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

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*The Protection of Individuals by means of Diplomatic Protection*

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## Diplomatic Protection as a Human Rights Instrument

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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-

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]

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.

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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.