

LEGAL NATURE AND LEGAL CONSEQUENCES OF DIPLOMATIC PROTECTION. CONTEMPORARY CHALLENGES*

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RESUMEN: En la era de la post-guerra, el derecho internacional ha reconocido cada vez más derechos individuales. Dicha evolución ha ocasionado que la importancia de la protección diplomática adquiera un nuevo significado como medio de protección de los mismos, y ha traído nuevos retos a las nociones tradicionales que rodean a este mecanismo. En el presente artículo, la autora argumenta que son derechos complementarios del Estado y del individuo los que se encuentran en la base de la protección diplomática y que, consecuentemente, el derecho a la reparación derivada de su ejercicio no debe pertenecer exclusivamente al Estado.

ABSTRACT: In the post-World War II era, international law has increasingly granted rights to individuals. This evolution has revived the current importance of diplomatic protection as a means of protection thereof, and has challenged the traditional notions surrounding it. In this article, the author argues that complementary rights of the State and of the individual lay at the basis of diplomatic protection and that, consequently, the right to reparation derived from its exercise must not belong exclusively to the State.

RÉSUMÉ: Depuis la fin de la Deuxième Guerre Mondiale, le droit international a conféré de plus en plus de droits directement aux individus. Une telle évolution a provoqué une résurgence de l'actuelle importance de la protection diplomatique comme moyen de protection des droits individuels, et cela représente un défi pour les notions traditionnelles qui entourent ce mécanisme. Dans cet article, l'auteur soutient que, à la base de la protection diplomatique, on retrouve les droits complémentaires de l'État et de l'individu et que, en conséquence, le droit à la réparation dérivant de l'exercice de la protection diplomatique ne devrait pas appartenir exclusivement à l'État.

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I. INTRODUCTION. GENERAL FRAMEWORK

The debate over the international protection of aliens¹ arises amidst a tug-of-war between issues such as State sovereignty, the principle of non-intervention and policy considerations, on the one hand, and human rights and the increased recognition of international rights to the individual, on the other.

Ever since the 18th century, the principal means of international protection of aliens has been the resort to diplomatic protection. Such figure, in its restricted sense (*stricto sensu*), is understood as a means of implementation of State responsibility which “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”.² It traditionally finds its theoretical underpinnings in the writings of Emmerich de Vattel, who stated that: “Whoever 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”.³

During the early half of the 20th century, diplomatic protection focused mainly on investment rights and economic interests of aliens, and was being exercised, in the most part, by the powerful investor States, a

1 We adhere to Tiburcio’s definition of “alien” as “an individual who, according to the laws of a given State, is not considered its national”. Tiburcio, C., *The Human Rights of Aliens under International and Comparative Law*, The Hague, Martinus Nijhoff Publishers, 2001, p. 1.

2 Draft Article 1 of the draft articles on Diplomatic Protection as adopted in first reading by the International Law Commission during its 56th session, contained in *Official Records of the General Assembly, 59th Session, Supplement No. 10 (A/59/10)* (2004), Report of the International Law Commission on the work of its 56th session, par. 59.

3 Vattel, E. de, “Le droit de gens ou les principes de la loi naturelle” (London, 1758), in *The Classics of International Law*, Washington, D.C., Carnegie Institution of Washington, 1916, vol. I, book II, p. 309, par. 71.

characteristic which led to many abuses.⁴ For this reason, developing nations, particularly Latin American ones, reacted strongly against it, with unsuccessful attempts to neutralize its effects (such as the Calvo Clause and the Drago Doctrine),⁵ and strong criticisms against it, as exemplified by the often-quoted passage of Judge Padilla Nervo's separate opinion in the *Barcelona Traction* case: "The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded".⁶

Due, probably, to these strong criticisms, during the second half of the twentieth century diplomatic protection fell into a sort of scholarly oblivion, yielding to analyses of alternative mechanisms of protection of aliens, considered less prone to abuse by powerful states. In Condorelli's words:

Autrefois institution centrale 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. Un outil, qui plus est, ayant attiré depuis longtemps des critiques sévères et passionnées de la part de ceux qui l'analysent comme un moyen mis aux mains des pays riches pour leur permettre de s'immiscer légalement dans les affaires intérieures des autres Etats et empiéter leur souveraineté. D'autres mécanismes, moins suspects, existent maintenant.⁷

4 For example, the Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of Witwatersrand, and the United States' military interventions in Dominican Republic in 1965, in Grenada in 1983 and in Panama in 1989 were carried out on the pretext of defending U.S. nationals there. See First Report on diplomatic protection, presented by J. Dugard to the International Law Commission during its 52th session, UN Doc. A/CN.4/506, 7 March 2000, pp. 5-6, par. 14.

5 For a description of the Calvo Clause, *cf infra* note 92; the Drago Doctrine was a response to action taken by Italy, Germany and Great Britain against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those States; it resulted in the 1907 Porter Convention Respecting the Limitation of the Employment of Force for the recovery of Contract Debts (Convention II of the 1907 Hague Peace Conference).

6 *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports, 1970, p. 3, individual opinion of Judge Padilla Nervo at p. 246.

7 L. Condorelli, "L'évolution du champ d'application de la protection diplomatique", en Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, Brussels, Nemesis-Bruylant, 2003, pp. 3-28, at p. 3.

It is true that the international legal system has undergone a considerable evolution in the last decades, particularly regarding the substantive and procedural rights afforded to individuals under international law. Nevertheless, far from replacing or rendering diplomatic protection obsolete, as some have argued, these developments have in fact revived the importance of diplomatic protection as a means of protection of such individual rights, and have come to challenge the traditional notions that lay at the basis of such mechanism.

To this date, diplomatic protection has remained in the domain of customary international law.⁸ Its customary nature was first stated by the PCIJ in the *Mavrommatis Palestine Concessions* case, where it recognized that: “It is an *elementary principle of international law* that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels”.⁹

Evidencing its current importance and need for clarification, the United Nations’ International Law Commission (ILC) has retaken its work on codification and alleged “progressive development” on the topic,¹⁰ “with a view to preventing abuses of the foreign State’s discretionary power to provide diplomatic protection”.¹¹ Bearing in mind the evolution of the international legal system, the ILC specifically agreed,

8 Previous unsuccessful attempts at codification include works prepared by the Institute of International Law in 1927, the International Commission of Jurists in 1928, the American Institute of International Law in 1930, and the Codification Committee of the League of Nations in 1929 (for the latter, see *American Journal of International Law (Special supplement)* (1929) at p. 232).

9 *Mavrommatis Palestine Concessions Case (Jurisdiction)* (Greece v. UK) Judgment of August 30, 1924: PCIJ Reports, Series A, No. 2, p. 12 (emphasis added). This dictum was repeated by the PCIJ in the *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), Judgment of February 28th, 1939: PCIJ Reports, Series A/B, No. 76, p. 16.

10 The codification works on diplomatic protection started as part of the codification on State responsibility in general, in 1956, with Special Rapporteur García-Amador’s “primary-rule” approach to the responsibility of States for injury caused in their territory to the person and property of aliens. In 1963 the boundaries of the project were redrawn, influenced by Special Rapporteur Roberto Ago’s “secondary-rule” approach, and only secondary rules on State responsibility in general were dealt with, applicable not only to diplomatic protection but to other fields as well. See *Yearbook of the International Law Commission, 1963*, vol. II, (Part One), doc. A/CN.4/152, p. 228, par. 5; See also J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Texts and Commentaries*, Cambridge, Cambridge University Press, 2002, p. 2. The ILC’s decision to retake codification on diplomatic protection was adopted in 1996. See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)* (1996). Report of the International Law Commission on the work of its 48th. session, para. 249 and annex II, add. 1.

11 *Official Records of the General Assembly, 53rd Session, Supplement No. 10 (A/53/10)* (1998), Report of the International Law Commission on the work of its 50th session, par. 74.

in the process of codification, to “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”.¹² We are of the view, however, that this goal has been met only partially in the set of draft articles on diplomatic protection adopted by the ILC *in first reading* in 2004 (the “First Reading Draft Articles”).¹³

In view of the fact that diplomatic protection is part and parcel of the international law on State responsibility, as a *mechanism or a procedure for invoking State responsibility*, and thus a means of implementation thereof or of giving effect thereto,¹⁴ the First Reading Draft Articles have been prepared within the framework of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001 (the “2001 State Responsibility Articles”).¹⁵ Indeed, it is commonly argued that the separate codification of these two topics was purely practical, led “[p]ar souci d’en terminer avec la codification de ce sujet [State responsibility] plus que pour des raisons doctrinales convaincantes”.¹⁶ In this sense, a State’s espousal of its national’s claim through diplomatic protection is actually the “Trojan horse” that elevates the dispute to the international arena and that renders applicable to the dispute,

12 *Idem*, para. 108.

13 Special Rapporteur Mohammed Bennouna, appointed in 1997, issued the following report: *Preliminary report on diplomatic protection, presented by M. Bennouna to the International Law Commission during its 50th session*, UN Doc. A/CN.4/484 and A/CN.4/484/Corr. 1, February 4th, 1998. Special Rapporteur John Dugard, appointed in 1999, has issued the following reports: First report, *supra* note 3, (UN Doc. A/CN.4/506 (7 March 2000) and Corr. 1 (7 June 2000) and Add. 1 (20 April 2000)); Second report (UN Doc. A/CN.4/514 (28 February 2001) and Corr. 1 (27 July 2001)); Third report (UN Doc. A/CN.4/523 (7 March 2002) and Add. 1 (16 April 2002)); Fourth report (UN Doc. A/CN.4/530 (13 March 2003) and Add. 1 (6 June 2003)); Fifth report (UN Doc. A/CN.4/538 (4 March 2004)). Sixth report (UN Doc. A/CN.4/546 (11 August 2004)). For the ILC debates as summarized in the ILC’s reports to the General Assembly, see *Official Records of the General Assembly: 55th session, Supplement No. 10, Doc. A/55/10* (2000); *56th session, Supplement No. 10, Doc. A/56/10* (2001); *57th session, Supplement No. 10, Doc. A/57/10* (2002); *58th session, Supplement No. 10, Doc. A/58/10* (2003); *59th session, Supplement No. 10, Doc. A/59/10* (2004). For the text of the articles as adopted at first reading and the commentaries attached thereto, see *supra* note 2.

14 Bennouna, M., Preliminary Report, *supra* note 13, at par. 10; Report of the International Law Commission on the work of its 50th session, *supra* note 11, at par. 104; Daillier, P. and Pellet, A. *Droit International Public, Nguyen Quoc Dinh*, (7th edition), Paris, Librairie Générale de Droit et de Jurisprudence, 2002, p. 763.

15 *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC on August 9th, 2001. For an introduction to their codification and the official text and commentaries of the adopted articles, see J. Crawford, *op. cit.* (note 10).

16 P. Daillier and A. Pellet, *op. cit.* (note 14), p. 763.

apart from the special rules on diplomatic protection, those on State responsibility in general (i.e. the 2001 State Responsibility Articles).¹⁷

In sum, it is fair to say that the customary international law status of diplomatic protection of individuals is not the same today as it was some years ago. Today, diplomatic protection faces new challenges with the evolution of the international legal system, mainly insofar as individual rights are concerned. What exactly are these challenges? This is what we purport to analyze in the present study. Our assessment shall focus on two fundamental issues which lie at the basis and at the summit of diplomatic protection: its legal nature and its legal consequences, particularly that of reparation. It is in these two elements that, in our view, the traditional doctrine reflected in the First Reading Draft Articles yet requires a major adaptation to respond to the contemporary individual-oriented needs of the international legal system.

II. THE INDIVIDUAL-ORIENTED EVOLUTION OF THE INTERNATIONAL LEGAL SYSTEM

Before 1945, international law left almost entirely to the discretion of States the issue of treatment of their own nationals, who had no direct rights or obligations on the international arena, and thus relied entirely on their State of nationality for the internationalization of any claim in which they were involved. During this period, the exercise of diplomatic protection had an exclusively inter-State character, between the State of nationality and the injuring State.

Nevertheless, the Second World War marked a drastic turnabout in the international legal system concerning the status of individuals. First of all, the punishment of war criminals at the Nuremberg and Tokyo war

17 In this sense: article 55 of the 2001 State Responsibility Articles. *Supra* note 10, at p. 306. This has also been recognized by the ILC in its commentaries to the First Reading Draft Articles. *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 13, par. 60, introductory commentary at par. (1). The ILC's commentaries to the 2001 Draft Articles contain references to diplomatic protection in the general presentation on circumstances precluding wrongfulness, and in the explanation of articles 20 (consent as a circumstance precluding wrongfulness), 36 (compensation), 39 (contribution to the injury), 42 (invocation of responsibility by an injured State) and 44 (admissibility of claims). See Crawford, J., *op. cit.* (note 19), pp. 161, 165 par. (10), 220 par. (5), 223 par. (16), 241 par. (6), 256 (note 702), 264 (note 722), 265 par. (3) and (note 726). Indirect reference may be found in the commentary to articles 31 (reparation) and 33 (scope). See *ibidem*, pp. 202 par. (5) and 209 pars. (3) and (4).

crimes tribunals “pointed out that international law was not concerned solely with the actions of sovereign states, but impose[d] duties and liabilities upon individuals as well as upon states”,¹⁸ a trend that was later reaffirmed by the UN General Assembly,¹⁹ the ILC,²⁰ and which reached its climax with the recent establishment of the permanent International Criminal Court under the Rome Statute.²¹ Apart from imposing liabilities, the end of the Second World War also began a trend of increasing acknowledgement of the existence of direct rights of the individuals on the international arena, by developing a new standard for their protection led in part by the desire to prevent the recurrence of crimes against humanity. Substantive international rights were recognized to individuals first within the development of international human rights law, which trend was then followed by international investment law and, more recently, by other domains such as consular law and regional integration frameworks. In addition, an important and revolutionary aspect of this tendency was the recognition of procedural rights to individuals under international law, mainly by according direct access to such individuals to file complaints against States before various regional and UN human rights protection mechanisms and investment dispute settlement mechanisms, and by creating *ad hoc* international claims tribunals and commissions.

Acknowledging that such an individual-oriented tendency is under way in international law is not to say, however, that individuals have substituted States as subjects on the international arena. Some of the individual substantive rights have no implementation mechanisms, and, while it may be argued that some are customary international law and binding, others are simply left to the domain of “soft law” or “non-binding” rules, casting doubts upon their practical effect. As for those of them which *do* have implementation mechanisms, either inter-State or

18 Sohn, L. B., “The New International Law: Protection of the Rights of the Individuals Rather than States”, in *American University Law Review*, 1982, vol. 32, pp. 1-64, at p. 10.

19 The UN General Assembly reaffirmed the Nuremberg Principles in Resolution 95, UN Doc. A/64/Add.1 (1947) and by approving by consensus a definition of aggression in Resolution 3314, 29 UN GAOR Supp. (no. 31) at 142, UN Doc. A/9631 (1974).

20 In 1949 the ILC further incorporated such principles into a project of “code of offenses against the peace and security of mankind” (Report of the International Law Commission to the General Assembly, 4 UN GAOR Supp. (No. 10) at 1, UN Doc. A/925 (1949)).

21 Rome Statute of the International Criminal Court, adopted on July 17, 1998 and entered into force on July 1, 2002.

through direct individual access, the absolute effectiveness of such mechanisms is still deficient in some fields, particularly human rights. Until the domain of individual international rights develops completely with effective enforcement mechanisms, the State will still play an important part in the internationalization of disputes regarding individuals, as acting under the rules of general international law. While this, in Pellet's terms, is "rather reminiscent of the parable of the blind man leaning on the cripple",²² due to the fact that general international law is not renowned for the effectiveness of its means of implementation, it must be acknowledged that States' participation can indeed offer support for the enforcement of such mechanisms. In sum, and without venturing into the long-lasting discussion if individuals are considered subjects of international law or not (a topic that goes beyond the scope of this study), we must acknowledge that, little by little, individuals *are* being granted rights and obligations on the international arena, and that it is undeniable that nowadays, following Higgins' reasoning, individuals are *participants*²³ within the international legal order, one which, nonetheless, is still essentially, but no longer exclusively, an inter-State one.

1. *Recognition of International Substantive Rights to the Individual*

A. *Substantive Human Rights Provisions*

Before 1945, human rights were part of the "reserved domain" of States, and not governed by international law. The post-World War II international concern for human rights was reflected in the establishment of a *universal* human rights protection system, one which finds its bases in the Charter of the United Nations ("UN Charter"),²⁴ and its authoritative interpretation contained in the 1948 Universal Declaration of Human Rights,²⁵ which lists the human rights that form "a basic component of international customary law, binding on all states, not only on members

22 Pellet, A., "Human Rightism and International Law", *Italian Yearbook of International Law*, Vol. X, 2001, pp. 3-16, at p. 11.

23 Higgins, R., *Problems and Process: International Law and How we Use It*, Oxford, Clarendon Press, 1994, p. 50.

24 *Charter of the United Nations*, adopted in San Francisco on June 26, 1945, entered into force on October 24, 1945. Preamble, arts 1(3), 13(1)b, 55, 56, 62 (2).

25 *Universal Declaration of Human Rights*, approved unanimously (with 8 abstentions) by the General Assembly on December 10, 1948, GA Res. 217A, UN Doc. A/810 at 56 (1948).

of the United Nations".²⁶ In turn, the rights listed in the Declaration were further detailed in two separate Covenants, in force since 1976: the International Covenant on Civil and Political Rights ("ICCPR"),²⁷ and the International Covenant on Economic Social and Cultural Rights ("ICESCR").²⁸ The first was to be given immediate effect through appropriate legislative or other measures, and the civil and political rights recognized therein have been considered to constitute "part of the law of mankind, a *jus cogens*".²⁹ In contrast, the ICESCR requires States only to take steps, to the maximum of their available resources, toward a progressive realization of the rights recognized therein, which are economic, social and cultural rights, the 'obligation of progressive realization' of which has led to many criticisms regarding their ineffectiveness. These four documents, together with the Optional Protocol of the ICCPR, constitute the "International Bill of Human Rights" that forms the basis of the universal protection system. All such rights are interdependent, complementary and indivisible.³⁰ In developing such rights, numerous additional declarations and conventions have been concluded concerning both individual³¹ and collective human rights.³²

In parallel, *regional* systems for the promotion and protection of human rights have been established. Their precursor was the European system, with the 1951 European Convention on Human Rights,³³ its Proto-

26 Sohn, L. B., *op. cit.* (note 18), p. 17.

27 International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, entered into force March 23, 1976, UN Doc A/6316 (1966).

28 International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200 A(XXI) of 16 December 1966, entered into force January 3, 1976, UN Doc A/6316 (1966).

29 Sohn, L. B., *op. cit.* (note 18), p. 32

30 See, in this sense, the 1968 Declaration of Teheran (par. 13) and the 1977 General Assembly Resolution 32/130.

31 Such as the UN Convention on the Elimination of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Discrimination Against Women, to cite a few examples.

32 These are "exercised jointly by individuals grouped into larger communities", as a precondition to the exercise of individual rights. Sohn, L. B., *op. cit.* (note 18), p. 48. They include the rights to self-determination, development, peace, environment, food and humanitarian assistance, among others.

33 European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome, November 4th, 1951, as amended by Protocol No. 11, *European Treaty Series* No. 5.

cols and the European Social Charter. It was followed by the development of the American system, based on the 1948 American Declaration on Human Rights, and contained in the American Convention on Human Rights,³⁴ in force since 1978. Finally, the African system was developed, with the African Charter on Human and Peoples' Rights, which entered into force in 1986.³⁵ Most of the provisions contained in such regional instruments are very similar to those contained in the ICCPR. The Asian region still lacks a human rights protection system.

B. *International Substantive Rights of Foreign Investors*

Substantive rights of foreign investors have been increasingly recognized in three large categories of instruments:

First, since the 1960's, *bilateral investment promotion and protection agreements* have proliferated between capital-exporting countries and capital-importing countries. Substantive rights are provided for in these agreements, as they define investment and the rights related thereto which guarantee its security, clarifying and supplementing customary international law on the subject in particular topics such as transfers of earnings and capital, or compensation in the event of expropriation.³⁶

Second, and of particular importance in the recognition of substantive international rights to foreign investors is the *1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States*³⁷ (the "1965 Washington Convention"), which constitutes a true milestone in the process of establishing an international legal framework for the protection and promotion of the flow of foreign investment between developed and developing countries.

And third, *multilateral investment agreements* have also been concluded in the last decades providing for important international rights to investors. An important example of such agreements can be found in the

34 American Convention on Human Rights, adopted at San José, Costa Rica, on 22 November, 1969, entered into force 18 July 1978. 1144 *UN Treaty Series* 123.

35 African (Banjul) Charter on Human Rights and Peoples' Rights, adopted at Nairobi on 26 June 1981, entered into force on October 21, 1986. OAU Doc. CAB/LEG/67/3 rev. 5.

36 Bennouna, M., Preliminary Report, *supra* note 13, at par. 39.

37 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted at Washington, D.C., on 18 March 1965 under the auspices of the International Bank for Reconstruction and Development (the World Bank). *United Nations, Treaty Series*, vol. 575, No. 8359, p. 159.

1994 North American Free Trade Agreement (“NAFTA”),³⁸ the first multilateral trade agreement to regulate investments extensive and comprehensively, which in Chapter XI, Part A, lays down a catalogue of substantive rights as a framework for the legal protection of the flow of investments among the three NAFTA countries.³⁹ It also protects investors against direct and indirect nationalization or expropriation and measures tantamount thereto, including other more specific requirements.

C. Substantive Rights of Individuals Under International Consular Law

The recent wave of diplomatic protection claims against the United States of America (“US”) for violation of the right to consular notification provided in article 36(1)(b) of the 1963 Vienna Convention on Consular Relations (“VCCR”),⁴⁰ against aliens sentenced to death penalty in the US, has also been crucial in the development of substantive individual rights within the international legal system. According to such provision, if a national of the sending State is detained and he so requests, the local consular post of the sending State is to be notified and the “competent authorities of the receiving State” shall “inform the person concerned without delay of his rights” in this respect.

The first claim of the sort before an international tribunal is the 1998 *Breard* case, filed by Paraguay against the US before the ICJ, which nevertheless was later withdrawn by the claimant following the actual execution of Mr. Breard by US authorities, in disregard of the order on provisional measures issued by the ICJ.⁴¹

38 *North American Free Trade Agreement*, signed on December 17, 1992; entered into force on January 1st, 1994; *International Legal Materials*, vol. 32, 1993, p. 605.

39 These include the most-favored-nation clause (article 1103), the national-treatment clause (article 1102), the international minimum standard (article 1105), and the requirement that treatment of foreign investors must not have the effect of imposing performance requirements on them (article 1106). The inclusion of the latter has caused strong reactions from some scholars who criticize the fact that they result in a favored treatment to the foreigner in comparison to the national. See, in this sense, Sepúlveda Amor, B., “International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction”, en *Houston Journal of International Law*, vol. 19, Spring 1997, Number 3.

40 Vienna Convention on Consular Relations, concluded April 24, 1963, entered into force on March 19, 1967.

41 *Case on the Vienna Convention on Consular Relations (Paraguay v. U.S.A.)*, Provisional Measures, Order of 9 April 1998, ICJ Reports, 1998, p. 248. See Babcock, S., “The Role of Interna-

On the regional scenario, on that same year and faced with an increasing number of Mexicans on death row in the US in violation of the article 36 right, Mexico requested an Advisory Opinion from the Inter-American Court of Human Rights on the interpretation of such article. The Opinion was issued in 1999,⁴² and it established that the right to consular notification contained in article 36 of the VCCR (i) is an *individual right* conferred “upon detained foreign nationals”,⁴³ and (ii) it forms part of the *human right* to a fair trial, as it “allows the right to the due process of law recognized in Article 14 of the [ICCPR] to have practical effects in concrete cases”,⁴⁴ which, if disregarded in a death penalty case, would lead to an arbitrary deprivation of life in violation of Article 6 of the ICCPR.⁴⁵

The clearest recognition of the fact that article 36 of the VCCR contains an individual right (as conferred directly under international law) is found in the ICJ’s 2001 judgment in the *LaGrand* case,⁴⁶ filed by Germany against the US in exercise of diplomatic protection of two of its nationals on death row in the US in violation of their article 36 VCCR rights. In the first place, the ICJ’s decision clearly recognized that “*Article 36, paragraph 1 [of the VCCR], creates individual rights [for the national concerned], which... may be invoked in this Court by the national State of the detained person*” (although it did not pronounce itself on the relationship between such provision and human rights, which it considered unnecessary to broach).⁴⁷ In doing so, it confirmed that diplomatic protection “is not limited to economic damages but concerns the protec-

tional Law in United States Death Penalty Cases”, *Leiden Journal of International Law* 15, 2002, pp. 367-387, at p. 374 ff.

42 Inter-American Court of Human Rights, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16.

43 *Ibidem*, par. 141 (1).

44 *Ibidem*, par. 141 (6).

45 Other authors support this interpretation. Notably, M. Pinto, “De la Protection Diplomatique a la Protection des Droits de l’Homme”, *RGDIP*, 2002, pp. 513 y 514.

46 *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 446. Such claim, in contrast to that of Paraguay, was still pursued by Germany (without requesting reparation) notwithstanding the execution of both individuals protected (one prior to its filing of the claim, and the other after the order on provisional measures issued by the ICJ, which was disregarded).

47 *Ibidem*, p. 446 at p. 494 par. 77.

tion of any rights granted to individuals by international law”.⁴⁸ In the second place, it recognized that the US “breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1”,⁴⁹ as was alleged in the “mixed claim” brought by Germany.

The latest case from this series is the recent 2004 decision of the ICJ in the *Case Concerning Avena and other Nationals (Mexico v. United States of America)*,⁵⁰ derived from a claim filed in exercise of diplomatic protection by Mexico against the US for violation of article 36 VCCR rights with respect to 54 (later reduced to 52) Mexican nationals on death row in the US. While Mexico followed very similar arguments to those used by Germany in the *LaGrand* case, the path taken by the judgment was quite different. Indeed, faced with an objection of non-exhaustion of local remedies presented by the US, the ICJ relied on the double nature of Mexico’s claim “in its own right and in exercise of its right to diplomatic protection of its nationals” to further state that it was not necessary to treat the claim as one of diplomatic protection. According to the ICJ, it sufficed to analyze the case under the injury which Mexico contended to have “itself suffered, directly and through its nationals, as a result of the violation” of article 36 of the VCCR, in which case the rule of exhaustion of local remedies was not applicable, thus dismissing the US’s objection. In sum, the ICJ in the *Avena* case decided, among others, (i) that the rule of exhaustion of local remedies does not apply in the case of mixed claims, due to the fact that they can be treated simply under the heading of an injury to the State (we adhere to the numerous criticisms that this approach has received);⁵¹ (ii) that the US had breached article 36, without expressly stating to whom this obligation was owed; and (iii) that it was not necessary to deal with the contention that article 36 was a

48 Deen-Racsmany, Z., “Diplomatic Protection and the *LaGrand* Case”, *Leiden Journal of International Law* 15, 2002, pp. 87-103, at pp. 102-103.

49 *LaGrand Case*, *supra* note 46, p. 446 at p. 515 par. 128(3).

50 *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of March 31, 2004, ICJ (General List No. 128), available at www.icj-cij.org

51 In our view, the claim should have been treated as a diplomatic protection claim and due heed should have been paid to the preponderance test and the futility or ineffectiveness of the local remedies. Among the six separate or dissenting opinions rendered by ICJ judges regarding the judgment, all of them make critical reference to the ICJ’s approach in such paragraph 40. In this sense, the Separate Opinions of Judges Vereshchetin, Parra-Aranguren, Tomka, and Judge ad hoc Sepúlveda, and the Declarations of President Shi and of Vice-President Ranjeva. For the text of such opinions, see *Avena Case*, *supra* note 50.

human right (just as in *LaGrand*), but that neither the VCCR nor the *travaux préparatoires* support such an interpretation (once again making no mention of the Inter-American Court's Advisory Opinion).⁵²

Nevertheless, it must be acknowledged that the *Avena* judgment did *not* retract from the two contributions of the *LaGrand* judgment that we mentioned in the preceding paragraphs: First, it recognized that article 36 creates individual rights which may be invoked before the ICJ by the State of nationality, by incorporating its corresponding *dictum* of the *LaGrand* decision⁵³ and by referring to such VCCR rights as “the individual rights of Mexican nationals”.⁵⁴ Second, it recognized throughout the judgment the possibility that both individual and State's rights may be involved in a diplomatic protection claim, and went further by expressly stating the interdependence of such rights, in the sense that “*violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual*”, a situation which it qualified as “*special circumstances of interdependence of the rights of the State and of individual rights*”.⁵⁵ In so doing, and added to the fact that, despite its choice to treat the claim as simply a claim for ‘direct injury’ to Mexico, it decided that the US had breached its obligations but did not expressly state to whom such obligations were owed (albeit Mexico's request for such a specification), the *Avena* judgment actually *extended* the *LaGrand* finding by recognizing that complementary rights of the State and of the individual are involved, not only in mixed claims but also in any other claim of diplomatic protection. In these two senses, the *Avena* judgment, despite its different outcome, came to confirm, reinforce and extend the *LaGrand* judgment's findings.

D. *The Right to Diplomatic Protection within the European Union*

Individual rights have also arisen within the regional integration framework. Thus, within the European Union (“EU”), article 20 of the Treaty establishing the European Community (former article 8(c) of the EU

52 *Avena Case*, *supra* note 50, par. 124.

53 *Ibidem*, para. 40.

54 *Idem*.

55 *Idem*.

Maastricht Treaty), establishes in favor of the European citizen a direct right to diplomatic protection by EU States other than its own, when its own State is not represented in the third country in which he finds himself. Such provision reads as follows: “Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State”.⁵⁶

Although such provision refers only to diplomatic protection *lato sensu*⁵⁷ but not particularly to diplomatic protection *stricto sensu* in the sense of an international claim of State responsibility, it is revolutionary, among others,⁵⁸ in the sense that it establishes a true direct *individual right to State protection*, a nature which is confirmed by other related documents.⁵⁹ Interestingly, it furthers the individual rights of the EU citizen on the regional level, since this individual right to diplomatic protection under the EU is generally not conferred to the individual under most of the national legislations of the EU Member States if taken separately⁶⁰ (where, in most cases, diplomatic protection is still discretionary).

56 (former Article 8c of the Maastricht Treaty- Provisions Amending the Treaty Establishing the European Economic Community with a view to establishing the European Community, 7 February 1992); currently in article 20 of the Treaty Establishing the European Community, *Official Journal C 325*, 24 December 2002.

57 Following Condorelli, “*Il s’agit ici, à vrai dire, de protection consulaire plutôt que de protection diplomatique, bien que le libellé de l’article soit suffisamment large pour que cette dernière puisse aussi y rentrer*”. Condorelli, L., *op. cit.* (note 7), p. 45.

58 This provision is also interesting in the sense that it derogates the condition of nationality of claims and allows for diplomatic protection to be exercised by an EU Member State in favor of an individual who is not a national of such State, subject to the agreement of the State of nationality. For an interesting analysis on this practice, see: R. Dolzer, “Diplomatic protection of Foreign Nationals”, in Bernhardt, Rudolf (dir.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Vol. I, pp. 1067-1070, at p. 1068.

59 In this sense, the explanatory notes contained in http://europa.eu.int/comm/justice_home/fsj/citizenship, clearly adopt the viewpoint that the diplomatic and consular protection referred to in such article is a right of the individual. In addition, this viewpoint is also highlighted in the Council’s Decision dated December 19, 1995. Moreover, article 46 of the Nice Charter on Fundamental Rights of the EU dated December 18, 2000 goes as far as placing this individual right within the category of *fundamental rights*.

60 In this sense, Puissochet clarifies that “[c]ette formulation... est toutefois susceptible d’être interprétée comme impliquant un droit pour les citoyens de l’Union à une protection diplomatique—ce qui serait une innovation puisque les citoyens français eux-mêmes ne peuvent, à l’heure actuelle, pas se prévaloir d’un tel droit vis-à-vis des autorités nationales... Le décret, qui transposera en France l’article 20 CE, devrait ouvrir le bénéfice de garanties nouvelles non seulement aux ressortissants d’autres Etats membres mais aussi aux nationaux français”.

2. Recognition of International Procedural Rights to the Individual

A. International Human Rights Protection Mechanisms available to the Individual

A multiplication of diverse procedural rights before human rights protection mechanisms has also been present in the latter half of the twentieth century. Some of such mechanisms are inter-State, but others allow for the individual to appear directly before them. Among these, within the *universal* framework, are the UN Charter-based mechanisms which include the review of individual complaints regarding “a consistent pattern of gross and reliably attested violations”, by the Commission on Human Rights under the mechanism created by Resolution 1503 (XLVIII) of 1970. As for the treaty-based mechanisms, individual complaints can be received by the Human Rights Committee established under the ICCPR (subject to consent to the Optional Protocol by the injuring State), by the Committee on the Elimination of Racial Discrimination or by the Committee Against Torture,⁶¹ among others. On the *regional* level, individual complaints can be brought directly before the European Court of Human Rights (under Protocol 11 of its Convention) and the Inter-American Commission on Human Rights (such Commission may later refer the case to the Court), while individual communications can only be reviewed by the African Commission on Human and Peoples’ Rights if they relate to “a series of serious or massive violations of human and peoples’ rights”.⁶²

The *effectiveness* of the remedies provided by human rights protection mechanisms is, however, still quite limited. On the universal level, as stated by Dugard, “[t]he sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions”.⁶³ On the regional scenario, although the tendency is positive, the success that the European

Puissochet, J. P., “La pratique française de la protection diplomatique”, in Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, cit. (note 7), pp. 118 y 119.

61 Established under the Convention on the Elimination of Racial Discrimination and under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment, respectively.

62 Art. 58(1) of the African Charter on Human and Peoples’ Rights (*supra* note 35).

63 Dugard, J., *First Report on diplomatic protection*, *supra* note 13, par. 25.

system has indubitably proved remains yet to be seen in the newer American or African systems; and a regional system is still desirable in Asia.

B. *Investment Dispute Settlement Mechanisms*

The major contribution for international procedural rights granted directly to foreign investors was provided by the establishment of the *International Centre for Settlement of Investment Disputes* (“ICSID”) under the 1965 Washington Convention. ICSID constitutes the first international investment dispute-settlement mechanism established in complete independence from domestic legal systems, and it allows direct access by foreign investors to bring international claims against their host States. Its proven success was increased after the establishment of its 1978 Additional Facility Rules, which allow, among others, for the ICSID procedure to be resorted to by individuals even if their State of nationality is not a Contracting State under the Washington Convention. Article 27(1) of the Washington Convention provides that the investor’s agreement to submit a dispute to ICSID arbitration excludes the possibility for his State of nationality to exercise diplomatic protection in his favor before or while ICSID arbitration is taking place.⁶⁴

In addition, the *bilateral investment agreements* that have proliferated in the second half of the twentieth century have also contributed to multiplying the international procedural rights granted to foreign investors. More than one thousand of them have included a clause by means of which they refer disputes between an investor and a host State to the ICSID procedure, while some others provide for alternative means of international investment dispute settlement which also allow for direct access by individuals.

Finally, investors’ procedural rights have also been increased through *multilateral investment treaties*, among which the most significant example can be found in Chapter XI- Part B of NAFTA, the first *multilateral* investment treaty to provide foreign investors direct access to an international dispute-settlement mechanism against their host State

64 The ICSID procedure is also characterized by the fact that it expressly excludes the application of the rule of exhaustion of local remedies unless a State requires otherwise (article 26 of the Washington Convention). The procedure allows for diplomatic protection to be exercised residually regarding compliance with the ICSID arbitral award by the injuring State (article 27(1) of the Washington Convention).

(article 1115). The individuals allowed to file such claims may be nationals or even non-nationals which are permanent residents of a State party to NAFTA (articles 1116 and 201). The means provided for dispute settlement are arbitration under either the ICSID Convention, the ICSID Additional Facility Rules, or an *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) (article 1120(1)). Other multilateral treaties have followed the same trend and have included similar provisions, as is the case of the Energy Charter Treaty,⁶⁵ the Cartagena Free Trade Agreement,⁶⁶ and the Colonia Protocol on the Reciprocal Promotion and Protection of Investments.⁶⁷

C. *Ad Hoc International Claims Tribunals or Commissions*

An important step in the international recognition of individual procedural rights has been the establishment of *ad hoc* international tribunals or commissions to deal with claims by the nationals of one State against another State derived from a situation of crisis or conflict between the two States. The two most relevant examples are found in the Iran-United States Claims Tribunal (“IUSCT”) and in the United Nations Compensation Commission (“UNCC”), both of which, as Kokott has highlighted, “reflect reactions to modern developments in international law”.⁶⁸

The IUSCT was established in 1981⁶⁹ to resolve the numerous claims that had arisen between Iran and the US and their nationals as derived from debts, contracts, expropriations and other measures affecting property rights.⁷⁰ It is an arbitral tribunal which jurisdiction extends, apart from the inter-State one, to “deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the Unit-

65 Energy Charter Treaty, entered into force on 16 April, 1998, see *International Legal Materials* vol. 34, 1995, p. 373; for the complete citation of NAFTA, *cf. supra* note 38.

66 Cartagena Agreement, 1969, available at www.sice.oas.org/agreements/Comand_e.asp

67 Adopted on January 17, 1994 in the context of the Asunción Treaty creating Mercosur. <http://www.mercosur.org.uy/espanol/snor/normativa/decisiones/DEC1193.htm>

68 Kokott, J., report on “The Exhaustion of Local Remedies”, London Conference, *International Law Association Reports*, 2000, pp. 604-654, at p. 609.

69 Algiers Agreement of January 19th, 1981 between the Islamic Republic of Iran and the US, *International Legal Materials*, vol. XX (1981), pp. 230-233.

70 To this date more than 4,000 judgments have been rendered by it, and its cut-off date for the presentation of claims was concluded in 1982.

ed States”,⁷¹ thus granting direct access thereto by individuals, even in the case of dual nationals of both States.⁷² As from the date of filing of the claim before the IUSCT, any other claiming procedure was excluded. In this sense, diplomatic protection could not be exercised by the individual’s State of nationality pending proceedings before the IUSCT.

As for the UNCC, it was established by means of a resolution of the Security Council⁷³ to resolve compensation claims for “any direct loss, damage... or injury to foreign Governments, nationals and corporations, as a result of Iraqi’s unlawful invasion and occupation of Kuwait”⁷⁴ in the context of the Gulf War. In contrast to the IUSCT, it operates more in an administrative manner than in a litigation format, as its purpose is to resolve a large number of claims in a reasonable time.⁷⁵ The UNCC does not provide direct access to it by individuals: compensation claims on behalf of individuals are to be submitted by their States of nationality or of residence,⁷⁶ and if this is not possible, by a person, authority or body authorized by the Governing Council to submit claims on their behalf. Thus, the UNCC is not, in reality, a case of direct access by individuals to international organs: it is truly a variation of the institution of diplomatic protection, or, as Condorelli has stated, “*un mécanisme très sophistiqué et complexe de protection diplomatique*”.⁷⁷ Nevertheless, its modern derogations from the traditional view of diplomatic protection respond to the contemporary, individual-oriented trends. First, it does not subject the protection to the discretion of the State of nationality,⁷⁸ as it allows for another person, authority or entity authorized by the Governing Council to submit the claim if the State does not. Second, and most important, under the UNCC individuals have a *direct right to reparation*

71 Algiers Agreement *supra* note 69, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (1981) 77 AJIL p. 836, art. II, par 1.

72 Algiers Agreement *supra* note 69, art. IV, par. 3. The IUSCT did not require the prior exhaustion of local remedies.

73 Security Council Resolution 687, adopted at its 2981st meeting, on April 3, 1991.

74 *Ibidem*, par. 16.

75 It also excludes the requirement of prior exhaustion of local remedies. To this date, more than 2,800,000 claims have been submitted regarding individuals.

76 Article 5 par. 1(a) of the Provisional Rules for Claims Procedure, approved by the UNCC’s Governing Council at the 27th meeting, 6th session held on June 26, 1992, S/AC.26/1992/10.

77 Condorelli, L., *op. cit.* (note 7), pp. 15 y 16.

78 The UNCC procedure also softens the requirement of nationality link. See, in this sense, art. 5 par. 1.a UNCC Provisional Rules for Claims Procedure, *supra* note 76 (emphasis added).

under it, due to the fact that it can be seen as obliging the State who brings the claim (which is in fact a protecting State under the view of diplomatic protection) to distribute the compensation in favor of the individual. Indeed, its governing documents recognize repeatedly that the payments of compensation “are available to individuals who claim losses”,⁷⁹ and despite the fact that it was recognized that “distribution of compensation will be the responsibility of each Government concerned”,⁸⁰ the very day after such recognition the Governing Council established a whole mechanism of surveillance of such distribution,⁸¹ and a later decision regulates the ‘return of undistributed funds’.⁸² Thus, as stated by Randelzhofer and Tomuschat, the UNCC is an example of a mechanism “that combines traditional elements of diplomatic protection with some degree of leeway for individuals to assert their rights on their own account”.⁸³

III. THE CHALLENGES POSED TO TRADITIONAL DIPLOMATIC PROTECTION BY THE INDIVIDUAL-ORIENTED EVOLUTION OF INTERNATIONAL LAW

1. *Legal Nature*

The debate surrounding the legal nature concerns the issue of whose right is being asserted when the State is exercising diplomatic protection: its own State right, or that of the protected individual.

A. *The Traditional view: A Discretionary Right of the State*

Traditionally, it has been considered that, underlying the State’s exercise of diplomatic protection, is a right that belongs entirely to the State. This idea was based on the classical Vattelian fiction that “*who-*

79 See, for example, the Criteria for additional categories of claims, adopted by decision of the UNCC’s Governing Council during its 3rd session, at its 18th meeting (28 November 1991) as revised at the 24th meeting (16 March 1992), S/AC.26/1991/7/Rev.1, March 17, 1992.

80 Decision of the UNCC’s Governing Council, S/AC.26/Dec. 17, March 23, 1994.

81 Decision of the UNCC’s Governing Council, S/AC.26/Dec. 18, March 24, 1994.

82 Decision of the UNCC’s Governing Council, S/AC.26/Dec.48, February 3, 1998.

83 Randelzhofer, A. and Tomuschat, C. (eds.), *State Responsibility and the Individual-Reparation in Instances of Grave Violations of Human Rights*, The Hague, Martinus Nijhoff Publishers, 1999, p. VIII.

ever ill-treats a citizen indirectly injures the State".⁸⁴ Nowhere is this position more clearly reflected than in the PCIJ's dictum in the 1924 *Mavrommatis Palestine Concessions Case*:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its *own right* – 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 sole claimant.⁸⁵

This view rests upon the idea that international obligations are necessarily of an inter-State character, and thus may only be owed to States (and not to individuals).⁸⁶ Such approach was confirmed by the ICJ in its decision in the *Reparations* case, where it considered that the rule inhering diplomatic protection rests on the bases that "the defendant State has broken an obligation *towards the national state* in respect of its nationals [and] that only the party to whom an international obligation is due can

⁸⁴ Vattel, E. de, *op. cit.* (note 3).

⁸⁵ *Mavrommatis Palestine Concessions case*, *supra* note 9, p. 12. The emphasis is ours. This traditional view was repeated by the PCIJ in the *Panevezys-Saldutiskis Railway Case*, *supra* note 9 at p. 16; the *Case Concerning the Payment of Various Serbian Loans issued in France*, Judgment of July 12th, 1929, PCIJ Reports, Series A No. 20; and in the *Case Concerning the Factory at Chorzow*, Judgment of September 13th, 1928, Merits, PCIJ Reports, Series A No. 17. The ICJ has adopted it in the *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion: ICJ Reports 1949, p. 174 at p. 181; the *Nottebohm Case (second phase)* Judgment of April 6th, 1955: ICJ Reports 1955, p. 4 at p. 24; the *Interhandel Case* (Judgment of March 21st, 1959: ICJ Reports 1959, p. 6 at p. 27) and the *Barcelona Traction, Light and Power Company, Limited case*, *supra* note 6, at p. 32 par. 33. It has also been recognized by other international tribunals: see, for example, *Administrative Decision No. V* of the US-German Claims Commission.

⁸⁶ Anzilotti stated, in this sense, that "*International responsibility does not derive, therefore, from the fact that an alien has suffered injury, and does not form a relationship between the State and the injured alien... The alien as such has no rights against the State, save in so far as the law confers them upon him*". Anzilotti, D., 1 *Corso di Diritto Internazionale* 423 (4th ed. 1955), as quoted by García Amador, *Yearbook of the International Law Commission*, vol. 2. In the same sense, Berliá, G., "Contribution à l'étude de la nature de la protection diplomatique", in *Annuaire Français de Droit International*, Centre National de la Recherche Scientifique, 1957, III, pp. 63-72 at p. 65.

bring a claim in respect of its breach".⁸⁷ By recurring to the Vattelian fiction, injuries suffered by nationals abroad are attached to their State of origin, under the justification that they "are not necessarily confined to the individual sufferer or his family, but include such consequences as the 'mistrust and lack of safety' felt by other foreigners similarly situated".⁸⁸ In this sense, it is argued that an injury to a national abroad affects the State's interests of self-preservation, equality and intercourse with other States, and even the State's superior interests of preserving the principles of international law and maintaining the peaceful coexistence among States.

A right of the State, the decision to exercise or not diplomatic protection is also traditionally deemed to be *discretionary*. Indeed, no instrument of international law, in the past or nowadays, establishes an international obligation to exercise diplomatic protection by a State in favor of its nationals. As clearly stated by the ICJ in the *Barcelona Traction* case:

Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting... The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when will it cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.⁸⁹

Under this view, the considerations underlying the decision to exercise or not diplomatic protection may vary depending on each case and may rely entirely on policy considerations regardless of the interests of the directly-injured individual, and the State is not required to provide justification for its decision.⁹⁰ Moreover, the manner in which the State carries out such exercise also remains within its discretion, and the indi-

87 *Reparation for injuries suffered in the service of the United Nations*, *supra* note 85, at pp. 181-182.

88 Brierly, J., "The Theory of Implied State Complicity in International Claims" (1928) in *British Yearbook of International Law*, vol. 9, p. 48.

89 *Barcelona Traction, Light and Power Company, Limited*, case, *supra* note 6, at p. 44 par. 78.

90 See in this sense, Borchard, E., *Diplomatic Protection of Citizens Abroad*, New York, The Banks Law Publishing Co., 1915, at VI. Also: G. Berlia, *op. cit.* (note 86), pp. 63 y 64.

vidual is entitled to no *international* right regarding the claim. The State *may* take into account the interests of the individual, or may even grant him/her related rights under its own *national* law, but *internationally* it is not obliged to do so.

Therefore, this reasoning considers that it is irrelevant if the individual has encouraged or waived the exercise of diplomatic protection in his/her favor: as an international right of the State, the individual has no say in it, and he/she has no means to oblige a refusing State to exercise diplomatic protection, or to impede a willing State to exercise it through waivers thereto. In this sense, the anticipated⁹¹ waivers to diplomatic protection issued as a consequence of the Latin American practice of the Calvo clause⁹² (which conditioned foreign investment to the prior waiver of the investor's right to call for diplomatic protection from his State of nationality), have been considered as not barring the actual exercise of diplomatic protection by the State of nationality if it so decides, on the grounds that the individual cannot waive an international right that belongs to the State.⁹³ Even the individual's waiver to diplomatic protection *after* the internationally wrongful act took place is considered to have no effect upon the State's discretionary power to exercise it against the will of such individual.⁹⁴

91 "Anticipated", in the sense of having been issued before the commission of an internationally wrongful act that injures the individual.

92 Originally a reaction to the discriminatory practice of diplomatic protection by powerful States, the Calvo clause came to be incorporated into the laws of many Latin American countries as a requirement for the validity of contracts signed with aliens, by providing for a contractual stipulation to the effect that "(a) the alien will be satisfied with local remedies; or (b) no dispute arising out of the contract will be settled by means of an international claim; or (c) the alien will be treated as a national of the contracting state for the purposes of the contract". It was defined by Special Rapporteur Dugard as "a contractual undertaking by an alien in which he agrees to waive any right which he may have to diplomatic protection by his State of nationality in matters arising out of the contract and to confine himself exclusively to local judicial remedies for any grievances he may have relating to the contract." Dugard, J., Third Report on Diplomatic Protection, Addendum, *supra* note 13, par (1).

93 An example of this traditional view is to be found in the U.S. Restatement of Foreign Affairs (Third), which states that, regarding diplomatic protection, if the person waives the claim before the injury effectively happens (i.e. the Calvo Clause), then "*the United States regards companies that sign such clauses or submit to such laws as waiving rights that are not theirs to waive, since, in principle, the injury is to the state*", par. 713 comment g.

94 The individual's waiver to diplomatic protection after the internationally wrongful act is committed may imply a consent by that individual to the internationally wrongful act, but such individual's consent will not preclude the wrongfulness of the act, provided that, in line with the 2001 State Responsibility articles, consent as a circumstance precluding wrongfulness relates to consent

As for the phase following the exercise of diplomatic protection, it is traditionally considered that the individual has no remedy under *international law* if he/she is not satisfied with the manner in which the protection was carried out (regardless of any such right conferred by the State under its own *national legislation*). The ICJ expressed this in its decision in the *Barcelona Traction* case:

[S]hould the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. [...] However, all these questions remain within the province of municipal law and do not affect the position internationally.⁹⁵

The ILC's First Reading Draft Articles on diplomatic protection have fully attached to the traditional view on the legal nature of such institution. In this sense, (i) they expressly state that "the right of diplomatic protection belongs to or vests in the State", a statement which "gives recognition to the Vattelian notion that an injury to a national is an indirect injury to the State";⁹⁶ (ii) they affirm its discretionary nature by clarifying that diplomatic protection is a "sovereign prerogative" of the State,⁹⁷ and stressing that it "has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so";⁹⁸ and (iii) they have opted not to include any reference to the Calvo Clause, because to do so was considered "unnecessary and superfluous", and "relevant and valid only insofar as it reaffirms the exhaustion of local remedies rule",⁹⁹ thus evidencing that the right of diplomatic protection belongs to the State and is not for the individual to waive.

by the injured State, which is considered to be the State of nationality, but not by the individual himself. See, in this sense, Daillier, P. and Pellet, A., *op. cit.* (note 14), at pp. 783 y 784.

⁹⁵ *Barcelona Traction, Light and Power Company, Limited* case, *supra* note 6, at p. 44, par. 78.

⁹⁶ *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 13, par. 60, Commentary to Draft Article 2, par. (1); see, also, Commentary to Draft Article 1, par. (3), and text of Draft Article 2.

⁹⁷ Report of the International Law Commission on the work of its 50th session, *supra* note 13, par. 77.

⁹⁸ *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 2, commentary to Draft Article 2, par. (2).

⁹⁹ Dugard, J., Third Report on Diplomatic Protection, Addendum, *supra* note 13, par (39).

B. *Challenges: An Underlying Right of the Individual and a State-Duty to Protect?*

That individual rights exist directly under international law in various fields has recently been acknowledged by the ICJ in the *LaGrand*¹⁰⁰ and *Avena* cases¹⁰¹ (regarding VCCR consular rights), and has also been recognized by the ILC in its Commentary to article 33 of its 2001 State Responsibility Articles:

[I]ndividual rights under international law may also arise outside the framework of human rights. The range of possibilities is demonstrated from the judgment of the International Court in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations “creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person”.¹⁰²

This fact alone has led some individual-rights theorists to react strongly against the traditional Vattelien fiction, in holding the extremist view that there are absolutely no State rights underlying the exercise of diplomatic protection: if exercised as a consequence of the breach of a treaty or custom that provides for individual rights, then it must be considered (according to them) that diplomatic protection has *only individual rights* as its basis, and that the State exercising it acts only as an agent or a representative of such individual,¹⁰³ but is in no way enforcing its own rights. They discard the Vattelien fiction as “insubstantial and illusory”,¹⁰⁴ and reject its traditional justifications according to which an injury to an individual affects the State’s interests. Nevertheless, such an extremist position is, in our view, in disharmony with the ‘essentially inter-State’ character of international law, particularly of the law of State

100 *Supra* note 46.

101 *Supra* note 50.

102 *Articles on Responsibility of States for Internationally Wrongful Acts*, in J. Crawford, *op. cit.* (note 10), Commentary to art. 33, par. (3), p. 209.

103 Amerasinghe, C. F., *Local Remedies in International Law* (2nd edition), Cambridge, Cambridge University Press, 2004, p. 55.

104 Scelle, G., “Droit de la Paix”, *Collected Courses of the Hague Academy of International Law*, 1933, IV, vol. 46, pp. 660 y 661.

responsibility.¹⁰⁵ Just as the traditional view is extremist in the sense of completely disregarding the existence of international individual rights, the view described above completely disregards the fact that such individual rights are contained in *inter-State* instruments, or are recognized by an *inter-State* customary law obligation. This truth alone evidences that there *is* a State interest involved when one of its nationals is injured abroad, whatever name –self-preservation, peaceful coexistence or intercourse– such interest may take.

Thus, the true challenge posed by individual rights to the traditional legal nature of diplomatic protection is *not*, as some have considered, the substitution of the underlying State's right for that of the individual. The true challenge consists in *acknowledging* that when an individual is injured abroad, it is *first of all his/her individual rights* that are concerned, and that the injury to such individual rights *consequently affects the State's rights*, which are *complementary* there to. This dual character of the legal nature of diplomatic protection had already been advanced by the ICJ in the *LaGrand* case when it recognized that the US's violation of the individual right contained in article 36 VCCR had breached its obligations owed “*to the Federal Republic of Germany and to the LaGrand brothers*”,¹⁰⁶ although such finding concerned a mixed claim.¹⁰⁷ That such dual character extends to all other cases of single-headed diplomatic protection claims was recently confirmed in the ICJ's judgment in the *Avena* case, where it recognized that “*violations of the rights of the individual under Article 36 [of the VCCR] may entail a violation of the rights of the sending State, and that violations of the rights of the lat-*

105 We adhere, in this sense, to Dominicé's view, according to which: “*des constructions différentes, qui verraient par exemple l'État n'être en quelque sorte que le porte-parole de son ressortissant, s'écartent non seulement d'une pratique et d'une jurisprudence substantielles, mais elles sont en outre en contradiction avec les caractéristiques fondamentales de la responsabilité internationale dans les rapports entre États*”. Dominicé, C., “Regard Actuel sur la Protection Diplomatique”, in *Liber Amicorum Claude Reymond Autour de l'Arbitrage*, Paris, Éditions du Juris-Classeur, 2004, pp. 73- 81, at p. 74.

106 *Cfr. supra* (note 49)

107 Mixed claim because Germany alleged violations to obligations both owed to the individuals and to the State, under different provisions. As aptly clarified by Dominicé, “*l'arrêt LaGrand met en lumière une situation qui... se présente lorsque les comportements d'un État sont à l'origine de deux réclamations parallèles d'un autre État, réclamations fondées sur la violation de normes distinctes, et qui conduisent l'État réclamant à faire valoir, d'une part son droit propre, et d'autre part sa protection diplomatique*”. Dominicé, C., *op. cit.* (note 105), p. 77.

ter may entail a violation of the rights of the individual".¹⁰⁸ It was also confirmed in such judgment's findings, when it avoided to name the beneficiary of the obligation breached, despite its (mistaken) choice of treating the claim upon the sole basis of the direct injury to Mexico. It is in adopting this recognition of complementariness and in adding to it the primacy of the violation of the individual's right that the challenge is to be satisfied. Authors such as Condorelli,¹⁰⁹ Gaja¹¹⁰ and Dominicé already adhered to this view¹¹¹ before the rendering of the *Avena* judgment. In an excellent analysis, the latter has clearly emphasized the primacy of the individual's right, as follows:

Ici, 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... A 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", mais la violation d'un droit international de ce ressortissant, et par ricochet de son État national.¹¹²

The traditional notion of the discretionary character of the State's exercise of such protection is inconsistent with the complementariness and individual primacy that underlies diplomatic protection. Given the individual's limited access to international tribunals, and the ineffectiveness of many of such direct mechanisms, it has been considered that the State should have a true *duty* to protect such national and act on his/her behalf when his/her rights are injured (resulting in a true *right to diplomatic*

108 *Avena Case*, *supra* note 50, par. 40.

109 In this sense, Condorelli interprets the LaGrand judgment as applicable to all cases of diplomatic protection, *cf.* Condorelli, L., *op. cit.* (note 7), p. 12, footnote (9).

110 Gaja, G., "Droits des Etats et droits des individus dans le cadre de la protection diplomatique", in Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, *cit.* (note 7), pp. 63-69, at pp. 63-65.

111 Orrego-Vicuña's report to the International Law Association already advanced the existence of this alternative view. Orrego Vicuña, F., "The Changing Law of Nationality of Claims", London Conference, *International Law Association Reports*, *cit.* (note 68), at pp. 633 y 634.

112 Dominicé, C., *op. cit.* (note 105), pp. 77-78 (emphasis added).

protection of the injured individual).¹¹³ However, international attempts in this sense have been quite scarce:

First, *de lege lata*, a small step forward was provided by the right to diplomatic protection *lato sensu* contained in article 20 of the European Community Treaty (although limited to the regional level and not concerned with diplomatic protection *stricto sensu*), from which is derived a corresponding *obligation* (non-discretionary) by EU Member States.¹¹⁴ Another contribution may be derived from the UNCC's provision according to which, if a State does not bring a claim on behalf of the individual, another person or body can do so and thus overcome the State's discretion to claim.¹¹⁵

Second, *de lege ferenda*, Special Rapporteur Dugard proposed that the ILC adopt in its Draft Articles a provision under which States would be *internationally obliged* to exercise diplomatic protection in favor of their nationals injured abroad by grave breaches to *jus cogens* norms, if the national so requested and if he/she was not afforded direct access to an international tribunal.¹¹⁶ Formulated in the midst of Dugard's efforts of providing a text acceptable to the more-conservative ILC, the proposal was quite weak as it excluded the State from such duty if it "would seriously endanger the overriding interests of the State and/or its people", a provision prone to be easily manipulated.¹¹⁷ The reactions were negative

113 Some even argue that the right to diplomatic protection is a *human right*. For a description, see Flauss, J. F., "Protection Diplomatique et protection internationale des droits de l'homme", *Revue Suisse de Droit International et de Droit Européen*, 2003, no. 1, pp. 1-36, at pp. 35-36.

114 *Supra* note 56.

115 *Cfr. supra* note 76.

116 The proposed article read as follows: "Article [4] 1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State. 2. The state of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority". Dugard, J., First report on diplomatic protection, *supra* note 13, par. 74.

117 According to Flauss, the Draft Articles, not containing a dispute-settlement mechanism, are not the place to establish such a limitation to the discretion, which would be better placed in an international human rights treaty provided with a control mechanism. Flauss, J. F., "Vers un aggiornamento des conditions d'exercice de la protection diplomatique?", in Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, cit. (note 7), pp. 29-61, at p. 60.

in both extremes, including criticisms for violating the principle of non-intervention¹¹⁸ and for establishing a “*clause échappatoire «attrape tout»*”;¹¹⁹ hence, the proposal was not accepted by the ILC, as “the question was still not ripe for treatment” because “the State practice and their *opinio juris* still hadn’t evolved in such direction”.¹²⁰

Third, some authors¹²¹ see in the jurisprudence of the European human rights organs a slight tendency towards a future possibility of alleging a right to diplomatic protection for injuries suffered under articles 2, 3 and 4 of the European Convention on Human Rights. While the Commission has repeatedly asserted that no right to diplomatic protection exists under article 1 of the Convention¹²² and that even if the State were obliged to protect its citizens it would enjoy a large discretionary power in its exercise,¹²³ Flauss argues that the Court’s decision in the *Bankovic* case, which acknowledged that the phrase “within their jurisdiction” could include a few extra-territorial activities among which “*recognized instances of the extra-territorial jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad*”,¹²⁴ could be used in the future as an argument to allege such a right to diplomatic protection, provided that the ‘positive obligations’ of States under such instrument be understood so as to include those extraterritorial ones

118 Quoting Flauss, “*C’est dire en définitive que l’Etat de la nationalité serait tenu à un devoir d’ingérence à l’égard des Etats portant atteinte gravement ou/et massivement aux droits de l’homme les plus fondamentaux*”. Flauss, J. F. *op. cit.*, p. 56.

119 Flauss, J.F. *op. cit.* (note 117), p. 57.

120 *Official Records of the General Assembly: 55th session, Supplement No. 10, Doc. A/55/10* (2000), Report of the ILC on the work of its 52nd session, p. 131.

121 In particular Ress, G., “*La Pratique Allemande de la Protection Diplomatique*”, in Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, *cit.* (note 7), pp. 121-151 and Flauss, J. F. (*op. cit.* (note 117) and *op. cit.* (note 113)).

122 See, in this sense, European Commission of Human Rights, May 2, 1978, *B. Russel, Peace Foundation Ltd. v. United-Kingdom*, application 7597/75. European Commission of Human Rights, December 9, 1987, *G. Kapas v. United-Kingdom*, application 12822/87 DR 54 p. 201; European Commission of Human Rights, April 22, 1998 *A Leschi and others v. France*, application no. 37505/97 DR 93-A p. 120; *X and Y v. UK*, of October 11th, 1993, or *O. and O.L. v. UK*, of July 13th, 1987.

123 *Nadler et Reckziegel v. Germany* case, dated April 12, 1996: “*even assuming that there existed a positive obligation on the part of a member state to give protection of its citizens against violation of fundamental rights... as far as international treaties are concerned the Contracting Parties enjoy a large discretionary power which is by its nature limited to reaching result acceptable for the Contracting Parties and that the general interest of establishing normal and friendly relations with the neighbouring State prevails over the individual interest at stake in the present matter*”.

124 European Court of Human Rights, *Bankovic et al v. Belgium et al.*, Application no. 52207/99, decision on inadmissibility, 12 December 2001.

of a procedural nature.¹²⁵ Nevertheless, this construction remains on the theoretical level, and its extension beyond diplomatic protection *lato sensu* (to which it appears to be limited) and practical effects yet remain to be proved.

Finally, some States have, indeed, incorporated in their *municipal* law a duty to exercise diplomatic protection in favor of their nationals. The most often-cited example is that of Germany, which in its 1919 Weimar Constitution (and earlier ones)¹²⁶ had established that “[a]gainst foreign States all Reich nationals have, both within and without the Reich, a claim to the protection of the Reich”, a provision which, although not transposed to the 1949 *Fundamental Law*, has been used as a basis for scholars and German courts alike to consider that there is an unwritten constitutional duty in such sense: «*que les organes de la République Fédérale ont l’obligation tirée de la Constitution de protéger les ressortissants allemands dans leurs droits constitutionnels et leurs intérêts envers les Etats tiers. Si cette obligation n’est pas satisfaite, cela peut objectivement être une violation de la Constitution*».¹²⁷ Recent cases have limited such right to the initial decision of exercise, but not the manner in which it is carried out.¹²⁸ The effectiveness of this obligation is dubious, as may be derived from Ress’ statement that “[l]’Allemagne reconnaît dans son ordre juridique un droit même constitutionnel à chaque ressortissant à la protection diplomatique, mais il s’agit d’un droit qui est très proche d’un *nudum iuris*”.¹²⁹ Various other States have also included such a “duty to exercise diplomatic protection” under their domestic laws,¹³⁰ but their enforceability is also, to say the least, questionable (in many cases there are not even courts competent to review the decision). Moreover, their existence in no way implies that international

125 Flauss, J. F., *op. cit.* (note 117), pp. 50-53.

126 In its 1867 Constitution, and then in article 3, paragraph 6 of the 1871 Constitution of the German Empire. The obligation was then included in article 112 of the Weimar Constitution.

127 *BVerfGE* 40, p. 141, at pp. 177 and ff. It can also be found in the *Buchholz* decision of March 6, 1997.

128 *Buchholz* decision of March 6, 1997.

129 Ress, G., *op. cit.* (note 121) at pp. 150-151.

130 Dugard identifies this “obligation” to exist in the Constitutions of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People’s Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, Viet Nam and Yugoslavia, albeit with different reaches. J. Dugard, First Report on diplomatic protection, *supra* note 13, par. 80.

law imposes such an obligation,¹³¹ simply suggesting “that certain States consider diplomatic protection for their nationals abroad to be desirable”.¹³²

In our view, at the present stage of international law, it is still wishful thinking to attempt to establish a general international obligation for States to exercise diplomatic protection of their own nationals abroad. As early as 1915 Borchard had stated that “[i]f it is a duty internationally, it is only a moral and not a legal duty, for there is no means of enforcing its fulfillment”,¹³³ a statement that, regrettably, may still be upheld. Thus, we do not consider that the challenge is to transform what is traditionally viewed as *discretion* into *duty*. The challenge, in our view, consists in *attenuating* the State’s discretion in deciding to exercise diplomatic protection: indeed, if we acknowledge that complementary rights of the State and of the individual are involved, the State deciding if it is to exercise diplomatic protection should take into account the interests of the individual in balance with its own policy considerations; in Gaja’s words: “*l’Etat ne devrait pas avoir la liberté de déterminer lui seul si c’est le cas de faire une réclamation*”.¹³⁴ While it is difficult to envisage a case where the State would exercise diplomatic protection as per the individual’s will even if it harms its own policy interests, the State should at least abstain from exercising diplomatic protection when it is contrary to the interests of the individual,¹³⁵ more so if such individual is a refugee and the protection is directed against his/her receiving State.¹³⁶

131 *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 2, Commentary to Draft Article 2, par (2). This was recognized expressly in the *Barcelona Traction* case, *supra* note 6.

132 Dugard, J., First Report on diplomatic protection, *supra* note 13, par. 81. As stated by Malenovsky: “*Il me paraît que cet ancrage constitutionnel ne reflète pas l’intention des constituants d’entériner précisément la protection diplomatique. Les dispositions constitutionnelles en question sont délibérément formulées afin de ne pas établir des droits justiciables. Elles ne sont généralement pas exécutées par des lois de procédure et, sauf quelques exceptions, il n’existe pas de cas où ces dispositions ont été appliquées dans la pratique... L’on peut toujours invoquer au maximum un ‘devoir moral’ de l’Etat, mais pas son ‘obligation juridique’*”. Malenovsky, J., “La pratique de la protection diplomatique dans les PECO, en République Tchèque en particulier”, in Flauss, Jean-François (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, *cit.* (note 7), pp. 93-107, at p. 98.

133 Borchard, E., *op. cit.* (note 90), at p. 29.

134 Gaja, G., *op. cit.* (note 110), p. 69.

135 According to Gaja: “*Tout au moins dans le cas, à vrai dire assez rare, où l’individu ne désirerait pas que l’Etat exerce la protection diplomatique à son égard, l’Etat national devrait s’en abstenir*”, Gaja, G., *op. cit.* (note 110), p. 69.

136 Flauss, J. F., *op. cit.* (note 117), pp 48-49.

In this sense, there are already some signs in contemporary international practice that show a trend of allowing individual waivers to diplomatic protection. *Before* the commission of the internationally wrongful act, foreign investors frequently waive to diplomatic protection (while arbitral proceedings are pending) through their consent to the ICSID procedure.¹³⁷ Also, for some inter-State human rights mechanisms, “the individual’s free consent may be relevant to their application”.¹³⁸ *After* the internationally wrongful act has been committed, individuals may waive to diplomatic protection by presenting a claim to the IUSCT (which suspends diplomatic protection pending proceedings), and under the U.S. Restatement of Foreign Affairs (Third), “*a state’s claim against another state for injury to its nationals fails if, after the injury, the person waives the claim or otherwise reaches a settlement with the respondent state*”.¹³⁹

To compensate for the lack of subsequent *international* remedies available to the individual who considers that his/her rights are not adequately protected, be it due to a refusal of exercise of diplomatic protection or to an improper exercise of such right by the State,¹⁴⁰ *municipal law* has provided some alternatives. For example, under Swiss law, while there is no judicial remedy to challenge the non-exercise of diplomatic protection, the Swiss Federal Council in the 1996 *Comtrade* case¹⁴¹ (brought against a refusal to grant diplomatic protection) stated that the only remedy available to the claimant was to invoke the constitutional “*interdiction de l’arbitraire*”, which was not present in such case because other elements were missing, but which may lead to an *a contrario* interpretation, following Condorelli, “*que, si les conditions requises par le droit international avaient été réunies, il aurait été... arbitraire de ne*

137 *Cfr supra* note 64.

138 *Articles on Responsibility of States for Internationally Wrongful Acts*, ILC commentary to article 20, in Crawford, J., *op. cit.* (note 10), p. 165 par. (10).

139 Par. 713 comment g., as quoted by Tiburcio, C., *op. cit.* (note 1), p. 61.

140 Flauss has highlighted that, within the European system of human rights, the question arises if the procedural guarantees contained in articles 13 and 16(1) of the European Convention on Human Rights may be invoked against a refusal of exercise of diplomatic protection in view of a violation of articles 13 or 16(1) of such Convention, such as denial of justice. It is proposed by Flauss that the decisions regarding *Fogarty* and *Al-Adsani* [req 37122/97, 35763/97] may lead the way to interpreting a possible use of the European Convention to counter the discretionality of the exercise of diplomatic protection, at least regarding *jus cogens norms*. Flauss, J. F., *op. cit.* (note 117), pp. 48-53.

141 *Comtrade* case, Decision of the Swiss Federal Council, October 30, 1996, p. 666.

pas protéger le particulier!¹⁴² In Spain, for example, while there is no judicial remedy against the refusal of diplomatic protection or the manner in which it is carried out, individuals have been accorded indemnity in some of such cases.¹⁴³

Such trends, however, have been disregarded in the ILC's First Reading Draft Articles.

2. *Legal Consequences: Reparation*

A. *Traditional View: Reparation as Owed to the State*

Under the traditional view of diplomatic protection, the injuring State's obligation to provide reparation, defined by the PCIJ as necessary to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed",¹⁴⁴ is *owed entirely to the State of nationality* of the injured alien. The justification underlying this approach is the consideration that it is the State's own right which is in question in a diplomatic protection claim. As stated by Judge Badawi in his dissenting opinion in the *Reparations* case: "[i]nternational law recognizes that the State has the right to claim reparation in respect of this damage, not because it considers that the State is a legal representative of the victim, but because it holds that the State is asserting its own right, the right which it has to ensure, in the person of its subjects, respect for the rules of international law".¹⁴⁵ The applicable rules for the performance of this inter-State obligation are provided for by the ILC's 2001 State Responsibility Articles¹⁴⁶ (the law of diplomatic protection having no special rules on the matter, as stated in the ILC's First Reading Draft Articles).¹⁴⁷

142 Condorelli, L., *op. cit.* (note 7), p. 15, footnote (14).

143 Pastor Ridruejo, J., "La pratique espagnole de la protection diplomatique", in Flauss, Jean-François (dir.), *La Protection Diplomatique : Mutations contemporaines et pratiques nationales*, *cit.* (note 7), pp. 109-113, at pp. 110-111.

144 *Case concerning the Factory at Chorzow*, *supra* note 85 at p. 47.

145 *Reparation for injuries suffered in the service of the United Nations*, *supra* note 85, Dissenting opinion by Judge Badawi Pasha, at p. 206.

146 *Articles on Responsibility of States for Internationally Wrongful Acts*, Commentary to article 33, par. (1), in J. Crawford, *op. cit.* (note 10), p. 209.

147 *ILC First Reading Draft Articles on Diplomatic Protection*, *supra* note 2, general commentary, par. (1), where they refer to the ILC 2001 State Responsibility Articles for issues of reparation.

In this sense, the State of nationality is vested with absolute discretion to decide whether or not to claim reparation, and the *forms* of reparation that may be claimed.¹⁴⁸ Thus, for example, in the context of a diplomatic protection claim, (i) *restitution* may be requested for “the release of persons wrongly detained or the return of property wrongly seized”;¹⁴⁹ (ii) *compensation*, which “shall cover any financially assessable damage”, will be sought “in respect of personal injuries suffered by its... nationals, over and above any direct injury it may itself have suffered in relation to the same event”, including material losses (such as loss of earnings and earning capacity, medical expenses and the like) and non-material damage suffered by the individual (called “moral damage” by some), including “loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life”;¹⁵⁰ and (iii) *satisfaction*, which may be requested in the form of, among others, “an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”;¹⁵¹ may also be requested for injury to nationals.¹⁵²

In calculating the amount of reparation owed, the *basis for calculation* is the injury suffered by the alien, although the ultimate reparation owed does not necessarily have to be equivalent thereto. The reparation may result higher or lower than the actual loss suffered by the alien, by taking into account the injury to the State of nationality and its discretion in accepting a lower amount of reparation due to policy reasons (for example, a lump-sum),¹⁵³ or even in waiving its right to reparation, fully or partially¹⁵⁴ (as occurred in the *LaGrand* case).¹⁵⁵ This traditional view was clarified by the PCIJ in its decision in the *Chorzow Factory* case, where it acknowledged that: “The reparation due by one State to another does not however change its character by reason of the fact that it takes

148 Subject to the rules of sequence established by in the State Responsibility Articles: see *Articles on Responsibility of States for Internationally Wrongful Acts*, article 34, in J. Crawford, *op. cit.* (note 10).

149 *Ibidem*, Commentary to article 35, in J. Crawford, *op. cit.* (note 10), p. 213.

150 *Ibidem*, Commentary to article 36, par. (16).

151 *Ibidem*, Article 37(2).

152 See, for example, the *Martini* arbitration (Italy v. Venezuela), May 3, 1930, *Affaire Martini*, *UN Reports of International Arbitral Awards*, vol. II, No. XXVI, pp. 975-1008, at p. 1002.

153 Bennouna, M., Preliminary Report, *supra* note 13, pp 6-7, par. (20).

154 “Il peut renoncer à la demande de restitution ou de réparation des dommages, soit totalement, soit partiellement.” Ress, G., *op. cit.* (note 121), p. 130.

155 *Cfr supra* note 46.

the form of an indemnity for the calculation of which the damage suffered by the private person is taken as the measure... The damage suffered by the individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State".¹⁵⁶

Also for the calculation of reparation, account will be taken "of the contribution to the injury by willful or negligent action or omission of the injured State *or any person or entity in relation to whom reparation is sought*",¹⁵⁷ namely, the alien, which rule "is consonant with the principle that full reparation is due for the injury—but nothing more— arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach".¹⁵⁸

The necessary corollary of this view is that, once the State has received the corresponding reparation, it has complete control over the disposition of the proceeds and it is under *no* international obligation to *distribute* it, in whole or in part, in favor of the injured alien. Thus, under the traditional view, the injured alien has no individual right to reparation under international law as derived from a diplomatic protection claim. This does not preclude, however, the possibility that the State, in its own discretion, adopt an obligation of distribution of proceeds under its own municipal law. Thus, it is traditionally considered that the State's decisions regarding a lump-sum agreement or the distribution of reparation are not amenable to judicial review, unless expressly stated under municipal law, a domain which does not affect the position in international law: as Bennouna has phrased it, "[w]hen all is said and done, the manner in which the individual himself is ultimately compensated is of little importance from the standpoint of international law".¹⁵⁹

B. *Challenges: An Individual Right to Reparation?*

The view that the individual has no international right to reparation as derived from a diplomatic protection claim exercised in his/her favor is absolutely contrary to the notion that both individual and State rights

156 *Case Concerning the Factory at Chorzow*, *supra* note 85, p. 28.

157 *Articles on Responsibility of States for Internationally Wrongful Acts*, article 39, in Crawford, J., *op. cit.* (note 10), (emphasis added).

158 *Ibidem*, ILC Commentary to art. 39, par (2).

159 Bennouna, M., Preliminary Report, *supra* note 13, pp. 6-7, par. (20).

underlie such types of claims, because it entirely disregards individual interests.¹⁶⁰ In this sense, the traditional view is unfairly contradictory and logically inconsistent, because while not affording any international right to reparation to the alien, it acknowledges that it is the *alien's injury* which will serve as a basis for the calculation of the injury of the State and of the reparation owed to the latter, a requirement which is truly “*paying heed to the interest of the alien rather than to that of his national state*”,¹⁶¹ but for no individual-borne purpose, as the reasoning excludes the alien's participation in the reparation obtained. Moreover, the injury caused to the State is calculated, as Reuter has framed it, «*d'après le dommage matériel et direct subi par l'individu, considéré dans son intégrité physique, sa situation familiale et professionnelle, ses intérêts et caractères envisagés sous l'angle où ils spécifient de la manière la plus singulière sa personnalité propre*»,¹⁶² implicitly admitting that there is an individual right involved in diplomatic protection. Such a contradiction in terms is evidenced also by the fact that the *alien's* conduct in contributing to the injury has an incidence over the amount of reparation, in reducing it. According to the ILC, the justification for this rule is “*that the position of the State seeking reparation should not be more favorable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually*”,¹⁶³ a statement that is indeed taking into account individual interests of fairness, but, again, with no practical effect for the individual. Seen from this viewpoint, diplomatic protection is much less effective as an instrument for the protection of individual rights compared to other mechanisms which grant direct access to the individual, where he/she is entitled to receive the corresponding reparation. As far as the *distribution* of the reparation is concerned, if it is acknowledged that there are individual rights underly-

160 As stated by Gaja: “*Même par rapport au contenu de la réclamation, l'individu devrait jouer un rôle. En particulier, le choix entre une réclamation pour la restitution ou une demande d'indemnisation devrait être fait par l'Etat en tenant compte des vues de l'individu*”. Gaja, G., *op. cit.* (note 110), p. 69.

161 Amerasinghe, C. F., *op. cit.* (note 103), p. 53.

162 Reuter, P., “*Quelques Remarques Sur la Situation Juridique des Particuliers en Droit International Public*”, *La Technique et les Principes du Droit International Public, Études en l'honneur de Georges Scelle*, Paris, Librairie Générale de Droit et de Jurisprudence, 1950, t. II, pp. 535-552, at p. 540.

163 *Articles on Responsibility of States for Internationally Wrongful Acts*, ILC Commentary to art. 39, par (6), in J. Crawford, *op. cit.* (note 10).

ing diplomatic protection then, as stated early on by Berlia, “*l’État qui conserverait par devers lui l’indemnité versée réaliserait un véritable enrichissement sans cause*”.¹⁶⁴

The contemporary evolution of international law regarding individual rights *has* reflected a tendency towards recognizing that the individual has a direct individual right to reparation or, at least, to judicial control regarding the distribution of the reparation. Within the field of human rights, many human rights instruments provide for an individual right to reparation as a consequence of injury derived from a State’s wrongful act, including, among others, articles 41 of the European Convention on Human Rights and 63 of the American Convention on Human Rights. Moreover, article 75 of the Rome Statute of the International Criminal Court has directed the Court to establish principles relating to reparation to victims, including restitution, compensation and rehabilitation. Also, the case of *Beaumartin c. France*, brought before the European Commission and Court of Human Rights, concerned review under article 6(1) of the European Convention of Human rights and article 1 of its Additional Protocol, of national procedures of distribution of reparation obtained as a consequence of a diplomatic protection claim, which procedures had breached the obligation of distribution provided in the lump-sum agreement entered into by the State: the European organs determined that such an agreement created an individual right to reparation (nevertheless, in the absence of a lump-sum agreement, it would not have been possible to invoke the corresponding provisions for such a review). In any case, Flauss has aptly highlighted that such jurisprudence “*participe à un renforcement des droits individuels des victimes. Elle contribue aussi, à tout le moins par ricochet, à la juridictionnalisation des procédures de répartition des indemnisations liées à l’exercice de la protection diplomatique, rejoignant de la sorte l’évolution déjà amorcée au plan national par certains Etats*”.¹⁶⁵

The UNCC has also contributed to this trend, as it contains a mechanism of surveillance for the distribution of the compensation obtained by the State in favor of the individual.¹⁶⁶ Earlier precedents include the compensations commissions that were established in the 1950’s by the US,

164 Berlia, G., *op. cit.* (note 86), p. 65.

165 Flauss, J. F., *op. cit.* (note 117), pp. 53-54.

166 *Cfr. supra* note 76.

United Kingdom and France following the Second World War for the purpose of distributing lump-sums received from certain East European countries to the victims injured as a consequence of such war.¹⁶⁷

In addition, within the States' *domestic* legal sphere, many municipal legal systems allow recourse to municipal courts to guarantee the transfer of the sum received by the State and to review its distribution.¹⁶⁸ While an international duty may not be derived from such practice, at least it must be acknowledged as support for the tendency that considers that a right of the individual is involved in diplomatic protection: "*il est aujourd'hui acquis que l'évolution en matière de répartition des indemnités introduit dans le droit positif international la notion suivant laquelle la protection diplomatique est un droit de l'individu*".¹⁶⁹ Nevertheless, it must be acknowledged that State practice of diplomatic protection on the *international* plane evidences that the individual's rights are seldom taken into account, and lump-sum agreements for lower amounts than the injury caused to the alien, or waivers to reparation, are a common practice among States, admitting the prevalence of policy considerations over individual interests.¹⁷⁰

While the ILC's 2001 State Responsibility Articles recognize, under article 48, that a State other than the injured State can request the execution of the obligation of reparation in the interest "of the beneficiaries of the obligation breached", the same is not stated for article 42 claims (under which diplomatic protection is exercised, as it is considered that the State of nationality is "specially affected" by an injury to its national), consistent with their traditional inter-State logic. Nevertheless, an interpretation of the ILC's commentary to article 33, which states that "[w]hen an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit", in which category it

167 Berlia, G., *op. cit.* (note 86), pp. 66-70.

168 Puissechet clarifies its existence under French law: "*Il existe en revanche un contrôle juridictionnel sur les actes de répartition par les autorités nationales compétentes à cet effet des indemnités globales versées, au titre des intérêts français, par un Etat tiers*". Puissechet, J. P., *op. cit.* (note 60), p. 117.

169 As for State practice, jurisdictional control over the distribution of reparation obtained as a consequence of a diplomatic protection exists under the national legislations of France. Berlia, G., *op. cit.* (note 86), p. 70.

170 Pastor Ridruejo, J. (*op. cit.* (note 143), pp. 111-112) describes a case before the Supreme Court of Justice of Madrid, September 28, 1994, which denied granting the individual additional indemnity as a consequence of the low amount that he received derived from a lump sum agreement for a diplomatic protection exercised in his favor.

included human rights, where “*a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights*”, and to which category it later added other individual rights besides human rights, citing as an example the *LaGrand* case for consular rights,¹⁷¹ may lead to admit that the individual must be considered holder of the right to reparation for *all* individual rights (regardless of the fact that fields other than human rights do not always reflect a right to reparation in their applicable instruments).

Some authors interpret the above as evidencing a State-tendency towards granting the individual the right to the reparation obtained.¹⁷² Others, however, consider that establishing an individual right to reparation is far from possible under the contemporary status of international law, where any relationship between a State and its nationals is strongly defended as part of its reserved domain. This latter argument, however, is weakened by the current state of affairs, as international law has proved that it *does* confer individual rights, which makes it only logical that such conferral be carried to its ultimate degree by recognizing a right to obtain reparation for their violation.

The ILC’s choice of not establishing separate provisions on reparation for diplomatic protection obeys to the traditional view. Nevertheless, from its general Commentary it is clear that the decision was far from uncontroversial within the ILC, as its paragraph (1) states that “[s]ome members of the Commission were of the view that the legal consequences of diplomatic protection should have been covered in the present draft articles and that the focus of attention should not have been the admissibility of claims.” The ILC’s traditional approach to reparation had already been criticized within its codification work on State Responsibility, regarding which authors such as Randelzhofer and Tomuschat had stated that their “*reluctance to deal with the individual as a holder of rights under international law contrasts sharply with new tendencies that*

¹⁷¹ Crawford, J., *op. cit.* (note 10), p. 209 par. (3), quoting the *LaGrand Case*, *supra* note 46, p. 446.

¹⁷² As stated by Gaja: “*C’est en tout cas l’individu seul qui devrait être le bénéficiaire de la réparation. La pratique est déjà nettement orientée dans ce sens, ce qui encore s’harmonise mieux avec la conception de l’existence des droits individuels plutôt qu’avec la conception traditionnelle*”, Gaja, G., *op. cit.* (note 110), p. 69.

seem fundamentally to alter traditional concepts of international law, tendencies which the ILC has apparently discarded".¹⁷³ It is a criticism which may still be upheld for the codification works on diplomatic protection. While the inter-State provisions contained in the 2001 State Responsibility Articles may have been considered as an inappropriate place for setting an individual right to reparation under diplomatic protection claims (as may be derived from their general references to non-State beneficiaries and their general applicability), the same cannot be said for the ILC's codification works on diplomatic protection, which mechanism is precisely characterized for being based on an injury to an individual. The ILC's approach of not including an individual right to reparation as derived from diplomatic protection claims in its First Reading Draft Articles (and referring entirely to the State Responsibility Articles for the issue of reparation), is a seriously missed opportunity to harmonize diplomatic protection with the individual-oriented evolution of international law and does nothing but weaken its role as a means of enforcement of individual rights.

IV. CONCLUDING REMARKS

The individual-oriented evolution of international law has had a deep impact upon the traditional view of diplomatic protection. The orthodox notion of diplomatic protection as a discretionary right of the State is today seriously challenged by international law's increasing recognition of individual rights. Nowadays, it is clear that at the basis of diplomatic protection lies, not a violation of a State's right through its nationals, but a true violation of the individual rights of such nationals, entailing a complementary -and second degree- violation of the rights of the State. Bearing this in mind, the traditional reliance on the State's unfettered discretion in deciding whether or not to exercise diplomatic protection must be attenuated. The State must now take into account the interests of the protected individual, by evaluating them as a first step before deciding to bring the claim, and by, as a minimum, abstaining from such exercise when it would result in a harm to such individual interests (which

173 Randelzhofer, A. and Tomuschat, C., *op. cit.* (note 83), p. VII.

may be evidenced by the individual's waiver to diplomatic protection after he/she has suffered the injury).

In view of the above, the traditional idea that the reparation obtained from a diplomatic protection claim is owed solely and entirely to the claiming State (which is under no further obligation to distribute it in favor of the individual) is outdated. Today, individual rights to reparation or to judicial control of the distribution are frequently granted within the field of human rights and the *ad hoc* claims commissions and tribunals. Indeed, it is one of the most important corollaries of any recognition of individual rights on the international arena.

In sum, due to the evolution of the status of individuals on the international level, the customary law on diplomatic protection is not the same today as it was some years ago. The codification process taking place within the ILC does not reflect, to this date, the totality of such influence. While the First Reading Draft Articles have adapted to this evolution regarding the scope of application and conditions of exercise of diplomatic protection, they still adhere to the traditional view by considering that diplomatic protection is an absolutely discretionary right of the State. Moreover, the decision not to codify special rules on reparation derived from diplomatic protection claims signifies the adherence to the traditional view that reparation is entirely owed to the State. Thus, the ILC's work has disregarded the individual-oriented evolution of international law in the two most fundamental issues which lie both at the basis and at the summit of the mechanism of diplomatic protection: its legal nature and the reparation obtained therefrom. As long as the codification works not recognize that today, at the basis of such mechanism, lie complementary rights of the State and of the individual and as long as the State retains the absolute right to the reparation obtained from diplomatic protection, any other attempts of "progressive development" (within the scope of application and conditions of exercise) of diplomatic protection lose their significance: they have no true practical consequence for the individual, who remains at the mercy of its State's unlimited discretion. In view of these serious shortcomings, the ILC codification works, as they stand in first reading, do not meet the contemporary, individual-oriented challenges of our international legal system.