

## Diplomatic Protection and Individual Rights: A Complementary Approach

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*Classical diplomatic protection has historically ignored the individual as a subject of public international law. This legal fiction, allowing the state to make a claim in the person of its nationals, replaces the individual's right to claim remedies or indemnities for damage sustained as a result of human rights violations. Diplomatic protection could and should be redefined so as to incorporate the protection of individual rights. This complementary approach, recognizing the interdependence of individual and state rights, is already underway in the case law of the International Court of Justice and the work of the International Law Commission.*

### I. THE RISE OF THE INDIVIDUAL AND ITS IMPLICATIONS FOR DIPLOMATIC PROTECTION

Citizens of one state who reside or conduct business in another may be subject to human rights violations. Those seeking remedies or indemnities are fortunate in that many of these rights have been enshrined in key international conventions since World War Two.<sup>1</sup> Classical diplomatic protection, a legal

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<sup>1</sup> These conventions include the Vienna Convention on Consular Relations, the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR). It is important to note that the ICCPR has its limitations. For a case brought by an individual to be accepted, it is not enough that the individual directly informs the Human Rights Committee of wrongful acts of which he or she has been a victim. The national state must also have ratified the

fiction allowing a state to assert its own rights in the person of an aggrieved national, is the traditional avenue of redress for such violations. However, as individuals increasingly become the subject of public international law,<sup>2</sup> they now share, along with the states that represent them, a substantive right to seek justice before international bodies such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

In light of this development, the traditional institution of diplomatic protection may seem irrelevant and even harmful. As it involves the exercise of a state right, rather than an individual right,<sup>3</sup> the implication may be that individuals do not have a legal personality under public international law. For this reason, some scholars have suggested that diplomatic protection be placed “in the attic of old concepts.”<sup>4</sup>

However, as the individual is still not a perfect subject of international law,<sup>5</sup> dispensing with any avenue of redress that exists for harms suffered abroad, including diplomatic protection, may be premature.

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Optional Protocol. See Annemarieke Vermeer-Künzli, *Restricting Discretion: Judicial Review of Diplomatic Protection*, 75 NORDIC J. OF INT'L L. 279, 284 (2006). Already in 1928, in its advisory opinion on Jurisdiction of the Courts of Danzig, the Permanent Court of International Justice (PCIJ) recognized that the individual can become a subject of international law and that individuals can benefit from a legal personality (in some cases). See *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (Ser. A/B) No. 42, at 20, 25 (Feb. 4), available at [http://www.icj-cij.org/pcij/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf); D. CARREAU, DROIT INTERNATIONAL 369 (Pedone, 2007).

<sup>2</sup> JOE VERHOEVEN, DROIT INTERNATIONAL PUBLIC 295–316 (Larcier, 2000). In many cases, individuals no longer have to ask their state to take legal action on their behalf. The United Nations Human Rights Committee examines individual communications.

<sup>3</sup> This logic is flawed with respect to the contemporary legal order. See SÉBASTIEN TOUZÉ, LA PROTECTION DES DROITS DES NATIONAUX À L'ÉTRANGER: RECHERCHES SUR LA PROTECTION DIPLOMATIQUE 56 (Pedone, 2007).

<sup>4</sup> Diplomatic protection *lato sensu* includes “political initiatives pursuing the aim to prevent infringements” and the diplomatic protection *stricto sensu*. Luigi Condorelli, *L'Évolution du Champ d'Application de la Protection Diplomatique*, in JEAN-FRANÇOIS FLAUSS, LA PROTECTION DIPLOMATIQUE-MUTATIONS CONTEMPORAINES ET PRATIQUES NATIONALES 3 (Bruylant, 2003). In this work, we are interested only in the diplomatic protection *stricto sensu*. We must not concern ourselves with the rationale (*raison d'être*) of preventive diplomacy.

<sup>5</sup> TOUZÉ, *supra* note 4, at 158.

Serious procedural deficiencies affect how a case can be brought before international bodies. For example, conditions of admissibility before the ECtHR can be very high. In some cases, an obligation to exhaust all possibility of domestic redress may apply, as admittedly has also been the case up to now for diplomatic protection. Nevertheless, the requirement of national exhaustion does not apply for diplomatic protection when there are no available, effective, or adequate national remedies.<sup>6</sup> Moreover, in opposition to the action under Article 35 in the ECHR, the action for diplomatic protection can be introduced after a period of six months from the date of the final national decision.<sup>7</sup>

Similarly, rights of appeal are weak and unclear<sup>8</sup> and, under the principle of *non bis in idem*, individuals cannot approach more than one international body. In addition, the immunity of the perpetrating state may leave individual rights unprotected, even under international human rights conventions. For example, the ECtHR sometimes lacks jurisdiction to rule on a given dispute.<sup>9</sup> There is no access to the ECtHR when it comes to state immunity.<sup>10</sup>

It is worth noting that only a minority of states adhere to these conventions anyway.<sup>11</sup> Generally, international law bestows states with extensive rights but only recognizes obliga-

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<sup>6</sup> See Resolution No. 5/2006, Diplomatic Protection of persons and property, The 72nd Conference of the International Law Association in Toronto, Canada (June 4–8, 2006).

<sup>7</sup> See ECHR, art. 35, § 1, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>8</sup> Many states have not ratified the protocols of the ECHR relating to the individual right to appeal.

<sup>9</sup> One can point to the cases *Al-Adsani v. United Kingdom* or *Fogarty v. United Kingdom*. *Al-Adsani v. U.K.*, App. No. 35763/97, Eur. Ct. H.R., ¶ 48, 66 (2001); *Fogarty v. U.K.*, App. No. 37112/97, Eur. Ct. H.R., ¶ 39 (2001). See also Jean-François Flauss, *Vers un Aggrioramento des Conditions D'Exercice de la Protection Diplomatique in LA PROTECTION DIPLOMATIQUE*, *supra* note 5, at 31, 52. Flauss considers diplomatic protection “a sort of ideal antidote” to state immunity. But this function has not yet been consecrated in international law as descriptive (*de lege lata*), but only prescriptive (*de lege ferenda*).

<sup>10</sup> See *Jones and Others v. U.K.*, App. No. 34356/06 and 40528/06, Eur. Ct. H.R., ¶ 213, 216 (2014).

<sup>11</sup> Seventy-two countries recognized the jurisdiction of the ICJ as compulsory, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST., <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3> (last visited Oct. 30, 2015), and 47 countries recognize the jurisdiction of ECtHR as compulsory, *European Court of Human Rights (ECtHR)*, COUNCIL OF EUROPE, [http://www.coe.int/t/democracy/migration/bodies/echr\\_en.asp](http://www.coe.int/t/democracy/migration/bodies/echr_en.asp) (last visited Oct. 30, 2015).

tions towards individuals where the latter *might* be fully entitled to *certain* widely recognized rights.<sup>12</sup>

Therefore, diplomatic protection should not be scrapped<sup>13</sup> but rather retained as an alternative, indirect avenue of individual redress for harms sustained abroad. It should complement, rather than limit or supersede, the right of the individual to directly or indirectly seek redress before an international body.<sup>14</sup> Redefining diplomatic protection as a complementary procedure, recognizing the interdependence between state and individual rights, is the best way forward. The modification of diplomatic protection so that it plays a crucial role in the protection of human rights could potentially universalize its application.<sup>15</sup> The International Law Commission (ILC) and the ICJ have both already taken steps in this direction.<sup>16</sup>

## II. CLASSICAL DIPLOMATIC PROTECTION

Diplomatic protection is the procedure by which a state acts extraterritorially in order to assert its legal interest. As a substantive right, it allows states to demand that international law be observed in the person of its nationals.<sup>17</sup> As a procedural right, it authorizes the state to act in order to enforce that substantive right.<sup>18</sup> In the contemporary international legal order, the action of the state in diplomatic protection remains the *ulti-*

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<sup>12</sup> The ECtHR judgments *Soering v. United Kingdom* and *Ilaşcu and Others v. Moldova and Russia* enshrine the limited positive obligations of states. See *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989); *Others v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. (2004).

<sup>13</sup> See Lucius Caflisch, *La Pratique Suisse de la Protection Diplomatique*, in FLAUSS, *supra* note 5, at 73.

<sup>14</sup> The individual has a subjective right to make a claim based on violation of international law - a primary rule. But the individual also has a right to invoke the rules of law that apply to responsible relations between states - a secondary rule. It is this secondary rule that applies mainly to diplomatic protection, without prejudice to the primary one.

<sup>15</sup> Enrico Milano, *Diplomatic Protection and Human Rights Before the International Court of Justice: Re-fashioning Tradition?*, 35 NETHERLANDS YEARBOOK OF INT'L L. 85, 89 (2004).

<sup>16</sup> The International Law Commission was established by the United Nations General Assembly in 1948 to promote the codification and progressive development of international law.

<sup>17</sup> TOUZÉ, *supra* note 4, at 19.

<sup>18</sup> *Id.* at 19, 30.

*ma remedium* for an individual who has suffered unaddressed damage.<sup>19</sup>

The first *Mavrommatis* judgment (1924) set the template for the classic definition of diplomatic protection. In 1921, the government of Greece brought three cases before the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, against the government of Great Britain on behalf of Mavrommatis, a Greek national. Mavrommatis had been granted concessions to build public works in Palestine that were later rescinded. In assessing its jurisdiction to hear the case, the Court enacted what became the formula of diplomatic protection:

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 rights – its rights 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.<sup>20</sup>

The *Mavrommatis* judgment established three long-standing features of diplomatic protection. *First*, diplomatic protection is a legal fiction based on an injury to the legal interest of the state and a right to see international law respected in the person of its nationals. *Second*, diplomatic protection is the discretionary exercise of a substantial and procedural state right. Arguably, this has the merit of filtering individual claims since a state will retain only the most serious and well-founded claims of its injured nationals. On the other hand, the discretionary nature of this right makes it more likely that states will act only when they have a political interest. *Third*, diplomatic protection treats the individual as an *object* of international law - the individual has no international legal personality.<sup>21</sup>

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<sup>19</sup> Marjoleine Zieck, *Codification of the Law on Diplomatic Protection: the First Eight Draft Articles*, 14 LEIDEN J. OF INT'L L. 209, 218 (2001).

<sup>20</sup> *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Judgment, 1924 P.C.I.J. (Ser. A) No. 2, at 12 (August 30), [http://www.icj-cij.org/pcij/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf).

<sup>21</sup> TOUZÉ, *supra* note 4, at 30, 36, 100. The strongest proponent of this view is Anzilotti, who argues that the state protects its nationals because it has a “right on a

Diplomatic protection is not consular protection, which has a more day-to-day character.<sup>22</sup> Consular protection does not internationalize the individual's claim but merely involves an appeal by consular officials to the domestic legal order of the state where the individual's rights were violated.<sup>23</sup> Furthermore, diplomatic protection is not functional protection, in which an international institution rather than a state exercises its right to demand an international judicial proceeding on behalf of an injured individual.<sup>24</sup>

### III. DIPLOMATIC PROTECTION AND THE LIMITATION OF INDIVIDUAL RIGHTS

Classical diplomatic protection has several limitations. *First*, only the state of nationality of the injured individual can utilize it against another state.<sup>25</sup> *Second*, except in certain circumstances mentioned above, the individual must first exhaust all possibilities of domestic redress under the legal order of the state where the violation occurred except in certain circumstances as mentioned above. The original object of the individual's diplomatic protection request must be the same as the object of the individual's domestic action, as well as the legal claims on the merits.<sup>26</sup> *Third*, a rule of international law must have been violated.<sup>27</sup>

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good" (*jus in rem*) on its own nationals, i.e. they are virtually the state's property. Through the game of nationality, one state requires from other states the respect of international law towards its nationals.

<sup>22</sup> Habib Gherari, *L'institution consulaire entre tradition et modernité*, in LA PROTECTION CONSULAIRE, SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, JOURNÉE D'ÉTUDE 7, 9 (Pedone, 2006); Caflisch, *supra* note 14, at 77.

<sup>23</sup> Jean-Paul Pancracio, DROIT ET INSTITUTIONS DIPLOMATIQUES 76 (Pedone, 2006). Acts taken *under* consular protection differ from those taken in the *context* of diplomatic protection. In France, acts of diplomatic protection are acts of the government and cannot be appealed in the French administrative courts. *See* Vermeer-Künzli, *supra* note 2, p. 281.

<sup>24</sup> The scope of this article also does not include the basic or procedural rights of corporations, shareholders, or the crews of ships.

<sup>25</sup> *See* Barcelona Traction, Light and Power Company, Limited, 1970 I.C.J. 3, ¶ 33–34 (February 5) (highlighting that human rights are obligations towards all (*erga omnes*) as opposed to diplomatic protection, which only concerns obligations of one state to another); *see also* Mónica Pinto, *De la Protection Diplomatique à la Protection des Droits de l'Homme*, 106 REVUE GÉNÉRALE DE DROIT INT'L PUB. 513, 535 (2002); Giorgio Gaja, *Droits des Etats et droits des individus dans le cadre de la protection diplomatique*, in LA PROTECTION DIPLOMATIQUE, *supra* note 5, at 63.

<sup>26</sup> Zieck, *supra* note 20, at 211.

<sup>27</sup> SERGE GUINCHARD & THIERRY DEBARD, LEXIQUE DES TERMES JURIDIQUES 840 (Dalloz, 23rd ed. 2015).

As a discretionary right that states can choose to invoke, diplomatic protection can be inconsistent with the defense of permanent and universal individual rights. If the state *may* initiate a procedure to defend the rights of one of its nationals abroad, this does not mean that the rights of that individual must be respected or that compensation to the individual is guaranteed. The individual cannot force a state to intervene. Furthermore, if the state's right replaces the individual's right, the individual has no means to take away the former and preserve the latter. The state's exercise of its right cannot be taken away either by an annulling judicial act or by a waiver of the concerned individual.<sup>28</sup>

Once the state invokes its own right at the international level, the individual's right for domestic redress is replaced.<sup>29</sup> The damage suffered by the individual becomes damage suffered by the state of nationality and he or she disappears behind a state screen.<sup>30</sup> It is the national state, on the basis of its own right, that is the entity seeking redress.<sup>31</sup>

#### IV. REFORMULATING DIPLOMATIC PROTECTION

A new prescriptive (*de lege ferenda*) definition of diplomatic protection recognizing the interdependence of state and individual rights would supplement the growing right of individuals to seek direct recourse for violations of their rights under international law.<sup>32</sup> This interdependence can be approached in several ways.

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<sup>28</sup> See VERHOEVEN, *supra* note 3, at 635 and *Factory at Chorzow* (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (Ser. A) No. 9 (July 26), which stated that individuals may not waive diplomatic protection in advance when they contract with foreign states. For more on this controversy, see TOUZÉ, *supra* note 4, at 234, 237; and Eric de Brabandère, *La 58ème Session de la Commission du Droit International*, 40 REVUE BELGE DU DROIT INT'L, 243, 243–44 (2007).

<sup>29</sup> See Craig Forcece, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the War on Terror*, 17 THE EUR. J. OF INT'L L. 369, 374 (2006).

<sup>30</sup> Permanent Court of International Justice, *supra* note 21.

<sup>31</sup> This theory has since been confirmed by many doctrines and decisions such as the *Railway Panevezys Saldutiskis* (30 June 1938), the *Serbian loans* (30 June 1938), *Nottebohm* (6 April 1955) and *Barcelona Traction* (5 February 1970), as well as by the arbitral bodies in the *Dickson Car Wheel v. United Mexican States* case (July 1931). The ICJ did not hesitate to say that this was an elementary principle of public international law. See Milano, *supra* note 16, at 92.

<sup>32</sup> Another way to put this is that the state would have a “related exclusive competence” vis-à-vis the rights of the individual. See TOUZÉ, *supra* note 4, at 30.

### A. Mediated Damage

Under the theory of mediated damage, an individual can expect a remedy because the violation of his or her individual rights is also an indirect violation of the rights of his or her state of nationality.<sup>33</sup> Under this theory, the state's right is *mediated* through the individual rights of its nationals, which never disappear. In one sense, mediated damage universalizes the violation of the individual right. Undoubtedly, a theory emphasizing the direct damage done to the individual is a stronger basis upon which to defend the individual as a subject of public international law than mediated damage to a state in the person of its nationals. As such, rather than superimposing the rights of a mediated state over those of the individual, the interdependence should be used to emphasize the coexistence of the two types of damage.

### B. Territorial Obligation

A state is required to treat non-nationals who reside within its territory according to the normal standard of civilized nations.<sup>34</sup> This obligation implies a universal right possessed by all individuals within a given territory to have their rights respected. Importantly, the obligation to respect these rights does not depend on reciprocity between two or more states; state A must respect the rights of the nationals of state B residing in its territory even if state B does *not* do the same for the nationals of state A. This issue was addressed in the important *Avena* case mentioned below.

### C. Subrogation

The individual has a right to remedy against damage, which can be exercised before a court under public international law. However, if diplomatic protection is used, that right is transferred from the individual to the state along with legal regime to which it applies – the right is subrogated. The nature of the right is the same before and after the subrogation.<sup>35</sup> The right of the individual, a subject under international law, is in

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<sup>33</sup> *Id.*, at 97.

<sup>34</sup> ICCPR, articles 2(1), 26.

<sup>35</sup> TOUZÉ, *supra* note 4, at 98.

no way weakened merely because it is subrogated to that individual's injured state of nationality. Furthermore, as subrogation operates when the prejudice to the individual occurs, at the moment of the initial damage, the right of the individual arises at that moment and does not disappear.<sup>36</sup>

#### D. *Novation*

The state can claim remedies for the initial damage suffered by one of its nationals due to an internationally wrongful act attributable to a foreign state. It is possible to argue that this claim can be shifted from the state acting alone to both the state and the individual acting together, thereby strengthening the right of the individual. This is the legal fiction of novation, the shift of a claim from one subject to another. That said, under novation the individual claim based on a violation of international law may not be invoked in the international order by the individual. The invocation of this right is dependent on a state screen.<sup>37</sup>

#### E. *Complementarity*

Although all the above modes can be used to prevent diplomatic protection from replacing an individual right with a state right, a 'complementary' view of diplomatic protection would be even stronger. The definition of diplomatic protection could be expanded so that it becomes a procedure by which a state acts internationally in order to assert its legal interest with the goal of both ensuring that international law is respected as to its nationals, guaranteeing the protection of their individual rights.<sup>38</sup>

Under this expanded definition, diplomatic protection forwards both the interest of the state and the rights of the individual. The individual claim invoked domestically is extended internationally by the procedural right of the state, but is not thereby limited in any way. The individual can also exercise his or her own basic right to seek redress under public international

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<sup>36</sup> *Id.* at 110.

<sup>37</sup> Pinto, *supra* note 26, at 532. Novation usually implies that a new object of a claim is created. In this case, the object remains the same; the violation of international law with respect to the individual.

<sup>38</sup> Flauss, *supra* note 5, at 31–32. This author states that diplomatic protection can perform a "supplementary or complementary function."

law. This can be understood as a “mixed” definition of diplomatic protection.

#### V. THE INTERNATIONAL LAW COMMISSION AND A ‘COMPLEMENTARY’ CONCEPT OF DIPLOMATIC PROTECTION

The International Law Commission (ILC) has recognized the need to redefine diplomatic protection. As part of its *Project to Codify Diplomatic Protection in Public International Law*, the ILC prepared draft articles for an international convention that would give individual rights a greater role in diplomatic protection.<sup>39</sup>

To be sure, the legal fiction in the *Mavrommatis* judgment still permeates the draft articles; traditional diplomatic protection as a procedural, discretionary state right is still enshrined.<sup>40</sup> Nonetheless, the draft articles emphasize the importance of individual rights.<sup>41</sup> This is in keeping with the belief of the ILC’s special rapporteur, John Dugard, that diplomatic protection should include the protection of human rights.<sup>42</sup>

Most significantly, under draft Article 8, individuals can be defended not only by their state of nationality but also by their state of habitual residence. This potentially extends the benefits of diplomatic protection to stateless persons and refugees.<sup>43</sup> Limitations do exist however. The state of habitual residence would not be able to bring an action against the state of origin. In addition, the nationality of the concerned individual must be the same at the date of the damage as at the date of the introduction of the claim. This prevents a wronged individual from ‘shopping’ for a state of nationality when requesting compensation for a violation of his or her rights.<sup>44</sup>

<sup>39</sup> Annemarieke Vermeer-Künzli, *Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case*, 20 LEIDEN J. OF INT’L L., 941, 941 (2007)

<sup>40</sup> Alain Pellet, *La Seconde Mort d’Euripide Mavrommatis? Notes sur le Projet de la C.D.I. sur la Protection Diplomatique*, in DROIT DU POUVOIR, POUVOIR DU DROIT: MÉLANGES OFFERTS À JEAN SALMON 1377 (2007).

<sup>41</sup> See *id.* at 1375.

<sup>42</sup> Although he is careful to say that it is preferable to describe diplomatic protection than to define it. Milano, *supra* note 16, at 92.

<sup>43</sup> James L. Kateka, *John Dugard’s Contribution to the Topic of Diplomatic Protection*, LEIDEN J. OF INT’L L. 921, 926 (2007).

<sup>44</sup> *Id.* at 922; Int’l Law Comm’n, *Projet d’Articles sur la Protection Diplomatique et Commentaires y Relatifs*, U.N. Doc. A/61/10 at 37 (2006), available at [http://legal.un.org/ilc/texts/instruments/french/commentaries/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/french/commentaries/9_8_2006.pdf).

Dugard brought the draft articles before the Sixth Committee of the General Assembly for consideration in 2007. However, with states harboring diverging views on several key issues, the articles were not adopted.<sup>45</sup> Despite this, it is clear that the ILC has played a crucial role in advancing a complementary understanding of diplomatic protection.

#### VI. THE INTERNATIONAL COURT OF JUSTICE AND A “COMPLEMENTARY” CONCEPT OF DIPLOMATIC PROTECTION

ICJ case law is also moving towards a transformed definition of diplomatic protection that recognizes the interdependence of individual and state rights. Specifically, the *Lagrand*, *Avena*, and *Diallo* cases shift the discussion towards an understanding of diplomatic protection that would also apply universally when an individual has suffered harm abroad.<sup>46</sup>

##### A. Towards protection of individual rights: the *Lagrand* case

In *Lagrand*, Germany approached the ICJ seeking to prevent the execution of the Lagrand brothers in the state of Arizona.<sup>47</sup> Invoking international human rights conventions, Germany argued that the United States had neglected to inform the accused of their right to seek assistance from the German Consulate. Germany sought protective measures to obtain a more favorable treatment for the Lagrand brothers.

In applying Article 31 of the *Convention on the Law of Treaties of 1969*, the ICJ deduced that the foreign state, *in casu* the United States, had obligations towards both the accused and their state of origin, Germany. The Court posited a two-pronged understanding of consular assistance; the right of a state to attend to its nationals when they are arrested or detained and the right of the individual to request assistance of his

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<sup>45</sup> Press Release, General Assembly, Les Délégations de la Sixième Commission Sont Divisées sur l'Idée d'Elaborer une Convention sur la Protection Diplomatique. U.N. Press Release AG/J/3323, (Oct. 19, 2007), available at <http://www.un.org/press/fr/2007/AGJ3323.doc.htm>.

<sup>46</sup> *Lagrand* (Germany v. United States of America), 2001 I.C.J. 466 (June 27); *Avena and Other Mexican Nationals* (Mexico v. United States of America), 2004 I.C.J. 12 (March 31); *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), 2010 I.C.J. 639 (November 30).

<sup>47</sup> See *id.*, *Lagrand*, at 31.

or her state of nationality.<sup>48</sup> The Court noted that measures protecting the individual's right are compulsory, although it did not specify the scope of this right. Nonetheless, it can be deduced from this jurisprudence that the ICJ indirectly recognized the function of protecting human rights as a component of diplomatic protection.<sup>49</sup>

Importantly, the *Lagrand* judgment did not question the discretionary nature of the state's procedural right to act in diplomatic protection. The state is the "only master to decide" if it will act in diplomatic protection to guarantee the individual rights of its nationals. The state has the "freedom of total action."<sup>50</sup>

*B. Towards differentiating between two complementary functions: the Avena case*

In *Avena*, Mexico raised similar complaints as Germany had done in *Lagrand* - more than fifty Mexican nationals were facing the death penalty in the United States. Mexico, citing violations of the rights of Mexican nationals on the territory of the United States, requested that the ICJ hand down protective measures. The ICJ did so, recognizing the interdependence of the rights of the state with those of the individual. The Court ruled that Mexico could act to protect the right of its nationals to consular assistance regardless of the treatment of foreigners on Mexican territory.<sup>51</sup> The ICJ ruled that this was a human right under Article 36 of the *Convention on Consular Relations*, which deals with essential procedural guarantees.<sup>52</sup> The Court

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<sup>48</sup> *Id.*, *Lagrand*, ¶¶ 77 and 91.

<sup>49</sup> This is the view of the expert Monica Pinto. Pinto, *supra* note 26, at 536. Interestingly, Paraguay was confronted with the same problem as Germany in Vienna Convention on Consular Relations (Para. v. U.S.) 1998 I.C.J. Rep. 266 (Apr. 9). One of its nationals was executed by the authorities of the state of Virginia. Contrary to Germany, Paraguay did not pursue the matter before the ICJ (order of Nov. 10, 1998).

<sup>50</sup> If this assertion is correct in international law, it tends to be relativized domestically. National constitutional provisions may foresee restrictions on this exercise of discretion. This is the case in Switzerland. See Jean-François Flauss, *Le Contentieux des Décisions de Refus d'Exercice de la Protection Diplomatique: A Propos de l'Arrêt du Tribunal Fédéral Suisse du 2 Juillet 2004, Groupement XC/Conseil Fédéral (1re Cour Civil)*, 109 REVUE GÉNÉRALE DE DROIT INT'L PUB. 407, 415 (2005).

<sup>51</sup> *Avena* and other Mexican nationals, *supra* note 47, ¶ 45.

<sup>52</sup> Milano, *supra* note 16, at 92.

refused to comment further on the nature of individual rights deserving of protection.

*C. Towards protection of human rights: the Diallo case*

The presumption that diplomatic protection defends human rights was confirmed explicitly in the *Diallo* judgment in 2010.

In 1998, Guinea brought a case against Zaïre (today Democratic Republic of Congo, hereafter DRC) before the ICJ on behalf of the Guinean businessman Diallo, who was imprisoned by the DRC between 1988 and 1996. Guinea claimed that his arrest, detention, and expulsion involved serious violations of international law. The ICJ found that the DRC had violated Articles 9 and 13 of the Covenant on Civil and Political Rights and Articles 6 and 12(4) of the African Charter on Human and People's Rights. These articles concerned the individual's right to protection against arbitrary arrest, detention, and expulsion. The DRC also violated Article 36(1)(b) of the Vienna Convention by not informing Diallo of his right to seek consular assistance.

The Court found that the DRC was obliged to compensate Guinea for the injurious consequences of the violations of Diallo's human rights:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.<sup>53</sup>

As Bruno Simma wrote in a recent article, "the human rights rose like a phoenix from the ashes of the Diallo case."<sup>54</sup>

VII. CONCLUSION: DIPLOMATIC PROTECTION SHOULD BE SEEN  
AS A COMPLEMENTARY PROCEDURE

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<sup>53</sup> Ahmadou Sadio Diallo, *supra* note 47, ¶ 39.

<sup>54</sup> Bruno Simma, *Human Rights before the International Court of Justice: Community Interest Coming to Life?*, in CHRISTIAN J. TAMS, *DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 593 (Oxford University Press, 2013).

Traditional diplomatic protection, with its emphasis on the rights of states, does not oblige a state carrying out a successful procedure to compensate the individual whose rights have been violated.<sup>55</sup> A “complementary” definition of diplomatic protection encompassing the rights of both states and individuals would oblige the state in which the violation was committed to provide compensation and protection in keeping with widely recognized human rights.

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<sup>55</sup> Pellet, *supra* note 41, at 1381.