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

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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

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 Babylonian 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

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'

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 nécessaire', 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 *Panevezys-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 decisions⁴³

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 *démarche* 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 *démarches* 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 *Panevezys-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.

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

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.

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 litigation⁸⁴ 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.

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 Treaty⁹⁵ 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-

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 tertiis 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

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 criticised¹¹¹ 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

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/EC¹¹⁹ 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

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. Tiilikainen, '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 concept¹²⁸ 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

125 Ibid.

126 S. Douglas Scott 'The EU Charter of Rights: a Poor Attempt to Strengthen 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/EC¹³⁷ 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

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. Burgogue-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

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

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.