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

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PART 2

Diplomatic Protection before the ICJ and National Courts

IV | Diplomatic Protection before the ICJ – Avena and indirect injury

As has been said before, the ICJ has dealt with a number of cases that were based on diplomatic protection. *Interhandel*, *Nottebohm*, *Barcelona Traction*, *ELSI*, *LaGrand* and, most recently, *Diallo* are cases that directly come to mind. The exercise of diplomatic protection in these and other cases has been described at a certain length in literature. In particular, Enrico Milano has given an extensive overview of diplomatic protection cases before the ICJ not so long ago.¹ It is therefore not necessary to discuss the ICJ's general approach in detail. Although many of these decisions have given rise to criticism on the way in which the ICJ dealt with the various requirements for the exercise of diplomatic protection, such as the question of the application of the local remedies rule in *Interhandel*, *ELSI* and *LaGrand* and the issue of nationality in *Nottebohm* and *Barcelona Traction*, the fact that the applicant presented a claim based on diplomatic protection was not disputed. The ICJ clearly acknowledged that the basis of the claim rested in the exercise of diplomatic protection and proceeded to investigate whether the claim so qualified was admissible. In *Interhandel*, *Barcelona Traction*, *ELSI* and *Nottebohm*, the claim was held inadmissible, whereas in *LaGrand*, the Court accepted the applicant's arguments and let the claim proceed.² In most older cases of the ICJ, the cases thus turned on the issue of admissibility and 'the substantive relation between diplomatic protection and human rights had never been at the core of the dispute considered by the Court.'³ In recent years, this has changed. States not only focus on their own injuries but include human rights. As Milano has forcefully argued, 'the link between human rights and diplomatic protection is becoming more and more recurrent in states' litigating strategies before the [ICJ].'⁴ This applies in particular to *LaGrand*, *Avena*, and *Diallo*.⁵ The first case has extensive-

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

2 *Interhandel*, at 28-29 (non-exhaustion of local remedies); *ELSI*, at 44-48 (exhaustion of local remedies) and 81 (absence of internationally wrongful act); *Nottebohm*, at 26 (absence of genuine link); *LaGrand*, at 483, para. 42 (espousal of individual rights).

3 E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?' 35 N.Yb.I.L. 85-142 (2004), at 111. Of course, the relation between diplomatic protection and the protection of human rights did play a role in *Barcelona Traction*, but see on this Ch. III.

4 *Ibid.*, at 119. See also *supra* Introduction and *infra* Chapter VI section 2.

5 *Diallo* will be discussed separately in Chapter V.

ly been discussed in recent literature and will not be analysed separately here.⁶ With respect to diplomatic protection, the most conspicuous part of *LaGrand* is without doubt the qualification of certain provisions of the VCCR as *individual* rights, rather than the rights of a state.⁷ Once Article 36(1)(b) had been so qualified, however, the exercise of diplomatic protection by Germany in order to claim responsibility for a violation of this right vis-à-vis its nationals in itself was not controversial. One may question whether local remedies had been exhausted and whether the LaGrands complied with the nationality requirement, but this does not affect the invocation of responsibility based on indirect injury through a violation of an individual right. In *Avena*, as will be discussed below, this situation was different. In this case the ICJ decided that diplomatic protection was not the mechanism Mexico needed to resort to in order to protect its nationals. Instead, it accepted Mexico's claim as a direct claim, based on direct injury.

Before discussing the decision in *Avena*, it is relevant to look at a, related, Advisory Opinion: the Inter-American Court's Advisory Opinion on the 'Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law'.⁸ In this Opinion, the Inter-American Court considered the question of whether the right to be informed of consular assistance should be seen as a human right and it stated that

the consular communication to which Article 36 of the Vienna Convention on Consular does indeed concern the protection of the rights of the national of the sending State and may be of benefit to him.⁹

Furthermore, the Court found that the right to be informed on consular assistance

must be recognized and counted among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.¹⁰

6 To give just a few: C. Tams 'Consular Assistance: Rights, Remedies and Responsibility; Comments on the ICJ's Judgment in the *LaGrand* Case' 13 EJIL 1257-1259 (2002); Z. Deen-Racsmány, 'Diplomatic Protection and the *LaGrand* Case', 15 LJIL 87-103 (2002); C. Dominicé 'Responsabilité internationale et protection diplomatique selon l'arrêt *LaGrand*', in: *El Derecho Internacional en los albores del siglo XXI*, Madrid 2002, at 233-242; R. Jennings, 'The *LaGrand* Case' 1 Law and Practice of Int'l Courts and Tribunals 13-54 (2002). See also the symposium in the Yale Journal of Int'l Law, Vol. 27, at 423-452.

7 *LaGrand*, at 494 (para.77). Another important part of the decision is that provisional measures issued by the Court are binding (at 506, para. 109).

8 Advisory Opinion OC-16/99, IACHR Series A no. 16 (1999). This opinion was requested by Mexico.

9 IACHR Advisory Opinion, para. 87

10 *Id.*, para. 122.

It concluded that

the international provisions that concern the protection of human rights in the American States, including the one recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.¹¹

The ICJ has both in *LaGrand* and in *Avena* avoided any decision on this point, despite a request to this effect by Germany and Mexico respectively.¹² It has in addition refrained from referring to the Advisory Opinion of the Inter-American Court. This has been criticised. For instance, Pinto wrote that ‘il est difficile d’expliquer l’absence de citation de la jurisprudence du système interaméricain dans le jugement de la CIJ’.¹³ Milano also expressed some doubts on the desirability of the divergence between the two courts:

[t]he gap between the two approaches could not have been wider, on the one hand a very human-rights oriented approach, on the other hand a very dismissive *caveat*.¹⁴

From a human rights perspective, one may indeed wonder why the ICJ would not use human rights language in the context of a right that it both an individual right and a right closely related to other, well-established, human rights.

It is not difficult to see the relation between consular assistance and fair trial. Foreigners may be unfamiliar with the judicial system of the host state, they may not speak the language, and may not know how to request legal counsel. It is clear that the foreign national can substantially benefit from consular assistance in such instances. Yet, it is submitted that this does not necessitate the qualification of the right to information on consular assistance as a *human right*. First, consular assistance is not a *conditio sine qua non* of fair trial. It is neither strictly necessary nor sufficient: without consular assistance, trials may be fair and they may be unfair even if there has been consular assistance. Second, even if the right to fair trial is part of human rights law, the law on consular relations as provided in the VCCR is not. One should not sever one provision of this Convention, take it out of the context of consular law and declare it a human right. Not every individual right is a human right.

11 *Id.*, para. 140. See for an overview of the Opinion and its (non-) application in the United States W.J. Aceves, ‘the Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16-99’, 94 AJIL 555-563 (2000).

12 *LaGrand*, at 494 (para 78). *Avena*, at 60-61 (para 124).

13 M. Pinto, ‘De la Protection Diplomatique à la Protection des Droits de l’Homme’, 106 R.G.D.I.P 513-547 (2002), at 531.

14 Milano, ‘Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?’ 35 N.Yb.I.L. 85-142 (2004), at 127.

As Spiermann, endorsing the position of the ICJ, has stressed: in current international law, individual rights do exist ‘outside the framework of human rights.’¹⁵ In this particular context, it is important to stress that the right to be informed on consular assistance is derived from a specific régime codified in the VCCR. This régime however primarily concerns inter-state relations and the large majority of the provisions in this Convention lay down the rules on consular intercourse. The fact that it *also* creates individual rights cannot change its overall purpose nor its status in international law. The VCCR is not a human rights convention, and was never perceived to be.

As its name suggests, the IACHR is a human rights court. It is therefore not surprising that it has decided on Mexico’s request in its own vocabulary, that is, human rights language. It translated consular law into human rights law, because ‘its [own] general objectives and “principles” ... will seem more plausible than traditional interpretative techniques.’¹⁶ Had it not welcomed the VCCR as falling within the realm of human rights, it would have been unable to deliver an opinion on the issue. The nexus with the human rights protected under the Inter-American Convention on Human Rights was therefore crucial. The ICJ, however, was in a different position. It did not need to enter into a human rights debate in order for the VCCR to fall within its jurisdiction. Moreover, as opposed to the IACHR, the ICJ is not a regional court with geographically limited jurisdiction and felt more restrained with respect to the interpretation of a multi-lateral treaty that clearly went beyond the intention of the parties,¹⁷ especially where this interpretation is not necessary for the result desired by the ICJ.

It is thus not necessary, and in light of the context of the relevant treaty not desirable, to draw one provision of the VCCR into the ambit of human rights. Yet it is important to acknowledge that the VCCR clearly establishes an individual right and that the ICJ allowed Germany to claim this right before the Court in an exercise of diplomatic protection. In other words:

15 O. Spiermann, ‘The *LaGrand* Case and the Individual as a Subject of International Law’, 58 ZÖR 197-221 (2003), at 211.

16 Martti Koskeniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law. Report of the Study Group of the ILC, 58th Session, A/CN.4/L.682 (2006), at 72 (para. 134) who gives the example of the WTO interpreting general international law. His argument applies *mutatis mutandis* to human rights bodies.

17 See B. Grzeszick, ‘Rechte des Einzelnen im Völkerrecht’, 43 Archiv des Völkerrechts 312-344 (2005), at 325. Grzeszick is highly critical of the ICJ’s interpretation of the VCCR and argues that it should not have accepted the existence of individual rights under this Convention at all.

for the individual concerned, what matters is that one has an individual right than one can assert and which is enforceable in the domestic courts of the receiving State, not whether this right is of an otherwise elevated or universal nature.¹⁸

In what follows, the ICJ's approach to this same individual right in *Avena* will be discussed.¹⁹

1 INTRODUCTION

On 31 March 2004, the ICJ issued its judgment in the *Case Concerning Avena and other Mexican Nationals*. Mexico claimed that the

United States of America, in arresting, detaining, trying, convicting and sentencing the 52 Mexican nationals on death row described in Mexico's Memorial, violated its international legal obligations to Mexico, in its own rights and in the exercise of its right to diplomatic protection of its nationals, by failing to inform, without delay, the 52 Mexican nationals after their arrest of their right to consular notification and access under Article 36 (1) (b) of the Vienna Convention on Consular Relations, and by depriving Mexico of its right to provide consular protection and the 52 nationals' right to receive such protection as Mexico would provide under Article 36 (1) (a) and (c) of the Convention.²⁰

At first glance this judgment appears as yet another decision concerning the Vienna Convention on Consular Relations (VCCR) and as a faithful copy of the earlier *LaGrand* Case, not the least due to the numerous references in *Avena* to this case. Like the *LaGrand* brothers, the Mexican nationals in this case had been deprived of their right to consular assistance by not being informed of this right and most of them were, like the *LaGrand* brothers, consequently prevented from claiming this right by the operation of the procedural default rule. At state level, Mexico was, like Germany, deprived of its rights to offer consular assistance to its nationals and found out about their detention rather late. Mexico thus claimed a violation by the United States of Article 36 (1) (a), (b) and (c) and Article 36 (2). In its submission, Mexico made it clear that the Court should consider the violation of both Mexico's own rights and the rights of its nationals. The latter are brought to the Court through the exercise of diplomatic protection. It is in this, in the exercise of diplomatic protection by Mexico, that *Avena* is far more complicated than *LaGrand*.²¹

18 B. Simma & C. Hoppe, 'From *LaGrand* and *Avena* to *Medellin* – a Rocky Road toward Implementation', 14 *Tulane J Int'l & Comp. L.* 7-59, at 13.

19 The following chapter has been published as an article entitled 'Case Concerning Mexican Nationals', in 18 *LJIL* 49-64 (2005).

20 *Avena*, at 36 (para. 49).

21 See Z. Deen-Racsmany, 'Diplomatic Protection and the *LaGrand* Case', 15 *LJIL* 87-103 (2002), for a discussion of diplomatic protection in *LaGrand*.

I shall discuss diplomatic protection in *Avena* by exploring the nature of diplomatic protection and the requirements for its exercise. In particular, the classification of the claim and the local remedies rule will be discussed. I shall show that by not properly distinguishing direct injury from indirect injury and thus did not dealing adequately with the question whether local remedies had to be exhausted the Court has not contributed to the clarity of the issue. This will be done on the basis of the Draft Articles on Diplomatic Protection, adopted by the ILC on second reading.²²

At the outset, there are two observations to make with regard to this case. First, certain aspects of cases concerning the VCCR, like the *LaGrand* case, the *Avena* case and the earlier *Breard* case,²³ sometimes cause confusion of moral and ethical considerations with legal arguments. Due to the fact that the applicant states in such cases are often protecting their nationals in criminal proceedings in an effort to save their lives, there is more at stake than the mere pronouncement of a judgment establishing a violation of international law, let alone of the VCCR. The irreversibility of the death sentence combined with an element of unfair trial (not having had access to consular assistance) made those states particularly keen to bring the case to the ICJ. The problem is not so much that they did so, but that the circumstances of the case appeal to our compassion and may give a feeling of unfairness. However, this has little to do with the legal complexity of the case. It is true that there are legal rules that are designed to prevent the circumstances Mexico, Germany and Paraguay were protesting against, but the reverse is not true. The fact that states protest against the way in which their nationals are being treated does not necessarily mean that there has been a violation of such rules. The *LaGrand* brothers and the 52 Mexican nationals were facing the death sentence while their national states oppose the death sentence but that does not imply that international law has been violated. In commenting on such cases, it is highly important indeed to remain focussed on the legal aspects and to set aside personal opinions on the death sentence.

Second, the ICJ is not a court to appeal to for a judgment on the extent to which the deprivation of consular assistance has influenced the trial at the local level. The Court may decide that there has been an internationally wrongful act and may decide on the proper remedies for this act, but it is not in a position to decide that Mexican nationals have been sentenced to death *because* they did not have consular assistance or that it would have been otherwise if they had.²⁴ This is mere speculation, and not something the Court should spend time on.

²² Draft Articles on Diplomatic Protection, adopted on 8 August 2006.

²³ *Case Concerning the Vienna Convention on Consular Relations* (Paraguay v. United States of America). Application submitted on 3 April 1998, but the case was discontinued at the request of the applicant on 10 November 1998. See ICJ Reports 1998, 426.

²⁴ *Avena*, at 60 (paras. 122-123).

Finally, for the purpose of this Chapter, the following should be noted. The 52 Mexican nationals listed in paragraph 16 of the judgment were not all in the same position. Only three of them had exhausted all judicial remedies available. For the majority various judicial remedies remained theoretically available. Some had been convicted and sentenced by a trials court and had not entered into the automatic appeals or post-judgment proceedings, others were denied such appeals but had their cases pending before various other courts ranging from a federal or state court of first instance to the supreme court of the state in which they were brought to trial or even the United States Court of Appeals for the Fifth Circuit.²⁵ The Court does acknowledge these differences,²⁶ but they do not play a major role in the judgment. For the discussion on the application of the local remedies rule below it is however important to keep this in mind.

2 THE BASIS OF DIPLOMATIC PROTECTION IN AVENA

Since the Court established the existence of individual rights under VCCR in *LaGrand*,²⁷ Mexico had good reasons to rely on those individual rights in its application. However, the admissibility of Mexico's claims based on the violation of the rights of its nationals is less clear-cut than in *LaGrand*. This lack of clarity is mainly caused by the classification of the claim, the conditions for the exercise of diplomatic protection, and the extent to which Mexico fulfilled these conditions. Much attention is drawn to this in the various opinions accompanying the judgment, although the opinions do not sufficiently clarify the issue.

Diplomatic protection is one of the oldest rights in international law and its existence is not disputed. Still one of the most important authorities on the issue, Borchard stated in 1919 that 'the state has ... in international law, a right against other states to protect its citizen abroad. This international right is universally admitted'.²⁸ It has been used and defined in numerous international judgments and decisions.²⁹ The standard rule, as reflected in the ILC's Draft Articles on Diplomatic Protection, is that a state may exercise its right to diplomatic protection if an internationally wrongful act has occurred in respect of one of its nationals and if this national has exhausted local

25 *Avena*, Application Mexico of 9 January 2003, Section D, paras. 67-267.

26 *Avena*, at 27 (para. 20).

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

28 E.M. Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 29.

29 From the PCIJ Cases like the *Mavrommatis Palestine Concessions Case* (Greece v. United Kingdom), PCIJ Series A, No. 2 and the *Panevezys-Saldutiskis Case* (Estonia v. Lithuania) PCIJ Series A/B/ no. 76 to the *ELSI Case*. Currently the *Ahmadou Sadio Diallo Case* (Republic of Guinea v. Democratic Republic of the Congo) which is also based on diplomatic protection is pending before the ICJ.

remedies.³⁰ In doing so, a state espouses the claim of its national due to indirect injury to the state, the fiction being that an injury to a national is considered an injury to the state.³¹ The nationality of the claim and the local remedies rule only apply to such indirect injuries and not to direct injuries.³² Thus, if Mexico is basing its claim on diplomatic protection, and it partly does,³³ it must prove that the individuals concerned have Mexican nationality and that local remedies are exhausted. For the purpose of this Chapter, we shall accept the Court's dictum on the nationality of the individuals concerned and assume that they were indeed of Mexican nationality.³⁴ We shall also not enter into the question of burden of proof with regard to the question of dual nationality.³⁵ However, the question of exhaustion of local remedies is more complicated, as is the nature of the injury towards Mexico. First, the nature of the injury will be defined and then, based on these findings, the local remedies rule will be applied.

A. Direct and indirect injuries under the VCCR

The law on state responsibility shows that a state may hold another state responsible for internationally wrongful acts.³⁶ The violation of a treaty, including a violation of the VCCR, may constitute such an internationally wrongful act.³⁷ State responsibility on the part of the United States for breaches of the VCCR, and thus the admissibility of the claim, is not disputed as far as it results in direct injury to the state of Mexico.³⁸ However, there is a difference between such direct injury and indirect injury to a state. The breaches of those provisions under the VCCR that have been identified as constituting individual rights, in particular Article 36 (1) (b),³⁹ are of a different nature. Although these individual rights are contained in a treaty (binding states, not individuals), they do not cause direct injury *per se*. It is primarily not the state that suffers from not having had access to consular assistance.

30 Draft Articles on Diplomatic Protection, Arts. 1,3 and 14.

31 See *supra* Chapter I on the legal fiction in diplomatic protection.

32 See also I. Brownlie, *Principles of Public International Law*, Oxford 2003, at 472 and Dugard, Second Report, at 10.

33 *Avena*, at 20-22 (paras. 13 (memorial)), at 22-24 (para. 14 (oral submissions)), and at 35-36 (para. 40 (final submissions)).

34 *Id.*, at 41-42 (para. 57).

35 *Id.*, at 40-41 (paras. 54-56) and Separate Opinion of Judge Parra-Aranguren, at 86-88 (paras. 11-15).

36 See Articles on State Responsibility in: ILC Report 2001, at 63.

37 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, at 228.

38 *Cf. LaGrand*, at 481-482 (para. 39).

39 *Id.*, at 494 (para. 77).

The Court did not consider the issue caused by this difference. It readily accepted that diplomatic protection was not the sole basis of Mexico's claim and declared that the injuries suffered by its nationals thus did not need to be claimed through the channel of diplomatic protection.⁴⁰ The Court found that the VCCR creates special circumstances through the 'interdependence of the rights of the State and of individual rights', an interdependence already established in *LaGrand*: 'Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection'.⁴¹ This interdependence or 'interrelatedness' is supposed to exist between Article 36 (1) (b) as an individual right on the one hand and Article 36 (1) (a) and (c) as state's rights on the other. Those rights do not exist separately, but should be seen as parts of one régime for consular protection. It is by virtue of this régime that a violation of Article 36 (1) (b) necessarily entails a violation of Article 36 (1) (a) and (c). Mexico therefore

may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered *both directly and through the violation of individual rights conferred on Mexican nationals*....⁴²

It was accordingly not necessary to exhaust local remedies and the Court would not 'deal with Mexico's claims of violation under a distinct heading of diplomatic protection'.⁴³

For various reasons, to be explained in what follows, this is one of the core passages of the judgment and also one of the most problematic.⁴⁴ The Court did not take up Mexico's claim under diplomatic protection. However, a closer look at the facts of the case and its legal background shows that the normal procedure for the protection of the individual rights of the Mexican nationals would have been diplomatic protection.⁴⁵ The Court tried to establish a special legal régime that would constitute an exception to the standard practice. The desirability of such an exception will be discussed below. I suspect the Court did this because it would otherwise have been compelled to investigate the exhaustion of local remedies for all 52 Mexican nationals.⁴⁶ It would possibly have had to declare the claim partly inadmissible and it therefore would not have been able to judge on the merits with regard to the violations of the

40 *Avena*, at 35-36 (para. 40).

41 *LaGrand*, at 492 (para. 74).

42 *Avena*, at 35-36 (para. 40 (emphasis added)).

43 *Ibid.*

44 It is also indicative that all separate opinions attached to the judgment without exception comment on para. 40 of the judgment.

45 This point is made in two of the *Separate Opinions* attached to the judgment: Judge *ad hoc* Sepúlveda at 106, para. 21 ff. and Judge Tomka at 95, para. 7.

46 See Introduction to this Chapter.

individual rights. However, the wish to render judgment on a certain issue should not lead to a failure to properly consider the legal issues involved.

B. Classification of mixed claims

The issue ultimately comes down to the classification of the claim and thus to the question whether the violation of individual rights can be seen as a direct injury to the state of nationality of the injured individual. As we have seen, the Court did not really consider this question and decided that Mexico was directly injured. The original application by Mexico however was a ‘mixed claim’, which implies that both direct and indirect injuries were present. As pointed out by the ILC’s special rapporteur on diplomatic protection, John Dugard, it is ‘in practice difficult to decide whether the claim is “direct” or “indirect” where it is “mixed”’.⁴⁷ He describes various methods for the determination of the claim as direct or indirect. There is no clear agreement on which method to apply and certain examples are being used to support more than one method.⁴⁸ In all tests it is ultimately the Court (or tribunal) that makes the decision. In the following, I shall discuss various methods in relation to this case.

At the outset it is obvious that the facts of this case all related to Mexican nationals. The only violation that caused direct injury beyond doubt is the fact that the United States prevented the Mexican consulate from providing for consular assistance by not notifying the consular posts of the detention of Mexican nationals. However, the fact that the Mexican nationals were not informed of their rights and the subsequent violation of the provision of the VCCR that guarantees full effect to those rights are not *prima facie* violations that cause direct injury. Quite to the contrary, *prima facie* they cause indirect injury. The Court’s construction to classify them as direct injuries through the interdependence of the rights contained in the VCCR seems artificial: what is exactly the difference between an indirect injury and an injury through nationals? Indeed, the phrasing ‘both direct and through the violation of the individual rights’⁴⁹ suggests that there is a difference. Considering that the Court first decided in paragraph 40 that the different sub-paragraphs of Article 36 (1) constitute one régime that should be treated as a unity and that a violation causes direct injury, it is remarkable that at other stages in the judgment the Court does seem to separate the sub-paragraphs. To start at the end, in the *dispositif*, the Court clearly distinguishes the violation of the rights of the Mexican nationals under Article 36 (1) (b) and those of Mexico under

⁴⁷ Dugard, Second Report, at 10.

⁴⁸ *Id.*, at 11.

⁴⁹ *Avena*, at 35-36 (para. 40).

36 (1) (a) and (c).⁵⁰ What is more, the Court even distinguished between (a) and (c): a violation of 36 (1) (a) was established in 49 cases while a violation of 36 (1) (c) was found only in 34 cases.⁵¹ The Court had established these differences earlier, in paragraph 106 of the judgment, where it analysed the consequences of failing to inform the Mexican nationals and found that Mexico had not in all cases effectively been prevented from providing legal assistance. In some cases in which the Mexican consulate knew about the detention of a national by other means than official notification, the Court found that it had been possible to provide legal assistance and that therefore there had not been a violation of the VCCR in that respect.⁵² Although the Court found it 'necessary to revisit the interrelationship',⁵³ it then decided to deal with the sub-paragraphs separately. This shows that the violation of Article 36 (1) (b) can be distinguished from the violation of the other sub-paragraphs, notwithstanding an 'interrelationship'. Indeed, it should have been dealt with 'under a distinct heading of diplomatic protection'.⁵⁴ In the following I shall show that this part of the claim should be regarded as the dominant, or preponderant, part of the claim through discussing the various methods for classification of claims.

B.1 *Sine qua non*

The first method to be considered is the *sine qua non* test.⁵⁵ This test asks 'whether the claim comprising elements of both direct and indirect injury would have been brought were it not for the claim on behalf of the injured national'.⁵⁶ In other words, would the claim have been brought if the national were not injured? Applying the *sine qua non* method, it is highly questionable whether Mexico would have brought the claim before the Court if none of its nationals had suffered from not being informed of their rights. One could think of the situation in which they were all released on other grounds without having received consular assistance. This, of course, is speculation because

⁵⁰ *Id.*, at 71-73 (para. 153) under 4, 5, 6 and 7.

⁵¹ One remark must be made here. The United States argued that there was no violation of Article 36 (1) (c) in many cases as Mexico knew about the detention through other channels (Memorial United States, para. 7.15). This argument, although perhaps valid in practice, must be rejected in principle. If accepted it allows the United States to benefit from its own mistake: *ex injuria jus non oritur*.

⁵² *Avena*, at 53-55 (para. 106).

⁵³ *Id.*, at 52 (para. 99).

⁵⁴ *Id.*, at 35-36 (para. 40).

⁵⁵ Without explicitly referring to it, Judge Parra-Aranguren in his Separate Opinions seems to apply this test in para. 28 (at 91) of this opinion when he submits that 'Mexico would not have presented its claim against the United States but for the injury suffered by its nationals'.

⁵⁶ Dugard, Second Report, at 11.

Mexico did bring the case before the Court. However, while many countries have difficulties meeting the requirements of the VCCR, there are not that many inter-state disputes with relation to this Convention in which states are eager to assert their own rights. If the matter is settled in a manner that is satisfactory to the foreign national or the foreign state, the issue is usually dropped. It is my submission that the fact that the Mexican nationals were facing the death sentence (combined of course with the favourable outcome of the *LaGrand* judgment) formed the major incentive for Mexico's application. Honourable as this may be, it does indicate that the injury was in fact primarily indirect.

B.2 Preponderance

The other major test is the 'preponderance test', where the Court has 'to examine the different elements of the claim and to decide whether the direct or the indirect injury is preponderant'.⁵⁷ In the Separate Opinions to the judgment of both Judge Parra-Aranguren and Judge Vereshchetin reference is made to this method.⁵⁸ For the application of the preponderance test, one has to weigh the elements of the claim and see whether the direct or the indirect parts are most important. Judge Vereshchetin concludes that '[d]irect injury to Mexico could arise only after the violations of the rights of its nationals'.⁵⁹ This conclusion is, however, difficult to support. There is no reason to assume a temporal sequence. The direct and the indirect injury and thus the violations of state and individual rights have arisen simultaneously: by not informing the Mexican nationals of their rights, Mexico is deprived of its rights as well. The VCCR does not give a hierarchy and there is no suggestion that the rights of the national state can only be violated *after* a violation of the national's rights. However, the seriousness of the violation of Mexico's rights is enhanced by the fact that injury was predominantly suffered by its nationals. The injury to the Mexican nationals would thus be the main element of the claim. Admittedly it is difficult to weigh those elements against each other. It is my submission however that the facts underlying the claim based on direct injury are those connected to the injury to the Mexican nationals. Therefore, in following Dugard,

⁵⁷ *Id.*, at 11.

⁵⁸ Separate Opinion Judge Parra-Aranguren, at 90-91, paras. 27-8 and Separate Opinion Judge Vereshchetin, at 81-83, paras. 7-11.

⁵⁹ Separate Opinion Judge Vereshchetin, at 82, para. 7.

if ... the claim would not have been brought but for the injury to the national, this evidence will usually demonstrate that the claim is preponderantly indirect.⁶⁰

This is supported by Amerasinghe. He argues that one should not look at the nature of the claim, but at 'the nature of the injury or right violated on which the claim is based'.⁶¹ If the claim is in essence based on a violation, regardless of whether this is a violation of a treaty, that injures a national and if the state is seeking to protect this national, then the claim must be regarded as preponderantly indirect.⁶² Although Mexico's claim was truly mixed, the essence of the claim was the protection of its nationals.

Thus, both the *sine qua non* and the preponderance test would suggest that Mexico's claim was based on indirect injury. Judge Parra-Aranguren came to the same conclusion, but his line of reasoning is not entirely clear. In interpreting paragraph 40 of the judgment he stated that 'Mexico's claim is a "mixed" claim...as recognized in paragraph 40 of the judgment'.⁶³ However, if the Court had acknowledged that the claim were mixed in the sense of Dugard's Second Report, as Judge Parra-Aranguren suggested, then the Court would also have had to determine which element of the claim was the dominant element. There is no sign that the Court indeed first considered the direct and the indirect injury and then concluded that the direct injury was the main basis of the claim. Quite to the contrary, the Court only accepted the direct injury and left out the indirect part. It treated the parts of the claim that were strictly speaking based on indirect injury as part of the claim based on direct injury. The complete lack of any distinction made by the Court shows that the Court did not consider this question.

B.3 Nature of the remedy and subject of the dispute

There are other elements in Mexico's claim pointing towards indirect injury. As Dugard suggests, the '*nature of the remedy* sought by the claimant state' is a further indication of the nature of the claim.⁶⁴ A declaratory remedy will point to direct injury while actual remedies for the individuals concerned point to indirect injury. In *Avena* the remedies sought were of both kinds. Mexico

60 Dugard, Second Report, at 12. This indicates that distinguishing the preponderance test from the *sine qua non* test is not always possible. There is a grey area between the two tests and the outcome of the tests is sometimes used to suit opposing purposes. The ILC tried to solve the matter in Article 14(3) of the ILC Draft Articles on Diplomatic Protection, but that Article only specifically mentions the preponderance test and does not indicate how this should be determined.

61 C. Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 163-4.

62 *Id.*, at 164.

63 Separate Opinion Judge Parra-Aranguren, at 90-91, para. 27.

64 Dugard, Second Report, at 13 (emphasis in original).

not only asked the Court to adjudge and declare that the United States violated the VCCR but also, and more importantly, remedies directly related to its nationals. In its fourth, fifth, sixth, seventh and eight submissions, Mexico requested almost all possible remedies: not only *restitutio in integrum* and restoration of the *status quo ante* but also the promise that violations of Article 36 VCCR shall not affect subsequent proceedings, meaningful and effective review and reconsideration of the convictions and sentences and a cessation of the violations towards Mexico and its nationals and guarantees for non-repetition respectively. These submissions all were actual remedies for the individuals concerned. Apart from the fact that Mexico would derive satisfaction from the knowledge that its nationals have been given some redress, it cannot be regarded as a remedy for the injury to Mexico proper.

Only a test based on the subject of the dispute may indicate direct injury in *Avena*. To cite Dugard, 'in most circumstances, the breach of a treaty will give rise to a direct claim unless the treaty violation is incidental and subordinate to an injury to the national'.⁶⁵ In this case, the treaty violation is not incidental in that it did not entirely depend on the individual Mexican nationals but also on a systematic non-compliance with the requirements under the VCCR by the United States. In addition, I would not suggest that the direct injury to Mexico was strictly speaking subordinate to the injury to the Mexican nationals. Although Dugard does not clearly specify what constitutes an injury that is incidental or subordinate, the question to be answered here is whether the state brings a claim purely for its own interest and not that of its national or whether its interests are less important than those parts of the claim brought on behalf of its national.

In *Avena*, it may be true that the facts underlying the direct injury were the same as those underlying the indirect injury and that this does support the *sine qua non* test, but it would be wrong to assume that the direct injury were therefore less grave particularly with regard to the pattern of violation. Although the Court in this respect observed that 'there is no evidence properly before it that would establish a general pattern',⁶⁶ one should also keep in mind the clear statement in paragraph 151 of the judgment indicating that

the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.⁶⁷

⁶⁵ *Id.*, at 12.

⁶⁶ *Avena*, at 68-69 (para. 149).

⁶⁷ *Id.*, at 69-70 (para. 151), or the Declaration of President Guillaume attached to *LaGrand*: 'Thus, subparagraph (7) does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid any ambiguity, it should be made clear that there can be no question of applying an *a contrario* interpretation to this paragraph', *LaGrand*, at 517.

The Court may have had many intentions with this statement, but it is likely to imply that the Court did not consider this a unique incident. Even if it is impossible to find a general pattern, the number of violations *vis-à-vis* Mexico is remarkable. It would allow the claim to transcend the individual level and to be truly a claim in the interest of the state. However, I do not think Mexico would have brought the claim if the injury to its nationals were less grave.⁶⁸ Some support for this position can be found in the fact that while Mexico does mention other cases of violations of the VCCR not involving the death sentence in its Memorial,⁶⁹ this was not again referred to it in the pleadings and was not taken up by the Court. It would thus go too far to define the entire claim as a direct claim only based on this argument, taking into consideration that the mere violation of international law (whether or not this is a repetitive violation) does not necessarily lead to direct injury. In the *Interhandel* case the Court found that the local remedies rule could be applicable notwithstanding the violation of international law being the subject of the dispute.⁷⁰ The applicability of the local remedies rule in this case indicated indirect injury. In discussing state practice on the issue of direct injury arising from violations of international law, Amerasinghe clearly shows that

the views expressed by states that a violation of an international judgment, an international treaty or international law *per se* results in a direct injury must be regarded as being in conflict with the accepted view of the law.⁷¹

In order to determine whether the subject of the dispute is a direct or an indirect injury, one would have to look at the nature of the violation of international law and then apply again the preponderance test. As shown above, the indirect injury to Mexico through injury to its nationals was indeed very present in the claim.

The classification of the claim as direct or indirect is of considerable importance to the proceedings and the outcome of the judgment. Although the Court in *Avena* did try to classify the claim as a direct claim, it did not do so carefully enough, causing much confusion. It may have been a wise decision to accept the injury to Mexico as a direct injury in an attempt to force the United States to comply with the VCCR in future. What has to be stressed however is that the lack of reasoning on this subject is a serious weakness of the judgment. The implication of the Court's non-qualification of Mexico's claim may now be that more claims should be regarded as direct claims and consequently that local remedies do not have to be exhausted. This is undesirable for the

⁶⁸ See above, section 2.B.1.

⁶⁹ Memorial Mexico, para. 161.

⁷⁰ *Interhandel* Case, at 6 and Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 155.

⁷¹ Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 158.

purpose of dispute settlement and the protection of the individual. If the claim is considered as a direct claim, remedies for the individual are not likely to occur or at least should not be part of the claim.⁷² The individual will thus not benefit from the claim. Additionally, an incorrect qualification of the claim may lead to cases that are based on diplomatic protection in disguise. Considering that diplomatic protection is a judicial means to settle disputes it should be explicitly used as such.⁷³ One should also bear in mind that diplomatic protection has been greatly abused in the past by powerful states to protect their interests in other states.⁷⁴ This has led to tremendous tensions and to the situation in which states are both hesitant to base claims on diplomatic protection (for fear of being accused of abusing their power) and unwilling to accept claims based on diplomatic protection. It has also led to the adoption of mechanisms to avoid the exercise of diplomatic protection, for instance the Calvo Doctrine. Diplomatic protection can, however, function as a means of improving human rights protection where other mechanisms fail or are not available.⁷⁵ This is not to say that diplomatic protection is a human right, but as violations of human rights law are often violations of international law diplomatic protection is a means of responding to those violations. It is essential then that the proper procedures be followed to avoid abuses. Careful consideration of the issue is much appreciated and it is regrettable that the Court did not do so.

C. Exhaustion of local remedies

One of the characteristics of a claim based on indirect injury, contrary to one based on direct injury, is the applicable requirement to exhaust local remedies before the claim can be declared admissible. The requirement to exhaust local remedies, also called the local remedies rule, is a rule firmly established in (customary) international law⁷⁶ and an attempt at codification has been made

⁷² See section 2.B.3. *supra*.

⁷³ One remark must be made at this point. Other means of dispute settlement can be applied by states seeking to exercise their right to diplomatic protection. One could think of negotiations by the Ambassador of a state or the Foreign Minister. Although the discussion of the exercise of diplomatic protection in these kinds of dispute settlements is beyond the scope of this Chapter it should be mentioned that states in these cases also often refrain from classifying the procedure as one of diplomatic protection. As an example could serve the case of Mr. Kuijt, a Dutch national who is imprisoned in Thailand and who has been in pre-trial detention for over 6 years. The Dutch government did try to negotiate on behalf of him, but never claimed that it was exercising diplomatic protection. See *infra* Chapter VI.

⁷⁴ Dugard, First Report, at 5-6.

⁷⁵ Dugard, First Report, at 8-10.

⁷⁶ Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 332, and Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 3: 'That the celebrated "rule of local remedies" is accepted as a customary rule of international law needs no proof today, as

with respect to diplomatic protection by the ILC in its Draft Articles on Diplomatic Protection.⁷⁷ Mexico's claim was a mixed claim but the local remedies rule also applies to mixed claims as a whole, as was recognized by the Chamber of the Court in the *ELSI* Case.⁷⁸ In this case, the United States argued that the local remedies rule would not apply as the subject of the dispute was a bilateral treaty, the violation of which had resulted in direct injury. The Chamber of the Court rejected this argument by considering that it

has not found it possible to find a dispute over alleged violation of the FCN Treaty resulting in direct injury to the United States, that is both distinct from, and independent of, the dispute over the alleged violation in respect of [the American companies] Raytheon and Machlett.⁷⁹

Referring to the *Interhandel* Case, the Chamber 'rejects the argument that ... there is a part of the Applicant's claim which can be severed so as to render the local remedies rule inapplicable to that part'.⁸⁰ This judgment shows both the importance of the classification of the claim, as has been argued above, and the resulting consequences for the application of the local remedies rule when parts of the claim do not, strictly speaking, constitute indirect injury. In addition, the Chamber of the Court in the *ELSI* case found that the local remedies rule should not be presumed to be excluded unless the parties to a treaty expressly decided to do so.⁸¹ This underlines the importance attached to the local remedies rule in international disputes.

In the field of diplomatic protection, one of the purposes of the rule is to offer the receiving state the possibility to settle the dispute before it is being raised to international level.⁸² This is particularly important as it is a way to prevent premature or unfounded interventions by the state of nationality of the individual, since it forces the individual to resort to means accessible to him first. However, if it has been shown that the foreign national has no means for self-protection left within the local justice system, a state should accept that the state of nationality of the individual may resort to diplomatic protection.

In *Avena* the Court first refrained from classifying the claim as preponderantly indirect, but secondly it did not observe the local remedies rule properly.

its basic existence and validity has not been questioned'.

77 Draft Articles on Diplomatic Protection, Article 14 (1). See also Dugard, Second Report, at 2-4.

78 *ELSI* case, at 42-44 (paras. 49-53).

79 *Id.*, at 42-43 (para. 51).

80 *Id.*, at 43-44 (para. 53).

81 *Id.*, at 42 (para. 50).

82 This was also argued in the *Claim of Finnish Shipowners against Great Britain in respect of the Use of certain Finnish Vessels during the War* (Finland v. Great Britain), 3 R.I.A.A., 1501 (1934).

Applying the rule to this case would not necessarily have resulted in inadmissibility, as the rule is not absolute. It has always been limited to judicial remedies (excluding application to non-judicial or quasi-judicial remedies) and to remedies that would be effective (excluding futile or non-available remedies).⁸³ If these conditions cannot be fulfilled, local remedies do not have to be exhausted. Borchard already acknowledged this: 'the exceptions to this requirement of exhausting local remedies occur ... where the local judicial organization is so corrupt, or the possibility of local remedy so remote, that it would be folly to compel a citizen to submit its cause of action to local courts'.⁸⁴ In addition, various judgments and decisions show that the rule is not absolute. Just to give two examples, as early as in 1934 the arbitral tribunal in the *Finish Ships Arbitration* decided that remedies do not have to be exhausted if the operation of domestic law prevented relief from the outset: 'the remedy must be effective and adequate'⁸⁵ and 'the local remedies rule does not apply where there is no effective remedy ... e.g. where there is no appealable point of law in the judgment, but also cases where on the merits of the claim recourse is obviously futile, e.g. where there may be appealable points of law but they are obviously insufficient to reverse the decision of the Court of first instance'.⁸⁶ In the *ELSI* case the situation was slightly different, as the American companies could possibly have brought the claim on the local level, but the Chamber of the Court nevertheless decided that if the claim had been brought in essence, even if the FCN Treaty was not mentioned specifically, the local remedies must be presumed to be exhausted.⁸⁷

In the present case, the Court rejected the United States' objection to the admissibility of Mexico's claim, that the Mexican nationals had failed to exhaust local remedies and that Mexico thus could not bring the claim.⁸⁸ The Court could have chosen two lines of reasoning for doing so. First, the Court could have accepted Mexico's argument that the local remedies available to the Mexican nationals were ineffective. Secondly, the Court could have decided that the rule was not applicable because the claim was not based on diplomatic protection. As shown in the previous section, the Court has chosen the second option and declared the rule inapplicable. This may seem to be the obvious choice, but in fact this choice caused more problems than it tried to solve. In paragraph 40 of the judgment the Court began by pointing out that the individual rights under the VCCR are indeed rights that should be claimed under diplomatic protection, but then took a different turn for the purposes of this case and found that Mexico could rely on direct injury and could proceed

83 Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 200.

84 Borchard, *Diplomatic Protection of Citizens Abroad*, New York 1919, at 285.

85 *Finish Ships Arbitration*, at 1494. See also Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 206.

86 *Finish Ships Arbitration*, at 1503.

87 *ELSI* case, at 45-46 (para. 58).

88 *Avena*, at 34-36 (paras. 38-40).

without having to show that its nationals had exhausted local remedies. As said before, the Court found that the VCCR creates special circumstances. However, the reference in this respect to the earlier *LaGrand* judgment is problematic, precisely because of the fact that the Court accepted that the German nationals had exhausted the local remedies.⁸⁹ Referring to this part of *LaGrand* thus does not support the view that the Mexican nationals are not under the obligation to exhaust local remedies. The reference in *LaGrand* only supports the view that the VCCR contains individual rights and that these may be invoked by the national state of the individual involved, which is exactly what will happen if a claim is based on diplomatic protection: it is

the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.⁹⁰

To summarise, the Court has not established why Mexico did not have to resort to diplomatic protection for the claims under the individual rights of the VCCR and thus, contrary to what it found, has not adequately disposed of the requirement to exhaust local remedies.

C.1 *Local remedies and the procedural default rule*

What the Court could have done, and in my view should have done, is to approach the local remedies rule differently. It should have started by accepting Mexico's claim in its exercise of diplomatic protection of its nationals. Having dealt with the nationality requirement, the Court would then have dealt with the requirement to exhaust local remedies. There are various ways in which this requirement could have been fulfilled. First, some of the 52 Mexican nationals had exhausted all remedies available and their situation was comparable to the situation of the *LaGrand* brothers just before their execution. As the Court stated in paragraph 114, Mr. Fierro (case No. 31), Mr. Moreno (case No. 39) and Mr. Torres (case No. 53) had no judicial remedies left and thus fulfilled the requirement. All the other Mexican nationals had 'further possibility of judicial re-examination'.⁹¹ These possibilities are not unqualified though, as it must be a judicial process. Paragraph

⁸⁹ *LaGrand*, at 487-488 (para. 58-60).

⁹⁰ Draft Articles on Diplomatic Protection, Article 1.

⁹¹ *Avena*, at 57 (para. 113). Note that the discussion on the procedural default rule in this part of the judgment is not concerned with the exhaustion of local remedies, but with the legality of the rule as such, which was challenged by Mexico. However, in discussing the procedural default rule as such, it becomes clear that the Court does find that it bars effective recourse to local remedies.

143 of the judgment can be interpreted as excluding executive clemency procedures in the United States as a part of the local remedies that have to be exhausted.⁹² Thus, second, the local remedies available to a certain number of Mexican nationals could have been qualified as not constituting *judicial* remedies properly speaking. Again, this only applied to those Mexican nationals who had no criminal procedures left to which to appeal. Third, the Court could have qualified the judicial remedies available for most of the Mexican nationals as futile or ineffective due to the operation of the procedural default rule. This conclusion can be found in several separate opinions attached to the judgment. Judge Tomka found that

[I]l aurait ainsi été possible à la Cour de parvenir à la conclusion que le Mexique a démontré que la condition de l'épuisement des voies de recours internes ne s'appliquait pas dans la présente affaire pour ce qui est de la demande présentée dans le cadre de la protection diplomatique.⁹³

Judge *ad hoc* Sepulveda elaborated further on the issue and found that

the application of the procedural default rule ... means ... that there are no remedies to exhaust, and that the futility rule becomes fully operative.⁹⁴

The procedural default rule creates a 'cloistered legal situation' and thus deprives a foreign national of an effective remedy.⁹⁵ In his opinion, the Court should have 'follow[ed] its holding [that the procedural default rule effectively bars the defendant from raising the issue of the violations of his rights under the VCCR] to its ultimate consequences' in particular considering that the situation had not changed since *LaGrand*.⁹⁶ In other words, the Court should have accepted the claim under diplomatic protection and should have declared that the local remedies rule was not applicable due to the futility of the local remedies.

A different approach resulting in the inapplicability of the local remedies rule is presented by Judge Vereshchetin. He suggested that the Court should refrain from applying the local remedies rule because the foreign national is on death row. This causes '*special circumstances*' in which the application of the local remedies rule would be unreasonable.⁹⁷ However, this is an undesir-

92 Again, this is not in discussing the local remedies rule as such. The Court already required in *LaGrand* that the review and reconsideration of the sentences had to be effective (*LaGrand*, at 513, para. 125). This criterion would likewise apply if the procedure in question were the subject of the local remedies rule.

93 Separate Opinion Judge Tomka, para. 13.

94 Separate Opinion Judge *ad hoc* Sepulveda, para. 22.

95 Separate Opinion Judge *ad hoc* Sepulveda, para. 36.

96 Separate Opinion Judge *ad hoc* Sepulveda, para. 45.

97 Separate Opinion Judge Vereshchetin, at 82, para. 12 (emphasis in original).

able approach of the matter and not one that is supported by international law. As diplomatic protection is a response to a violation of international law, the fact that an individual is sentenced to death and is on death row is not *per se* a reason to exercise diplomatic protection, as these circumstances as such do not constitute a violation of international law.⁹⁸ If the death sentence is the result of a violation of international law – e.g. in case of an arbitrary sentence or a denial of justice – the local remedies rule would not apply, but not because a person is on death row but because local remedies in such cases would most likely be futile.

There is one reason for refraining from entering into the question of exhaustion of local remedies. When it comes to deciding upon the futility of the local remedies, a court may find itself in a difficult situation.⁹⁹ It may lack knowledge concerning the domestic situation of the respondent state and there questions of burden of proof may arise.¹⁰⁰ This may be an argument for a court to find other ways to settle the dispute without dealing with the local remedies rule. In *Avena* however, there was little reason to expect such difficulties. The Court had already discussed the procedural default rule in *LaGrand*, concluding that the rule rendered appeals to local remedies ineffective.¹⁰¹ Although the United States had made an effort to improve knowledge concerning the consular rights of foreign nationals, the Court recognized in *Avena* that no fundamental change had been made to the rule.¹⁰² This should imply that again the procedural default rule made recourse to local remedies ineffective and thus not required for the admissibility of the claim. The Court could simply have concluded that the procedural default rule barred effective recourse to local remedies and that the remedies accordingly had to be regarded as exhausted.

98 There are indications that the death sentence and consequently the death row phenomenon will become contrary to international law. See W. Schabas, *The Abolition of the Death Penalty in International Law*, Cambridge 2002. On the other hand, the United Nations Human Rights Committee has only recognised a violation of the International Covenant in cases of death row if this was unduly prolonged, unduly harsh or the result of an unfair trial. Even in the *Soering* case before the European Court of Human Rights (Ser. A, vol. 116, Appl. no. 000014038/88), death row was not regarded as a violation of international law in general but only under the special circumstances of the case. In *Avena* the death sentence as such was not the subject of the dispute and considering the current state of affairs Mexico could not exercise diplomatic protection based on the violation of a rule that is not (yet) a rule of international law.

99 As was acknowledged by the Chamber of the Court in the *ELSI* case, at 47 (para. 63): ‘it is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”’.

100 The Chamber of the Court in the *ELSI* case decided that the burden of proof is on the state claiming that the remedies have not been exhausted (at 46, para. 59), but there are other sources establishing a division of the burden of proof between the parties to the dispute. See Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 285-92.

101 *LaGrand*, at 497-498 (para. 91).

102 *Avena*, 57 (para. 113).

3 CONCLUSION

The violation of the VCCR possibly had serious consequences for the trials and sentences of the 52 Mexican nationals referred to in *Avena*. Although the Court rightly did not enter the question to what extent these violation influenced the trials at the national level, one can easily imagine that consular assistance might have had a positive effect on the procedures and thus one understands the reasons why Mexico brought the claim. As has been shown above however, the preponderance test and other tests referred to lead to the conclusion that Mexico's claim was essentially based on indirect injury inflicted on its nationals. This case was truly a case concerning Mexican nationals. In such situations diplomatic protection would be the right instrument to make a claim based on those violations. It is, however, essential that diplomatic protection be properly applied by ensuring that the requirements are met and that the proper procedures are followed. It is only then that diplomatic protection can offer real redress, especially in cases of violations of individual rights for which other fora are unavailable or ineffective.¹⁰³ The question of exhaustion of local remedies thus should have been addressed, but could have been answered in such a manner as to render the claim admissible due to the ineffectiveness of the remedies available to the Mexican nationals.

One could legitimately ask why it would be necessary for the Court to take all the steps that have been suggested in the previous sections. Why classify the claim and then declare that the effective local remedies are exhausted, only to come to the same conclusion, namely that the claim is admissible? After all, without these steps the Court did consider the claim and did find a violation of individual rights *vis-à-vis* the Mexican nationals concerned. However, the ICJ is the institution *par excellence* that should pay attention to the nature of international disputes and to legal reasoning. For the sake of the individuals concerned and the proper administration of justice, as explained in section 2.B.3, the Court should have considered the Mexican claim more carefully. What the Court did in its judgment is particularly striking considering that Mexico did bring the claim under diplomatic protection. The Court however preferred to see it as something else. It turned this case into an example of diplomatic protection in disguise by putting the veil of direct injury over it. This is in a way a re-opening of Pandora's Box that it took so long to close. The past abuses of diplomatic protection by western powers in the 19th and even early 20th century have caused a serious setback. Currently, the ILC is finalizing its Articles on diplomatic protection that should regulate the procedures and prevent the earlier situations of abuse.

103 In this case through the operation of the Procedural Default Rule, but one could also think of those parts of the world that do not have a regional system for the protection of human rights.

As I said above, the Court could have contributed considerably to this development. Although the present judgment leaves the question whether the right to consular notification and communication under the VCCR should be considered as a human right unanswered¹⁰⁴ and although it is thus not submitted that they should be, this case could have been an example of the function of diplomatic protection as an instrument for the protection of individual rights in the modern world.

104 *Avena*, at 60-61 (para. 124). See also *LaGrand*, at 494 (para. 78).

