

Towards a “Humanization” of Diplomatic Protection?

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I. Prolegomena

In 1996 the International Law Commission (hereinafter ILC) identified the topic of diplomatic protection as one ripe for codification and progressive development¹ and undertook the task of articulating the relevant rules. This project was, in

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¹ See Report on the Work of the International Law Commission during its 48th session (1996), UN Doc. A/51/10 (General Assembly, Official Records, Supplement No. 10), § 249 and annex II, addendum 1. The General Assembly, in its resolution 51/160 of 16 December 1996, endorsed the decision and invited the ILC to further examine the topic. In the same year, the International Law Association (hereinafter ILA) established a Committee on the Diplomatic Protection of Persons and Property, which would closely follow the work of the ILC. For a common examination of the two projects see Pieter H. Koopmans, *Is the Right to Diplomatic Protection a Human Right?*, in: *Studi di Diritto Internazionale in Onore di Gaetano Arangio Ruiz*, Napoli 2004, 1975-1984, *passim*.

a way, completed in 2004 with the adoption of a set of 19 Draft Articles on first reading. Despite some initial controversies, Professor John Dugard, the second Special Rapporteur on the topic², succeeded in accomplishing an undoubtedly difficult job, especially if one takes account of the serious challenges that the institution of diplomatic protection is currently confronted with. The robust development of human rights law, which confers directly rights to the individual, the subsequent proliferation of dispute settlement mechanisms granting an eminent role to the injured individual and the multiplication of international judicial *fora* directly accessible by him/her, have called into question the usefulness and adequacy of diplomatic protection in the framework of the (human rights) protection of nationals abroad, precisely because of its State-centred character.³

It was precisely these challenges that led Judge Mohammed Bennouna, the first Special Rapporteur, to declare – when introducing his Preliminary Report on diplomatic protection – that “the traditional view [on diplomatic protection]⁴ is largely based on a fiction of law”⁵ and, then, to embark on sharply criticising this legal fiction as being completely outdated and profoundly non-egalitarian.⁶ Some months after, however, the Working Group of the ILC, instructed to examine the question of the nature of diplomatic protection, was affirming that “the exercise of

² Professor John Dugard, Special Rapporteur from 1999 on, succeeded Judge Mohammed Bennouna to the position, who had served as Special Rapporteur from 1997 until 1998; see Report on the Work of the International Law Commission during its 56th session (2004), UN Doc. A/59/10 (General Assembly, Official Records, Supplement No. 10), Chapter IV, 13-93 (§§ 38-60), at 13-14 (§§ 39-42) (hereinafter ILC Report 2004).

³ In fact, many voices have been raised pointing to the obsolescence of diplomatic protection. See on this point, among others, Luigi Condorelli, *La protection diplomatique et l'évolution de son domaine d'application*, 86 RDI (2003), 5-26, at 5: “[a]utrefois institution central du système des relations interétatiques, la protection diplomatique est généralement perçue aujourd'hui *comme une sorte de vieil outil désormais rarement utilisé et promis sans doute très prochainement à un rangement définitif au grenier des concepts d'antan*”, (emphasis added).

⁴ See on the traditional view the famous passage of the *Mavrommatis Palestine Concessions Case* (hereinafter *Mavrommatis Case*), judgment of 30 August 1924, PCIJ Ser. A, No. 2, 6 et seq., at 12: “[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. 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 the sole claimant”, (emphasis added).

⁵ Preliminary Report on Diplomatic Protection by Mohamed Bennouna, UN Doc. A/CN.4/484 (4 February 1998), at 7 (hereinafter Bennouna's Report).

⁶ *Ibid.*, at 2-3. In a contribution to a collective volume the same period, Judge Bennouna will express his personal views much more freely when stating that “il n'est plus concevable aujourd'hui de maintenir intacte la nature juridique de la protection diplomatique telle que formulée par la jurisprudence *Mavrommatis*”. He will then appeal for a realistic transformation of the institution in order to adequately deal with the exigencies of contemporary international human rights law; Mohammed Bennouna, *La protection diplomatique, un droit de l'Etat?*, in: Boutros Boutros-Ghali *Amicorum Discipulorumque Liber. Paix, Développement, Démocratie*, Bruxelles 1998, 245-250, at 249.

diplomatic protection is the right of the State"⁷, and later John Dugard declared that "[w]e should not dismiss an institution, like diplomatic protection, that serves a valuable purpose simply on the ground that it is premised on a fiction and cannot stand up to logical scrutiny".⁸ Having rejected the dismissive approach, but well aware of the contemporary challenges to diplomatic protection, Professor Dugard launched an ambitious effort to readjust its functioning on the basis of the developments in the human rights field⁹ and employ it "as a means to advance the protection of human rights in accordance with the values of the contemporary legal order".¹⁰

The main task of this paper is to highlight some inconsistencies and controversies with regard to the evolution of diplomatic protection. The idea is to examine the various approaches to diplomatic protection (the dismissive approach/the expansive-human rights approach) and to discuss aspects of it, which are ill-grounded or reflect a poor theoretical elaboration.¹¹ In a nutshell, one can observe two different trends concerning the study of diplomatic protection. On the one hand, the advocates of a "humanization" of diplomatic protection frequently resort to arguments based on equity by underlining, for example, the extreme injustice that the discretionary nature of diplomatic protection can generate; due to the indeterminate and, thus, apparently insufficient for transforming the exercise of diplomatic protection to a State obligation State practice, they depart from strictly positivist views in order to metamorphose diplomatic protection. We will argue that their instrumentalist analysis (the law of diplomatic protection as an instrument for the promotion of human rights) represents a utopian vision of international law inspired by humanistic ideals, which are not directly transposable into the institution of diplomatic protection.¹²

⁷ Report on the Work of the International Law Commission during its 50th session (1998), UN Doc. A/53/10 (General Assembly, Official Records, Supplement No. 10), Chapter V, 70-84, (§§ 56-110), at 84 (§ 108, point c) (hereinafter ILC Report 1998).

⁸ First Report on Diplomatic Protection by John Dugard (hereinafter Dugard I), UN Doc. A/CN.4/506 (7 March 2000), at 7 (§ 21), (emphasis added).

⁹ As early as in 1998 the open-ended Working Group of the ILC, established to specify the approach to the topic, declared that "[t]he work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights", in UN Doc. A/CN.4/L.553, point (d), reprinted in: ILC Report 1998, note 7, at 84 (§ 108).

¹⁰ Dugard I, note 8, at 4 (§ 9), (emphasis added).

¹¹ For that purpose, some critical methodological tools will be employed. See, for example, David Kennedy, *International Legal Structures*, Baden-Baden 1987; Martti Koskenniemi, *The Politics of International Law*, 11 EJIL (1990), 4-32; David Kennedy, *Les clichés revisités, le droit international et la politique* (cours à l'Institut des hautes études internationales de Paris), 4 *Droit international – Collection des cours et travaux* (1999-2000), Paris, 3-179; David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 NYU J. of Int'l L. & Pol., 335-500.

¹² See the distinction between utopian and apologetic arguments in: Martti Koskenniemi, *From Apology to Utopia. The Structure of the International Legal Argument*, Cambridge (re-issued 2005).

On the other hand, the exponents of positivist legality favour the traditional conception of the exercise of diplomatic protection being the States' prerogative. The apparent incompatibility of this view with the "humanization" process of international law forces some international law scholars to be rather apologetic about the unjust State practice¹³ and, as a step further, to deny traditional diplomatic protection any usefulness, especially because of the spectacular development of international human rights law.¹⁴

It is our view that the main setback of both attitudes is their failure to capture the political essence of the institution of diplomatic protection.¹⁵ Having that in mind, we will try to critically assess the codification proposals of Professor Dugard and the ILC, and the various suggestions of international law scholars, on the basis of Professor Dugard's conclusion that "the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights".¹⁶ We will first examine the various views concerning the contours and nature of diplomatic protection (I). Then, we will consider the latest developments concerning the idea of diplomatic protection being not a right but rather an obligation of the State (II). In that part, we will argue that the interesting developments regarding the recognition of an eventual obligation of the State to exercise diplomatic protection are only loosely linked to the inter-State law of diplomatic protection, and that they constitute primarily part of the law of human rights and, therefore, such a discussion in the framework of a codification effort on diplomatic protection is rather misplaced.¹⁷ In a final chapter, we are going to systematize our objections to the process of transformation of diplomatic protection (III).

The gist of our argument is that the impoverishment of the theoretical discourse in international law has also influenced the discussion concerning the evolution of

¹³ See for example the rather apologetic call of the International Court of Justice (hereinafter ICJ) in the *Barcelona Traction, Light and Power Company, Limited Case (Belgium v. Spain)*, judgment of 5 February 1970, ICJ Reports (1970), 3 et seq., at § 90 (hereinafter *Barcelona Traction Case*), advocating the conclusion of special agreements in order to by-pass its own findings, since it holds that "in the present state of the law the protection of shareholders requires that recourse be had to treaty stipulation or special agreements directly concluded between the private investor and the State in which the investment is placed".

¹⁴ This seems to be the attitude of the first Special Rapporteur, Judge Mohammed Benouna; see Benouna's Report, note 5, at 2-3 and 11-13, where he asserts that numerous claims settlement mechanisms confirm "the gap between the solutions adopted in this conflict and the traditional mechanisms of diplomatic protection" (at 13). For a different reading of the "dismissive approach", see John Dugard, *Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission*, 24 AYIL (2005), 75-91, at 76-79.

¹⁵ In our view, this is also apparent in Professor Dugard's work in the framework of the ILC.

¹⁶ Dugard I, note 8, at 10 (§§ 31-32), (emphasis added); Dugard, note 14, at 78-79, where he states that "[d]iplomatic protection provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments", (emphasis added).

¹⁷ For this idea, see also Koijmans, note 1, at 1983-1984.

diplomatic protection. Torn between the reality that diplomatic protection is being marginalized and the wish to increase its usefulness as a human rights protection mechanism (but at what cost?), the ILC and international law scholars found themselves in a constant effort to balance between these two antithetic poles and many times ended up making questionable suggestions, precisely because of the lack of a consistent theoretical elaboration of the relevant questions.

II. Defining Diplomatic Protection: The Ghost of Vattel's Definition

The two poles that characterize the whole discussion about diplomatic protection, namely the reality of the outdated and unjust nature of traditional diplomatic protection forcing international law scholars to adopt an apologetic attitude, and the utopian quest for its revitalization by increasing its relevance and applicability, are also pertinent to the definition of diplomatic protection. One of the elements that can crucially influence the essence of diplomatic protection relates to the field of its application. Consequently, the scope of diplomatic protection will be traced by focusing, on the one hand, on some expansionist views that consider a wide range of inter-State procedures as being part of the mechanism of diplomatic protection and, on the other hand, on some trends challenging the relevance of diplomatic protection on dispute settlement mechanisms, which, at first sight, seem to contribute crucially to the elaboration of the nationality of claims rule (A). After having illustrated the serious controversies concerning its scope, we will examine the legal fiction permeating diplomatic protection and the implications for this concept by the ICJ's pronouncements on the *LaGrand* Case. In this section, we will also briefly examine the interaction of the different theories with the conditions of exercise of diplomatic protection, namely the nationality of claims and the exhaustion of local remedies (B).

A. The Contours of Diplomatic Protection

According to the definition adopted by the ILC on first reading in 2004, diplomatic protection "consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State".¹⁸ The main issues raised by this definition are the following: First, there is a

¹⁸ Article 1 of the Draft Articles on Diplomatic Protection adopted by the Commission on first reading, reproduced in ILC Report 2004, note 2, at 17 (§ 59). Despite the fact that diplomatic protection belongs to the general topic of the treatment of aliens no effort has been made to codify the primary rules on the subject and more particularly, any reference to the concept of "denial of justice" – which is sometimes considered as the necessary condition for engaging the responsibility of the State – is avoided. See on that point, Dugard I, note 8, at 15 (§ 40).

debate over the meaning of the term “action” (2). Secondly, controversial views have been expressed with regard to the appropriateness of diplomatic protection in the field of collective claims arrangements. In this field, the policy of some specialized settlement procedures involves the assertion of application of a *lex specialis* with regard to diplomatic protection on the basis of their novel characteristics (3). But before examining these two aspects of the definition, we will briefly analyze the material scope of diplomatic protection (1).

1. Towards an International Human Rights Standard of Treatment?

Traditionally, diplomatic protection was linked to the treatment of aliens abroad.¹⁹ The sort of treatment that constitutes an internationally wrongful act has been a source of contention between the developing and the developed world.²⁰ On the one hand, developing countries adhered to the “national treatment” standard, which demands that a State treat aliens no worse than its own nationals.²¹ This standard, however, did not set any substantive threshold for the lawfulness of an act and therefore, made aliens vulnerable to the same abuses that the State perpetuated against its own citizens.²² For that reason, developed States put forward the “international minimum treatment standard” which is violated when “the treatment of aliens transgresses the human rights principles that States are obliged to

¹⁹ “When the citizen leaves the national territory, he enters the domain of international law ... By receiving the alien upon his territory, the State of residence admits the sovereignty of his national country and the bond which attaches to it”, Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York 1915, at 26; see also *ibid.*, *The Protection of Citizens Abroad and the Change of Original Nationality*, 43 *Yale Law Journal* (1934), 359-392, at 362-363. It is not here the appropriate place for examining in detail the material scope of diplomatic protection, namely which internationally wrongful acts committed that injure an alien can give rise to the exercise of diplomatic protection; for this issue see the analysis of Mariana Salazar Alborno, *Diplomatic Protection: Contemporary Challenges. A Study on the Impact of the Individual-Oriented Evolution of International Law Upon Diplomatic Protection*, Mémoire pour l’obtention du DEA en relations internationales, IUHEI/Geneva (October 2004), at 40 et seq. Part of this study is published in Mariana Salazar Alborno, *Legal Nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges*, 6 *Anuario Mexicano de Derecho Internacional* (2006), 377-417. Further references are based on the mémoire.

²⁰ See in addition to the references in the preceding footnote, also Richard B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, Manchester 1984, at 51-61; Colin Warbrick, *Diplomatic Representations and Diplomatic Protection*, 51 *ICLQ* (2002), 723-733, at 726-727; F. V. García Amador, *The Changing Law of International Claims*, New York 1984; Craig Forcese, *Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law*, 37 *Geo. Wash. Int’l L. Rev.* (2005), 469-500, at 474-479.

²¹ One of the main proponents of this standard has been the Argentine diplomat C. Calvo; see First Report on State Responsibility by García-Amador, UN Doc. A/CN.4/96 (1956), reproduced in the ILC Yearbook, Vol. II, 1956, 173-231, at 201; see also Bernardo Amor Sepúlveda, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 *Houst. J. Int’l L.* (1997), 565-593, at 571, where he justifies the standard by reference to the sovereign equality of States and the risks that a foreign investor undertakes when investing abroad.

²² Forcese, note 20, at 474.

extend to their own nationals under conventional or customary human rights law".²³

This standard extended beyond the strict limits of the notion of "denial of justice", but, initially, it was distinguished from the "international human rights obligations" that States undertake *vis-à-vis* their own nationals. According to the celebrated *dictum* of the *Neer* claim on the content of the standard, "[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man [sic] would readily recognize its insufficiency".²⁴ One can easily observe that the content of the standard is uncertain and extremely flexible and as Professor Warbrick submits, "it stands in contrast to the prescriptions of human rights law".²⁵

In order to circumvent these deficiencies, some international lawyers assert that the development of international human rights law has not only enriched the "international minimum standard" but that it has further substituted it for an "international human rights standard" treating nationals and aliens alike.²⁶ As Enrico Milano suggests, "[t]o maintain that an alien has a right to a fair trial means to say that his rights in a foreign country are determined internationally by the law of human rights".²⁷

Another tendency has been to apply a more rigorous version of the "minimum treatment standard". This is well illustrated in the framework of the North American Free Trade Agreement (hereinafter NAFTA) Chapter 11 Arbitration Procedure.²⁸ For example, in the *Mondev* Case one of the *ad hoc* Tribunals rejected that the *Neer* standard reflected the modern conception on the minimum treatment be-

²³ See Detlev Vagts, Minimum Standard, in: Rudolf Bernhardt (ed.), Encyclopaedia of Public International Law (EPIL), Vol. III, Amsterdam 1997, 408-410, at 409; Restatement (Third) of the Foreign Relations Law of the United States, Washington 1987, § 711 (b-c), cited by Forcese, *ibid.*, at 475 (footnote 32).

²⁴ *The United States of America on Behalf of L.F.H. Neer and Pauline E. Neer (claimants) v. The United Mexican States*, decision of 15 October 1926, United States-Mexican Claims Commission, IV UNRIAA/RSA (1952), 60-66, at 61-62.

²⁵ Warbrick, note 20, at 726.

²⁶ See Salazar Alborno, note 19, at 42-43; Lillich, note 20, at 51-61. See also the Declaration on the Human Rights of Individuals Who Are not Nationals of the Country in Which They Live, GA Res. 40/144. This idea is also present in the work of García-Amador on State responsibility for injuries to aliens and their property; see the analysis of James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge 2002, at 1-2 and 14-15.

²⁷ Enrico Milano, Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?, 35 NYIL (2004), 85-142, at 103, 122 and 137-138, where he refers to the *Breard*, *LaGrand* and *Avena* Cases.

²⁸ North American Free Trade Agreement, adopted 17 December 1992, 32 ILM (1993), 289 et seq. and 605 et seq. Article 1105 § 1 of NAFTA entitled "Minimum Standard of Treatment", provides that international law on such treatment requires "fair and equitable treatment and full protection and security".

cause of the contemporary developments in the field of foreign investments and then, it submitted that “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitable without necessarily acting in bad faith”.²⁹ If this reading of the minimum standard correctly reflects customary international law, it seems that a higher threshold of protection than the one applied in human rights law is put forward. It should be stressed, however, that the requirement of “fair and equitable” treatment still constitutes an amorphous obligation imposed on States and does not resolve the problem of an abusive use of the standard.³⁰

Finally, it should be noted that the work of the ILC has been marginally affected by the discussion on the evolution of the substantive rules whose violation gives rise to State responsibility and, subsequently, to the activation of the institution of diplomatic protection, because of the distinction between primary and secondary rules devoutly followed by the ILC.³¹ Nevertheless, the endorsement of the “international human rights standard” has been part of a wider effort of “humanization” of the law on diplomatic protection, as we will see in the following chapters.³²

²⁹ *Mondev Int’l Ltd. v. United States*, Award of 11 October 2002, ICSID Case No. ARB(AF)/99/2 (NAFTA Ch. 11 Arb. Tr.), 42 ILM (2003), 85 et seq. = 6 ICSID Reports (2004), 192 et seq. The NAFTA Free Trade Commission, had already issued on 31 July 2001 an interpretation of Article 1105 § 1, where it was stated that this provision “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party”, reproduced in *Methanex Corporation v. United States*, Award of 7 August 2005, NAFTA Ch. 11 Arb. Tr., available at: <http://www.naftaclaims.com/disputes_us_6.htm>, in Part IV, Chapter C, 5-6 of the award (§ 10). Arbitral Tribunals have pronounced on the binding character of this interpretation; *contra* Expert Opinion of Robert Jennings in Response to the NAFTA FTC Interpretation, 6 September 2001, Exh. 1, partly reproduced in *ibid.*, at 3 (§ 5). For a first commentary on the *Methanex* Case, see Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles*, available at: <http://www.iisd.org/pdf/2005/commentary_methanex.pdf>, particularly, at 5-6. See also the comments of Forcese, note 20, at 477-479, who asserts that the pronouncements of the Tribunal in the *Mondev* Case should not be limited to the treatment of foreign investments but should also extend to the treatment of individuals.

³⁰ Forcese, *ibid.*, at 479. In the same line the Tribunal in the *Waste Management Inc. v. United Mexican States* Case, Award of 30 April 2004, ICSID Case No. ARB(AF)/00/3 (NAFTA Ch. 11 Arb. Tr.), reprinted in: 43 ILM (2004), 967 et seq., § 99, admitted that “the standard is to some extent a flexible one which must be adapted to the circumstances of each case”.

³¹ See, nevertheless, the work of García-Amador in the framework of the ILC, which included an explicit though truncated code of human rights and an indirect linkage between human rights and the protection of aliens. For the whole set of the draft articles, see ILC Yearbook, Vol. II, 1961, 46-54. See also the tendency of Mohammed Bennouna to partially focus on the relationship between primary and secondary rules as reflected for example in the discussion about the fraudulent reliance on the one of the two nationalities or the clean hands doctrine, in Bennouna’s Report, note 5, at 16-17 (§§ 60-61). The ICJ made recently a reference in the notion of “the international minimum standard relating to the treatment of foreign nationals” with regard to the treatment of Ugandan nationals by Congo, and linked it to the exercise of diplomatic protection; see *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, available at: <www.icj-cij.org>, §§ 313, 317 and 333.

³² See also Warbrick, note 20, at 726-727.

2. Revitalizing Diplomatic Protection Through the Expansion of Its Scope

The question of the limits of diplomatic protection is rather complicated. There is a strong tendency to broaden the scope of diplomatic protection by incorporating to the institution also means of consular assistance and informal diplomatic representations (a). Furthermore, the question of the relations between diplomatic protection and the protection of human rights will be briefly examined (b).

a) Consular Assistance, Diplomatic Representations and Diplomatic Protection: Three Terms, Same Content?

According to a broad definition, diplomatic protection has also a preventive nature, meaning that it encompasses all diplomatic steps taken in order to prevent an imminent injury to the individual abroad.³³ This view tends to equate diplomatic protection with diplomatic representations, the latter covering "a wide range of communications from one government to another, in which one expresses its disapproval about some action or inaction of the other".³⁴ Apparently, this form of action, which does not necessarily impute unlawful conduct to another State, is closely related to some aspects of consular assistance as envisaged in the VCCR.³⁵ The ICJ has been recently seized of cases combining questions of diplomatic protection and consular assistance.³⁶ In the *LaGrand* Case, which represents the most illustrative example, the Court conceded, following the German submissions on the topic, that Article 36 of the VCCR³⁷ conferred rights on individuals which

³³ According to this view, diplomatic protection should also include measures taken before all the conditions of an internationally wrongful act are met; that means without having "un fait illicite par-fait"; Condorelli, note 3, at 8-9. See also Milano, note 27, at 93; Georges Perrin, *Réflexions sur la protection diplomatique*, in: *Mélanges Marcel Bridel: Recueil de travaux publiés par la Faculté de Droit, Lausanne 1968*, 379-411, at 379-380.

³⁴ Warbrick, note 20, at 724; see, for example, the opposition of the European Union to death penalty and its general calls for the observance of the safeguards provided by the Vienna Convention on Consular Relations, adopted 24 April 1963, 596 U.N.T.S., 262-512 (hereinafter VCCR), as expressed in two letters towards the United States authorities (reprinted in Martin Mennecke, *Towards the Humanization of the Vienna Convention of Consular Rights – The LaGrand Case before the International Court of Justice*, 44 GYIL [2001], 430-468, at 462 [footnote 137]), which are initiatives not directly linked to an internationally wrongful act.

³⁵ One of the functions of a diplomatic mission is to protect "in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law"; see Article 3 of the Vienna Convention on Diplomatic Relations, adopted 18 April 1961, 500 U.N.T.S., 95 et seq.

³⁶ *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, order of 9 April 1998, ICJ Reports (1998), 248 et seq.; *LaGrand Case (Germany v. United States of America)*, judgement of 27 June 2001, ICJ Reports (2001), 446 et seq.; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, judgement of 31 March 2004, ICJ Reports (2004), 12 et seq. (hereinafter *Avena Case*).

³⁷ Art. 36 § 1 (b) of the VCCR (note 34) provides that "[w]ith view to facilitating the exercise of consular functions relating to nationals of the sending State: ... (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody

were violated by the United States and that this violation gave rise to the right of Germany to exercise diplomatic protection on behalf of its injured nationals.³⁸

What caused much confusion in this case was the complex legal argumentation of Germany, which based its claim on the violation of the international legal obligations by the US towards Germany, stemming from Article 36 of the VCCR, “in its own rights [direct injury] and in its right to the exercise of diplomatic protection of its nationals [indirect injury of Germany-direct injury of its nationals]”.³⁹ This wording was mistakenly interpreted by the US as an indication that in Germany’s view the VCCR provided for a right to exercise diplomatic protection.⁴⁰ In the reality, Germany used diplomatic protection as the (secondary, customarily-derived, rule) mechanism for invoking the responsibility of the US for the violation of the primary rules concerning individual rights to consular assistance; so there was no direct connection between the substantive rules on consular assistance and the exercise of diplomatic protection.⁴¹

pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; ...*”, (emphasis added).

³⁸ *LaGrand* Case, note 36, at 494 (§ 77), where the Court stated that article 36 § 1 of the VCCR “creates individual rights, which ... may be invoked in this Court by the national State of the detained person”. For an analysis of the case, see Mennecke, note 34; Martin Mennecke/Christian Tams, *LaGrand* Case (*Germany v. United States of America*), 51 ICLQ (2002), 449-455; Christian Tams, Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ’s Judgment in the *LaGrand* Case, 13 EJIL (2002), 257-1259 and report at <www.ejil.org/journal/curdevs/sr24.html>; Tim Stephens, The *LaGrand* Case (*Federal Republic of Germany v. United States of America*). The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose?, 3 Melbourne Journal of International Law (2002), 143-164; Stephanie Baker, *Germany v. United States* in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations and Provisional Measures Orders, 30 Ga. J. Int’l & Comp. L. (2001-2002), 277-304; Joan Fitzpatrick, Symposium on the *LaGrand* Case: The Unreality of International Law in the United States and the *LaGrand* Case, 27 Yale J. Int’l L. (2002), 427-433.

³⁹ See Memorial of the Federal Republic of Germany, *LaGrand* Case (*Germany v. United States of America*), vol. I, 16 September 1999, § 7.02, available at: <http://www.icj-cij.org>; see on the whole question the analysis of Zsuzsanna Deen-Racsányi, Diplomatic Protection and the *LaGrand* Case, 15 LJIL (2002), 87-103, at 90-93; see also Tams, *ibid.*, (in the report).

⁴⁰ Counter-Memorial submitted by the United States of America, *LaGrand* Case (*Germany v. United States of America*), 27 March 2000, § 73; the same misconception seems to characterize sometimes the analysis of Monica Pinto, De la protection diplomatique à la protection des droits de l’homme, 106 RGDIP (2002), 513-548, *passim*.

⁴¹ See Deen-Racsányi, note 39, at 93. This misunderstanding is also apparent in other parts of the US argumentation; the US submitted, for example, that diplomatic protection did not relate to the application and interpretation of the Vienna Convention and therefore Germany could not invoke Protocol I of the Convention as a jurisdictional basis for seizing the ICJ. The Court rejected these allegations (*LaGrand* Case, note 36, § 42), but without stating the obvious, namely that there was a significant difference between jurisdiction over whether Germany had “the right to exercise diplomatic protection under the VCCR, and *over claims brought in the exercise of diplomatic protection* under the Protocol”, in: Deen-Racsányi, *ibid.*, at 94 (emphasis in the original).

Nevertheless, the question is raised whether we should consider some forms of diplomatic assistance included in the VCCR – such as the communication of consular authorities with the arrested or prosecuted national and the arrangement of his legal representation – as constituting part and parcel of diplomatic protection. Some scholars seem to favour such an approach⁴², while others submit that the so-called diplomatic protection *lato sensu*⁴³ should be distinguished from diplomatic protection *stricto sensu*, mainly because the conditions for the exercise of the former are much more flexible.⁴⁴ In our view, the former construction constitutes an illustrative example of the agonizing effort of some international law scholars to defy the allegations that diplomatic protection is becoming obsolete.⁴⁵ Diplomatic protection *lato sensu* represents an illustration of considerations of effectiveness concerning the use of diplomatic protection in contemporary international law, in

⁴² See, among others, Warbrick, note 20, at 731; Pinto, note 40. Professor Condorelli makes reference to the relevant provision of the ICSID mechanism that prohibits the investor's national State from exercising diplomatic protection, but allows the "simples démarches diplomatiques tendant uniquement à faciliter le règlement du différend", in: Condorelli, note 3, at 9, citing Art. 27 §§ 1-2 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter ICSID Convention), adopted 18 March 1965, 575 U.N.T.S., 159 et seq., reprinted in: 4 ILM (1965), 524 et seq.

⁴³ The distinction between diplomatic protection *lato sensu* and *stricto sensu* is also made in a different context, namely that of separating the taking of diplomatic measures from the recourse to judicial proceedings. The World Court made this distinction on different occasions; see on that *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, judgment of 28 February 1939, PCIJ Ser. A/B, No. 76, 4 et seq., at 16; *Nottebohm Case (Liechtenstein v. Guatemala)*, judgment of 6 April 1955, ICJ Reports (1955), 4 et seq., at 24. In contrast, international legal scholars draw no distinction between the two forms; see on that point, Paul Weiss, Diplomatic Protection of Nationals and International Protection of Human Rights, 4 *Révue des droits de l'homme: Human Rights Journal* (1971), 643-678, at 645 and the analysis in the Report on the Work of the International Law Commission during its 52nd session (2000) (hereinafter ILC Report 2000), UN Doc. A/55/10 (General Assembly, Official Records, Supplement No. 10), Chapter V, 141-175 (§§ 406-495), at 146 (§§ 423-424).

⁴⁴ See the practice of the British government, which draws a distinction between diplomatic representations and diplomatic protection when it states that "[t]he [Claims] rules cover only the requirements for the presentation of formal claim. It may sometimes be permissible and appropriate to make informal representations even where the strict application of the rules would bar the presentation of a formal claim", in: UK Materials on International Law 1999, 70 BYIL (1999), 527. See also Article 20 of the Treaty Establishing the European Community (Official Journal C 325, 24 December 2002), available at: <<http://europa.eu.int/eur-lex/en/treaties/dat/12002E/pdf/12002EEN.pdf>> and Article II-106 of the Treaty Establishing a Constitution for Europe (Official Journal C 310, 16 December 2004), available at: <<http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>> providing for a right of the European citizen to protection by the diplomatic or consular authorities of any EU state and the analysis in: Torsten Stein, Die Regelung des diplomatischen Schutzes im Vertrag über die Europäische Union, in: Georg Ress/Torsten Stein (eds.), *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen*, Baden-Baden 1996, 97-105. There is a controversy about whether this provision is limited to consular assistance or it also extends to diplomatic protection; see Christian Storst, *Der Fall Abbasi: Wegbereiter eines gemeineuropäischen Anspruchs auf diplomatischen Schutz?*, 42 AVR (2004), 411-424, at 414.

⁴⁵ Professor Condorelli's attempt to defy the predominant view that diplomatic protection is becoming obsolete through an expansion of its scope, on the basis that also consular relations or other diplomatic representations aim at the protection of the nationals abroad, is highly illustrative of this trend; see Condorelli, note 3, at 9-10.

the sense that it can be “modernized” and recover its efficiency and popularity through an excessive and uncritical expansion.⁴⁶

We believe that taking into account considerations of diplomatic protection’s efficiency while trying to review a mechanism is a legitimate task. It should be, however, in conformity with the realities of international law; and the reality is that the ILC has, from early on, shown that it considers the close link between State responsibility and diplomatic protection as one of the most important guidelines in its effort to codify the latter.⁴⁷ Consequently, diplomatic protection is limited to the measures which follow the commission of an internationally wrongful act and the taking place of the injury.⁴⁸

b) Violations *erga omnes* and Diplomatic Protection Beyond Individualism:

The Barcelona Traction *dictum*

The definition further speaks about an injury to determined persons. The question then arises whether the inter-State mechanisms provided for in international human rights treaties should be considered a form of diplomatic protection and more generally, which exactly is the role of diplomatic protection in the framework of the invocation of State responsibility for violations of (human rights) *erga*

⁴⁶ See for an excellent illustration of how considerations of effectiveness have led to the elaboration of the traditional view on diplomatic protection, Benouna, note 6, at 246.

⁴⁷ See, on that point, the ILC Report 2000, note 43, at 147 (§ 427), where it is stated that “because of the relationship between State responsibility and diplomatic protection, the Commission in its work on the latter should use terms consistent with the terms used in the former”, and the admission that “a State acting on behalf of one of its nationals [is] nonetheless invoking State responsibility” (*ibid.*, at 86 (§ 286)); see also Richard B. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack*, 69 AJIL (1975), 359-365, at 359, describing diplomatic protection as a “procedural counterpart” of State responsibility. Professor Condorelli that mainly puts forward the idea of diplomatic protection *lato sensu*, later, with regard to Article 20 of the Treaty Establishing the European Community, seems to have a more ambivalent position, as he distinguishes between this form of consular protection and diplomatic protection (Condorelli, note 3, at 12). *Contra* Torsten Stein, Interim Report on “Diplomatic Protection under the European Union Treaty” submitted to the ILA Committee on Diplomatic Protection of Persons and Property in the 2002 Conference, available at: <www.ila-hq.org/pdf/Diplomatic%20Protecton/Diplomatic%20Protection%20Second%20Report%202002.pdf> (32-39), who speaks in the case of the European Union about a conventional derogation from the traditional view.

⁴⁸ ILC Report 2004, note 2, at 25-26, and the critical observations thereon by Milano, note 27, at 93 and 103. The correlation between State responsibility and diplomatic protection seems, however, to be seriously undermined by the fact that whereas diplomatic action encompasses “protest, request for an inquiry or for negotiations aimed at the settlement of disputes” (ILC Report 2004, *ibid.*, § 5 of the Commentary to Article 1), the Draft Articles on State Responsibility explicitly exclude protests or calls for the observance of an obligation from the definition of the invocation of State responsibility; see Report on the Work of the International Law Commission during its 53rd session (2001), UN Doc. A/56/10 (General Assembly, Official Records, Supplement No. 10), Chapter VII, 29-365 (§§ 36-77), at 294-295 (§ 2 of the Commentary to Article 42) (hereinafter ILC Report 2001); for the implications of this inconsistency, see *infra*, footnotes 58 et seq., and Ian Scobie, *The Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law*, 13 EJIL (2002), 1201-1220, at 1215-1216.

omnes obligations.⁴⁹ Inter-State claims for human rights violations usually have a collective or massive character. As a result, it is not always possible to examine the fulfilment of the conditions for the exercise of diplomatic protection (nationality link/exhaustion of local remedies) in each and every individual case. Moreover, the essentially bilateral character of diplomatic protection does not fit very well with the communitarian characteristics of human rights *erga omnes* obligations. For these reasons, the utility of diplomatic protection in this type of cases has been contested.⁵⁰

One aspect of the multidimensional relation between diplomatic protection and human rights concerns the role of diplomatic protection in the field of *erga omnes partes* obligations⁵¹ and the precise nature of treaty-based inter-State human rights protection mechanisms. Some authors trace some elements of diplomatic protection in these mechanisms, despite the fact that they have usually the character of an *actio popularis*, serving primarily the idea of an "*ordre public*".⁵² Whereas one could trace some elements of diplomatic protection in the latest use of the European Convention of Human Rights (hereinafter ECHR) inter-State mechanism and in the tendency of States to intervene to individual applications in support of the individual's claim⁵³, it is our submission that the use of the term "diplomatic

⁴⁹ On the question of *erga omnes partes*, see mainly Jean-François Flauss, Protection diplomatique et protection internationale des droits de l'homme, 13 RSDIE (2003), 1-36, at 2-15; Pinto, note 40, *passim*. On the question of *erga omnes* obligations, see Giorgio Gaja, Is a State Specially Affected When Its Nationals' Human Rights Are Infringed?, in: L.C. Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays in Honour of Judge Antonio Cassese*, The Hague 2003, 373-382, *passim*; *ibid.*, *Droits des États et droits des individus dans le cadre de la protection diplomatique*, in: Jean-François Flauss (ed.), *La protection diplomatique: mutations contemporaines et pratiques nationales*, Bruxelles 2003, 63-69, *passim*; Milano, note 27, at 102-119; Scobbie, *ibid.*, *passim*; Condorelli, note 3, at 18-23.

⁵⁰ See the analysis of Juliane Kokott, Zum Spannungsverhältnis zwischen nationality rule und Menschenrechtsschutz bei der Ausübung diplomatischer Protektion, in: Ress/Stein, note 44, 45-61, *passim*.

⁵¹ See Article 48 § 1(a) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: ILC Report 2001, note 48, at 320-321 (§ 7 of the Commentary).

⁵² See on that point Jean-François Flauss, Vers un aggiornamento des conditions d'exercice de la protection diplomatique?, in: *ibid.* (note 49), 29-61, at 30. See also the detailed analysis of the issues in Jean-François Flauss, *Contentieux européen des droits de l'homme et protection diplomatique*, in: *Libertés, justice, tolérance: Mélanges en hommage au doyen Gérard Cohen-Jonathan* (2004), Bruxelles, 813-838, at 821-826.

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), E.T.S. No. 5, as amended by Protocol No. 11, E.T.S. No. 155. For the latest developments, see *Denmark v. Turkey*, European Court of Human Rights (hereinafter ECtHR) (First Section), Application No. 34382/97, decision on the admissibility of 8 June 1999, concerning the treatment by Turkish authorities of a Danish citizen and the observations on it by Theodor Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, 301 RCADI (2003), 9-490, at 312, and also *Cyprus v. Turkey*, ECtHR, Application No. 25781/94, judgement of 10 May 2001 and the observations by Flauss, note 49, at 14-15. With regard to the intervention of States in individual applications, see the interventions of Cyprus in the *Loizidou v. Turkey* Case, ECtHR, Application No. 15318/89, decision of 28 July 1998, and of Romania in the *Ilaşcu and Others v. Moldova and Russia* (hereinafter *Ilaşcu* Case), Application No. 48787/99, ECtHR Ser. A, decision of 8 July 2004, available at: <<http://hudoc.echr.coe.int>>, reprinted in: 40 EHRR (2005), 1030-1171.

protection” is misleading, since these mechanisms do not usually require the existence of a nationality link to the injured individual⁵⁴ or the prior exhaustion of local remedies⁵⁵, conditions essential for the activation of diplomatic protection.

It is our view that the tendency to invent, in a way, a wider “*champ d’application*” for diplomatic protection, disregards the fact that these mechanisms are based on a distinct *rationale*. The wish to increase diplomatic protection’s applicability leads us away from the reality of diplomatic protection being an institution involving the violation of both State and individual interests/rights on the basis of the nationality link; in contrast, the inter-State human rights protection mechanisms aim either at the preservation of public order or at the direct and exclusive protection of the rights of individuals.⁵⁶

Similar questions are raised with regard to the interaction between the invocation of the violation of (human rights) *erga omnes* obligations and the exercise of diplomatic protection in the field of State responsibility. On the basis of our discussion lays the famous *obiter dictum* of the ICJ in the *Barcelona Traction Case*, where the Court observed that “an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. In view of the importance of the rights involved [in the former], all States can be held to have a legal interest in their protection”, while for the latter, the Court stated that “[i]t cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance”.⁵⁷

This passage apparently inspired the ILC’s distinction between injured and non-injured or legally interested States, which transcends the ILC Draft Articles on Sta-

⁵⁴ See the way the Court treats the question of dual nationality in the *Avena Case* (note 36, § 42) and the comments thereon of Philippe Weckel, *Chronique de jurisprudence internationale. Avena et autres ressortissants mexicains (Mexique c. Etats-Unis)*, 108 RGDIP (2004), 731-742, at 734 (§ 8). Professor Pinto, note 40, at 537-538, justifies this situation by suggesting that a State can exercise diplomatic protection in favour of an individual for ensuring the respect for the “*légalité internationale objective*”. The use of the inter-State human rights mechanisms as a sort of diplomatic protection seems to favour also Professor Warbrick, note 20, at 728-729.

⁵⁵ Professor Condorelli submits that “... *on sait bien, en effet, que lorsque la violation attribuée à un État peut être qualifiée de ‘massive’, voire ‘systématique’, l’exigence de l’épuisement ne joue plus*”; Condorelli, note 3, at 8 (emphasis added). See also the treatment of the question of the exhaustion of local remedies in the *Avena Case* (ibid.) and the critical observations of Annemarieke Künzli, *Case Concerning Mexican Nationals*, 18 LJIL (2005), 49-64, *passim*. While in the framework of the ECHR no distinction is made between individual and inter-State claims, in the case of administrative practices the condition of the exhaustion of local remedies is dispensed.

⁵⁶ *Contra* Pinto, note 40, at 537-538. See also the stimulating observations of Alborno, note 19, at 43-48, who concludes that “[s]uch a possibility [for other States to invoke responsibility for human rights violations] simply comes to reinforce the view that diplomatic protection involves *complementary rights* of the State and of the individual, *primacy* given to the latter ...” (ibid., at 47).

⁵⁷ *Barcelona Traction Case*, note 13, at 32 (§ 33). This decision of the Court is sometimes linked to its unwillingness to examine the human rights argument put forward by Germany with regard to the individual rights stemming from Art. 36 of the VCCR in the *LaGrand Case*, note 36, § 78.

te Responsibility.⁵⁸ According to this distinction, apart from the (directly) injured State, also the non-injured States can invoke State responsibility in the case of violations of *erga omnes* obligations. But should the invocation of State responsibility by a non-injured State in the case of violations of *erga omnes* obligations be considered a form of diplomatic protection?⁵⁹ The two projects of the ILC on State Responsibility and on Diplomatic Protection seem to be rather confusing.

On the one hand, Articles 44 and 48 § 3 of the 2001 Draft Articles on State Responsibility make clear that the invocation of responsibility by whichever State and in whichever context is subject to the general conditions of diplomatic protection, namely the nationality link and the exhaustion of local remedies.⁶⁰ In addition to this, in his First Report on Diplomatic Protection, Professor Dugard made reference to a prospective report on the right of a State to assert diplomatic protection over a non-national injured by the breach of a *jus cogens* norm.⁶¹ On the other hand, the upholding of the requirement of the nationality link by the ILC and the non-materialization of the promised report on *erga omnes* obligations lead to the completely illogical conclusion that, ultimately, the non-injured States are always precluded from invoking responsibility under Article 48, since they do not fulfil the nationality requirement!

The confusing combination of the two drafts and their apparent dissonance led international law scholars to suggest various *formulae*⁶² premised on the alleged difference between diplomatic protection and protection in the case of human rights. Professor Gaja, for example, submits that, on the one hand, the obligations giving rise to the former could be invoked only by the State of nationality (which is correct) and, on the other hand, that with regard to claims for human rights violations the position of the State of nationality was identical to the one of all the

⁵⁸ See Edith Brown Weiss, The ILC's State Responsibility Articles: Invoking State Responsibility in the Twenty-First Century, 96 AJIL (2002), 798-816, at 801 and 804; Scobbie, note 48, at 1208.

⁵⁹ Article 48 § 2 refers to the third States' "entitlement" to invoke State responsibility and ask for cessation and non-repetition of the internationally wrongful act and the performance of the obligation of reparation by the wrongdoing State. This provision has led Enrico Milano to speak of "a form of diplomatic protection of a third state", in: Milano, note 27, at 106.

⁶⁰ See ILC Report 2001, note 48, at 304-307; Scobbie, note 48, at 1215; Milano, *ibid.*, at 105.

⁶¹ Dugard I, note 8, at 60 (§ 185).

⁶² For example, Professor Scobbie (note 48, at 1215-1219) suggests that the non-injured State's claim for cessation and non-repetition of the internationally wrongful act falls short of an invocation of responsibility, as defined in the 2001 Draft Articles on State Responsibility (ILC Report 2001, note 48, at 294-295, § 2 of the Commentary to Article 42), and, consequently, the nationality link requirement does not apply. On the basis of this construction, he submits, a State is entitled to seek a declaratory judgment that a State has breached a *jus cogens* norm (more correctly an *erga omnes* obligation), but it cannot ask for the performance of the obligation of reparation. In another passage of his highly interesting essay, Professor Scobbie (*ibid.*, at 1217), contends that "[i]t could be argued ... that the invocation of the breach of a peremptory norm transcends diplomatic protection", but he rejects this view.

other States (which is in a way misleading).⁶³ Enrico Milano, on his part, asserts that in the case of a violation of *erga omnes* obligations “the invoking state is acting on a different plane, as compared with the state of nationality exercising diplomatic protection”, because its legal interest lies “in the protection of the integrity of collective obligations owed to the international community as a whole ... rather than in the protection of the rights of the injured individual”.⁶⁴

In our view, the whole controversy, apart from reflecting a very serious inconsistency between the two drafts, also shapes the two antithetic poles that we already described, namely the reality of diplomatic protection’s outdated concept and the quest for increasing diplomatic protection’s utility. In the end, even the proponents of diplomatic protection’s expansion in the field of *erga omnes* obligations concede that such an evolution cannot be envisaged on the basis of the two drafts, as they currently stand.⁶⁵

3. *Ad Hoc* Claims Settlement Mechanisms and Diplomatic Protection

The discussion about the scope of diplomatic protection has also witnessed a different trend. International lawyers, based on the extraordinary nature and the “*lex specialis*” reasoning of the relevant *ad hoc* claims settlement mechanisms tend to distinguish them from the institution of diplomatic protection in order to justify

⁶³ Professor Gaja is the main exponent of this theory. What Professor Gaja contends is that the protection in the case of human rights violations cannot be qualified as diplomatic protection even if it is offered by the State of nationality (Gaja, *Is a State*, note 49), because in this case some of the elements of diplomatic protection – such as the nationality of claims requirement or the discretion of the State to transfer the reparation to the individuals concerned – are inapplicable (*ibid.*, at 376 and 381-382). Professor Gaja further submits that the State of nationality is not the directly injured or specially affected State, because in the case of human rights violations all States share a common interest for the respect of human rights and when invoking responsibility they do “not have any interests on their own” (*ibid.*, at 381, referring to the *Reservations to the Genocide Convention* advisory opinion, ICJ Reports [1951], 15 et seq., at 23). In contrast, some other scholars dismiss these allegations and remain fond of the idea that there is a close relationship between diplomatic protection and human rights protection. See the view of Professor Dugard, in: Dugard I, note 8, at 10 (§ 32). See also how Professor Pinto, note 40, at 535-538, conceives the link between diplomatic protection and protection of human rights, by focusing mainly on the notion of denial of justice. Professor Pinto asserts that a protest for denial of justice can be based on a human rights violation and she reaches the rather arbitrary conclusion that diplomatic protection should be considered a human right itself.

⁶⁴ Milano, note 27, at 115-116, where he also states that in this case the action aims at safeguarding the general legal values and not at redressing the injury caused to the individual. He is, however, forced to admit that as the two projects stand right now, non-injured States will not be able to bring an admissible claim for the performance by the responsible State “of the obligation of reparation ... in the interest of the ... beneficiaries of the obligation breached”, as Article 48 § 2(b) of the 2001 Draft Articles on State Responsibility provides, (*ibid.*, at 107).

⁶⁵ Milano, *ibid.*, at 89. It seems that the controversy mainly stems from the unfortunate distinction between directly and non-directly injured States in the law of State responsibility, which fails to take into account the special character of human rights violations claims. See on this point, Weiss, note 58, at 802-803.

their sharp departure from the established conditions for the exercise of diplomatic protection.

The example of lump-sum settlement agreements, that we will first examine, highlights a different phenomenon, namely, the tendency of the ICJ to exclude specific indications of State practice from the traditional *corpus* of the customary law on diplomatic protection. More precisely, the Court in the *Barcelona Traction Case*⁶⁶, when examining international practice with regard to the question of the place of shareholders' interests within companies' claims in settlement procedures, hastened summarily to reject the general arbitral jurisprudence – taking into account shareholders' rights in a broader than in the municipal law way – by noticing that "in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case".⁶⁷

The Court's "*lex specialis*" approach to lump-sum settlement agreements, bilateral investment treaties (hereinafter BITs) and relevant arbitral case-law⁶⁸ has been sharply criticized. Professor Lillich, which is an assiduous proponent of the continuing contribution of the former to the law of international claims, has on different occasions reproached the ICJ for parochialism.⁶⁹ According to his view, the

⁶⁶ *Barcelona Traction Case*, note 13.

⁶⁷ *Ibid.*, at 40. Professor Caflisch, despite recognizing the hasty way in which the Court reached its dismissive conclusion in the *Barcelona Traction Case* (Lucius C. Caflisch, *The Protection of Corporate Investments Abroad in the Light of the Barcelona Traction Case*, ZaöRV 31 [1971], 162-196, at 188), and his intervention in: Richard B. Lillich, *Round Table: Toward More Adequate Diplomatic Protection of Private Claims: "Aris Gloves", "Barcelona Traction", and Beyond*, 65 ASIL Proceedings (1971), 333-365, at 344-345, seems to approve the Court's conclusion due to the absence of uniformity with regard to the solutions put forward by lump-sum settlement agreements (*ibid.*, at 362), as he concludes that "the conditions which must be met [in order for treaties to be evidence of custom] are very stringent: There must be a near uniformity of treaty rules; moreover, it is impossible to prove the existence of a customary rule only through conventional law. There has to be something else", *ibid.*; see also Maurice Mendelson, *Runaway Train: The 'Continuous Nationality' Rule from the Panevezys-Saldutiskis Railway Case to Loewen*, in: Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), London, 97-150, also available at: <<http://www.biicl.org/index.asp?contentid=822>>, who asserts (p. 14-15 of the transcript) that "[e]ven if a consistent pattern could be detected, it would be wrong to deduce from it a rule of customary law, for there is no special reason to assume that the treaty practice is referable to such a rule"; Ian M. Sinclair, *Nationality of Claims British Practice*, 27 BYIL (1950), 125 et seq., at 128. See also the statement of the American Government in the framework of the *Delagoa Bay* litigation that "where by special agreement between the two Governments a right to compensation has been accorded to the shareholders ... it is plain that no principle of international law can be deduced [from it]", reproduced in: Green H. Hackworth, *Digest of International Law*, vol. V, Washington 1943, 843.

⁶⁸ The Court observed that "[s]pecific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such agreements are *sui generis* and provide no guide in the present case", *ibid.*

⁶⁹ Richard B. Lillich, *Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona*, 65 AJIL (1971), 522-532, *passim*; Richard B. Lillich/Burns H. Weston, *Lump Sum Agreements: Their Contribution to the Law of International Claims*, 82 AJIL (1988), 69-78, *passim*. *Contra*

Court's treatment of State practice on this issue is not at all satisfactory; despite not being uniform in their content, lump-sum settlement agreements have been concluded over a considerable period of time and they do show that "it is the practice to allow claims to be brought on behalf of nationals interested in foreign corporations".⁷⁰ It is submitted that at least the general trend towards opening the settlement proceedings to claims by shareholders – evidenced by the lump-sum settlement agreements provisions – should be taken into account.

Beyond the example of lump-sum settlement agreements, two of the main institutions, whose case-law constitutes the basis for Professor Dugar d's progressive proposals, namely, the Iran-United States Claims Tribunal (hereinafter I-USCT) and the United Nations Compensation Commission (hereinafter UNCC), have also been part of the debate whether they should be treated as mechanisms contemplating a diplomatic protection function or not. The discussion has mainly focused on the place of the individual within these mechanisms and on the applicable law. With regard to the UNCC, the UN Secretary General submitted that "the Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function".⁷¹ It is a fact that, in many aspects, the UNCC sharply departs from the traditional rules on diplomatic protection. It should be noted, however, that the Commission preserved some elements resembling the function of diplomatic protection, such as the fact that the claims are gathered and presented primarily by governments⁷² (a procedure where

Mendelson, note 67, at 28-29, who states (at 45) that "the content of the norms of the world's 2200 BITs is in many respects too inconsistent to represent a settled practice".

⁷⁰ J. Mervyn Jones, Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies, 26 BYIL (1949), 225-258, at 241. Doubts, nevertheless, expresses Professor David Harris, The Protection of Companies in International Law in the Light of the *Nottebohm* Case, 18 ICLQ (1969), 275-317, at 281-282. Arbitral Tribunals remain split with regard to the relevance of investment treaties to ascertaining customary international law; see the analysis of Pia Acconci, Is There Room for Customary Law in International Investment Law? The Requirement of Continuous Corporate Nationality in the *Loewen* Case, 2 Transnational Dispute Management (2005), also available at: <<http://www.biicl.org/index.asp?contentid=822>>, at 7.

⁷¹ Report of the Secretary General Pursuant to Paragraph 19 of Security Resolution 687, UN Doc. S/22559 of 2 May 1991, § 20; see the comments of Felipe H. Palillo, Nature et caractéristiques de la procédure devant la Commission d'indemnisation des Nations Unies, in: René-Jean Dupuy (ed.), Le développement du rôle du Conseil de Sécurité: Colloque la Haye, 21-23 Juillet 1992/Académie de droit international de la Haye = The Development of the Role of the Security Council: Peace-keeping and Peace-building/Hague Academy of International Law, Alphen ad Rijn 1993, 287-302, at 291 (§ 12). The dispute settlement procedure of the UNCC has been characterized as a hybrid; see Brigitte Stern, Un système hybride: la procédure de règlement pour la réparation des dommages résultant de l'occupation illicite du Koweït par l'Irak, 37 McGill Law Journal (1991-1992), 625-644, at 635, where she asserts that the system will combine elements of diplomatic protection and direct access.

⁷² The claims remain, however, private and there is no case of espousal; see for example Article 1 § 12 of the Provisional Rules for Claims Procedures, Decision No. 10 of the UNCC's Governing Council, UN Doc. S/AC.26/1992/10 (1992), 26 June 1992, where a claimant is described as "any individual, corporation ... that files a claim with the Commission" and Governments submit claims on behalf of the individuals or the corporations (Art. 5); see the analysis of Norbert Wühler, The United Nations Compensation Commission: a New Contribution to the Process of International Claims Resolution, 2 Journal of International Economic Law (1999), 249-272, at 253.

governments keep some discretion both concerning the presentation and the withdrawal of the claims).⁷³

Concerning the I-USCT, it has been suggested that it constitutes an imperfect international claims tribunal because the essential ingredient of diplomatic protection, namely the espousal of claims, is missing.⁷⁴ This view is further supported by the conclusions of the Tribunal in the *A/18* and *A/21* Cases, where it held that “the object and purpose of the Algiers Declarations was to resolve a crisis in the relations between Iran and the United States, not to extend diplomatic protection in the normal sense” and underlined that “Tribunal awards uniformly recognize that no espousal of claims by the United States is involved in the case before it”.⁷⁵ Nevertheless, the Tribunal has been established by an international treaty and is integrated to the international legal order, as the withdrawal of the small claims pending before it and their settlement through a lump-sum agreement suggests.⁷⁶ Therefore, it is an open issue, whether the I-USCT is a private arbitral tribunal or an international/inter-State tribunal.⁷⁷

⁷³ Provisional Rules for Claims Procedures, *ibid.*, § 4. John R. Crook, The United Nations Compensation Commission – A New Structure to Enforce State Responsibility, 87 AJIL (1993), 141-157, at 150. *Contra* Alexandros Kolliopoulos, La Commission d’indemnisation des Nations Unies et le droit de la responsabilité internationale, Paris 2001, at 283 and 293-295, who submits that the independence of the individual in the proceedings is absolute, because the role of the governments in presenting the claims is purely functional and the national filtering is based on a logic completely different from the logic of State discretion in diplomatic protection; he further speaks of the State intervening in favour of an objective legality, (*ibid.*, at 303).

⁷⁴ David Caron, The Nature of the Iran-United States Tribunal and the Evolving Structure of International Dispute Resolution, 84 AJIL (1990), 104-156, at 131-137. The basic argument is that the Tribunal should be treated as the Tribunal of a 3rd State, because it was created as a substitute to US Courts; see Brigitte Stern, Les questions de nationalité des personnes physiques et de nationalité et de contrôle des personnes morales devant le Tribunal des Différends Irano-Américains, 30 AFDI (1984), 425-445, at 431-432. In the same line of reasoning, the applicability of the law of diplomatic protection in the framework of investment protection treaties and the foreign investment arbitration has been questioned because of the lack of espousal therein; see Acconci, note 70, at 4; Christopher Schreuer, Shareholder Protection in International Investment Law, available at: <www.univie.ac.at/intlaw/pdf/csunpubpaper_2.pdf>, at 4; Stanimir A. Alexandrov, The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as “Investors” and Jurisdiction *Rationae Temporis*, 4 The Law and Practice of International Courts and Tribunals (2005), 19-59, at 27.

⁷⁵ See *Islamic Republic of Iran v. United States of America* (A/18 Case), Award No. 32-A18-FT of the Full Tribunal (6 April 1984), reprinted in: 5 I-USCTR (1984), 252 et seq. = 75 ILR (1987), 175-268 and Case No. A/21 (*State Party Responsibility for Awards Rendered Against its Nationals*), Award of the Full Tribunal (4 May 1987), 14 I-USCTR (1987), 324 et seq., at 330; for a commentary, see Bruno Leurent, Problèmes soulevés par les demandes des doubles nationaux devant le Tribunal des différends irano-américains, 74 Revue critique de droit international privé (1985), 273-315 and 477-503, at 286-297.

⁷⁶ David J. Bederman, The United Nations Compensation Commission and the Tradition of International Claims Settlement, 27 NYU J. Int’l L. & Pol. (1994), 1-42, at 29.

⁷⁷ See the analysis of David Lloyd Jones, The Iran-United States Claims Tribunal: Private Rights and State Responsibility, 24 VJIL (1984), 259-285, at 261. See also Mohsen Mohebi, The International Law Character of the Iran-United States Claims Tribunal, The Hague 1999, at 95-155 and 212 et seq.

Both jurisdictions claim independence from diplomatic protection and inapplicability of its rules in their context and present themselves as antithetical to it, to the point of contesting its future usefulness.⁷⁸ How can one explain these *lex specialis* tendencies? Koskenniemi and Leino offer an interesting explanation by focusing on the power struggle taking place between the different institutions of the international legal system.⁷⁹ The process of emancipation of these “new type” jurisdictions from traditional diplomatic protection on the basis of a “dynamic” interpretation of their constitutive instruments or on the basis of arguments about their hybrid character is a sign of their hegemonic tendencies aiming at extrapolating from the field of the settlement of collective claims the institution of diplomatic protection.⁸⁰

B. The Interrelation Between the Injury to the Individual and the Injury to the State

A second level of analysis relates to the functioning of diplomatic protection, meaning the ways State and individual rights correlate. According to the Vattelian conception of diplomatic protection “[w]hoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed, and if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.”⁸¹ The main elements of this definition are the no-

⁷⁸ See the conclusions of Kollioopoulos, note 73, at 304, where he states that “la dissociation entre titulaire passif d’une norme et sujet actif apte à valoir sur la scène internationale tend à estomper et le monopole de l’action internationale de l’État paraît sérieusement menacé. Il semble maintenu au cas de la Commission ...”, footnote omitted. See also the Dissenting Opinion of Prosper Weil in the *Tokios Tokèles v. Ukraine* Case, Decision on Jurisdiction of 29 April 2004, ICSID Case No. ARB/02/18, available at: <http://ita.uvic.ca/documents/Tkios-Jurisdiction_000.pdf>, where he submits that an “unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on ... the availability of diplomatic protection”, § 8.

⁷⁹ Martti Koskenniemi/Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LJIL* (2002), 553-579, *passim*; Martti Koskenniemi, *What Is International Law For?*, in: Malcolm D. Evans (ed.), *International Law*, Oxford 2003, 89-114, at 108-110.

⁸⁰ See the analysis of Koskenniemi, *ibid.*, at 110. In the same vein, the ICJ’s marginalization of the precedential value of lump-sum settlement agreements has exactly the same meaning. It is not a coincidence that after analysing the different institutions international law scholars turn to the question whether their case-law would be considered a precedent in the field; see the relevant observations of Bederman, note 76, at 39-40 and of Caron, note 74, at 104, where he erroneously notes that the Tribunal appears to yield decisions of unclear precedential value. In our view, the Tribunal managed with a twist in its reasoning to both find a justification for its sharp departure from the traditional concept of diplomatic protection and to ultimately inspire the codification work of the ILC on the topic of diplomatic protection.

⁸¹ Emmerich de Vattel, *Le droit des gens ou les principes de la loi naturelle*, London 1758, in: *The Classics of International Law*, Washington D.C. 1916, cited in: Dugard I, note 8, at 12 (§ 36), emphasis added. Curiously, Judge Bennouna’s citation of the Vattel’s *dictum* as included in his Report is completely different, in the sense that it speaks about direct injury to the State. Judge

tion of an indirect injury to the State itself and the public policy purpose for a State to protect its citizens.

With regard to the question whether a violation of a right of the individual leads to an indirect violation of some interest/right of the State of nationality and consequently, to its indirect injury, Professor Dugard submits that "[i]n some situations the violation of an alien's human rights will engage the interests of the national State ... However, in the case of an isolated injury to an alien, it is true that ... the notion of injury to the State itself is indeed a fiction".⁸² For many years, the purpose of the alleged fiction was to remedy the lack of standing of the injured individual at the international level;⁸³ it was even suggested that considerations of justice and equity towards the incapable individual were at the heart of the legal fiction.⁸⁴ Nevertheless, other international law scholars insist that there is always an injury to the interests of the national State when the rights of its nationals are violated.⁸⁵

Going a step further, it is important to examine whose claim is enforced, whose right is asserted when the State exercises diplomatic protection. According to the traditional view, as restated by John Dugard, the State of nationality acts on its own behalf and asserts its own rights since an injury to a national is an injury to the State itself.⁸⁶ Other scholars, however, have spoken of a "transformation" of

Bennouna further comments that this definition is a relic "of the extensions of the 'social contract' theories", in: Bennouna's Report, note 5, at 3 (§ 8).

⁸² Dugard I, *ibid.*, at 7 (§ 19); see also James L. Briery, *The Law of Nations: An Introduction to the International Law of Peace*, Oxford 1954, at 218, who observes that "[t]here is a certain artificiality in this way of looking at the question. No doubt a state has in general an interest in seeing that its nationals are fairly treated in a foreign country, but it is an exaggeration to say that whenever a national is injured in a foreign state, his state as a whole is necessarily injured too."

⁸³ See on this point, Perrin, note 33, at 382; Mendelson, note 67, at 8; Bennouna, note 6, at 248; Milano, note 27, at 87; Francisco Orrego Vicuña, Interim Report on "The Changing Law of Nationality of Claims" submitted to the ILA Committee on Diplomatic Protection of Persons and Property in the 2000 Conference in: <www.ila-hq.org/pdf/Diplomatic%20Protection/DipProtection.pdf>, (28-44), at 30.

⁸⁴ Louis Cavaré, *Les transformations de la protection diplomatique*, ZaöRV 19 (1958), 54-80, at 58.

⁸⁵ See the analysis of Professor Perrin, note 33, at 386-388, who asserts that there is always an interest of the State which is at stake, namely the guarantee in the person of its subjects that international law will be respected. The injury to the State of nationality was once described in terms of an injury to the dignity of the State. In a more elaborated way, Professor Perrin distinguishes between the existence of a right and the existence of an injury for the State of nationality when the right of the individual and indirectly the right of that State are violated. With regard to the latter, he concludes that "même si un seul individu est lésé, la réalité du préjudice porté à l'État est facile à saisir si l'on songe qu'il constitue un précédent menaçant pour les compatriotes de la victime" (*ibid.*, at 386); in the same line of reasoning, Professor Mendelson, note 67, at 5, submits that "States have a direct, but not necessarily material, interest in ensuring that these rules are complied with"; see also the comments of Louis Dubouis, *La distinction entre le droit de l'État réclamat et le droit du ressortissant dans la protection diplomatique (à propos de l'arrêt rendu par la Court de Cassation le 14 juin 1977)*, 67 *Revue critique de droit international privé* (1978), 615-640, at 620-622.

⁸⁶ *Mavrommatis Case*, note 4, at 12. The traditional approach was the one finally put forward both by the Special Rapporteur (although qualified and in a rather ambiguous language) and the ILC. More

the individual claim into a State claim with the view of rendering the former justiciable on the international plane.⁸⁷ It should be noted that the whole debate over the nature of the claim is characterized by an unprecedented obscurity, with scholars suggesting different *formulae* which, in their view, describe more accurately the relation between the State and the individual.⁸⁸

Instead of analyzing in every detail the various theories, we will focus on two recent cases before the ICJ, which depart from the traditional rule.⁸⁹ As we have briefly seen, the ICJ in the *LaGrand* Case held that the individual rights stemming from Article 36 § 1 (b) of the VCCR were violated by the US – thus, giving rise to the exercise of diplomatic protection by the national State of the injured individuals (here Germany) – and it further confirmed the mixed character of Germany’s claim, which was also based on the invocation of a violation of its direct rights under the same Article.⁹⁰ Regarding the exercise of diplomatic protection, however, the Court, instead of reiterating the traditional view that it is the right of the State that it is asserted, went on saying that the individual rights created by the VCCR

precisely, Professor Dugard’s draft article 3 provided that “[t]he State of nationality has the right to exercise diplomatic protection *on behalf of* a national unlawfully injured by another State” and that “the State of nationality has a discretion in the exercise of this right”, in: Dugard I, note 8, at 22, § 61 (emphasis added); see also his assertion that “[a]rticle 3 codifies the principle of diplomatic protection in its traditional form. It recognizes diplomatic protection as a right attached to the State”, *ibid.*, at 26 (§ 73). The ILC, on its part, clearly adhered to the traditional (Vattelian) conception of diplomatic protection by adopting Article 2 of the 2004 Draft, which stipulates that “[a] State has the right to exercise diplomatic protection in accordance with the present draft articles”, in: ILC Report 2004, note 2, at 18, where it is also stated (at 27) that “[i]t [Article 2] gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State”, footnote omitted.

⁸⁷ Judge Bennouna adheres to this view as he asserts (Bennouna’s Report, note 5, at 5 [§§ 16-17]) that “[i]f this individual is unable to internationalize the dispute ... his State of nationality, by contrast, can espouse his claim by having him, and the dispute, undergo a veritable ‘transformation’ ... the espousal of the claim enables the claimant to claim respect for his own right on the basis of the nationality link ... On the basis of a dualist approach towards relations under international law and under domestic law, the traditional view thus emphasizes the State of nationality while eclipsing the claim of the individual which is at the origin of it”; for the same analysis see Dubouis, note 85, at 620-621. *Contra* Professor Christian Dominicé, *Regard actuel sur la protection diplomatique*, in: *Liber Amicorum Claude Reymond: autour de l’arbitrage*, Paris 2004, 73-82, at 76, who suggests that originally there is the violation “d’un droit international de ce ressortissant, et par ricochet de son État national”, *ibid.*, at 78.

⁸⁸ One first variation of the traditional theory treats the State as an agent of the individual claim; see on that Chittharanjan F. Amerasinghe, *Local Remedies in International Law*, Cambridge 2004, at 55. According to another view, the material right is vested in the individual, but the State maintains the procedural right to enforce the claim; see on that point, Wilhelm K. Geck, *Diplomatic Protection*, in: Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law (EPIL)*, Vol. I, Amsterdam 1992, 1045-1067, at 1058. According to a third view, the State exercises vicariously a right originally conferred on the individual; ILC Report 1998, note 7, at 76 (§ 80). Another submission considers the individual as being the exclusive holder of the right and points out the irrelevance of the “legal fiction” debate; see *ibid.*, at 76 (§ 79). A final argument can be drawn by the theory of the mixed claims; see on that point Perrin, note 33, at 392.

⁸⁹ See Article 1 of the Draft Articles (“... a State adopting in its own right the cause of its national ...”) adopted by the ILC on first reading and reproduced in: ILC Report 2004, note 2, at 17 (§ 59).

⁹⁰ See the analysis of the dual character of the relevant provisions by Tams, note 38.

"may be invoked in this Court by the State of the detained person".⁹¹ In another passage of the same judgement, the Court declared that "the dispute as to whether paragraph 1 (b) creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals" related to the interpretation and application of the Convention.⁹² In our view, the Court, by underlining the pertinence of the rights of individuals, sharply departs from the *Mavromatis dictum*. Its brief and ambiguous reasoning, however, neither offers any explanation for that linguistic "*glissement*" nor does it deal with the consequences of the new approach.

Despite being acclaimed as a decisive step towards an individual-oriented conception of international law⁹³, the application of the "mixed claim" construction in the *Avena* Case by the ICJ shows that there are many implications not envisaged initially. In that case, the ICJ, after reiterating the idea of the special circumstances of the interrelated regime established by Article 36 § 1 of the VCCR (giving rise to interdependent individual and State rights)⁹⁴, declared that Mexico "may, in submitting a claim in its own name, request the Court to rule on the violation of rights

⁹¹ See *LaGrand* Case, note 36, at § 77 (emphasis added). The same expression was taken up by the Court in the *Avena* Case, note 36, § 40, where it further reaffirmed that in this specific case the claim of diplomatic protection involved rights of both the State and the individual in a complementary way ("violations of the rights of the individual under article 36 [of the VCCR] may entail a violation of the rights of the sending State", *ibid.*). It is a rather exceptional situation to invoke both a direct and an indirect injury, the second being put forward through the mechanism of diplomatic protection. The reason for this highly complicated German legal defence can be traced back to the order on provisional measures. More precisely, as Judge Sir Robert Jennings observes, Article 41 of the ICJ Statute enables the Court to indicate provisional measures "which ought to be taken to preserve the respective rights of either party", namely to preserve the rights of States, the rights of individuals being of no relevance. As the execution of the *LaGrand* brothers would not involve a further violation of the rights of Germany under the VCCR, the German request for provisional measures had no apparent object and consequently, the Court's Order of 3 March 1999 could not be justified, unless a legal device linking the right of the State to the rights of the injured individuals could be found; and this was realised through the invocation of diplomatic protection! See on that point the excellent analysis of Sir Robert Jennings, *The LaGrand Case*, 1 *The Law and Practice of International Courts and Tribunals* (2002), 13-54, at 45-49.

⁹² *LaGrand* Case, *ibid.*, at § 42 (emphasis added). As Professor Dominicé (note 87, at 77-78) underlines, this theoretical construction sets at the centre of diplomatic protection an individual right and consequently, the injury to the State exists only at a secondary level, and he concludes that "[à] l'origine de la protection diplomatique, il n'y a donc pas une atteinte au droit de l'État 'en la personne de son ressortissant'". See also the analysis by Pinto, note 40, at 530-535.

⁹³ Tinta Faria, *Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case*, 12 *EJIL* (2001), 361-363 and report available at: <<http://www.ejil.org/journal/Vol12/No2/sr2.rtf>>, (p. 17 of the report); Karin Oellers-Frahm, *Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht*, 28 *EuGRZ* (2001), 265-272; Tams, note 38; Mennecke, note 34, at 467-468. See also the Concurring Opinion of Judge Antônio A. Cançado Trindade in the Advisory Opinion of the I-ACHR on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Inter-American Court of Human Rights OC-16/99, Advisory Opinion of 1 October 1999, I-ACHR Reports, Ser. A, No. 16, reprinted in: 7 *IHR* (2000), 766 et seq.

⁹⁴ *LaGrand* Case, note 36, at §74; see also Weckel, note 54, at 734; Stephens, note 38, at 151.

which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals” and therefore the Court was not obliged to “deal with Mexico’s claims of violation under a distinct heading of diplomatic protection”.⁹⁵

Does this wording constitute a reassertion of the *LaGrand* construction or should it be considered a retreat from it? It is probably very early for a definitive answer; it should be noted, however, that this description indirectly brings diplomatic protection closer to the *Mavrommatis dictum*⁹⁶ and it further suggests that in the case of “mixed claims” the State claim (direct injury) can absorb the claim under diplomatic protection.⁹⁷ This solution of transforming the indirect to direct injuries may seem at first sight beneficial for the injured individuals but it could actually lead to an abusive use of a sort of “diplomatic protection” in disguise.⁹⁸

It is quite surprising that a legal fiction, one of the many existing in international law⁹⁹, has given rise to so many conflictual theories and so much ink has been shed in order to rationalize the fiction and reconcile it with the conditions for the application of diplomatic protection. In a way, it seems that international lawyers can’t see the wood for the trees. As Judge Charles De Visscher underlines, the law of diplomatic protection is opportunistic and the legal fiction on which it is based is the best reminder of its political character.¹⁰⁰ It should be kept in mind, however, that the choice to be made between the various theories has an impact on the legal regime of diplomatic protection. As Judge Bennouna correctly submits, “[w]hen

⁹⁵ See *Avena* Case, note 36, § 40 (emphasis added), and the excellent analysis of the Court’s reasoning by Künzli, note 55, *passim*. It should also be noticed that, as Enrico Milano correctly observes (note 27, at 135-136), the nature of the remedies ordered, which are based on the idea of due process guarantees for the individual accused (*Avena* Case, *ibid.*, §§ 121 and 142), depart from the rationale of diplomatic protection that it is the right of the State that is asserted.

⁹⁶ See the observations of Judges Ranjeva (Declaration of Judge Ranjeva, *ibid.*, §§ 9 and 12) and Parra-Aranguren (Separate Opinion of Judge Parra-Aranguren, *ibid.*, § 21) and the comments of Weckel, note 54, at 735 (§ 9).

⁹⁷ Annemarieke Künzli highlights the confusion of the Court, which classifies the violation of the individual rights as a direct injury but simultaneously distinguishes between direct injury *stricto sensu* (violation of State rights) and injury through the violation of the individual rights. Moreover, the Court seems at other times to treat the regime of Article 36 of the VCCR as a unity (giving rise to direct injury *lato sensu*) and at other times to distinguish between the different sub-paragraphs, in: Künzli, note 55, at 54; as Annemarieke Künzli submits the flawed reasoning of the Court is probably due to its effort to avoid treating the question of the exhaustion of local remedies (*ibid.*, at 53). See also the critical remarks of Judges Vereshchetin (Separate Opinion of Judge Vereshchetin, *ibid.*, §§ 1-4) and Tomka (Separate Opinion of Judge Tomka, *ibid.*, § 6).

⁹⁸ See Künzli, *ibid.*, at 64; for the question of preponderance see also Deen-Racsány, note 39, at 99-100.

⁹⁹ See Jean Salmon, *Le procédé de la fiction en droit international public*, in: Ch. Perelman/P. Foriers, *Les présomptions et les fictions en droit*, Bruxelles 1974, 124-143, *passim*.

¹⁰⁰ Charles de Visscher, *Théories et réalités en droit international public*, Paris 1970, at 299-301.

a State invokes a right of a national it is obliged, in one way or another, to involve the national at the level of procedure and of any transaction that takes place".¹⁰¹

As already examined, the traditional view was initially considered¹⁰² the self-evident construction that could lead to the effective protection of an individual deprived of any power to enforce his/her rights at the international level¹⁰³; the legal fiction took into account the realities of the international system. Nowadays, legal scholars seem to bother about the inconsistencies of the fiction¹⁰⁴ and about its wider implications on the question of whether the State is obliged to exercise diplomatic protection or not. For these reasons, the points of inconsistency between the legal fiction and its conditions of exercise should be briefly addressed in this part of the study.

The rule on the exhaustion of local remedies constitutes one of the most apparent examples of inconsistency with the traditional view that the State is asserting its own right¹⁰⁵, because it fails to provide a satisfactory justification why the exhaustion of local remedies by the injured individual is a requirement for the admissibility of a State claim.¹⁰⁶ For some, this rule demonstrates the crucial role of the individual's claim in diplomatic protection. Its rationale, however, probably lies in the interests of the host/responsible State: out of respect for its sovereignty, the settlement of the difference in its own courts is given priority.¹⁰⁷

¹⁰¹ Benouna's Report, note 5, at 14 (§ 51); see on this point Article 48 § 2 (b) of the Draft Articles on State Responsibility, which stipulates that any State can claim the "performance of the obligation of reparation ... in the interest ... of the beneficiaries of the obligation breached", in: ILC Report 2001, note 48, at 319, (emphasis added); see the observations of Giorgio Gaja, *Droits des États*, note 49, at 69. As Alborno, note 19, at 72-73, underlines, the same phrase is not included in Article 42 of the Draft Articles, which constitutes the basis for the exercise of diplomatic protection.

¹⁰² See however the position of Georges Scelle, *Rapport sur la théorie du gouvernement international*, 7 *Annuaire de l'Institut international de droit public* (1935), 41-112, at 72-73, where he states that "le but de l'intervention par protection diplomatique devrait être uniquement la garantie à l'individu des facultés juridiques que le droit commun international lui reconnaît".

¹⁰³ See the analysis of Perrin, note 33, at 384.

¹⁰⁴ See *ibid.*, at 388-392, who interestingly enough seeks to establish that if interpreted in a specific way, all conditions for the exercise of diplomatic protection can be reconciled with the two main theories on diplomatic protection (asserting its own right/asserting the right of the individual).

¹⁰⁵ See for example Dominicé, note 87, at 75; Dubois, note 85, at 623.

¹⁰⁶ Professor Perrin thinks that if the rule of the exhaustion of local remedies is considered as the necessary element for the existence of state responsibility, meaning that this is the substantive rule breached that generates state responsibility, then the rule is consistent with the traditional theory; Perrin, note 33, at 390-391; the same view is also shared by Dubois, *ibid.*, at 623.

¹⁰⁷ See on that point Amersinghe, note 88, at 51. The rule can be also explained by focusing on the rationale of diplomatic protection, namely the incapacity of the individual to bring the claim before an international forum; Koijmans, note 1, at 1976. See also for other justifications, Matthias Herdegen, *Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen*, in: Ress/Stein, note 44, 63-70, at 63-64.

Another example of inconsistency is the continuous nationality doctrine.¹⁰⁸ It has been submitted that if an injury to a national is an injury to the State itself, the occurrence of the injury would have been sufficient for admitting the claim of the State whose nationality the injured individual had at the time of the injury.¹⁰⁹ Professor Mendelson, however, demonstrates that traditional diplomatic protection is not only about the rights of the State and that the concept of nationality represents also a bond of allegiance, which, when broken, disentitles the original State from pursuing the claim.¹¹⁰ The rule of continuity cannot be easily reconciled also with the view that the State acts as agent of the individual's claim. As Professor Perrin submits “[o]n ne voit pas pourquoi l'État requérant ne serait pas alors fondé à intervenir en faveur de l'individu qui aurait sa nationalité au moment de la réclamation, mais non point au moment de la commission de l'acte illicite”.¹¹¹

In conclusion, it is our view that diplomatic protection is premised on a legal fiction, or is at least a legal device that cannot be easily reconciled with the exigencies of contemporary international law. International lawyers are aware of its decreasing utility and applicability.¹¹² As a result, they tend either to dismiss completely the traditional concept of diplomatic protection or to proceed to a radical readjustment by expanding its scope and, subsequently, transform its nature. We shall focus on this last question in the next part.

¹⁰⁸ According to this rule the claim that is put forward should have belonged continuously from the time of the injury until the presentation of the claim or the making of the award to a person having the nationality of the State exercising diplomatic protection; see Mendelson, note 67, *passim*; see Orrego Vicuña, note 83; First Report on Diplomatic Protection by John Dugard, UN Doc. A/CN.4/506/Add. 1 (20 April 2000) (hereinafter Dugard I/Add. 1), at 2 (§ 1); Eric Wylér, *La Règle dite de la continuité de la nationalité dans le contentieux international*, Paris 1990.

¹⁰⁹ As a result, and based also on considerations of effectiveness, the Special Rapporteur proceeded to modify the rule. See also the proposal of Professor Flauss, *Vers un aggiornamento*, note 52, at 39-41.

¹¹⁰ See Mendelson, note 67, at 7-10.

¹¹¹ Perrin, note 33, at 388. A final example can be traced in the principle of non-responsibility in the case of dual nationals. Other interesting examples of inconsistency can be found in the “clean hands/mains propres” doctrine (Georges Berlià, *Contribution à l'étude de la nature de la protection diplomatique*, 3 AFDI [1957], 63-72, at 65) or the way reparation is calculated (Dubouis, note 85, *passim*). Regarding the “clean hands” doctrine, the Special Rapporteur of the ILC has recently rejected its relevance in the codification work; see Sixth Report on Diplomatic Protection by John Dugard, UN Doc. A/CN.4/546 (11 August 2004); see also Aleksandr Shapovalov, *Should a Requirement of “Clean Hands” Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate*, 20 *Am. U. Int'l L. Rev.* (2005), 829-866, *passim*.

¹¹² Whole fields of international law, such as foreign investments have almost excluded the applicability of diplomatic protection for several reasons; see, on this point, Juliane Kokott, *Interim Report on “The Role of Diplomatic Protection in the Field of the Protection of Foreign Investment”* submitted to the ILA Committee on Diplomatic Protection of Persons and Property in the 2002 Conference, that can be found in: <www.ila-hq.org/pdf/Diplomatic%20Protection/Diplomatic%20Protection%20Second%20Report%202002.pdf>, (21-31).

III. An Individual Right to Diplomatic Protection: A Step Towards Increasing Diplomatic Protection's Effectiveness?

We have tried until now to examine the evolution of the nature of diplomatic protection by primarily focusing on the case-law of the ICJ, the recent developments in the field of claims settlement mechanisms (I-USCT, ICSID, UNCC, NAFTA) and finally, on the ILC codification work. On several occasions throughout this survey, we suggested a more theoretical analysis of the various choices and we attempted to highlight the political considerations behind the adopted solutions. In this perspective, we analyzed the stance of Professor Dugard and other international law scholars towards the various jurisprudential solutions and we critically assessed their effort to take account of the evolution of human rights in the field. Furthermore, we cast light on the tendency to expand the scope (*rationae personae* and *rationae materiae*) of diplomatic protection. We avoided considering the most controversial aspect of the transformative process with regard to diplomatic protection, namely, the recognition of the existence of a State obligation to exercise diplomatic protection and a (consequent?) human right to it.¹¹³ It is now the appropriate moment for studying the different legal arguments aiming at the conversion of diplomatic protection to a human right.

A. The "Hierarchization" Paradigm: Dugard's Proposal on Serious Breaches of *jus cogens*

A first possible construction eventually leading to the imposition to States of a duty to exercise diplomatic protection can be traced to the *de lege ferenda* proposal of John Dugard in the case of violation of *jus cogens* norms.¹¹⁴ Despite the fact that many scholars and a substantial number of ICJ cases have been adamant that there is no right to diplomatic protection¹¹⁵, the Special Rapporteur of the ILC, on the basis of recent State practice providing in constitutional texts for a right of the individual to receive diplomatic assistance, proposed a draft article imposing an obligation on the State of nationality to exercise diplomatic protection in the case of a "grave breach of a *jus cogens* norm".

His proposal was, however, severely criticized for being both too interventionist and too limited in its scope, since the scope of the obligation was restricted by sev-

¹¹³ See Berli a, note 111; Fla us s, Vers un aggiornamento, note 52, at 48-61.

¹¹⁴ Dugard I, note 8, at 27-34 (§§ 75-93). For a summary of the discussion in the ILC, see Marjoleine Zieck, Codification of the Law on Diplomatic Protection: The First Eight Draft Articles, 14 LJIL (2001), 209-232, at 219-221.

¹¹⁵ The ICJ, for example, has allowed that "[s]hould the national or legal person on whose behalf it is acting consider their rights are not adequately protected, they have no remedy in international law ... The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted and when it will cease"; *Barcelona Traction Case*, note 13, at 44 (§ 78).

eral conditions, which made the whole draft article appear as mirage.¹¹⁶ In our view, Professor Dugard's proposals, which initially reaffirmed the traditional concept of diplomatic protection (Art. 3) and then introduced the *jus cogens* exception, reveal the weaknesses of the rule/exception logic.¹¹⁷ The introduction of exceptions to a rule so as to reflect social reality better, as in this case, is constantly undermined by the need to set some standards which will allow to determine when is the rule applied and when the exception.¹¹⁸ In order to compromise pragmatically between the different views and simultaneously, to respond to social realities, international lawyers resort to abstract notions which finally tend to devour the rule or the exception. In the case of Professor Dugard's proposal, there was a very important qualification in the operation of the exception, a "*clause échappatoire attrape-tout*"¹¹⁹ as Professor Flauss has characterized it, which re-introduced through the back door State discretion, because it allowed States to refuse to exercise diplomatic protection if that could "seriously endanger the overriding interests of the State and/or its people"¹²⁰ and, consequently, rendered the application of the Article dependent on the political considerations Professor Dugard had tried to circumvent. For these reasons, we believe that the ILC correctly decided that the whole issue was not ripe for codification and abandoned the proposal.¹²¹

¹¹⁶ Professor Flauss, *Vers un aggiornamento*, note 52, at 30-31, speaks about, on the one side, a "*dévoir d'ingérence*" and on the other side, about a "*trompe-l'oeil*". See also the critical comments of Judge Koijmans who poses a series of questions concerning the rule, such as to whom will be "the duty owed: only to the individual or also to the international community as a whole" (but that implies that the duty as such is a *jus cogens* norm) or "if the breach is the concern of all States [is it] no longer a matter of diplomatic protection" since it is the rights of the international community as a whole that are endorsed, in: Koijmans, note 1, at 1981.

¹¹⁷ This rule/exception logic permeates the vast majority of international norms. See the analysis of Professor Martti Koskeniemi, *Hierarchy in International Law: A Sketch*, 8 EJIL (1997), 566-582, at 574; *ibid.*, *The Effect of Rights on Political Culture*, in: Alston Philip (ed.), *The EU and Human Rights*, Oxford 2002, 99-116, at 110-111.

¹¹⁸ See the arguments used by Professor Dugard, in: Dugard I, note 8, at 33 (§ 88), where he states that "[a]rticle 4 seeks to give effect to developments of this kind [constitutional and human rights developments] ... care is taken to limit the proposed duty on States to particularly serious cases, to give States a wide margin of appreciation ...".

¹¹⁹ Flauss, *Vers un aggiornamento*, note 52, at 31, where he also noted that the absence of a mechanism for the settlement of disputes with regard to this provision rendered the whole article dependent on the domestic incorporation or adoption of relevant mechanisms.

¹²⁰ Article 4 § 2 (a) of Dugard's Draft Articles, included in Dugard I, note 8, at 27.

¹²¹ *Contra Milano*, note 27, at 96-97. See for the discussions within the ILC, ILC Report 2000, note 43, at 156-158 (§§ 450-455).

B. The "Judicialization" Paradigm: Judicial Review of Foreign Policy Discretion

What should be further analyzed from Dugard's argumentation is the interpretation of the relevant constitutional rules providing for a right of the individual to diplomatic protection.¹²² The normative value of these constitutional provisions has been a matter of serious controversy. Some scholars have, for example, underlined the irrelevance of domestic provisions for the creation of an international obligation to exercise diplomatic protection, based on a clear declaration of the ICJ in the *Barcelona Traction* Case that "all these questions [the existence of domestic remedies for controlling the State in the exercise of diplomatic protection] remain within the province of municipal law and do not affect the position internationally".¹²³ It is our submission that this view draws a sharp distinction between the municipal and the international legal order marked by an excessive dualism that cannot be easily justified as such.¹²⁴ Other international lawyers, by contrast, assert that the recognition of an individual right to diplomatic protection in the domestic legal systems should not be treated as a fact by international bodies but it should be considered as a strong sign of State practice having an impact on the creation of relevant international law norms.¹²⁵

Another observation that weakens the normative force of domestic developments is that, even when such an obligation is provided for by some constitutional texts, "it is actually much more a moral duty than a legal obligation, since the intention of the State of nationality is clearly influenced by political considerations and the degree of appropriateness ...".¹²⁶ In our view, this opinion should be quali-

¹²² See, on this point, Bennouna's Report, note 5, at 13-14 (§§ 45-48); Condorelli, note 3, at 14-15; Berlia, note 111, at 70-72; Perrin, note 33, at 395-396 and 404-411; Dubouis, note 85, *passim*. The most famous example has been Article 112 of the Weimar Constitution, which provided that "[a]gainst foreign States all Reich nationals have, both within and outside the Reich's territory, a claim for the protection by the Reich"; see on this provision, Georg Röss, *La pratique allemande de la protection diplomatique*, in: Flauss, *La protection diplomatique*, note 49, 121-151, at 121; Karl Doehring, *Die Pflicht des Staates zur Gewährung diplomatischen Schutzes: Deutsches Recht und Rechtsvergleichung*, Köln 1959; Storost, note 44, at 420. There has been also in the framework of the EU a question whether the relevant EU provisions created a duty to exercise diplomatic protection; see Milano, *ibid.*, at 95 (footnote 33).

¹²³ *Barcelona Traction* Case, note 13, at 44 (§ 78), (emphasis added); see also the comments in the ILC, where it was stated that "such national laws did not affect the discretionary right of the State to exercise diplomatic protection"; ILC Report 1998, note 7, at 82 (§ 100).

¹²⁴ See the critical observations of Dubouis, note 85, at 621, in the context of compensation provisions; Rudolf L. Bindschedler, *La protection de la propriété en droit international public*, 90 RCADI (1956/II), 173-306, at 288; *contra* Perrin, note 33, at 396, where he states that "dans ce domaine, les deux ordres juridiques en jeu paraissent au contraire indépendants l'un de l'autre ... À l'inverse la création d'une telle obligation interne n'aurait, si elle avait lieu, aucun effet sur la nature du droit qu'invoque la réclamation".

¹²⁵ Dugard I, note 8, at 30 (§ 80), where John Dugard refers to the relevant State practice.

¹²⁶ Bennouna's Report, note 5, at 13-14 (§ 48). See also Röss, note 122, at 150-151, who asserts that "il s'agit d'un droit qui est très proche d'un *nudum iuris*"; Borchard, *The Diplomatic Protection*, note 19, at 29 and 356.

fied. An examination of the relevant constitutional provisions and their interpretation by domestic courts suggests that the decision to exercise diplomatic protection can be subject to judicial review – but under very specific circumstances.

We will focus on four decisions in different legal systems¹²⁷ that qualify the theory of the absolute discretion of the State with regard to the exercise of diplomatic protection. The first example is the *Rudolf Hess* Case in Germany.¹²⁸ In this case, the complainant, Hitler's Deputy, who flew to England during the Second World War and was since 1947 imprisoned in Spandau, instituted proceedings before the German courts seeking a ruling that would have declared the Federal Republic of Germany liable under the German Basic Law for taking further specific diplomatic steps in order to obtain his immediate release, such as the reference of the case to the UN organs.¹²⁹ Despite the absence of a specific reference to an obligation to provide for diplomatic protection in the German Basic Law, the German Constitutional Court found that "the organs of the Federal Republic ... have a constitutional duty to provide protection for German nationals and their interests in relation to foreign States". The basis of this duty was to be found in the content of the bond of nationality as "*Loyalitäts- und Schutzverhältnis*".¹³⁰

The Court, however, admitted that in the fulfilment of this duty the German Government enjoyed a wide discretion, which was only limited by the threshold of the "arbitrary treatment of a national which is totally incomprehensible from any reasonable standpoint including considerations of foreign policy".¹³¹ Since the German Federal Government had already taken some serious diplomatic initiatives in order to obtain the release of the complainant, the Court determined that there was no case of arbitrary refusal and dismissed any claim for imposing to the Government any further obligation.

In the British legal system, on its part, any decision to exercise diplomatic protection falls within the ambit of foreign policy considerations, which were tradi-

¹²⁷ There are numerous other domestic decisions; for example, in Germany recent decisions have limited the existence of an individual right to the control of the initial decision to exercise diplomatic protection but not to the manner in which it is carried out (*Buchholz* Case, decision of 6 March 1997, cited by Alborno, note 19, at 35-36 (footnote 167)); in the UK the right of the individuals was, until recently, linked to the notion of "legitimate expectations", meaning that individuals had at least a "legitimate expectation" that they will be afforded diplomatic protection if the conditions were fulfilled, in: Colin Warbrick, Protection of Nationals Abroad: Current Legal Problems, 37 ICLQ (1988), 1002-1012, at 1009. It is submitted that despite the fact that the majority of the decisions only try to limit the discretion of the State, this technique does not mean that the relevant constitutional rules providing for a right to diplomatic protection are non-justiciable. *Contra* Flauss, note 49, at 31-32.

¹²⁸ Case No. 2 BVerfG (Federal Constitutional Court) 419/80 (*Rudolf Hess* Case), reprinted in: 90 ILR (1992), 386-400 and Case No. 7 C 60.79, BVerwG (Federal Administrative Court), 11 et seq., reprinted in: 9 Fontes Iuris Gentium (1981-1985), Series A, Section II, 128 et seq. (in German). For an analysis of the cases, see Röss, note 122; Eckart Klein, Anspruch auf diplomatischen Schutz?, in: Röss/Stein, note 44, 125-136, at 127 et seq.

¹²⁹ Case No. 2 BVerfG, *ibid.*, at 387-388.

¹³⁰ Klein, note 128, at 128; Storoost, note 44, at 420.

¹³¹ Case No. 2 BVerfG, note 128, at 395 and 398.

tionally considered a Royal Prerogative and thus, not subject to judicial review.¹³² After 1985, the British Courts started hesitantly reviewing executive activity on the basis of the subject-matter of the governmental action and the suitability of review in each particular case but they had never dealt with a request to oblige the British government to take specific diplomatic steps until the *Abbasi* Case.¹³³ In that case, the Court of Appeal was confronted with a request to compel the British Foreign Office to make representations to the United States Government on behalf of a British national detained in Guantanamo Bay in Cuba.

In its decision the Court of Appeal declared that there was no duty to exercise diplomatic protection under customary international law or the ECHR¹³⁴, but then admitted that there was place for judicial review of a refusal to render diplomatic assistance based on the idea that every citizen had a legitimate expectation that the government would not "simply wash their hands of the matter and abandon him to his fate".¹³⁵ The legitimate expectations doctrine only gave rise to a review of the farthest limits of State discretion and, generally, required no more than that the government consider making diplomatic representations and that in the consideration "all relevant factors ... be thrown into the balance". Consequently, judicial review would be available only in the extreme case, where the government refused to consider whether to make diplomatic representations.¹³⁶

A recent decision of the Constitutional Court of South Africa seems to adopt a slightly more liberal approach.¹³⁷ In the *Kaunda* Case, the Court unanimously de-

¹³² See John G. Collier, *United Kingdom*, in: Elihu Lauterpacht/John G. Collier (eds.), *Individual Rights and the State in Foreign Affairs: An International Compendium*, New York 1977, 602 et seq., at 610 et seq.

¹³³ *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, (2002) EWCA Civ. 1598 (6 November 2002), available at: <http://www.hmcourts-service.gov.uk/judgmentsfiles/j1354/Abbasi_judgment.htm> (last visited, 21 April 2005), reproduced in: 42 ILM (2003), 358 et seq. (hereinafter *Abbasi* Case). The case was quite exceptional because the Government was very reluctant to take any decisive action towards the United States despite the serious violations of fundamental human rights taking place in Guantanamo. See also the comments on the case by Storoost, note 44, at 411-413 and Chris Horan, *Judicial Review of Non-Statutory Executive Powers*, 31 *Federal Law Review* (2003), 551-572, at 564-565.

¹³⁴ *Abbasi* Case, *ibid.*, at §§ 69-79; Storoost, *ibid.*, at 412.

¹³⁵ *Abbasi* Case, *ibid.*, at § 98. The UK policy on the question of diplomatic representations is analyzed by Warbrick, note 20. The British government gives the advice that in case someone is detained to insist that the British Consul is notified because "IT IS YOUR RIGHT" (emphasis in the original), *ibid.*, at 727. Recently in the *Al-Adsani v. United Kingdom* Case, Application No. 35763/97, ECtHR Ser. A, judgement of 21 November 2001, 34 EHRR (2002), 11 et seq., § 50, the British government contended, as a response to allegations that the applicant was deprived of any effective remedy for fundamental human rights violations, that "[t]here were other, traditional means of redress for wrongs of this kind available to the applicant, namely diplomatic representations or an inter-State claim", reproduced by the Court of Appeal in the *Abbasi* Case, *ibid.*, at § 96. See for a comment on this statement and its wider implications for the relations between diplomatic protection and the ECHR, Flauss, *Contentieux européen*, note 52, at 833-834.

¹³⁶ *Abbasi* Case, *ibid.*, at § 99 and 104; see also the comments of Storoost, note 44, at 412.

¹³⁷ *Samuel Kaunda and Others v. President of the Republic of South Africa and Others* (hereinafter *Kaunda* Case), Constitutional Court of South Africa, decision of 4 August 2004, reprinted in: 44 ILM (2005), 173-233. For the constitutional provisions in question, see Gerhard Erasmus/Lyle David -

clared that the right of South African citizens to request diplomatic protection means that there is a corresponding obligation of the Government “to consider the request and deal with it consistently with the Constitution” and although the Court held that this obligation was coupled with a wide margin of appreciation due to the political considerations involved, rendering the Court an inappropriate forum for dealing with the issue, the discretion was not beyond its powers of review “if it can be shown that the decision was irrational or contrary to legitimate expectations”.¹³⁸ Nevertheless, a later decision of the High Court of South Africa attempts to restrict the scope of application of the decision of the Constitutional Court in the *Kaunda* Case only to instances of gross, flagrant and egregious infringements of international human rights of individuals (§ 41) and it further holds that the doctrine of legitimate expectations, despite being recognized as a constraint to the executive power’s action, does not give rise to any substantive rights, such as the right to diplomatic protection (§ 99).¹³⁹

A final example, confirming the general trend towards the affirmation of the justiciability of executive decisions on issues related to foreign policy, can be drawn by the Swiss legal system. The Swiss Constitution does not provide for a right to diplomatic protection¹⁴⁰, though the Confederation’s wide discretion in

son, Do South Africans Have a Right to Diplomatic Protection?, 25 South African Yearbook of Int’l Law (2000), 113-130, at 127-130.

¹³⁸ Ibid., at 185-187 (§§ 67-80). The Court considered that the terms of the South African Constitution, which were premised on a commitment to international human rights norms, imposed to the government some sort of obligation to protect the citizens’ rights (abroad) from human rights violations, but held that the constitutional right was not enforceable as such. See Dugard, note 14, at 82-83; Mary Combs, *Kaunda v. President of the Republic of South Africa*, 99 AJIL (2005), 683-688, at 684, underlines the refusal of the Court to recognize an extraterritorial effect for this right. Moreover, Erasmus/Davidson (ibid., at 128-129) argued that the right to citizenship provided for in Section 3 of the South African Constitution was a basic human right, which included a duty to consider an application for the granting of diplomatic protection and a duty to provide for a fair and justified decision, but that the substance of the political decision was not justiciable. Some of the separate opinions in the judgement also underlined that for them there was a (substantive) constitutional duty entailing “a duty to properly consider the request for diplomatic protection ... to follow a fair procedure in processing the request and ... to furnish reasons for its decision” (Judge J. Ngcobo concurring, ibid., at 207 (§ 192)). It is true that the recognition of an entitlement to request diplomatic protection is not exactly the same as a right to demand the exercise of diplomatic protection and in the same vein, an obligation to examine the request is not an obligation to exercise diplomatic protection.

¹³⁹ *Josias van Zyl and Others v. The Government of the Republic of South Africa and Others*, High Court of South Africa (Transvaal Provincial Division), case no. 20320/2002, decision of 20 July 2005, available at: <www.legalbrief.co.za/filemgmt_data/files/Van%20Zyl%20J%20v%20State.pdf> (last visited, 18 August 2005). As a result the Court asserted that the discussion about whether the South African constitution grants a right to diplomatic protection to the South African citizens is irrelevant in the case of South African companies (§§ 41 and 93) and concluded that notwithstanding the affirmation of the justiciability of decisions related to the conduct of foreign relations “[t]he government has a broad and extremely wide discretion”.

¹⁴⁰ See Lucius Caflisch, La pratique suisse de la protection diplomatique, in: Flauss, La protection diplomatique, note 49, 74-86, at 76, citing the *N. et consorts c. Confédération suisse* Case, Swiss Federal Court, 6 October 1995.

deciding the exercise or not of diplomatic protection is not absolute and thus, the Confederation can be held responsible on grounds of an arbitrary action or of an exercise of diplomatic protection to the detriment of the individual's interests.¹⁴¹ A recent decision of the Swiss Federal Court seems to go further as it recognizes the applicability of the remedy of administrative law for controlling the validity of a refusal to exercise diplomatic protection. The Court reaches its conclusion on the basis of an autonomous interpretation of Article 6 § 1 of the ECHR, which is considered relevant to the case despite the absence of a substantive "*droit défendable*" (such as a right to diplomatic protection).¹⁴²

Notwithstanding the very cautious approach, the case-law just analyzed recognizes that the initial phases of a procedure leading to diplomatic protection, namely, the decision to exercise it or not (but not the specific measures taken) can be subject to judicial scrutiny, though a very limited one, based on the prohibition of arbitrariness and/or the doctrine of legitimate expectations.¹⁴³ The justification for crucially limiting the scope of the judicial review has been mainly the highly political nature of governmental decisions and the inappropriateness of the judicial function for assessing the correctness of the measures taken.¹⁴⁴

Moreover, the admission of a power of judicial review should be linked to the trend to control State action concerning the last steps of the diplomatic protection procedure, namely, the decision on how the reparation should be distributed to the individual claimants. Traditionally, reparation was owed entirely to the State of the nationality of the injured person, despite the fact that it was more often than not calculated on the basis of the injury suffered by that person.¹⁴⁵ The necessary cor-

¹⁴¹ See Etienne Grisei, Article 45 *bis*, in: Commentaire de la Constitution fédérale, Bâle, (1987-1996), § 12. The Swiss Constitutional Court (Conseil fédéral suisse) has also reached the same conclusion in the *Comtrade* Case (cited by Condorelli, note 3, at 15 [footnote 16]).

¹⁴² *Groupeement X. c. Conseil fédéral*, Tribunal fédéral suisse (1^{ère} cour civile), decision of 2 July 2004 (unpublished, in file with the author), § 1.1. For an analysis of the case, see Jean-François Flauss, *Le contentieux des décisions de refus d'exercice de la protection diplomatique. À propos de l'arrêt du Tribunal fédéral suisse du 2 Juillet 2004, Groupeement X c. Conseil Fédéral* (1^{ère} Cour civile), 109 RGDIP (2005), 407-419, at 415-419. Nevertheless, the scope of the review of the legality of the federal decision remains unclear.

¹⁴³ In this direction was the effort of John Dugard; Dugard I, note 8, at 31-33; see also Orrego Vicuña, note 83, at 44, clause 2.

¹⁴⁴ See, for example, the statement of the Federal Constitutional Court of Germany in the *Rudolf Hess* Case that "[t]he scope of discretion in the foreign policy sphere is based on the fact that the shape of foreign relations and the course of their development are not determined solely by the wishes of the Federal Republic of Germany and are much more dependent upon circumstances beyond its control" and furthermore that "[i]t is not for the courts to substitute their assessment of the possible consequences of such steps on the international plane for the assessment made by the competent organs of foreign affairs", in: Case No. 2 BVerfG, note 128, at 396 and 398. In the same vein, see *Kaunda* Case, note 137, at 186 (§ 73). It should be admitted that these issues are politically sensitive; see, on that point, Dubouis, note 85, at 626-627.

¹⁴⁵ Case *Concerning the Factory at Chorzow*, judgement of 13 September 1928, PCIJ Ser. A, No. 17, at 28. For an analysis of the question, see Alborno, note 19, at 67-74.

ollary of this view was that the State enjoyed unlimited discretion as to how it should distribute the reparation to the injured individuals.¹⁴⁶

Recent developments, however, strongly advocate the modification of the view on the absolute State discretion.¹⁴⁷ The UNCC constitutes an illustrative example as it provides for a monitoring mechanism concerning the distribution of compensation.¹⁴⁸ The limitations set to the discretion of the States in relation to the distribution of the payments of compensation have created some controversy. Some international law scholars have underlined that it was the governments that received the payments, and that in the case of mass claims the ultimate determination of the *modus* of distribution remained at the States' discretion.¹⁴⁹ Nevertheless, the whole procedure provided for by the UNCC Governing Council concerning the distribution is so detailed that in reality eliminates State discretion.¹⁵⁰ In addition to this, the ICJ's unwillingness to completely set aside the rights of the beneficiaries in the determination of the appropriate remedies in the *LaGrand* and *Avena* Cases and the Court's focus on the existence or not of an "actual prejudice to the defendant in the process of administration of international justice", led some scholars to suggest a *de lege ferenda* restriction of the States' discretion with regard to the distribution of the reparation.¹⁵¹

Finally, the ECtHR has, in the framework of claims based on a violation of Article 6 § 1 of the ECHR and of Article 1 of Additional Protocol No. 1, held that a lump-sum settlement agreement created an individual right to the agreed compensation if the agreement provided explicitly for the obligation of the benefiting State to proceed to the distribution of the reparation to the individual claimants.¹⁵²

¹⁴⁶ Once again on the basis of a strict dualism, it has been maintained that even when States provided under the municipal legislation for an obligation to distribute the reparation, this did not influence international law. *Contra* in the context of inter-State reparation commissions, Berli a, note 111, at 70, who speaks of an unjustified enrichment if the State retains the reparation for itself. See also Dubouis, note 85, at 626-627 and 634-635; Karl Doehring, *Handelt es sich bei einem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protektion ausubenden Staat zusteht, oder geht es um die Erzwingung von Rechten des betroffenen Individuums?*, in: Ress/Stein, note 44, 13-20, at 19.

¹⁴⁷ See the Compensation Commissions established after the 2nd World War in France for the distribution of reparations based on lump-sum settlement agreements, in: Berli a, *ibid.*, at 66-70. See, generally, for the judicial control of the distribution in France, Jean P. Puissochet, *La pratique française de la protection diplomatique*, in: Flauss, *La protection diplomatique*, note 49 115-120, at 117.

¹⁴⁸ See Distribution of Payments and Transparency, Decision No. 18 of the UNCC's Governing Council, UN Doc. S/AC.26/Dec. 18, 24 March 1994; Wühler, note 72, at 268-269;

¹⁴⁹ See Paolillo, note 71, at 298.

¹⁵⁰ For example, States are obliged to distribute the payments in six months' time after the receipt, and three months after they must submit a report. If part of the money is not allocated to the claimants, the State is obliged to return it to the Compensation Fund; see Return of Undistributed Funds, Decision No. 48 of the UNCC's Governing Council, UN Doc. S/AC.26/Dec. 48, 3 February 1998. For a detailed analysis, see Kollipoulos, note 73, at 300-301.

¹⁵¹ *Avena* Case, note 36, § 121, emphasis added; Milano, note 27, at 136 and 140-141.

¹⁵² *Beaumartin v. France*, Application No. 15287/89, judgement of 24 November 1994, Ser. A, No. 296-B, 19 EHRR (1994), 485 et seq., § 28. In this case the ECtHR held that the Protocol concluded be-

Nonetheless, the Court has qualified this right by stating that in such a case the benefiting State enjoyed an absolute discretion with regard both to the evaluation of the level of reparation agreed with the other State and to the way this reparation is distributed to the individual claimants,¹⁵³ and it further held that a negotiated agreement providing only for a symbolic reparation satisfied the test of proportionality.¹⁵⁴ Despite these shortcomings, Professor Flauss has asserted that "la jurisprudence de Strasbourg ... participe à un renforcement des droits individuels des victimes".¹⁵⁵

It should be stressed, however, that this process of "judicialization" is a complex one.¹⁵⁶ It is our submission that domestic and international courts do not claim a power of judicial review over foreign policy decision-making out of sheer sympathy for human rights; besides, the limited character of this review has a remote influence on the process of transformation of diplomatic protection, as we explain in the next paragraph. The interference – though hesitant – of courts in the field of the discretionary executive powers is based on the attractive idea of extending the application of the Rule of Law at the procedural level.¹⁵⁷ In our view, this should not be so easily hailed as a step towards the further "humanization" of (international) law; we believe that this evolution simply represents a shift of the discretion

tween Morocco and France providing for a French obligation to distribute the reparation could be considered as creating a "créance patrimoniale" qualified as a property right in the sense of Article 1 of the First Protocol; see Sébastien Touzé, *L'affaire des emprunts russes devant la Cour européenne des droits de l'homme*, 57 *Revue trimestrielle des droits de l'homme* (2004), 283-316, at 289. By contrast, in the *Catherine Abraini Leschi and Others v. France*, Application No. 37505/97, decision on admissibility of 22 April 1998, European Commission on Human Rights, 93 DR, 120 et seq., the Treaty of Friendship between Russia and France on 7 February 1992, being just a declaration of intentions, did not give rise to any right to reparation and consequently, the application was declared inadmissible. It should be further noted that the application of Article 1 of the First Protocol does not guarantee an integral compensation in favour of the individual claimant. See also Flauss, *Contentieux européen*, note 52, at 829 (footnote 58).

¹⁵³ *Dreux-Brézé v. France*, Application No. 57969/00, judgment of 15 May 2001, available at: <<http://hudoc.echr.coe.int>>, 11, and the critical observations of Touzé, *ibid.*, at 292, who even casts doubt on the precedential value of the Court's decision in *Beaumartin* Case, *ibid.*, at 300.

¹⁵⁴ The Court seems to favour the general interest stemming from the idea of public utility and the preservation of the amicable relations between States over the individual interests, thus, adhering to the most traditional views on the nature of diplomatic protection; see Touzé, *ibid.*, at 311.

¹⁵⁵ Flauss, note 49, at 29.

¹⁵⁶ For an analysis of this phenomenon, see, among others, Martti Koskeniemi, *Judicial Review of Foreign Policy Discretion in Europe*, in: Petri Helander/J. Lavapuro/Tuomas Mylly (eds.), *Yritys eurooppalaisessa oikeusyhteisössä*, Turku 2002, 155-173. See also Jan Klabbers, *Straddling Law and Politics: Judicial Review in International Law*, in: R. St. J. MacDonald/D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden 2005, 809-835, *passim*.

¹⁵⁷ The principles of arbitrariness and legitimate expectations are illustrative examples of this trend; see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge MA 2004, at 189.

permeating foreign policy choices from the executive to the judiciary, a shift that ultimately risks further weakening the democratic foundations of our society.¹⁵⁸

In addition to this, the discussion in the framework of the ILC on the recognition of a right to diplomatic protection seems rather misplaced.¹⁵⁹ As Judge Kooijmans observes, the *jus cogens* proposal of the Special Rapporteur, if applied, could indeed fill in an important gap in the present system of human rights protection; but it is doubtful whether this should be done by dramatically transforming diplomatic protection.¹⁶⁰ Moreover, Professor Dugard tends to treat together two different issues, namely, the question of diplomatic protection as a human right and that of the judicial review of State discretion. We submit that the links between these two issues are rather weak. Consequently, the whole idea of controlling State's discretion must be placed in the context of the right to due process, as Professor Orrego Vicuña has proposed¹⁶¹ and as the case-law of national and international courts suggests. In this way, the sterile debate over the transformation of diplomatic protection will fade, while the process of limiting State discretion with regard to the exercise of diplomatic protection could probably be facilitated.¹⁶²

C. The "Humanization" Paradigm: The ICJ's Turn to Human Rights Idealism?

Since the normative importance of the exercise of judicial review of State discretion is frequently downplayed, some international law scholars suggested that the transformation of diplomatic protection could be based on a dynamic reading of the ICJ's decision on the *LaGrand* Case. In this case, Germany invoked the violation of Article 36 of the VCCR, which, in its view, conferred rights both to the detainee's State and the detained person, thus allowing Germany to present two claims, one – through the mechanism of diplomatic protection – concerning the injury to the individual and one concerning its direct injury.¹⁶³ The Court, on its part, accepted Germany's ability to present a mixed claim asserting simultaneously its rights and the rights of its nationals¹⁶⁴, and then, it proceeded to the examination of the question whether Article 36 § 1 of the VCCR conferred rights to individuals.

¹⁵⁸ This is true if we treat the principle of democratic representation as a cornerstone of contemporary democracies; see Hirschl, *ibid.*, at 186 and 222, who underlines the countermajoritarian nature of this shift and speaks of a serious democratic deficit created by the transferral of powers to the judiciary.

¹⁵⁹ Kooijmans, note 1, *passim*.

¹⁶⁰ *Ibid.*, at 1980-1981.

¹⁶¹ See Orrego Vicuña, note 83, at 32.

¹⁶² Kooijmans, note 1, at 1984.

¹⁶³ See the analysis of Deen-Racsmany, note 39, at 87-88.

¹⁶⁴ *LaGrand* Case, note 36, § 42.

Surprisingly enough, and based on rather controversial interpretative methods,¹⁶⁵ the ICJ accepted the “humanization” view on Article 36 of the VCCR. Nevertheless, the Court’s summary treatment of the issue left many questions unanswered: which exactly were the rights stemming from this provision¹⁶⁶; had the individual rights acquired the character of human rights, a question on which the Court wisely reserved its opinion in the *LaGrand Case*¹⁶⁷; and finally, against whom these rights could be asserted?¹⁶⁸

It is this last question that bears directly to our topic. Based on the ambiguous reasoning of the ICJ, some commentators suggested that the right to consular communication, flowing from Article 36 § 1 of the VCCR, “should operate also against the detainee’s own State”, meaning that the individual was entitled to demand his national State to exercise diplomatic protection.¹⁶⁹ This reading of the

¹⁶⁵ The Court adopted a rigid textual approach relying on the plain words and after noticing that Article 36 §1 (b) stipulated that “[t]he said authorities shall inform the person concerned without delay of his rights under this subparagraph” (emphasis added), it concluded that the article created individual rights, *ibid.*, § 77. Judge Shi, in his Separate Opinion, sharply criticized the Court’s exclusive reliance on a textual interpretation, and after examining the actual language of the whole Convention and the *travaux préparatoires*, he concluded that the Court’s interpretation of the provision run counter to the object and purpose of the Convention, *ibid.*, § 4 of his Separate Opinion; see Jennings, note 91, at 46-47 and also Judge Oda’s Dissenting Opinion, *ibid.*, § 24. See also the critical comments of Menckel, note 34, at 450-455; Tams, note 38.

¹⁶⁶ See the critical remarks of Pinto, note 40, at 529-530, who, based on the analysis of the I-ACHR (*Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, note 93), enumerates the individual rights stemming from Article 36 as follows: right to information about the possibility of consular assistance, right to consular notification and right to consular communication.

¹⁶⁷ The Court underlined that such a pronouncement would not have affected the outcome of the proceedings (note 35, § 78; see also Gilbert Guillaume, *La Cour internationale de Justice et les droits de l’homme*, in: *La Cour internationale de Justice à l’aube du XXI^e siècle – Le regard d’un juge. Hommage à Gilbert Guillaume*, Pedone 2003, 265-272, at 270) and, thus, it refrained from taking up the German contention that “the right to information under Article 36 of the Vienna Convention constitutes an individual, indeed, a human right ... of aliens”, in: *Verbatim Record, LaGrand Case*, ICJ Doc. 2000/26, §§ 1, 7 and 14, available at: <www.icj-cij.org>. *Contra* the attitude of the I-ACHR, *ibid.*, §141. See also the observations of Tams, note 38, at 1257, who speaks about the ambiguity of the distinction between individual and human rights and further comments that “[w]hile the [I-ACHR] ... went on to discuss the relation between individual rights to consular assistance and procedural human rights, the ICJ stopped short of recognizing that Article 36 of the VCCR was a human right, thereby prudently avoiding a politicization of the dispute” (emphasis added), meaning that a pronouncement on the human rights character would have further led the ICJ to assert that consular assistance formed part of the international guarantees of due process and ultimately, that the Court would have ended speaking about the *LaGrand* brothers’ right to life and the issue of capital punishment. Critical to the Court’s attitude are Fitzpatrick, note 38, at 429-430; Flauss, note 49, at 4. *Contra* Condorelli, note 3, at 12-13 (footnote 11).

¹⁶⁸ These ambiguities allowed commentators of the case to assert that the Court implicitly adhered to the view that the provision was not only designed to afford basic procedural rights of information and access to consular assistance, but that it “is designed to protect substantive human rights, such as fair criminal trial and sentencing”, in: Stephens, note 38, at 155. See also the Concurring Opinion of Judge Cançado Trindade in the Advisory Opinion of the I-ACHR, *ibid.*, § 1, speaking about the humanization of the VCCR.

¹⁶⁹ Warbrick, note 20, at 731.

case allegedly lends support to the idea of constraining States' discretion in the field of diplomatic protection, provided that the procedure of consular notification forms part of it.¹⁷⁰

This interpretation of the *LaGrand* Case is, in our view, quite far-fetched, especially if one takes into account that the Court, in a frequently neglected passage of the judgment, declared that it was irrelevant to know whether the LaGrand brothers would have requested the German consular assistance and "whether Germany would have rendered such assistance"¹⁷¹, which shows that the Court confirmed, though indirectly, the discretionary nature of any German decision. Finally, the Court's abstention from adopting a human rights language in the *LaGrand* Case and the rejection of this approach in the *Avena* Case, where the Court in an *obiter dictum* declared that "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support [this] conclusion"¹⁷², further weakens the arguments on the recognition of a duty to exercise diplomatic protection on the basis of the "humanization" of the VCCR.

The analysis of the different argumentative lines followed in order to "subdue" the idea of State discretion casts light on the slippery slope towards human rights idealism. Many international legal scholars, starting from supposedly legal arguments that ambitiously aim at restraining the subjectivity of the State's decision to exercise diplomatic protection (the *jus cogens* suggestion), afterwards pass to the idea of law being less about substantive rules and more about offering the appropriate procedure that will eliminate the danger of abusive use of State power (the municipal courts' control of the discretion suggestion) and they end up appealing to humanistic ideals¹⁷³ that hardly conceal the reality of the law's surrender to a superficial morality¹⁷⁴; this is a painful return to subjectivism, this time in the form of human rights idealism.¹⁷⁵

¹⁷⁰ This seems to be the position of Monica Pinto, note 40, *passim* and at 525. The reasoning of Professor Pinto is not always clear as she seems to jump to conclusions and blur between diplomatic protection as a procedural mechanism and diplomatic protection as a human right.

¹⁷¹ *LaGrand* Case, note 36, § 74.

¹⁷² *Avena* Case, note 36, § 124; but see the critical observations thereon by Milano, note 27, at 130.

¹⁷³ See Judge Cançado Trindade's assertion that "one can only find an answer to the problem of the foundations and the validity of general international law in the universal juridical conscience, starting with the assertion of the idea of an objective justice", in the Advisory Opinion of the I-ACHR, note 85, Concurring Opinion of Judge Cançado Trindade, § 14.

¹⁷⁴ For an analysis of the ultimate turn to ethics, but in a different context, see Martti Koskeniemi, 'The Lady Doth Protest Too Much'. Kosovo, and the Turn to Ethics in International Law, 65 *The Modern Law Review* (2002), 159-175, *passim*.

¹⁷⁵ See Professor Koskeniemi's description of the non-political and universal human rights idealism as one of the mistakenly perceived "most beneficial gifts to humanity", in: Koskeniemi, *The Effect of Rights on Political Culture*, note 117, at 100-101.

D. Conclusion: Are Limitations to State Discretion a Triumph of Effectiveness?

Beyond our objections for this (unconscious?) turn to human rights idealism, a further criticism against the orchestrated effort to restrain State's discretion in the field of diplomatic protection should be examined. This is based on the repercussions that such a limitation could have on the effectiveness of diplomatic protection. A recent decision in the framework of the ECHR illustrates the dilemma that the proponents of the recognition of a State duty to exercise diplomatic protection ultimately face.

Until recently, the case-law of the ECtHR did not leave almost any space for a speculation that the Court could adhere to the view of a State's duty to exercise diplomatic protection.¹⁷⁶ On the one hand, the organs of the ECHR had repeatedly denied recognizing a right to diplomatic protection.¹⁷⁷ On the other hand, the ECtHR has been reluctant to put under scrutiny the discretionary decisions of States with regard to the exercise of diplomatic protection on the basis of an invocation of the right to fair trial and to an effective remedy (Articles 6 § 1 and 13 of the ECHR).¹⁷⁸

A final construction under the ECHR could be based on the theory of positive obligations.¹⁷⁹ Professor Flauss foresaw this possibility but observed that "une

¹⁷⁶ See the elaboration of the topic by Flauss, *Vers un aggiornamento*, note 52, at 49 et seq.; *ibid.*, note 49, at 24-28; *ibid.*, *Contentieux européen*, note 52, at 830-834; Jean-François Flauss, *Protection diplomatique et protection internationale des droits de l'homme*, in: Renato Zerbini Ribeiro Leão *et al.* (eds.), *Os rumos do direito internacional dos direitos humanos/Trends in International Law of Human Rights: Liber Amicorum Antônio Augusto Cançado Trindade*, vol. I, Porto Alegre 2005, 383-422.

¹⁷⁷ See the firm position of the European Commission that the Convention did not guarantee a right to diplomatic protection or to any other analogous measure (see *B. Russel, Peace Foundation Ltd. v. United Kingdom*, Application No. 7597/75, decision of 2 May 1978; *G. Kapas v. United Kingdom*, Application No. 12822/87, decision of 9 December 1987; *A. Leschi Case*, note 152). See also Flauss, *Protection diplomatique*, *ibid.*, at 52 (footnote 67).

¹⁷⁸ The now defunct Commission had been more willing to a sort of judicial review in those cases, where municipal law provided for a form of judicial control of this type of foreign policy decisions; see the *Nadler and Reckziegel v. Germany Case*, Application No. 27718/95, decision on admissibility of 12 April 1996, European Commission on Human Rights, available at: <<http://hudoc.echr.coe.int>>, where it was stated that "[t]he Commission found that nothing permitted it to conclude that the German government used its discretionary power in weighing general and individual interest in an arbitrary manner", cited in: *Re s s*, note 122. Professor Flauss concluded with regard to the same question that the ECtHR has shown signs of unwillingness to follow the uncritical expansion of these two rights, as evidenced in the *Al-Adsani Case*, note 135, in: Flauss, *ibid.*, at 27. See also the more nuanced position of Professor Flauss, *Contentieux européen*, note 52, at 832.

¹⁷⁹ See, generally, on the theory of positive obligations Eckart Klein (ed.), *The Duty to Protect and to Ensure Human Rights*, Berlin 2000; Alistair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford 2004; Frédéric Sudre, *Les "obligations positives" dans la jurisprudence européenne des droits de l'homme*, 6 *Revue trimestrielle des droits de l'homme* (1995), 363-384, *passim*. The ECtHR has recognized that there is a general obligation for the contracting States under Article 1 of the ECHR to ensure the enjoyment of rights and liberties to every person within their jurisdiction

telle interrogation n'a véritablement de sens que si la jurisprudence de Strasbourg retenait une conception particulièrement extensive de la notion d'obligations positives, c'est-à-dire admettant l'existence d'obligations positives à portée extraterritoriale qui, en l'occurrence, pourraient se traduire par des obligations d'ordre procédural".¹⁸⁰ Indeed, according to Article 1 of the ECHR "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".¹⁸¹ The words "within their jurisdiction" have been analyzed as meaning that "a State's jurisdictional competence is primarily territorial" and that there is a presumption of jurisdiction throughout the State's territory, which can be rebutted in the case of the absence of effective control.¹⁸² The ECHR has established a close link between the notion of jurisdiction and the notion of effective control/actual authority, leaving a very limited space for the extraterritorial application of the Convention.¹⁸³

and furthermore, it has recognized that for that purpose it is not sufficient for a State to abstain from any intervention, but that it should also take positive measures of a preventive or repressive character. Usually the ECtHR leaves a margin of appreciation to the States and does not proceed in a detailed review of the positive measures taken; see on this point *Sudre*, *ibid.*, at 375-378; Ioana Petculescu, *Droit international de la responsabilité et droits de l'homme. A propos de l'arrêt de la Cour européenne des droits de l'homme du 8 juillet 2004 dans l'affaire Ilaşcu et autres c. la République de Moldova et la Fédération de Russie*, 109 RGDIP (2005), 581-607, at 592.

¹⁸⁰ (Emphasis added). The obstacle of extraterritoriality is apparent: if a State-party to the ECHR is to be held responsible because the absence of diplomatic representation could contribute to the violation of its nationals' rights, that could happen only by suggesting that the State-party is still bound by its conventional obligations outside its territory, and, therefore, an extraterritorial application of the theory of positive obligations is involved; see *Flauss*, note 49, at 26. The obstacle of the so-called extraterritorial reach of a possible obligation is also present in the reasoning of Judge J. Ngcob'o's concurring opinion in the *Kaunda* Case, note 137, at 206 (§ 183), who asserts that the obligation does not cease once the citizen crosses the borders.

¹⁸¹ ECHR, note 53.

¹⁸² See *Bankovic and Others* Case, Application No. 52207/99, judgement of 12 December 2001, reprinted in: 41 ILM (2002), 517 et seq., §§ 59 and 70-71; *Assanidzé v. Georgia*, Application No. 71503/01, judgement of 8 April 2004, available at: <<http://hudoc.echr.coe.int>> and reprinted in: 25 HRLJ (2004), 54-75, § 139; *Ilaşcu* Case, note 53, § 312. On this point, see Gérard Cohen-Jonathan, À propos des arrêts *Assanidzé* (8 avril 2004), *Ilaşcu* (8 juillet 2004) et *Issa* (16 Novembre 2004), 16 Revue trimestrielle des droits de l'homme (2005), 767-785, at 773; Petculescu, note 179, at 586.

¹⁸³ See *Soering v. United Kingdom*, Application No. 14038/88, judgement of 7 July 1989, ECtHR Ser. A, No. 161, reprinted in: 11 EHRR (1989), 439 et seq., §§ 88-91; *Bankovic and Others* Case, *ibid.*, § 71; *Ilaşcu* Case, *ibid.*, § 317. Nevertheless, the Court seems to have left the door open to a possible extension of positive obligations in the context of foreign relations by declaring that "cases involving the activities of its diplomatic or consular agents abroad" were within the scope of article 1 of the Convention, *Bankovic* Case, *ibid.*, § 73. Professor Weckel considers that the requirement of jurisdiction-authority constitutes a limitation of the responsibility of the State compared with the general regime of State responsibility; see Philippe Weckel, *Chronique de jurisprudence internationale. Ilaşcu et autres v. Moldova et Russie*, 108 RGDIP (2004), 1036-1044, at 1038-1039. Petculescu (*ibid.*), speaks of a "conception étendue de la 'jurisdiction'".

The obstacle of extraterritoriality – and, in our view, the lack of causal link¹⁸⁴ – were the most important reasons, which suggested that the ECtHR would be very reluctant to find a State in breach of the Convention because it failed to fulfil its positive obligations (and what type of obligations?) with regard to its abroad injured nationals. Only in exceptional circumstances that conclusion could be overruled, circumstances which seem to be united in an unprecedented and the lengthiest judgement of the ECtHR's history, namely in the *Ilaşcu* Case, where the Court found Moldova in breach of its positive obligations under the ECHR to take all necessary (mainly diplomatic) measures to ensure in the person of its nationals the respect of the rights guaranteed in the Convention.¹⁸⁵

The exceptional element was that the case did not really involve an extraterritorial application of the conventional obligations incumbent upon the Republic of Moldova, since the case concerned the unlawful detention of some individuals in the Transdnestrian territories, which were controlled by a separatist movement, but over which the Moldovan territorial sovereignty was never challenged.¹⁸⁶ Because of the separatist movement, however, Moldova was not in control of the territory and so, according to the established case-law of the Court¹⁸⁷, one would have expected the Court to find that the lack of real authority over the territory meant the absence of Moldovan jurisdiction and thus, that Moldova could not be held responsible.¹⁸⁸

Quite the contrary occurred, however; the Court declared that the loss of effective control did not mean that Moldova had ceased to have jurisdiction under Article 1 of the ECHR over the seceded territories, but it added that the factual situation (the secession) reduced the scope of that jurisdiction to the respect of the positive obligations of Moldova towards persons within that territory.¹⁸⁹ The innova-

¹⁸⁴ See, for a first approach to the question of causal link in the case of positive obligations, Benedetto Conforti, Reflections on State Responsibility for the Breach of Positive Obligations: The Case-law of the European Court of Human Rights, 12 Italian Yearbook of International Law (2003), 3-11, *passim*.

¹⁸⁵ *Ilaşcu* Case, note 53, § 352. For a comment on this aspect of the case, see Fouad Zarbiev, Le phénomène de séparatisme devant la Cour européenne des droits de l'homme. A propos de l'arrêt *Ilaşcu et autres c. Moldova et Russie*, 19 L'observateur des Nations Unies (2005), 77-97, at 90-95; Syméon Karagiannis, Le territoire d'application de la Convention européenne des droits de l'homme. *Vaetera et nova*, 16 Revue trimestrielle des droits de l'homme (2005), 33-120, at 74-81; Cohen-Jonathan, note 182, at 774-778; Petculescu, note 179, at 592-595; Roemer Lemaître, Transdnestria before the European Court of Human Rights, 6 International Law Forum (2004), 111-115, at 114-115.

¹⁸⁶ See the dissenting opinion of Judge Ress, *ibid.*, § 1, where he states that "[t]he sovereignty over the whole territory was and is not disputed". See also the observations of Zarbiev, *ibid.*, at 89, where he asserts that the Court seems to confuse territorial sovereignty with jurisdiction over the territories, meaning real and effective authority; Weckel, note 183, at 1036.

¹⁸⁷ The assimilation between the notion of jurisdiction and the notion of real authority over the territory was recently reaffirmed in the *Assanidzé* Case, note 182, § 144.

¹⁸⁸ Cohen-Jonathan, note 182, at 774

¹⁸⁹ *Ilaşcu* Case, note 53, §§ 331 and 333; see the critical comments of Zarbiev, note 185, at 89-90; Karagiannis, note 185, at 74-80, where he states that the Court seems to distinguish between juris-

tive approach of the Court raises many questions.¹⁹⁰ With regard to the content of the positive obligations of Moldova, the Court refers to the taking of diplomatic measures aiming at the restoration of the Moldovan authority in the region and at the release of the detained individuals.¹⁹¹ The Court's suggestions fall clearly within the context of diplomatic representations.¹⁹² Should the conclusion from this case be that there is a general obligation to take the necessary diplomatic steps¹⁹³ in order to ensure the enjoyment of the rights of the Convention by every person under the State's jurisdiction? It is hard to say that, but the value of this innovative legal construction remains to be seen.¹⁹⁴ A first indication, however, of the confu-

dition and scope of jurisdiction. In his Hague Academy lectures, Judge Rozakis described the Court's judgment as an application of an extra-legal, a political notion of jurisdiction. Moreover, as Judge Sir Nicola Bratza observes in his partly dissenting opinion (joined by Judges Rozakis, Hedigan, Thomassen and Panțiru), the case-law on positive obligations "was developed in a factual context where the respondent State exercised full and effective control over all parts of its territory ...", in: *ibid.*, § 8. *Contra*, see the positive comments of Petculescu, note 179, at 592; Olivier de Frouville, *Chronique de jurisprudence de la Cour européenne des droits de l'homme*, 132 JDI (2005), at 474; Weckel, note 183, at 1040-1041, where he asserts that the Court's innovatory reasoning contributes to the simplification of the regime of State responsibility by recognizing the responsibility of the State in the separated territories on the basis of the theory of due diligence.

¹⁹⁰ Judge Sir Nicola Bratza (*ibid.*) articulates many of them in his partly dissenting opinion, where he wonders how the detained individuals remain within the jurisdiction of Moldova when the latter does not exercise any control; how is the scope of jurisdiction reduced (Judge Ress, in his dissenting opinion rejects the Court's approach and states that the scope of jurisdiction remains always the same but it is the responsibility that is limited only to specific obligations, *ibid.*, § 1; Weckel, *ibid.*, at 1041; Cohen-Jonathan, note 182, at 777) and how the Court estimates that it is precisely in the environment of a limited scope of jurisdiction that the performance of the positive obligations is more required? See also the observations of Cohen-Jonathan, *ibid.*, at 776-777; Flauss, note 142, at 410; Zarbiev, *ibid.*, at 90-91; Theodor Schilling, *Is the United States Bound by the International Covenant on Civil and Political Rights in Relation to Occupied Territories?*, Global Law Working Paper 08/04, available at: <<http://www.nyulawglobal.org/workingpapers/documents/GLWP0804Schilling.pdf>>, 12.

¹⁹¹ *Ibid.*, §§ 339-341; Professor Karagiannis notes with disapproval the Court's general insistence that Moldova take "all the appropriate measures which it is still within its power to take" (*ibid.*, § 313) and wonders whether this language implies even the taking of military action, in: Karagiannis, note 185, at 78-79, especially if one takes into account that Judge Casadevall, in his partly dissenting opinion, joined by Judges Ress, Birsan, Tulkens and Fura-Sandström, establishes Moldovan responsibility also because "these attempts (to exercise control over the Transdniestrian territories) were limited to diplomatic activity", *ibid.*, § 5.

¹⁹² Cohen-Jonathan, note 182, at 778; Zarbiev, note 185, at 93-94, observes that "on peut se demander si la Cour a décidé de revenir sur la position constante de la défunte Commission européenne des droits de l'homme en consacrant un devoir de la protection diplomatique", but it adds that "[o]n peut difficilement prêter à la Cour de telles intentions, tout portant à croire que sa position est liée aux circonstances particulières de l'espèce (to which the Court makes reference; *ibid.*, § 337)" (footnotes omitted).

¹⁹³ The Court wisely refrained from indicating specific measures that Moldova should have taken in order to comply with its conventional obligations, *ibid.*, § 334; see also § 8 of the partly dissenting opinion of Judge Sir Nicola Bratza.

¹⁹⁴ In his Hague Academy lectures, Judge Rozakis underlined the exceptional character of the *Ilașcu* Case and expressed the case's limited precedential value with regard to the question of the territorial application of the Convention; see Christos Rozakis, *The New European Court of Human Rights: Trends and Prospects*, RCADI (2004), forthcoming. The ECtHR has, nevertheless, already re-

sion around the ambit of the Court's pronouncement, can be traced to the *Manoilescu et Dobrescu* Case, where the third Chamber of the Court interpreted the *Ilaşcu* Case as follows: "même en l'absence de contrôle effectif sur un territoire extérieur à ses frontières(!), un Etat demeure tenu, en vertu de l'article 1 de la Convention, par l'obligation positive de prendre les mesures qui sont en son pouvoir et en conformité avec le droit international ..." ¹⁹⁵ Obviously, the Court errs when speaking about an extraterritorial application of the ECHR in the *Ilaşcu* Case.

Generally speaking, even if some of the novel constructions analyzed in this chapter stand the test of time, we wonder whether the recognition of an obligation to exercise diplomatic protection can be considered as a triumph of effectiveness. As eminent scholars have stressed, such an evolution could either create serious frictions between States, as there would probably be floods of requests for the exercise of diplomatic protection that States would be obliged to take into account, or the constant invocation thereof could lead to its weakening and trivialization. ¹⁹⁶ In our view, the reality is that diplomatic protection remains a highly political institution that cannot be turned into a duty for the State on the basis of a misconceived idea of effectiveness because ultimately it will become a completely inoperative mechanism. ¹⁹⁷

ferred to the *Ilaşcu* Case when examining the question of the positive obligations of the Contracting Parties under the ECHR; see *ST. v. Germany*, Application No. 61603/00, ECtHR Ser. A, decision of 16 June 2005, available at: <<http://hudoc.echr.coe.int>>, § 102. Professor Karagiannis, note 185, at 80 (footnote 136), highlights some of the wider implications of the Court's approach concerning the recognition of a positive obligation to take all necessary measures to prevent or avenge the violation of the Convention with regard to the negotiations in Cyprus.

¹⁹⁵ *Manoilescu et Dobrescu c. Roumanie et Russie*, Application No. 60861/00, ECtHR Ser. A, decision of 3 March 2005, available at: <<http://hudoc.echr.coe.int>>, § 101, (emphasis added).

¹⁹⁶ See the analysis of Perrin, note 33, at 28-31, where he further observes that in reality this evolution would not diminish the inherent inequality in the institution of diplomatic protection. See also the critical remarks on the positive obligation construction by Zarbiev, note 185, at 93, where he states that "cette position prend le contre-pied d'une jurisprudence considérant le souci de bonnes relations internationales comme devant prévaloir sur les intérêts individuels" and he mentions, among others, the *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, ECtHR Ser. A, admissibility decision of 12 December 2002, available at: <<http://hudoc.echr.coe.int>>.

¹⁹⁷ The voice of human rightists can be valuable in the context of recognizing a limited power to judicial review of decisions refusing the exercise of diplomatic protection and of the way the agreed reparation is distributed to the injured individuals. For the question of reparation, see Milano, note 27, at 108; Alborno, note 19. It is in these fields, where reality has shown that human rights considerations are more pertinent, that the failure of the ILC to adopt innovative solutions has led to sharp criticism. Our submission is, however, that these questions remain beyond the scope of the codification effort on diplomatic protection; see Koijmans, note 1, *passim*.

IV. Epilogue: “*Le roi est mort. Vive le roi!*” or a Serious Identity Crisis for Diplomatic Protection?

Are the rumours on the eminent “death” of diplomatic protection exaggerated? It is difficult to give a definitive answer. Many international lawyers¹⁹⁸ have treated the allegations of the gradual abandonment of diplomatic protection as an overstatement and they have invoked in their support their experience of the daily cases of diplomatic representations. We do not object to this evidence; our view is, however, that this “informal” exercise of diplomatic protection does not really involve an examination of the conditions for its exercise, such as the fulfilment of the nationality link, which usually come to the fore when there is a formal exercise of diplomatic protection, and especially when a claim reaches an international forum for settlement.¹⁹⁹ It is exactly with this “hardcore” diplomatic protection that the ILC is concerned. And it is this aspect of diplomatic protection that gradually faces the challenge of marginalization.²⁰⁰

Throughout this essay we have referred to the impact that specific suggestions on the nature of diplomatic protection could have on the effort to increase diplomatic protection’s utility in contemporary international law. Indeed, the whole codification work of the ILC is, in a way, an exercise on the revitalization of an institution heading for obsolescence. But what is the result of this codification effort? Can we speak of a “*renaissance*” of diplomatic protection, of a new diplomatic protection that responds to the challenges of the transforming international legal order and constitutes a cornerstone of the effective protection of human rights – a development so much advocated by Professor Dugard? *Le roi est mort et vive le nouveau roi?* Probably not.

Despite the numerous attacks launched against the legal fiction on which diplomatic protection is based, this rather outmoded fiction found a place in the codification work of the ILC.²⁰¹ In so doing, the ILC made also clear its hostility towards the majority of the ground-breaking suggestions of the two Special Rapporteurs that could have completely altered the nature of the institution. More precisely, Professor Dugard tried to combine a human rights-oriented approach, which was primarily expressed through the “effective human rights protection” paradigm, with considerations of effectiveness, meaning the idea that diplomatic

¹⁹⁸ See, among others, Caflisch, note 140.

¹⁹⁹ As the ILC underlines diplomatic actions should be taken under a claim of right, in: ILC Report 2000, note 43, at 173 (§ 495). See, on this point, *supra*, footnotes 47–48 of this article.

²⁰⁰ See Milano’s comment, note 27, at 86, that the decreasing importance of diplomatic protection is based on an element of truth.

²⁰¹ See Milano, *ibid.*, at 89, who states that “its [diplomatic protection’s] fictitious nature *seems to somehow undermine its potentials as a legal venue to redress an abusive conduct ...*”, (emphasis added).

protection should be modernized and become more attractive as a procedural counterpart of State responsibility.²⁰²

Because of this duality of purpose, we submit that the final result of the codification effort fails to reach a solution with regard to the serious identity crisis that currently permeates diplomatic protection. Moreover, the absence of a provision for the lifting of diplomatic protection's conditions of exercise in the case of claims for violations of *erga omnes* obligations by a non-injured State undercuts the possibility of admitting these claims and further marginalizes the role of diplomatic protection in the field of human rights. In our view, these shortcomings are partly due to the limited theoretical elaboration of the topic. Indeed, Professor Dugard's reports do not focus sufficiently on the impact that human rights could have on diplomatic protection. More precisely, Professor Dugard does not explain in a systematic way which are the elements of the human rights discourse (procedural: emergence of individual as a subject of international law/substantive: proliferation of human rights obligations for States) that influence the institution of diplomatic protection and how they influence it (is, for example, the proliferation of the cases where the individual has standing before international (quasi-) judicial *fora* undermining or enhancing diplomatic protection, why and how?).²⁰³

The lack of a theoretical analysis of the human rights aspect is all the more apparent in the part where one of the basic tenets of diplomatic protection – reflecting its State-oriented characteristics and its highly politicized nature – is examined, namely, the question of the discretionary right of the State to exercise diplomatic protection and the possible limitations to it. With regard to this question, some eminent scholars,²⁰⁴ based on the Court's stance in the recent *LaGrand* and *Avena* Cases, challenged the legal fiction on which diplomatic protection is traditionally premised.²⁰⁵ The recognition of the complementariness and individual primacy in terms of the claims involved in the exercise of diplomatic protection has been

²⁰² Having this dual approach (human rights-effectiveness) in mind, Professor Dugard presented a set of commentaries, which may have been characterized by an accentuated idealism, especially when he managed to combine the two approaches (the effective remedy ideal permeating the rules on the nationality link), while other times he was more pragmatic, showing a clear preference for effectiveness (protection of shareholders). For this process of balancing between human rights idealism and pragmatism, see Dugard, note 14, at 79. For a relevant analysis, see Vasileios Pergantis, 'Towards a "Humanization" of Diplomatic Protection and the Nationality of Claims Rule? A Critical Appraisal of Recent Developments, Mémoire pour l'obtention du DEA en relations internationales, IUHEI/Geneva (October 2005), *passim*.

²⁰³ For a distinction between substance and procedure, see also Milano, note 27, at 137-138.

²⁰⁴ Gaja, *Droits des États*, note 49, at 63-65; Orrego Vicuña, note 83.

²⁰⁵ See the analysis by Professor Dominicé, note 87, at 77, where he states that "[i]ci, l'attention est portée exclusivement sur la protection diplomatique et prend en considération un seul acte illicite. C'est à propos de cet acte illicite initial au détriment d'un étranger qu'il faut constater qu'il n'est pas au premier chef une atteinte au droit de l'État national de celui-ci. Il l'est simultanément, mais au second degré. La théorie du 'droit individuel' indique bien qu'il y a au point de départ la violation d'une règle du droit international accordant un droit à l'individu." It would have been preferable to speak of "ressortissants" instead of "individu", since the former term better reflects the link between the State and its citizens, which remains at the heart of diplomatic protection.

taken a step further towards the articulation of a claim for establishing a duty of the State to protect its nationals and thus, an obligation to exercise diplomatic protection.

As we have seen, the “duty of State” approach to the question is of a doubtful value, especially if one considers that challenging the legal fiction and recognizing the existence and even primacy of the rights of the individual in diplomatic protection or expanding its scope in the field of human rights does not automatically mean the imposition of an obligation to the State of nationality to exercise diplomatic protection.²⁰⁶ It is, mainly, on the basis of the due process idea that the discretion of the State could be restrained. Nevertheless, it is questionable, whether the codification of diplomatic protection rules should deal with this issue.

The *Avena* Case, however, suggests a different vision with regard to the interaction between the different areas of international law involved in the codification work of the ILC, namely, diplomatic protection, human rights protection and, by analogy, protection of foreign investments. More precisely, in this case, as we have seen, the ICJ set completely aside the diplomatic protection claim, because otherwise it would have been confronted probably with a US objection of non-exhaustion of local remedies, and focused on the State claim, in which the claim for the injury of the individual was, in a way, absorbed. This *ad hoc* approach to diplomatic protection – though sharply criticized – represents the idea of diplomatic protection having a residual and ultimately subsidiary to human rights/foreign investments protection mechanisms nature.²⁰⁷

As we are heading towards the second reading of the Draft Articles, the comments of governments in the framework of the 6th Committee and their written submissions to the ILC confirm that while diplomatic protection is a means for the

²⁰⁶ Professor Perrin illustrates the weakness of a theory of “automaticity”, when he submits that “[c]ette conception paraît difficilement acceptable. Que l’individu soit titulaire de droits qui ont leur source dans les traités ou la coutume, que ces droits servent la base à la réclamation de l’État d’origine, n’a pas et ne peut avoir pour effet de créer à la charge de ce dernier une obligation sur le plan du droit interne”; Perrin, note 33, at 394. The same applies with regard to the justiciability of the relevant constitutional provisions already analyzed.

²⁰⁷ We believe that Professor Dugard’s submission in favour of the complementary to and not supplanting of human rights protection mechanisms role of diplomatic protection (note 14, at 91), is not at all identical with the Court’s attitude in the *Avena* Case. See also the allegation of Vratislav Pechota, *The Limits of International Responsibility in the Protection of Foreign Investments*, in: Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, The Hague 2005, 171-182, at 171, that “[t]he two thousand bilateral investment treaties concluded so far have created a body of ... investment rules that relegate the general international law concerning State responsibility to the status of secondary (default) principles”, (emphasis added). We suggest that it is exactly this vision that Article 17 of the 2004 Draft reflects; see ILC Report 2004, note 2, at 85-88, where it is stipulated (§ 5 of the Commentary) that “[t]his draft article is primarily concerned with the protection of human rights by means other than diplomatic protection. It does, however, also embrace the rights of States, natural persons and other entities conferred by treaties and customary rules on other subjects, such as the protection of foreign investment. The draft articles are likewise without prejudice to such rights that exist under procedures other than diplomatic protection”. *Contra* Milano, note 27, at 138, who suggests another reading of Article 17.

protection of individuals it remains a prerogative of the State.²⁰⁸ We believe that these comments highlight the limitations of diplomatic protection as an institution characterized by the political uncertainty inherent in its discretionary nature that primarily serves State interests, a remnant of an outdated conception of the international legal order. These observations are also a sore proof of the utopian idealism permeating the "humanization" project, which, although allegedly serving both the protection of human rights and the effectiveness of diplomatic protection, did not succeed in elaborating a viable solution for its serious identity crisis. Does this finding constitute a regression for the human rights cause? We do not believe so; in our view, there are other mechanisms that could serve this cause much more effectively.

²⁰⁸ See the observations in the framework of the discussion in the 6th Committee, summarized in: UN Doc. A/C.6/60/SR.18, 23 November 2005, 5, § 20 (Nordic countries), 8, § 38 (Republic of Korea) (denying the "agent" theory), 9, § 47 (Netherlands), 13, § 71 (Belarus), UN Doc. A/C.6/60/SR.19, 28 November 2005, 5, § 27 (Belarus), and UN Doc. A/C.6/60/SR.20, 29 November 2005, 3, § 10 (Indonesia); see also the comments and observations on the topic of diplomatic protection received from governments by the ILC, reproduced in: UN Doc. A/CN.4/561, 27 January 2006, particularly 9 (Mexico), 10 (Nordic countries) and 12 (Panama).

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