Diplomatic Protection and the *LaGrand* Case

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Abstract. While the most important feature of the judgment given by the International Court of Justice in the *LaGrand* case is probably the conclusion that provisional measures indicated by the Court are binding, the decision is not without significance in the field of diplomatic protection.

1. INTRODUCTION

In 1999 the Federal Republic of Germany brought a case before the International Court of Justice ('ICJ') against the United States of America for violations of its own rights and the rights of two of its nationals, Karl and Walter LaGrand.[1] The LaGrands were arrested in Arizona, USA for attempted armed bank robbery in 1982 during which the bank manager was murdered. They were prosecuted, and sentenced to death in 1984, without having been advised by US authorities of their rights under Article 36 of the 1963 Vienna Convention on Consular Relations[2] ('VCCR') to request that the consular authorities of their state of nationality, Germany, be informed.[3]

Under Article 36(1)(b) of the Convention the local authorities were obliged to advise arrested nationals of contracting parties, "without delay," of this right.[4] Germany argued that this provision conferred rights on indi-

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1. Case concerning the Vienna Convention on Consular Relations (Germany *v.* United States of America), Judgment of 27 June 2001, available at http://www.icj-cij.org (hereinafter 'LaGrand case').
2. 596 UNTS No. 8638, 262, at 292–293.
3. For a detailed presentation of the facts of the case *see* LaGrand case, *supra* note 1, at paras. 13–34.
4. Art. 36(1) provides that:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
> […]

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viduals, which had been violated in this case. This was the basis of the German complaint concerning diplomatic protection. Germany further contended that its right under the Convention to be informed of the detention of its nationals had been violated and submitted a claim also with regard to this direct injury. The application was brought under Article I of Optional Protocol II to the VCCR, which states that:

> [d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.[5]

In the original application Germany demanded the nullification of the sentence imposed upon the LaGrands and reparation.[6] As the LaGrands were subsequently executed, causing "irreparable harm to the rights claimed by Germany,"[7] the applicant felt compelled to modify its claim relating to diplomatic protection to a mere request that the Court adjudge and declare

> (1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, subparagraph 1*(b)*, of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and *in its right of diplomatic protection of its nationals*, under Articles 5 and 36, paragraph 1, of the said Convention; […].[8]

The US, while admitting that it had breached the obligations it owed to Germany under Article 36(1)(b) of the Convention,[9] claimed that the

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> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph*; […].

Supra note 2 (emphasis added).

5. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, 596 UNTS No. 8640, 488.
6. Application Instituting Proceedings filed in the Registry of the International Court of Justice on 2 March 1999, LaGrand case (Germany *v.* United States of America), para. 15, available at http://www.icj-cij.org.
7. Memorial of the Federal Republic of Germany, LaGrand case (Germany *v.* United States of America), Vol. I, 16 September 1999, para. 1.04, available at http://www.icj-cij.org.
8. *Id.*, at para. 7.02 (emphasis added).
9. The USA considered its formal apology and the measures it undertook to prevent the recurrence of such breaches sufficient and asked the Court to dismiss all other claims of Germany. *See* Counter-Memorial submitted by the United States of America, LaGrand case (Germany *v.* United States of America), 27 March 2000, para. 175, available at http://www.icj-cij.org.

Convention did not confer rights upon individuals. It objected to the Court's jurisdiction over this aspect of the case on the ground that, in its view, the German attempt at diplomatic protection before the ICJ lacked legal basis. An interesting but arguably severely flawed discussion developed before the Court on this issue. Somewhat unexpectedly the Court did not explain its conclusions on diplomatic protection in the judgment.

In these circumstances it is important to evaluate the arguments relating to diplomatic protection raised by the parties in order to avoid that the misunderstandings or misinterpretations which dominated the discussions of this aspect of the case be attributed more significance in similar future cases than they deserve. The present article addresses this task. The first section will review relevant German arguments, US counter-arguments and the ruling of the Court on diplomatic protection. This will be followed by a critical analysis of the arguments presented by the United States. The article concludes with an evaluation of the judgment from the perspective of diplomatic protection.

2. Diplomatic Protection in the Submissions of the Parties

While not demanding compensation or any form of monetary reparation for itself or for the family of the LaGrands, Germany laid great emphasis on the issue of diplomatic protection. Its Memorial and oral pleadings were clearly directed towards having the right of individuals under Article 36(1)(b) of the Convention confirmed and enforced. In support of the right to exercise diplomatic protection for violations of the rights of nationals under Optional Protocol II, the German Memorial cited a famous passage by the predecessor of the ICJ:

> 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. 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 right to ensure, in the person of its subjects, respect for the rules of international law.[10]

It then turned to the preconditions of the exercise of this right, namely,

> [f]irst, the violation of an individual right provided by international law. Second, the existence of a bond of nationality between the State exercising its right to diplomatic protection and the individual whose rights were violated.[11]

10. Mavrommatis Palestine Concessions case (Greece *v.* UK), Jurisdiction, 1924 PCIJ (Ser. A) No. 2, at 12, cited *in* the LaGrand case, German Memorial, *supra* note 7, at para. 4.89.
11. *Id.*, at para. 4.90.

As the United States did not dispute the LaGrands' German nationality,[12] the only point that remained to be shown, in the view of Germany, was the violation of the LaGrands' individual rights.[13] The failure of US authorities to advise the LaGrands of their rights under Article 36(1)(b) of the VCCR constituted such violation.[14]

The US proved a tough opponent. While admitting that it violated the obligations it owed to Germany under the Convention, it protested the German attempt at diplomatic protection. The Counter-Memorial even accused Germany of attempting

> to wrap [the US failure to inform the LaGrand brothers that they could request consular notification] in as many overlapping characterizations of consequential illegality as possible.[15]

In its efforts to demonstrate that the Court lacked jurisdiction over this aspect of the dispute the USA referred to the fact that the only jurisdictional basis for the case before the ICJ – the USA not accepting its compulsory jurisdiction under Article 36(2) of its Statute – was Article I of Optional Protocol II to the VCCR.[16] The US argued that diplomatic protection, regulated by customary international law rather than by the Convention, did not concern the application and interpretation of the Convention, and hence it did not fall under this jurisdictional clause.[17]

In turn, in the course of the oral pleadings, the Counsel for Germany stated that

> In [Germany's] view such an exercise of diplomatic protection constitutes an application of what the International Law Commission calls 'secondary rules' of international law, and there can be no doubt that *it also constitutes an 'application of the Convention'* in the sense of Article I of the Optional Protocol to the Vienna Convention which is the basis of the Court's jurisdiction.[18]

In response it was submitted on behalf of the respondent that

12. *Id.*, at paras. 3.73–3.75.
13. *Id.*, at para. 4.90.
14. *Id.*, at para. 4.90
15. LaGrand case, US Counter-Memorial, *supra* note 9, Part IV, Chapter III, at para. 74. *See also id.*, at paras. 73, 75.
16. *See supra* note 5 and accompanying text.
17. LaGrand case, US Counter-Memorial, *supra* note 9, n. 100 and paras. 73–75; LaGrand case, Public sitting held on Tuesday 14 November 2000 at 10 a.m. at the Peace Palace. Verbatim Record, uncorrected. CR 2000/28, paras. 3.11, 3.15, 3.17, US Pleadings (Theodor Meron), available at http://www.icj-cij.org. It should be recalled that the USA rejected the German view that the Convention conferred rights on individuals.
18. LaGrand case, Public sitting held on Monday 13 November 2000 at 1 p.m. at the Peace Palace. Verbatim Record, uncorrected. CR 2000/27, German Pleadings (Bruno Simma), Chapter VIII, para. 6, available at http://www.icj-cij.org (emphasis added).

> 3.10. It is unclear what Germany means by 'diplomatic protection' in the present case and what the consequences of its invocation are in this context. With respect, there is nothing between this case and espousal of economic claims in *Mavrommatis*.
> […]
> 3.13. […] Suppose that in some cases of breach, a State presents to this Court a diplomatic protection claim asking for compensation for a national, who, it alleges, lost a week's pay because he was detained without being informed of the right to have his consul notified. The new cases presented to the Court by Germany also involve typically rather trivial situations. Acceptance of the German argument would require the Court to adjudicate all such claims, present and future.
> 3.14. The Memorial itself recognizes that the right of Germany to exercise diplomatic protection is founded on international, i.e., on customary law.[19]

On a later occasion, the Counsel for the United States argued that

> 3.3. […] the Vienna Convention deals with consular assistance […] it does not deal with diplomatic protection. Legally, a world of difference exists between the right of the consul to assist an incarcerated national of his country, and the wholly different question whether the State can espouse the claims of its nationals through diplomatic protection. […]
> 3.4. In explaining the relevance of diplomatic protection, *the Memorial stated: 'According to the rules of international law on diplomatic protection, Germany is also entitled to protect its nationals with respect to their right to be informed …' Thus Germany based its right of diplomatic protection on customary law.* I have to recall that this case comes before this Court not under Article 36, paragraph 2, of its Statute, but under Article 36, paragraph 1. Is it not obvious […] that whatever rights Germany has under customary law, they do not fall within the jurisdiction of this Court under the Optional Protocol?[20]

In rebuttal, Germany submitted that

> [diplomatic protection] enters the picture only through the intermediary of the Vienna Convention. What we request this Court to do is to find that Article 36 not only establishes rights and obligations between States but also gives rise to rights of individuals. If one was to follow this view, a dispute arising out of the interpretation of Article 36 necessarily encompasses a dispute about whether or not Germany is entitled to grant its nationals diplomatic protection. Hence, diplomatic protection does not stand alone, isolated, […] but is closely and insolubly linked to the dispute over the correct interpretation of the Convention. In other words, *if, as Germany submits, Article 36 contains individual rights, Germany's right to diplomatic protection will be the necessary corollary*. If, on the other hand, the US view were to prevail, the issue of diplomatic protection would inevitably evaporate. What this proves is that the controversy whether in our case, a right of

19. LaGrand case, CR 2000/28, US Pleadings (Meron), *supra* note 17.
20. LaGrand case, Public sitting held on Friday 17 November 2000 at 2 p.m. at the Peace Palace. Verbatim Record, uncorrected. CR 2000/31, US Pleadings (Theodor Meron), available at http://www.icj-cij.org (emphasis added).

> Germany to diplomatic protection exists, clearly is a 'dispute arising out of the interpretation of the Vienna Convention'.[21]

The Court rejected the US objections and ruled that

> the dispute as to whether paragraph 1*(b)* creates individual rights and whether Germany has standing to assert those rights on behalf of its nationals [does relate to the interpretation and application of the Convention]. These are consequently disputes within the meaning of Article I of the Optional Protocol. Moreover, the Court cannot accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty. Therefore the Court concludes that it has jurisdiction with respect to the whole of Germany's first submission.[22]

The Judgment of the Court makes no further mention of diplomatic protection.

3. A Closer Look at the US Arguments Against Diplomatic Protection

The objections of the United States to the jurisdiction of the ICJ over the German exercise of diplomatic protection comprised the following five major arguments:

(a) Germany confused diplomatic protection with consular protection;
(b) diplomatic protection does not relate to the application and interpretation of the Vienna Convention on Consular Relations;
(c) Germany attempted to base the jurisdiction of the Court on customary international law;
(d) Germany was trying to claim for the same breach under different titles; and
(e) the acceptance of Germany's claim could lead to too many small claims in the docket of the Court.

While these arguments were not attributed equal weight in the pleadings, each formed a significant part of the US attempt to persuade the Court not to assume jurisdiction over German diplomatic protection claims and not to consider diplomatic protection as relevant to the case. Thus it is important to examine each of them in more detail.

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21. LaGrand case, Public sitting held on Thursday 16 November 2000 at 10 a.m. at the Peace Palace. Verbatim Record, uncorrected. CR 2000/30, German Pleadings (Bruno Simma), available at http://www.icj-cij.org, para. 7 (emphasis added).
22. LaGrand case, *supra* note 1, at para. 42.

3.1. The contention that Germany confused diplomatic protection with consular protection

In its modified request to the Court submitted in the Written Memorial Germany asked the ICJ to declare that the US "violated its international legal obligations to Germany, in its own right and *in its right of diplomatic protection of its nationals*, under Articles 5 and 36, paragraph 1," of the VCCR.[23] This formulation, together with the statement that diplomatic protection "enters the picture […] through the intermediary of the Vienna Convention,"[24] gave rise to some confusion. The USA – understandably – interpreted these submissions as an indication that in Germany's view the VCCR provided for a right to exercise diplomatic protection and the Application concerned the violation of this right.[25] Consequently, it argued that the VCCR, dealing with consular assistance, did not establish such right.[26]

It should, however, be noted that the Application identified Article I of Optional Protocol II to the VCCR,[27] rather than the Convention itself, as the basis of the Court's jurisdiction, suggesting that diplomatic protection concerned a dispute over the application of the Convention. This fact indicates that the German claim concerning diplomatic protection aimed at the confirmation by the Court of *a direct and an indirect injury* caused by the USA through its breach of Article 36(1)(b) of the VCCR,[28] rather than at a confirmation of a right to diplomatic protection under the VCCR.

This conclusion gains support from the following argument raised in the German Memorial:

> Germany thus claims that the United States violated the rights of the Applicant in a twofold way: First, the conduct of the United States impeded Germany from exercising its protective functions spelled out in the said provisions and thus directly violated a treaty-based right of Germany, *and second, Germany was injured in the person of its two nationals Karl and Walter LaGrand, whose illegal treatment – with fatal results – it now raises by way of diplomatic protection*.[29]

The German submission immediately preceding the discussion of the law of diplomatic protection confirms this view. It declares that

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23. *See supra* note 8 and accompanying text (emphasis added).
24. LaGrand case, CR 2000/30, German Pleadings (Simma), *supra* note 21, at para. 7.
25. The US Counter-Memorial stated:

    > Germany also claims that, because the LaGrand brothers were not informed of the possibility of consular notification, Germany suffered additional legal injury by being denied its right to provide diplomatic protection in respect of individual legal injuries suffered by the brothers.

    Supra note 9, at para. 73.
26. LaGrand case, CR 2000/31, US Pleadings (Meron), *supra* note 20, at para. 3.3.
27. *Supra* note 5 and accompanying text.
28. LaGrand case, German Memorial, *supra* note 7, at para. 4.86.
29. *Id.*, at para. 3.22 (emphasis added).

> [b]y not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36(1)(b) of the Vienna Convention on Consular Relations, the United States has not only violated its treaty obligations to Germany in the latter's own right, but also injured Germany *indirectly* through its failure to accord to German nationals in the United States the treatment to which they were entitled under international law.[30]

The Court did not address this apparent confusion. It is nevertheless clear, as indicated by the above quotations, that Germany never intended to base its claim on the VCCR only, and it has not contended that the Convention itself regulated the issue of diplomatic protection. The disagreement between the parties was thus merely apparent rather than real. The US interpretation of this aspect of the Convention was not in fact contested by Germany.

3.2. The contention that diplomatic protection does not relate to the application and interpretation of the Vienna Convention on Consular Relations

The Court dealt with this aspect of the US arguments in a straightforward manner. It rejected all US objections concerning Germany's right to exercise diplomatic protection.[31] Unfortunately, however, its reasoning on this issue was not entirely satisfactory.

It does seem logical, and therefore needs no further explanation, that, as the ICJ concluded, the question as to *whether* Germany was entitled to exercise diplomatic protection falls under the dispute settlement clause in Article I of Optional Protocol II.[32] However, there is a significant difference between jurisdiction over a *dispute as to whether* Germany has the right to exercise diplomatic protection under the VCCR, and over *claims brought in the exercise* of diplomatic protection under the Protocol. In the opinion of the author, the latter issue was the matter of contention between the parties in *LaGrand*. Short of explaining where the right of Germany to bring the case before it originated from, the Court merely stated that it

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30. *Id.*, at para. 4.86 (emphasis in original). Similarly, the German conclusion concerning the law of diplomatic protection is that

> [b]oth under international and U.S. domestic law, Art. 36(1)(b) of the Vienna Convention provides for an individual right of foreigners – a right that the United States has violated in the case of the LaGrand brothers. According to the law of diplomatic protection, this conduct is in breach of the right of the State of which the LaGrands were nationals. Therefore, Germany
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> > 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.

Id., at para. 4.120, quoting the Mavrommatis case, *supra* note 10.

31. *See supra* note 22 and accompanying text.
32. *Id. See further supra* note 5 and accompanying text.

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> [could not] accept the contention of the United States that Germany's claim based on the individual rights of the LaGrand brothers is beyond the Court's jurisdiction because diplomatic protection is a concept of customary international law. This fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty.[33]

The argument of the Court – that the fact that diplomatic protection is a concept of customary law does not *prevent* the state from exercising diplomatic protection before it – does not seem to explain sufficiently what *grants* the state of nationality the right to do so. It would therefore have been helpful, with future cases in mind, if the Court had laid down explicitly that as the Convention confers rights on individuals, which in this case were violated by the US, the claim brought by Germany on behalf of the LaGrands for violations of their rights *concerned the application of the VCCR*. Hence it was within the jurisdiction of the Court. The Court should also have stated explicitly that diplomatic protection could be exercised for a violation of any rights granted to individuals under international law, *including* those provided for in the VCCR.

In this context it is interesting to recall the US argument that the *LaGrand* case had nothing to do with the classical type of diplomatic protection for economic injuries, suggesting that the law of diplomatic protection – as presented by the Permanent Court of International Justice ('PCIJ') in the *Mavrommatis* case[34] – relates only to economic damage. It is true that the *Mavrommatis* case concerned financial damage, arising from the cancellation by the British authorities of certain concessions in Palestine which the Ottoman Empire had granted Mavrommatis. However, the US suggestion that the Judgment is limited to financial damages does not stand to scrutiny.

The *Mavrommatis* case was brought to the PCIJ by the Greek Government in the exercise of diplomatic protection of one of its nationals. Greece based its claim on Article 26 of the Mandate for Palestine conferred on His Britannic Majesty, which provided that

> if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the *interpretation and application* of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice […].[35]

As in the *LaGrand* case, the respondent (Great Britain) disputed the jurisdiction of the Court, on the basis that the issue complained of by Greece did not fall under this provision.

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33. *Id.*
34. *Supra* note 10.
35. Cited *in id.*, at 11 (emphasis added).

In the view of Greece, the issue of contention between the parties concerned the interpretation and application of Article 11 which stated that

> [t]he Administration of Palestine […], *subject to any international obligations accepted by the Mandatory*, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. […][36]

The dispute therefore fell within the PCIJ's jurisdiction.

Greece further argued that this formulation covered the obligations assumed by the Mandatory under the 1920 Treaty of Sèvres, Part IX, Section IV, Article 2, which stated that

> [i]n the territories detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers, *Allied nationals and companies controlled by Allied groups of nationals holding concessions* granted before October 29th, 1914, by the Turkish Government or by any Turkish local authority *shall continue in complete enjoyment of their duly acquired rights*, and the Power concerned shall maintain the guarantee granted or shall assign equivalent ones.
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> Nevertheless, any such Power, if it considered that the maintenance of any of these concessions should be contrary to the public interest, shall be entitled […] to buy out such concession or to propose modifications therein; in that event it shall be bound to pay to the concessionaire *equitable compensations* […].[37]

This Article was later replaced by Protocol XII of the 1923 Lausanne Treaty, which similarly confirmed the rights of concessionaires, nationals of the contracting parties, whose concessions were on territories which did not continue to form part of the Ottoman Empire and were entered into before 29 October 1914.[38] Under this Protocol Mavrommatis was entitled to have his concessions falling under the Protocol readapted.

After having found that the dispute fulfilled the other criteria mentioned in Article 26 of the Mandate, the PCIJ proceeded to determine whether

> the Government of Palestine and consequently also the British Government have, since 1921, wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to certain public works.[39]

The Court found that it had jurisdiction over the claim concerning the Jerusalem concessions cancelled by the Mandatory, which fulfilled all conditions set in Protocol XII of the Lausanne Treaty. It concluded that the British authorities violated Mavrommatis' right – conferred by the Protocol – to have this concession readapted and consequently they

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36. Cited *in id.*, at 17 (emphasis added).
37. Cited *in id.*, at 25 (emphases added).
38. The relevant provisions are summarized *in id.*, at 27.
39. *Id.*, at 17.

breached Article 11 of the Mandate. In contrast, the Court found that it lacked jurisdiction over the Jaffa concessions, which were entered into after the date set in Protocol XII.[40]

While this case undeniably deals with economic rights, it is just as clear that it is not limited to such rights. There is nothing in the Judgment to suggest that its applicability should be limited in the way proposed by the US Counsel. The Court merely analyzed relevant treaties and found that they had the cumulative effect of protecting Mavrommatis' rights – in this case those granted under the Jerusalem concessions by the Ottoman Empire, protected by Protocol XII. It is important to stress that the famous formulation by the PCIJ of the right of states to protect their nationals is not limited to economic interests. Instead, the Court stated a more general rule concerning all violations of international law.[41]

The *Mavrommatis* Judgment appears even more relevant for *LaGrand* in the light of the fact that its jurisdictional basis was a treaty provision that established jurisdiction over disputes with regard to the application and interpretation of the treaty. By assuming jurisdiction over at least a part of the claim the PCIJ showed that disputes concerning rights of individuals which are protected by a treaty – in that case even indirectly – may be seen as disputes concerning the application and interpretation of that treaty. This provides a clear precedent for the ICJ Judgment in the *LaGrand* case.

3.3. The contention that Germany sought to base the jurisdiction of the Court on customary international law

It will be recalled that the US argued that Germany's claim of diplomatic protection lacked jurisdictional basis as the USA does not accept the compulsory jurisdiction of the ICJ under Article 36, paragraph 2 of its Statute. The US counsel denied the applicant's submission that the Court had jurisdiction over the claim concerning diplomatic protection under Optional Protocol II to the VCCR as, "[a]ccording to the rules of international law on diplomatic protection,"[42] Germany was entitled to protect its nationals. He implied from this formulation that the applicant intended to base its submission concerning diplomatic protection on customary international law.[43] However, in fact Germany did not propose customary law as a jurisdictional basis.

The irrelevance of customary law as a jurisdictional basis for diplomatic protection before an international court under a dispute settlement clause

40. *Id.*, at 27–28.
41. *Id.*, at 12. *See also* text accompanying note 10 *supra*.
42. LaGrand case, German Memorial, *supra* note 7, at para. 4.87.
43. *See* LaGrand case, US Pleadings (Meron), CR 2000/28, *supra* note 17, at para. 3.14, and CR 2000/31, *supra* note 20, at para. 3.4.

is well demonstrated in the *Mavrommatis* Judgment.[44] *Mavrommatis* was one of the first cases of diplomatic protection before an international court brought under a treaty providing for compulsory jurisdiction over disputes concerning its application and interpretation, which – directly or indirectly – guaranteed individual rights. In this case the PCIJ fully considered the subject of diplomatic protection. The Court's jurisdiction was established by applicable treaties, which jointly guaranteed the rights of the concessionaires (*i.e.*, individuals). The PCIJ did not consider that the fact that the case arose out of violations of rights of an individual protected by international treaties would necessitate reliance on the customary international law of diplomatic protection for its jurisdiction. Protocol XII of the Lausanne Treaty granted Mavrommatis the right to have his Jerusalem concessions readapted. The corresponding obligation of the British authorities was confirmed in Article 11 of the Mandate, which required Britain to respect the international obligations assumed by the Mandatory. Finally the right of Greece to protect these rights through international judicial proceedings was established under Article 26 of the Mandate which provided for compulsory PCIJ adjudication of disputes concerning the interpretation and application of the Mandate. The right of Greece to exercise diplomatic protection before the PCIJ was thus, as can be implied from the judgment, not conditional on the applicability of the customary law of diplomatic protection.[45]

In fact, what the US counsel probably intended to refer to in claiming that Germany wanted to base jurisdiction on international custom is the German reference to the acknowledgement by the PCIJ that the right of a state to protect its nationals when they are injured by other states, in violation of international law, is "an elementary principle of international law."[46] It is true that this principle is often quoted – as, for example, by International Law Commission ('ILC') Special Rapporteur Dugard – as a confirmation of the "rule of customary international law that States have the right to protect their nationals abroad."[47] However, the US suggestion is misleading. It is not claimed in this passage of the *Mavrommatis* Judgment, or in the German pleadings for that matter, that customary international law in itself would grant the ICJ jurisdiction over a dispute. Instead, it appears that the intention of the PCIJ in *Mavrommatis* as well as of the German legal team in citing this statement and referring to the 'international law of diplomatic protection' was to rely on the 'fiction,'

44. *Supra* note 10.
45. Otherwise, the basis of its jurisdiction being purely conventional, the Court should have declined jurisdiction over both concessions. Alternatively, if customary law rules too were sufficient for its jurisdiction, it should also have assumed jurisdiction over the Jaffa concessions which were not covered by Protocol XII of the Lausanne Treaty as they were not entered into force before 29 October 1914.
46. *See supra* note 10 and accompanying text.
47. J. Dugard, First Report on Diplomatic Protection, UN Doc. A/CN.4/506 (7 March 2000), at 13, para. 36, available at http://www.un.org/law/ilc/index.htm.

widely recognized under international law, that an injury to a national which originates from a breach by another state of its obligations under international law is an injury to the state itself.[48]

In respect of this 'fiction' the US counsel was correct. Germany intended to rely on it, and it is not laid down in any – relevant – treaties. However, there is also no codified rule that an injury to diplomatic personnel is a direct injury to the state – as the US nonetheless rightly claimed and relied on in the *Hostages* case[49] –, nor that local remedies need to be exhausted before diplomatic protection can take the form of judicial proceedings – as the US argued in this case.[50] Yet, these notions are accepted as part of international law and frequently relied upon in international judicial proceedings, even in cases brought under treaty provisions.

Moreover, the PCIJ did not consider the fact that this 'fiction' was not codified in a treaty applicable to the case to be sufficient to deny jurisdiction in *Mavrommatis*.[51] Similarly, the ICJ did not find customary international law relevant for its jurisdiction in the *LaGrand* case and assumed jurisdiction over Germany's claim of diplomatic protection on the sole basis of Article I of Optional Protocol II to the VCCR.[52] This appears to suggest that certain principles relating to the enforcement of rights, including this 'fiction,' do not need to be laid down in treaties relevant for the case before they can be relied on before international courts.

3.4. The contention that Germany was trying to claim for the same breach on different grounds[53]

The Court did not specifically address this argument. It should, however, be stressed, that various sources have confirmed the right of the state of nationality to bring claims for violations of its own general or national interests. This should be possible even while exercising diplomatic protection on behalf of a national in respect of the same breach of interna-

48. *Id.*, at 11–16, paras. 33-46.
49. Case concerning United States Diplomatic and Consular Staff in Tehran (United States *v.* Iran), Judgment, 1980 ICJ Rep. 6, at para. 8(c). This case was also brought under Art. 36(1) of the Statute of the ICJ.
50. *See* J. Dugard, *Second Report on Diplomatic Protection*, UN Doc. A/CN.4/514 (28 February 2001), at 2–3, paras. 1–4, available at http://www.un.org/law/ilc/index.htm; LaGrand case, US Pleadings (Meron), CR 2000/28, *supra* note 17, at paras. 3.3, 3.21–3.42.
51. *Supra* note 10.
52. LaGrand case, *supra* note 1, at para. 42.
53. At times the US legal team used this argument against the German claim that by its failure to inform the LaGrands of their rights the Arizona authorities violated not only Art. 36(1)(b), but also subparas. (a) and (c). This Section addresses only the contention that by complaining of direct and indirect injury Germany intended to bring as many claims as possible for the same breach.

tional law.[54] This possibility is explicitly acknowledged in the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), which provides that the exhaustion of local remedies rule is inapplicable if

> the State of the alien's nationality, which has espoused his claim, is asserting on its own behalf a separate and preponderant claim for direct injury to it arising out of the same wrongful conduct.[55]

The notion that one act might violate the rights of a state and those of its nationals at the same time is also recognized in the *Third Restatement*.[56]

Views are, however, not uniform on this issue. Some argued that in such instances only one claim could be brought.[57] Yet, the ICJ concluded that Article 36(1)(b) "spells out the obligations the receiving State has towards the *detained person* and the *sending State*"[58] and it assumed "jurisdiction with respect to the *whole* of Germany's first submission."[59] As this submission concerned US violations of "its international legal obligations to Germany, *in its own right and in its right of diplomatic protection of its nationals*,"[60] the Judgment appears to confirm the view that claims may be brought simultaneously for direct and indirect injury arising out of the same international wrong.

3.5. The contention that the acceptance of Germany's claim may lead to too many small claims in the docket of the Court

According to information published by the Death Penalty Information Center as of 6 February 2002 there were 119 foreign nationals (of thirty-three different nationalities) on death row in eighteen states of the United States. Of these, forty defendants' right to consular notification is claimed to have been violated, whereas consular notification has taken place in a

54. Dugard, *supra* note 47, Addendum, Art. 9(3), at 2; para. 29, at 16; Dugard, *supra* note 50, at paras. 23–27 and citations therein. *See also*, F.V. García Amador, *Third Report on State Responsibility*, UN Doc. A/CN.4/111 (2 January 1958), 1958 YILC, Vol. II, 47, at 64–66; Art. 22 *in* F.V. García Amador, *Sixth Report on State Responsibility*, UN Doc. A/CN.4/134 (26 Januuary 1961) and Add. 1 (26 December 1961), 1961 YILC, Vol. II, 1, at 49.
55. Part IV, at para. 208(c)).
56. American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States (1988), Part II, para. 902, cmt. k, at 348.
57. *See*, *e.g.*, T. Meron, *The Incidence of the Rule of Exhaustion of Local Remedies*, 35 BYIL 83, at 86 (1959).
58. LaGrand case, *supra* note 1, at para. 77 (emphasis added).
59. *Id.*, at para. 42 (emphasis added).
60. LaGrand case, German Memorial, *supra* note 7, Vol. I, at para. 7.02 (emphasis added).

timely manner in only four instances.[61] Even after the executions of Karl and Walter LaGrand, capital punishment was carried out on four foreign nationals in the USA who had complained of the lack of consular notification on appeal or in clemency proceedings. One further execution is stayed awaiting the outcome of a last-minute appeal.[62]

These figures concern only cases where death sentences were handed down. The VCCR, however deals with nationals of contracting states arrested or detained in a foreign country, whether facing capital punishment or not. Moreover, whereas US compliance with the VCCR has been extensively monitored, and cases of violations have been widely publicized, evidence suggests that the record is not substantially different in other countries.[63]

The US contention might thus have been correct. By allowing Germany's application, the Court might have opened its doors to a multitude of claims brought on behalf of individuals. However, the argument fails to recog-

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61. According to a report published by the Death Penalty Information Center

> [e]ven applying the less stringent definition of prompt notification used by the State Department, only 4 cases of complete compliance with Article 36 requirements have been identified to date, out of 132 total reported death sentences (including those executed, reversed on appeal or released).

Foreign Nationals and the Death Penalty in the United States, Information material, available at http://www.deathpenaltyinfo.org/forgeignnatl.html#REPORTED DEATH-SENTENCED (last visited 26 February 2002).

62. Alvaro Calamvro (Philippines) in Nevada was executed on 5 April 1999, Joseph Stanley Faulder (Canada) in Texas on 17 June 1999, Miguel Angel Flores (Mexico) in Texas on 9 November 2000 and Sahib al-Mosawi (Iraq) in Oklahoma on 6 December 2001. *Id.* The execution of Gerardo Valdez Maltos (Mexico) in Oklahoma was last scheduled for 30 August 2001. However, on 10 September 2001,

> the Oklahoma Court of Criminal Appeals granted an indefinite stay of execution […], citing the novel and complex issues of international law raised by his last-minute appeal [after] Valdez's attorneys had filed a habeas corpus petition based on the recent binding judgement of the International Court of Justice in the LaGrand Case.

Id., *Oklahoma Governor Denies Clemency to Mexican National. See also* Amnesty International, *United States of America: A Time for Action – Protecting the Consular Rights of Foreign Nationals Facing the Death Penalty*, AI Index AMR 51/106/2001, August 2001, available at http://www.web.amnesty.org/ai.nsf/recent/AMR511062001.

63. According to a study conducted in The Netherlands,

> [a]bout 80% of the [consular] posts are informed of the arrest of a Dutch national by the local authorities in conformity with the international agreements. Half of these posts find that the notification by the local authorities does not happen in a timely manner.
>
> In 50% of cases [there are 1880 Dutch nationals in foreign prisons known to the Dutch authorities!] a complaint is made towards the local authorities for late notification.

(The author's translation. The original Dutch text is available at http://www.rekenkamer.nl/nl/download/Gedetineerdenzorg%20buitenland.pdf, at 20–21.) According to an Amnesty International report on Saudi Arabia, "[t]he governments of foreign nationals executed in Saudi Arabia are also not always informed." (Saudi Arabia. *Execution of Nigerian Men and Women*, AI Index MDE 23/49/00, available at http://www.amnesty.org/ailib/aipub/2000/MDE/523049000.htm.)

nize that states are usually reluctant to exercise diplomatic protection, especially in the form of international judicial proceedings. It is thus likely that most similar cases will continue to be dealt with in domestic courts – provided there is a possibility of appeal – or through diplomatic channels. Moreover, states are often assumed to be rational actors. Would a rational actor be likely to spend great amounts of money to claim satisfaction for a minor damage, such as

> asking for compensation for a national, who, it alleges, lost a week's pay because he was detained without being informed of the right to have his consul notified?[64]

Even though the *LaGrand* Judgment might increase the potential for abuse of the institution of diplomatic protection, the ICJ is no doubt competent to see through such applications and deal with them in an appropriate manner. The Court has not voiced concern about petty cases filling its docket, nor did it indicate any distinction between 'trivial' and 'non-trivial' cases with regard to its jurisdiction.[65] Moreover, it is arguable that with most controversial questions settled by the *LaGrand* Judgment, cases concerning diplomatic protection for violations of Article 36 of the VCCR will be routine exercises for the ICJ.

4. CONCLUSION

While the ICJ ruling in *LaGrand* that the provisional measures ordered by the Court are binding is potentially one of the most important decisions in its jurisprudence, another very important segment of the Judgment, namely the Court's pronouncement on diplomatic protection is open to criticism. The Court did decide the question posed to it in a clear manner but it did not address severe flaws in the pleadings of the parties, mainly the respondent. As the Court did not explicitly deny those arguments, there is a danger that they may be relied on as precedents in future proceedings.

Despite this weakness, the value of the decision from the perspective of diplomatic protection is not to be underestimated. Very significantly, the Court clarified – at least by implication – for the first time in legal history that the right of states to exercise diplomatic protection in the *Mavrommatis* sense is not limited to economic damages but concerns the protection of any rights granted to individuals by international law. Moreover, it can be implied from the Judgment that a treaty provision con-

64. LaGrand case, US Pleadings (Meron), CR 2000/28, *supra* note 17, at para. 3.13.
65. Very controversially, the US counsel referred to this case as 'trivial.' *Id.* Sentence of death is not a trivial matter, not even in the context of diplomatic protection. Indeed, a case concerning protection from the death penalty imposed in proceedings characterized by violations of the rights of the accused appears less trivial than diplomatic protection for any economic injury.

ferring jurisdiction on the ICJ over disputes arising out of the interpretation and application of the treaty which grants individuals certain rights is a sufficient jurisdictional basis between the parties concerning the violation of the rights protected by the treaty. The Judgment further suggests that a state may bring two separate claims arising out of the violation of the same right, one in its own right and another in the exercise of diplomatic protection.

These findings are important for individuals who have been sentenced to lengthy prison terms or to death in violation of their right to have the consular authorities of their states of nationality informed of their arrest, or whose other non-economic rights have been violated by a foreign country. It is hoped that states will handle this newly confirmed freedom to protect their nationals in such cases in a responsible manner, and that the ruling of the Court will have the effect of enhanced state compliance with the provisions of the VCCR and other treaties which confer rights on individuals.