]

The changes in this article not only pertain to the fiction – there is also a new emphasis on the invocation and implementation of the responsibility of another state – but the discussion will be limited to this issue here. It is submitted that the current draft is more accurate with respect to the nature of diplomatic protection in the light of the legal fiction and thus has considerable advantage over the previous draft. Since it emphasises the fact that the injury was inflicted

and Observations, Add. 2,, at 2 (emphasis added).

120 Government Comments and Observations, Add. 2, at 2.

121 For the full argument on this point, see *infra*, Chapter IV.

122 Draft Articles on Diplomatic Protection, Art 1.

on the individual rather than the state it is in line with the operation of the legal fiction.

While the omission of the words 'in its own right' should be interpreted as a departure from the opaqueness in *Mavrommatis* and should be welcomed for that reason, the ILC unfortunately decided to leave some room for discussion, unnecessarily. It explained in the Commentary to this provision that it 'is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both.'[123] It is difficult to reconcile this comment to the actual wording of the Article. Even if the provision does not explicitly exclude the protection of a state's own rights in the exercise of diplomatic protection, which would account for the comment that this question is left open, this must be the conclusion. The repeated references to the law of state responsibility and the ILC Articles on this topic are a clear reminder also of the distinction between direct and indirect injury. The ICJ may have overlooked this distinction in *Avena*, but the ILC certainly did not. The Commentary to draft article 14 (on local remedies) explains that the local remedies rule is only applicable to indirect injury and not to direct injury.[124] As has been mentioned before, diplomatic protection is not the proper mechanism for claiming responsibility of another state for direct injury. Viewing diplomatic protection 'through the prism of State responsibility'[125] entails that this distinction should be made and that the protecting state is acting in response to a violation of the rights of its national, and not its own rights. Perhaps the difference between the provision itself and the accompanying commentary can be explained as reflecting the consensus which allows the draft article and the commentary taken together to be agreeable to all.

By structuring the exercise of diplomatic protection as a right of a state to present a claim based on an injury to its national, the provision further underlines the distinction between primary and secondary rules of international law and allows the legal fiction to transform the violation of a primary right into the state's secondary right to address this violation. In the Commentary, the modification is explained by reference to the imperfections in the fiction:

> [m]any of the rules of diplomatic protection contradict the correctness of the fiction, notably the rule of continuous nationality which requires a State to prove that the injured national remained its national after the injury itself and up to the date of the presentation of the claim.[126]

123 ILC Report 2006, at 26.
124 *Id.*, at 74.
125 *Id.*, at 26.
126 *Id.*, at 25.

The point is of course that certain rights and obligations of the individual affect the perception one has of diplomatic protection or conflict outright with the concept of the state's rights. Even as the modification of draft article 1 has significantly contributed to a proper understanding of the mechanism of diplomatic protection, some questions remain to be reviewed. The (importance of the) role of the individual has led some to argue that the legal fiction is inappropriate. It would harm the position of the individual and put too much emphasis on states. In the First Report the Special Rapporteur had raised the issue of the role of the individual and acknowledged that the local remedies rule, the continuous nationality of claims rule, and the general practice since the *Chorzow Factory* case[127] to measure damages according to the injury suffered by the individual clearly show the fictitious nature of diplomatic protection.[128] They primarily relate to the individual but constitute conditions for the right of the individual's national state. While an attempt could be made to explain these requirements in a way that also confirms a right of the protecting state, such an attempt is destined to fail, in particular with respect to the continuous nationality rule and the practice regarding compensation. The requirement to exhaust local remedies is the least controversial in this respect since one could argue that the local remedies rule is in reality a tribute to the sovereignty of the defendant state, supporting the inter-state character of diplomatic protection.[129] Thus, while the burden to exhaust local remedies is upon the individual national, this does not necessarily put the individual at the centre of the claim. In what follows, issues related to compensation and the continuous nationality rule will be considered in particular in the light of the discussions in the ILC preceding the adoption of the draft articles on second reading.

B.2 Compensation and draft article 19: pulling the rabbit out of the hat

The influence of the injury sustained by the individual on the award of remedies and the question of whether the individual has any entitlement to receiving any compensation obtained by his or her national state constitute a complex issue. One way is to see this as a practicality that does not affect the fundamental nature of the claim, especially since most states do not subscribe to the existence of a rule obliging them to transfer any reparations to the indi-

127 *Case concerning the Factory at Chorzow* (Germany *v.* Poland), PCIJ, Series A, No.17 (1928), at 28.

128 Dugard, First Report, at para. 19.

129 See for instance Freeman, *International Responsibility of States for Denial of Justice*, London 1938, at 406-407 who has stated that 'the sole function of the local remedy rule is to give the territorial State and opportunity of appreciating and discharging a responsibility that has already been engaged'.

vidual (even if they do so in practice)[130] and considering the many 'lump-sum' agreements,[131] which also deny an articulate part to the individual.[132] One would thus not expect any provisions on this matter in the draft articles on diplomatic protection, especially considering their state-centred nature.

Yet, the ILC decided to reconsider compensation and to include a new article during the second reading which provides, in soft language, that states 'should' not only consider the wishes of the individual with respect to the extent and kind of protection but also should transfer (part of) any compensation received to this individual.[133] Since this is an exercise in progressive development, the provision is worded in a way that avoids creating binding obligations and it has thus little more than a hortatory effect, reminding states of good practices. As the Commentary explains these are

> desirable practices, constituting necessary features of diplomatic protection, that add strength to diplomatic protection as a means for the protection of human rights and foreign investment.[134]

The transfer of compensation received to the injured individual is widely supported in state practice[135] and this is a legitimate ground for the ILC to propose the provision by way of progressive development. While one may support the policy considerations underlying this provision,[136] it is not easily understood in the light of the fiction and the nature of the exercise of diplomatic protection under the draft articles.

One may note as a preliminary issue that this provision is a secondary rule to a set of secondary rules: it prescribes the consequences of the consequences of an internationally wrongful act. This in itself confirms the secondary nature of diplomatic protection, but does not operate on the same level. More importantly for the purpose of the present discussion, draft article 19 troubles the strict application of the legal fiction, not only with respect to compensation. The fiction in its pure form transforms the primary right of the individual to a secondary right of the state. Draft article 19 however brings it back to the individual. In doing so, it creates additional secondary rules applicable to

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130 On this matter, there seems to be quite some state practice, but the lack of *opinio juris* would bar the formation of a rule of custom. See Dugard, Seventh Report, paras. 93-103.

131 See B.H. Weston, R.B. Lillich & D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements 1975-1995*, New York 1999, who define a lump sum settlement as follows: 'Under lump sum settlement agreements, the responden state pays a fixed – sometimes called an "*en bloc*" or "global" – sum to the claimant state, with the latter … adjudicating the separate claims and allocating a share of the fund to each successful claimant', at 3-4.

132 See on distribution of the negotiated lump-sum, Ibid., at 21 *et seq*.

133 Draft Articles on Diplomatic Protection, Art 19 (c).

134 ILC Report 2006, at 95.

135 Dugard, Seventh Report, at paras 93-103.

136 The present author certainly supports this policy argument and the creation of an obligation to exercise diplomatic protection under certain circumstances. See *infra* Chapter VI.

individuals. Whereas this provision does not create legally binding obligations, it does create something short of an obligation and thus it creates something short of a corresponding right. The latter clearly is the individual national's. It is submitted that while the ILC may have intended to address some of the issues related to the position of the individual, it has created an oddity that fails to concord with the general system of diplomatic protection. Once a state has espoused a claim, it has a discretionary power over the way in which the claim is pursued. It may be argued that states are not entirely free in their decision whether or not to espouse the claim,[137] but this is a different matter than a state's discretion upon espousal. As the Commentary correctly notes, this provision is contrary to the logic of diplomatic protection.[138] More specifically, it is difficult to reconcile with the idea of the legal fiction transforming an individual right to a state's right. As such it does not affect the transformation from a primary to a secondary right.

B.3 Continuous nationality

If one considers the state as the owner of the secondary right to exercise diplomatic protection and one also considers that this right is a discretionary right, then the continuous nationality rule raises questions similar to the ones related to draft article 19. Despite some support for the rule, current international law does not attribute a customary law status to the continuous nationality rule. The very existence and the scope of the rule are controversial and subject to debate, both in the ILC and in legal writing.

Both the position that an exception should be made for changes of nationality between the time of the injury and the presentation of the claim and the position that nationality must be continuous not only at the time of the presentation of the claim but until the award of the claim have been expressed. In an exhaustive overview of the status of the continuous nationality rule under current international law, Duchesne has argued that the continuous nationality rule is difficult to reconcile with the position that a state espouses the claim of the individual and through the operation of the fiction makes it its own. He thus questions the status of the continuous nationality rule beyond the time of the occurrence of the injury as a rule under customary international law.[139] The former position is also supported by the ILC draft articles adopted on first reading in Article 5(2), supported by the Special Rapporteur. While

137 See on this matter ILC Report 2006, at 96 and *infra* Chapter VI.

138 ILC Report 2006, at 97.

139 M. S. Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes', 36 Geo. Wash. Int'l L. Rev. 783 (2004). See also Dubois, 'La Distinction entre le droit de l'Etat réclamant et le Droit du Ressortissant dans la Protection Diplomatique', 67 R.C.D.I.P 614-640 (1978), at 623.

Dugard recognised the undesirability of "nationality shopping", he has pleaded for some flexibility in the application of the continuous nationality rule to accommodate involuntary changes of nationality.[140] This view was also supported by a number of States in their comments and observations to the Draft Articles (Belgium,[141] the United Kingdom,[142] Austria, El Salvador, The Netherlands, and the Nordic Countries[143]) and by various members of the ILC in their statements to the ILC while discussing this Draft Article.

The strongest supporter of the latter view is perhaps the United States in its comments to the ILC on the Draft Articles on Diplomatic Protection adopted on first reading, in which it proposed to require a continuity of nationality until the *resolution* of the claim, which is clearly more than the original *presentation* of the claim.[144] Although it admitted that extending the requirement of continuous nationality beyond the presentation of the claim may not be part of current customary law, the United States, while relying on the *Loewen Group* decision,[145] emphasised that this extension is desirable since a state would loose its legal interest in receiving the remedies when the individual involved is no longer its national. The ICSID tribunal in *Loewen* also supported the rule.

In response, the Special Rapporteur pointed out that the interpretation by the United States of the *Loewen Group* decision (and other decisions) to support a general extension of the continuous nationality rule until the making of an award is flawed. While this decision and other decisions referred to by the United States show that a claim must be dismissed when the individual changes nationality between the presentation of the claim and the making of an award, it is simultaneously true that they have one particularity in common. As Dugard wrote,

> many of the decisions in favour of the date of the resolution of the claim, and on which the United States relies, involve instances in which the national changed

140 ILC Report 2004, at 34-37.
141 See Government Comments and Observations, Add.1, at 6.
142 Ibid.
143 See Government Comments and Observations, at 15-16.
144 See *Id.*, at 17
145 *The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, ICSID Case No. ARB (AF) 98/3, 42 ILM 811 (2003). This decisions has been heavily criticised: see M. S. Duchesne, 'The Continuous-Nationality-of-Claims Principle: Its Historical Development and Current Relevance to Investor-State Investment Disputes', 36 Geo. Wash. Int'l L. Rev. 783-815 (2004); M. Mendelson, 'The Runaway Train: the "Continious Nationality Rule" from the *Panevezys-Saldutiskis Railway* case to *Loewen*' in: T. Weiler (ed.) *International Investment Law and Arbitration* London 2005, 97-149; P. Acconci, 'The Requirement of Continuous Corporate Nationality and Customary International Rules on Foreign Investments: The *Loewen* case', 14 Italian Yb. of Int'l Law 225-236 (2004).

his/her nationality after the presentation of the claim and before the award to that of the respondent State.[146]

The result of such a situation would be that the respondent state pays compensation to its own national. In all fairness, this should be a reason to declare the claim inadmissible. While this exception may in turn raise issues with respect to protection of dual nationals against a state of nationality – a discussion of which is beyond the scope of the present Chapter –, it certainly does not support a general extended requirement for continuous nationality until the making of an award.

Despite absence of proof of international customary law, the ILC decided to include the continuous nationality rule in the draft articles on diplomatic protection and retained that provision on second reading. Referring to the continuous nationality rule, it stipulates that protection may be exercised on behalf of a national 'who was a national continuously from the date of injury to the date of the official presentation of the claim' and adds that such nationality will be presumed if it 'existed at both these dates.'[147] It provides for one exception and two further restrictions: loss of nationality unrelated to the bringing of the claim does not exclude protection, whereas injury caused by a former state of nationality at the time the national had that nationality and acquisition of the nationality of the respondent state both render the exercise of diplomatic protection inadmissible.

This draft article is clearly the result of a compromise. While the continuous nationality rule is thus included in the rules on diplomatic protection, it is not an absolute rule and the word 'only', which was suggested by the United States,[148] was not included, nor was the requirement of continuity extended until the resolution of the claim. In addition, Article 5(1) limits the burden of proof on the applicant state. On the other hand, while the draft article adopted on first reading was silent on this issue, the new provision does address the '*Loewen*' situation, where the national changes nationality to that of the respondent state after the presentation of the claim in draft article 5(4). This requirement, in itself a restriction of the exercise of diplomatic protection, is relatively strict: it does not allow for an exception if the change of nationality was involuntary (for instance due to marriage or adoption).[149]

The difficulty with the continuous nationality rule is that it touches on the nature of diplomatic protection as a state's right and therefore on the operation of the legal fiction. While many states may be prepared to consider the injury

146 Dugard, Seventh Report, at para. 40.

147 Draft Articles on Diplomatic Protection, Art. 5(1). It is curious to note that Lauterpacht called the Continuous Nationality Rule an 'essentially reasonable rule'. H. Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens', 9 Cambridge Law Journal 330-348 (1946), at 338.

148 Government Comments and Observations, at 17.

149 Similar provisions apply to corporations. See Draft Articles on Diplomatic Protection, Art. 10.

as purely affecting the individual, they certainly do not reject the discretionary nature of diplomatic protection and the draft articles as a whole do not challenge this discretion. It may be advantageous for the defending state to adhere to the continuous nationality rule, since it will limit the number of admissible claims, but it is problematic from the perspective of the fiction. A strict adherence to the continuous nationality rule emphasises the role of the individual: through the continuity of his or her nationality, the legal interest of the protecting state is preserved. However, as has already been referred to above, this is difficult to reconcile with an equally strict adherence to the *Mavrommatis* principle stipulating that the state is the 'sole claimant'.[150] If the legal fiction transforms the injury caused by a violation of a primary rule into a right of a state to present a claim, the nationality of the individual is only relevant at the time of the injury. Cases such as the *LaGrand* case, where the individuals at the origin of the claim had died by the time the claim was presented or resolved, provide clear support for the view that indeed the state is the sole judge regarding the modes and continuation of the claim.

This, however, brings us to the same issue as the one underlying the complexities of draft article 19: the individual's secondary rights and obligations that influence his or her national state's secondary right to exercise protection on his or her behalf. In this respect, the legal fiction is even more 'imperfect' and 'limited' than originally envisaged. Not only is the fiction limited to protection and does it not entail a state's responsibility for actions of the individual, but the legal fiction is hampered because of the individual's role in the secondary stages. Under the ILC draft articles on diplomatic protection, the legal fiction is not an absolute fiction and *Mavrommatis* has been abandoned on more than one account. Both the bringing of a claim 'in its own right' is no longer adhered to and the element of complete discretion, the state as the 'sole judge' is limited.

4 Conclusion

Law makes use of many fictions and could not function as it does without fictions. Yet, fictions are not always clear and it is necessary to question their function and to analyse in detail what they aim to achieve. This is hardly new: as we have seen Vaihinger and Kelsen discussed fictions, arriving at very different conclusions. Whereas in case of fictions that are perceived to present an undesirable picture of reality one may question their value, it should be kept in mind that fictions are a legal tool to enable the application of the law in an area that is in need of regulation. They are by their very nature imperfect, limited yet necessary and for that reason should be subject to scrutiny. In this

150 *Mavrommatis,* at 12.

process, one should consider whether the purpose of the fiction is still legitimate, but also whether the mechanism itself is still desirable.

In the context of diplomatic protection, the legal fiction that allows a state to espouse the claim of one of its nationals has been subject to criticism and held to be irreconcilable with the current state of the law. The position of the individual under international law today is very different from the early 20th century. Individuals are increasingly recognised as subjects of international law and would thus no longer need protection by their national state, thus rejecting the mechanism provided by the legal fiction. Yet it will be shown that individual agency is still, regrettably, limited and that diplomatic protection continues to be indispensable.

In analysing legal fictions in general and the distinction between primary and secondary rules of international law, it has been demonstrated that the fiction in diplomatic protection operates on two levels. Through the application of the legal fiction, the espousal of the claim, a primary right gives rise to a secondary right. This is not surprising. The transformation from a primary right to a secondary right in itself does not require a fiction. Under the law of state responsibility, the violation of a primary right puts into operation the system of secondary rules that are enshrined in the ILC articles on state responsibility. In this process, there is no pretending: state responsibility only applies after the occurrence of an internationally wrongful act. Nevertheless, diplomatic protection is different from the 'normal' law of state responsibility. Instead of applying secondary rules to primary rules of the same owner, the secondary rules apply after the violation of primary rights of another person: the individual national of the espousing state. This is accomplished through the legal fiction.

As we have seen, the question of the transformation from rights of the individual to rights of the state is rather complex. The injury is without any doubt sustained by the individual and not by the protecting state. Similarly, the right to exercise diplomatic protection is without doubt the right of the protecting state and not the individual national's. There is however much in between that shifts the focus from the individual to the state and back. The conditions for the exercise of diplomatic protection contain obligations of both the state and the individual national. The local remedies rule is intimately connected to the prohibition on denial of justice, conflating the secondary condition and a primary right. Similarly, the continuous nationality rule emphasises that the legal interest of the claiming state must be supported by the nationality of the injured individual up and until the presentation of the claim. This is not so much a conflation of two rights, but rather contradicts the position that the espousing state is the sole claimant. It only becomes the sole claimant after the presentation of the claim. Yet when applying the continuous nationality rule it does not continue to be solely in control. In addition, whereas the ILC generally seems to support the state-centred view on diplomatic protection, it requires states to consider the wishes of the individual

national and in draft article 19 it reminded states of the cause of and reason for the exercise of diplomatic protection. Taken in an extreme way, this reduces the state to a representative of the individual. One scholar has, perhaps with this in mind, distinguished diplomatic protection and 'representative action', the difference being that diplomatic protection concerns a claim based on the state's rights and the individual national's rights which are not easily separated whereas representative action only concerns the protection of individual rights. To support his argument, the author has relied on the ICJ's decision in *Avena*.[151] As has been pointed out earlier however, in relation to the Italian government's proposal, *Avena* generally does not support specific arguments related to diplomatic protection. The Court in *Avena* did not accept the claim as based on diplomatic protection but as a direct injury to Mexico, thereby bypassing the requirement to exhaust local remedies. Even if one would consider the concept of representative action, a case that is interpreted to be one of direct injury certainly provides no support. The discretionary nature of diplomatic protection, even taking into account draft article 19, dictates that states are not merely representing their nationals. More generally, it is not necessary to make this distinction once it is acknowledged that states do not protect their own rights in the exercise of diplomatic protection.

Yet, they do exercise their own right of diplomatic protection and enjoy a large measure of discretion in the modalities of the exercise of this right, despite the encouragement in draft article 19. Once the legal fiction is applied and the violation of the individual right has prompted the resort to diplomatic protection by his or her national state, the state will decide how and to what extent protection will be exercised and what part of the reparation received, if at all, will be transferred to the individual.

But does this all mean that the legal fiction in diplomatic protection has lost its value and that it should be abandoned, since the mechanism does not ensure the individual's control? It is submitted that is has not and should not. Whereas individuals undeniably are the bearers of certain rights, such as human rights, their capacity to ensure protection of these rights is still, regrettably, limited. The limited agency of individuals under current international law is clearly shown by a number of international and national decisions. In the *Al Adsani* case, decided by the European Court of Human Rights, the state immunity of Kuwait was upheld despite allegations of torture. This decision was recently confirmed by the House of Lords in the United Kingdom in the *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* et al. where it was again found that immunities would be upheld.[152] Even if the claimants

151 C. Santulli, 'Entre Protection Diplomatique et Action Directe: La Représentation', in: *Le Sujet en Droit International, colloque du Mans*, Société française pour le Droit International, Paris 2005, at 85-98.

152 *Jones* v. *Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya; Mitchell and others* v. *Al-Dali and others and the Kingdom of Saudi Arabia* [2006] UKHL 26, per Lord Hoffmann.

in both cases could pursue civil procedures against the relevant states, the execution of the decision would remain largely unwarranted. In an inter-state claim, such immunities would not be of any significance. Another example is provided by individuals who attempted to challenge the inclusion of their names on counter-terrorism listings. The *Kadi* and *Yusuf* cases before the European Court of First Instance[153] clearly showed the ineffectiveness of individual action against such lists, which was further confirmed in the Belgian case of *Sayadi & Vinck* v. *l'Etat Belge*.[154] In most of these cases the Courts and parties indicated that it could not but uphold the relevant immunities, but that this would not lead to impunity given the possibility of diplomatic protection.[155] This clearly shows the incapacity of the national court to address the matter and it shows the importance of diplomatic protection for the protection of the individual. As Dugard has stated in the Commentary,

> [t]he individual may have rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State level remains an important remedy for the protection of persons whose … rights have been violated abroad.[156]

Abandoning the legal fiction now would be premature and not in the interest of the individual. To end with Ost and van de Kerchove:

> [v]oilà donc qu'il allait falloir s'accompagner de ces « jouets », si du moins on avait le souci d'assurer la suite de la représentation.[157]

153 Case T-306, *Yusuf and Al Barakaat* and Case T-315, *Kadi*, European Court of First Instance, decisions of 21 September 2005. See also M.K. Bulterman, 'Fundamental Rights and the UN Financial Sanction Regime – the Kadi and Yusuf Judgments of the CFI', 19 LJIL 753-772 (2006).

154 *Sayadi & Vinck v. l'Etat Belge*, Tribunal de première instance de Bruxelles, decision of 18 february 2005.

155 *Al-Adsani* v. *United Kingdom* [ECHR], Judgment of 21 November 2001, Application no. 35763/97, at para 50; Case T-306, *Yusuf and Al Barakaat* and Case T-315, *Kadi*, European Court of First Instance, decision of 21 September 2005 at para 267 para 314 respectively.

156 ILC Report 2006, at 26.

157 F. Ost and M. van de Kerchove 'Le jeu, un paradigme fécond pour la théorie du droit', in: idem, *Le jeu: un Paradigme pour le droit*, Paris 1992, at 258.

II Exercising Diplomatic Protection

The fine line between litigation, demarches and consular assistance

INTRODUCTION

One of the last Draft Articles that was proposed by the Special Rapporteur to the International Law Commission for inclusion in the Draft Articles on Diplomatic Protection concerns the relationship between diplomatic protection and consular assistance.[1] International law distinguishes between (at least) two kinds of international relations.[2] This is stipulated by the existence of two separate treaties: the two Vienna Conventions of 1961 and 1963 have codified the rules with respect to diplomatic and consular relations respectively.[3] A fundamental difference is that a diplomatic agent is a political representative of a state, while a consular officer has no such function.[4] As a consequence, the establishment of a consulate in non-recognised territories does not always imply recognition while establishing an embassy usually does and immunities granted to ambassadors are markedly different from those granted to consuls.[5] In accordance with the two regimes applicable to international relations, international law recognises two kinds of protection states can exercise on behalf of their nationals: consular assistance and diplomatic protection. There are fundamental differences between consular assistance and diplomatic protection. A persistent subject of debate and controversy however is the question of which activities by governments fall under diplomatic

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1 See Dugard, Seventh Report, at 11, para. 21. This proposal was not endorsed and the issue was referred to the Commentary. This Chapter was published as an article entitled 'Exercising Diplomatic Protection, the Fine Line between Litigation, Demarches and Consular Assistance' in 66 ZaöRV 321-350 (2006).

2 See e.g. M.A. Ahmad, *Institution Consulaire et le Droit International*, Paris 1966, at 62, who stresses the importance of distinguishing between diplomatic and consular functions.

3 The Vienna Convention on Diplomatic Relations, UN Treaty Series, vol. 500, p.95 (hereinafter: VCDR) and the Vienna Convention on Consular Relations, UN Treaty Series, vol. 596, p. 262 (hereinafter: VCCR).

4 E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York 1919, at 436. See also B. Sen, *A Diplomat's Handbook of International Law and Practice*, Dordrecht 1988, at 246.

5 See B. Sen, *A Diplomat's Handbook of International Law and Practice*, Dordrecht 1988, at 246-8; M.A. Ahmad, *Institution Consulaire et le Droit International*, Paris 1966, at 63. See also I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 355-7 (but see at 93 on implied recognition through establishment of consular post); M.N. Shaw, International Law, Cambridge 2003, at 385; C. Wickremasinghe, 'Immunities enjoyed by officials of States and International Organizations', in: M.D. Evans, *International Law*, Oxford 2006, at 404-405.

protection and which actions do not. This debate is fuelled by an equally persistent misunderstanding of the definition of the term action for the purpose of diplomatic protection resulting in actions being mistakenly classified as an exercise of consular assistance.

The problem is not so much the question of what constitutes consular assistance, but the definition of action for the purpose of diplomatic protection to the exclusion of consular assistance. Most scholars and diplomats would be able to identify whether the issuance of passports, the exercise of notarial functions or acting as registrar of marriages are forms of diplomatic protection or consular assistance. However, it becomes more complicated with respect to the very general function of 'protecting in the receiving state the interests … of nationals', as it is provided in Article 5(a) of the VCCR, especially as this provision resembles in detail Article 3(b) of the VCDR.

Diplomatic protection is often considered to involve judicial proceedings. Interventions outside the judicial process on behalf of nationals are generally not regarded as constituting diplomatic protection but as falling under consular assistance instead. The position of the Netherlands and the United Kingdom are presented here as examples of this position. In the case of a Dutch national detained in Thailand, the Dutch government made a considerable effort to improve his situation. This Dutch national, whose girlfriend was caught in possession of cocaine, was held in pre-trial detention in the Bangkok prison for six years. Despite attempts by the Dutch government to prevent this, he was finally tried and convicted on predominantly circumstantial evidence, having thus exhausted all local remedies. When the Dutch Minister of Foreign Affairs contacted the Thai Ambassador in the Netherlands, the Thai Ministers of Foreign Affairs and of Justice on behalf of the Dutch national, the Dutch authorities considered this not as a case of diplomatic protection but as an exercise of consular assistance. The position of the United Kingdom, as presented by Warbrick and McGoldrick, also seems to be that there is no exercise of diplomatic protection unless an official claim has been brought.[6] The *Ferhut Butt* case provides a clear example of this practice, as the judgment failed to distinguish the two kinds of protection and considered the requested *diplomatic* interventions as interferences in the domestic affairs of a foreign state.[7] Without legal proceedings, i.e. claims before (international) courts or tribunals, action undertaken by a government on behalf of a national would thus remain within the realm of consular assistance and not reach the level of diplomatic protection.

6 C. Warbrick, and D. McGoldrick, 'Diplomatic Representation and Diplomatic Protection', 51 ICLQ 723-44 (2002).

7 *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Ferhut Butt*, Court of Appeal 9 July 1999, 116 ILR 607-22, at 616-18. This decision raises various questions with respect to diplomatic protection. For a more detailed analysis see *infra*, Chapter VI.

However, this view is not in conformity with the standard definition of diplomatic protection as can be found in legal writing, (inter)national case law and the work of the ILC. Although the line between various forms of protection and assistance is not always sharply drawn in legal writing and although one should not exclude the possibility that something which starts as consular assistance becomes diplomatic protection at a later stage, it is important to point to the various distinctions and make an attempt to end the Babylonic confusion of tongues.[8] Any intervention, including negotiation, on inter-state level on behalf of a national *vis-à-vis* a foreign state should be classified as diplomatic protection (and not as consular assistance), provided the general requirements of diplomatic protection have been met, i.e. that there has been a violation of international law for which the respondent state can be held responsible, that local remedies have been exhausted and that the individual concerned has the nationality of the acting state.[9] However, in reality the classification of the actions undertaken by states on behalf of their nationals is often inaccurate and sometimes even flawed.

In what follows, the term 'action' with respect to diplomatic protection will be analysed through a discussion of legal writing, international and national decisions and the ILC Draft Articles on diplomatic protection. As states tend to classify certain actions as falling within consular assistance rather than diplomatic protection, the differences between these two forms of involvement on behalf of an individual will be clarified. Within this section, a separate section will be dedicated to the provision in various EU treaties (the Treaty establishing a Constitution for Europe, the EU Charter and the EC Treaty) providing for diplomatic protection and consular assistance for EU citizens by other states than their national state. In conclusion, the relevance of classifying government actions as an exercise of diplomatic protection will be demonstrated.

1 The term Action

International legal doctrine, international and national judicial decisions and the work of the ILC on the issue show that diplomatic action is not limited to international judicial proceedings such as arbitration or litigation before the ICJ. In the first section, legal doctrine shall be discussed, followed by

8 It is interesting to note a comment by Perrin: 'les affaires [i.e. instances of diplomatic protection] soumises à la conciliation, à l'arbitrage ou au règlement judiciaire sont très peu nombreuses, ces modes de règlement ayant un caractère tout à fait subsidiaire' in: G. Perrin, 'La Protection Diplomatique des Sociétés Commerciales et des Actionnaires en Droit International Public', 32 Revue Juridique et Politique Ind. et Coop. 387-409 (1978), at 391.

9 If any of these requirements are not met the intervention could still be qualified as diplomatic protection, but the claim would then be inadmissible, as the protection would be unfounded.

international and national decisions. In the final section, the work of the ILC shall be presented.

A. International legal doctrine

Borchard indicated that states have a choice of means for the exercise of diplomatic protection:

> [a]s no municipal statutes specify the circumstances and limits within which this right of protection shall be exercised, each government determines for itself the justification, expediency and manner of making the international appeal.[10]

As examples of mechanisms he mentioned that they

> may range from diplomatic negotiations, the use of good offices, mediation, arbitration, suspension of diplomatic relations, a display of force, retorsion, reprisals, or armed intervention, to full war in the full sense of the word.[11]

Nowadays we exclude the use of force and gunboat diplomacy from the exercise of diplomatic protection (see below, section 1d), so the emphasis here is on the first means of settlement. It is interesting to note the way in which Borchard distinguished 'diplomatic negotiations' and 'good offices'. Under diplomatic negotiations

> [t]he complaining state, through its diplomatic representative, brings the claim to the attention of the defendant government, which may interpose defenses or suggest some other method of settlement.[12]

Good offices on the other hand include both informal representations, which he described as 'unofficial, personal and friendly efforts of a diplomatic agent',[13] and the 'official, formal and governmental support of a diplomatic claim.'[14] They involve 'representations consisting of requests, recommendations and other personal efforts'.[15] In his description, good offices resemble the functions others have described as consular assistance. While informal representations where a diplomatic agent for instance contacts a high official in the Ministry of Justice would be a form of diplomatic protection according to Borchard, Warbrick and McGoldrick do not classify such actions as an

10 E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 354.
11 *Id.*, at 439.
12 Ibid.
13 *Id.*, at 440.
14 Ibid.
15 *Id.*, at 441.

exercise of diplomatic protection.[16] However, if we consider again the deliberate differentiation between consular and diplomatic relations as shown by the existence of the two conventions, the conclusion must be that protection stemming from diplomatic (or representative), rather than consular, channels must be considered to be diplomatic protection. Indeed, Borchard in discussing consular assistance clearly distinguished consular assistance and diplomatic protection, as already mentioned above.[17]

Dunn also considered diplomatic action under diplomatic protection to include more than only international litigation:

> [i]t embraces all cases of official representation by one government on behalf of its citizens or their property interests within the jurisdiction of another.[18]

He stated in addition that

> the normal case of protection seldom gets beyond the stage of diplomatic negotiation. What ordinarily happens in a case of protection is that the government of an injured alien calls the attention of the delinquent government to the facts of the complaint and the request that appropriate steps be taken to redress the grievance.[19]

Gehr on the other hand questioned whether steps taken outside the framework of adjudication should be considered as diplomatic protection. He however suggested that indeed one could think of mechanisms such as 'Verhandlung, Untersuchung, Vermittlung [und] Vergleich.'[20] More recently, Condorelli confirmed this view by stating that

> quel que soit le "canal" exploité, quelle soit la méthode de règlement des différends choisie pour le traitement au niveau international de la réclamation en question, on est bien toujours dans le champ de la protection diplomatique.[21]

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16 See *supra* Introduction to this chapter.

17 E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 436, discussed *supra* in section 1.

18 F.S. Dunn, *The Protection of Nationals*, New York 1932, at 18.

19 *Id.*, at 19.

20 W. Gehr, 'Das diplomatische Schutzrecht in': B. Simma and C. Schulte (eds), *Völker- und Europarecht in der aktuellen Diskussion*, Vienna 1999, at 123. *See also* A.M. Aronovitz, 'The Procedural Status of Individuals in Diplomatic Protection and in the European Convention on Human Rights: A Comparative Study', 28 Comparative Law Review 15-53 (1995), at 18.

21 L. Condorelli, 'L'Évolution du Champ d'Application de la Protection Diplomatique', in: J.-F. Flauss (ed.), *La Protection Diplomatique, Mutations Contemporaines et Pratiques Internationales*, Brussels 2003, at 6.

In addition French state practice includes diplomatic negotiations within the scope of diplomatic protection.[22]

Modern general textbooks on international law are silent on the issue or ambiguous. Cassese for instance, in describing the mechanism of diplomatic protection mentions first that

> before the national state brings a claim before an arbitral tribunal or institutes judicial proceedings before an international court … it is necessary for the relevant individual to have exhausted all the domestic remedies,[23]

implying that diplomatic protection always involves judicial proceedings. But later he states that

> their national state decided to exercise diplomatic protection (by approaching through diplomatic channels the state that had allegedly wronged one's nationals…), or judicial protection (by bringing a claim on behalf of one's nationals before an international tribunal or court).[24]

This last citation is particularly interesting as it echoes formulations of the PCIJ and ICJ, to be considered below. It is thus not clear whether according to Cassese diplomatic protection always involves judicial proceedings or whether it encompasses non-judicial mechanisms such as negotiation. However, it is submitted that this lack of clarity was not intentional but resulted from the fact that Cassese did not fully consider the issue as the questions this would raise would go beyond the scope of his book.

Brownlie's Principles of Public International Law is not very explicit, but merely states that 'the state of the persons harmed may present a claim on the international plane.'[25] Evans' International Law is silent on the issue.[26] Shaw does not seem to have taken a position. On the question of whose rights are being protected he states that once 'a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant,'[27] while in referring to British practice it is indicated that it 'distinguishes between formal claims and informal representation'

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22 J.-P. Puissochet, 'La Pratique Française de la Protection Diplomatique', in: J.-F. Flauss, *La Protection Diplomatique, Mutations Contemporaines et Pratiques Internationales*, Brussels 2003), at 117-8. An example given here is that 'le département demande aux chefs de poste concernés des interventions, au niveau le plus haut si necessaire', at 118.

23 A. Cassese, *International Law*, Oxford 2005, at 122.

24 *Id*., at 376 (emphasis added).

25 Brownlie, *Principles of Public International Law*, Oxford 2003, at 489.

26 P. Okowa, 'Issues of Admissibility and the Law on International Responsibility, The Bases of Diplomatic Protection' in: M.D. Evans (ed.), *International Law*, Oxford 2006, at 483-93.

27 M.N. Shaw, *International Law*, Cambridge 2003 at 723 (emphasis added),

without however giving the impression that the latter should not be considered as an exercise of diplomatic protection.[28]
International legal doctrine thus does not support the view that diplomatic protection is limited to procedures involving international adjudication. One then wonders where the view emerged that diplomatic protection involves only judicial proceedings.

B. International decisions

As has been stated before, various international legal proceedings have been based on diplomatic protection, in particular before the PCIJ and its successor, the ICJ. In these decisions and opinions, the ICJ and its predecessor referred to diplomatic protection, diplomatic action and international judicial proceedings on various occasions. A short analysis of these statements will show that diplomatic protection should not be limited to international adjudication.

In the famous *Mavrommatis Palestine Concessions* case, the Permanent Court stated that states are allowed to take up the cases of a national 'by resorting to diplomatic action *or* international judicial proceedings on his behalf'.[29] In the *Panevezyz-Saldutiskis Railway* case the PCIJ literally repeated this phrase, without however referring to the earlier *Mavrommatis* decision.[30] In the *Serbian Loans* case, the Court stated that the dispute originated when the French government entered into diplomatic negotiations with the Serb-Croat-Slovene government, which suggests that diplomatic protection was actually exercised from the moment the French government espoused its nationals' claim and not from the moment the case was brought before the PCIJ.[31]

The ICJ in the *Nottebohm* case distinguished 'diplomatic protection and protection by means of international judicial proceedings'.[32] Despite the fact that the *Reparation for Injuries* Advisory Opinion concerned protection by an international organisation and not by a state,[33] the judgment, in dealing with diplomatic protection in general, confirmed that various methods exist for the presentation of an international claim in the exercise of diplomatic protection, including 'protest, request for an enquiry [and] negotiation'.[34] This position was repeated in the *Barcelona Traction* case. In line with the general perception

28 *Id.*, at 724.
29 *Mavrommatis*, at 12 (emphasis added).
30 *Panevezys-Saldutiskis Railway* Case, at 16.
31 *Case Concerning the Payment of Various Serbian Loans issued in France*, at 15 and 18.
32 *Nottebohm* Case (Second Phase), at 24 . This formulation is rather odd, an interpretation of which will be given below.
33 See on this point ILC Report 2004, at 24, para. 60(3); C. Storost, *Diplomatischer Schutz durch EG und EU? Die Berücksichtigung von Individualinteressen in der europäischen Außenpolitik*, Berlin 2005, at 27-125 for protection by the EC and EU.
34 *Reparation for Injuries*, at 177.

on choice of means with respect to dispute settlement,[35] the Court stated that 'within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means … it thinks fit'.[36] The *ELSI* case also reflects the idea of choice of means:

> the case [before the ICJ] arises from a dispute which the Parties did not "satisfactorily adjust by diplomacy"; and that dispute was described in the 1974 United States claim made at the diplomatic level as a "claim of the Government of the United States of America on behalf of Raytheon Company and Machlett Laboratories, Incorporated".[37]

As in the *Serbian Loans* case, this confirms the idea that the dispute does not originate at the litigation stage but earlier and that negotiations can be deployed to try and settle the dispute.

In all these dicta there is nothing which suggests that diplomatic protection is limited to international adjudication or that it only commences at the moment a case is brought before an international tribunal. Rather, in describing the origins of the various disputes, both the ICJ and the PCIJ referred to negotiations preceding the litigation before the Court without suggesting that that fell beyond the scope of the exercise of diplomatic protection.[38] Admittedly, the term 'action' is rather vague, but there is no suggestion that it should not include *demarches*. Even if one were to understand 'action' as referring to more or less formal dispute settlement mechanisms other than international judicial proceedings, it would include diplomatic negotiation, e.g. between the Ambassador of the injured alien's national state and Government officials of the host state.[39] In general, the presenting of international claims is not limited to formal presentation before international tribunals.[40]

One issue should be clarified: there is a difference between the formulation in *Mavrommatis* and *Nottebohm*. Where the PCIJ referred to diplomatic *action* the ICJ used the term diplomatic *protection*. The phrasing in *Mavrommatis* clearly gives an inclusive definition of diplomatic protection: a state exercises diplomatic protection *by diplomatic action or international judicial proceedings*. However, the *Nottebohm* decision seems *prima facie* to distinguish international adjudication from diplomatic protection and even to state that diplomatic protection does *not* include international litigation. As the ICJ clearly accepted applications based on diplomatic protection on numerous occasions it would be wrong to interpret the statement in *Nottebohm* in this way. This is supported by the

35 M.N. Shaw, *International Law*, Cambridge 2003, at 918.
36 *Barcelona Traction* (Second Phase), at 44 (para. 78).
37 *ELSI*, at 43, para 51.
38 See *e.g.* the *Serbian Loans* case and the *ELSI* case, as quoted above.
39 J.G. Merrills, *International Dispute Settlement*, third edition, Cambridge 1998, at 8-9 on forms of negotiation; see also M.N. Shaw, *International Law*, Cambridge 2003, at 918-21;
40 I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 485.

second part of the citation in question: the Court continues stating that '[these] are measures for the defence of the rights of the State.'[41] The issue of the function of diplomatic protection as, also, protecting state interests will be discussed below in section III.2, but the second part of the sentence clearly indicates that it is not only through international adjudication that states can exercise their right of diplomatic protection. It is submitted that it is either an inaccuracy of the Court or that the 'and' should be interpreted as specifying, and not differentiating, where the second part of the phrase indicates a special feature of the first part: diplomatic protection, and in particular judicial proceedings. It would be contrary to the ordinary meaning of the citations to interpret them as excluding diplomatic negotiations from the realm of diplomatic protection.[42]

Two more recent cases before the ICJ, the *LaGrand* case and the *Case Concerning Avena and other Mexican Nationals*, concerned both consular assistance and diplomatic protection. As the procedures instigated by Germany and Mexico before the ICJ clearly constitute an example of the exercise of diplomatic protection through seeking international adjudication, in that sense they do not answer or clarify the question on the nature of diplomatic action for the purpose of diplomatic protection. A more detailed discussion of these two decisions will follow below in section 2.D.

In conclusion, the PCIJ and ICJ decisions show that resort to diplomatic protection recognises a choice of means. Since states generally enjoy a choice of means in dispute settlement, diplomatic protection is no exception to this rule and includes a wide range of activities, from presentations by representatives of states to litigation procedures at the ICJ.

C. National decisions[43]

We find the same position in national Court decisions. In considering whether a national government had offered adequate diplomatic protection to its nationals, various courts have found that governments had met the necessary level of protection by conducting negotiations through their diplomatic channels or by protesting at the level of government representation. In the *Rudolf Hess* case for instance, the German Constitutional Court considered that diplomatic *demarches* by the German government were proof that the government had fulfilled its obligations under the German Constitution, which grants

41 *Nottebohm*, at 24.

42 See in this respect also S.N. Guha Roy, 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?', 55 AJIL 863 (1961), at 864: 'a direct diplomatic move or access to an international tribunal, as the case may be, is in order'.

43 For a detailed discussion of the decisions presented in this section and other national court decisions on diplomatic protection see *infra* Chapter VI.

a right to diplomatic protection to German citizens.[44] Similar decisions can be found in other countries. The Court of Appeal in the UK decided in the *Abbasi* case that the British government had met the legitimate expectation of the applicant by conducting diplomatic negotiations with the United States on behalf of Mr. Abbasi.[45] Although more complex for reasons discussed below, the *Ferhut Butt* case draws the same picture. Ms. Ferhut Butt demanded protection for her brother who was detained in Yemen on suspicion of terrorism. The decision of the Court of Appeal speaks of 'formal representations' but there is no suggestion that this would be limited to litigation.[46] In the *M. Kuijt* case, a Dutch Court came to a similar conclusion.[47] In South Africa, the decision in the *Kaunda* case and in particular Judge Ngcobo's separate opinion support the choice of means more explicitly.[48] Judge Ngcobo stressed that the South African Government had actually exercised diplomatic protection by requesting the Zimbabwe authorities to grant South African diplomats access to the trials of the South African nationals concerned in this case.[49] The Judge explained that, regardless of whether those diplomats were actually present at the trials, the request as such should be seen as a diplomatic *demarche* and thus as an exercise of diplomatic protection.[50] In a later South African decision, this view was confirmed. In the *Jozias van Zyl* case, the High Court of South Africa found that

> within the panoply of diplomatic protection, the executive has a reasonably wide choice to "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion [*sic*], severance of diplomatic relations, [and] economic pressure".[51]

Some decisions by national courts show confusion of diplomatic protection and consular assistance. While most courts would include *demarches* to fall within the scope of diplomatic protection, some courts make no distinction between diplomatic protection and consular assistance, as the *Van Zyl* decision

44 *Fall Rudolf Hess,* BVerfG, Beschl. V. 16.12.1980, 90 ILR 387-400, at 396.

45 *Abbasi & Anor v Secretary of State for Foreign and Commonwealth Affairs,* 2002 WL 31452052 (CA, Civ Div), at paras. 107-108.

46 *Ferhut Butt*, at 619.

47 *M. Kuijt* v. *The Netherlands*, 18 March 2003, LJN. no. AF5930, Rolno. KG 03/137, at paras. 3.6-3.7

48 *Samuel Kaunda and Others* v. *The President of the Republic of South Africa, The Minister of Justice and Constitutional Development and others,* Judgment of 4 August 2004, Case no. CCT 23/04, 44 ILM 173-233.

49 *Id.*, separate opinion Judge Ngcobo, at paras. 198-202.

50 *Id.*, at para. 200.

51 *Jozias van Zyl and others v. The Government of the Republic of South Africa and others*, Judgment of 20 July 2005, Case No. 20320/2002, at para. 49. The judge here referred to the first Report of the ILC Special Rapporteur on Diplomatic Protection, who listed the actions considered by legal scholars to fall under diplomatic protection.

shows, or classify *demarches* by diplomatic representatives unjustly as an exercise of consular assistance. Although this is unfortunate for the purpose of defining what diplomatic protection exactly is, it does support the position that diplomatic protection is more than international litigation only. In section 3 below, the differences between diplomatic protection and consular assistance will be examined and the relevant decisions by national courts discussed.

Admittedly, views on what may or may not constitute diplomatic protection may differ among governments, but legally the position of the Courts here presented is the correct one.

D The ILC Report and Draft Articles on Diplomatic Protection

The first ILC Report on Diplomatic Protection does point to the existing differences between various conceptions of the term action, but does not clearly define the term. Reference is made to Dunn, the *Nottebohm* case, the *Panevezyz-Saldutiskis Railway* case and the Preliminary Report to the ILC by Bennouna.[52] The two cases are interpreted as making a distinction, but, as mentioned above, this is not necessary if one accepts the inclusive understanding of the conjunction. In his first report, the Special Rapporteur suggested that 'the restrictions on the means of diplomatic action open to the protecting State are governed by general rules of international law, particularly those relating to countermeasures as defined in the draft articles on State responsibility.'[53] However, this still does not define the term 'action' precisely.

The Draft Articles on Diplomatic Protection and the commentary thereto that were adopted on first reading by the ILC in its 2004 Session are more enlightening. Draft Article 1 provides that diplomatic protection 'consists of resort to diplomatic action or other means of peaceful settlement'[54] and the commentary explains that

> "diplomatic action" covers all the lawful procedures employed by a state to inform another state of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes.[55]

This clearly supports the position that diplomatic action for the purpose of diplomatic protection contains more than just adjudication, including *demarches* and all other kinds of diplomatic protests. Indeed 'action' for the purpose of diplomatic protection should be interpreted as encompassing anything beyond

52 Dugard, First Report, at paras. 41-5.
53 Dugard, First Report, at para. 47.
54 International Law Commission, Diplomatic Protection, titles and texts of the draft articles adopted by the Drafting Committee on first reading UN Doc A/CN.4/L.647 adopted on 24 May 2004, Art. 1.
55 ILC Report 2004, commentary to Draft Article 1, para. 5.

the stage of consular assistance short of the kind of actions prohibited under the ILC's Articles on State Responsibility. As the Commentary to the Draft Articles stipulates, '[d]iplomatic protection must be exercised by lawful and peaceful means'[56] and thus the use of force is not an acceptable means for the exercise of diplomatic protection.[57] While in the First Report it was explained that military intervention was not an uncommon feature of diplomatic protection and that arguably customary international law does not exclude the use of force for the purpose of diplomatic protection,[58] it is highly undesirable to permit forcible protection of nationals. Despite the fact that there is some state practice supporting the use of force for diplomatic protection, it is contrary to the obligation to peaceful settlement of disputes and the general prohibition of the use of force as stipulated in the UN Charter.[59]

2 Diplomatic Protection and Consular Assistance

One of the causes for incorrect interpretations of the term 'action' for the purpose of diplomatic protection is that government officials and legal scholars have often confused diplomatic protection and consular assistance.[60] A clear example of this is provided by Denza, who states that

> [i]n determining the legal rules applicable to members of a diplomatic mission exercising consular functions, it must be borne in mind that there is no clear dividing line between diplomatic and consular functions.[61]

Although both are exercised for the benefit of a national, there are fundamental differences between the two. At least three aspects should be distinguished: first, the limits placed on consular activities as opposed to diplomatic protection by the VCCR;[62] secondly, the difference in level of representation between consular assistance and diplomatic protection; and, thirdly, the

56 Ibid.
57 In the Draft Articles on Diplomatic Protection that were adopted on second reading in 2006, this position has been maintained. See ILC Report 2006, at 26-27, para. 8.
58 Dugard, First Report, at paras. 47-60.
59 Art. 2(3) and 2(4) respectively. On forcible protection of nationals see R.B. Lillich, 'Forcible Protection of Nationals Abroad: the Liberian "Incident" of 1990', in: 35 German Yb of International Law, at 205-223 (1992).
60 Dugard, First Report, at para. 43.
61 E. Denza, *Diplomatic Law, a Commentary on the Vienna Convention on Diplomatic Relations* (Second Edition), Oxford 1998, at 33. It should be noted that diplomatic functions are not limited to diplomatic protection and also that overlap between the two branches representation is not always problematic. This Chapter only discusses the issue of diplomatic protection exercised by the diplomatic branch of Embassies and the lack of distinction between these and consular activities.
62 VCCR, at 262-512.

preventive nature of consular assistance as opposed to the remedial nature of diplomatic protection.

In the last part of this section, a discussion of EU legislation on diplomatic protection and consular assistance for EU citizens will be presented.

A. The two Vienna Conventions revisited: the difference between diplomatic and consular relations

The International Law Commission started its work on the codification of consular law in 1955 and concluded its Draft Articles in its 13th Session in 1961. The ensuing Vienna Convention on Consular Relations was adopted in 1963 and entered into force in 1967. Article 5 of this convention specifies the functions of consular staff including 'protecting in the receiving state the interests of the sending state and its nationals, both individuals and bodies corporate, within the limits permitted by international law' (sub a) and 'helping and assisting nationals, both individuals and bodies corporate of the sending state' (sub e). Article 5 (i) specifies the legal assistance that can be provided by the consulate for the benefit of a national. Ahmad indicated that the most important function of the consulate is

> veiller à ce que les ressortissants de l'Etat d'envoi puissent faire usage de tous les droits que leur accordent le droit interne de l'Etat de résidence, d'une part, et le droit international d'autre part. Ainsi, au cas où les nationaux de l'Etat d'envoi seraient l'objet de mesures vexatoires ou arbitraires de la part des autorités locales, les consuls ont alors le droit d'intervenir auprès de celles-ci afin d'obtenir justice pour ses ressortissants.[63]

However as a result of the obligation not to interfere in the domestic affairs of the receiving state as provided for in Article 55 of the VCCR, this cannot be interpreted to imply that the consul actually has the power to intervene in a judicial process to prevent a denial of justice. To cite Shaw:

> [Consuls] have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime.[64]

Indeed Ahmad later qualified the consular 'intervention' as having a representative character: in case the individual national cannot attend a trial or is absent from the receiving country, a consul can represent the national in judicial

63 M.A. Ahmad, *L'Institution Consulaire et le Droit International*, Paris 1966, at 91.
64 M.N. Shaw, *International Law*, Cambridge 2003, at 688.

proceedings and the consulate can arrange for legal representation.[65] Likewise, the UK Court of Appeal in the *Ferhut Butt* case decided that the applicant's request for assistance could not be granted: since the local remedies had not (yet) been exhausted, the conditions for diplomatic protection were not met and the request could also not be part of consular assistance as it violated the non-intervention principle.[66] The emphasis here is clearly on assistance while maintaining the position of the individual as the primary agent. Consular officers exercising assistance in no way replace the individual concerned. Even in cases where the consular officer represents a national in legal proceedings he would still represent the individual rather than his national state.

Similar to the VCCR the VCDR also stipulates the functions of diplomatic agents for the benefit of individual nationals, but contrary to the VCCR it does not specify the actions a diplomatic agent could or should undertake. While Article 3 allows a diplomatic mission to protect 'in the receiving state the interests of the sending State and of its nationals, within the limits permitted by international law' (sub b) the convention is silent on the content of this protection except for a very broad requirement to comply with international law.[67] As mentioned in the Introduction, the text of Article 5(a) VCCR and Article 3(b) VCDR is the same.

While the principle of non-intervention does limit the scope of consular assistance, it has no repercussions for diplomatic protection. It is true that diplomatic agents are also not to interfere with the domestic affairs of the receiving state (Article 41(1) VCDR), but diplomatic protection, if exercised in accordance with international law, is never an interference with domestic affairs of the receiving state, since the sending state exercises diplomatic protection in its own right. After exhaustion of local remedies it is no longer a dispute between an individual and a state but between two states. It is thus not an internal affair but an international dispute.

As the VCCR in Arts. 3 and 70 explicitly provides for the exercise of consular functions by diplomatic staff, both consular assistance and diplomatic protection can be exercised by a diplomatic mission. The opposite situation is also possible. Under Article 17 of the VCCR, subject to the agreement of the receiving state and in absence of a diplomatic mission, the consulate can exercise diplomatic functions.[68] However, the fact that one person can exercise two functions does not imply a merger of those functions: the officer or agent involved should be aware of the capacity in which he or she is acting considering the fundamental differences between the two kinds of protection.

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65 M.A. Ahmad *L'Institution Consulaire et le Droit International*, Paris 1966, at 99.

66 *Ferhut Butt* case, at 614-6 and 618.

67 See generally E. Denza, *Diplomatic Law*, Oxford 1998, at 29-37.

68 See for a discussion of the controversies around this issue E. Denza, *Diplomatic Law,* Oxford 1998, at 31-4.

B. Representing a state or representing an individual

Activities by (representatives of) a state should only be placed under diplomatic protection if they reach the level of representation of state interests and not merely the interests of the national. That is to say that an intervention by the consul, *e.g.* visiting a detained national or providing for legal assistance, should be regarded as consular assistance whereas an intervention by the Ambassador is diplomatic protection.[69] The Ambassador primarily represents the state and not its single individuals. Similarly, when Ministers of Foreign Affairs or even the Head of State are involved, one should properly speak of diplomatic protection and not of consular assistance. Since states (partly) assert their own rights through the exercise of diplomatic protection it is connected to state sovereignty. These differences between consular assistance and diplomatic protection are however not always clear in legal writing and practitioners also seem to be sometimes unable to make the proper classification.

In his treatise on Consular Law and Practice, Lee has elaborated on the functions of consulates and the protection of nationals by consular officers.[70] Although the mechanism of diplomatic protection is absent from his discussion, various issues and examples presented as belonging to consular practice should be considered to fall under diplomatic protection. The protection of nationals as such traditionally belongs to diplomatic protection, including issues such as the minimum standard of treatment. Lee however introduced the minimum standard as also applicable to consular assistance and suggested that violation of such a standard would allow the consular officer to protest even at the level of national (as opposed to local) authorities of the receiving state. He supported the existence of a minimum standard or even a universal human rights standard with reference to cases dealing not with consular assistance but with diplomatic protection (e.g. the *Neer* claim).[71] Additionally, in his section on the assistance and protection of nationals imprisoned in a foreign country, the examples put forward by Lee often involve ambassadors and foreign ministers rather than consular officers.[72] The failure to adequately distinguish consular assistance and diplomatic protection is particularly striking in Lee's description of American consular practice, as it shows how both Lee and the United States, in the 1980 *Foreign Affairs Manual* as reproduced by Lee, confuse

69 See also C. Storost, *Diplomatische Schutz durch EG und EU*, Berlin 2005, at 20-1. The situation is more complicated in the absence of consular officers at an Embassy. The Ambassador will then take all actions, consular and diplomatic. However, the fact that the functions are being exercised by one person does not amount to a merger of the functions itself. They should always be clearly distinguished.

70 L.T. Lee, *Consular Law and Practice*, Oxford 1991.

71 *Id.*, at 129-32.

72 *Id.*, at 138, 148-151 and 155.

the functions of consular officers and diplomatic agents. To give one example: consular officers are instructed to

> observe the physical conditions under which the prisoner [with nationality of sending state] is being held. If it is determined that the conditions do not meet generally accepted international standards, the consular officer should attempt to obtain improvement through direct intervention with the responsible authorities on local level. If this does not achieve results *formal protests* at the local, state, or national level should be considered.[73]

Interestingly, the 2005 version of the Foreign Affairs Manual uses the exact same wording as Borchard in 1919 (cited above in section II.1). However it is not describing diplomatic protection but defining consular assistance: '[r]epresentation by consular officers to foreign governments on behalf of U.S. citizens usually proceeds initially through the use of "good offices". The term good offices refers to informal, unofficial advocacy of interests through personal contacts and the friendly efforts of a consular officer.'[74] The instructions also indicate why protests are of prime importance: it is not only for the benefit of the individual national at hand, but also to improve the situation of all US nationals imprisoned in that particular country. Now, formal protests at national level clearly are an exercise of diplomatic protection and not of consular assistance. This is supported by the fact that the intervention is not exclusively to improve the situation of one national, but to improve the situation of many. It transgresses the level of the individual.

Ress has also given examples of consular assistance that could, and possibly should, well be qualified as diplomatic protection. Contrary to his interpretation, an intervention by the Minister of Foreign Affairs on behalf of German nationals in case of unfair trials should *prima facie* be considered as diplomatic protection rather than consular assistance.[75]

Dutch Courts, in two separate cases, likewise did not clearly distinguish between diplomatic protection and consular assistance and have, as has also been stated above (section 1) failed to classify activities that clearly fall within the scope of diplomatic protection as such. Both in the summary proceedings brought by Mr. Kuijt and in the case of Mr. van Dam v. The Netherlands the Court described the actions taken by the Dutch government on behalf of the nationals involved in a general way without specifying which part should

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73 *Id.*, at 167 (emphasis added).

74 Foreign Affairs Manual, Ch. 7 FAM 033, (CT: CON-106; 06-06-2005). Available through http://www.foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

75 G. Ress, 'La Pratique Allemande de la Protection Diplomatique', in J.-F. Flauss (ed.) *La Protection Diplomatique, mutations contemporaines et pratiques nationales*, Bruxelles 2003, at 145-7.

be classified as consular assistance and which part was diplomatic protection.[76]

It is not so strange that confusion arises. Most diplomatic protection cases either have to do with deprivation of property or with arrest, detention, imprisonment and trials of nationals. In the latter cases, it comes close to the responsibilities of consular sections. It is the consular officers who would provide legal assistance, who would visit their nationals in prison and who would usually monitor the trials. However, these activities only establish a relation between the national and the consular officer. Although consular officers may communicate with the officials of the host state involved, this would not constitute diplomatic protection. The consulate is not representing the interests of the state as such. However, the moment the representatives of the state are involved, the activities change to diplomatic protection.

Some have tried to find a definition of diplomatic protection that would include many kinds of actions to prevent a clear distinction. Erik Castrén for instance has defined diplomatic protection as an entitlement 'to intervene through its diplomatic *and consular* representatives for the benefit of its citizens'[77] and hence tried to circumvent the issue. Other authors have attempted to resolve the apparent confusion by discerning a broad concept and a narrow concept of diplomatic protection. Broadly diplomatic protection would be any kind of protection by diplomatic officers of the national state, including consular assistance. Diplomatic protection in a narrow sense is limited to the espousal of claims in international litigation. Poirat, for instance, has indicated that

> [i]l faut donc prendre garde à ne pas confondre l'institution *stricto sensu* de la protection diplomatique et les mesures que peut adopter … l'État par l'intermédiaire de ses autorités diplomatiques et consulaires.[78]

Perhaps this is also the interpretation of Warbrick and McGoldrick when they state that diplomatic protection does not occur until an official claim has been brought.[79] It is submitted that these definitions and descriptions are however not very desirable since they fail to take into account the fundamental differences between diplomatic protection and consular assistance.

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76 *M. Kuijt* v. *The Netherlands*, 18 March 2003, LJN. no. AF5930, Rolno. KG 03/137; *Van Dam* v. *The Netherlands*, 25 November 2004, Rolno. 02/43.

77 E.J.S. Castrén, 'Some Considerations upon the Conception, Development, and Importance of Diplomatic Protection', 11 Jahrbuch für Internationales Recht 37-48, at 37 (1962).

78 F. Poirat, 'Article II-106' in: L. Burgorgue-Larsen, A. Levade and F. Picod (eds), *Traité établissant une Constitution pour l'Europe*, Brussels 2005, 582. See also W. Gehr, 'Das diplomatische Schutzrecht in': B. Simma and C. Schulte (eds), *Völker- und Europarecht in der aktuellen Diskussion*, Vienna 1999, at 117-8.

79 See *supra* Introduction to this chapter.

C. Preventive assistance and remedial protection

There is another element of distinction between diplomatic protection and consular assistance. Consular assistance often has a preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred.[80] This allows for consular assistance to be less formal and simultaneously more acceptable to the host state.[81] According to Zourek, consular assistance is primarily concerned with the protection of the rights of the individual and confined to the consent of the individual concerned.[82] Indeed, as stipulated in the Vienna Convention on Consular Relations, consular assistance will only be provided if the individual concerned so requests.[83] A diplomatic demarche on the other hand has the intention of bringing the matter to the international, or inter-state, level ultimately capable of resulting in international litigation[84] and the individual concerned cannot prevent his national state from taking up the claim or from continuing procedures. As Zourek has stated

> [l]e secours de l'autorité consulaire a donc un caractère accessoire. La démarche diplomatique par contre a un tout autre caractère. Elle a pour effet de mettre l'affaire sur le terrain interétatique et ouvre la procédure qui peut aboutir à la naissance d'un différend international.[85]

It would be too far-fetched to infer from this that diplomatic protection is only and exclusively concerned with the interests of the state, but one could certainly conclude that consular assistance is primarily in the interest of the individual while diplomatic protection is in the interest of both the individual and the state.

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80 See for instance F. Przetacznik, 'The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection), 21 Österreichische Zeitschrift für öffentliches Recht 69-113 (1971), at 112.

81 L. Caflisch, 'La Pratique Suisse de la Protection Diplomatique', in: J.-F. Flauss, *La Protection Diplomatique*, Brussels 2003, at 77.

82 J. Zourek, 'Quelques Problèmes Théoriques du Droit Consulaire', 90 Journal de Droit International 4-67 (1963), at 54-5.

83 VCCR, Art. 36(1) (*b*).

84 F. Przetacznik, 'The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection), 21 Österreichische Zeitschrift für öffentliches Recht 69-113 (1971), at 113.

85 J. Zourek, 'Quelques Problèmes Théoriques du Droit Consulaire', 90 Journal de Droit International 4-67 (1963), at 55.

D. LaGrand and Avena

Since two recent ICJ decisions concerned both diplomatic protection and consular assistance, they deserve particular attention.

Germany and Mexico respectively filed a case against the United States for violation of the Vienna Convention on Consular Relations (VCCR) in their own right and in their right to diplomatic protection, as their nationals had individually suffered from the non-compliance with this Convention.[86] The merits of the cases before the ICJ thus concerned the exercise of consular assistance while the mechanism utilised to bring the claim was, in both cases, the exercise of diplomatic protection. In LaGrand the ICJ accepted Germany's claim (partly) as an exercise of its right to diplomatic protection and established that both the State of Germany and the German nationals had suffered from lack of consular assistance.[87] However, in the case of Mexico, the Court decided otherwise and determined that the violations of the VCCR constituted direct injuries to Mexico, whereby diplomatic protection would not be necessary as an instrument for bringing the claim. Although the Court's deliberations in Avena are of interest to a study on diplomatic protection for various reasons – the most important being the failure of the Court to classify Mexico's claim properly – there was no apparent confusion of diplomatic protection and consular assistance, since this issue had already been clarified in LaGrand.[88] The situation in LaGrand was however different.

On 7 January 1982 Walter LaGrand (1962) and Karl LaGrand (1963), both German nationals, were arrested in the United States on suspicion of armed robbery, murder and kidnapping. On 14 December 1984 both were sentenced to death for murder in the first degree and to prison sentences by the Superior Court of Pima County, Arizona. On 2 November 1998, after having exhausted all remedies available, the LaGrand brothers were denied further review of their conviction and sentences.[89] They had not received consular assistance at any stage of the trial as they were unaware of their entitlement to such assistance and as the German consulate was unaware of the detention and trial of two German nationals. The claim Germany presented before the ICJ was accordingly based on the failure by the United States to notify without delay the LaGrands of their right to consular assistance and the failure to inform the German authorities of the arrest and detention of two German nationals, both obligations deriving from Article 36(1) of the VCCR. Germany argued that it would have been able through the exercise of consular assistance

86 *LaGrand*, at 489 (para 65), *Avena*, at 35-36 and 39 (paras. 40 and 49).

87 *LaGrand*, at 494 (para. 77).

88 For a detailed analysis of the issues and problems with respect to diplomatic protection in *Avena* see *infra*, Chapter IV. Attention is also drawn here to the surprising difference in the reasoning in *LaGrand* and *Avena*, particularly considering the similarity of the underlying facts of both cases.

89 *LaGrand*, at 474-478 (paras. 13-24).

to provide adequate legal assistance and relevant information which in its turn, perhaps, would have prevented the LaGrands from being sentenced to death.[90] The claim was presented both in Germany's own right and in its right to exercise diplomatic protection on behalf of its nationals.[91] The United States contested Germany's claim under diplomatic protection and tried to convince the Court that Germany was confusing diplomatic protection and consular assistance and that the Court therefore should declare the claim inadmissible. The argument was that the VCCR does not deal with diplomatic protection, but only with consular assistance. In addition, it was claimed that, contrary to the argument of Germany, the VCCR did not contain individual rights and therefore the exercise of diplomatic protection should not be accepted.[92]

The Court rejected the objections presented by the United States and decided that it had jurisdiction to entertain the claim based on both direct and indirect injury and stated clearly that the general jurisdiction clause under the Optional Protocol to the VCCR would not

> prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national.[93]

The Court clearly – and rightly so – distinguished between consular assistance and diplomatic protection, accepting that individual rights arising under a treaty on consular relations could be claimed through the vehicle of diplomatic protection.[94] Diplomatic protection is a mechanism that can be resorted to after an internationally wrongful act has occurred causing injury to an alien. Since the non-compliance with the VCCR by the United States gave rise to injury to the German nationals as a result from the violation of their individual rights under this convention, Germany had indeed seized the proper vehicle to claim redress for this injury. For the admissibility of such a claim it is immaterial what the contents are of the rights violated creating indirect injury.

E. Diplomatic protection and consular assistance in the EU framework

A particular source of confusion of diplomatic protection and consular assistance is Article 20 EC Treaty[95] which corresponds to Article 46 of the Charter

90 *Id.*, at 491 (para. 71).
91 *Id.*, at 481 and 489 (paras. 38 and 65).
92 *Id.*, at 482 (para. 40).
93 *Id.*, at 482-483 (para. 42); see also O. Spiermann, 'The *LaGrand* case and the Individual as a Subject of International Law' 58 ZÖR 197-221 (2003).
94 *LaGrand*, at 492-494 (paras. 75-77).
95 Official Journal C 325 of 24 December 2002, at 45.

of Fundamental Rights of the European Union (EU Charter)[96] and Article I-10 of the Treaty Establishing a Constitution for Europe (EU Constitution).[97] Article I-10 of the EU Constitution provides under 2(c) that

> Citizens of the Union … shall have … the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.[98]

In the explanation on the EU Charter, it is stated that this right is the same as the right guaranteed by Article 20 EC Treaty.[99]

At first sight, the provision may seem non-controversial. It is an expression of the principle of non-discrimination which is fundamental to the EU.[100] Since discrimination on the ground of nationality is prohibited within the Union, it may not be surprising that Union citizens should also receive equal protection outside the Union.[101] However, by providing for both consular assistance and diplomatic protection, the provision disregards the fundamental differences demonstrated above between these two mechanisms. In addition, it is particularly problematic in light of the criteria for diplomatic protection and the underlying principles of international law in general. In what follows, first the concept 'EU citizenship' shall be discussed in the context of the requirement of nationality of claims. Secondly, and as a consequence of the nature of EU citizenship, the apparent misunderstanding of the term action for the purpose of diplomatic protection in this context will be demonstrated.

There are two principal objections to this provision. First, as has been pointed out by Denza, the provision in the EU treaties is not in compliance with the VCDR and the VCCR, such as the rules on accreditation and the pro-

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96 Official Journal C 364 of 18 December 2000, at 1.

97 Official Journal C 310 of 16 December 2004, at 13-4.

98 Although the EU Constitution has not (yet) entered into force and thus is not a binding document yet, this is the most recent document in which the right to diplomatic protection is provided for. For convenience sake, I shall therefore refer to the provision in the EU Constitution. It should be borne in mind that this provision is literally the same as the provision in the EC Treaty, which of course is binding upon EU member states.

99 Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50 of 18 October 2000, at 39-40.

100 But see T. Kostakopoulou, 'Nested "old" and "new" citizenships in the European Union: bringing out the complexity', 5 Colum. J. Eur. L. 389, at 411 (1999), who states that 'the Union citizens' right to consular and diplomatic protection has a hybrid nature. On the one hand, entitlement depends on an individual's status as a national of a Member State. Its realization reaffirms that diplomatic protection falls within the states' domain of jurisdiction. On the other hand, the principle of equality of treatment is not confined inside the borders of the Union but has been extended to the external dimension of Community Law.'

101 See also C. Storost, *Diplomatische Schutz durch EG und EU*, Berlin 2005, at 221.

tection of interests of other states.[102] Secondly, and more importantly, the collective European treaties are treaties under international law and therefore they are governed by international law of treaties. As reflected in Article 34 of the Vienna Convention on the Law of Treaties and the Latin maxim *pacta tertii nec nocent nec prosunt*, treaties are only applicable between the parties of a treaty and not binding on third states. Thus any provision contained in an EU treaty, charter or constitution is not binding upon states that are not members to the EU. This may again seem obvious since this is one of the core principles of international treaty law. However, it has serious consequences for the application of the afore-mentioned provision. Third states are not bound to respect any of the provisions contained in treaties and conventions in force within the EU and for reasons explained in what follows are not obliged to – and with respect to diplomatic protection unlikely to – accept protection by states that are not the state of nationality of an individual EU citizen.[103]

E.1 Nationality and EU citizenship for the purpose of diplomatic protection

Under the provision in the EU Constitution it is by virtue of EU citizenship that individuals having the nationality of one EU member state can receive diplomatic protection exercised by another EU member state. One of the criteria for the exercise of diplomatic protection is the nationality of claims, as is reflected in ILC Draft Article 3(1) and has been generally accepted in international law. It is by virtue of the bond of nationality that diplomatic protection can be exercised.[104] As a consequence, in absence of this bond, a state is not entitled to exercise diplomatic protection. As Brownlie explains

> [a] normal and important function of nationality is to establish the legal interest of a state when nationals … receive injury or loss at the hands of another state. The subject-matter of the claim is the individual and his property: the claim is that of the state. Thus if the plaintiff state cannot establish the nationality of the claim, the claim is inadmissible because of the absence of any legal interest of the claimant.[105]

102 E. Denza, *Diplomatic Law*, Oxford 1998, at 37.

103 See in this respect also C. Storost, *Diplomatische Schutz durch EG und EU*, Berlin 2005, who notes that with respect to diplomatic protection by the EU or the EC the Common Foreign and Security Policy also constitutes a *res inter alios acta* that does not necessarily bind third parties, at 148-9.

104 See e.g. E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at. 7 et seq.; P. Okowa, 'Issues of Admissibility and the Law on International Responsibility' in: M.D. Evans (ed.), *International Law*, Oxford 2006, 479-506, at, 483-488.

105 I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 456-60.

In the *Panevezys-Saldutiskis Railway* case it was stated that a state's

> right to diplomatic protection is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.[106]

This dictum clearly excludes the exercise of diplomatic protection by any state but the state of nationality. Although the phrase 'in absence of a special agreement' may invite an interpretation to effect of including the kind of agreement concluded between EU member states in the EU Constitution, the EU Charter and the EC Treaty, it must be stressed that the 'special agreement' mentioned by the PCIJ can only refer to agreements between the state of nationality and the defendant state for reasons explained above: any agreement between the state of nationality and another state (not the defendant state) does not concern the defendant state.[107] It is interesting to note that the provision in Article 20 EC Treaty seems to provide explicitly for the conclusion of such agreements, since the second part of the provision reads as follows: 'Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection' (emphasis added). The 'international negotiations' clearly include the kind of 'special agreement' referred to in the *Panevezys-Saldutiskis Railway* case.

The absence of the bond of nationality also played an important role in the *Nottebohm* case, since the ICJ decided that in absence of a genuine link with Liechtenstein – combined with close links with Guatemala – the former country was not entitled to exercise diplomatic protection against the latter. The Court stated that 'in order to be capable of being invoked against another State, nationality must correspond with the factual situation.'[108] Nationality, the Court explained, is

> a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[109]

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106 *Panevezys-Saldutiskis Railway* Case, at 16.

107 The VCCR and VCDR explicitly provide for such agreements under Arts. 8 and 18 and Arts. 6 and 46 respectively.

108 *Nottebohm*, at 22.

109 *Id.*, at 23.

The examination of the circumstances of the dispute demonstrated that Mr. Nottebohm's nationality of Liechtenstein

> was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.[110]

Although, the decision in *Nottebohm* has been criticised[111] and should only be interpreted as applicable to the very particular circumstances of Mr. Nottebohm and his long-term connections to Guatemala,[112] it is safe to say that this decision does support the importance of the element of the bond of nationality for the purpose of diplomatic protection. It would be wrong to exclude all protection in cases of absence of a bond, but it is probably right to conclude that protection is not possible if there is an established bond of nationality with another state.

There have been attempts to apply the nationality criterion less strictly.[113] Indeed, Dugard has suggested that the 'genuine link' requirement as formulated in *Nottebohm* be abandoned.[114] However, the reasons for a lenient approach to the nationality criterion are usually derived from the non-availability (or limited availability) of protection through the state of nationality. Examples given by Dugard are prolonged absence from or a 'tenuous connection' with the state of nationality.[115] These grounds are not applicable in the context of the EU. Since diplomatic protection is not exclusively exercised by diplomatic missions but also by other representatives of a state, such as

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110 *Id.*, at 26.

111 See for instance P. Okowa, 'Issues of Admissibility and the Law on International Responsibility, The Bases of Diplomatic Protection' in: M.D. Evans (ed.), *International Law*, Oxford 2006, at 480-1; W.K. Geck, 'Diplomatic Protection' in: R. Bernhardt (ed) *Encyclopaedia of Public International Law* (Vol. I), Amsterdam 1992, at 1050; C. Joseph, *Nationality and Diplomatic Protection*, Leiden 1969, at 12; Dugard, First Report, at para. 106-18; See also the three dissenting opinions of Judges Klaestad and Read and Judge *ad hoc* Guggenheim, attached to the Judgment and the later *Flegenheimer* claim, 14 R.I.A.A. 327 (1958).

112 The Court itself indicated the restrictions applicable to its decision: 'what is involved is not recognition for all purposes but merely for the purposes of the admissibility of the Application, and, secondly, that what is involved is not recognition by all States but only by Guatemala.', *Nottebohm*, at 17.

113 See T. Stein, 'Interim Report on "diplomatic protection under the European Union Treaty"', in ILA Committee on Diplomatic Protection of Persons and Property, Second Report (New Delhi, 2002), at 36-7 and sources referred to. See also A. Zimmermann and C. Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', 70 Nordic JIL 423-430 (2001), at 450-451, who argue that UNMIK could exercise diplomatic protection on behalf of people born in Kosovo, with Kosovar ancestry or with residence of at least 5 years in Kosovo, because UNMIK had issued travel documents for such people, in analogy to the ICJ's decision in *Reparation for Injuries*.

114 Dugard, First Report, at para. 117.

115 Ibid.

the Minister of Foreign Affairs or the Head of State, the absence of a diplomatic mission does not necessarily lead to non-availability of protection. In addition, a national of an EU member state having a 'tenuous connection' with his state of nationality is unlikely to have a connection with another EU member state sufficient for the purpose of diplomatic protection. More importantly given the high level of co-operation and loyalty on state level, which is not reflected in mutual concern for the inhabitants, between EU member states, they are arguably unwilling to put their good relations with the other EU member state at risk on behalf of a national of this state.

One exception to this rule currently under consideration in the ILC deserves separate attention: the protection of refugees and stateless persons who are lawfully residing in the protecting state.[116] It is clear that in these cases there either is no bond with another state (stateless persons) or that the bond of nationality is useless for the purpose of diplomatic protection,[117] since the individual national in question has good reasons not to apply for protection to his state of nationality (refugees). While this provision is highly desirable for the indicated group considering their vulnerability, it should be restricted to refugees and stateless persons and not be interpreted to weaken the condition of nationality in other circumstances. In addition, an important difference between the conditions of protection in Draft Article 8 and the EU provisions is that under Draft Article 8 protection is only possible when the stateless person or the refugee is lawfully and habitually resident in the protecting state while the provision in the various EU treaties and documents gives an unconditional possibility for protection. The absence of the bond of nationality is partly compensated in the Draft Article by requiring a link through residence. Weak as this still may be, it certainly renders protection more acceptable than the protection of an individual national of another state who is habitually residing in his state of nationality.

The provision contained in the EU treaties applies both to diplomatic protection and to consular assistance. With respect to the latter, one remark should be made. While even consular assistance is usually only exercised on behalf of a national, it is not excluded that a consular officer of one state renders assistance to a national of another state. Since consular assistance is not an exercise in the protection of the rights of a state nor an espousal of a claim, the nationality criterion is not required to be applied as strictly as in

116 Draft Articles on Diplomatic Protection, Art. 8. This provision is considered to reflect progressive development rather than codification of existing international law. See Dugard, First Report, para. 183.

117 The argument could be made that, in the case of EU citizens, in absence of diplomatic representation of their state of nationality in the receiving state, this nationality is also useless and the EU citizens would thus be in the same position as the stateless person or the refugee. However, since diplomatic protection does not require a diplomatic mission because the exercise of diplomatic protection is also possible through the responsible ministers or even a head of state, this argument is without merit.

the case of diplomatic protection. There is no necessity for a legal interest through the bond of nationality. However, as I have argued above, this flexibility is inappropriate for diplomatic protection.

The issue of protection of EU citizens thus revolves around the question of whether a "bond of nationality" should be assumed to exist between a national of an EU member state and any other EU member state. While it clearly is not the case that nationals of an EU member state actually and automatically have the nationality of all other EU member states, they do have so-called EU citizenship. If Article 20 EC Treaty (and the parallel provisions in the EU Charter and the EU Constitution) is to be carried out in practice it is by virtue of this EU citizenship that nationals of EU member states can receive diplomatic protection of a state of which they do not have the nationality. Thus the operation of the provision depends on the status of EU citizenship and whether it should be considered to equal nationality. To answer this question two points will be considered. First, on various occasions it has been emphasised that EU citizenship is a supplementary title rather than something equal to or replacing member state nationality. Secondly, if EU citizenship is to be considered as some kind of nationality it should have the same connotation of creating a bond. In other words, an injury to an EU citizen should then be regarded as an injury to any EU member state, creating a legal interest and the right to espouse the claim as an injury to an EU member state through the injury to a national of another EU member state. It is highly questionable whether EU citizenship has (yet) reached this status and whether EU member states consider nationals of other states to be equal to their own.[118] As already mentioned above, this is particularly so if these nationals are living in their state of nationality, for the purpose of diplomatic protection by virtue of their EU citizenship.

E.1.1 Citizenship as nationality?

In Directive 2004/38/EC[119] the concept of EU citizenship is defined. Although the Directive primarily concerns movement and residence of individuals eligible for EU citizenship within the EU some provisions in this document are relevant to the question of protection outside the EU. While it is stipulated in the preamble (point 3) that 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence' the operative part defines an EU citizen as 'a person having the nationality of a Member State' (Article 2(1)), nationality thus being a

118 An example of this, in the view of the author, is the recent situation concerning the cartoons critical of certain aspects of the Islam published in Denmark. Other EU member states have so far not demonstrated a genuine interest in protecting threatened Danish nationals or their property abroad.

119 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2005 on the right of citizens of the Union. Official Journal L 158 of 30 April 2004, at 77-123.

prerequisite for EU citizenship. In the EU Constitution it is stated in Article I-10 (1) that '[c]itizenship of the Union shall be additional to national citizenship and shall not replace it.'[120] These provisions clearly demonstrate that citizenship cannot be equated with nationality and that EU citizenship should not be interpreted to negate the nationality of individual states, or the power of EU member states to determine their own nationality laws and criteria for naturalisation. Since nationality is a necessary requirement for EU citizenship one could also conclude that nationality has a higher status than citizenship.

E.2.1 Nationality of the European Union?

Usually 'citizenship' does not have the same connotation as 'nationality'. Although Borchard equated citizenship and nationality,[121] nowadays citizenship and nationality are often distinguished. As Weis notes

> [c]onceptually and linguistically, the terms "nationality" and "citizenship" emphasize two different aspects of the same notion: State membership. "Nationality" stresses the international, "citizenship" the national, municipal aspect.[122]

In other words, 'the term "citizenship" is confined mostly to domestic legal forums, while the term "nationality" is connected to the international law forum.'[123] In this context, citizenship alone cannot fulfil the condition of nationality for the purpose of diplomatic protection. Its nature confines it to the domestic sphere.

Optimistically, O'Leary and Tiilikainen have stated that

> as the European Union abolishes its internal borders, develops a common justice and home affairs policy and a common foreign and security policy, never mind a common currency, traditional notions of state membership as an aspect of state sovereignty and national allegiance are called into question. Indeed, the establishment of European Union citizenship implies the enjoyment of rights and the performance of duties beyond the bounds of a state/national relationship.[124]

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120 See on this point also T. Kostakopoulou, 'Nested "old" and "new" citizenships in the European Union: bringing out the complexity', 5 Colum. J. Eur. L. 389, at 411 (1999), at 393-6 and again at 406; N.W. Barber, 'Citizenship, Nationalism and the European Union' 27 European Law Review (3) 241-59 (2002), who states that 'European citizenship was intended to complement, and not to replace, national citizenship', at 241.

121 E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 7 and *passim*.

122 P. Weis, *Nationality and Statelessness in International Law*, Alphen aan den Rijn 1979, at 5.

123 K. Rubinstein and D. Adler, 'International Citizenship: the Future of Nationality in a Globalized World', (2000) 7 Ind. J. Global Legal Stud. 519, at 521.

124 S. O'Leary and T. Tiilkainen, 'Introduction', in: *Id.*, *Citizenship and Nationality Status in the New Europe*, London 1998, 3.

However, even they were compelled to add that EU citizenship 'does not replace Member State nationality.'[125] More negatively, the EU citizen has also been characterised as

> the type … of the informed, empowered, isolated but complaining and litigious being (nothing wrong with most of these except in what is missing – as strong, complementary, social and political sense).[126]

Storost has also argued that EU citizenship does not establish an 'umfassendes Band wechselseitiger Rechtsbeziehungen und damit [eine] der Staatsangehörigkeit vergleichbare allgemeine "Grundbeziehung".'[127] Only if EU citizenship is considered to be more than a domestic concept[128] and if this citizenship is considered to be the same as nationality of an EU member state will it suffice for the purpose of diplomatic protection. The question of to what extent nationals of an EU member state consider themselves as EU citizens and to what extent EU member states consider injury to another state or another state's national as an injury to themselves is rather a political or philosophical question and not only a legal one. It is submitted that the European Union is not (yet) in a position to replace all national sentiments and to encompass all national interests. European citizenship cannot, as it stands now, be equalled to citizenship and nationality of the individual member states, as Barber has convincingly shown.[129] In addition, 'ties of belonging and a sense of identity to the "nation" ' are often considered essential for the granting of a form of citizenship that comes closest to nationality.[130] While EU citizenship was designed to be a 'stimulation of European identity'[131] it has not succeeded in creating a common sentiment of EU nationality. Individual nationals of EU member states continue to consider themselves nationals of a certain state rather than citizens of the union.[132] EU citizenship is, in conclusion, not based on the required 'genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.'[133]

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125 Ibid.

126 S. Douglas Scott 'The EU Charter of Rights: a Poor Attempt to Strenghen Democracy and Citizenship?', in: M. Andenas and J.A. Usher (eds), *The Treaty of Nice and Beyond, Enlargement and Constitutional Reform*, Oregon 2003, at 400.

127 C. Storost, *Diplomatische Schutz durch EG und EU*, Berlin 2005, at 32.

128 One could however argue that the EU as a whole is the 'domestic legal forum' to which a concept of citizenship is applied, which does not concern the world outside the EU.

129 N.W. Barber 'Citizenship, Nationalism and the European Union', 27 European Law Review (3) 241-259 (2002).

130 T. Kostakopoulou, 'Nested "old" and "new" citizenships in the European Union: bringing out the complexity', 5 Colum. J. Eur. L. 389, at 411 (1999), at 396.

131 S. O'Leary, *European Union Citizenship, Options for Reform*, London 1996, at 39.

132 *Id.*, at 47.

133 *Nottebohm*, at 23.

E.2 Citizenship, diplomatic protection and consular assistance

EU citizenship clearly is not sufficient to fulfil the requirement of nationality of claims for the purpose of diplomatic protection. Considering the fundamental nature of this requirement and its universal acceptance, one wonders then how the right to diplomatic protection was included in the various EU treaty provisions. It is submitted that the drafters of these provisions either did not intend to include diplomatic protection but failed to use the proper language or confused – and continue to confuse – diplomatic protection and consular assistance.[134]

There are a number of examples supporting this position. To start with the commentary to the EU Constitution, Poirat has explained that

> [c[ontrairement à ce que pourrait de prime abord laisser penser le libellé de l'Article [II-10] son objet n'est pas d'organiser les modes d'exercice de la protection diplomatique telle qu'elle est, en droit international, strictement entendue.[135]

This clearly supports the view that the provisions were not intended to include diplomatic protection. Indeed, 'la protection diplomatique … demeure subordonnée au statut de national ou de ressortissants et ne consiste d'aucune manière en la détention par les citoyens de droits politiques.'[136] The 'right' accorded to citizens of the Union may include consular assistance but EU member states cannot be forced to exercise diplomatic protection.

In Decision 95/553/EC[137] the actions for the purpose of 'diplomatic and consular protection' to EU citizens are defined in Article 5(1):

> (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union.

In a 'Factsheet' on consular and diplomatic protection provided through the website of the European Institutions (http://europe.eu.int) the conditions for

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134 At the "Hearing on the Green Paper on diplomatic and consular protection of Union citizens in third countries' held on 29 May 2007 in Brussels, which was attended by the author, it was stated both by governments and by Members of the EU institutions that indeed, the provisions were not to be interpreted as to include diplomatic protection. However, several individuals, NGOs and other organisations, in their statements at this Hearing, failed to make the distinction.

135 F. Poirat, 'Article II-106' in: L. Burgorgue-Larsen, A. Levade and F. Picod (eds), *Traité établissant une Constitution pour l'Europe*, Brussels 2005, at 581.

136 *Id.*, at 581.

137 Decision 95/553/EC: Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. Official Journal L 314 of 28 December 1995, at 73-76.

protection and the kind of assistance that may be expected are further defined.[138] In order to qualify for protection an individual is required to 1) possess the nationality of a EU member state; 2) be 'in distress abroad ... and require consular protection'; and 3) be in a non-EU state where his or her state of nationality is not represented through an embassy or consulate.[139]

While the conditions for protection mention the nationality of claims, they are silent on the exhaustion of local remedies and injury resulting from an internationally wrongful act. Prior to the fulfilment of these conditions, diplomatic protection cannot be exercised. What is envisaged here is clearly consular assistance, which does neither require exhaustion of local remedies nor the occurrence of an internationally wrongful act. Only the assistance mentioned under point c could under certain circumstances give rise to diplomatic protection.

It is curious to note that the wording of the Decision is fairly precise and deviates in this respect from the text provided in the EC Treaty, the EU Charter and the EU Constitution. While it is stated in the preamble that the decisions concerns 'protection' without further qualification, Article 1 provides that '[e]very citizen of the European Union is entitled to the *consular protection* of any Member State's diplomatic or consular representation' (emphasis added). In the light of the activities defined in Article 5 of the Decision, cited above, this is correct.[140] While even consular assistance is usually only exercised on behalf of a national, it is not impossible that a consular officer of one state may render assistance to a national of another state. Since consular assistance is not an exercise in the protection of the rights of a state nor an espousal of a claim, the nationality criteria are not required to be applied as strictly as in the case of diplomatic protection. There is no necessity for a legal interest through the bond of nationality.

However, the 'Factsheet' fails to maintain this level of clarity. In the explanation to point c (assistance in case of detention or arrest) various actions by the embassy or consulate – such as informing the ministry of the state of nationality or visiting the detained national – are stated to be subject to the consent of the individual national concerned. This corresponds to the rules laid down in the VCCR, which also determines that consular assistance only takes place if so requested by the individual national.[141] However, the EU Factsheet continues by stating that the embassy or consulate will

> ensure that the treatment offered to [the individual national] is not worse than the treatment accorded to nationals of the country where [he or she has] been arrested

138 See http://ec.europa.eu/youreurope/nav/en/citizens/citizenship/outside-eu-protection/index.html).

139 See EU Factsheet.

140 As noted above in section I, under the VCCR consular functions can be exercised by members of the diplomatic mission.

141 See *e.g.* VCCR 36(1) (*b*).

> or detained, and, in any case, does not fall below minimum accepted international standards (for example United Nations standards of 1955). In the event that such standards are not respected, it will inform the foreign ministry of [the] country of origin and, in consultation with them, take action with the local authorities.[142]

This explanation is not particularly clear, to say the least. Injury arising out of a violation of the international minimum standard can give rise to an internationally wrongful act and thus entitle a state to exercise diplomatic protection. While the first part of the explanation states that the embassy or consulate will exercise protection in case of a violation of this standard, which would amount to diplomatic protection, the last part of the explanation however seems to indicate that diplomatic protection will only be exercised with the consent of (or at least after informing) the state of nationality. This may however be problematic. As explained above (section 2.A), the consular or diplomatic agent will not be entitled to 'take action with the local authorities' in a way that would amount to diplomatic protection due to the requirement of nationality of claims. The Factsheet's clear misunderstanding of the two concepts demonstrates that the general conception of the application of this provision is not evident. [143]Even though the Factsheet is not a legally binding document and does not provide an authoritative interpretation of EU legislation, it does support the argument that the provision included in the EU Constitution, the EU Charter and the EU Treaty is not well designed and contributes to the confusion with respect to the distinction between consular assistance and diplomatic protection. The fact that Decision 95/553/EC seems to limit the application of the provision to consular assistance does not alter this fact. This decision did not enter into force until May 2002, which supports the view that the EU member states themselves are not overly enthusiastic about it. It is submitted that the provisions were never really intended to include diplomatic protection and that, as Stein argues, the EU member states 'seem to have agreed to understand only and exclusively "consular protection"' in the application of Article 20.'[144]

In conclusion, it is clear that consular assistance and diplomatic protection while both mechanisms for the protection of the individual, are fundamentally different. Diplomatic protection is conditioned upon the exhaustion of local remedies and the nationality of claims. Both requirements do not apply (local

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142 EU Factsheet.

143 It is also curious to note that the Factsheet resembles the information given in the US Foreign Affairs Manual and the examples given by Lee, both discussed above in section 3.2. The flawed presentation of consular assistance in the US document and the EU Factsheet seem to suggest that the states concerned assume that the public are unable to make the distinction.

144 T. Stein, 'Interim Report on "diplomatic protection under the European Union Treaty"', in ILA Committee on Diplomatic Protection of Persons and Property, Second Report 2002, at 32.

remedies), or do not apply as strictly (nationality of claims), to consular assistance. Diplomatic protection is more representative and remedial in nature whereas consular assistance remains on the level of the individual national concerned and has a more preventive nature. However, it is equally clear that these differences are not always recognised. In addition, activities that should be classified as diplomatic protection are in fact sometimes considered to be an exercise of consular assistance. As will be pointed out in the Conclusion it is desirable under international law not to confuse these mechanisms for protection, not only for legal reasons but also to avoid diplomatic tensions.

3 Conclusion

While the ILC Draft Articles are in the final stage a definition of certain fundamental issues connected to these Articles is called for. In the present discussion, the concept of action for the purpose of diplomatic protection has been explored. As was stated in the *Mavrommatis Palestine Concessions* case, a state, in espousing the claim of a national, is – also – asserting its own right.[145] Since the diplomatic representatives of states are not primarily concerned with the protection of nationals of the sending states but rather with protection of the interest of the state itself, activities exercised by them should be classified as an exercise of diplomatic protection. The exercise of diplomatic protection is certainly not limited to international litigation and includes *demarches* and many kinds of protests, such as letters from the Minister of Foreign Affairs of the sending state to his or her colleague of the receiving state in which the situation of an individual national of the sending state is called to the attention of the receiving state and presented as a failure to comply with international standards. Doctrine, case law and state practice discussed above has shown that while there is a divergence between the different sources of the law on the definition and scope of the term action for the purpose of diplomatic protection, legal doctrine, international decisions and national decisions – with a few exceptions – provide a correct presentation of activities that fall within the scope of diplomatic protection and seem to distinguish diplomatic protection and consular assistance. The opinions of states themselves are not so clear. There is a tendency to gather various activities under consular assistance and to refrain from openly exercising diplomatic protection. It is not so clear why the representatives of states are so reluctant to define their activities for the purpose of protecting their nationals as diplomatic protection. As shown in the ILC Special Rapporteur's First Report on diplomatic protection, the mechanism has been greatly abused in the past. This has led certain scholars and practitioners to renounce the mechanism altogether.[146] However, short

145 *Mavrommatis*, at 12.
146 Dugard, First Report, at para. 17.

of an effective universal mechanism for the protection of personal human rights, diplomatic protection is not without merit. To cite Jessup:

> [a]lthough frequently represented as a weapon of the strong against the weak states, in recent times [the protection of nationals abroad] affords perhaps the most striking example of the effectiveness of international law as protector of the weak.[147]

As a consequence, it is important that activities by representatives of states that belong to the realm of diplomatic protection be labelled as such. This is both for the benefit of recognition of the mechanism as a potential human rights instrument and for the prevention of abuse of diplomatic protection. Since diplomatic protection is subject to certain conditions, the lawfulness of the exercise is capable of being reviewed. This is not the case with consular assistance and it is submitted that it is partly for this reason that consular assistance is limited in scope by fundamental principles such as the non-intervention principle.

The conditions for diplomatic protection reflect the nature of the mechanism: the exhaustion of local remedies and the nationality of claims are necessary both to prevent intervention in the domestic affairs of another state and to provide a legal interest in the claim. They entitle a state to lift the claim from the local to the inter-state level. Consular assistance has no such effect. Consuls, while assisting individual nationals, operate on the local level and their assistance should have no intention of bringing the claim beyond the local level. It is for this reason that inappropriate consular assistance is problematic. As was correctly stated in the *Ferhut Butt* case: inappropriate consular assistance is a violation of the receiving state's sovereignty.[148] In addition, as has been demonstrated, the representative and remedial character of diplomatic protection clearly distinguish this mechanism from consular assistance, a conclusion which is supported by the existence of different treaties for these two fields of international relations.

While the differences between these two mechanisms are clear and while the term 'action' includes a wide variety of activities, a last word should be dedicated to the attitudes of states and their non-recognition of instances of diplomatic protection. Since diplomatic protection has been abused and since it is often – wrongly – associated with legal proceedings some of this reluctance of states with respect to diplomatic protection is to a certain extent understandable. Modern states may not wish to be associated with colonial powers and gunboat diplomacy. However, this should not be a cause of reluctance of states to protect their nationals in cases of egregious human rights violations. In particular due to the fact that diplomatic protection is a well-established mechanism with reviewable conditions that are capable of safe-guarding the

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147 P.C. Jessup, *A Modern Law of Nations*, North Haven 1968, at 94-5.
148 *Ferhut Butt* case, at 611 and 614-15

proper application of the protection offered the value of this mechanism should not be underestimated. Since, perhaps unfortunately, a claim brought on behalf of a state usually carries more weight than one brought on behalf of individuals, states should not feel restrained to exercise diplomatic protection if they have an interest in improving the human rights situation of their nationals abroad.

III A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes

> 'When a State admits into its territory foreign investments or foreign national, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.'[1]

INTRODUCTION

The celebrated paragraph 33 of *Barcelona Traction* inspired the International Law Commission (ILC) in 2001 to draft Article 48, and in particular paragraph 1(b) of this provision, of the Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility).[2] This article provides for the invocation of international responsibility, on the condition that a serious breach of a peremptory norm which is 'owed to the international community as a whole' has been violated.[3] While this provision was included in the Articles on State Responsibility as an exercise in progressive develop-

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1 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium *v*. Spain), Judgment of 5 February 1970, ICJ Reports 1970, at 32, para. 33. This chapter will be published as an article entitled 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*', in 56 ICLQ 553-583 (2007).

2 Articles on State Responsibility, Article 48. For the purpose of this discussion, the term 'peremptory norm' will be used predominantly, consistent with the practice of the ILC. However, in quoting other sources, the term *jus cogens* will not be replaced and will be taken as a synonym for 'peremptory norm'. The author is aware of debates distinguishing peremptory norms from norms of *jus cogens*. However, it is felt that it is unnecessary to enter into such debates for the present purpose, since invocation *erga omnes* can be based both on rules of *jus cogens* and on peremptory norms.

3 48(1)(b) reads as follows: 'Any State other than the injured state is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: … the obligation breached is owed to the international community as a whole.' Articles on State Responsibility, Article 48.

ment, it builds on existing ideas of the importance of norms of *jus cogens* and the idea that compliance with such norms is the concern of the international community and not just of individual states. The regime created under Article 48 however stands in a complex relation to the long-established mechanism of diplomatic protection or the protection of nationals. There are important distinctions between the two mechanisms, but they also share fields of application. In what follows, these differences and similarities will be analysed and discussed, to demonstrate that while they should be recognised, they do not deprive either mechanism of a role in current international law. Both diplomatic protection and invocation of responsibility *erga omnes* can and should be used for the protection of individuals.

The two regimes for the invocation of international responsibility for injuries to individuals are both based on some measure of indirect injury. In the case of diplomatic protection the injury is indirect because it is inflicted upon a national of the state, not on the state itself. In case of invocation under Article 48 it is indirect because the state invoking responsibility is not itself injured either, as is stipulated in its heading, which reads 'Invocation of responsibility by a State other than an injured State'. Although the ICJ in *Barcelona Traction* attempted to create a dichotomy, indicating that 'an essential distinction should be drawn' between the two mechanisms, it is by no means clear how then they should be interpreted vis-à-vis each other.[4] Making the distinction based on the nature of the violated rule, as the ICJ seemed to indicate is in any event not feasible: responsibility for a breach of a peremptory norm can be invoked both through diplomatic protection and through application of Article 48. However, since diplomatic protection is based on classical indirect injury, the local remedies rule applies and the protected individual must possess the nationality of the protecting state. Yet in case of invocation under Article 48, while the claiming state is not the injured state, a claim of this kind is presumably to be interpreted as a direct claim where the legal interest is established through membership of the international community, and the conditions for indirect claims are not applicable: the claimant state is not required to show that the injured individuals are its nationals nor is it necessary to exhaust local remedies. This may appear to be a correct way of distinguishing the two mechanisms, but the matter is further complicated by Article 44 of the Articles on State Responsibility which requires exhaustion

4 From this discussion are excluded treaty-based mechanisms such as inter-state complaints procedures under the ICCPR, the ECHR and other human rights treaties. These mechanisms are fundamentally different since their application depends on prior consent of the states parties to the relevant treaties and the specific rules of the treaty regimes. Diplomatic protection is part of customary international law and the Articles on State Responsibility, including the parts that constitute progressive development and in particular Art. 48(1)(b), are also designed to be part of general international law.

of local remedies and nationality of claims.[5] No explicit exception is made here for invocation under Article 48 and since such invocation not necessarily involves nationals of the claimant state, the obstacles created by Article 44 are not easily disposed of.[6] The distinction so clearly made in *Barcelona Traction* is not beyond criticism and certainly not as evident as the ICJ intended it to be.[7] Neither this dictum nor the Articles on State Responsibility convincingly overrule the apparent difficulties inherent in the latter mechanism, since, as has been argued, 'the project [on diplomatic protection] as it stands demonstrates conflict with the state responsibility project' and '[i]ts content, moreover, does not augur well for the admissibility of the invocation of responsibility on behalf of non-national beneficiaries.'[8] This argument seems to be further strengthened by the application of the *lex specialis derogat legi generali* rule, Article 55 of the Articles on State Responsibility.[9] State responsibility, as codified in the Articles on State Responsibility is the *lex generalis*, since it provides the general rules on state responsibility that would be applicable if there are no special circumstances defying that applicability, for instance in case of 'actual inconsistency' between the Articles on State Responsibility and the special rules.[10] Indirect injury can be seen as a special circumstance, in particular because it is governed by a special set of rules: the rules on diplomatic protection. Since they do apply to diplomatic protection and are not intended to apply to invocation under Article 48, there is a clear inconsistency, Thus, the special rules on diplomatic protection would prevail over the general rules of state responsibility in case of indirect injury. This is an attractive argument against invocation *erga omnes* without compliance with the nationality of claims and the local remedies rule. Yet, as will be argued below in section 2.A, the nature of a claim brought under Article 48 of the Articles on State Responsibility is not general as opposed to the speciality of diplomatic

5 Articles on State Responsibility, Article 44. It is provided here that any claim is inadmissible if 'the claim is not brought in accordance with any applicable rule relating to the nationality of claims' (sub a) and 'the claim is one to which the rule of exhaustion of local remedies applies …' (sub b).

6 The Commentary to Article 44 features amongst the shortest in the Commentary to the Articles on State Responsibility and it basically affirms the conditions for admissibility usually applicable to indirect claims. It does however not clarify when those conditions will be applicable nor does it explain the content and scope of these conditions in detail. Instead it refers to the ILC project on diplomatic protection. See Articles on State Responsibility, Commentary to Article 44, at 304-307.

7 See C. Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 158-179 for an excellent analysis of this issue in *Barcelona Traction*.

8 I. Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, at 1215.

9 See Articles on State Responsibility, Commentary to Article 55, which states that 'article 55 makes it clear that the present articles operate in a residual way', at 357.

10 Articles on State Responsibility, Commentary to Article 55, at 358.

protection. Even though it may relate to the same breach of international law, it is a different kind of claim which does not cause inconsistency.[11]

The relation between invocation under Article 48 of the Articles on State Responsibility and such invocation by means of diplomatic protection will be explored on the basis of the two sets of (draft) articles which have been prepared by the ILC. At the outset it is however necessary to clarify in detail to what extent these mechanisms may coincide and to narrow down the discussion to those instances in which they both may be applicable. Both diplomatic protection and invocation under Article 48 have applications that are not shared by the other mechanism and that thus do not cause conflicting situations and which will therefore not be considered in the present analysis. The first difference relates to the *subject matter* of the situation. Article 48 is applicable to violations of peremptory norms.[12] Responsibility for injuries resulting from non-peremptory norms can thus not be invoked under Article 48. In addition, Article 48 is only applicable to *serious* breaches of peremptory norms. Yet, it also means that acts of aggression are included, which typically constitute injury to the state subject to the act of aggression and not injury involving individuals, even if individuals may also suffer from the act of aggression. Diplomatic protection in its turn covers all indirect injuries, whether resulting from a peremptory norm or not.[13] It is thus clear that responsibility for non-serious instances of breaches of peremptory norms may be invoked through diplomatic protection but not through an appeal to Article 48, whereas breaches that do not cause injuries to individuals, even if they are indirect, can result in invocation under Article 48 but not through diplomatic protection.

A second difference concerns the *nationality* of the individuals who have suffered the injury and who may be protected. As has been stated above, invocation of state responsibility under Article 48 should not require nationality of the claimant state whereas diplomatic protection does. Thus, presumably, states can invoke the responsibility of another state regardless of the nationality

11 Note that the Commentary to Article 55 emphasises that 'it is not enough that the same subject matter is dealt with by two provisions' and that if there is no inconsistency, there should at least be 'a discernible intention that one provision is to exclude the other', at 358. The ILC evidently had no intention to subject invocation under Article 48 to the rules on diplomatic protection.

12 Although there is some academic debate on the question of which norms exactly constitute peremptory norms, no attempt will be made in this Chapter to clarify that discussion. For the present purpose the following norms will be assumed to belong to the corpus of peremptory norms: the prohibition on aggression, the basic rules of international humanitarian law applicable in armed conflict such as the prohibition on war crimes and crimes against humanity, the prohibitions on genocide, torture, slavery and apartheid and the right to self determination. This list however, is not exhaustive. See Articles on State Responsibility, Commentary to Article 40, at 283-284. On the status of the prohibition on arbitrary detention, see *infra* note 49, and accompanying text.

13 Articles on State Responsibility, Commentary to Article 40, at 285.

of the victims if they rely on Article 48, but not if they exercise diplomatic protection. There is an additional difference in this respect concerning refugees. Serious violations of peremptory norms may lead to massive refugee influx. Although the draft articles on diplomatic protection contain, as an exercise in progressive development, a provision on the protection of refugees, this protection is excluded 'in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.'[14] The Commentary explains that policy considerations underlie this exception clause:

> [m]ost refugees have serious complaints about the treatment at the hand of their State of nationality … . To allow diplomatic protection in such cases would open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.[15]

The exception is however not applicable to invocation of responsibility under Article 48. Moreover, where the serious breaches of peremptory norms by a state cause large numbers of refugees, the invocation of responsibility is in the interest of the community as a whole and the case would clearly fall within the scope of Article 48.[16]

Thirdly, the *consequences* of the invocation of responsibility differ. States exercising diplomatic protection have a large discretion with respect to the requested remedies. Although the draft articles suggest in draft article 19 that regard should be had to the wishes of the individual,[17] the general rules of state responsibility on reparation[18] and countermeasures[19] are applicable.

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14 Draft Articles on Diplomatic Protection, Art. 8(3).

15 ILC Report 2006, at 51. See also *Al-Adsani* v. *United Kingdom* [ECHR], Judgment of 21 November 2001, Application no. 35763/97, Concurring Opinion of Judge Pellonpää, joined by Judge Sir Nicolas Bratza, at p. 1 of the Opinion.

16 A similar argument would apply to the local remedies rule. However, considering the non-absolute character of this rule, it is not unlikely that the exhaustion of local remedies will not be considered necessary – because that would be unreasonable – in situations of serious breaches of peremptory norms. See Articles on State Responsibility, Commentary to Article 40, at 285. In addition, the question of nationality has 'legal priority' vis-à-vis the local remedies rule. See Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, at 1215. It is therefore not necessary to pursue this issue.

17 Draft article 19 provides that states 'should:
(a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;
(b) take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
(c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions...'
See Draft Articles on Diplomatic Protection, Art. 19.

18 Part two, Chapter II of the Articles on State Responsibility, Articles 34-39.

19 Part three, Chapter II of the Articles on State Responsibility, Articles 49-53.

The 'close connection' between diplomatic protection and the general rules on state responsibility has been emphasised in the Commentary:

> [m]any of the principles contained in the articles on Responsibility of States … are relevant to diplomatic protection and are therefore not repeated in the present draft articles. This applies in particular to the provisions dealing with the legal consequences of an internationally wrongful act. … All these matters are dealt with in the articles on Responsibility of States.[20]

Thus, regardless of the subject-matter of the claim, the standard rules on reparation and countermeasures will be applicable.

This situation is different with respect to invocation under Article 48. Article 48 specifies, in para. 2(a) and (b), that the state invoking responsibility can claim cessation and guarantees of non-repetition (sub a) and reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached' (sub b). Even if obligations *erga omnes* may 'impose special duties on the offending State which may go beyond the bilateral reparation scheme which applies in reciprocal relationships,'[21] there are limitations with respect to these reparations, which are relevant for the distinction between this mechanism and diplomatic protection. As is explained in the commentary to the Articles on State Responsibility,

> a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party.[22]

Although this provision is recognised as being an exercise in progressive development, the fact that the state invoking responsibility cannot itself benefit from reparation received logically follows from the premise that this state is not acting merely in its own interest but in the interest of the international community and the beneficiaries of the obligation breached.[23] This is fundamentally different from the applicable rules on diplomatic protection: as we have seen, states are encouraged to transfer any compensation received to the protected national but they are not obliged to do so and they are explicitly allowed to deduct a reasonable amount. Even if diplomatic protection is based on a fiction, and even if the state cannot be presumed to have actually suffered

20 ILC Report 2006, at 22.

21 S. Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules – the Identification of Fundamental Norms' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order*, Jus Cogens *and Obligations* Erga Omnes, Leiden/Boston 2006, 21-40 at 26.

22 Articles on State Responsibility, Commentary to Article 48, at 323.

23 See below for further analysis of 'beneficiaries' and 'international community as a whole'.

an injury itself,[24] the level of discretion states have in the exercise of diplomatic protection also affects the kind and amount of reparation claimed.

The question of whether third states are entitled to take countermeasures is more complex.[25] Due to the exceptional nature of countermeasures, the conditions under which they can be installed are necessarily limited. Amongst others, they must be necessary and proportionate, in response to an earlier breach of international law and directed against the delinquent state.[26] It is however difficult to clearly specify when and to what extent countermeasures are necessary and proportionate when they are the result of invocation of responsibility under Article 48. Within the Chapter dealing with countermeasures, a special provision on this issue is included. Article 54 of the Articles on State Responsibility contains a saving clause stating that the entitlements of third states acting under Article 48 to take lawful measures[27] in response to breaches of peremptory norms are not prejudiced. The status of such an entitlement under international law is not undisputed and the Articles on State Responsibility deliberately leave the matter undecided. As the ILC noted in the Commentary to this Article, 'there appears to be no clearly recognised entitlement of States referred to in article 48 to take countermeasures in the collective interest.'[28] Even if states are considered to be entitled to take such measures, they are limited with respect to beneficiaries: they may only be taken in the interest of the injured state and/or individuals, as is stipulated in Article 54.[29] In comparing the two mechanisms on this point, the rules applicable

24 See Chapter I.

25 See generally on countermeasures in response to violations of peremptory norms e.g. D. Alland, 'Countermeasures of General Interest' (2002), 13 EJIL 1221-1239; C. Hillgruber, 'The Right of Third States to Take Countermeasures' in: Tomuschat and Thouvenin (Eds), *The Fundamental Rules of the International Legal Order*, Jus Cogens *and Obligations* Erga Omnes, Leiden/Boston 2006, 266-293.

26 See also P. Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms in International Law and United Nations Law' (2002), 13 EJIL 1241-1255, who argues in favour of a measure of 'subsidiarity between the response of UN organs and that of states not directly injured acting on an individual or collective basis', at 1254.

27 The Commentary explains that the Article deliberately refrains from using the term 'countermeasures', 'so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.' Articles on State Responsibility, Commentary to Article 54, at 355. It should also be noted that this only relates to measures taken by states in their individual capacity and not to measures taken in execution of decisions of international organisations such as the UN, see Articles on State Responsibility, Commentary to Article 54, at 350.

28 Articles on State Responsibility, Commentary to Article 54, at 355 and also at 283. See also L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1143, who points to the ambiguities of this particular provision.

29 See also A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 270-2 who supports taking countermeasures *erga omnes* particularly in the light of the decentralised international legal system.

to diplomatic protection are evidently more generous to the protecting state and are well-established, whereas the consequences of these rules related to invocation under Article 48 are much less clear and in the event countermeasures are taken they certainly should not benefit the claiming state individually.

In conclusion, the only situation the two mechanisms share are instances of serious breaches of peremptory norms affecting individuals who have another nationality than the nationality of the host state or who are dual nationals, refugees of a third country or stateless persons. Narrowing down the focus of this study does however not limit its relevance. Considering the large numbers of individuals travelling to other countries, for instance seeking employment, and considering the abuses they may suffer in their host state (racial discrimination, torture or, in case of war, war crimes and crimes against humanity), it is important to outline and – if possible – to enhance existing mechanisms for protection. The first section will discuss the relation between diplomatic protection and peremptory norms. The second section will then turn to the invocation of responsibility under Article 48, which will be followed by a general conclusion on the relationship between the two mechanisms and their position under current international law.

1 Invocation of Responsibility by means of Diplomatic Protection

The second reading of the draft articles on diplomatic protection resulted in a significant modification in the wording of draft article 1. It now emphasises the strong relation between the law of diplomatic protection and the law of state responsibility and instead of echoing the language of *Mavrommatis*, the provision speaks of the invocation of responsibility for indirect injury caused by an internationally wrongful act.[30] It was felt that the phrase 'in its own right', which featured prominently in the old draft article 1, no longer reflected reality since the rights that constitute the subject of the claim are international rights of individuals and the only right that belongs to the state is the right to exercise diplomatic protection.[31] The exercise of diplomatic protection is a response to an indirect injury and allows a state to stand up for its national, whereby the 'part', that is, the national, is protection by the 'whole', the state. This clearly shows the fictitious nature of diplomatic protection, since the rights that are being protected do not actually belong to the state, but to its parts.[32]

30 Draft Articles on Diplomatic Protection, Article 1 reads: 'For the purpose of the present draft articles, diplomatic protection consists of 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 legal person that is a national of the former State with a view to implementing such responsibility'.

31 See Government Comments and Observations, Add. 2, at 2.

32 For a detailed discussion of the fiction in diplomatic protection see Chapter I.

Although this may sound obvious, it is important to stress the nature of diplomatic protection here, since it will be shown that invocation under Article 48 is fundamentally different in this respect.

Historically, diplomatic protection has been exercised for a wide range of violations of international law. Expropriation of property, as in *Nottebohm* and *Interhandel*, denial of justice and violation of the international minimum standard, as in the *Neer* and *Roberts* claims, and violations of the Vienna Convention on Consular Relations, as in *LaGrand* and *Avena*, feature among the rules the violation of which provided the basis for the exercise of diplomatic protection. Diplomatic protection is not part of international human rights law and international attempts to include it in this corpus of law have not been convincing. Germany and Mexico's effort to receive a declaratory judgment of the ICJ on this point have remained fruitless.[33] However, that does not mean that diplomatic protection has no role to play in the protection of human rights. It may not be a human right *pur sang*, yet it is an important mechanism for the invocation of responsibility for violations of human rights,[34] including serious violations of those human rights norms that constitute peremptory norms.

A Draft article 19: recommended practice in case of serious injuries.

The ILC has on various occasions dealt with the enhanced importance of diplomatic protection with respect to violations of peremptory norms. John Dugard, ILC Special Rapporteur on diplomatic protection, first emphasised the importance of diplomatic protection in response to such violations in his First Report. Draft Article 4 provided that a state has an obligation to exercise diplomatic protection 'if the injury [to its national] results from a grave breach of a *jus cogens* norm attributable to another State.'[35] This provision created an exception to the discretion states were generally assumed to have with respect to the decision to exercise diplomatic protection, but Dugard explained that this exception was justified based on existing state practice[36] and the nature of *jus cogens*:

> [t]oday there is general agreement that norms of *jus cogens* reflect the most fundamental values of the international community and are therefore most deserving of international protection. It is not unreasonable therefore to require a State to

33 *LaGrand* case (Germany *v.* United States), Judgment of 27 June 2001, ICJ Reports 2001 p. 466, at p. 494 (para. 78); *Case Concerning Avena and Other Mexican Nationals* (Mexico *v.* United States), Judgment of 31 March 2004, ICJ Reports 2004 p. 12, at 60-61 (para. 124).

34 Dugard, First Report, para. 32.

35 *Id.*, para. 74.

36 *Id.*, paras. 81-7.

> react by way of diplomatic protection to measures taken by a State against its nationals which constitute the grave breach of a norm of *jus cogens*.[37]

The Commission was however of the opinion that this article was too progressive to be acceptable and did not include the provision in the 2004 draft articles adopted on first reading.[38] The discretionary nature of diplomatic protection was maintained and no specific reference to peremptory norms was included. In 2006, the issue returned to the ILC through the comments and observations submitted by states in response to the draft articles adopted on first reading. Italy specifically called for the inclusion of a provision containing an obligation to exercise diplomatic protection in case of violations of peremptory norms,[39] and the ILC again discussed the issue of an obligation to exercise diplomatic protection. Italy's proposal was to insert an extra provision echoing the rejected draft article 4 of the First Report on Diplomatic Protection.[40] It would support the inclusion of an obligation 'when the protection of fundamental values pertaining to the dignity of the human being and recognised by the community as a whole is at stake.'[41] The term 'fundamental values' would be interpreted narrowly and only encompass a very limited number of norms.[42]

Not surprisingly, the ILC was not prepared to backtrack on an abandoned path. Yet it did acknowledge the merits of the inclusion of a reference to the relevance of diplomatic protection. The result of all this was the inclusion of draft article 19 which provides, under the heading of *recommended practice*, that states should '[g]ive due consideration to the possibility of exercising diplomatic protection, especially when significant injury has occurred.'[43] The precise extent and scope of 'significant injury' is left undetermined in the Commentary to this draft article, although reference is made to 'significant human rights violations'.[44] In the ILC, the inclusion of a specific reference to peremptory norms was discussed but the members decided to leave the matter open and – while not excluding its application to violations of peremptory norms – not to restrict the recommendation to violations of such

37 *Id.*, para. 89 (footnotes omitted).
38 Diplomatic Protection – titles and texts of the draft articles on Diplomatic Protection adopted by the Drafting Committee on first reading, International Law Commission 56th session, A/CN.4/L/647 (2004). See also *infra* Chapter VI, section 1.
39 Government Comments and Observations, Add. 2, at 2-3.
40 *Id.*, at 3.
41 *Id.*, at 3.
42 It would include serious violations of human rights violations, in particular 'the right to life, the prohibition on torture and inhuman or degrading treatment or punishment, the prohibition on slavery and the prohibition on racial discrimination', see Government Comments and Observations, Add. 2, at 3. War crimes and crimes against humanity thus seem to have been excluded.
43 Draft Articles on Diplomatic Protection, Art. 19(a).
44 ILC Report 2006, at 96.

norms. One of the arguments brought forward against such restriction was that in case of a violation of peremptory norms the exercise of protection would not be limited to the state of nationality. This would provide other means for protection is such cases, which will be absent for less serious breaches. In addition, the provision should not invite discussion on whether or not the relevant breach had the status of a peremptory norm, since this would not contribute to the purpose of the provision, which was to enhance protection for the individual. A related argument was that a breach or a relatively minor rule would result in serious injury to individuals, which would justify the exercise of protection. The focus here should thus be on the individual and not on the breach. The Commission thus decided not to specify the nature of the rule underlying the relevant breach and only to refer to 'significant injury'.

Even if the application of draft article 19 was deliberately not limited to violations of peremptory norms, a wish to strengthen any mechanism of protection in case of violations of such norms did provide the motive for its genesis. The Commentary actually shows that what the Commission had in mind were serious breaches of fundamental human rights norms, if not breaches of peremptory norms. A first reference in the Commentary to support this conclusion is the 2005 World Summit Outcome resolution, adopted by the General Assembly.[45] The document is referred to in order to 'reaffirm' that '[t]he protection of human beings by means of international law is today one of the principal goals of the international legal order.'[46] However, the Resolution only speaks of the responsibility to protect in cases of violations of peremptory norms:

> [t]he international community … has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, … to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[47]

While draft article 19 is perhaps not limited to such norms, deriving its legitimacy from the Resolution points in their direction. Needless to say, the violation of peremptory norms will invariably lead to 'significant injury'.

In addition, in supporting the recommendation to consider the exercise of diplomatic protection the Commentary refers to various national decisions on the (non-)exercise of diplomatic protection: the *Rudolf Hess* case, the *Abbasi* case and the *Kaunda* case. These cases all concerned (alleged) arbitrary detention. Although the prohibition on arbitrary detention is not generally included in the list of peremptory norms, it has been described as non-

45 2005 World Summit Outcome Resolution, GA 60th Session, UN Doc. A/RES/60/1.
46 ILC Report 2006, at 95.
47 2005 World Summit Outcome Resolution, para. 139.

derogable.[48] While non-derogability is not the same as being peremptory, there is a clear similarity or connection. Peremptory norms are by definition non-derogable while non-derogable norms are de facto peremptory. This applies in particular to the prohibition on arbitrary detention.[49] For this reason, the decisions support the idea that the recommendation not only refers to 'serious injuries' but also to serious violations of international law. Whether or not one accepts that this is what the ILC had in mind, the draft articles on diplomatic protection emphasise the relevance of this mechanism for the protection against human rights violations, in particular when on a large scale or involving peremptory norms, rendering serious injury inevitable.[50]

B The saving clause in draft article 16

Before turning to invocation under Article 48 of the Articles on State Responsibility, it should be noted that the draft articles on diplomatic protection contain a saving clause to avoid conflict with other mechanisms of protection: draft article 16 provides that the rights of states and natural or legal persons

> to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the … draft articles [on diplomatic protection].[51]

Although the discussions in the ILC have shown that this primarily refers to inter-State proceedings under human rights instruments and investment dispute settlement mechanisms, the Commentary to this draft article refers also to invocation under Article 48. Without much explanation, it is stated that the conditions for diplomatic protection do not apply to such invocation. Thus, the purpose is to restrict the application of the draft articles on diplomatic protection and not to negatively affect the functioning of other mechanisms by imposing rules that would otherwise be applicable for indirect claims. As the ILC had overlooked the friction between invocation *erga omnes* under Article 48(1)(b) and the rules on diplomatic protection, it apparently tried to remedy

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48 See S. Marks & A. Clapham, *International Human Rights Lexicon*, Oxford 2005, at 78.

49 See A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 58-60, who specifically refers to 'illegal deprivation of liberty' as an example of a prohibition that is peremptory because it is non-derogable, at 60. It should be noted that the applicants in *Abbasi* and *Kaunda* also argued that the circumstances of their detention amounted to torture or inhuman or degrading treatment. The Courts in both cases however only considered the arbitrariness of the detention, although they may have weighed the allegations of torture in their assessment of the urgency of the situations.

50 It is interesting to note that the ILC, when debating State Responsibility, also found that violations of peremptory norms 'by definition' involve a 'risk of substantial harm'. See ILC Yearbook 2001 (Vol. I), A/CN.4/SER.A/2001, report of the 2682nd meeting, at 105, para. 16.

51 Draft Articles on Diplomatic Protection, Article 16.

this situation with a simple statement in the Commentary to the Draft Articles on Diplomatic Protection: the Commentary specifically refers to invocation of responsibility under Article 48(1)(b) of the Articles on State Responsibility and simply states that the conditions of diplomatic protection, as contained in the Draft Articles on Diplomatic Protection, do not apply to such invocation.[52] Furthermore, in a footnote, it states that Article 44 of the Articles on State Responsibility does not apply to Article 48 with reference to Milano.[53] Milano however does not conclusively exclude the application of Article 44, but merely states that it creates obstacles and concludes that

> from a joint reading of the 2001 Articles on State Responsibility and the … Draft Articles on Diplomatic Protection, the room left for the enforcement of *erga omnes* human rights obligations beyond the traditional mechanisms of protection appears to be minimal.[54]

It may be true that the clause clearly exclude other 'full' regimes that have rules of their own, but it is problematic for invocation under Article 48(1)(b), since this mechanism precisely lacks rules of its own. If it is interpreted as a direct claim, then indeed the saving clause in the draft articles of diplomatic protection will exclude it from its scope. Yet, if it is interpreted as an indirect claim, there is no reason why it should be, particularly when taking into account Article 44 of the Articles on State Responsibility. In any event, the reasons for non-application of the rules on diplomatic protection to invocation under Article 48 of the Articles on State Responsibility given in the Commentary, by reference to one scholar, do not convincingly overcome the apparent contradiction in the Articles on State Responsibility. The separation of the two mechanisms is not created because the ILC says it is. It remains to be seen whether the distinction between the two mechanisms, and the ensuing non-application of the local remedies rule and the nationality of claims rule, can be found in the nature of invocation *erga omnes* under current international law.

2 Invocation of Responsibility under the Articles on State Responsibility

In 2001 the ILC adopted the Articles on State Responsibility. While these Articles largely codify customary international law on state responsibility, they also contain some progressive development. In particular, the Articles on State

52 ILC Report 2006, at 87.
53 ILC Report 2006, at 87, note 245.
54 E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition' (2004), 35 Netherlands Yb of Int'l Law 85-142, at 107.

Responsibility provide for the invocation of responsibility by a member of the international community in case of a violation of a peremptory norm due to the *erga omnes* character of such a norm regardless of the existence of actual injury to the invocating state as a consequence of the violation.[55] As will be demonstrated, the interpretation of the *erga omnes* character of peremptory norms is crucial to the proper application of such invocation. As Byers has argued '*erga omnes* rules expand the scope of possible claimants in certain situations, to protect key common interests where traditional rules of standing are insufficient to do so.'[56] It allows states

> not directly affected by an internationally wrongful act to invoke the responsibility of the violator, be it on their own behalf, on behalf of the subjects of international law who are not in a position to bring a claim themselves, or simply as members of the international community.[57]

Membership of the international community to which obligations *erga omnes* are owed provides legal standing in cases concerning violations of norms that are (perceived to be) fundamental to this community,[58] a violation which will 'shock the conscience of mankind', to borrow the language of Lord Phillips of Worth Matravers in the Pinochet No. 3 decision.[59]

In Part two, Chapter III and Part three, Chapters I and II of the Articles on State Responsibility, Article 41 stipulates the consequences of a breach of an obligation under peremptory norms; Article 48 sets out the conditions under which third states may invoke responsibility and the kind of claim they may present; and Article 54 provides for countermeasures taken by third states. While these provisions are an exercise in progressive development, they also are 'a framework for [such] development, within a narrow compass, of a

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55 It should be noted that the ILC deliberately avoided the use of the words '*erga omnes*' because of a perceived lack of clarity. See Articles on State Responsibility, Commentary to Article 48, at 321. Although one clearly can question the preciseness of the term *erga omnes* it will be used here as a synonym to 'owed to the community as a whole'.

56 M. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 238.

57 Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules – the Identification of Fundamental Norms' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order*, Jus Cogens *and Obligations* Erga Omnes, Leiden/Boston 2006, at 26, and similarly at 35.

58 See also P. Okowa, 'Issue of Admissibility and the Law on International Responsibility' (2006) in: M.D. Evans, *International Law*, Oxford 2006, at 494 who stated that '[a]n implicit feature of this category of obligations [i.e. obligations *erga omnes*] is that the specific requirements of legal interest based either on direct injury or ties of nationality are dispensed with.' No explanation is given here however of the ways in which this can be achieved.

59 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet Ugarte (No.3)* [1999] 2 W.L.R., 827, per Lord Phillips of Worth Matravers. See also R. Jennings & A. Watts (eds). *Oppenheim's International Law*, Vol. 1 Peace (9th edition), London 1992, at 998.

concept which ought to be broadly acceptable'.[60] Indeed, in 1986, Meron has stated, which is worth citing in full:

> there has been a growing acceptance in contemporary international law of the principle that, apart from agreements conferring on each state party *locus standi* against the other state parties, all states have a legitimate interest in and the right to protest against significant human rights violations wherever they may occur, regardless of the nationality of the victims. This crystallization of the *erga omnes* character of human rights … is taking place despite uncertainty as to whether a state not directly concerned (e.g., in the protection of its nationals), *ut singuli*, may take up claims against the violating state and demand reparation for a breach of international law. However, the general principle establishing international accountability and the right to censure can be regarded as settled law. Thus, while doubts may persist about the appropriate remedies that can be demanded by a third state …, the *locus standi* of such a third state, in principle, is not questioned.[61]

If invocation under Article 48 is successful and applied worldwide, the mechanism of diplomatic protection may seem redundant and overly cumbersome due to the extra conditions that apply.

Not surprisingly, these provisions have yet to be applied in practice. Even if the Court has recently acknowledged the existence of rules of *jus cogens*,[62] it rejected a counterclaim brought forward by Uganda concerning the inhuman treatment of individuals by the Democratic Republic of the Congo. The Court found that Uganda had failed to establish the relevant, Ugandan, nationality of the individuals concerned and that, as a consequence, it could not exercise diplomatic protection on behalf of these individuals.[63] From the perspective of diplomatic protection, this approach is of course correct, since legal interest is created through the bond of nationality.[64] However, Judge Simma, in a strong separate opinion to the judgment, has argued that diplomatic protection was not the only mechanism available to invoke responsibility for the treatment of these individuals. Despite the fact that Uganda itself did not argue along these lines

60 Crawford, Fourth Report, at para. 52.

61 T. Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, at 11-12 (footnotes omitted). Note that Meron clearly makes a distinction between invocation *erga omnes* and invocation *erga omnes partes*. See for this difference *infra* section 2.A.3.

62 *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002)*, paras. 64 and 125; *Genocide* case, para. 162.

63 *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v*. Uganda), judgment of 19 December 2005, available at www.icj-cij.org, para 333. See also *infra* notes 84 and 86 and accompanying text.

64 See *Panevezys-Saldutiskis Railway* case (Estonia *v*. Lithuania), PCIJ, Series A/B, No. 76 (1937), at 16.

> it would have been possible for the Court in its Judgment to embrace the situation in which these individuals found themselves, on the basis of international humanitarian and human rights law, and that no legal void existed in their regard.[65]

In his opinion, the nature of the breaches of international law provided Uganda with legal standing:

> The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers.[66]

Judge Simma pointed out that Article 48 of the Articles on State Responsibility is applicable: these obligations, that is, obligations under international human rights law, 'are instances *par excellence* of obligations that are owed to a group of States including Uganda.'[67] Such obligations are the concern of the international community as a whole and ensuring compliance is to be taken seriously:

> [i]f the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile.[68]

One cannot but sympathise with Judge Simma's concern with the protection of the individuals concerned and share his implicit criticism of the fact that

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65 *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 19.

66 Ibid., at para. 37. It is interesting to note that the Court, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, at 136, decided in the *dispositif* sub D, not only that the international community is under an obligation not to recognise the situation in violation of international humanitarian law, but that all States Parties to the Fourth Geneva Convention 'have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.' (at 202).

67 *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 35.

68 Ibid., at para. 41. See also *Congo – Uganda* case, Dissenting Opinion of Judge Kateka, at para. 69 who stated that 'the Court should have invoked international humanitarian law to protect the rights of these persons. The Court would seem not to have given enough weight to violations of the rights of these persons at Ngjili Airport by the DRC.'

the World Court refused to entertain a claim that concerned the world community.

However, Judge Simma's analysis of the situation, the application of the relevant provisions of the Articles on State Responsibility and the ensuing conclusion regarding such invocation are by no means clear and this lack of clarity is instrumental to the inherent obscurities in Article 48. The first question is what constitutes the legal interest in cases of Article 48 invocation as different from diplomatic protection. The ensuing question is then what constitutes a claim *erga omnes*. Only if it is clear how and to what extent a state invoking responsibility under Article 48, and in particular Article 48(1)(b), is doing something else than exercising diplomatic protection, we may be able to properly distinguish the two mechanisms and answer the question of whether Article 44, the traditional requirements for indirect claims, really creates the obstacles it is said to create.

In any event, the conclusion that Article 48 read in conjunction with Article 44 is a dead letter is not very satisfactory. Applying principles of the law of treaties by analogy to the Articles on State Responsibility, it is also wrong: one must try to interpret the treaty in a way that all provisions are meaningful. In addition one should have regard to the principle of effectiveness and attempt to uphold the purpose of the provision in light of the purpose of the treaty as a whole.[69] Excluding the application of Article 48 where it concerns non-nationals because of the application of Article 44 is thus not the preferred interpretation and was certainly not the intention of the ILC. In what follows, the analysis of the question of legal interest will show that diplomatic protection, and the traditional requirements for its exercise, can and should co-exist with invocation of responsibility under Article 48. Secondly, it will be argued that the purpose of Article 48 is to transcend the level of traditional bilateralism and that the interpretation of the Articles on State Responsibility as a whole should acknowledge that.

It is thus clear that the *erga omnes* nature of the obligation, which in turn derives from its peremptory status, must create the capacity to invoke responsibility. However, whether this is acceptable will depend on the interpretation of legal interest and the idea of membership of the international community: do states really have a legal interest in defending the fundamental rules of the international community at large? It is submitted that they do and that we must accept this premises, at least if we aspire to transcend the bilateral nature of international law towards multilateralism.

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69 For these principles see G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points', (1957) 33 Brit. Y.B. Int'l Law 211.

A. Injury and interest

Byers has noted that '[g]enerality of standing, rather than non-derogable character, is the essence of *erga omnes* rules.'[70] The question of legal interest and standing, even if it concerns a peremptory norm, should however not be confounded with the question of the availability of a judicial forum: having a legal interest in a certain matter does not imply access to a certain judicial forum. On this point, Tams has argued that while 'all States have standing to institute ICJ proceedings in response to *erga omnes* breaches … [and] to take countermeasures …',[71] the *erga omnes* character of the norm to cannot overcome the necessity of states' consent to the relevant dispute settlement mechanism.[72] Judge *ad hoc* Dugard similarly found that

> there are limits to be placed on the role of *jus cogens*. The request to overthrow the principle of consent as the basis for [the ICJ's] jurisdiction goes beyond these limits.[73]

Orakhelashvili, assuming that the very nature of *jus cogens* rules allows them to trump everything else, would go one step further and support invocation of responsibility for obligations *erga omnes* regardless of consent on the relevant forum. He has argued that

> in the case of norms protecting the community interest … tribunals must safeguard such community interest not only in terms of substance but also at the jurisdictional level.[74]

Thus, given the nature of peremptory norms, '[t]he principle of consent comes here into apparent clash wit the principle of non-derogability of *jus cogens*.'[75]

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70 Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 230.

71 Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 310-311.

72 Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, stated that 'proceedings could only be brought against States that have accepted the Court's jurisdiction to entertain claims based on breaches of customary international law', at 311. Considering that this group of states is rather small, the statement referred to in the text accompanying note 71, is less generous than it seems to be. See also Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, at 12.

73 *Case Concerning Armed Activities on the Territory of the Congo*, Separate Opinion Judge *ad hoc* Dugard, at para. 14.

74 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 490.

75 *Id.*, at 492. A similar point has been made by Ruffert, who noted, in relation to the ICJ's refusal to give the peremptory nature of *jus cogens* prevalence over the principle of consent that 'this state of the law seems to be scandalous from the standpoint of modern international law, which has moved away from bilateral consensual relationships towards the promotion of the interest of the international community. Fundamental norms are as a matter of principle independent of individual consent. On the contrary, obligations derived

Even if the peremptory nature of a norm cannot create jurisdiction of a certain court where it does not exist, it can, when jurisdiction exists but is limited by reservations or other limiting clauses, determine the application, or rather the non-application, of such limitations.[76] Whereas it is correct to note that it would be meaningless to grant the status of peremptory norms without simultaneously providing for enforcement, it is important to recognise that this does concern two different questions. More importantly, the invocation of responsibility *erga omnes* is not restricted to applications at the ICJ. As is made clear in the Articles on State Responsibility, it may also lead to the taking of countermeasures or other mechanisms to induce compliance with the relevant norm.

A.1 Obligations erga omnes *and the* actio popularis

When considering the legal interest in, and the reasons for, invoking obligations *erga omnes*, there is another kind of claim that often comes to mind: the *actio popularis*.[77] Although invocation *erga omnes* and an *actio popularis* have some elements in common, it is convenient to distinguish invocation *erga omnes* and *actio popularis*, in order to ensure that the invocation *erga omnes* does not evoke the same negative response the *actio popularis* has.

It should be emphasised that the term *actio popularis* in Roman law refers to a plurality of actions and that our 'modern' conception of this term is not necessarily accurate with respect to its origin.[78] In ancient Rome, what all forms of the *actio popularis* had in common was 'l'attribution générale d'une qualité pour agir.'[79] This, however, gives a first indication of the most important difference between the two mechanisms. The *actio popularis* is a municipal law phenomenon, where the existence of a legal system, indeed a

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from peremptory norms … are deliberately designed to apply to States without consent or against their will.' M. Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringement of Fundamental Rules of the International Legal Order' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order*, Jus Cogens *and Obligations* Erga Omnes, Leiden/Boston 2006, 295-310, at 296-297 (footnotes omitted). See however H. Thirlway 'Injured and Non-Injured States before the ICJ', in: M. Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter*, Dordrecht 2005, at 311-328, who shows the complexities of applications to the ICJ of non-injured states.

76 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 499-508.

77 On *actio popularis* see generally F. Voeffray, *L'* Actio Popularis *ou la Defense de l'Interêt Collectif devant les Juridictions Internationales*, Paris 2004; see also A.P. Rubin, '*Actio Popularis*, *Jus Cogens* and Offences *Erga Omnes*', (2001) 35 New Eng. L. Rev. 265-280; P.P Mercer, 'The Citizens Right to Sue in the Public Interest: the Roman *Actio Popularis* revisited' (1983) 21 U. W. Ontario L. Rev. 89-103; W.J. Aceves, '*Actio Popularis*? The Class Action in International Law' (2003) 2003 U. Chicago L. F. 353-402.

78 See Voeffray, *L'*Actio Popularis *ou la Défense de l'Interêt Collectif devant les Juridictions Internationales*, Paris 2004, at 6-13.

79 *Id.*, at 13.

functioning judiciary, is presupposed. The *actio popularis* is distinguished from other actions based on the merits of the claim (it is a claim on behalf of others instead of the claimant individually), but the person (or entity) bringing the claim has an inherent access to the judiciary. Apart from the fact that the transposition of municipal law principles to public international law usually requires fundamental changes in application of the principle, the absence of inherent access to the judiciary is a serious obstacle to the application of *actio popularis* in public international law. This obstacle is absent in the invocation *erga omnes*, where no such presupposition applies.[80]

From this difference flows another difference: the *actio popularis* is limited to adjudication, whereas invocation *erga omnes* is not. Invocation *erga omnes* can be established through the taking of countermeasures or other mechanisms available to states in this respect, such as unilateral sanctions short of countermeasures or even requests for action by the UN Security Council. This difference also relates to the difference in scope of the terms *actio popularis* and obligations *erga omnes*. While *actio popularis* presupposes a judicial forum, it contains no prepositions with respect to the norms which may be invoked through an *actio popularis*. Invocation *erga omnes* however does rely on the nature of the underlying norms, that is, the *erga omnes* nature of peremptory norms. Yet, it is independent of the question of jurisdiction and legal forum

The notion of absence of individual or direct injury is common to both invocation *erga omnes* under Article 48(1)(b) of the Articles on State Responsibility and an *actio popularis*, but another difference is created by the applicable legal interest. A claimant invoking responsibility *erga omnes* has a direct legal interest in the claim, even if there is no direct injury, and can even bring a claim on behalf of an entity that has no standing.[81] This claimant is a definable part of the community that is represented in the claim and the claim is not primarily on behalf of someone else or some other entity but in the interest of the community including the claimant. The emphasis is on a violation of a right owed to the claimant, which may be shared by others. An *actio popularis* is intrinsically a representative claim where the claimant takes up someone else's cause. The represented person or entity would have the same access to the judiciary in principle, but is unable (e.g. because of death) or unwilling to bring the claim. The legal interest may be the greater good, the addressing of universal wrongs or the advancement of society, but an *actio popularis* is characterised by an absence of direct legal interest invested in the claimant.

Considering its nature, it is perhaps understandable that the *actio popularis* has not enjoyed much popularity in international law. The ICJ has not allowed

80 See *Id.*, at 261-262; Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 161.

81 This would be the case when responsibility is invoked for violation of the prohibition on genocide against a state's own population. The population would not have standing under international law in the way a third state has under the Articles on State Responsibility.

any *actio popularis* so far: the rejection of the *actio popularis* in the South-West Africa cases is well-known,[82] as are the *Nuclear Tests* cases,[83] but the Court also refused to entertain such claims more recently brought forward in *LaGrand*,[84] *Avena*,[85] and in the *Oil Platforms* case.[86] It is curious to note that Orakhelashvili has argued the contrary, relying on *Barcelona Traction*.[87] Pursuant to this decision, he stated, the Court would not require proof of individual interest. However, his finding relies not on the decision itself but on the Separate Opinion of Judge Ammoun.[88] Judge Ammoun in turn relies on

82 *South-West Africa* case (Ethiopia *v.* South Africa; Liberia *v.* South Africa), Judgment of 18 July 1966, ICJ Reports 1966 p. 6, at 47 (para. 88). But see Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, who shows that the applicant states in this case were not in fact arguing on the basis of *actio popularis*, but on the interpretation of a special treaty-based jurisdiction clause, at 63-69.

83 *Nuclear Tests* case (New Zealand *v.* France; Australia *v.* France), Judgments of 20 December 1974, ICJ Reports 1974 p. 457 and 253, where arguments related to the *erga omnes* character of the claim, brought forward both by New Zealand and by Australia, were not referred to in the judgment which was narrowed down to the existence of a legal dispute. In the 1995 Request made by New Zealand, the applicant specifically referred to its own rights *and those of other states*. See *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case* (Order of 22 September 1995), ICJ Reports 1995 p. 288, at 291 (para.6). The Request was found inadmissible, because of the difference in subject-matter between the 1974 case and the current request.

84 *LaGrand*, Oral Pleadings, CR 2000/26, 13 November 2000, Agent for the Federal Republic of Germany, para. 9, who stated that Germany was presenting this claim 'not only for the sake of the citizens of our two countries, but for the benefit of human beings worldwide.'

85 *Avena*, Oral Pleadings, CR 2003/24, 15 December 2003, Agent for the United Mexican States, para. 38, who stated that the Court 'fait face à une responsabilité dont la gravité ne peut être dissimulée. Autant pour le sort des cinquante-deux ressortissants mexicains visés dans notre requête et dans notre mémoire, que pour les millions de personnes qui, tous les jours, traversent les frontières et se rendent dans un pays qui n'est pas le leur, il est indispensable de savoir, en définitive, quelle est la portée des droits reconnus par l'article 36 et le contenu précis de la réparation qui découle de leur violation, et dont l'arrêt *LaGrand* est l'indéniable précurseur.'

86 *Oil Platforms* case (Islamic Republic of Iran *v.* United States), Judgment of 6 November 2003, ICJ Reports 2003 p. 161, at 208 and 211 (paras. 101, and 108-9). The United States claimed that Iran endangered maritime commerce in general and gave examples of ships flying the flag of other states that had suffered. Iran objected to this claim and the Court responded by stating that it 'recalls that the first submission presented by the United States in regard to its counter-claim simply requests the Court to adjudge and declare that the alleged actions of Iran breached its obligations to the United States, without mention of any third States. Accordingly, the Court will strictly limit itself to consideration of whether the alleged actions by Iran infringed freedoms guaranteed to the United States under Article X, paragraph 1, of the 1955 Treaty' (para. 109). See also J.-M. Thouvenin, 'La Saisine de la CIJ en cas de violation des règles fondamentales' in: C. Tomuschat and J.-M. Thouvenin (Eds), *The Fundamental Rules of the International Legal Order*, Jus Cogens *and Obligations* Erga Omnes, Leiden/Boston 2006, 311-334, who offers a brief analysis of the issue of consent and fundamental rules of international law.

87 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 524.

88 *Barcelona Traction* case, Separate Opinion of Judge Ammoun, at 326-7.

the Dissenting Opinion of Judge Foster in the *South-West Africa* case.[89] While one may share the criticism on the outcome of the *South-West Africa* case and welcome the opinion of Judge Ammoun, it should be borne in mind, perhaps regrettably, that none of this supports the argument that the ICJ has accepted *actio popularis*. It is in fact hardly likely that the Court would accept such a claim lacking both direct injury and legal interest.

A.2 States other than the injured state

Article 48 should be read in conjunction with Article 42(b)(ii), which stipulates that a state will be considered an 'injured' state when

> the breach of the obligation is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.[90]

This is the case when it concerns an obligation 'breach of which must be considered as affecting *per se* other States to which the obligation is owed.'[91] At first sight, this seems to be very similar to Article 48(1)(a), which allows for invocation of responsibility if a collective interest of the group is threatened. The Commentaries to both Article 42 and Article 48 however explain the difference: states acting under Article 42 are *injured* states, whereas states acting under Article 48 are states with a *legal interest* but not necessarily injured states.[92] The Commentaries further explain that the two provisions are not mutually exclusive[93] and that the rights under Article 48 are 'more limited' than those under Article 42.[94] On the other hand, invocation under Article 42 is only possible 'where each parties' performance is effectively conditioned upon and requires the performance of each of the others.'[95] As Sicilianos has explained,

> [t]his distinction tends to reflect the idea that the commission of a wrongful act, while it may affect a number of states, does not necessarily affect them all in the

89 *South-West Africa* case, at 479-482.
90 Articles on State Responsibility, Article 42.
91 *Id.*, Commentary to Article 42, at 300.
92 Articles on State Responsibility, Commentary to Article 42, at 294, and Commentary to Article 48, at 319; see also Commentary to Article 33, at 234.
93 Articles on State Responsibility, at 293.
94 *Id.*, Commentary to Article 48, at 322.
95 *Id.*, Commentary to Article 42, at 300.

> same way. The wrongful act, while violating a genuine subjective right of one ore several states, may affect the legal interests of other states.[96]

Sicilianos' explanation corresponds to the idea that while the invocation under Article 42 and Article 48 is similar, the consequences are not. As has been outlined in the introduction, reparations and countermeasures to which states acting under Article 48 may be entitled differ from those applicable to directly injured states.[97]

One of the effects of this distinction is that Article 48, and in particular Article 48(1)(b), is separated from direct injuries, and brought within the field of indirect injuries for which the traditional conditions of nationality of claims and exhaustion of local remedies apply. Even if we accept that the distinction between directly injured states and states not directly injured but with a legal interest may seem logical considering the internal structure of the Articles on State Responsibility, the explanations given are not entirely satisfactory. The Articles on State Responsibility do not themselves answer the question of how to distinguish legal interest in Article 48(1)(b) from legal interest while exercising diplomatic protection. In both instances, states are not directly injured but do have legal standing based on legal interest. A complicating factor is that the examples given in the Commentary for the two situations (i.e. injured states under Article 42(b)(ii) and states with a legal interest under Article 48) are the same and include both a nuclear free zone treaty and marine pollution also affecting coastal states and a cross-reference with respect to the meaning of 'collective interest'.[98] How, then, does one classify invocation of responsibility for a violation of a non-proliferation treaty: is the invoking state an 'injured' state under Article 42(b)(ii), or is it one with a 'legal interest' under Article 48(1)(a)?[99] In addition, the Commentary to Article 42(b)(ii) clarifies that 'the interdependent obligations covered by [this provision] will usually arise under treaties establishing particular regimes.'[100] This limitation with respect to the origin of the obligation is not included in the Commentaries

96 L.-A. Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1138. See also E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 AJIL 798-816 (2002), at 802-808.

97 See *supra* Introduction to this Chapter.

98 Articles on State Responsibility, Commentary to Article 42, at 300 and Commentary to Article 48, at 320-321 and 322. The Commentary to Article 48 directly refers to Article 42 with respect to the term 'collective interest' at note 764.

99 Perhaps this question is less pertinent with respect to the peremptory norms to which the present study is limited: it is not necessary that state A complies with the prohibition on racial discrimination for state B to be able to perform its obligations under this rule and although the international community has an interest in ensuring compliance with this prohibition, it is not the case that the performance of one state is 'effectively conditioned upon or requires' compliance of other states. However, the collective interest, which goes beyond the sum of bilateral obligations, will be threatened by any breach.

100 Articles on State Responsibility, Commentary to Article 42, at 301.

to Articles 48(1) (a) and (b). However, as will be explored below, the admissibility of invocation under Article 48(1)(a) will usually depend on the existence of a treaty-regime establishing a collective interest. It is submitted that it will be difficult to determine the position of a state invoking responsibility for a breach of a multilateral treaty establishing a collective interest where this state is clearly affected in the sense that the performance of the obligations under the treaty are threatened or that the collective object is threatened by the breach but not individually affected.

It may be easier to distinguish an Article 42(b)(ii) situation from invocation under Article 48(1)(b) because of the difference in the applicable source of the violated rule (respectively a multilateral treaty and general international law) and absence of individual injury to the state invoking responsibility. However, as said above, this brings such invocation very close to invocation by means of diplomatic protection.

A.3 Erga omnes *and* erga omnes partes

There is another reason why Article 48(1)(b) is stands very close to the customary rules on diplomatic protection. Article 48 distinguishes two kinds of invocation for states other than the injured state. Under Article 48(1)(*a*), invocation is possible when the obligation breached is an obligation *erga omnes partes*. Such obligations are different from obligations *erga omnes*, the invocation of which is provided for in Article 48(1)(*b*). As Tams has pointed out, '[t]he legal regime governing obligations *erga omnes partes* first and foremost depend on the terms of the treaty of which they form part.'[101] These are treaties whereby all parties to the treaty have a legal interest in its performance.[102] Obligations *erga omnes*, however, find their origin in general international law.[103] Although this distinction may not be relevant for all purposes, it is relevant for our present inquiry.[104] It is submitted that states parties to a treaty creating obligations *erga omnes partes*, such as a disarmament treaty and most

101 Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 125.

102 See Crawford, Third Report, at paras. 92 and 106; Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 120.

103 Whereas James Crawford (Third Report, at para. 106) had noted that obligations *erga omnes* arise both under general international law and under 'generally accepted multilateral treaties (e.g. in the field of human rights)', Tams (*Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 121-128) has convincingly demonstrated that, in order to be obligations *erga omnes* capable of creating legal interest in the interest of the international community as a whole, they must derive from general international law, even if they may also be contained in multilateral treaties.

104 See also Meron, 'On a Hierarchy of International Human Rights' (1986), 80 AJIL 1-23, cited *supra*, note 61 and accompanying text.

of the humanitarian law treaties, have an stronger entitlement to claim responsibility of another state in case of a violation that states acting *erga omnes*. The nature of the regime created by the respective treaties requires compliance by all states parties for the proper functioning of the regime. Even if the states invoking responsibility under Article 48(1)(a) are not directly injured, the collective interest is threatened by non-compliance of others as is the enjoyment of their rights.[105] Some treaties may specifically provide for this common interest, such as the Geneva Conventions in Common Article 1 which obliges the states parties to these conventions to ensure respect for the convention.[106] In other treaties it is generally assumed to exist.[107] Regardless of whether states would in reality act on such obligations, it is important to realise that the possibility is not created in the Articles on State Responsibility, or general international law, but exists based on the respective treaty regimes.

It is instructive to return to Judge Simma's Opinion. Bearing in mind the difference outlined above between obligations *erga omnes* and obligations *erga omnes partes*, one could question whether Judge Simma is correct in classifying the relevant breaches of international human rights law and international humanitarian law as obligations *erga omnes* and not as obligations *erga omnes partes*, or rather in not making the distinction at all. In fact, Judge Simma appears to confuse Article 48(1)(a) and (b): he derives legal standing for Uganda from the various treaties both Uganda and the DRC are parties to,[108] that is the States Parties to the Fourth Geneva Convention and the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the Convention against Torture. [109]These are all treaty-regimes creating obligations within a certain group of states for the purpose of achieving a collective interest. The obligations here are however obligations *erga omnes partes* and not *erga omnes*. It is thus invocation under Article 48(1)(a) and not under 48(1)(b). While obligations *erga omnes* may derive from the universal nature of obligations *erga omnes partes*,[110] which may be the case with universally ratified human rights treaties, it is necessary to refer to their customary status in order to invoke responsibility *erga omnes*. A correct application of Article 48 in Judge Simma's Opinion would have called for invocation *erga omnes partes*. One could even argue that Uganda was an injured state

105 See e.g. P. Okowa, 'Issues of Admissibility and the Law on International Responsibility' in: M.D. Evans, *International Law*, Oxford 2006, at 495-496.

106 Geneva Conventions of August 12, 1949, International Committee of the Red Cross, Geneva. See on this point also the *Wall Advisory Opinion*, at 199-200, para. 158.

107 For instance in non-proliferation of nuclear weapons treaties and environmental treaties. See Crawford, Third Report, at para. 106; Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 70-78 and 120; Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 84.

108 *Congo – Uganda* case, Separate Opinion Judge Simma, at para. 32.

109 *Id.*, at para. 31.

110 Tams, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005, at 122.

under Article 42(b)(ii), given the close relationship between this state and the breaches of the relevant norms. Judge Simma's sweeping paragraph cited above in reality only refers to obligations *erga omnes*, which shows that the Separate Opinion had not contemplated the difference between the various kinds of invocation. It would have been preferable to distinguish clearly, as the ICJ did in the *Wall Advisory Opinion*.[111]

Contrary to what a superficial reader may conclude, Judge Simma's Opinion has thus not presented an argument in favour of invocation of responsibility *erga omnes* under Article 48(1)(b). In addition, the few legal scholars who have expressed their views on the matter, have only criticised the provision, claiming that it either constitutes a seriously impaired and limited provision.[112]

Since Article 48(1)(*b*), which creates the possibility of invocation of responsibility in the interest of the community as a whole (*erga omnes*), is an exercise of progressive development, there is a marked difference between the first and the second provision in Article 48(1). Even if, as the Special Rapporteur has said, it builds on existing ideas, the very possibility of invocation is not articulated in any other instrument nor is it a well-established part of general international law. It is therefore difficult to set aside other rules applicable to the same subject in particular the customary rules on diplomatic protection and the reminder of them in Article 44 of the Articles on State Responsibility. In order to ensure the proper interpretation and application of Article 48(1)(b), one must do so within the context of other, related, rules of international law, in particular the rules on obligations *erga omnes*. One may agree with Orakhelashvili, who stated that '[i]t would be pointless if a norm was endowed with peremptory status, but its effects and legal consequences were governed by the criteria of other rules.'[113] However, the fact that a certain rule is recognised as a peremptory norm does not place it in a legal vacuum without any link to other parts of international law. The mere fact that certain existing norms are granted a special status, that is, the status of being peremptory, suggests that they are part of the system as a whole. Hence, they do not exist beyond that system. This applies all the more to invocation *erga omnes*. Part

111 *Wall Advisory Opinion*, at paras. 155-159, where it distinguished the character of the right to self determination and some of the rules under international humanitarian law from specific obligations under the Fourth Geneva Convention. The former were to be complied with by all states *erga omnes* because of their status in customary international law; the latter only by all states parties to this convention. Although the Court refrained from using the language of *erga omnes* and *erga omnes partes* it is clear from the text and the specific reference to 'states' in the former case and 'states parties' in the latter that it categorised the obligations differently.

112 See e.g. Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002), 13 EJIL 1201-1220, and E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition' (2004), 35 Netherlands Yb of Int'l Law 85-142.

113 Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 80.

of the secondary rules of international law they apply to an existing body of primary rules.

B Beyond bilateralism: owed to the international community as a whole

In a preponderantly bilateralised view of international law, where multilateral obligations are considered as a web of bilateral relations, the 'international community' is naturally interpreted as the community of states who have obligations vis-à-vis each other on a bilateral basis.[114] Diplomatic protection is typically a mechanism that relies on bilateral obligations between states. States are obliged to treat the nationals of another state in accordance with certain standards, but can only be held responsible for breaches of such standards by one state: the state of nationality of the injured individual(s). With the creation of Article 48(1)(b) the ILC has attempted to develop this view. On the one hand it has included other participants in the concept of the international community and the beneficiaries of claims made on behalf of this community[115] and other hand it has emphasised the existence of collective interests, thereby abandoning this strict bilateralism. As was clearly stated by the ILC's Special Rapporteur on State Responsibility, the purpose of including a specific regime covering serious breaches of peremptory norms was to 'recognise that there can be egregious breaches of obligations owed to the community as a whole, breaches which warrant some responses by the community and by its members.'[116] When states invoke responsibility *erga omnes*,

114 For such a view see e.g. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules', (1997) 66 Nord. JIL 211-239, at 232-238.

115 A natural language interpretation of the 'beneficiaries' of claims in the interest of the international community would suggest that these include individuals and other private parties since they are part of the international community as a whole. Crawford has stated, 'our conception of ''the international community as a whole'' needs to be an inclusive and open-ended one,' (see J. Crawford, 'Responsibility to the International Community as a Whole; the Earl Snyder Lecture in International Law' (2001), 8 Ind. J. Global. Leg. Stud. 303-322, at 315), not least because violations of peremptory norms will mostly affect individuals and not just states. This interpretation is supported by the fact that the ILC deliberately did not adopt the language of the Vienna Convention on the Law of Treaties, which contains the phrase 'International Community of States' (Article 53), but omitted the words 'of States' in favour of other entities. The ILC clearly included private parties such as the ICRC in the international community as a whole. See Crawford, Fourth Report, at paras. 36-37. See also Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002), 13 EJIL 1127-1145, at 1140. The 'international community of states as a whole' was considered a 'subset' of the international community as a whole (see ILC Yearbook 2001, report of the 2682nd meeting, at 105, para. 15). The inclusion of other entities in the 'beneficiaries' of such claims has however not been universally accepted and it has been argued that this matter should have been further clarified by the ILC. See e.g. See R. Pisillo Mazzeschi, 'The Marginal Role of the Individual in the ILC's Articles on State Responsibility' (2004), 14 Italian Yb of Int'l Law 39-51, at 44-45.

116 Crawford, Fourth Report, at para 52.

a claim is brought by a part on behalf of the whole: invocation under Article 48(1)(b) is in the interest of the international community as a whole. The state claiming responsibility is not the directly injured state and shall not be the primary beneficiary of the claim.[117] The emphasis on the membership of the international community and the collective interest that this membership generates for individual states also shows that invocation under Article 48 was intended to be of a different nature than 'ordinary' invocation,[118] and that the conditions to the latter kind of invocation should not be applied as if they were two of a kind. The words '*mutatis mutandis*' in the commentary to Article 48(3) are thus to be taken seriously. Although the ILC failed to clarify where exactly the difference was to be found, it must rest in the *erga omnes* nature of the obligation and the legal interest it creates. A claim under Article 48, even if it concerns individual injury and not direct injury to a state, is a direct claim, since the claimant state as a member of the international community has a direct legal interest in compliance with the relevant rule by virtue of its membership of the international community and not, as in diplomatic protection, through the bond of nationality.

The term 'international community' is admittedly rather vague, even if it is often used in legal documents such as resolutions by the General Assembly[119] and the Security Council[120] and ICJ decisions.[121] Tomuschat has argued that many of these references are as informative as the phrase 'to whom it may concern'.[122] This is rather accurate: an appeal to the international community is meant to induce those that are willing and able to respond, *erga omnes*. Often, however, this will primarily be directed at states, because, in Tomuschat's words,

> die Staaten dieser Erde – und darüber hinaus auch die von ihnen gebildeten Internationalen Organisationen, teilweise sogar die Internationalen Verbände – seien zu einen rechtlichen Gebilde zusammengeschlossen, das in seiner Gesamtheit die Verantwortung für die Sicherheit de Existenzgrundlagen der Menschheit trage.[123]

117 See *supra* note 22 and accompanying text.

118 Articles on State Responsibility, Commentary to Article 48, at 319-324.

119 E.g. A/RES/60/288 (2006): '*Reaffirming* that … the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism', at 2.

120 E.g. S/RES/1718 (2006): '*Underlining* the importance that the Democratic People's Republic of Korea respond to other security and humanitarian concerns of the international community', at 1.

121 See *Barcelona Traction*, cited *supra* note 1 and accompanying text, and numerous references to this dictum in other decisions.

122 C. Tomuschat, 'Die Internationale Gemeinschaft' (1995), 33 Archiv des Völkerrechts 1-20, at 4.

123 *Id.*, at 6. It should be noted that the world's Civil Society can also have a significant role in the protection against violations *erga omnes* even if this role is hardly ever legal and even if they cannot invoke state responsibility the way other states can.

Perhaps it is not desirable to define the international community too strictly since definitions tend to constrain development, or expansion, of the concept they define. The international community is a concept *par excellence* that should be allowed to develop.[124]

The vagueness of the concept however does not decrease standing *erga omnes*. Even if states invoking responsibility for a breach of a peremptory norm may 'act in the collective interest',[125] it is not necessary to accurately define the 'collective' for the claim to be admissible. It is sufficient that states invoking the responsibility for an obligation *erga omnes* are entitled to do so because the obligation is owed to the international community *including the invoking state*. That is to say a state invoking responsibility for an obligation *erga omnes* is claiming its own right, a right that it shares with other states. It is thus a kind of invocation of responsibility that is rightly distinguished from diplomatic protection, a distinction inherent in the *erga omnes* nature of such invocation. Although this is sometimes a subtle distinction, it may be clarified by the example of the prohibition on torture. A violation of this prohibition may be claimed either by exercising diplomatic protection on behalf of a national or *erga omnes*. In the former case, the rights that are claimed are rights that are not primarily owed to the claimant state. Although the claimant state may have agreed with the defendant state not to practice torture, the obligation not to subject individuals to torture is owed to the individual (foreign) nationals and this is the right that is claimed. It is an indirect claim and the customary rules for such a claim apply. If the claim is brought *erga omnes*, the obligation is owed to the international community, including the claimant state, which makes it a direct claim. This in turn ensures the non-application of the traditional requirements of diplomatic protection. Judge Simma, then, was correct in saying that diplomatic protection is not the only means for invoking responsibility in such instances.

3 Conclusion

International law has long recognised that certain rules are so fundamental, and breaches of such rules so offensive, to the international community that they warrant a special response. The ICJ, in 1970, articulated this concern by stating that certain rules 'are the concern of all States …; they are obligations *erga omnes*.'[126] This position was further developed by the ILC and resulted in the adoption of Article 48 and in particular paragraph (1)(b) which provides

124 See also the rather sophisticated article by N. Tsagourias, 'The Will of The International Community as a Normative Source of International Law', in: I.F. Dekker and W.G. Werner (eds.), *Governance and International Legal Theory*, Leiden 2004, at 97-121.

125 Articles on State Responsibility, Commentary to Article 48, at 319.

126 *Barcelona Traction*, at 32, para. 33.

for the invocation of responsibility for serious breaches of peremptory norms. In the preceding analysis it has been demonstrated that there are considerable difficulties with the way in which the ILC has failed to expressly clarify the legal framework in which such invocation should operate. In particular its relation to diplomatic protection has been left unexplained even though invocation of obligations *erga omnes* is similarly based on indirect injury, as is stipulated in the heading of Article 48. This has lead some to believe that the traditional conditions for claims based on indirect injury, as codified in Article 44, would apply and cause Article 48 to be of little importance. These critics may feel strengthened in their position by the reluctance of the ICJ to accept claims *erga omnes*.

Yet the distinction between invocation of responsibility by means of diplomatic protection and such invocation *erga omnes* is not to be found in the nature of the injury inflicted upon the individuals concerned. As has been demonstrated, claims *erga omnes* are inherently direct claims, since the obligation *erga omnes* is owed to the community as a whole, including the claimant state. A state invoking responsibility under Article 48(1)(b) is thus claiming its own right. This is markedly different from the exercise of diplomatic protection, where states, while relying on their own right to exercise diplomatic protection, are not claiming their own rights but rights owed to their nationals. States invoking responsibility *erga omnes* have legal standing because they have a direct legal interest in compliance with the obligations *erga omnes*. States exercising diplomatic protection also have a legal interest, but it is indirect because it is conditioned upon the bond of nationality. Considering these differences, it is clear that invocation under Article 48(1)(b) is must be distinguished from invocation by means of diplomatic protection. Accordingly, the rules applicable to diplomatic protection do not apply to such claims.

We now have two regimes for the invocation of responsibility and it is important to strengthen both. Diplomatic protection is a well-established mechanism for the protection of individual rights and may be very effective due to it long-standing recognition in international law. In practice, it may be easier to induce states to invoke responsibility when in concerns their nationals because of the national political repercussions if they refuse to do so.[127] However, because of its bilateral nature, states may also, perhaps unjustifiably so, be reluctant to exercise their right to protect their nationals for fear of deterioration of the relation with the host state.[128] In such cases,

127 A good example of this is provided by the case of Mr Arar in Canada. For details see http://www.ararcommission.ca. Mr Arar initially did not receive any protection from Canada after the US extradited him to Syria where he allegedly was subjected to torture. However, when his situation was made known by Canadian media, the Canadian Government eventually set up an inquiry commission to investigate what had happened to Mr Arar and why the Canadian Government had failed to react.

128 This would, it is submitted, be particularly unjustifiable in case of breaches of peremptory norms.

invocation for breaches of obligations *erga omnes* under Article 48(1)(b) may be an attractive alternative. Such invocation not so much emphasises the bilateral relations and the desire for individual compensation, but the multilateral concern with the situation and the desire to bring it to an end. These two means of invoking responsibility for breaches of peremptory norms can occur simultaneously.[129] Although multiplied litigation may be considered undesirable, it should be stressed that neither invocation of responsibility by means of diplomatic protection nor actions under Article 48 is limited to adjudication. Within the limits of permissible responses to such breaches, that is, excluding the unilateral resort to the use of force, any means to induce compliance would be available. If we aspire to protect against such egregious violations of international law, we should welcome, and enhance, all means of protection, including the new, multilateral, invocation of responsibility of obligations *erga omnes*.

129 Perhaps it is instructive in this respect to note that proceedings before the European Court of Human Rights do not exclude other means of protection. When a national of state A is complaining for violations of his rights against state B, state A is allowed to simultaneously exercise diplomatic protection. States have on occasion actively supported their national claimants in cases against other states, short of exercising diplomatic protection. This was the case in *Selmouni* v. *France*, Appl. No. 25803/94 [ECHR], and *Soehring* v. *the United Kingdom*.

PART 2

Diplomatic Protection before the ICJ and National Courts

IV Diplomatic Protection before the ICJ – Avena and indirect injury

As has been said before, the ICJ has dealt with a number of cases that were based on diplomatic protection. *Interhandel*, *Nottebohm*, *Barcelona Traction*, *ELSI*, *LaGrand* and, most recently, *Diallo* are cases that directly come to mind. The exercise of diplomatic protection in these and other cases has been described at a certain length in literature. In particular, Enrico Milano has given an extensive overview of diplomatic protection cases before the ICJ not so long ago.[1] It is therefore not necessary to discuss the ICJ's general approach in detail. Although many of these decisions have given rise to criticism on the way in which the ICJ dealt with the various requirements for the exercise of diplomatic protection, such as the question of the application of the local remedies rule in *Interhandel*, *ELSI* and *LaGrand* and the issue of nationality in *Nottebohm* and *Barcelona Tracton*, the fact that the applicant presented a claim based on diplomatic protection was not disputed. The ICJ clearly acknowledged that the basis of the claim rested in the exercise of diplomatic protection and proceeded to investigate whether the claim so qualified was admissible. In *Interhandel*, *Barcelona Traction*, *ELSI* and *Nottebohm*, the claim was held inadmissible, whereas in *LaGrand*, the Court accepted the applicant's arguments and let the claim proceed.[2] In most older cases of the ICJ, the cases thus turned on the issue of admissibility and 'the substantive relation between diplomatic protection and human rights had never been at the core of the dispute considered by the Court.'[3] In recent years, this has changed. States not only focus on their own injuries but include human rights. As Milano has forcefully argued, 'the link between human rights and diplomatic protection is becoming more and more recurrent in states' litigating strategies before the [ICJ].'[4] This applies in particular to *LaGrand*, *Avena*, and *Diallo*.[5] The first case has extensive-

1 E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?' 35 N.Yb.I.L. 85-142 (2004).

2 *Interhandel*, at 28-29 (non-exhaustion of local remedies); *ELSI*, at 44-48 (exhaustion of local remedies) and 81 (absence of internationally wrongful act); *Nottebohm*, at 26 (absence of genuine link); *LaGrand*, at 483, para. 42 (espousal of individual rights).

3 E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?' 35 N.Yb.I.L. 85-142 (2004), at 111. Of course, the relation between diplomatic protection and the protection of human rights did play a role in *Barcelona Traction*, but see on this Ch. III.

4 *Ibid.*, at 119. See also *supra* Introduction and *infra* Chapter VI section 2.

5 *Diallo* will be discussed separately in Chapter V.

ly been discussed in recent literature and will not be analysed separately here.[6] With respect to diplomatic protection, the most conspicuous part of *LaGrand* is without doubt the qualification of certain provisions of the VCCR as *individual* rights, rather than the rights of a state.[7] Once Article 36(1)(*b*) had been so qualified, however, the exercise of diplomatic protection by Germany in order to claim responsibility for a violation of this right vis-à-vis its nationals in itself was not controversial. One may question whether local remedies had been exhausted and whether the LaGrands complied with the nationality requirement, but this does not affect the invocation of responsibility based on indirect injury through a violation of an individual right. In *Avena*, as will be discussed below, this situation was different. In this case the ICJ decided that diplomatic protection was not the mechanism Mexico needed to resort to in order to protect its nationals. Instead, it accepted Mexico's claim as a direct claim, based on direct injury.

Before discussing the decision in *Avena*, it is relevant to look at a, related, Advisory Opinion: the Inter-American Court's Advisory Opinion on the 'Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law.'[8] In this Opinion, the Inter-American Court considered the question of whether the right to be informed of consular assistance should be seen as a human right and it stated that

> the consular communication to which Article 36 of the Vienna Convention on Consular does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him.[9]

Furthermore, the Court found that the right to be informed on consular assistance

> must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.[10]

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6 To give just a few: C. Tams 'Consular Asssistance: Rights, Remedies and Responsibility; Comments on the ICJ's Judgment in the LaGrand Case'13 EJIL 1257-1259 (2002); Z. Deen-Racsmany, 'Diplomatic Protection and the LaGrand Case', 15 LJIL 87-103 (2002); C. Dominicé 'Responsabilité internationale et protection diplomatique selon l'arrêt LaGrand', in: *El Derecho Internacional en los albores del siglo* XXI, Madrid 2002, at 233-242; R. Jennings, 'The LaGrand Case' 1 Law and Practice of Int'l Courts and Tribunals 13-54 (2002). See also the symposium in the Yale Journal of Int'l Law, Vol. 27, at 423-452.

7 *LaGrand*, at 494 (para.77). Another important part of the decision is that provisional measures issued by the Court are binding (at 506, para. 109).

8 Advisory Opinion OC-16/99, IACHR Series A no. 16 (1999). This opinion was requested by Mexico.

9 IACHR Advisory Opinion, para. 87

10 *Id.*, para. 122.

It concluded that

> the international provisions that concern the protection of human rights in the American States, including the one recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.[11]

The ICJ has both in *LaGrand* and in *Avena* avoided any decision on this point, despite a request to this effect by Germany and Mexico respectively.[12] It has in addition refrained from referring to the Advisory Opinion of the Inter-American Court. This has been criticised. For instance, Pinto wrote that 'il est difficile d'expliquer l'absence de citation de la jurisprudence du système interaméricain dans le jugement de la CIJ'.[13] Milano also expressed some doubts on the desirability of the divergence between the two courts:

> [t]he gap between the two approaches could not have been wider, on the one hand a very human-rights oriented approach, on the other hand a very dismissive *caveat*.[14]

From a human rights perspective, one may indeed wonder why the ICJ would not use human rights language in the context of a right that it both an individual right and a right closely related to other, well-established, human rights.

It is not difficult to see the relation between consular assistance and fair trial. Foreigners may be unfamiliar with the judicial system of the host state, they may not speak the language, and may not know how to request legal counsel. It is clear that the foreign national can substantially benefit from consular assistance in such instances. Yet, it is submitted that this does not necessitate the qualification of the right to information on consular assistance as a *human right*. First, consular assistance is not a *conditio sine qua non* of fair trial. It is neither strictly necessary nor sufficient: without consular assistance, trials may be fair and they may be unfair even if there has been consular assistance. Second, even if the right to fair trial is part of human rights law, the law on consular relations as provided in the VCCR is not. One should not severe one provision of this Convention, take it out of the context of consular law and declare it a human right. Not every individual right is a human right.

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11 *Id.*, para. 140. See for an overview of the Opinion and its (non-) application in the United States W.J. Aceves, 'the Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16-99', 94 AJIL 555-563 (2000).

12 *LaGrand*, at 494 (para 78). *Avena*, at 60-61 (para 124).

13 M. Pinto, 'De la Protection Diplomatique à la Protection des Droits de l'Homme', 106 R.G.D.I.P 513-547 (2002), at 531.

14 Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?' 35 N.Yb.I.L. 85-142 (2004), at 127.

As Spiermann, endorsing the position of the ICJ, has stressed: in current international law, individual rights do exist 'outside the framework of human rights.'[15] In this particular context, it is important to stress that the right to be informed on consular assistance is derived from a specific régime codified in the VCCR. This régime however primarily concerns inter-state relations and the large majority of the provisions in this Convention lay down the rules on consular intercourse. The fact that it *also* creates individual rights cannot change its overall purpose not its status in international law. The VCCR is not a human rights convention, and was never perceived to be.

As its name suggests, the IACHR is a human rights court. It is therefore not surprising that it has decided on Mexico's request in its own vocabulary, that is, human rights language. It translated consular law into human rights law, because 'its [own] general objectives and "principles" … will seem more plausible than traditional interpretative techniques.'[16] Had it not welcomed the VCCR as falling within the realm of human rights, it would have been unable to deliver an opinion on the issue. The nexus with the human rights protected under the Inter-American Convention on Human Rights was therefore crucial. The ICJ, however, was in a different position. It did not need to enter into a human rights debate in order for the VCCR to fall within its jurisdiction. Moreover, as opposed to the IACHR, the ICJ is not a regional court with geographically limited jurisdiction and felt more restrained with respect to the interpretation of a multi-lateral treaty that clearly went beyond the intention of the parties,[17] especially where this interpretation is not necessary for the result desired by the ICJ.

It is thus not necessary, and in light of the context of the relevant treaty not desirable, to draw one provision of the VCCR into the ambit of human rights. Yet it is important to acknowledge that the VCCR clearly establishes an individual right and that the ICJ allowed Germany to claim this right before the Court in an exercise of diplomatic protection. In other words:

15 O. Spiermann, 'The *LaGrand* Case and the Individual as a Subject of International Law', 58 ZÖR 197-221 (2003), at 211.

16 Martti Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the ILC, 58th Session, A/CN.4/L.682 (2006), at 72 (para. 134) who gives the example of the WTO interpreting general international law. His argument applies *mutatis mutandis* to human rights bodies.

17 See B. Grzeszick, 'Rechte des Enzelnen im Völkerrecht', 43 Archiv des Völkerrechts 312-344 (2005), at 325. Grzeszick is highly critical of the ICJ's interpretation of the VCCR and argues that it should not have accepted the existence of individual rights under this Convention at all.

> for the individual concerned, what matters is that one has an individual right than one can assert and which is enforceable in the domestic courts of the receiving State, not whether this right is of an otherwise elevated or universal nature.[18]

In what follows, the ICJ's approach to this same individual right in *Avena* will be discussed.[19]

1 INTRODUCTION

On 31 March 2004, the ICJ issued its judgment in the *Case Concerning Avena and other Mexican Nationals*. Mexico claimed that the

> United States of America, in arresting, detaining, trying, convicting and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own rights and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (*b*) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (*a*) and (*c*) of the Convention.[20]

At first glance this judgment appears as yet another decision concerning the Vienna Convention on Consular Relations (VCCR) and as a faithful copy of the earlier *LaGrand* Case, not the least due to the numerous references in *Avena* to this case. Like the LaGrand brothers, the Mexican nationals in this case had been deprived of their right to consular assistance by not being informed of this right and most of them were, like the LaGrand brothers, consequently prevented from claiming this right by the operation of the procedural default rule. At state level, Mexico was, like Germany, deprived of its rights to offer consular assistance to its nationals and found out about their detention rather late. Mexico thus claimed a violation by the United States of Article 36 (1) (*a*), (*b*) and (*c*) and Article 36 (2). In its submission, Mexico made it clear that the Court should consider the violation of both Mexico's own rights and the rights of its nationals. The latter are brought to the Court through the exercise of diplomatic protection. It is in this, in the exercise of diplomatic protection by Mexico, that *Avena* is far more complicated than *LaGrand*.[21]

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18 B. Simma & C. Hoppe, 'From *LaGrand* and *Avena* to *Medellin* – a Rocky Road toward Implementation', 14 Tulane J Int'l & Comp. L. 7-59, at 13.

19 The following chapter has been published as an article entitled 'Case Concerning Mexican Nationals', in 18 LJIL 49-64 (2005).

20 *Avena*, at 36 (para. 49).

21 See Z. Deen-Racsmány, 'Diplomatic Protection and the *LaGrand* Case', 15 LJIL 87-103 (2002), for a discussion of diplomatic protection in LaGrand.

I shall discuss diplomatic protection in *Avena* by exploring the nature of diplomatic protection and the requirements for its exercise. In particular, the classification of the claim and the local remedies rule will be discussed. I shall show that by not properly distinguishing direct injury from indirect injury and thus did not dealing adequately with the question whether local remedies had to be exhausted the Court has not contributed to the clarity of the issue. This will be done on the basis of the Draft Articles on Diplomatic Protection, adopted by the ILC on second reading.[22]

At the outset, there are two observations to make with regard to this case. First, certain aspects of cases concerning the VCCR, like the *LaGrand* case, the *Avena* case and the earlier *Breard* case,[23] sometimes cause confusion of moral and ethical considerations with legal arguments. Due to the fact that the applicant states in such cases are often protecting their nationals in criminal proceedings in an effort to save their lives, there is more at stake than the mere pronouncement of a judgment establishing a violation of international law, let alone of the VCCR. The irreversibility of the death sentence combined with an element of unfair trial (not having had access to consular assistance) made those states particularly keen to bring the case to the ICJ. The problem is not so much that they did so, but that the circumstances of the case appeal to our compassion and may give a feeling of unfairness. However, this has little to do with the legal complexity of the case. It is true that there are legal rules that are designed to prevent the circumstances Mexico, Germany and Paraguay were protesting against, but the reverse is not true. The fact that states protest against the way in which their nationals are being treated does not necessarily mean that there has been a violation of such rules. The LaGrand brothers and the 52 Mexican nationals were facing the death sentence while their national states oppose the death sentence but that does not imply that international law has been violated. In commenting on such cases, it is highly important indeed to remain focussed on the legal aspects and to set aside personal opinions on the death sentence.

Second, the ICJ is not a court to appeal to for a judgment on the extent to which the deprivation of consular assistance has influenced the trial at the local level. The Court may decide that there has been an internationally wrongful act and may decide on the proper remedies for this act, but it is not in a position to decide that Mexican nationals have been sentenced to death *because* they did not have consular assistance or that it would have been otherwise if they had.[24] This is mere speculation, and not something the Court should spend time on.

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22 Draft Articles on Diplomatic Protection, adopted on 8 August 2006.

23 *Case Concerning the Vienna Convention on Consular Relations* (Paraguay *v*. United States of America). Application submitted on 3 April 1998, but the case was discontinued at the request of the applicant on 10 November 1998. See ICJ Reports 1998, 426.

24 *Avena*, at 60 (paras. 122-123).

Finally, for the purpose of this Chapter, the following should be noted. The 52 Mexican nationals listed in paragraph 16 of the judgment were not all in the same position. Only three of them had exhausted all judicial remedies available. For the majority various judicial remedies remained theoretically available. Some had been convicted and sentenced by a trials court and had not entered into the automatic appeals or post-judgment proceedings, others were denied such appeals but had their cases pending before various other courts ranging from a federal or state court of first instance to the supreme court of the state in which they were brought to trial or even the United States Court of Appeals for the Fifth Circuit.[25] The Court does acknowledge these differences,[26] but they do not play a major role in the judgment. For the discussion on the application of the local remedies rule below it is however important to keep this in mind.

2 THE BASIS OF DIPLOMATIC PROTECTION IN AVENA

Since the Court established the existence of individual rights under VCCR in *LaGrand*,[27] Mexico had good reasons to rely on those individual rights in its application. However, the admissibility of Mexico's claims based on the violation of the rights of its nationals is less clear-cut than in *LaGrand*. This lack of clarity is mainly caused by the classification of the claim, the conditions for the exercise of diplomatic protection, and the extent to which Mexico fulfilled these conditions. Much attention is drawn to this in the various opinions accompanying the judgment, although the opinions do not sufficiently clarify the issue.

Diplomatic protection is one of the oldest rights in international law and its existence is not disputed. Still one of the most important authorities on the issue, Borchard stated in 1919 that 'the state has … in international law, a right against other states to protect its citizen abroad. This international right is universally admitted'.[28] It has been used and defined in numerous international judgments and decisions.[29] The standard rule, as reflected in the ILC's Draft Articles on Diplomatic Protection, is that a state may exercise its right to diplomatic protection if an internationally wrongful act has occurred in respect of one of its nationals and if this national has exhausted local

25 *Avena*, Application Mexico of 9 January 2003, Section D, paras. 67-267.
26 *Avena*, at 27 (para. 20).
27 *LaGrand*, at 494 (para. 77).
28 E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29.
29 From the PCIJ Cases like the *Mavrommatis Palestine Concessions* Case (Greece *v.* United Kingdom), PCIJ Series A, No. 2 and the *Panevezys-Saldutiskis Case* (Estonia *v.* Lithuania) PCIJ Series A/B/ no. 76 to the *ELSI* Case. Currently the *Ahmadou Sadio Diallo* Case (Republic of Guinea *v.* Democratic Republic of the Congo) which is also based on diplomatic protection is pending before the ICJ.

remedies.[30] In doing so, a state espouses the claim of its national due to indirect injury to the state, the fiction being that an injury to a national is considered an injury to the state.[31] The nationality of the claim and the local remedies rule only apply to such indirect injuries and not to direct injuries.[32] Thus, if Mexico is basing its claim on diplomatic protection, and it partly does,[33] it must prove that the individuals concerned have Mexican nationality and that local remedies are exhausted. For the purpose of this Chapter, we shall accept the Court's dictum on the nationality of the individuals concerned and assume that they were indeed of Mexican nationality.[34] We shall also not enter into the question of burden of proof with regard to the question of dual nationality.[35] However, the question of exhaustion of local remedies is more complicated, as is the nature of the injury towards Mexico. First, the nature of the injury will be defined and then, based on these findings, the local remedies rule will be applied.

A. Direct and indirect injuries under the VCCR

The law on state responsibility shows that a state may hold another state responsible for internationally wrongful acts.[36] The violation of a treaty, including a violation of the VCCR, may constitute such an internationally wrongful act.[37] State responsibility on the part of the United States for breaches of the VCCR, and thus the admissibility of the claim, is not disputed as far as it results in direct injury to the state of Mexico.[38] However, there is a difference between such direct injury and indirect injury to a state. The breaches of those provisions under the VCCR that have been identified as constituting individual rights, in particular Article 36 (1) (*b*),[39] are of a different nature. Although these individual rights are contained in a treaty (binding states, not individuals), they do not cause direct injury *per se*. It is primarily not the state that suffers from not having had access to consular assistance.

30 Draft Articles on Diplomatic Protection, Arts. 1,3 and 14.
31 See *supra* Chapter I on the legal fiction in diplomatic protection.
32 See also I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 472 and Dugard, Second Report, at 10.
33 *Avena*, at 20-22 (paras. 13 (memorial)), at 22-24 (para. 14 (oral submissions)), and at 35-36 (para. 40 (final submissions)).
34 *Id.*, at 41-42 (para. 57).
35 *Id.*, at 40-41 (paras. 54-56) and Separate Opinion of Judge Parra-Aranguren, at 86-88 (paras. 11-15).
36 See Articles on State Responsibility in: ILC Report 2001, at 63.
37 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, at 228.
38 *Cf. LaGrand*, at 481-482 (para. 39).
39 *Id.*, at 494 (para. 77).

The Court did not consider the issue caused by this difference. It readily accepted that diplomatic protection was not the sole basis of Mexico's claim and declared that the injuries suffered by its nationals thus did not need to be claimed through the channel of diplomatic protection.[40] The Court found that the VCCR creates special circumstances through the 'interdependence of the rights of the State and of individual rights', an interdependence already established in *LaGrand:* 'Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection'.[41] This interdependence or 'interrelatedness' is supposed to exist between Article 36 (1) (*b*) as an individual right on the one hand and Article 36 (1) (*a*) and (*c*) as state's rights on the other. Those rights do not exist separately, but should be seen as parts of one régime for consular protection. It is by virtue of this régime that a violation of Article 36 (1) (*b*) necessarily entails a violation of Article 36 (1) (*a*) and (*c*). Mexico therefore

> may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered *both directly and through the violation of individual rights conferred on Mexican nationals*….[42]

It was accordingly not necessary to exhaust local remedies and the Court would not 'deal with Mexico's claims of violation under a distinct heading of diplomatic protection'.[43]

For various reasons, to be explained in what follows, this is one of the core passages of the judgment and also one of the most problematic.[44] The Court did not take up Mexico's claim under diplomatic protection. However, a closer look at the facts of the case and its legal background shows that the normal procedure for the protection of the individual rights of the Mexican nationals would have been diplomatic protection.[45] The Court tried to establish a special legal régime that would constitute an exception to the standard practice. The desirability of such an exception will be discussed below. I suspect the Court did this because it would otherwise have been compelled to investigate the exhaustion of local remedies for all 52 Mexican nationals.[46] It would possibly have had to declare the claim partly inadmissible and it therefore would not have been able to judge on the merits with regard to the violations of the

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40 *Avena*, at 35-36 (para. 40).
41 *LaGrand*, at 492 (para. 74).
42 *Avena*, at 35-36 (para. 40 (emphasis added)).
43 Ibid.
44 It is also indicative that all separate opinions attached to the judgment without exception comment on para. 40 of the judgment.
45 This point is made in two of the *Separate Opinions* attached to the judgment: Judge *ad hoc* Sepulveda at 106, para. 21 *ff.* and Judge Tomka at 95, para. 7.
46 See Introduction to this Chapter.

individual rights. However, the wish to render judgment on a certain issue should not lead to a failure to properly consider the legal issues involved.

B. Classification of mixed claims

The issue ultimately comes down to the classification of the claim and thus to the question whether the violation of individual rights can be seen as a direct injury to the state of nationality of the injured individual. As we have seen, the Court did not really consider this question and decided that Mexico was directly injured. The original application by Mexico however was a 'mixed claim', which implies that both direct and indirect injuries were present. As pointed out by the ILC's special rapporteur on diplomatic protection, John Dugard, it is 'in practice difficult to decide whether the claim is "direct" or "indirect" where it is "mixed"'.[47] He describes various methods for the determination of the claim as direct or indirect. There is no clear agreement on which method to apply and certain examples are being used to support more than one method.[48] In all tests it is ultimately the Court (or tribunal) that makes the decision. In the following, I shall discuss various methods in relation to this case.

At the outset it is obvious that the facts of this case all related to Mexican nationals. The only violation that caused direct injury beyond doubt is the fact that the United States prevented the Mexican consulate from providing for consular assistance by not notifying the consular posts of the detention of Mexican nationals. However, the fact that the Mexican nationals were not informed of their rights and the subsequent violation of the provision of the VCCR that guarantees full effect to those rights are not *prima facie* violations that cause direct injury. Quite to the contrary, *prima facie* they cause indirect injury. The Court's construction to classify them as direct injuries through the interdependence of the rights contained in the VCCR seems artificial: what is exactly the difference between an indirect injury and an injury through nationals? Indeed, the phrasing 'both direct and through the violation of the individual rights'[49] suggests that there is a difference. Considering that the Court first decided in paragraph 40 that the different sub-paragraphs of Article 36 (1) constitute one régime that should be treated as a unity and that a violation causes direct injury, it is remarkable that at other stages in the judgment the Court does seem to separate the sub-paragraphs. To start at the end, in the *dispositif*, the Court clearly distinguishes the violation of the rights of the Mexican nationals under Article 36 (1) (*b*) and those of Mexico under

47 Dugard, Second Report, at 10.
48 *Id.*, at 11.
49 *Avena*, at 35-36 (para. 40).

36 (1) (*a*) and (*c*).[50] What is more, the Court even distinguished between (*a*) and (*c*): a violation of 36 (1) (*a*) was established in 49 cases while a violation of 36 (1) (*c*) was found only in 34 cases.[51] The Court had established these differences earlier, in paragraph 106 of the judgment, where it analysed the consequences of failing to inform the Mexican nationals and found that Mexico had not in all cases effectively been prevented from providing legal assistance. In some cases in which the Mexican consulate knew about the detention of a national by other means than official notification, the Court found that it had been possible to provide legal assistance and that therefore there had not been a violation of the VCCR in that respect.[52] Although the Court found it 'necessary to revisit the interrelationship',[53] it then decided to deal with the sub-paragraphs separately. This shows that the violation of Article 36 (1) (*b*) can be distinguished from the violation of the other sub-paragraphs, notwithstanding an 'interrelationship'. Indeed, it should have been dealt with 'under a distinct heading of diplomatic protection'.[54] In the following I shall show that this part of the claim should be regarded as the dominant, or preponderant, part of the claim through discussing the various methods for classification of claims.

B.1 Sine qua non

The first method to be considered is the *sine qua non* test.[55] This test asks 'whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national'.[56] In other words, would the claim have been brought if the national were not injured? Applying the *sine qua non* method, it is highly questionable whether Mexico would have brought the claim before the Court if none of its nationals had suffered from not being informed of their rights. One could think of the situation in which they were all released on other grounds without having received consular assistance. This, of course, is speculation because

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50 *Id.*, at 71-73 (para. 153) under 4, 5, 6 and 7.

51 One remark must be made here. The United States argued that there was no violation of Article 36 (1) (*c*) in many cases as Mexico knew about the detention through other channels (Memorial United States, para. 7.15). This argument, although perhaps valid in practice, must be rejected in principle. If accepted it allows the United States to benefit from its own mistake: *ex injuria jus non oritur*.

52 *Avena*, at 53-55 (para. 106).

53 *Id.*, at 52 (para. 99).

54 *Id.*, at 35-36 (para. 40).

55 Without explicitly referring to it, Judge Parra-Aranguren in his Separate Opinions seems to apply this test in para. 28 (at 91) of this opinion when he submits that 'Mexico would not have presented its claim against the United States but for the injury suffered by its nationals'.

56 Dugard, Second Report, at 11.

Mexico did bring the case before the Court. However, while many countries have difficulties meeting the requirements of the VCCR, there are not that many inter-state disputes with relation to this Convention in which states are eager to assert their own rights. If the matter is settled in a manner that is satisfactory to the foreign national or the foreign state, the issue is usually dropped. It is my submission that the fact that the Mexican nationals were facing the death sentence (combined of course with the favourable outcome of the *LaGrand* judgment) formed the major incentive for Mexico's application. Honourable as this may be, it does indicate that the injury was in fact primarily indirect.

B.2 Preponderance

The other major test is the 'preponderance test', where the Court has 'to examine the different elements of the claim and to decide whether the direct or the indirect injury is preponderant'.[57] In the Separate Opinions to the judgment of both Judge Parra-Aranguren and Judge Vereshchetin reference is made to this method.[58] For the application of the preponderance test, one has to weigh the elements of the claim and see whether the direct or the indirect parts are most important. Judge Vereshchetin concludes that '[d]irect injury to Mexico could arise only after the violations of the rights of its nationals'.[59] This conclusion is, however, difficult to support. There is no reason to assume a temporal sequence. The direct and the indirect injury and thus the violations of state and individual rights have arisen simultaneously: by not informing the Mexican nationals of their rights, Mexico is deprived of its rights as well. The VCCR does not give a hierarchy and there is no suggestion that the rights of the national state can only be violated *after* a violation of the national's rights. However, the seriousness of the violation of Mexico's rights is enhanced by the fact that injury was predominantly suffered by its nationals. The injury to the Mexican nationals would thus be the main element of the claim. Admittedly it is difficult to weigh those elements against each other. It is my submission however that the facts underlying the claim based on direct injury are those connected to the injury to the Mexican nationals. Therefore, in following Dugard,

57 *Id.*, at 11.
58 Separate Opinion Judge Parra-Aranguren, at 90-91, paras. 27-8 and Separate Opinion Judge Vereshchetin, at 81-83. paras. 7-11.
59 Separate Opinion Judge Vereshchetin, at 82, para. 7.

> if … the claim would not have been brought but for the injury to the national, this evidence will usually demonstrate that the claims is preponderantly indirect.[60]

This is supported by Amerasinghe. He argues that one should not look at the nature of the claim, but at 'the nature of the injury or right violated on which the claim is based'.[61] If the claim is in essence based on a violation, regardless of whether this is a violation of a treaty, that injures a national and if the state is seeking to protect this national, then the claim must be regarded as preponderantly indirect.[62] Although Mexico's claim was truly mixed, the essence of the claim was the protection of its nationals.

Thus, both the *sine qua non* and the preponderance test would suggest that Mexico's claim was based on indirect injury. Judge Parra-Aranguren came to the same conclusion, but his line of reasoning is not entirely clear. In interpreting paragraph 40 of the judgment he stated that 'Mexico's claim is a "mixed" claim…as recognized in paragraph 40 of the judgment'.[63] However, if the Court had acknowledged that the claim were mixed in the sense of Dugard's Second Report, as Judge Parra-Aranguren suggested, then the Court would also have had to determine which element of the claim was the dominant element. There is no sign that the Court indeed first considered the direct and the indirect injury and then concluded that the direct injury was the main basis of the claim. Quite to the contrary, the Court only accepted the direct injury and left out the indirect part. It treated the parts of the claim that were strictly speaking based on indirect injury as part of the claim based on direct injury. The complete lack of any distinction made by the Court shows that the Court did not consider this question.

B.3 Nature of the remedy and subject of the dispute

There are other elements in Mexico's claim pointing towards indirect injury. As Dugard suggests, the '*nature of the remedy* sought by the claimant state' is a further indication of the nature of the claim.[64] A declaratory remedy will point to direct injury while actual remedies for the individuals concerned point to indirect injury. In *Avena* the remedies sought were of both kinds. Mexico

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60 Dugard, Second Report, at 12. This indicates that distinguishing the preponderance test from the *sine qua non* test is not always possible. There is a grey area between the two tests and the outcome of the tests is sometimes used to suit opposing purposes. The ILC tried to solve the matter in Article 14(3) of the ILC Draft Articles on Diplomatic Protection, but that Article only specifically mentions the preponderance test and does not indicate how this should be determined.

61 C. Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 163-4.

62 *Id.*, at 164.

63 Separate Opinion Judge Parra-Aranguren, at 90-91, para. 27.

64 Dugard, Second Report, at 13 (emphasis in original).

not only asked the Court to adjudge and declare that the United States violated the VCCR but also, and more importantly, remedies directly related to its nationals. In its fourth, fifth, sixth, seventh and eight submissions, Mexico requested almost all possible remedies: not only *restitutio in integrum* and restoration of the *status quo ante* but also the promise that violations of Article 36 VCCR shall not affect subsequent proceedings, meaningful and effective review and reconsideration of the convictions and sentences and a cessation of the violations towards Mexico and its nationals and guarantees for non-repetition respectively. These submissions all were actual remedies for the individuals concerned. Apart from the fact that Mexico would derive satisfaction from the knowledge that its nationals have been given some redress, it cannot be regarded as a remedy for the injury to Mexico proper.

Only a test based on the subject of the dispute may indicate direct injury in *Avena*. To cite Dugard, 'in most circumstances, the breach of a treaty will give rise to a direct claim unless the treaty violation is incidental and subordinate to an injury to the national'.[65] In this case, the treaty violation is not incidental in that it did not entirely depend on the individual Mexican nationals but also on a systematic non-compliance with the requirements under the VCCR by the United States. In addition, I would not suggest that the direct injury to Mexico was strictly speaking subordinate to the injury to the Mexican nationals. Although Dugard does not clearly specify what constitutes an injury that is incidental or subordinate, the question to be answered here is whether the state brings a claim purely for its own interest and not that of its national or whether its interests are less important than those parts of the claim brought on behalf of its national.

In *Avena*, it may be true that the facts underlying the direct injury were the same as those underlying the indirect injury and that this does support the *sine qua non* test, but it would be wrong to assume that the direct injury were therefore less grave particularly with regard to the pattern of violation. Although the Court in this respect observed that 'there is no evidence properly before it that would establish a general pattern',[66] one should also keep in mind the clear statement in paragraph 151 of the judgment indicating that

> the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.[67]

65 *Id.*, at 12.

66 *Avena*, at 68-69 (para. 149).

67 *Id.*, at 69-70 (para. 151), or the Declaration of President Guillaume attached to *LaGrand*: 'Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph', *LaGrand*, at 517.

The Court may have had many intentions with this statement, but it is likely to imply that the Court did not consider this a unique incident. Even if it is impossible to find a general pattern, the number of violations *vis-à-vis* Mexico is remarkable. It would allow the claim to transcend the individual level and to be truly a claim in the interest of the state. However, I do not think Mexico would have brought the claim if the injury to its nationals were less grave.[68] Some support for this position can be found in the fact that while Mexico does mention other cases of violations of the VCCR not involving the death sentence in its Memorial,[69] this was not again referred to it in the pleadings and was not taken up by the Court. It would thus go too far to define the entire claim as a direct claim only based on this argument, taking into consideration that the mere violation of international law (whether or not this is a repetitive violation) does not necessarily lead to direct injury. In the *Interhandel* case the Court found that the local remedies rule could be applicable notwithstanding the violation of international law being the subject of the dispute.[70] The applicability of the local remedies rule in this case indicated indirect injury. In discussing state practice on the issue of direct injury arising from violations of international law, Amerasinghe clearly shows that

> the views expressed by states that a violation of an international judgment, an international treaty or international law *per se* results in a direct injury must be regarded as being in conflict with the accepted view of the law.[71]

In order to determine whether the subject of the dispute is a direct or an indirect injury, one would have to look at the nature of the violation of international law and then apply again the preponderance test. As shown above, the indirect injury to Mexico through injury to its nationals was indeed very present in the claim.

The classification of the claim as direct or indirect is of considerable importance to the proceedings and the outcome of the judgment. Although the Court in *Avena* did try to classify the claim as a direct claim, it did not do so carefully enough, causing much confusion. It may have been a wise decision to accept the injury to Mexico as a direct injury in an attempt to force the United States to comply with the VCCR in future. What has to be stressed however is that the lack of reasoning on this subject is a serious weakness of the judgment. The implication of the Court's non-qualification of Mexico's claim may now be that more claims should be regarded as direct claims and consequently that local remedies do not have to be exhausted. This is undesirable for the

68 See above, section 2.B.1.
69 Memorial Mexico, para. 161.
70 *Interhandel* Case, at 6 and Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 155.
71 Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 158.

purpose of dispute settlement and the protection of the individual. If the claim is considered as a direct claim, remedies for the individual are not likely to occur or at least should not be part of the claim.[72] The individual will thus not benefit from the claim. Additionally, an incorrect qualification of the claim may lead to cases that are based on diplomatic protection in disguise. Considering that diplomatic protection is a judicial means to settle disputes it should be explicitly used as such.[73] One should also bear in mind that diplomatic protection has been greatly abused in the past by powerful states to protect their interests in other states.[74] This has lead to tremendous tensions and to the situation in which states are both hesitant to base claims on diplomatic protection (for fear of being accused of abusing their power) and unwilling to accept claims based on diplomatic protection. It has also lead to the adoption of mechanisms to avoid the exercise of diplomatic protection, for instance the Calvo Doctrine. Diplomatic protection can, however, function as a means of improving human rights protection where other mechanisms fail or are not available.[75] This is not to say that diplomatic protection is a human right, but as violations of human rights law are often violations of international law diplomatic protection is a means of responding to those violations. It is essential then that the proper procedures be followed to avoid abuses. Careful consideration of the issue is much appreciated and it is regrettable that the Court did not do so.

C. Exhaustion of local remedies

One of the characteristics of a claim based on indirect injury, contrary to one based on direct injury, is the applicable requirement to exhaust local remedies before the claim can be declared admissible. The requirement to exhaust local remedies, also called the local remedies rule, is a rule firmly established in (customary) international law[76] and an attempt at codification has been made

72 See section 2.B.3. *supra*.

73 One remark must be made at this point. Other means of dispute settlement can be applied by states seeking to exercise their right to diplomatic protection. One could think of negotiations by the Ambassador of a state or the Foreign Minister. Although the discussion of the exercise of diplomatic protection in these kinds of dispute settlements is beyond the scope of this Chapter it should be mentioned that states in these cases also often refrain from classifying the procedure as one of diplomatic protection. As an example could serve the case of Mr. Kuijt, a Dutch national who is imprisoned in Thailand and who has been in pre-trial detention for over 6 years. The Dutch government did try to negotiate on behalf of him, but never claimed that it was exercising diplomatic protection. See *infra* Chapter VI.

74 Dugard, First Report, at 5-6.

75 Dugard, First Report, at 8-10.

76 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 332, and Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 3: 'That the celebrated "rule of local remedies" is accepted as a customary rule of international law needs no proof today, as

with respect to diplomatic protection by the ILC in its Draft Articles on Diplomatic Protection.[77] Mexico's claim was a mixed claim but the local remedies rule also applies to mixed claims as a whole, as was recognized by the Chamber of the Court in the *ELSI* Case.[78] In this case, the United States argued that the local remedies rule would not apply as the subject of the dispute was a bilateral treaty, the violation of which had resulted in direct injury. The Chamber of the Court rejected this argument by considering that it

> has not found it possible to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of [the American companies] Raytheon and Machlett.[79]

Referring to the *Interhandel* Case, the Chamber 'rejects the argument that … there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part'.[80] This judgment shows both the importance of the classification of the claim, as has been argued above, and the resulting consequences for the application of the local remedies rule when parts of the claim do not, strictly speaking, constitute indirect injury. In addition, the Chamber of the Court in the *ELSI* case found that the local remedies rule should not be presumed to be excluded unless the parties to a treaty expressly decided to do so.[81] This underlines the importance attached to the local remedies rule in international disputes.

In the field of diplomatic protection, one of the purposes of the rule is to offer the receiving state the possibility to settle the dispute before it is being raised to international level.[82] This is particularly important as it is a way to prevent premature or unfounded interventions by the state of nationality of the individual, since it forces the individual to resort to means accessible to him first. However, if it has been shown that the foreign national has no means for self-protection left within the local justice system, a state should accept that the state of nationality of the individual may resort to diplomatic protection.

In *Avena* the Court first refrained from classifying the claim as preponderantly indirect, but secondly it did not observe the local remedies rule properly.

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its basic existence and validity has not been questioned'.

77 Draft Articles on Diplomatic Protection, Article 14 (1). See also Dugard, Second Report, at 2-4.

78 *ELSI* case, at 42-44 (paras. 49-53).

79 *Id.*, at 42-43 (para. 51).

80 *Id.*, at 43-44 (para. 53).

81 *Id.*, at 42 (para. 50).

82 This was also argued in the *Claim of Finnish Shipowners against Great Britain in respect of the Use of certain Finnish Vessels during the War* (Finland *v.* Great Britain), 3 R.I.A.A., 1501 (1934).

Applying the rule to this case would not necessarily have resulted in inadmissibility, as the rule is not absolute. It has always been limited to judicial remedies (excluding application to non-judicial or quasi-judicial remedies) and to remedies that would be effective (excluding futile or non-available remedies).[83] If these conditions cannot be fulfilled, local remedies do not have to be exhausted. Borchard already acknowledged this: 'the exceptions to this requirement of exhausting local remedies occur … where the local judicial organization is so corrupt, or the possibility of local remedy so remote, that it would be folly to compel a citizen to submit its cause of action to local courts'.[84] In addition, various judgments and decisions show that the rule is not absolute. Just to give two examples, as early as in 1934 the arbitral tribunal in the Finish Ships Arbitration decided that remedies do not have to be exhausted if the operation of domestic law prevented relief from the outset: 'the remedy must be effective and adequate'[85] and 'the local remedies rule does not apply where there is no effective remedy ... e.g. where there is no appealable point of law in the judgment, but also cases where on the merits of the claim recourse is obviously futile, e.g. where there may be appealable points of law but they are obviously insufficient to reverse the decision of the Court of first instance'.[86] In the ELSI case the situation was slightly different, as the American companies could possibly have brought the claim on the local level, but the Chamber of the Court nevertheless decided that if the claim had been brought in essence, even if the FCN Treaty was not mentioned specifically, the local remedies must be presumed to be exhausted.[87]

In the present case, the Court rejected the United States' objection to the admissibility of Mexico's claim, that the Mexican nationals had failed to exhaust local remedies and that Mexico thus could not bring the claim.[88] The Court could have chosen two lines of reasoning for doing so. First, the Court could have accepted Mexico's argument that the local remedies available to the Mexican nationals were ineffective. Secondly, the Court could have decided that the rule was not applicable because the claim was not based on diplomatic protection. As shown in the previous section, the Court has chosen the second option and declared the rule inapplicable. This may seem to be the obvious choice, but in fact this choice caused more problems than it tried to solve. In paragraph 40 of the judgment the Court began by pointing out that the individual rights under the VCCR are indeed rights that should be claimed under diplomatic protection, but then took a different turn for the purposes of this case and found that Mexico could rely on direct injury and could proceed

83 Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 200.
84 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 285.
85 *Finnish Ships Arbitration*, at 1494. See also Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 206.
86 *Finnish Ships Arbitration*, at 1503
87 *ELSI* case, at 45-46 (para. 58).
88 *Avena*, at 34-36 (paras. 38-40).

without having to show that its nationals had exhausted local remedies. As said before, the Court found that the VCCR creates special circumstances. However, the reference in this respect to the earlier *LaGrand* judgment is problematic, precisely because of the fact that the Court accepted that the German nationals had exhausted the local remedies.[89] Referring to this part of *LaGrand* thus does not support the view that the Mexican nationals are not under the obligation to exhaust local remedies. The reference in *LaGrand* only supports the view that the VCCR contains individual rights and that these may be invoked by the national state of the individual involved, which is exactly what will happen if a claim is based on diplomatic protection: it is

> 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 legal person that is a national of the former State with a view to the implementation of such responsibility.[90]

To summarise, the Court has not established why Mexico did not have to resort to diplomatic protection for the claims under the individual rights of the VCCR and thus, contrary to what it found, has not adequately disposed of the requirement to exhaust local remedies.

C.1 Local remedies and the procedural default rule

What the Court could have done, and in my view should have done, is to approach the local remedies rule differently. It should have started by accepting Mexico's claim in its exercise of diplomatic protection of its nationals. Having dealt with the nationality requirement, the Court would then have dealt with the requirement to exhaust local remedies. There are various ways in which this requirement could have been fulfilled. First, some of the 52 Mexican nationals had exhausted all remedies available and their situation was comparable to the situation of the LaGrand brothers just before their execution. As the Court stated in paragraph 114, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53) had no judicial remedies left and thus fulfilled the requirement. All the other Mexican nationals had 'further possibility of judicial re-examination'.[91] These possibilities are not unqualified though, as it must be a judicial process. Paragraph

89 *LaGrand*, at 487-488 (para. 58-60).

90 Draft Articles on Diplomatic Protection, Article 1.

91 *Avena*, at 57 (para. 113). Note that the discussion on the procedural default rule in this part of the judgment is not concerned with the exhaustion of local remedies, but with the legality of the rule as such, which was challenged by Mexico. However, in discussing the procedural default rule as such, it becomes clear that the Court does find that it bars effective recourse to local remedies.

143 of the judgment can be interpreted as excluding executive clemency procedures in the United States as a part of the local remedies that have to be exhausted.[92] Thus, second, the local remedies available to a certain number of Mexican nationals could have been qualified as not constituting *judicial* remedies properly speaking. Again, this only applied to those Mexican nationals who had no criminal procedures left to which to appeal. Third, the Court could have qualified the judicial remedies available for most of the Mexican nationals as futile or ineffective due to the operation of the procedural default rule. This conclusion can be found in several separate opinions attached to the judgment. Judge Tomka found that

> [I]l aurait ainsi été possible à la Cour de parvenir à la conclusion que le Mexique a démontré que la condition de l'épuisement des voies de recours internes ne s'appliquait pas dans la présente affaire pour ce qui est de la demande présentée dans le cadre de la protection diplomatique.[93]

Judge *ad hoc* Sepulveda elaborated further on the issue and found that

> the application of the procedural default rule … means … that there are no remedies to exhaust, and that the futility rule becomes fully operative.[94]

The procedural default rule creates a 'cloistered legal situation' and thus deprives a foreign national of an effective remedy.[95] In his opinion, the Court should have 'follow[ed] its holding [that the procedural default rule effectively bars the defendant from raising the issue of the violations of his rights under the VCCR] to its ultimate consequences' in particular considering that the situation had not changed since *LaGrand*.[96] In other words, the Court should have accepted the claim under diplomatic protection and should have declared that the local remedies rule was not applicable due to the futility of the local remedies.

A different approach resulting in the inapplicability of the local remedies rule is presented by Judge Vereshchetin. He suggested that the Court should refrain from applying the local remedies rule because the foreign national is on death row. This causes '*special circumstances*' in which the application of the local remedies rule would be unreasonable.[97] However, this is an undesir-

92 Again, this is not in discussing the local remedies rule as such. The Court already required in *LaGrand* that the review and reconsideration of the sentences had to be effective (*LaGrand*, at 513, para. 125). This criterion would likewise apply if the procedure in question were the subject of the local remedies rule.

93 Separate Opinion Judge Tomka, para. 13.

94 Separate Opinion Judge *ad hoc* Sepulveda, para. 22.

95 Separate Opinion Judge *ad hoc* Sepulveda, para. 36.

96 Separate Opinion Judge *ad hoc* Sepulveda, para. 45.

97 Separate Opinion Judge Vereshchetin, at 82, para. 12 (emphasis in original).

able approach of the matter and not one that is supported by international law. As diplomatic protection is a response to a violation of international law, the fact that an individual is sentenced to death and is on death row is not *per se* a reason to exercise diplomatic protection, as these circumstances as such do not constitute a violation of international law.[98] If the death sentence is the result of a violation of international law – e.g. in case of an arbitrary sentence or a denial of justice – the local remedies rule would not apply, but not because a person is on death row but because local remedies in such cases would most likely be futile.

There is one reason for refraining from entering into the question of exhaustion of local remedies. When it comes to deciding upon the futility of the local remedies, a court may find itself in a difficult situation.[99] It may lack knowledge concerning the domestic situation of the respondent state and there questions of burden of proof may arise.[100] This may be an argument for a court to find other ways to settle the dispute without dealing with the local remedies rule. In *Avena* however, there was little reason to expect such difficulties. The Court had already discussed the procedural default rule in *LaGrand*, concluding that the rule rendered appeals to local remedies ineffective.[101] Although the United States had made an effort to improve knowledge concerning the consular rights of foreign nationals, the Court recognized in *Avena* that no fundamental change had been made to the rule.[102] This should imply that again the procedural default rule made recourse to local remedies ineffective and thus not required for the admissibility of the claim. The Court could simply have concluded that the procedural default rule barred effective recourse to local remedies and that the remedies accordingly had to be regarded as exhausted.

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98 There are indications that the death sentence and consequently the death row phenomenon will become contrary to international law. See W. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge 2002. On the other hand, the United Nations Human Rights Committee has only recognised a violation of the International Covenant in cases of death row if this was unduly prolonged, unduly harsh or the result of an unfair trial. Even in the *Soering* case before the European Court of Human Rights (Ser. A, vol. 116, Appl. no. 000014038/88), death row was not regarded as a violation of international law in general but only under the special circumstances of the case. In *Avena* the death sentence as such was not the subject of the dispute and considering the current state of affairs Mexico could not exercise diplomatic protection based on the violation of a rule that is not (yet) a rule of international law.

99 As was acknowledged by the Chamber of the Court in the *ELSI* case, at 47 (para. 63): 'it is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been "exhausted"'.

100 The Chamber of the Court in the *ELSI* case decided that the burden of proof is on the state claiming that the remedies have not been exhausted (at 46, para. 59), but there are other sources establishing a division of the burden of proof between the parties to the dispute. See Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 285-92.

101 *LaGrand*, at 497-498 (para. 91).

102 *Avena*, 57 (para. 113).

3 Conclusion

The violation of the VCCR possibly had serious consequences for the trials and sentences of the 52 Mexican nationals referred to in *Avena*. Although the Court rightly did not enter the question to what extent these violation influenced the trials at the national level, one can easily imagine that consular assistance might have had a positive effect on the procedures and thus one understands the reasons why Mexico brought the claim. As has been shown above however, the preponderance test and other tests referred to lead to the conclusion that Mexico's claim was essentially based on indirect injury inflicted on its nationals. This case was truly a case concerning Mexican nationals. In such situations diplomatic protection would be the right instrument to make a claim based on those violations. It is, however, essential that diplomatic protection be properly applied by ensuring that the requirements are met and that the proper procedures are followed. It is only then that diplomatic protection can offer real redress, especially in cases of violations of individual rights for which other fora are unavailable or ineffective.[103] The question of exhaustion of local remedies thus should have been addressed, but could have been answered in such a manner as to render the claim admissible due to the ineffectiveness of the remedies available to the Mexican nationals.

One could legitimately ask why it would be necessary for the Court to take all the steps that have been suggested in the previous sections. Why classify the claim and then declare that the effective local remedies are exhausted, only to come to the same conclusion, namely that the claim is admissible? After all, without these steps the Court did consider the claim and did find a violation of individual rights *vis-à-vis* the Mexican nationals concerned. However, the ICJ is the institution *par excellence* that should pay attention to the nature of international disputes and to legal reasoning. For the sake of the individuals concerned and the proper administration of justice, as explained in section 2.B.3, the Court should have considered the Mexican claim more carefully. What the Court did in its judgment is particularly striking considering that Mexico did bring the claim under diplomatic protection. The Court however preferred to see it as something else. It turned this case into an example of diplomatic protection in disguise by putting the veil of direct injury over it. This is in a way a re-opening of Pandora's Box that it took so long to close. The past abuses of diplomatic protection by western powers in the 19th and even early 20th century have caused a serious setback. Currently, the ILC is finalizing its Articles on diplomatic protection that should regulate the procedures and prevent the earlier situations of abuse.

103 In this case through the operation of the Procedural Default Rule, but one could also think of those parts of the world that do not have a regional system for the protection of human rights.

As I said above, the Court could have contributed considerably to this development. Although the present judgment leaves the question whether the right to consular notification and communication under the VCCR should be considered as a human right unanswered[104] and although it is thus not submitted that they should be, this case could have been an example of the function of diplomatic protection as an instrument for the protection of individual rights in the modern world.

104 *Avena*, at 60-61 (para. 124). See also *LaGrand*, at 494 (para. 78).

V Diallo and the Draft Articles: application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* case

1 INTRODUCTION

The latest decision of the ICJ involving diplomatic protection is the *Case Concerning Ahmadou Sadio Diallo*,[1] in which the Republic of Guinea brought a claim against the Democratic Republic of the Congo (DRC) in an exercise of diplomatic protection. At the outset, it is clear that the decision is hardly controversial and that in fact not much of it is of prime importance for the development of international law in general or on the issues at hand in particular. Having said that, the case bears witness to some of the developments in this field of law indicated in the previous Chapters, even if the subject of the dispute is not primarily concerned with human rights. The most conspicuous statement in this regard is to be found in paragraph 39 of the decision:

> [o]wing to substantive development in international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection … has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[2]

Indeed, contrary to the opinion of some authors,[3] the mere fact that the Republic of Guinea resorted to diplomatic protection to address the injuries inflicted upon Mr Diallo clearly supports the idea that diplomatic protection can be used to address human rights violations and shows that states can use diplomatic protection as a last resort where their nationals have been unable to secure redress for internationally wrongful acts.

On 24 May 2007, the ICJ issued its decision on the preliminary objections in the *Case Concerning Ahmadou Sadio Diallo*. It its decision the Court declared the claim brought forward by the Republic of Guinea to be partly admissible

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1 *Case Concerning Ahmadou Sadio Diallo* (Preliminary Objections), (Republic of Guinea *v.* Democratic Republic of the Congo), Judgment of 24 May 2007. The case is not yet published. All documents, including the Application, Memorials and Verbatim Records of the Oral Proceedings are available at http://www.icj-cij.org. This Chapter is based on an article which will be published entitled 'Diallo and the Draft Articles, the Application of the Draft Articles on Diplomatic Protection in the *Ahmadou Sadio Diallo* case' in 19 LJIL issue 4 (*forthcoming*).

2 *Diallo*, at para. 39.

3 See *supra* Introduction.

and decided that it could proceed to the merits stage. In its application the Republic of Guinea relied not only on the customary international law rules on diplomatic protection as codified in the ILC Draft Articles on Diplomatic Protection but also on some elements of progressive development as presented in these Draft Articles. In doing so, it invited the Court to discuss some of the Draft Articles. The DRC raised preliminary objections, both questioning the Republic of Guinea's standing with respect to the corporations and Mr Diallo as shareholder and manager and questioning compliance with the local remedies rule on all accounts.

In the Preliminary Objections phase, the Court essentially dealt with these two issues and a number of questions related to these issues. While the parties to the dispute did not always present their arguments in a clear and concise manner, the Court disentangled the materials presented to it and identified two major questions: whether the Republic of the Guinea had standing to present the various elements of its claim and if so whether the local remedies had been exhausted. The claim presented by the Republic of Guinea consisted of three parts. Exercising diplomatic protection, its first claim concerned the injury suffered by Mr Diallo personally when he was imprisoned and subsequently expelled from the DRC. Secondly, it concerned violation of his rights as an *associé* or shareholder of the two corporations owned by him: Africom-Zaire and Africontainers-Zaire. Thirdly, it exercised protection 'with respect to Mr. Diallo "by substitution" for Africom-Zaire and Africontainers-Zaire and in defence of their rights.'[4]

In many ways, this case presents an interesting dialogue between the leading case on protection of corporations, the 1970 *Barcelona Traction* case,[5] the ILC draft articles on the protection of corporations and shareholders, for which *Barcelona Traction* served as a starting point, and the ICJ in applying these rules. At the time, *Barcelona Traction* provided in some respects a progressive view on this matter, but it has since become the standard and development beyond the rules presented there has been limited.[6] In its Draft Articles, the ILC followed *Barcelona Traction* in detail and the ICJ also refrained from questioning its earlier decision. An important distinction between *Barcelona Traction* and *Diallo* is that Barcelona Traction Ltd was incorporated in a third state (Canada) whereas the corporations owned by Mr Diallo were incorporated in the defendant state, the DRC. Yet, the law on protection of corporations and shareholders is still largely derived from the 1970 decision. Not surprisingly,

4 *Diallo*, para 76.
5 *Barcelona Traction*, at 3.
6 See e.g. L.J. Lee, '*Barcelona Traction* in the 21st Century: Revisiting its Customary and Policy Underpinnings 35 Years Later', 42 Stan. J. Int'l. L. 237-275 (2006), at 238. The author argues in favour of development in a different direction, but clearly shows that this has not yet happened.

the DRC relied on *Barcelona Traction* to urge the Court to declare the claim inadmissible since Africom-Zaire and Africontainers-Zaire, like the Barcelona Traction, Light and Power Company, did not have the nationality of the applicant state. The Republic of Guinea for its part argued that the present situation fell within the exceptions spelled out it *Barcelona Traction* and that it could therefore exercise protection "by substitution".

The Court acknowledged, with one exception to be discussed below, the customary status of the rules incorporated in the ILC Draft Articles. Instead of referring to the *Mavrommatis Palestine Concessions* case or remaining silent on the source of the rule of customary law, the Court defined diplomatic protection under customary international law by citing draft article 1.[7] The reference to this draft article is of particular interest if one considers its drafting history. In the ILC Draft Articles adopted on first reading, draft article 1 reflected the language of the *Mavrommatis Palestine Concessions* of which draft article 1 as adopted on first reading was a faithful copy.[8] Even though he was aware of the disadvantages of the *Mavrommatis* formula, the Special Rapporteur initially did not favour re-opening the debate on this draft article,[9] but the comments and observations received from governments[10] and suggestions from other ILC members triggered a substantial discussion on this point. As a result, the wording was changed significantly to bring the definition on diplomatic protection more in line with a modern approach to international law. [11]At the outset, it was, however, not evident that the innovative element of the definition of diplomatic protection, i.e. leaving out the part stipulating that a state was 'adopting in its own right' the claim of its national, would be accepted and it is therefore of particular importance that the ICJ confirmed the status of draft article 1. It repeated this in paragraph 64, where it is stated that the protection of shareholders for direct injury caused to the shareholder is 'no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles'.[12] This statement in addition confirms the correctness of draft article 12, which provides for the exercise of diplomatic protection in case of direct injury to shareholders. The Court also stressed that the requirement to exhaust local remedies only applies to

7 *Diallo*, at para. 39.

8 ILC Report 2004, at 17: 'Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State'. The Commentary also refers to *Interhandel*. See *Ibid.* at 25.

9 Dugard, Seventh Report, at para. 3.

10 In particular those submitted by Italy. See Government Comments and Observations, Add. 2, at 2.

11 See on this issue Chapter I, section 3.B.1.

12 *Diallo*, at para. 64.

legal remedies and not to remedies given as of favour or as of grace, thereby giving support to draft article 14.[13]

In what follows, the decision of the ICJ in the *Diallo* case will be discussed in the light of the ILC Draft Articles, with particular emphasis on the way in which the ICJ applied the elements of progressive development in those Draft Articles. The next section will present a background to the case, present the most important facts and outline some of the limitations to the questions before the Court. The following section will discuss the question of standing of the Republic of Guinea for the various elements of the claim in the light of the relevant provisions of the ILC Draft Articles, which will be followed by a section on the issue of exhaustion of local remedies. A general conclusion will present some observations on the Court's reasoning, or lack thereof, and the implications for the development of the law on diplomatic protection.

2 Background: Doing Business in the DRC

On 28 December 1998, the Republic of Guinea instituted proceedings against the DRC. It claimed the DRC had violated various international rights of Mr Ahmadou Sadio Diallo, who is a Guinean national. More specifically, it claimed the DRC had failed to comply with its obligations vis-à-vis Mr Diallo arising under international human rights law. Mr Diallo had allegedly suffered from unlawful detention, unlawful deprivation of property (both moveable and immoveable), illegal expulsion which prevented him from retrieving his property, and a subsequent denial of justice.[14] In addition to this, the Republic of the Guinea also brought claims for violations vis-à-vis Mr. Diallo's corporations, Africom-Zaire and Africontainers-Zaire. These corporations, which Mr Diallo set up in 1974 and 1979 respectively, had been incorporated in the DRC, with Mr. Diallo as their *gérant* (manager) and their primary business was conducted within the territory of the DRC. By the late 1980s, the corporations met with increasing difficulties with its business partners, which resulted in lengthy litigation procedures, which largely remain unresolved today. These

13 *Ibid*, at para. 47. See also the Commentary to draft article 14, ILC Report 2006, at 72 and below section 4.

14 It is interesting to note that the initial application and annexed memorial were of relatively poor quality. The sources relied on to show that there were violations of the law binding upon the DRC range from the Universal Declaration on Human Rights ('signed and ratified' by the DRC) and the ICJ's decision in the *Tehran Hostages* case to the International Covenant on Civil and Political Rights and Article 2 of the Declaration of the Rights of Man and Citizen of 1789 (see Application, at 30-31). Although not specifically mentioned, it is perhaps fair to suggest that the Republic of Guinea wished to claim that the DRC had violated norms of customary international law, most of which 'is in breach of a peremptory norm of general international law.' (Application, at 31). However, in its subsequent memorial and in the oral phase, the Republic of Guinea employed a number of experienced counsels and presented a much more coherent argument.

primarily concern the payment of debt, destruction of property of Diallo's corporations and breach of contract.[15] There is considerable dispute between the parties on the situation of Africom-Zaire and Africontainers-Zaire, in particular with respect to the status of the litigation, the question of whether these corporations suffered a denial of justice and on whether the actual injuries have occurred. The lack of adequate documentation and clarity regarding the legal framework within which the corporations operated, disputes over the relevance and authenticity of existing documents and a general lack of trust between the parties have not helped to solve these issues. Wisely, perhaps, the ICJ deferred these matters to the merits phase of the proceedings.[16] In 1995, the DRC decided to expel Mr Diallo from its territory and motivated this decision by stating that Mr Diallo threatened the public order in the DRC by his presence and conduct 'especially in the economic, financial and monetary areas'.[17] Initially, the DRC argued that, while the document containing the order to leave the country contained the words 'refusal of entry', it should in reality be considered as an expulsion, the point being that Congolese law does not allow for appeal against a 'refusal of entry'. The Court, however, decided that 'the DRC cannot now rely on an error allegedly made by its administrative agencies at the time'.[18] Indeed, *ex injuria jus non oritur*. It was further disputed what exactly preceded the expulsion and whether the treatment received by Mr Diallo prior to being expelled amounted to inhuman or degrading treatment. The DRC however failed to raise the question of exhaustion of local remedies with respect to the injuries allegedly sustained by Mr Diallo prior to his expulsion and the Court subsequently limited the question to the exhaustion of local remedies with respect to the expulsion proper.[19]

According to the Republic of Guinea, the apparent unwillingness and inadequacy of the Congolese judiciary and the expulsion of Mr. Diallo constituted ample reasons to waive the local remedies rule or to consider it fulfilled.[20] Echoing the Draft Articles on Diplomatic Protection, the Republic of Guinea argued that the remedies were not reasonably available and that Mr. Diallo was manifestly precluded from exhausting them.[21] The Court, however, decided the matter along the lines of *Avena*, as will be explained in section 4. Finally, with respect to the protection of shareholders of a corpora-

15 *Diallo,* at para. 14.
16 *Ibid.*, at para. 59.
17 *Diallo*, at para. 15. See also Memorial of the DRC, at 41 (para. 1.56) and Memorial of the Republic of Guinea, at 30 (para. 2.64).
18 *Ibid.*, at para 46.
19 *Ibid.*, at para. 45.
20 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, p. 18-24 (Thouvenin).
21 The Oral Pleadings refer to draft article 15(a) and 15(d) on pp. 22 (para.13) and 19 (para 6) (Thouvenin) respectively.

tion incorporated in the respondent state, the Republic of Guinea argued that incorporation in the DRC is a prerequisite for doing business there and that therefore draft article 11(b) of the ILC Draft Articles is applicable.[22]

3 Standing for the Protection of Shareholders

The Republic of Guinea's legal interest in protecting Mr Diallo's personal human rights and his direct rights as shareholder is relatively clear. While the protection of shareholders may not be well established in all aspects, *Barcelona Traction* and the subsequent ILC Draft Articles clearly indicate that states can protect the direct rights of their nationals, including their rights as shareholders.[23] Such rights pertain to

> the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation.[24]

The rule formulated in *Barcelona Traction* has been codified in draft article 12 of the ILC Draft Articles. The Commentary explains that the line between the rights of shareholders and the corporate rights, in particular concerning management of the corporation, will not always be clear.[25] Since Mr Diallo was both a shareholder and the manager of his corporations, the Court will be forced, in the merits phase, to make a clear distinction between the rights of Mr Diallo and the corporate rights of Africom-Zaire and Africontainers-Zaire. In addition, as the Court had already indicated, it will be required to distinguish his rights as *associé* from those as *gérant*.[26] The matter is further complicated by the fact that while Africom-Zaire and Africontainers-Zaire have a separate legal personality distinguishable from its *associés* and *gérants* in law, Mr. Diallo in fact impersonated these companies: as the Republic of Guinea pointed out, in various official documents issued by the DRC, reference is made to Mr. Diallo where it in fact concerned his corporations.[27] These will be

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22 *Diallo*, *supra* note 1, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, pp. 33-42. For specific references see pp. 33 (para. 3) and 40 (para. 16) (Pellet).

23 For an extensive analysis of the law on protection of corporations and shareholders, including many references to scholarly work and judicial decisions on this topic see Dugard, Fourth Report.

24 *Barcelona Traction*, at 36.

25 ILC Report 2006, at 67.

26 The terms *associé* and *gérant* are used by both parties in their pleadings and by the Court in its judgment. A *gérant* is a manager while an *associé* is a 'holder of *parts sociales* ("not freely transferable" shares) in SPRLs'. See *Diallo*, at 13-14 (para. 25). Although the Court will decide on the differences in its decision on the merits, they will be comparable to the differences between an executive officer or director and a shareholder.

27 *Diallo*, *supra* note 1, Rejoinder of the Republic of Guinea (7 July 2003), at 23-24 (paras. 1.56-60).

difficult questions to answer, but it is at this stage difficult to predict the outcome.[28] In any event, the Court declared that the Republic of Guinea had standing to protect Mr Diallo's direct rights as *associé*.[29]

A. The application of draft article 11(b)

While the previous point raises interesting questions regarding corporate law and rights of shareholders vis-à-vis corporate rights, the more controversial question in this phase of the claim was the Republic of Guinea's standing to exercise diplomatic protection by substitution for a corporation having the nationality of the defendant state. This case would allow the Court to provide a litmus test on the validity of the exceptions given to the prohibition on such protection in *Barcelona Traction*, which were included in the ILC Draft Articles. These exceptions are stipulated in Article 11, which provides that

> A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:
> (a) The corporation has ceased to exist according to the law of the State of incorporation for reason unrelated to the injury; or
> (b) The corporation has, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that States was required by it as a precondition for doing business there.

The Commentary to this provision explains that it is modelled on the dictum in *Barcelona Traction*, but in a restrictive manner, which is indicated by the negative wording.[30] The debates in the ILC preceding adoption of this provision and its commentary showed diverging views on the desirability of the protection of shareholders' rights. However, the provision that was adopted on second reading is less restrictive than the one adopted on first reading. Initially, Article 11(b) required that incorporation in the defendant state was a precondition *by law* whereas now, as is explained in the Commentary, other forms of pressure to incorporate in the defendant state may equally trigger the application of Article 11(b).[31] The deletion of the words 'under the law

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28 It is to be hoped that, unlike in *Barcelona Traction*, the Court will this time include developments in international law, derived from state practice and *opinio juris*, to determine the questions of rights of shareholders and rights of corporations, of *gérants* and *associés*. See on this point the very critical paper of R.B. Lillich, 'Two Perspectives on the Barcelona Traction Case: the Rigidity of Barcelona', 65 AJIL 522-532 (1971). A similar point was raised by L.J. Lafaro & R.J. Ried (ed.), 'Protection of Shareholder Interests in Foreign Corporations – *Barcelona Traction* Revisited', 41 Fordham Law Review 396-422 (1973), at 416-418.

29 *Diallo*, paras. 64-67.

30 ILC Report 2006, at 58-9 and 65.

31 *Ibid.*, at 65.

of the latter state [i.e. the state of incorporation]' was not only supported by the Special Rapporteur and some members of the ILC, but also by various states in their comments on the Draft Articles adopted on first reading.[32] The question to be answered is thus whether the facts underlying the dispute between the Republic of Guinea and the DRC warrant the application of any of the exceptions to the general prohibition of the protection of non-nationals.

The decision and underlying reasoning of the ICJ in this respect seems fairly straightforward: protection can only be exercised on behalf of nationals; Africom-Zaire and Africontainers-Zaire have been incorporated in the DRC, which also is the state in which they conduct most of their activities. Unless the exceptions formulated in *Barcelona Traction* as reflected in draft article 11 apply, protection on behalf of these corporations by the Republic of Guinea is not admissible. Since the corporations have not ceased to exist (article 11(a)) and since incorporation in the DRC was not a precondition for doing business there (article 11(b)), the exceptions do not apply and this part of the claim is inadmissible.[33] Yet, much can be said about this reasoning.

At the outset, it is submitted that the Court was, in its opinion, choosing the lesser of two evils. It did not wish to reject draft article 11 since it acknowledged the merits of the exceptions provided in this article:

> [t]he theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available … Protection "by substitution" would therefore appear to constitute the very last resort for the protection of foreign investment.[34]

However, it neither wished to declare admissible the Republic of Guinea's attempt to exercise protection on behalf of the corporations 'by substitution'. Therefore, it avoided the question of whether or not draft article 11(b) reflects customary international law by concluding that

> the companies … were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph *(b)* of the ILC draft Articles on Diplomatic Protection.[35]

In doing so, the court chose a very narrow interpretation both of the facts and of the application of draft article 11, as Judge *ad hoc* Mahiou has pointed out in his declaration. While it may not have been necessary to incorporate in the

32 Government Comments and Observations, at 34 (Norway on behalf of the Nordic Countries), Government Comments and Observations, Add.1, at 10 (Belgium and the United Kingdom).
33 *Diallo*, paras. 86-94.
34 *Ibid.*, para. 88.
35 *Ibid.*, at para. 93.

DRC, Africom-Zaire and Africontainers-Zaire were required, under Congolese law, to establish their *siège social* and the administrative centre in the DRC if they intended to conduct most of its business in the DRC. Failure to do so would lead to loss of registration and loss of licence to conduct business in the DRC. According to Judge *ad hoc* Mahiou, Mr. Diallo in reality had no other choice than to incorporate in the DRC.[36] This was also argued by the Republic of Guinea,[37] and the argument required more attention than it received in the present decision. It will be recalled that, whereas the exception to the exclusivity of protection of nationals should generally be applied restrictively, the rule provided for in draft article 11(b) applies to forced incorporation both *de jure* and *de facto*. The situation of Mr Diallo's companies, as described by Judge Mahiou, is somewhere in between: the legal requirement to establish the *siège social* and the administrative centre in the DRC *de facto* required incorporation in the DRC.[38] The Court merely stated that 'it has not satisfactorily been established' that incorporation in the DRC was required.[39] Whereas the applicant naturally has the burden of proof, this is not absolute and it is for the respondent to respond to the proof brought forward by the applicant. In matters concerning national legislation, the burden of proof is often shared,[40] but even if this were not the case in *Diallo*, the statements made by the Republic of Guinea arguing that incorporation was a prerequisite for doing business in the DRC remained unchallenged. Whereas the way in which the parties addressed the issue of local remedies, in particular the absence of argument by the respondent, led the Court to conclude that the argument of the applicant should be accepted, it dismissed the argument on the obligation to incorporate in the DRC with surprising ease.[41] This is very unfortunate, not necessarily because of the outcome but because of the lack of underlying reasoning since as it stands the decision fails to provide any clarity on this issue.

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36 *Ibid*, Declaration of Judge *ad hoc* Mahiou, at para. 10.

37 See *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/51, p. 46-50, paras. 19-28 (Pellet) and again in CR.2006/53, p. 40-42, paras. 16-21 (Pellet).

38 This should be read in conjunction with the provision on nationality of corporations. While the state of incorporation usually will be the state of nationality, an exception can be made if the seat of management and financial control is in another state. So even if Africom-Zaire and Africontainers-Zaire had not been incorporated in the DRC, they might still qualify for nationals of the DRC under draft article 9 of the ILC Draft Articles. See on this further below, section 3.2.

39 *Diallo*, at para. 92.

40 See e.g. *ELSI*, p. 15, at 46 (on the availability of local remedies) and *Avena*, p. 12, at 41-42 (on matters concerning nationality).

41 See *Diallo*, at para. 74: '[t]he Court further observes that at no time has the DRC argued that remedies distinct from those in respect of Mr. Diallo's expulsion existed in the Congolese legal system … and that he should have exhausted them. … Inasmuch as it has not been argued that there were remedies [available] …, the question of the effectiveness of those remedies does not in any case arise'.

B. Africom-Zaire and Africontainers-Zaire's genuine link

Perhaps the reasoning of the Court should be understood in a different manner. In 1955, the ICJ decided that Liechtenstein could not exercise diplomatic protection on behalf of one of its nationals because of the lack of a genuine link with Liechtenstein and the presence of such a link with the respondent state, Guatemala.[42] The genuine link-test, as used by the Court in *Nottebohm* had been abandoned by the ILC in de draft articles as far as natural persons are concerned,[43] but it was retained, in a somewhat different fashion, in the provisions on nationality of corporations. While the most important criterion for the determination of the nationality of a corporation is the state of incorporation, it is not the only criterion:

> When the corporation is controlled by nationals of another State … 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.[44]

In his Fourth Report, John Dugard extensively discussed the question of when states would have standing to protect a corporation and it was clear that this would not always be limited to the state of incorporation.[45] In particular, when the only link between the corporation and the state of incorporation is the act of incorporation, this state is very unlikely to extend protection to the corporation.[46] Therefore, as was suggested in the Fourth Report and retained in the Draft Articles adopted on second reading, an exception is created beyond strict nationality based on incorporation to allow more states to exercise diplomatic protection on behalf of a corporation with which they have a link. In his Fourth Report, John Dugard suggested various options for establishing this link (economic control, *siège social*, majority or predominance of shareholders),[47] but the ILC decided in favour of the 'seat of management and financial control' in draft article 9.

Admittedly, in *Diallo*, the question did not turn on this draft article but on draft article 11(b) and the protection by the state of nationality of the shareholders. Yet the fundamental question was whether protection of the two

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42 *Nottebohm Case* (Second Phase) (Liechtenstein *v.* Germany), ICJ Reports 1955, p. 4.

43 ILC Report 2006, at 32: 'Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case, as an additional factor for the exercise of diplomatic protection, even where the national possesses only one nationality'.

44 ILC draft article 9. See ILC Report 2006, at 52.

45 Dugard, Fourth Report, at 2-20 (paras 1-46).

46 *Ibid.*, at 6 (para. 16). See also J.R. Crawford, 'The ILC's Articles on Diplomatic Protection', 31 South African Yb of Int'l Law 19-51 (2006), at 36-38.

47 Dugard, Fourth Report, at 12-20 (paras 28-46).

companies by the Republic of Guinea against the DRC would be justifiable and in order to answer this question, one should establish whether there exists sufficient allegiance between the protecting state and the protected entity. Draft article 9 and 11 provide for a framework to answer this question. Both provide for exceptions to the rule that the state of incorporation is the state of nationality and that only the state of nationality can exercise diplomatic protection. These exceptions only apply if there are additional factors lessening the status of the state of incorporation. The situation in which the state of incorporation is allegedly responsible for causing injury to a corporation predominantly or entirely owned by foreigners constitutes an example *par excellence* in which there is no protection, which warrants the application of the exceptions.

In finding an answer to the question in *Diallo*, the fact that Africom-Zaire and Africontainers-Zaire were not only incorporated in the DRC but also clearly had a strong link with the DRC and not with the Republic of Guinea, or any other state for that matter, must have influenced the Court in its decision. The Court actually stated that

> [i]t appears natural, against this background, that Africom-Zaire and Africontainers-Zaire were created in Zaire and entered in the Trade Register of the City of Kinshasa by Mr. Diallo.[48]

It would thus not seem justified in these particular circumstances to allow protection of such companies by the Republic of Guinea.

On a final note, an interesting question here is whether this decision reflects the spirit of the regime of protection of corporations and shareholders as provided for in the ILC Draft Articles. While the Special Rapporteur sought to create a legal regime that would be generous towards allowing the protection of natural and legal persons, especially in situations where other mechanisms were lacking, he simultaneously was careful to create such a regime based on existing rules and state practice and to avoid rules that would lead to abuse. For instance, he rejected the argument that there would be a realistic danger of 'nationality shopping' by individuals (natural persons), given the difficulties they generally encounter when changing nationality. Therefore, he was initially not in favour of the continuous nationality rule for natural persons.[49] The continuous nationality rule was however included in the Draft Articles adopted on first reading and maintained on second reading.[50] The opinions of the ILC members in the drafting committee were mixed and it was difficult to obtain agreement. Ultimately, a compromise was found and an additional paragraph was added to the draft adopted on first reading to

48 *Diallo*, at para. 92.

49 See Addendum to the First Report, International Law Commission, 52nd Session, A/CN.4/506/Add.1 (2001), at 13-16.

50 See on the Continuous Nationality Rule *supra* Chapter I, section 3.B.3.

accommodate concerns brought forward by the United States in their comments and observations.[51] For legal persons, in particular corporations, the issue was less controversial. Already in the Fourth Report, Dugard indicated that it is less likely that corporations involuntarily change nationality and that the human rights concerns that apply to natural persons are not relevant for corporations.[52] Throughout the ILC's deliberations on this issue it was clear that the deliberate change of nationality by a corporation to ensure protection was not to be encouraged, which resulted in the adoption of the draft articles preferring the state of incorporation as state of nationality, and in any event not to allow multiple claims, and requiring continuous nationality.[53] Draft Article 11 continues in the same spirit: only under exceptional circumstances will the state of incorporation be by-passed and protection be allowed by another state. In the absence of a deficit to the substantive link between the company and the state of incorporation, protection by another state will not be admissible. Although the ICJ regrettably did not spell out these considerations, its decision thus fits well with the ILC Draft Articles.

4 Expulsion and Local Remedies: non availability de jure or de facto?

As has been indicated above, the Republic of Guinea argued that the expulsion of Mr. Diallo prevented him from exhausting local remedies: he was not allowed to enter the country, and thus could not be expected to exhaust local remedies. The response by the DRC was twofold. First, it argued that Mr. Diallo could have applied for revision of the expulsion and second that he could have asked another person to pursue litigation in his absence on his behalf.

The argument of the Republic of Guinea much relied on the factual circumstances of the case and the *unreasonableness* to require exhaustion of the local remedies. The expulsion from the DRC resulted in the fact that Mr. Diallo could not enter the territory of the Congo to represent himself and his corporations in an attempt to exhaust local remedies. According to the Republic of Guinea, all complaints by Mr. Diallo related to injuries of his rights, which required his presence. The fact that no procedure was conducted after his expulsion should be read as an indication that indeed, Mr. Diallo's physical presence was indispensable.[54] In addition, it was argued that the length of the proceedings in the DRC demonstrated the unwillingness of the judiciary of the

51 ILC Report 2006, draft article 5, at 17-18. For the Commentary to the added paragraph see p. 40. For the US-view, see Government Comments and Observations, at 17-21.
52 Dugard, Fourth Report, at 39-41.
53 ILC Report 2006, at 52-58.
54 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, at 18-19 (Thouvenin).

DRC to address Mr. Diallo's complaints which was aggravated by the many interferences in these proceedings by the Congolese government.[55] The Republic of Guinea in reality asked the Court to apply draft article 15(a) and (d). Article 15(a) provides for an exception to the local remedies rule when local remedies are not 'reasonably available' or provide 'no reasonable possibility of … redress'. The element of reasonableness with respect to the local remedies rule is well established in international law.[56] Article 15(d) on the other hand is an exercise in progressive development and takes this a step further. It provides for situations in which 'it would be manifestly unreasonable to expect compliance with the [local remedies] rule'.[57] Although the ILC refrained from giving a comprehensive list of examples of such situations, the one example given is

> the situation in which the injured person is prevented by the respondent State from entering its territory, either by law or by threats to his personal safety, and thereby denying him the opportunity to bring proceedings in local courts.[58]

It should be noted that the rule requires strict application, as is indicated by the word 'manifestly'. The unreasonableness of the requirement should be evident and clearly established. One cannot but notice the similarities between the example given by the ILC and the situation of Mr. Diallo and it was for good reasons that the Republic of Guinea relied on this rule in its argument.[59] The expulsion order manifestly prevented Mr. Diallo from entering the country and the procedures were undeniably lengthy.

While the Court could have taken the opportunity to discuss this rule and apply it to the present case, it took a different approach. Its line of reasoning was much like the one in *Avena*, where it had held that remedies given as of favour or as of grace do not constitute judicial remedies.[60] Since Mr. Diallo could only apply for 'reconsideration by the competent authority' of his expulsion[61] and since this procedure does not constitute judicial remedy, he had no local remedies left to be exhausted. The Court concluded that the objection raised by the DRC with respect to the exhaustion of local remedies could not be upheld.[62]

Article 14 of the ILC Draft Articles on Diplomatic Protection provides for the local remedies rule and the Commentary to this draft articles stipulates

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55 Ibid., at 19-22.
56 See *supra* Chapter I, section 2.C.
57 ILC Report 2006, at 83.
58 ILC Report 2006, at 83.
59 *Diallo*, Exceptions Préliminaires, Republic of Guinea, (Oral Pleadings), CR 2006/53, at 19 (Thouvenin).
60 *Avena*, at 65-66 (paras. 138-143).
61 *Diallo*, para. 47.
62 *Diallo*, para. 48.

the exception resorted to by the ICJ in *Diallo*: '[l]ocal remedies do not include remedies whose purpose is to obtain a favour and not to vindicate a right, nor do they include remedies of grace'.[63] Since the Court declared the claim admissible only in respect of Mr. Diallo's individual rights and not the protection exercised 'by substitution', it was clear that Mr. Diallo's expulsion prevented him from exhausting local remedies since he was the holder of the rights allegedly violated.[64] The Court's approach did not necessitate a review of the efficiency of the Congolese judiciary nor of the extent of interference by the Congolese government. One could have the same criticism on this line of reasoning as I have expressed in Chapter IV on *Avena*. Yet, the Court's strategy here is justifiable considering the circumstances of this case. Contrary to *Avena*, in which the Court could not only rely on a wealth of information submitted by the parties but also on its findings in *LaGrand*, the situation in *Diallo* was different. The factual circumstances of the case were rather complicated, the Republic of Guinea and the DRC were in disagreement on large parts of the facts and they failed to provide the Court with a clear picture. Considering this lack of clear evidence, the Court may have had no other choice but to adopt the present strategy in which is based its decision on the law in force in the DRC rather than the particular facts of this case.

5 Conclusion

In its decision, the ICJ provided support for the ILC Draft Articles on Diplomatic Protection in relying on these draft articles. In a relatively short judgment, the Court declared the claim of the Republic of Guinea admissible with respect to protection on behalf of Mr. Diallo for injuries of his human rights and his rights as shareholder of Africom-Zaire and Africontainers-Zaire. It rejected the claim on behalf of the latter companies 'by substitution'. The above analysis of this decision reveals that while the Court provided valuable support to some of the draft articles, it postponed important questions to the merits and avoided any pronouncement on the controversial question of protection of corporations by the state of nationality of the shareholders as provided for in draft article 11. The effect of this is that, as with *Nottebohm*, it will be difficult to distillate a general rule from the judgment, which could provide guidance in future disputes. In addition, the Court refrained from an in-depth discussion of the local remedies rule. While understandable from a practical point of view, for the purpose of the development of this rule, this is regrettable. It would have had an excellent opportunity to clarify the concept of reasonableness in this connection.

63 ILC Report 2006, at 72 (footnotes and emphasis omitted).

64 The corporations could have been represented by counsel, not necessarily by Mr. Diallo, even though this may not have been his preference.

This case may not be a high profile case, especially when compared to the decision rendered just a few months earlier concerning the Genocide Convention.[65] Nevertheless, it provides significant support to the developments of the law of diplomatic protection: it is an instrument to be resorted to for the protection of individuals, especially where other mechanisms of protection are not available.

65 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ, Judgment of 26 February 2007, available at http://www.cij-cij.org (not yet published).

VI Restricting Discretion: Judicial Review of Diplomatic Protection

1 INTRODUCTION

Diplomatic protection is one of the oldest rights of a state in international law. The standard rule, as reflected in the International Law Commission's Draft Articles on Diplomatic Protection adopted on second reading, is that a state may exercise its right to diplomatic protection if an internationally wrongful act has been committed against one of its nationals and if the national has exhausted local remedies.[1] Diplomatic protection has been the basis for many international inter-state claims and proceedings, from mixed claims commissions such as the US–Mexican Claims Commission (famous for the *Roberts* and the *Neer* claims) to contentious cases before the Permanent Court of International Justice and, to a lesser extent, its successor, the ICJ. In addition, however, nationals of various states have in the past 30 years, filed complaints against their own national governments for failure to exercise diplomatic protection. The individuals concerned have generally complained of arbitrary detention, unfair trial or other treatment prohibited under international human rights law, such as torture or inhumane or degrading treatment or punishment in a foreign country. In other instances the subject of the claim was deprivation of property and subsequent denial of justice, a traditional foundation for the exercise of diplomatic protection.[2] Referring to the growing importance of human rights and the relative lack of enforcement measures available to individuals for those rights, the applicants have argued that the obligation to provide access to court and an effective remedy under international human rights law should be construed to oblige states to exercise diplomatic protection in case of serious human rights violations. As will be discussed in section two of this chapter, the attitude towards human rights has changed over the years. Increasingly, human rights are considered to be individual rights, giving individuals the corresponding right to claim compliance with those rights or reparation in case of violation of these rights. The analysis of the national judgments will show that this development has influenced the courts' decisions. The states against which the complaints have been filed have invariably

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1 Draft Articles on Diplomatic Protection, Articles 1, 3 and 14, at 1, 2 and 5 respectively. See also ILC Report 2006. This chapter was published as an article entitled 'Restricting Discretion: Judicial Review of Diplomatic Protection' in 75 Nordic JIL 279-307 (2006).

2 See I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 505-522.

been parties to the major UN human rights treaties, such as the International Covenant on Civil and Political Rights, and regional human rights treaties, such as the European Convention on Human Rights and the African Charter on Human and Peoples' Rights. Although no Court has endorsed an applicant's claims in its entirety, Courts have shown a willingness to accept to a limited extent the growing importance of human rights protection and enforcement through active measures by states and governments, in other words through the exercise of diplomatic protection.

Traditionally, diplomatic protection has been regarded as the discretionary right of a state.[3] The logical consequence of this position is that Courts should declare any request for review of action (or inaction) undertaken under diplomatic protection to be non-justiciable as the subject belongs to the discretionary realm of the executive.[4] French judicial decisions between 1904 and 1970[5] show exactly this approach: diplomatic protection is an *acte de gouvernement* and

> submissions by which [the claimants] asked for the annulment of the decision [not to exercise diplomatic protection] ... raise questions which are not capable, by their nature, of being brought before the administrative court.[6]

However, an investigation into more recent other national decisions will show that this view on the nature of diplomatic protection has evolved and indeed has been modified. Surprisingly, without exception, the judges rendering these decisions have entered into the merits of the case. They have acknowledged the discretionary nature of diplomatic protection and the fact that the executive would usually be more suited to the task of assessing the required level and kind of protection, but they have indicated simultaneously that a conclusion to the contrary, that is that the executive failed to exercise this right adequately, should not be excluded *a priori*. For instance, they have held in cases showing arbitrary decision-making, due to inadequate investigation by the executive, or when serious and fundamental human rights violations are at stake, that the refusal to exercise diplomatic protection may be in breach of the government's obligations.

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3 See for instance Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29. See also the Commentary to draft article 2, ILC Report 2006, at 29.

4 See for non-justiciability of acts of the executive: Brownlie, *Principles of Public International Law*, Oxford 2003, at 49-50; M. N. Shaw, *International Law*, Cambridge 2003, at 162; H. Fox, 'International Law and the Restraint on the Exercise of Jurisdiction by National Courts of States', in M. D. Evans (ed.), *International Law*, Oxford 2006, 361-394, at 384 *et seq.*; A. Cassese *International Law*, Oxford 2005, at 99.

5 See generally G. Ress, 'Mangelhafte diplomatische Protektion und Staatshaftung', 32 ZaöRV (1972), at 425-450.

6 *Société Sapvin*, Conseil d'Etat, 25 March 1998, 89 ILR 7.

The question of which law is violated is not always answered clearly: is it national (constitutional) law, in which an obligation towards national citizens is enshrined, is it general international law or is it human rights law, or a combination of these fields of law? Although reference is usually made to international law, the decisions are primarily based on obligations under national (constitutional) law and obligations under international human rights law, thus to a certain extent combining these two fields of law. However, even so these decisions do contribute to the development of international law in the form of state practice. It could even be argued that they are a subsidiary source of law under Article 38(1)(d) of the ICJ Statute.[7]

The way in which national judges have responded to claims based on an alleged right to diplomatic protection is particularly interesting in view of the current discussion in the International Law Commission (ILC). The ILC decided that the topic of diplomatic protection was appropriate for codification and progressive development in 1996.[8] The predecessor of the current Special Rapporteur submitted a Preliminary Report in 1998[9] in which he suggested that diplomatic protection 'is not amenable to judicial review' and that any obligation on the part of the national state is more a 'moral duty than a legal obligation'.[10] The reference to a 'moral duty' echoes the argument presented by Borchard in 1919.[11] Despite acknowledging the findings of the German Constitutional Court in the *Rudolf Hess* decision,[12] the former Special Rapporteur, Mohamed Bennouna, refrained from discussing more recent developments and appeared to endorse the traditional view on the discretionary nature of diplomatic protection.[13] In 1999 the former Special Rapporteur was replaced by the current Special Rapporteur, John Dugard.

In his First Report, the current Special Rapporteur investigated more recent developments and suggested that states should, under certain specified circumstances, be obliged to exercise diplomatic protection. Draft Article 4, as presented in the First Report, provides under paragraph 1 that

> [u]nless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if

7 See H. Thirlway, 'The Sources of International Law', in Evans (ed.), *International Law*, Oxford 2006, 115-140, at 129-130. See also the *Arrest Warrant* case (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, at 23-25 (paras. 56-59).

8 Yearbook of the ILC, 1996, (Vol. II), at 97, para. 248.

9 Bennouna, Preliminary Report, para. 48.

10 *Id.*, para. 48.

11 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29.

12 To be discussed more in detail *infra*, section 3.A.

13 Bennouna, Preliminary Report, para. 48.

the injury results from a grave breach of a *jus cogens* norm attributable to another State.[14]

In the commentary, the Special Rapporteur indicated that although there were differing views on the issue, 'there are signs ... of support for the view that States have not only a right but a legal obligation to protect their nationals abroad'.[15] The proposed Article was to be interpreted as an 'exercise in progressive development'.[16] The discussion in the ILC however showed that this provision was too progressive to be accepted and it was as a result not included in the Draft Articles as submitted to the Sixth Committee on First Reading in 2004. Article 2 of the Draft Articles merely states that 'A State has the right to exercise diplomatic protection in accordance with the present draft articles'.[17]

The Draft Articles adopted on first reading were submitted for consideration to UN Member States prior to the Second Reading. Due to the existing controversy on the precise status and nature of the right to diplomatic protection, it was not surprising that most of the commenting States did not suggest the adoption of the earlier abandoned Article.[18] However, Italy did suggest that a duty to exercise diplomatic protection in case of a violation of a norm of *jus cogens* should be included in the Draft Articles[19] and this proposal received some support from members of the ILC. Consequently, the drafting committee of the ILC discussed the matter again. Although it has not adopted the proposal as suggested by Italy, it did adopt a new Draft Article in an exercise of progressive development. Under the heading of 'recommended practice', this provision, Draft Article 19, encourages states to exercise diplomatic protection, 'especially when significant injury occurred', to have regard to the wishes of the injured individual with respect to the kind of compensation, if any, and to transfer such compensation to the individual.[20] This provision has deliberately been drafted in soft language and thus does

14 Dugard, First Report, para. 74.
15 Dugard, First Report, para. 87.
16 Dugard, First Report, para. 88.
17 The article included in the Draft Articles adopted on first reading has been retained on second reading, Draft Articles on Diplomatic Protection.
18 Indeed, no such suggestion was made by states. See Government Comments and observations, and Government Comments and Observations, Add. 1 and 2 (2006).
19 See Government Comments and observations received, Add.2 (2006)
20 Article 19 reads: 'A State entitled to exercise diplomatic protection according to the present draft articles, should:
a) give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury occurred;
b) take into account, whenever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and
c) transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.' See Draft Articles on Diplomatic Protection.

not create binding obligations. Nevertheless, together with the judicial decisions discussed below it shows that the rights and duties connected to diplomatic protection are developing. As will be argued, these decisions in fact show some support for the initial position of the Special Rapporteur presented in his First Report and the inclusion of the new article 19 in the Draft Articles.

2 Background: Human Rights as Individual Rights

The decisions to be discussed below almost all concern (alleged) violations of obligations under human rights law. The fact that the individuals concerned have been claiming protection against violations of these rights relates to a general development in human rights law from states' rights to individual rights. This development of human rights as individual rights is commonly considered to have started in the aftermath of the Second World War.[21] While pre-war Borchard clearly considered diplomatic protection to be an adequate mechanism for the protection of individual human rights,[22] he still derived the rights of individuals from the rights of their state of nationality:

> in the present state of our civilization, the individual, as a human being, is accorded certain fundamental rights *by all states* professing membership in the international community[23]

and

> whatever rights the individual has in a state not his own are derived from international law, and are due him by virtue of his nationality.[24]

Human rights were thus not considered to be vested in individuals as such but to derive from states as holders of international rights. In addition, human rights were generally considered to be a domestic affair.[25]

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21 See *e.g.*, Brownlie, *Principles of Public International Law*, Oxford 2003, at 529; Shaw, *International Law*, Cambridge 2003, at 253; Cassese, *International Law*, Oxford 2005, at 377. See also the discussion presented in H. J. Steiner and P. Alston (eds.), *International Human Rights in Context*, Oxford 2000, at 324 *et seq*.

22 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 13: 'if these rights of a resident alien are violated without proper redress in the state of residence, his home state is warranted by international law in coming to his assistance and interposing diplomatically in this behalf'.

23 *Id*., at 12 (emphasis added).

24 *Id*., at 13.

25 See on this point for instance the discussion in Steiner and Alston, *International Human Rights in Context*, Oxford 2000, at 127-30.

The horrors of the Nazi régime changed this attitude and lead to awareness that implementation of human rights should not be solely left to the discretion of states. As Steiner has aptly commented on the implementation of human rights,

> the assumption above about the good-faith commitment of all States to a human rights regime defies our knowledge of the world and of the human rights movement's history.[26]

The solution would be to create human *rights* that eventually would become enforceable by the beneficiary of those rights. Some authors have contended that this development would render the mechanism of diplomatic protection futile, as individuals no longer enjoy human rights by virtue of their nationality but by virtue of the fact that states are required to grant enjoyment of human rights to all individuals within their territory irrespective of their nationality.[27] Although this view fails to take into account the relative ineffectiveness of existing human rights mechanisms, it does show that human rights are increasingly considered to belong to the individual rather than his or her national state.[28] As Higgins pointed out 'a human right is a right held *vis-à-vis* a state, by virtue of being a human being'[29] and not *vice versa*.

The conclusion that human rights are increasingly considered as individual rights rather than states rights may not be strikingly revolutionary. Ever since the adoption of the various human right treaties with monitoring bodies we have been accustomed to the individuality of these rights, the European system perhaps being the strongest. The adoption of the 11th Protocol (ETS no. 155) and the subsequent changes to the European Convention on Human Rights form a clear example of this development, as the Convention now obliges all current and future states parties to the Convention to accept individual complaints.[30] It is also interesting to note Garcia Amador's views on this matter.

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26 H.J. Steiner, 'International Protection of Human Rights', in M.D. Evans (ed.), *International Law*, Oxford 2006, 753-782, at 756.

27 G. Gaja, 'Is a state specially affected when its nationals' human rights are infringed?', in L. Chand Vohrah *e.a.* (ed.), *Man's Inhumanity to Man*, The Hague, 2003, at 382; see also Dugard, First Report, para. 17.

28 See critically on implementation and individual enforcement of human rights, Brownlie, *Principles of Public International Law*, Oxford 2003, at 556-7 and Dugard, First Report, paras. 22-32. See also R.B. Lillich 'Editorial Comment: The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who are not Citizens of the Country in Which They Live', 70 AJIL 507-510 (1976), at 509.

29 R. Higgins, *Problems and Process*, Oxford 1994, at 98. See on this point also P. C. Jessup, *A Modern Law of Nations*, North Haven 1968, at 90: 'It is inherent in the concept of fundamental rights of man that those rights inhere in the individual and are not derived from the state'.

30 See also L. Reed, 'Great Expectations: where does the proliferation of international dispute resolution tribunals leave international law?', 96 ASIL Proceedings 219-237, at 221-222 (2002)

In 1956 he submitted his First Report on State Responsibility to the ILC, in which he stated that

> [t]he traditional view [i.e. that 'the private person's status was considered an essential condition of his enjoyment of certain international rights … [and] that these rights should be thought of as identical with, or at any rate inseparable from the rights of the State of nationality'] is *a fortiori* incompatible with the present international recognition of the fundamental human rights and freedoms.[31]

This development has many implications for diplomatic protection, not all of which can be discussed within the scope of this Chapter, which focuses on the reviewability of executive decisions whether or not to exercise diplomatic protection and the ensuing limitation on the discretionary nature of the right to diplomatic protection. To give just a few examples of other implications, Gaja has indicated that focussing on the individual as the holder of rights has as a consequence both that a state cannot espouse a claim against the wishes of the individual and that the individual has a right to reparation, as this rights flows from the violation of an initial right which also rests with the individual.[32] Amerasinghe has also discussed the relation between developments in human rights law and diplomatic protection in his study on the local remedies rule.[33] Although he seems to consider human rights protection and diplomatic protection to be two different mechanisms, he has recognised that 'while valid differences must be accepted, there is every reason why the experience in one area could inform the development of the law in the other'.[34]

3 National Court Decisions: Limiting Discretion

A. The Rudolf Hess decision

Germany has a long-standing tradition of granting its nationals a right to diplomatic protection under its constitution, which contains an explicit pro-

31 ILC Yearbook 1956, Vol. II, p 194 (para. 111).

32 G. Gaja, 'Droits des états et droits des individus dans le cadre de la protection diplomatique', in J.-F. Flauss (ed.), *La Protection Diplomatique, mutations contemporaines et pratiques nationales*, Bruxelles 2003, at 68-69.

33 Amerasinghe, *Local Remedies in International Law*, Cambridge 2004. See for a discussion on the relationship between human rights protection and diplomatic protection for the purpose of the local remedies rule at 64-83 and 430-435.

34 *Ibid.*, at 434.

vision to this effect.[35] However, the constitution does not specify a minimum level of protection to be provided by the government or the kind of diplomatic protection to be expected. One of the first cases in which the (non-)exercise of diplomatic protection was challenged was the *Rudolf Hess* case.[36] In June 1977 Rudolf Hess, sentenced with life imprisonment and detained in the Berlin-Spandau Prison in 1947 for his role in the Nazi régime, instituted proceedings against the Federal Republic of Germany, arguing that the government was obliged to exercise diplomatic protection on his behalf as the circumstances of his detention were contrary to international law. In December 1980 the *Bundesverfassungsgericht* found that the Federal Government was indeed under a constitutional duty to provide diplomatic protection to nationals but that it had a wide discretion in the exercise of this protection.[37] The Court noted that the Federal Government had in fact raised the issue with the governments of the Allied Powers, arguing that 'the frail state of health of the Complainant had ... long justified his release',[38] but that it was considered inappropriate to release Mr. Hess as this 'could raise the question of legality of the judgment of the [Nuremberg] Tribunal.'[39] The Court also noted the intention by the Federal Government to continue its attempts to improve the situation of the claimant, notwithstanding the apparent legality of his detention.[40] Despite its finding that assessment of the precise action to be taken in the exercise of diplomatic protection must be left to the government,[41] the Court did investigate the action undertaken by the German government and found that the government had actually made a considerable effort to improve the situation of the claimant. The fact that this did not have the result desired by the claimant is

> not, of itself, sufficient to give rise to a duty under constitutional law for the Federal Government to take specific further measures of possibly greater scope and consequence.[42]

35 K. Doehring *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes*, Cologne 1959, at 25-47. See also G. Ress, 'Mangelhafte diplomatische Protektion und Staatshaftung', 32 ZaöRV 421?481, at 450 *et seq.*; D. Blumenwitz, 'Die deutsche Staatsangehörigkeit und die Schutzpflicht in der Bundesrepublik Deutschland', in A Heldrich *et al.*, *Konflikt und Ordnung, Festschrift für Murad Ferid zum 70. Geburtstag*, München 1978, at 443 *et seq.*

36 BVerfG, Beschl. v. 16.12.1980 – 2 BvR 419/80, 28 NJW 1499 (1981) and 90 ILR 387-400.

37 90 ILR at 388.

38 *Ibid.*, at 392.

39 *Ibid.*, at 392.

40 *Ibid.*, at 396.

41 *Ibid.*

42 *Ibid.*

The *Rudolf Hess* decision has been interpreted as confirming the view that diplomatic protection is a discretionary right of states and not of individuals.[43] However, this interpretation is flawed as the Court did not dismiss the case as a non-justiciable *acte de gouvernement*. As we have seen, the Court entered into the merits of the case and found that the actions undertaken by the Federal Government were satisfactory. Two conclusions must be drawn. First, the Court has not excluded a finding that under different circumstances the government could be held to have violated its obligations in respect of diplomatic protection. Secondly, the Court seems to have been satisfied with the actions taken by the Federal Government, which may imply that it required a certain minimum standard of government action, albeit undefined.

B. HMHK v. The Netherlands

HMHK v. *The Netherlands*, filed in 1983,[44] concerned a Dutch national who was arrested and detained in Germany after the delivery of narcotics to a German undercover police officer. An agreement preceding the delivery was concluded between the applicant Dutch national and a German undercover agent on Dutch territory, the Dutch authorities having consented to the presence of the German police officer on Dutch territory. The applicant argued that his arrest and detention were the result of abduction with the assistance of the Dutch authorities and that this was contrary to international law. He also argued that the fact that the Dutch authorities had been involved in his abduction should add more weight to the obligation to exercise diplomatic protection on his behalf against Germany. This case was decided in favour of a discretionary right of states to exercise diplomatic protection, the Court stated that under international law the right to exercise diplomatic protection belonged to the state and not to the individual and that the state had a wide discretion in the exercise of this right.[45] No reference to the earlier *Rudolf Hess* decision was made and the Court was generally of the opinion that an analysis of the protection offered was not necessary.

Although this decision supports the traditional view on diplomatic protection,[46] and for that reason differs from the other cases presented, one comment should be made. An explanation for the unwillingness of the Court to consider the level of protection offered can perhaps be found in a final remark made by the Court:

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43 See for instance E. Klein, 'Anspruch auf diplomatischen Schutz?', in G. Ress and T. Stein (eds.), *Der diplomatische Schutz im Völker- und Europarecht*, Baden 1996, at 128-129.

44 94 ILR at 342-346.

45 *Ibid.*, at 345.

46 The case is referred to in Shaw, *International Law*, Cambridge 2003, at 722, note 193, to support the view that there is no individual right to diplomatic protection under current international law.

> K. must be deemed to belong to the large group of Dutch nationals who are detained abroad for drug offences [and] the state cannot be required to accord him preferential treatment. It is, after all, generally known ... that the Netherlands hardly ever co-operates in the extradition of Dutch nationals abroad or in the taking over of the execution of their sentences.[47]

It is submitted that this suggests that another conclusion would have been feasible, had the circumstances been different and not drugs-related. In this case, the Court refrained from entering into a debate on the level of protection that would have been adequate in this case, but perhaps not solely or even not primarily on the ground that diplomatic protection should be considered a discretionary right.[48] As pointed out, the nature of the offence clearly influenced the Court's approach.

C. Comercial F SA v. Council of Ministers

In 1987 a group of Spanish individuals and companies with interests in Equatorial Guinea filed a complaint before the Spanish Supreme Court against the Spanish Council of Ministers for lack of diplomatic protection.[49] The individuals and companies claimed to have suffered violations of international law during and after the decolonisation of Equatorial Guinea. Spain had granted independence to Equatorial Guinea in 1968 and shortly after Francisco Macias Ngema was appointed as President of the new republic. He failed however to maintain law and order and the situation in Equatorial Guinea deteriorated rapidly, not in the least due to the undemocratic nature of the government. After a military coup in 1979 a new government was installed, with Obian Nguema as President, but this government also failed to ensure safety and security for the residents of Equatorial Guinea.

The Spanish individuals and companies, who 'found themselves exposed to arbitrary action by the organs of the newly independent State',[50] resulting amongst others in deprivation of property, argued that the Spanish government had not offered sufficient protection. The Attorney General argued on behalf

47 94 ILR at 345-346.

48 As will be shown below (section 3.5) individual nationals can often rely on standard policies. For the Dutch government, the standard policy was not to make representations in cases involving drug-related offences and the lack of diplomatic protection was in conformity with these policies in this case. This may have influenced the Court in its decision.

49 *Comercial F SA* v. *Council of Ministers* (Case No. 516), Spain, Supreme Court (Third Chamber), 6 February 1987. 88 ILR at 691-697.

50 88 ILR at 694.

of the Council of Ministers that the claim was inadmissible as diplomatic protection was 'the right of a state and not an individual right' and as

> there is no doubt that a State can lawfully decline to grant a request for diplomatic protection, for reasons deriving from the national or international political order.[51]

The Spanish Court however entered into the merits of the case:

> In this connection ... it is of value to outline the facts which led to the alleged damage inflicted on the claimants, not only in order to understand the nature of the problems raised, but also to evaluate the possible consequences of not granting the appellant's claim for compensation.[52]

The Court thus did not accept the Attorney General's contention, but instead reviewed the activities of both the Spanish government and the claimant companies, only to conclude that the claimants had not complied with the required time limit – complaints had to be filed within one year after the critical date. The claim therefore was dismissed, though not as a result of diplomatic protection being an *acte de gouvernement*.[53]

Although this decision is not particularly enlightening with respect to the nature of diplomatic protection, it is significant to note that the course taken by the Court necessitated a review of the facts underlying the claim, while a dismissal on grounds of the discretionary nature of diplomatic protection would have been possible without reference to the particular circumstances.

D. JAAC 61.75 and 68.78

The circumstances of the *JAAC 61.75* decision of 30 October 1996 are rather complicated as the case involved a Swiss company, an Asian society and a subsidiary organ or Specialized Agency of the UN, subsidiary to the General Assembly.[54] It was thus not a complaint by a company about violations of international law by a foreign state, but a complaint against a UN agency. The UN organ had asked the Asian society to supply certain goods, and the Asian society borrowed money from the Swiss company to provide the goods. However, the UN organ had explicitly laid down in its order that the Asian company was not to involve a third party with the effect of creating rights or claims by that third party with regard to the transaction. When the Swiss company claimed its money it was unable to obtain the money from the Asian

51 *Ibid.*, at 694.
52 *Ibid.*, at 694.
53 *Ibid.*, at 696.
54 The facts of the case do not specify the names of the company and the society nor which UN organ was involved.

society and demanded that the UN organ transfer the money directly to the Swiss company. The UN organ refused to do so referring to the provision in the transaction documents. The Swiss company then pursued a claim before a Geneva Court, which decided that the UN organ was required to pay the money to the Swiss company. However, after the judgment was handed down the UN claimed immunity and a higher court reversed the judgment of the Geneva Court granting the UN immunity before local courts. The Swiss company then approached the Swiss Permanent Mission to the International Organisations in Geneva and the Ministry of Foreign Affairs. The government indicated that it could not provide assistance and the Swiss company filed a claim before the *Conseil fédéral*. The Swiss company claimed that it had suffered from denial of justice, prohibited under the Swiss Constitution, due to the fact that the Swiss government refused to exercise diplomatic protection without giving adequate reasons for this decision. It also claimed that it had suffered a denial of justice as the government has violated its obligation to protect the rights of the company abroad.

In the opinion of the *Conseil fédéral*, international law did not provide for an obligation to exercise diplomatic protection and as a consequence the only source for such an obligation could be internal law.[55] After having subjected the relevant Swiss laws to scrutiny, the *Conseil* concluded that Swiss internal law did not provide for such an obligation. According to the *Conseil*, it had to safeguard not only the interest of its individual nationals, but also the interests of the population as a whole under public international law.[56] Moreover, the law did not give nationals the right to demand protection.[57] However, the *Conseil* also found that the Swiss government was not entirely free to act as it pleased as 'la seule limitation imposée à l'Etat dans l'exercice de son pouvoir relatif à la protection diplomatique est l'interdiction de l'arbitraire'.[58] The government's decision not to exercise diplomatic protection would have been arbitrary if its assessment of the facts had been faulted, if decisions had been taken based on unsupported facts or if its decision had been incompatible with rules of law and equity.[59] The *Conseil* felt obliged to establish the relevant facts and applicable law and to analyse the behaviour of all parties involved. It concluded, first, that there had been no violation of international law for which the UN and its subsidiary agency could be held responsible under international law (one of the requirements for the exercise of diplomatic protection) and that diplomatic protection therefore would have been inappropriate; and, secondly, that the government had not acted

55 *JAAC 61.75*, para. 2.1, available at http://www.jaac.admin.ch/franz/doc/61/61.75.html.
56 *Ibid.*, para. 2.2.1.
57 *Ibid.*, para. 2.2.3.
58 *Ibid.*, para. 2.3.
59 *Ibid*.

arbitrarily in refusing to exercise diplomatic protection on behalf of the Swiss Company.[60]

The *Conseil's* conclusion is contradictory. The emphasis on the discretionary nature of the exercise of diplomatic protection is difficult to reconcile with the examination of the actions taken by the respective parties and emphasis on the prohibition on arbitrary decision-making. An *acte de gouvernement* would not normally be considered justiciable and thus entering into the merits of the case would be inappropriate, in particular entering into the question of what measures the government could, and possibly should, have taken to protect its national. As in the *Rudolf Hess* decision, the *Conseil* did not feel restrained to do that. And again, the *a contrario* would be that the government would have breached its obligations had the circumstances been different.

The same approach was taken in *JAAC 68.78* in 2004. The facts of this case are very similar to the facts in the earlier decision: it also concerned a claim by a Swiss corporation, referred to as *Groupement*, against an institution enjoying immunities, in this case the Centre Européen de pour la Recherche Nucléaire (CERN), for non-payment of services rendered by sub-contracted entities. Interestingly, the *Conseil fédéral* did find that the decision by the Swiss government not to exercise diplomatic protection was arbitrary since the claimant corporation had not been privy to the reasons underlying the decision.[61] However, when considering the merits of the case, the *Conseil* was of the opinion that the *Groupement* failed to show convincingly that a breach of international law had occurred and that a third arbitral procedure would be necessary to address this wrong. According to the *Conseil*, the Swiss government was justified in its decision not to exercise diplomatic protection on behalf of the *Groupement*.[62] Similar to the earlier *JAAC 61.75* the *Conseil* entered into the merits of the case and found that, while the decision not to exercise diplomatic protection in itself may have been arbitrarily taken, the decision itself was justified considering the facts of the case and the behaviour of the *Groupement*.

E. Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs

More recently, the Court of Appeal in the United Kingdom considered the issue of diplomatic protection in the *Application of Abbasi & Anor* v. *Secretary of State for Foreign and Commonwealth Affairs & and the Secretary of State for the*

60 *Ibid.*, para. 5.
61 *JAAC 68.78*, paras 3.2-3.3. Available at http://www.jaac.admin.ch/franz/doc/68/68.78.html.
62 *Ibid.*, para. 9.

Home Department.[63] The *Abbasi* decision is not the first British case concerning review of the (non)exercise of diplomatic protection. It thus should be considered in the light of preceding decisions, in particular the *Pirbhai* case[64] and the *Ferhut Butt* case.[65]

The *Pirbhai* case concerned a claim by British nationals who had lost their property in Uganda after having been expelled from that country by General Amin's government. The decision of the High Court, later confirmed on appeal, firmly stated that the decision by the Secretary of State not to intervene on behalf of the British nationals could not be reviewed by the Court. Despite the fact that concern was expressed over the situation of the applicants, it was concluded on appeal that

> [w]hatever the jurisdiction of the court, few would disagree with the proposition that in the context of a situation with serious implications for the conduct of international relations, the court should act with a high degree of circumspection in the interests of all concerned. It can rarely, if ever, be for judges to intervene where diplomats fear to thread.[66]

Diplomatic protection was thus considered to be a discretionary right rather than one to be subjected to judicial review. Although the Court did present its decision as reflecting the general rule, this case, concerning loss of property, must be distinguished from cases involving individual human rights, such as *Abbasi* but also the *Ferhut Butt* case. I shall return to this distinction in the discussion on the *van Zyl* decision (below, section 3.8).

More relevant for the interpretation of the *Abbasi* decision is the *Ferhut Butt* case as the facts of the case bear some resemblance to *Abbasi.* The case was brought by the sister of a British national detained in Yemen on the suspicion of terrorist activities. She claimed that both the trial and the conditions of detention, including allegations of torture and inhuman treatment, were in flagrant violation of international human rights law and that therefore the British government was obliged to exercise diplomatic protection on behalf of her brother and other British nationals detained with him. Although the High Court phrased its concern over the fate of the detained British nationals delicately, it clearly accepted that the situation was the result of 'the most

63 [2002] EWCA Civ 1598, [2002] All ER (D) 70 (Nov) (CA, Civ Div), *see also* 125 ILR 685-726.

64 *Regina* v. *Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Kamrudi Pirbhai e.a.*, High Court, Queens Bench Division, 7 September 1984 and Court of Appeal, 15 October 1985, 107 ILR 462-81.

65 *Regina* v. *Secretary of State for Foreign and Commonwealth Affairs*, ex parte *Ferhut Butt*, High Court, 1 July 1999 and Court of Appeal, 9 July 1999, 116 ILR 607-22.

66 107 ILR at 479.

serious interference with the fundamental human rights of the detainees'.[67] Despite the fact that both the High Court and the Court of Appeal reproduced the correspondence between the applicant and the Secretary of State, showing the level of engagement of the latter, both courts concluded that it is not for a court to review the measures taken. The Court of Appeal, following the High Court, concluded that

> [w]hether and when to seek to interfere or to put pressure on in relation to the legal process, if ever it is a sensible and a right thing to do, must be a matter for the Executive and no one else, with their access to information and to local knowledge. It is clearly not a matter for the courts.[68]

While this conclusion may seem to support the non-justiciability of such claims, it is submitted that the facts of this particular case left the respective judges little room to decide otherwise. The applicant had requested direct interference with the judicial process in Yemen with the view to influencing the course of justice to avoid an adverse verdict. The Court of Appeal dealt with this issue most extensively and found that an order to this effect would constitute an interference with the domestic affairs of a foreign state.[69] The argument that complying with the request of the applicant would constitute an interference with the domestic affairs of a foreign state is closely connected to the requirement of exhaustion of local remedies. In this case, the local remedies in Yemen were arguably not exhausted, at least in the view of the Court.[70] It is not necessary to enter into a detailed debate on the local remedies rule; suffice it to say here that the requirement of exhaustion of local remedies prior to the exercise of diplomatic protection is, at least partly, derived from state sovereignty as it 'warrants the local state in demanding for its local courts freedom from interference'.[71] Since the Court was of the opinion that the local remedies were not exhausted, it found that the exercise of diplomatic protection would be premature and the same would apply to a court decision ordering diplomatic protection. It is in this respect that the Ferhut Butt case must be distinguished from the Abbasi decision. Nevertheless, as will be shown below,

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67 116 ILR at 610, starting the assessment of the situation as follows: '[i]t is not for me to examine the truth of these allegations. I shall assume for the purpose of this application that the allegations are true.'

68 116 ILR at 622.

69 116 ILR at 621-2.

70 116 ILR at 614-5 and 620. Obviously, one could question the effectiveness and adequacy of the remedies available in this case, but an assessment of the Yemenite judiciary falls outside the scope of the present discussion. The Court in any case found 'no evidence nor basis for any submission ... that a fair hearing will not be obtained on appeal.' 116 *ILR* at 615.

71 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 817. See also, Dugard, Second Report and generally Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, (on sovereignty and local remedies: at 62-4).

the Abbasi decision has departed from the non-justiciability of the exercise of diplomatic protection.

Mr. Abbasi, a Guantanamo Bay detainee, argued that the United Kingdom should have exercised diplomatic protection as his detention violated public international law and fundamental human rights, in particular the prohibition on arbitrary detention,[72] a *jus cogens* norm of international law.[73] The Court agreed that Mr Abbasi's treatment was not in conformity with international law:

> in apparent contravention of fundamental principles recognized by both jurisdictions [ie the United Kingdom and the United States] and by international law Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.[74]

The Court was requested to decide whether the exercise of diplomatic protection could be subjected to judicial review and if so whether the British Foreign Ministry could be held to have failed to exercise this right properly. Although the Court did find that international law does not yet recognize a duty to exercise diplomatic protection,[75] it simultaneously rejected

> the position that there is no scope for judicial review of a refusal to render diplomatic assistance to a British subject who is suffering a violation of a fundamental human right.[76]

Constituting a clear departure from the earlier *Ferhut Butt* decision, this may seem slightly incongruous. If there was no duty, why then would the Court allow judicial review? The solution is found in 'legitimate expectation'.[77] As the Court stated,

> the doctrine of 'legitimate expectation' provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion.[78]

72 *Abbasi*, paras. 6 and 22.
73 *Ibid.*, paras. 28-29.
74 *Ibid.*, para. 64. See also para. 107.
75 *Ibid.*, paras. 69 and 79.
76 *Ibid.*, para. 80.
77 *Ibid.*, para. 82.
78 *Ibid*.

If the government has a more or less consistent policy with respect to the protection of nationals abroad, individual nationals may rely on this policy and expect the government to act accordingly.[79]

In addition, the Court found that the 'mere fact that a power derived from the Royal Prerogative did not necessarily exclude it from judicial review'.[80] In particular where the government has made an express policy statement with respect to a subject matter that falls within its discretionary powers, it would be subject to judicial review, notwithstanding the discretionary nature of the decision. With respect to diplomatic protection, the British government had issued express statements on its policies.[81] Although these statements only reveal a certain role, a 'commitment 'to consider' making representations',[82] the Court found that this was sufficient to create a legitimate expectation.[83] As the British government had in fact acted and 'the British detainees are the subject of discussions between this country and the United States', the Court decided that, at this stage, it would not be appropriate for the Court to accept the applicant's submissions. It thus decided to dismiss the application.[84]

However, the Court made it very clear that it did not consider the exercise of diplomatic protection to be entirely within the discretion of the executive. Indeed, it would in certain circumstances 'be appropriate for the court to make a mandatory order to the Foreign Secretary to give due consideration to the applicant's case'.[85] Thus the English Court took the matter one step further than the German and Swiss Courts in explicitly referring to the possibility of a decision to the contrary.[86] It departed from the classification of diplomatic protection as *acte de gouvernement* and further limited the discretion of the executive.

The *Abbasi* decision provides an important and enlightening example of the interpretation of the right to and nature of diplomatic protection. The Court considered other options open to the applicant for claiming violations of his (international) rights and emphasized the importance of the protection of

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79 In this respect it is interesting to note that the judgment referred to the First Report on Diplomatic Protection by the ILC Special Rapporteur. The Report was introduced by Mr. Blake QC on behalf of the applicant, stressing the conclusions by the Special Rapporteur concerning the existence of a duty to exercise diplomatic protection in case of violations of a *jus cogens* norm. See *Abbasi*, paras. 36 and 41.

80 *Abbasi*, para. 83.

81 *Ibid.*, paras. 88-91.

82 *Ibid.*, para. 92.

83 *Ibid.*, paras. 92, 98 and 99.

84 *Ibid.*, paras. 107-108.

85 *Ibid.*, para. 104.

86 See on this point *also* C. Kilroy, '*R.* (on the application of Abbasi) v. *Secretary of State for Foreign and Commonwealth Affairs*: *Reviewing the prerogative*', 2 E.H.R.L.R 222-229, at 229 (2003).

human rights. On the other hand it also weighed the political implications of the case and the reality of the possibilities open to the British government, indicating that it would be unrealistic to expect the government to achieve the impossible (i.e. the immediate release of Mr. Abbasi), but simultaneously stressing that a minimum involvement was to be expected. It is submitted that the *Abbasi* decision clearly indicates that the right to diplomatic protection is not solely and exclusively conferred on the state and that the exercise of diplomatic protection is not at the absolute discretion of government officials but that it is subject to human rights standards and rules of legal certainty.[87]

F. M. K. v. The Netherlands

Mr. Kuijt, a Dutch national, instituted summary proceedings against The Netherlands in 2003.[88] He had been held in pre-trial detention in Bangkok, on suspicion of drug-trafficking, for six years by the time he filed his complaint and he considered this as a violation of his right to a fair trial within a reasonable time and his right to liberty. He complained that the norms violated were part of universal human rights norms entailing *erga omnes* obligations and argued that this implied that the Dutch government had the obligation to take all necessary measures to improve his situation.[89] In particular, he argued that the Dutch Embassy in Thailand should issue a statement, in order to obtain *habeas corpus*, guaranteeing that Mr. Kuijt would not leave Thailand and should do everything to obtain redress from the Thai government for the violation of fundamental human rights. In addition the Dutch government should try everything possible to secure his release.[90] The Court analysed the effort taken by the Dutch government on behalf of Mr. Kuijt and came to the conclusion that his complaint could not be upheld. The government was be unable to dictate to the Thai government how to treat its prisoners, but in addition, the Dutch government had – contrary to its usual approach of nationals detained on suspicion of drug-related offences – tried to influence

87 Mr. Abbasi was returned to the United Kingdom on 25 January 2005, after diplomatic negotiations between the United Kingdom and the United States. He was soon released from custody. The decision in *Abbasi* has recently been confirmed in *Al Rawi* v. *Secretary of State and Commonwealth Affairs and the Secretary of State for the Home Department*, [2006] EWHC 972 (Admin), Case no. CO/10470/2005, available at http://www.bailii.org/ew/cases/EWHC/Admin/2006/972.html. This case also concerned Guantanamo Bay detainees. It is interesting to note that the case was partly brought on behalf of refugees recognised as such by the United Kingdom and thus concerned the question of diplomatic protection for refugees, as provided in Draft Article 8 (see Draft Articles on Diplomatic Protection). A discussion of this topic however is beyond the scope of the present Chapter.

88 *M. Kuijt* v. *The Netherlands*, 18 March 2003, LJN. no. AF5930, Rolno. KG 03/137 (hereinafter *Kuijt*).

89 *Ibid.*, para. 2.2.

90 *Ibid*.

the treatment of Mr. Kuijt by quiet diplomacy.[91] In the final paragraph of the judgment, the Court decided that, although the situation of Mr. Kuijt was a reason for concern, his claims nevertheless had to be dismissed, as they were both too farfetched and too unsubstantiated. Having said that, the Court however concluded that

> it expects the [Dutch government] to continue to take an effort to assist the applicant and to take all possible measures to secure the release of the applicant as soon as possible.[92]

In addition, 'so far it has not been shown that all possibilities have been sufficiently investigated'.[93]

This case concerned both consular assistance and diplomatic protection, as the applicant argued that the Dutch government had failed to meet its obligations under both mechanisms. The Court found with regard to consular assistance that individuals have no right to consular assistance under international law with respect to their national state but it failed to distinguish consular assistance from diplomatic protection. The actions undertaken by the Dutch government on behalf of Mr. Kuijt as described in the judgment however do point to diplomatic protection: diplomatic interventions to the Thai authorities, quiet diplomacy and correspondence between the Dutch and Thai Minister of Foreign Affairs. This lack of demarcation between the two kinds of assistance is not unusual in the Court's practice.[94] As certain activities, in particular those undertaken by an Ambassador or a Minister of Foreign Affairs, should be considered as representing the state rather than the individual, such actions should properly be classified as exercises of diplomatic protection. This includes diplomatic *demarches* and official protests, as described by the ICJ in its *Reparation for Injuries* Advisory Opinion.[95] Since the Court did investigate the activities undertaken by the Dutch government that could properly be classified as diplomatic protection, and thus entered into the merits of the case, the decision is in line with the decisions discussed above. It

91 *Ibid.*, para. 3.6-3.7.
92 *Ibid.*, para. 3.8. (Translation by the Author).
93 *Ibid.*, para. 3.8. (Translation by the Author).
94 See for instance *Van Dam* v. *The Netherlands*, 25 November 2004, Rolno. 02/43.
95 *Reparation for Injuries*, at 177. The definition of the term 'action' for the purpose of diplomatic protection is controversial. Some attention was given to it in the First Report on Diplomatic Protection (Dugard, First Report). See also C. Warbrick, 'Diplomatic Representation and Diplomatic Protection', 51 ICLQ 723-744 (2002). See for this issue *supra* Chapter II.

restricted the discretionary powers of the executive, not in the least by ordering the government to continue its attempts to improve the situation of the claimant.[96]

G. Samuel Kaunda and Others *v.* The President of the Republic of South Africa and others

In August 2004 the South African Constitutional Court gave its decision in the *Kaunda* case,[97] in which the issue of diplomatic protection was discussed extensively, both in the judgment and in the separate opinions. The applicants, who were South African nationals, were detained in Zimbabwe on the charge of conspiracy and the possession of dangerous weapons, allegedly relating to a coup to overthrow the government of Equatorial Guinea. They requested the South African government for diplomatic protection as they claimed that their detention in Zimbabwe violated international norms and they feared extradition by Zimbabwe to Equatorial Guinea and subsequent unfair trials and the death sentence in Equatorial Guinea. They requested the government to

> ensure that their rights to dignity, freedom and security of the person and fair conditions of detention and trial are at all times respected and protected in Zimbabwe and Equatorial Guinea.[98]

The Constitutional Court explicitly dealt with the question whether diplomatic protection should be considered as a (human) right under international law that

> should be developed to recognise that in certain circumstances where injury is the result of a grave breach of a jus cogens norm, the state whose national has been injured, should have a legal duty to exercise diplomatic protection on behalf of the injured person.[99]

Although it recognized that there had been some support for this position in the International Law Commission's debates on the issue, the Court found that

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96 Curiously, this case has taken a different turn as The Netherlands and Thailand have entered into a bilateral agreement on the exchange of prisoners under which Mr. Kuijt was allowed to return to The Netherlands to be detained in a Dutch prison. For the text of this bilateral treaty, see Tractatenblad 2004, p 216.

97 *Samuel Kaunda and Others* v. *The President of the Republic of South Africa, The Minister of Justice and Constitutional Development and others*, Judgment of 4 August 2004, 2004 (10) BCLR 1009 (CC) 2004 SACLR LEXIS 19. See also 44 ILM 173-233.

98 *Kaunda*, para. 3.

99 *Ibid.*, para. 28.

> [c]urrently the prevailing view is that diplomatic protection is not recognised by international law as a human right and cannot be enforced as such. To do so may give rise to more problems than it would solve ... It must be accepted, therefore, that the applicants cannot base their claims on customary international law.[100]

The Court therefore rejected the claim to a right to diplomatic protection under international law.

The Court then investigated the existence of such a right under national law derived from provisions in the South African Constitution and international human rights law. It first turned to the applicable human rights treaties and concluded that a right to diplomatic protection is not explicitly provided for in any of them,[101] and that it cannot be inferred either: 'A right to diplomatic protection is a most unusual right, which one would expect to be spelt out expressly rather than being left to implication'.[102] The Court considered whether, even if diplomatic protection was not an enforceable right in itself, it might be so through other enforceable rights. In particular, the Court considered whether section 7(2) of the South African Constitution, requiring the state to respect, protect and promote the rights contained in the Bill of Rights, could be given extra-territorial effect to oblige the government to ensure respect for the Constitution vis-à-vis its nationals, even when they were in a foreign country.[103]

The Court found that it would be an interference with the sovereignty of other states to demand a right to diplomatic protection through the national constitution: 'when the application of a national law would infringe the sovereignty of another state, that would ordinarily be inconsistent with and not sanctioned by international law'.[104] More specifically,

> to assume an obligation that entitles [South African] nationals to demand, and obliges [the South African government] to take action to ensure that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own law, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty.[105]

This view is however not entirely convincing. The exercise of diplomatic protection is never an interference in state sovereignty, unless it is inappropriate due to the fact that the requirements are not met (when no violation

100 *Ibid.*, para. 29.
101 *Ibid.*, para. 34.
102 *Ibid.*, para. 35.
103 *Ibid.*, para. 36.
104 *Ibid.*, para. 40.
105 *Ibid.*, para. 44.

of international law has occurred, local remedies have not been exhausted or the individual involved does not have the required nationality). The violations complained of by the applicants in *Kaunda* were violations of international human rights law and did not per se require extra-territorial application of South African Constitutional law. They could easily be founded on provisions in the human rights treaties, to which all relevant states, i.e. South Africa, Zimbabwe and Equatorial Guinea, were parties. Thus the extra-territorial application of the South African Constitution could have been avoided. The conclusion that a right to diplomatic protection which arises from the violation of human rights, whether contained in a national constitution or in an international treaty, would violate another state's territorial sovereignty is thus difficult to reconcile with the nature of diplomatic protection.

Having rejected the argument that the government had a 'particular duty to protect' in view of the alleged involvement of the South African government in the arrest and detention in Zimbabwe,[106] the Court turned to consider whether a right to diplomatic protection existed under section 3 of the South African Constitution, which provides that South African citizens are 'equally entitled to the rights, privileges and benefits of citizenship'.[107] Although the Court again rejected the position that there is a right to diplomatic protection, it found that South African nationals 'are entitled to *request* South Africa for protection under international law against wrongful acts of a foreign state'.[108] It continued by stating that '[individual nationals] are not in position to invoke international law themselves and are obliged to seek protection through the state of which they are nationals'[109] and that 'the citizen is entitled to have the request considered and responded to appropriately'.[110]

In their respective separate opinions, both Judge Ngcobo and Judge O'Regan disagreed with the Court on this point. Although they both concurred with the Court in its conclusion, they held different views with respect to the existence of an individual right to diplomatic protection and the corresponding duty to protect. They were both of the opinion that the Court should have held that the South African Constitution does contain an obligation to provide for diplomatic protection in certain cases.

Judge Ngcobo suggested that

106 *Ibid.*, paras. 45-53. This line of argument was also introduced by the applicant in the *HMHK* v. *The Netherlands* case, see *supra* section 3.B.

107 Section 3(1) of the South African Constitution, as cited in *Kaunda*, para. 58.

108 *Kaunda*, para. 60 (emphasis added).

109 *Ibid.*, para. 61.

110 *Ibid.*, para. 63.

> there is a compelling argument for the proposition that states have, not only a right but, a legal obligation to protect their nationals abroad against an egregious violation of their human rights.[111]

He rejected the idea that existing human rights mechanisms are sufficient for the protection of human rights and found that the South African government had a special commitment in the promotion and protection of human rights which should impose a 'special duty in this regard'.[112] In particular, in urgent situations, diplomatic protection 'may prove to be one of the most, if not the most, effective remedy for the protection of human rights',[113] as the injured individual may not have other instruments or remedies at his or her disposal.[114] Judge Ngcobo concluded that diplomatic protection is a 'benefit' within the meaning of section 3(2) of the Constitution and that this provision read together with section 7(2) imposes 'a constitutional duty on the government to ensure that all South African nationals abroad enjoy the benefits of diplomatic protection'.[115] A request for diplomatic protection may not be 'arbitrarily refused' and must be considered appropriately.[116] Referring to the *Abbasi* decision, Judge Ngcobo found that South African nationals benefit from a legitimate expectation based on the government's standard policy.[117] However, he agreed with the majority opinion in this case as he found that the government had not failed to consider the request appropriately and that it had not been shown that the government had denied protection.[118]

In her separate opinion, Judge O'Regan also derived an obligation to protect from the South African Constitution. As the Constitution should be interpreted 'in a way to promote rather than hinder the achievement of the protection of human rights',[119] it would thus be appropriate to 'understand section 3 as imposing ... an obligation to provide diplomatic protection ... to prevent or repair egregious breaches of international human rights norms'.[120] She concluded that

> to the extent that section 3(2) [of the Constitution] states then that 'citizens are equally entitled to the ... privileges and benefits' of citizenship, it is not only an

111 *Kaunda*, Separate Opinion Judge Ngcobo, para. 169.
112 *Ibid.*, paras. 169 and 170.
113 *Ibid.*, para. 167.
114 *Ibid.*, para. 181.
115 *Ibid.*, para. 188.
116 *Ibid.*, para. 192.
117 *Ibid.*, paras. 168 and 198 respectively.
118 *Ibid.*, paras. 204 and 208.
119 *Kaunda*, Separate Opinion Judge O'Regan, para. 237.
120 *Ibid.*, para. 238.

> entitlement to *equal* treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement of diplomatic protection itself.[121]

Later in her opinion, Judge O'Regan even took a stronger position:

> section 3 of the [South African] Constitution read in the light of other provisions of [the] Constitution imposes an obligation upon the government to take appropriate steps to provide diplomatic protection to its citizens who are threatened with or who have experienced egregious violations of international human rights norms by a foreign state upon whom the international rights norms are binding.[122]

The Court would not go that far. It emphasized that

> [w]hen the request [for diplomatic protection] is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the rights that is asserted is the individual.[123]

It also found that

> [a] request to the government in such circumstances [i.e. in case of 'gross abuse of international human rights norms'] where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse.[124]

In addition it stressed that in case of refusal by the government 'the decisions would be justiciable, and a court could order the government to take appropriate action'.[125] The Court therefore held that citizens have a right to request protection and the government has the corresponding duty to duly consider that request. However, it is here that the discretionary nature of diplomatic protection emerges: the government is better suited to the task of assessing whether protection would be necessary than a court.[126] Or, in the wording

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121 *Ibid.*, (emphasis in original).
122 *Ibid.*, para. 261
123 *Kaunda*, para. 64.
124 *Ibid.*, para. 69.
125 *Ibid.*, para. 69.
126 *Ibid.*, para. 67. Judge O'Regan found that the Court should have been more explicit on this point: 'Although it is quite clear that the consideration and assessment of another country's criminal justice system is a sensitive matter for our government, the demands of comity and sensitivity should not mean that government remains blind to the risk of egregious violation of human rights of its nationals by other jurisdictions. It is not only its constitutional obligation to take appropriate steps to provide diplomatic protection ... but the developing global and regional commitment to the protection of human rights also requires government to be responsive to these issues. It is not satisfactory therefore for government

of the Court: 'A court cannot tell the government how to make diplomatic interventions for the protection of its nationals'.[127] This might seem to contradict the Court's earlier finding, that it might order the government to take action. However, as the Court explained, the Court has jurisdiction over government actions and as this includes 'an allegation that government has failed to respond appropriately to a request for diplomatic protection'[128] it can thus review whether the decision (not) to take action was taken in good faith and rationally,[129] but 'this does not mean that courts would substitute their opinion for that of the government or order the government to provide a particular form of protection'.[130] After all,

> [t]he best way to secure relief for the national on whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.[131]

The Court subsequently investigated whether the government had acted appropriately in the present case and found that there was no failure on the part of the South African government to provide diplomatic protection.[132]

The Court furthermore found that part of the claim should be dismissed for being premature, in particular with respect to claimed violations the applicants might face if Zimbabwe would grant extradition to Equatorial Guinea or if they would be sentenced to death in Equatorial Guinea. In the Court's opinion, there was no evidence to support these claims and that it would be to the government to respond adequately at the appropriate time.[133] In addition, diplomatic interventions to secure fair trial and to prevent the death sentence in Equatorial Guinea would require 'delicate negotiations' the assessment of which falls essentially 'within the domain of the government'.[134] It would thus not be for the Court to make a mandatory order on this part of the claim. However, as in the *Abbasi* case, the *Kaunda* Court held that the applicants had a legitimate expectation to benefit from standard policies. The South African government's public policy was to make representations in case of death sentences against South African nationals. This would imply, in the Court's view, that the government would be obliged to do so.

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merely to say that it is not its policy to comment on the criminal justice system of other countries.' para. 267.

127 *Kaunda*, para. 73.
128 *Ibid.*, para. 78.
129 *Ibid.*, paras. 76-80.
130 *Ibid.*, para. 79.
131 *Ibid.*, para. 77.
132 *Ibid.*, paras. 82-143.
133 *Ibid.*, para. 127.
134 *Ibid.*, para. 133.

However, in the present case, the Court found that there 'is no evidence to suggest that this would not happen',[135] indicating that although the claim was premature, it would not be without merit if the government would fail to provide due protection.

The *Kaunda* decision clearly shows that the exercise of diplomatic protection is a valuable mechanism for the promotion and protection of human rights. Although the Court decided in line with the earlier *Rudolf Hess* decision that the government has a discretion with respect to the specific ways in which the protection might be provided, it simultaneously stressed that the decision (not) to exercise diplomatic protection was subject to judicial review and that such decisions should meet standards of fair proceedings: South African nationals have a right to request diplomatic protection and their request must be duly considered.[136] The decision whether or not to exercise diplomatic protection must be in accordance with standard policies to meet the individual's legitimate expectation and may not be taken arbitrarily. If the government failed in this respect, it would be for the Court to render a mandatory decision ordering the government to take appropriate steps to protect a national abroad. As pointed out, the Court was satisfied with the actions taken by the government on behalf of the applicants. However, it expressly stated that it would not hesitate to decide otherwise if the government had not taken appropriate measures or would fail to do so in subsequent situations concerning the applicants in the present case.[137]

H. Josias van Zyl and others *v.* The Government of the Republic of South Africa and others

Mr. Josias van Zyl was a major shareholder of various mining companies, collectively referred to as Swissborough, involved in mining diamonds in Lesotho. These companies were all incorporated in Lesotho, as only companies incorporated in Lesotho were granted leases for diamond mining purposes. However, in execution of the Lesotho Highlands Water Projects, which

135 *Ibid.*, para. 99.

136 See on this point also M. Coombs, 'International Decision: Kaunda v. President of the Republic of South Africa', 99 AJIL 681-686, at 681 (2005), who considers that the decision does not differ from the earlier *Abbasi* and *Hess* decisions and that the decision rejects 'the arguments of certain scholars that [the right to diplomatic protection] should be found to exist' (at 684, footnotes omitted). The present author submits that this does no justice to the considerations of the judges and the way in which they have tried to distinguish their decision from the German and British precedents.

137 In May 2005, the Zimbabwe authorities released the applicants and most of them have returned to South Africa. Despite South Africa's strict legislation against mercenaries, no charges have been brought against the applicants and they have not been arrested.

involved the building of a major dam in Lesotho, the property rights of the applicant were expropriated. No compensation was paid and litigation in local courts in Lesotho offered no redress.[138] Mr. van Zyl approached the South African government and requested diplomatic protection on his behalf. He argued that Lesotho had violated the international minimum standard for the treatment of aliens and that his right to property under the South African Constitution and his right to equality had been violated.[139] Although the President of South Africa did send a *note verbale* to the government of Lesotho asking for due consideration of Mr. van Zyl's situation,[140] further requests for diplomatic protection were rejected.[141] Mr. van Zyl then started legal proceedings arguing argued that this was contrary to both South African and international law, invoking the *Kaunda* decision.

On 20 July 2005 the judgment was handed down by the South African High Court. Mr. Josias van Zyl complained of the failure of the South African government to provide him with diplomatic protection against Lesotho for injury resulting from a deprivation of property. Although the procedures were already in an advanced stage in spring 2004 the High Court decided to defer handing down a decision to a later stage in light of *Kaunda* to allow the parties to the *van Zyl* case to reconsider their submissions and to allow the judge to give due attention to *Kaunda*.

In answering the question of to what extent the principles formulated in *Kaunda* were applicable, the judge found that there were three fundamental differences between *Kaunda* and the instant case. First, *Kaunda* concerned 'gross and flagrant infraction[s] of international human rights such as physical abuse and torture which is different from expropriation'.[142] Secondly, the judge found that unlike in cases concerning human rights, the true beneficiary in this case was a 'juristic person such as companies'.[143] The judge found that states have an enhanced obligation towards natural persons as opposed to 'juristic persons'. The third difference advanced by the judge is essentially a repetition of the first:

> there is indeed a fundamental difference between an infringement of international human rights on the one hand and breaches of international minimum standards

138 *Josias van Zyl and others* v. *the Government of the Republic of South Africa and others*, judgment of 20 July 2005, High Court of South Africa (Transvaal Provincial Devision), Case No: 20320/2002, 2005 (11) BCLR 1106 (t), 2005 SACRL LEXIS 13, para. 11.

139 *van Zyl*, para. 23.

140 *Ibid.*, para. 14.

141 *Ibid.*, paras. 13, 24 and 60-62.

142 *Ibid.*, para. 41.

143 *Ibid*.

> in respect to property on the other. The latter essentially constitutes and international delict.[144]

In the opinion of the Judge an international *delict* was of a different order than and should be distinguished from infringements of human rights and that due to this distinction a right to diplomatic protection did not exist. The claim to a right to diplomatic protection and the collateral obligation for the government to exercise diplomatic protection on behalf of Mr. van Zyl was therefore rejected.

The judgment is not very progressive and some passages are unclear,[145] but the relevance of this decision is to be found in the references to *Kaunda*: the conclusions reached in *Kaunda* were confirmed, but they were not applied to this particular case due to the differences between the two cases. We may or may not agree with this. The right to property is sometimes considered as a human right[146] and expropriation contrary to international standards may amount to a violation of this right. The court was prepared to accept an obligation for the exercise of diplomatic protection in cases of egregious human rights violations, but would not extend this obligation to situations involving non-natural persons with essentially commercial or economic interests.[147] While reaffirming the existence of an obligation to exercise diplomatic protection, this judgment clearly limits the obligation to situations of serious human rights violations involving individuals.

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144 *Ibid*.

145 See for instance *van Zyl*, para. 93: '[citizens] are entitled as such to request the protection of South Africa ... However, the same premise cannot be applied to companies who are legal persons, since they are not citizens and enjoy no rights and privileges in terms of section 3 of the Constitution ... However where a company is a national and that company seeks diplomatic protection, then the executive is obliged to consider that request and has to exercise its discretion to afford diplomatic protection.' What the judge intended to explain here is that the obligations towards companies cannot be found in the same section of the constitution as those towards natural persons. However, the formulation here is particularly confusing.

146 The right to property is provided for in the Universal Declaration on Human Rights (Article 17), but not in the ICCPR. See on this matter for instance Th. van Banning, *The Human Right to Property*, Antwerpen 2002. Also, Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, has mentioned the right to property as a fundamental human right: 'the individual, as a human being, is accorded certain fundamental rights ... These rights, uncertain as they are in content [include] ... the right to personal security, to personal liberty and to private property' at 12 and again similarly at at 15.

147 It is submitted that this may also explain the differences between the *Pirbhai* case and the *Abbasi* case (*see* section 3.E). In addition, the majority of the cases discussed by Ress (1972), concerned complaints by corporations or individuals deprived of their property or rights related to property, such as concessions. However, his discussion shows no distinction by the French courts between violations of individual human rights and questions related to deprivation of property. The S*apvin* case, also concerned a claim by a corporation related to loss of property.

4 CONCLUSION

The above analysis of the various national decisions shows that the discretionary nature of diplomatic protection has undergone a change. Contrary to earlier decisions dismissing all claims as falling outside the scope of judicial review as *acte de gouvernement* present day courts have agreed to review claims based on lack of protection. Notwithstanding the possibility of preliminarily dismissing the claims on the ground of non-jusiticiability, the judges, without exception, have entered into the merits of the various claims and considered carefully the actions taken by the respective governments and the violations of international law.

The German Court in the *Rudolf Hess* decision tentatively put forward the view that, while it found that the German executive had wide discretion in determining the level of protection offered, the government could be expected to take at least some action. The Spanish Court in the *Comercial F SA* v. *Council of Ministers* case refused to declare the claim inadmissible because of the nature of diplomatic protection but instead entered into the merits and found another ground for inadmissibility. This has been further developed by subsequent decisions. The English Court decided in *Abbasi* that UK nationals could rely on standard policies by virtue of the concept of legitimate expectation, thus limiting the government's discretion explicitly. In addition, the Swiss Court in the *JAAC 61.75* decision further qualified the discretionary nature of diplomatic protection by a prohibition on arbitrary decision-making. In the most recent cases, *Kaunda* and *Van Zyl*, we find these conclusions again, but the *Van Zyl* decision has limited the right to diplomatic protection to violations of human rights.

The concept of legitimate expectation and the prohibition on arbitrary decisions by the executive, as developed in the judgments, have thus been connected to diplomatic protection and have resulted in a more clearly defined field of obligation and discretion. These are the 'signs of support' which would justify the progressive development suggested by the Special Rapporteur and the drafting committee of the ILC.

The decisions show that an obligation to exercise diplomatic protection would, if at all, be found in national legal systems. The German, Swiss and South African Courts derived the potential obligation from their own constitutions, at least partly. The British Court found the principle of legitimate expectation in its national legal system. The limitations created through the concept of legitimate expectation and the prohibition on arbitrary decisions both relate to legal certainty. They confirm the rule of law and the individual

right of due process, as enshrined in most international human rights treaties.[148] The fundamental nature of the human rights violations involved in these cases compelled the judges to investigate whether the respective governments had taken the requests for protection seriously.

In situations where individuals have very little to no means at their disposal to enforce respect for their rights under international (human rights) law, the exercise of diplomatic protection is still, perhaps regrettably, of prime importance. In the international community, states have significantly more influence than individuals and they may be able to obtain redress in cases where individuals are left with empty hands. Diplomatic protection thus provides a useful, and sometimes necessary, instrument for the protection of these rights. By limiting the discretionary nature of diplomatic protection, the national decisions have shown not only the high importance attached to the protection of fundamental human rights but also the acknowledgement of the role diplomatic protection can and should have as such an instrument.

5 EPILOGUE

After publication of the present chapter, more decisions have been rendered by national courts on judicial review of diplomatic protection. One decision deserves special mentioning, since it confirms the above analysis and emphasises the importance of government representations in case of serious human rights violations. On 8 March 2007, the Federal Court of Australia, per Justice Tamberlin, rendered its decision in the case of Hicks v. Huddock.[149] Mr. Hicks, a previous detainee on Guantanamo Bay, brought a case against the Australian government, *inter alia* arguing that the latter's decision not to proceed with negotiations on Mr Hicks' behalf to secure release from Guantanamo Bay and repatriation to Australia was based on irrelevant considerations. The Australian Government applied for a 'summary judgment' seeking dismissal of the case for lack of reasonable prospect of success. Although the Court acknowledged that the Ministry of Foreign Affairs generally has a wide discretion in such matter, it rejected the motion for summary judgment and held that

> [i]t is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle and as such and exceptional case as to justify proceeding to hearing by this Court.[150]

148 Such as Article 8 of the Universal Declaration on Human Rights; Article 6 of the European Convention for Protection of Human Rights; Article 7 of the African Charter on Human and Peoples' Rights; Article 8 of the Inter-American Convention on Human Rights.

149 *Hicks v Ruddock* [2007] FCA 299.

150 *Ibid.*, at para. 91.

It thereby allowed review of the decision not to proceed with the exercise of protection on Mr. Hicks' behalf. These proceedings have not yet started and it remains to be seen whether there will be a decision on this point, since Mr. Hicks was returned to Australia after entering a guilty plea. He is serving his sentence in Australia.

General Conclusions

The protection of nationals abroad has survived the passage of time. From the writings of Vattel until the adoption of the draft articles on diplomatic protection by the International Law Commission, the issue of diplomatic protection has continuously been part of international law. The law has changed: the use of force for the purpose of the protection of nationals abroad has been abandoned, new mechanisms for the protection of individuals in general have emerged and the individual enjoys rights under international law independent of his or her nationality. Yet, despite this development, the international legal system has not succeeded in providing a new universally applicable binding mechanism for the protection of individual human rights. Hence the continuing importance of diplomatic protection.

In the present study, a normative assessment of diplomatic protection has been presented to answer the question of what position diplomatic protection has today and it has been demonstrated that, first, diplomatic protection as characterised in this thesis is by no means incompatible with current international law and, second, that it has been resorted to – and should be resorted to – for the protection of human rights of the individual. Starting out from the position that protection of individuals against serious violations of human rights is desirable and that the international community recognises the importance of certain fundamental rights, based on an analysis the most important documents in the field of diplomatic protection, the position outlined above has been defended, with the purpose to define and clarify the law on diplomatic protection and its use as a human rights instrument. The remainder of this conclusion consists of two parts: a summary of the arguments presented and some thoughts on further development in the field of diplomatic protection.

1 Summary

Chapter I presents a modern interpretation of the legal fiction in diplomatic protection. Legal fictions are an indispensable instrument for the application of law and in a broader sense for the maintenance of the rule of law. By pretending that injury to an individual constitutes an injury to the state of nationality of that individual, the individual is provided protection that would

otherwise be unavailable. Even if this conclusion is relatively straightforward, demonstrating the exact function of the legal fiction in this process is not. A close analysis reveals that the fiction facilitates at least three transitions. First, and perhaps foremost, the individual injury is transformed into the state's right to exercise diplomatic protection. Second, the violation of a primary rule prompts the exercise of a right based on a secondary rule. The ILC's attempt to progressively develop the law on diplomatic protection has added a third dimension to the operation of the fiction in diplomatic protection. To accommodate the concern that the law of diplomatic protection be too much centred on states and disallow a central role of the individual, the ILC included Article 19 encouraging states to exercise diplomatic protection in serious situations, to consider the wishes of the individual with respect to the modes of exercise of diplomatic protection and to transfer compensation received to the individual. From the point of view of the fiction, this recommendation has an interesting effect: while it is a secondary norm of international law, the provisions short of an obligation create something short of a right belonging to the individual and not the state. This way, the fiction returns to the individual.

As has been pointed out, the provision is somewhat incongruous within the regime of the draft articles on diplomatic protection and from a legal point of view, it is susceptible to criticism. This criticism is presented in Chapter I. While this criticism is legally pertinent, a note should be added here with respect to considerations of policy. The sometimes strong objections to the law on diplomatic protection mostly stem from dissatisfaction with the way in which it represents a state-centred world. To prevent irrelevance in a world that is, slowly, moving away from the model in which states are the only actors, it was a wise decision to attempt to attribute a greater role to the individual, even if the way in which this was done may not have been ideal. It remains to be seen whether states will accept this recommendation. Statements by UN member states in the Sixth Committee in 2006 suggest that there is in any event no general acceptance of this provision.[1] It would certainly benefit the injured individual and may enhance the mechanism as a whole. If individuals feel that their state of nationality can really protect them in case of violations of their international (human) rights, they may appeal to their state of nationality more often and these states may in turn increase their activities on behalf of their nationals abroad. One may question whether an increase of international litigation is desirable, but protection against violations, in particular of serious violations, of international law vis-à-vis individuals is something international law should always support.

1 See various statements made to the Sixth Committee, ranging from outright rejection of the provision (e.g. South Africa and the United Kingdom, both in A/C.6/61/SR.10) to warmly welcoming it (e.g. The Netherlands and Norway (on behalf of the Nordic Countries), UN Doc. A/C.6/61/SR.9 and A/C.6/61/SR.10 resp.)

Chapter II continues the debate on the position of the law of diplomatic protection in current international law. By analysing the modes in which diplomatic protection is exercised and by distinguishing it from consular assistance, this position is clarified. A surprising number of scholars and institutions fail to distinguish clearly between the two mechanisms available for protection of and assistance to nationals abroad. While some of these cases show error or ignorance, the argument can be made that the distinction is not in the interest of the individual and that what matters is the protection.[2] While this appears to be an attractive line of reasoning, in the spirit of human rights law putting the individual first, the converse is true. By obscuring the line between diplomatic protection and consular assistance one risks unlawful intervention in the domestic affairs of the host state, which will ultimately result in a hostile attitude towards any action on behalf of foreigners. Clarity in this respect will have the opposite effect. Once a protecting state has demonstrated that its national has been injured by an act attributable to the host state and that there are no local remedies left to exhaust, the protection exercised will be all the more acceptable and effective.

Since diplomatic protection is conditioned upon the exhaustion of local remedies and the nationality of claims, the question has arisen whether these conditions would not be too demanding in case of violations of peremptory norms, especially considering their *erga omnes* character. Invocation of responsibility in such cases is after all not limited to the exercise of diplomatic protection: the Articles on State Responsibility provide for the invocation of responsibility by states other than the injured state *erga omnes*. The ensuing question is how the law of diplomatic protection relates to this aspect of the law of state responsibility, especially since both fields of law have been considered by the ILC resulting in two sets of (draft) articles. Chapter III discusses these issues. Matters are further complicated by the general requirement in the Articles on State Responsibility applicable to claims based on indirect injury. Claims by non-injured states bear strong resemblance to indirect claims, but if both kinds of invocation of state responsibility are subject to the same conditions, there is no real distinction because the invoking state is then limited to one, the state of nationality. Whereas this may be in favour of the law on diplomatic protection, it is not a very satisfactory outcome. The analysis in chapter III shows that a claim brought *erga omnes* is a claim with a different legal character than one brought in the exercise of diplomatic protection. The former is a direct claim based on a direct legal interest, whereas the latter is an indirect claim with a legal interest created through the bond of nationality.

2 See, for instance, C. Forcese, 'Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law', 37 George Washington Int'l Law Review 469-500 (2005), at 472-473 and 'The Capacity to Protect: Diplomatic Protection of Dual Nationals in the "War on Terror"', 17 EJIL 369-394 (2006), at 374-375. The author seems to make no such strict distinction.

A claim *erga omnes* is a claim based on an obligation that is owed to the community as a whole, including the claimant state. If we wish to enhance mechanisms for the protection of individuals, in particular in the case of serious or large scale human rights violations, we should endeavour to maintain a variety of mechanisms, including the invocation of state responsibility *erga omnes* and the invocation of state responsibility through the exercise of diplomatic protection, because this gives states a choice of means and the possibility to use the mechanism most suitable for a particular situation. When the state of nationality is in a position to respond to the serious violations of the human rights of its nationals, diplomatic protection is an effective mechanism. Yet, the state of nationality may not always be in such a position. If the violations are of such a nature to be a concern of the international community, this should not bar invocation of responsibility.

Chapter IV discusses the ICJ's approach to diplomatic protection, in particular in *Avena*. Whereas other decisions, such as *Nottebohm*, *Interhandel*, *Barcelona Traction* and *LaGrand*, have generally been considered to constitute the leading cases on diplomatic protection, the way in which the Court dealt with, or rather did not deal with, the issue of diplomatic protection in *Avena* is particularly striking. Based on the nature of diplomatic protection as discussed in Part I, the Court's approach is criticised and it is shown what kind of claim Mexico brought forward in *Avena* and what international law prescribes for such a claim. The purpose of this analysis is not merely to criticise the Court, but rather to show what the effects are of incorrect legal reasoning by the world's highest judicial organ. As stated, this is in a way a re-opening of Pandora's Box that it took so long to close. If states can pretend to present a direct claim, when the subject matter is not a violation of an obligation *erga omnes*, the willingness of other states to accept such a claim will wane. Diplomatic protection in disguise will not serve the interests of the individual and one may question whether it serves the interest of the claimant state. It is thus of paramount importance that the nature of the claim be characterised appropriately, even if this means that compliance with additional conditions is required. Chapter IV is followed by a Chapter discussing the ICJ's decision in *Diallo*. While this decision may not be of prime importance for the development of international law in general it shows significant support for the ILC draft articles and the general approach in these draft articles. In particular, the Court confirmed the relevance of diplomatic protection for the protection of human rights and accepted the definition of diplomatic protection which resulted from the modifications to draft article 1. Other issues were unfortunately not dealt with in a comprehensive manner. As in *Avena* the Court did not enter into a detailed and in-depth discussion of the exhaustion of the local remedies nor did it really consider the Congolese domestic legal situation regarding incorporation.

In the last Chapter, claims brought by individuals who felt that their interest was not addressed, or not addressed adequately, have been analysed.

The point of departure in this chapter is the question whether states have an obligation to exercise diplomatic protection and whether this exercise is subject to judicial review by national courts. Even though the decisions discussed in this Chapter stem from a variety of countries, they show remarkable similarities. One would expect the judges to decline ruling on the issue, because the exercise of diplomatic protection is traditionally considered a discretionary power of the executive of a state. Surprisingly, the national judicial organs in question, without exception, entered into the merits of the claim, reviewed the activities undertaken by the respective states on behalf of the individual national concerned and concluded, based on this analysis, that the government had met its obligations vis-à-vis the individual. While it may be disappointing that no court went as far as to condemn the government, the fact that there was judicial review is promising. Some courts explicitly stated that the decision could have been different under different circumstances.

Even if a conclusion that states have a duty to exercise diplomatic protection and that individuals have a corresponding right to claim such protection cannot be drawn from these decisions, the trend that emerges from these decisions is promising. It should be added that individuals are not always in a good position to determine what kind of protection, if at all, must be exercised. Governments, and in particular the ministry of foreign affairs, are usually more familiar with diplomatic channels and in a better position to decide what measures would be most effective. In addition, not all claims by individuals are necessarily well-founded. Nevertheless it is important that these decisions show that individuals are in a position to challenge the decision of their national government and that governments are thereby forced to consider principles such as the prohibition of arbitrary decision-taking and the legitimate expectation of the individual.

2 Further Considerations and Developments

In the previous Chapters, specific elements and applications of diplomatic protection have been discussed. Some underlying thoughts will now be addressed. First, the view is expressed that the legal nature of diplomatic protection allows it to be resorted to more often. Second, an argument is presented that the peremptory nature of fundamental human rights norms may support the development in the direction of an obligation to exercise diplomatic protection in case of violations of such norms.

Martti Koskenniemi has stated that 'law is both an instrument of policy and a momentary system of binding standards.'[3] This statement also applies to diplomatic protection: it is used to promote certain policies and considered

3 Koskenniemi, *From* Apology *to* Utopia*, the Structure of International Legal Argument*, Cambridge 2005, at 20.

a discretionary right, yet it is premised on legal conditions and influenced by other rules of international law. As an instrument for the protection of human rights, this combination has given rise to criticism since the concept of human rights and the discretionary power of states sometimes seem irreconcilable. While there may be good reasons for allowing a margin of appreciation by states, one may legitimately ask whether an instrument with such characteristics is suitable as human rights instrument, especially if the decision whether or not to exercise diplomatic protection may largely depend on political considerations of the state and not on the seriousness of the situation of the individual. Should a mechanism that through its discretionary nature may allow states to prioritise their policies rather than the well-being of their nationals be supported?

Perhaps there is no single answer to this problem. Riphagen has stated that '[p]ositive law has always been, is, and always will be, a product of *wishful thinking*, the "wish" being "political" and the "thinking" being "legal".'[4] Even if one cannot always avoid the political element, one can emphasise the legal element to the effect that the instrument is neutralised. In this thesis, I have attempted to show the legal nature of diplomatic protection and to demonstrate that its conditions are subject to rules of international law. This ensures that the admissibility of a claim brought in exercise of diplomatic protection can at all times be assessed. Such verification will avoid abuse since it offers a means to reject unjust claims. On the domestic level, considerations of fairness, legitimate expectation and constitutional rights in turn give the national judiciary a means to evaluate the (non-)exercise of protection. An emphasis on the legal nature has an additional effect: by being a customary international law mechanism that is based on legal conditions, it may be invoked by states regardless of their position in international relations. The *Diallo* case is a promising example in this respect. Perhaps this view is too idealistic, and perhaps Martti Koskenniemi is right when he attacks 'the idea that international law provides a non-political way of dealing with international disputes.'[5] Yet, even if some residue of politics is inevitable in international law, the legal nature of diplomatic protection – and an emphasis on this legal nature – will minimise the influence of political considerations on this mechanism. Even if the channels through which it is exercised may be political channels, this does not necessarily influence the legal nature of the protection. The *decision* to exercise diplomatic protection is a legal decision, which is justifiable on legal grounds even if the means by which it is exercised is political. If it is not interpreted as a political statement, but rather as a legal response to a breach of international law that is independent from political relations, it will be more easily available. In addition, diplomatic protection is not limited

4 W. Riphagen, 'Techniques of International Law', 246 Recueil des Cours 235-386 (1994), at 245 (emphasis in original).

5 Koskenniemi, *From* Apology *to* Utopia, Cambridge 2005, at 69.

to international litigation. Therefore, it is available to states (and against states) who do not wish to subject themselves to existing dispute settlement mechanisms. Another aspect is that political preferences may change much more quickly than legal regimes. In general, the latter requires either amendment or abandonment of a treaty or evidence of change in practice and *opinio juris*. It takes more than the withdrawal of diplomatic representatives. A legal mechanism thus has a more permanent status than one based on political considerations. Hence, it is, again, important to stress and enhance the legal nature of diplomatic protection.

In many of the previous Chapters, I have entered a plea for taking the protection of individual rights seriously and for recognising the role diplomatic protection could play in this regard. This plea is not part of the legal argument presented throughout the preceding chapters. It is rather a motivation for the legal analyses, which refuted the assertion that certain characteristics of diplomatic protection make it an instrument unsuitable for the protection of human rights. To strengthen this argument further, it would be interesting to assess the *effectiveness* of the exercise of diplomatic protection, in particular in relation to the effectiveness of human rights protection through other mechanisms such as the existing human rights courts and the individual complaints procedures before UN Treaty Bodies. Such an assessment however, raises a series of methodological questions and insurmountable problems with regard to the comparability and representativeness of collected materials, indeed of the very issue of gathering information. Although statistics may exist with respect to the effect of decisions issued by the UN Treaty Bodies and human rights courts such as the ECtHR,[6] no such information is available with respect to diplomatic protection. Diplomatic protection is often exercised through quiet diplomacy and only major disputes that are brought before international tribunals are made public.[7] It is thus impossible to answer the question of effectiveness based on empirical data.

Yet, the nature of diplomatic protection gives an indication of its effectiveness, in particular compared to other mechanisms. First, diplomatic protection is available to all states regardless of whether these states have signed a treaty providing for human rights protection. The claim underlying the exercise of diplomatic protection may arise from a violation of customary international law, a bilateral treaty, a multilateral treaty or any other source of international law. The UN Treaty Bodies and regional human rights courts are only available to individuals within the jurisdiction of the states that have explicitly accepted

6 See D. Donoho, 'Human Rights Enforcement in the Twenty-First Century', 35 Ga. J. Int'l & Comp. L 1-52 (2006) , at 17-27 for an estimation of compliance with decisions by the various international human rights institutions. See also L.R. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', 107 Yale Law Journal 273-391, at 295-297 and 344-345 (1997).

7 See Introduction, section 2.A.

the jurisdiction of such courts and bodies. Secondly, the exercise of diplomatic protection is not limited to adjudication. While states exercising diplomatic protection are required to comply with the local remedies rule and the nationality of claims rule, they need not go through court procedures. Negotiations between an Ambassador and a Minister of Foreign Affairs are also among the means available for the protection of individuals. Diplomatic protection is an inherently flexible means of dispute settlement. If the situation is politically sensitive and there is a wish not to disclose the details, mechanisms for this purpose are available, but if states wish to go through adjudication and to leave the decision to a third party, this is also possible. The choice of means may also induce compliance and in such cases states are generally more inclined to accept a settlement if they were able to 'exercise a degree of control over the process.'[8] Thirdly, enforcement of the settlement of the claim is not solely in the hands of a court, if the settlement is achieved though adjudication. Diplomatic protection is part of the law of state responsibility. Therefore, the available means for inducing compliance with international law are available ranging from retorsions to countermeasures. Thus, if negotiations on the claim fail, states may resort to sanctions, or if it is a matter of large scale and widespread violations, they may turn to the UN Security Council.

One remark should be made. The vast majority of cases brought before the UN Treaty Bodies and the regional human rights courts are claims by individuals against their state of nationality, which is fundamentally different from the exercise of diplomatic protection. However, none of these instruments prohibits claims by nationals of one state against another state, as long as the injury occurred within the jurisdiction of the host state. It is in comparison to such claims that diplomatic protection has the advantages outlined above.

When considering the future of diplomatic protection, it will be interesting to see how it will develop vis-à-vis the notion of peremptory norms. It has been established that claims based on peremptory norms can be issued both by the state of nationality and by other states *erga omnes*. The question now is to what extent an obligation exists to exercise diplomatic protection in case of a violation of a peremptory norm. Presently, states and the ILC have not supported this idea. As an example, it will be recalled that this idea was brought forward in the *Abbasi* case, where counsel on behalf of Mr Abbasi argued that the right to access to court, enshrined in Article 6 of the ECHR, forces states to exercise diplomatic protection, in particular in case of violations

8 J.G. Merrills, 'The Means of Dispute Settlement', in: M.D. Evans (ed.), *International Law*, Oxford 2006, 533-559, at 542. See however the discussion on this between Posner and Yoo on the one hand and Helfer and Slaughter on the other in E.A. Posner & J.C. Yoo, 'Judicial Independence in International Tribunals', 93 California Law Review 1-74 (2005) and L.R. Helfer & A.-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo', 93 California Law Review 899-956 (2005).

of *jus cogens*. In addition, Dugard suggested in his First Report that there should be an obligation to exercise diplomatic protection in case of violations of peremptory norms. While such proposals were rejected by the court and the ILC respectively, one could take this argument one step further. Even if the content of peremptory norms is not always clear, the criterion that distinguishes such norms from other norms is their peremptory and cogent nature. Contrary to what one might expect, however, this cogent nature cannot overrule states' consent to dispute settlement, as was made clear by the ICJ in the *Congo-Rwanda* case and further elaborated in the separate opinion of Judge *ad hoc* Dugard to that decision.[9] This has allowed several courts to avoid entering into the merits of cases concerning allegations of violations of peremptory norms. However, what would happen if there were consent to the dispute settlement mechanism? Can states in such a situation insist on the discretionary nature of diplomatic protection? A narrow interpretation of the concept of peremptory norms would perhaps answer this affirmatively: only the prohibition contained in the norm is peremptory, not the secondary obligations such as addressing violations of the norm or offering a remedy.[10] However, a more generous approach to peremptory norms is feasible and would find support in the Articles on State Responsibility and the *Wall Advisory Opinion*. Both refer to the obligation on all states not to recognise situations resulting from breaches of peremptory norms and the obligation to 'cooperate to bring [it] to an end'.[11] I would argue that this applies *a fortiori* to an (indirectly) injured state. In addition, while the draft articles on diplomatic protection do not contain a provision requiring states to accept the exercise of diplomatic protection against them, 'this must be implied', as it is stipulated in the Commentary, provided the exercise meets the requirements of diplomatic pro-

9 See *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002)* (Democratic Republic of the Congo *v.* Rwanda), Judgment of 3 February 2006, available at www.icj-cij.org, paras. 64 and 125; Separate Opinion Judge *ad hoc* Dugard, at para. 14; See also Ch. III, section 2.A.

10 See the discussion on this point presented by Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, at 78-82, who argues against the position that peremptory norms do not entail subsequent obligations. See on a related point the Separate Opinion of Judge Guillaume to the *Arrest Warrant* case, who argued that Belgium had no right under international law to issue its arrest warrant despite the relevant crime being a crime against humanity. In his line of reasoning, no right to respond, nor indeed an obligation, exists based on the peremptory nature of the crime. E. de Wet argued in turn that 'the consensus about the normative superior quality of the prohibition of torture does not yet encompass the consequences to be attributed to jus cogens norms within the national legal order. Stated differently, the consensus has not yet progressed to a level where it would include an optimization of the efficient enforcement of jus cogens norms, such as a peremptory obligation to grant the victims of torture a legal avenue for claiming compensation', E. de Wet., 'The Prohibition on Torture as an International Norm of *Jus Cogens* and its Implications for National and Customary Law', 15 EJIL 97-121 (2004), at 120.See further Shelton, 'Normative Hierarchy in International Law', 100 AJIL 291-323 (2006);

11 Articles on State Responsibility, Art 41 and *Wall Advisory Opinion*, dispositif sub D, at 202.

tection.[12] Hence, if the claimant state complies with the nationality of claims and the local remedies rule, there will be consent with respect to the mechanism for the settlement of the dispute at hand: diplomatic protection. It will be recalled that the exercise of diplomatic protection per se does not require consent to jurisdiction of a specific judicial forum. The question then becomes the following: how can states refuse to exercise protection against a violation of a peremptory norm if the mechanism for such protection is available and may not be rejected by the respondent state? As I said above, states and bodies such as the ILC, which continue to stress the discretionary nature of diplomatic protection, will mostly answer this question negatively. It is to be hoped that the notion of enhanced importance of protection against violations of peremptory norms will force them to reconsider this question, to realise that diplomatic protection is a relatively easily accessible mechanism and to answer the question positively. It would certainly be a logical sequence to the trend outlined in Chapter VI.

Even if the development of the law does not go in this direction, the protection of individuals by means of diplomatic protection will retain its importance. As long as individuals are not endowed with the capacity to truly claim their rights under international law in the international arena, the exercise of diplomatic protection will continue to be necessary. The present analysis has demonstrated that diplomatic protection as a legal instrument has a clearly defined position in international law and that this position enables it to contribute to the protection of individuals against violations of their international (human) rights.

12 ILC Report 2006, at 30.

Samenvatting

De Bescherming van het Individu door middel van Diplomatieke Bescherming Diplomatieke Bescherming als een Mensenrechteninstrument

Hoewel het internationale recht in vele opzichten veranderd is sinds Vattel zijn meesterwerk schreef in de zeventiende eeuw, heeft diplomatieke bescherming, de bescherming van onderdanen in het buitenland, de tand des tijds doorstaan. Een van de belangrijkste redenen hiervoor is dat het internationale recht nog steeds geen ander bindend mechanisme dat universeel van toepassing is heeft weten te creëren dat de rechten van het individu kan beschermen. Diplomatieke bescherming is wel zo'n mechanisme.

Zoals deze studie laat zien hebben de veranderingen in het internationale recht het instrument diplomatieke bescherming niet onberoerd gelaten. Het is om die reden nodig de regels rond diplomatieke bescherming opnieuw te beoordelen en te analyseren in het licht van deze veranderingen. Uitgaande van de positie dat het beschermen van individuen in het buitenland tegen ernstige schendingen van mensenrechten wenselijk is, en dat de internationale gemeenschap het belang van bepaalde fundamentele rechten erkent, analyseert deze studie dit rechtsgebied vanuit een aantal rechtsbronnen: verdragsbepalingen, het werk van de International Law Commission van de Verenigde Naties (ILC), uitspraken van nationale en internationale gerechtelijke instanties en de doctrine. Hoewel sommige onderwerpen bewust buiten het bestek van deze studie gehouden zijn presenteert dit werk een herdefinitie en verheldering van de aard en het reikwijdte van diplomatieke bescherming.

Deze studie bestaat uit twee delen. In Deel 1, dat de nadruk legt op de theorie, wordt ingegaan op de vraag naar de aard van diplomatieke bescherming en haar plaats in het huidige internationale recht. Deel 2 presenteert een analyse van de toepassing van diplomatieke bescherming in de internationale rechtspraktijk. Hoofdstuk 1 geeft een moderne interpretatie van de juridische fictie in diplomatieke bescherming. Juridische ficties zijn een onmisbaar instrument voor de toepassing van het recht en in bredere zin voor het behoud van de rechtstaat. Door te pretenderen dat een schending van het recht van een individu een schending van het recht van zijn nationale staat is wordt het individu een bescherming geboden die anders niet beschikbaar zou zijn. Deze

conclusie is weliswaar tamelijk eenvoudig, maar de analyse van de precieze functie van de juridische fictie in dit proces is dat niet. Zij laat zien dat de fictie een aantal overgangen bewerkstelligt. Ten eerste, en dit is misschien wel het belangrijkst, wordt de schending ten opzichte van het individu omgezet in het recht van de nationale staat om diplomatieke bescherming uit te oefenen waarmee de staat het individu kan beschermen. Ten tweede geeft de schending van een primaire regel de mogelijkheid tot het uitoefenen van een recht dat gebaseerd is op een secundaire regel. In haar poging diplomatieke bescherming progressief te ontwikkelen heeft de ILC nog een andere dimensie toegevoegd aan de werking van de fictie. Om tegemoet te komen aan de zorg dat diplomatieke bescherming zich teveel concentreert op staten en geen centrale rol toekent aan individuen heeft de ILC besloten staten aan te moedigen om diplomatieke bescherming te verlenen in bepaalde situaties, om de wensen van het individu met betrekking tot de manier waarop bescherming geboden wordt in overweging te nemen en om eventuele schadevergoeding over te dragen aan het individu. Vanuit het perspectief van de fictie heeft deze aanbeveling een interessant effect: hoewel het een secundaire norm is creëert deze bepaling, die nog geen verplichting is, iets wat bijna een recht is van het individu en niet van de staat. Op deze manier keert de fictie terug naar het individu.

Het is nog de vraag of staten deze aanbeveling zullen accepteren. Verklaringen van de lidstaten van de VN in het *Sixth Committee* in 2006 suggereren dat er in ieder geval geen algemene aanvaarding van deze bepaling is. Wel zou zij het gelaedeerde individu ten goede komen en ook zou zij het mechanisme als geheel versterken. Als individuen de indruk krijgen dat hun nationale staat werkelijk bescherming kan bieden in het geval van schendingen van hun internationale (mensen)rechten dan zullen zij vaker een beroep doen op hun nationale staat en deze zal op zijn beurt meer activiteiten ontplooien ten behoeve van zijn onderdanen in het buitenland. Het is de vraag of een toename van het aantal internationale rechtzaken wenselijk is, maar bescherming tegen schendingen, en zeker tegen ernstige schendingen, van internationale rechten van het individu is iets wat internationaal recht altijd zou moeten steunen. De bepaling valt enigszins buiten de logica van de het regime van de ontwerpartikelen inzake diplomatieke bescherming en vanuit juridisch oogpunt is zij ontvankelijk voor kritiek: een gewoonterechtelijke basis zou ontbreken, de bepaling zou strijdig zijn met de opvatting dat diplomatieke bescherming het recht van staten is en de bewoording van de bepaling is ongelukkig gekozen. Hoewel deze kritiek pertinent is, kan er een beleidsoverweging tegenin gebracht worden. De soms ernstige bezwaren tegen diplomatieke bescherming komen meestal voort uit onvrede met de manier waarop dit instrument een wereld representeert die zich concentreert op staten. Om irrelevantie in een wereld die, langzaam, beweegt in een andere richting en die het model waarin staten de enige actoren zijn verlaat te voorkomen was het een wijze beslissing

om te proberen een grotere rol toe te kennen aan het individu, ook als de manier waarop dit gedaan is niet ideaal is.

Hoofdstuk II biedt vervolgens een analyse van de methoden waarmee diplomatieke bescherming uitgeoefend wordt. Hierin wordt een onderscheid gemaakt tussen diplomatieke bescherming en consulaire bijstand, met uitgebreide aandacht voor de bepalingen in verschillende EU verdragen over diplomatieke bescherming en consulaire bijstand van EU burgers. Een verrassend aantal geleerden en juridische instituten slaagt er niet in een duidelijk onderscheid te maken tussen deze twee beschermingsmechanismen voor onderdanen in het buitenland. In de meeste gevallen is dit duidelijk het gevolg van fouten of onwetendheid, maar soms wordt ook beweerd dat het onderscheid niet zo belangrijk is: waar het om gaat de bescherming en niet het etiket dat erop geplakt wordt. Dit argument lijkt aantrekkelijk en de nadruk te leggen op de mensenrechten en het individu. Het tegendeel is waar. Door de grens tussen diplomatieke bescherming en consulaire bijstand te vervagen loopt men het risico op een onrechtmatige inmenging in de interne aangelegenheden van het gastland en dit zal er uiteindelijk toe leiden dat het gastland een vijandige houding aanneemt tegenover iedere activiteit ten behoeve van buitenlandse onderdanen. Duidelijkheid in dit opzicht heeft het tegenovergestelde effect. Als een beschermende staat eenmaal heeft aangetoond dat zijn onderdaan gelaedeerd is door een handeling die toerekenbaar is aan het gastland en dat er geen locale rechtsmiddelen meer zijn die uitgeput moeten of kunnen worden, dan zal de geboden bescherming acceptabeler zijn voor het gastland, en effectiever.

Voor het uitoefenen van diplomatieke bescherming, een indirecte claim, moet aan twee voorwaarden worden voldaan: uitputting van locale rechtsmiddelen en het nationaliteitsvereiste. Het is echter de vraag of dit op dezelfde manier geldt in het geval van schendingen van dwingend recht, *jus cogens*, met name gezien het *erga omnes* karakter van zulk recht. Aansprakelijkheidsstelling is immers niet beperkt tot het instrument van diplomatieke bescherming: de ontwerpartikelen inzake staatsaansprakelijkheid voorzien in aansprakelijkheidsstelling door andere, niet direct gelaedeerde staten *erga omnes*. In hoofdstuk III wordt ingegaan op de vraag hoe dit onderdeel van de staatsaansprakelijkheid zich verhoudt tot diplomatieke bescherming, met name nu de ILC over beide onderwerpen een set ontwerpartikelen heeft geproduceerd. De algemene eisen die de artikelen inzake staatsaansprakelijkheid stellen aan indirecte claims maken de zaak nog ingewikkelder. Immers, claims die naar voren gebracht worden door niet-gelaedeerde staten vertonen een opvallende gelijkenis met indirecte claims, hetgeen de indruk wekt dat de vereisten voor diplomatieke bescherming, i.e. de uitputting van locale rechtsmiddelen en het nationaliteitsvereiste, ook van toepassing zijn op claims van niet-gelaedeerde staten. Als beide soorten van aansprakelijkheidsstelling onderworpen zijn aan dezelfde voorwaarden dan bestaat er geen werkelijk onderscheid en blijft aansprakelijkheidsstelling beperkt tot één staat: de nationale staat. Hoewel

dit wellicht gunstig lijkt voor het instrument diplomatieke bescherming is het niet een bevredigende uitkomst. De analyse in Hoofdstuk III laat dan ook zien dat een *erga omnes* claim van een juridisch andere aard is dan een claim op basis van diplomatieke bescherming. De eerste is een directe claim gebaseerd op een direct rechtsbelang terwijl de tweede een indirecte claim is gebaseerd op een rechtsbelang dat bestaat vanwege de band die gecreëerd wordt door de nationaliteit. Een claim *erga omnes* is een claim gebaseerd op een verplichting die geldt tegenover de gemeenschap als geheel, inclusief de staat die de klacht brengt.

Als we mechanismen voor de bescherming van het individu willen versterken, met name in het geval van ernstige mensenrechtenschendingen of zulke schendingen op grote schaal, dan moeten we proberen de verscheidenheid aan mechanismen te behouden: zowel aansprakelijkheidstelling *erga omnes* als aansprakelijkheidsstelling via het uitoefenen van diplomatieke bescherming. Dit geeft staten een keuzevrijheid en de mogelijkheid dat mechanisme te kiezen dat het meest geschikt is in een bepaalde situatie. Wanneer de nationale staat de mogelijkheid heeft te reageren op een ernstige schending van de mensenrechten van een van zijn onderdanen, dan is diplomatieke bescherming een effectief middel. De nationale staat heeft die mogelijkheid echter niet altijd. Als de schendingen van een zodanige aard zijn dat zij het belang van de internationale gemeenschap raken dan zou het feit dat de nationale staat niets kan ondernemen geen belemmering moeten zijn voor aansprakelijkheidsstelling.

Het eerste hoofdstuk van Deel 2, Hoofdstuk IV, bespreekt de benadering van het Internationaal Gerechtshof ten aanzien van diplomatieke bescherming, zoals die naar voren kwam in de uitspraak in *Avena*. De manier waarop het Hof in *Avena* de diplomatieke bescherming behandelde, of liever gezegd niet behandelde, is op zijn minst opvallend. Op basis van het karakter van diplomatieke bescherming zoals besproken in Deel 1 van deze studie wordt de benadering van het Hof bekritiseerd en er wordt aangetoond wat voor claim Mexico naar voren bracht in *Avena* (een gedeeltelijk indirecte claim) en wat internationaal recht voorschrijft voor zulke claims (de uitputting van locale rechtsmiddelen en het nationaliteitsvereiste). Het doel hiervan is niet alleen kritiek te uiten op het Hof. Het gaat er met name om te laten zien wat de gevolgen zijn van incorrecte juridische argumentatie, vooral als dit gedaan wordt door het hoogste juridische orgaan. Zoals gezegd leidt dit tot het heropenen van de doos van Pandora terwijl het zo lang duurde om die te sluiten. Als staten kunnen pretenderen dat zij een directe claim hebben, wanneer het niet om een claim *erga omnes* gaat, dan zal de bereidheid van andere staten om zulke claims te accepteren verminderen. Het uitoefenen van diplomatieke bescherming onder het mom van een directe claim is niet in het belang van het individu en het is zelfs de vraag of het in het belang van de klagende staat is. Het is dus noodzakelijk dat de claim adequaat gekarakteriseerd wordt, ook als dit betekent dat voldaan moet worden aan bijkomende voorwaarden.

Hoofdstuk IV wordt gevolgd door Hoofdstuk V waarin de beslissing van het Internationaal Gerechtshof in *Diallo* centraal staat. Deze zaak is wellicht niet een zaak die van enorme invloed is op de ontwikkeling van het internationale recht, te meer daar het Hof, net als in *Avena* naliet de uitputting van locale rechtsmiddelen grondig te behandelen en ook geen uitputtende analyse van de nationale juridische situatie omtrent incorporatie in de Democratische Republiek Congo presenteerde. Het belang van deze uitspraak ligt echter ergens anders, namelijk in de aanzienlijke steun voor de ontwerpartikelen van de ILC en voor de algemene benadering in deze artikelen die in de uitspraak naar voren komt. Het Hof benadrukte met name het belang van diplomatieke bescherming voor de bescherming van mensenrechten en het heeft de definitie zoals die in artikel 1 is verwoord overgenomen. Vooral dat laatste is relevant, aangezien deze definitie een vernieuwing is ten opzichte van de oude, traditionele definitie van diplomatieke bescherming (zoals ook behandeld is in Hoofdstuk I)

In het laatste Hoofdstuk worden zaken besproken die aangespannen zijn door individuen tegen hun eigen staat. Het ging in deze zaken om de klacht dat de staat geen of te weinig bescherming geboden had. De vraag die gesteld wordt in Hoofdstuk VI is of staten een verplichting hebben diplomatieke bescherming uit te oefenen en of de uitoefening van bescherming onderworpen kan worden aan rechterlijke toetsing door nationale juridische instanties. Hoewel de arresten die besproken worden in dit hoofdstuk voortkomen uit verschillende staten vertonen zij opvallende gelijkenissen. Het had voor de hand gelegen dat de rechters in de verschillende zaken zich onbevoegd zouden verklaren op grond van de overweging dat diplomatieke bescherming traditioneel gezien tot de discretionaire bevoegdheden van de uitvoerende macht behoren. Dit betekent dat er geen verplichting bestaat en – als gevolg daarvan – geen rechterlijke toetsing. Verrassend genoeg hebben alle nationale juridische organen zonder uitzondering de zaken inhoudelijk behandeld, de activiteiten ten behoeve van het individu ondernomen door de staat beoordeeld en op basis van deze analyse geconcludeerd dat de overheden aan hun verplichtingen ten opzichte van de bewuste onderdanen voldaan hadden. Het is misschien teleurstellend dat geen van de instanties heeft geoordeeld dat de overheid niet aan de verplichtingen had voldaan, maar het feit dat er rechterlijke toetsing was is op zichzelf veelbelovend. Sommige instanties hebben zelfs expliciet in de beslissing gezegd dat het oordeel anders uitgevallen zou zijn als de omstandigheden anders waren geweest.

Zelfs als het op grond van deze arresten niet mogelijk is te concluderende dat staten een internationale verplichting hebben tot het verlenen van diplomatieke bescherming en dat individuen het corresponderende recht hebben om zulke bescherming te eisen, dan is toch de trend die blijkt uit de arresten veelbelovend. Hier moet aan toegevoegd worden dat individuen niet altijd in staat zijn te beoordelen of en zo ja op welke manier zij het beste beschermd kunnen worden. Overheden, en dan in het bijzonder het ministerie van buiten-

landse zaken, zijn meestal beter bekend met de diplomatieke kanalen en in een betere positie om te bepalen welke maatregelen het meeste effect zullen sorteren. Bovendien zijn niet alle klachten van individuen per definitie gegrond. Hoe dit ook zij, het is van belang dat deze arresten laten zien dat individuen de mogelijkheid hebben om de beslissing van hun eigen overheid aan te vechten en dat de overheden op deze manier gedwongen worden beginselen zoals het verbod op arbitraire beslissingen en de gerechtvaardigde verwachting van het individu in overweging te nemen.

In de conclusie worden de bevindingen van de verschillende hoofdstukken samengevat en verbonden. Op grond van de voorafgaande hoofdstukken blijkt dat diplomatieke bescherming nog steeds een belangrijke plaats heeft in het internationale recht. Diplomatieke bescherming heeft een duidelijk juridisch karakter en is onderworpen aan juridisch toetsbare voorwaarden. De ontvankelijkheid, of toelaatbaarheid, van een claim gebaseerd op diplomatieke bescherming is dus altijd vast te stellen. In negatieve zin voorkomt dit misbruik en helpt het ongerechtvaardigde claims te verwerpen. Het heeft ook een positief effect: diplomatieke bescherming is een recht dat bestaat in internationaal gewoonterecht. Dit betekent dat het toegepast kan worden door alle staten ongeacht hun positie in internationale betrekkingen. De *Diallo* zaak is in dit opzicht een goed teken. Wellicht is dit een te optimistische kijk op het internationale recht, en is er een veel grotere rol voor internationale politiek, maar zelfs als dit zo is dan zal de juridische aard van diplomatieke bescherming de rol van politiek minimaliseren. Dit zal vervolgens de beschikbaarheid van het mechanisme vergroten: het is beschikbaar voor alle staten, en tegen alle staten, die zich niet willen onderwerpen aan een bestaand geschillenbeslechtingmechanisme. Tegelijkertijd is diplomatieke bescherming niet afhankelijk van de politieke verhoudingen tussen twee staten doordat het een juridisch mechanisme is. Tenslotte is het minder onderhevig aan verandering dan politieke situaties. Het veranderen van juridische regimes vergt vaak tijd en in ieder geval inspanning. Dit maakt het een stabiel, en dus beschikbaar en betrouwbaar mechanisme.

Een van de motivaties voor deze studie is geweest het versterken van een instrument ter bescherming van mensenrechten. In de conclusie wordt overwogen dat het weliswaar welhaast onmogelijk is om in absolute termen de effectiviteit van dit mechanisme vast te stellen, maar dat de kenmerken van diplomatieke bescherming wel een indicatie hiervan geven, vooral in relatie tot andere mechanismen. Ten eerste is diplomatieke bescherming niet beperkt tot staten die partij zijn bij een bepaald verdrag. Ten tweede is het uitoefenen van diplomatieke bescherming niet beperkt tot gerechtelijke procedures en hebben staten een keuzevrijheid wat de methode betreft. Ten derde ligt het afdwingen van de uitkomst van de bescherming niet alleen in handen van een internationaal hof. Diplomatieke bescherming is deel van het staatsaansprakelijkheidsrecht en dus gelden dezelfde regels voor afdwingen, variërend van

retorsies tot represailles, sancties en inspanningen van de VN Veiligheidsraad. Tenslotte wordt overwogen dat de verdere ontwikkeling in de richting van normatieve hiërarchie in het internationale recht een positieve invloed zal hebben op diplomatieke bescherming. Het kenmerk van *jus cogens* is immers dat het superieur is ten opzichte van andere regels. Hoewel het Internationaal Gerechtshof recentelijk heeft vastgesteld dat deze eigenschap van bepaalde regels geen consensus ten aanzien van geschillenbeslechting kan creëren, valt het nog te bezien wat het effect zal zijn op het moment dat deze consensus er in principe is. Zoals hierboven vermeld, staat het mechanisme van diplomatieke bescherming altijd ter beschikking aan staten, vooropgesteld dat voldaan is aan de eis van uitputting van locale rechtsmiddelen en het nationaliteitsvereiste. Dit zou op termijn kunnen leiden tot een verplichting tot het verlenen van diplomatieke bescherming in het geval van schendingen van dwingend recht. De Conclusie eindigt met de stelling dat het verduidelijken en versterken van diplomatieke bescherming van belang is zolang het internationale recht niet op een betere manier voorziet in de bescherming van individuen tegen schendingen van hun individuele (mensen)rechten.

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Curriculum Vitae

Annemarieke Vermeer-Künzli was born on the 19th of January 1979 in Middelstum (The Netherlands). She attended the Praedinius Gymnasium in Groningen and graduated in 1996. From 1996 to 2002 she studied Classics at Leiden University, majoring in Ancient Greek Philosophy, and obtained her MA degree in May 2002. During the last year of her studies in Classics, she enrolled in the public international law programme for non-lawyers at the Faculty of Law of Leiden University and obtained the Certificate in Public International Law (*Internationaal Getuigschrift*) in August 2002. After an Internship at Amnesty International's UN Office in Geneva, she was appointed assistant lecturer at the 'Public International Law' department of the Faculty of Law of Leiden University in January 2003, which was followed with an appointment as PhD-fellow in October of that year. During her appointment, she has assisted the ILC Special Rapporteur on Diplomatic Protection and has published regularly on the topic of diplomatic protection. She attended international law seminars in Geneva (ILC), Helsinki and the Netherlands and was a visiting fellow of the Lauterpacht Research Centre in Cambridge in Fall 2006. She will continue to lecture at the Law Faculty of Leiden University.

In de boekenreeks van het E.M. Meijers Instituut voor Rechtswetenschappelijk Onderzoek van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2006 en 2007 verschenen:

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