LEGAL CONDITIONS FOR THE EXERCISE OF THE RIGHT OF DIPLOMATIC AND CONSULAR PROTECTION

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ABSTRACT

This article examines the legal conditions governing the exercise of the right of diplomatic and consular protection under contemporary international law. The study draws on international conventions, decisions of international judicial bodies, scholarly doctrine, and state practice. In this work, it was analyzed the key preconditions – nationality of claims, exhaustion of local remedies, and the conduct of the injured person, through the lens of the IRAC (Issue, Rule, Analysis, Conclusion) methodology. Particular attention is paid to the interrelationship between diplomatic and consular protection and their mutual delimitation. The article concludes that despite the codification of relevant norms in the ILC Draft Articles of 2006, a number of fundamental questions remain debatable, necessitating further development of international legal regulation.

I. Introduction (Issue)

Diplomatic and consular protection are among the oldest institutions of international law, tracing their origins to the writings of Emer de Vattel, who as early as the eighteenth century advanced the proposition that a State is entitled to protect its nationals abroad where their rights are violated by a foreign State. Under his doctrine, an injury caused to a national is regarded as an injury caused to the State of his nationality [1.71]. This thesis formed the foundation of what Edwin Borchard would subsequently term "diplomatic protection", emphasizing its public-law character and its distinction from mere consular assistance [2.29]

The question of legal conditions for the exercise of these institutions acquired particular urgency in the twentieth century in connection with the growth of international migration, globalization, and the increasing number of investment disputes. It was then that the need arose for a systematic codification of the relevant rules. The United Nations International Law Commission (ILC) undertook such a codification in 2006 by adopting the Draft Articles on Diplomatic Protection with Commentaries – a document which, notwithstanding its non-binding character, has become an essential reference point for States and international judicial bodies [3].

The present article addresses the following problem: what are the legal conditions whose fulfilment entitles a State to exercise diplomatic and consular protection on behalf of its nationals? In other words, what distinguishes the lawful exercise of this right from arbitrary interference in the internal affairs of a foreign State? The IRAC method makes it possible to formulate the legal problem in structured manner, to set out the applicable rules, to conduct their analysis, and to formulate conclusions.

Ii. Review of the literatur

The doctrine of diplomatic protection has received extensive treatment in both classical scholarship and contemporary research. The classical definition was formulated by the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case (1924), according to which diplomatic protection is the right of a State to take up the cause of one of its nationals whose rights have been violated by a foreign State in breach of international law [4].

Contemporary doctrines relies primarily on the seminal work of Chittaranjan Amerasinghe ("Diplomatic Protection", Oxford University Press, 2008), which examines the conditions of admissibility of diplomatic claims, the role of nationality, and the principle of exhaustion of local remedies [5]. John Dugard, who served as ILC Special Rapporteur, argued in a series of annual reports for the need to distinguish diplomatic protection as a right of the State from consular assistance as a right of the individual[6.506].

Annemarieke Vermeer-Kunzli, in her doctoral research, called into question the traditional view that individuals do not hold the right to diplomatic protection and argued that States are under a duty to exercise protection in certain circumstances [7]. Christian Amerasinghe, for his part, conducted a detailed analysis of the Barcelona Traction case (1970), which exerted a decisive influence on the understanding of the conditions for the protection of shareholders [8.65].

Consular protection has traditionally been addressed within the framework of commentaries on the Vienna Convention on Diplomatic Relations of 1963. Of particular note is Eileen Denza's commentary on the Vienna Convention on Diplomatic Relations (4th ed., 2016), which analyses the interrelationship between diplomatic and consular functions [9].

Iii. Research methods

The present study employs a combination of method characteristic of international legal scholarship. The formal-legal method was applied in the analysis of the texts of international treaties, in particular the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the ILC Draft Articles on Diplomatic Protection of 2006.

The comparative-legal method was employed in juxtaposing the conditions for the exercise of diplomatic protection as established in the practice of various States with the codified rules. The historical method allowed for the tracing of the evolution of the institution from Vattel's doctrine to contemporary approaches. The systemic method was applied to establish the interrelationship between diplomatic and consular protection as constituent elements of a unified system of international legal protection of individuals abroad.

The empirical foundation of the study consists of judicial practice, primarily decisions of the International Court of Justice and the Permanent Court of International Justice, in which the

key legal positions on these matters have been formulated. The IRAC method has been applied as the structural principle of the exposition, ensuring the logical coherence of the analysis.

Iv. Legal framework (rule)

The basic legal framework for diplomatic protection is set out in the ILC Draft Articles on Diplomatic Protection of 2006. Article 1 of that instrument defines diplomatic protection as the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act to a natural or legal person that is a national of the former State [10]. Although the document is not legally binding, its norms are widely applied as reflecting customary international law.

The Vienna Convention on Diplomatic Relation of 1061, in Article 3, lists among the functions of diplomatic mission the protection in the receiving State of the interests of the sending State and of its nationals, within the limits permitted by international law [11]. The Vienna Convention on Consular Relations of 1963, in Article 5, includes the rendering of assistance to nationals of the sending State among consular functions, while Article 36 enshrines the right of the consul to communicate with detained nationals [12].

The fundamental distinction between diplomatic and consular protection lies in the fact that the former is a discretionary right of the State, whereas consular assistance, in particular that provided under Article 36 of the Vienna Convention of 1963, gives rise to specific obligations with respect to detained foreign nationals. This distinction was confirmed by the ICJ in the LaGrand case (2001) [13.466].

V. Analysis of the conditions for the exercise of protection (analysis)

5.1. The Nationality Condition (Nationality of Claims)

The first and most essential condition for the exercise of diplomatic protection is the existence of a nationality link between the claimant State and the injured person. The nationality principle requires that the individual hold the nationality of the claimant State both at the time of the injury and the date of the formal presentation of the claim. This requirement is enshrined in Article 5 of the ILC Draft Articles.

The foundational precedent on this question is the ICJ's decision in the Nottebohm case (1955), in which the Court denied Liechtenstein the standing to present a claim on behalf of Friedrich Nottebohm, who had been naturalized shortly before the outbreak of the Second World War. The Court held that for nationality to be recognized as opposable in international relations, there must exist a genuine connection (genuine link) between the person and the State. Although this doctrine applies primarily to cases of naturalization and does not constitute a universal principle, it has exerted considerable influence on the development of international practice.

The situation is different with regard to the protection of legal persons. In the Barcelona Traction case (1970), the ICJ held that the right to exercise diplomatic protection belongs to the State of incorporation of the company, and not to the State of nationality of the shareholders, which substantially limits the possibilities for the protection of foreign investors [14.3]. A number of scholars, including Borchard, have criticized this rigorous approach as failing to reflect the realities of the international economy [15.186].

5.2. Exhaustion of Local Remedies

The second mandatory condition is that the injured person shall have exhausted all available local remedies in the respondent State. This principle is codified in Articles 14-16 of

the ILC Draft Articles and constitutes a norm of customary international law, as confirmed in the Interhandel case (1959) [16.6].

The rationale of this principle lies in respect for the sovereignty of the respondent state: before recourse is had to international means of protection, the injured person must afford that State an opportunity to redress the alleged wrong through its own legal mechanisms. Nevertheless, the principle admits of a number of exceptions: exhaustion is not required where local remedies are ineffective or unavailable for objective reasons, where the State itself has breached an obligation to provide adequate protection, or where the requirement has been waived by treaty.

In the Panevezys-Saldutiskis Railway case (1939), the PCIJ confirmed that the principle of exhaustion of local remedies is one of the well-established rules of customary international law [17.18]. This means that a State which has not availed of national procedures is not entitled to seek international protection even where the violation of its interests is manifest.

5.3. Conduct of the Injured Person ("Clean Hands")

The third condition, which is of a more contested character, is the "clean hands" principle (ex injuria jus non oritur), under which a State may decline to exercise protection, or a court may reject a claim, where the injured person has itself acted unlawfully. This principle is reflected in Article 39 of the ILC Draft Articles on State Responsibility [18].

Amerasinghe and other authoritative scholars take the view that "clean hands" doctrine does not constitute an independent legal condition, but rather represents one of the factors taken into account in determining the extent of responsibility [19.98]. State practice likewise does not provide an unequivocal answer to this question.

5.4. Consular Protection: Special Condition

Consular protection differs from diplomatic protection in a number of fundamental respects. Unlike the latter, it does not require the full exhaustion of local remedies and is exercised primarily in cases of detention or arrest of a national. Article 36 (1)(b) of the Vienna Convention of 1963 obliges the authorities of the receiving State to notify the consular post without delay upon the arrest or detention of foreign national.

In the Avena case (2004), the ICJ found that the United States had breached the aforementioned notification obligation, thereby violating the rights both of the detained Mexican nationals and of Mexico as the State of their nationality [20.12]. The Court thus confirmed that Article 36 gives a rise to individual rights, and not merely to inner-State obligations.

According to Doehring, it is precisely in the context of consular protection that the tendency towards the subject of the individual in international law manifests itself most clearly: the national appears not merely as an object of protection, but as the holder of an independent right to receive consular assistance [21]. This distinguishes consular protection substantially from diplomatic protection, which remains to this day the exclusive prerogative of the State.

5.5. The Discretionary Character of the Right to Protection

An essential characteristic of diplomatic protection is its discretionary nature: the State is free to decide whether or not to exercise protection. Article 2 of the ILC Draft Articles expressly states that a State "may", but is not obliged to exercise diplomatic protection. Nevertheless, Article 19 of the Draft Articles recommends that States give due consideration to the possibility of exercising protection, particularly where significant harm has been suffered.

Vermeer-Kunzli, in her doctoral research, argues for the existence in international law of an incipient duty on the part of the State to protect its nationals in situations of gross human rights violations, invoking precedents from international judicial practice and the principle of due diligence [22.210]. This approach has not yet received general recognition, but represents a significant trend in the doctrine.

In the ELSI case (1989), the ICJ considered the question of the lawfulness of the exercise of diplomatic protection on behalf of shareholders of an American corporation [23.15]. The Court did not call into question the right to protection itself, but confirmed that its exercise is conditional upon compliance with both substantive and procedural conditions.

VI. Conclusion

The research analysis permits the following conclusions to be drawn. The right of diplomatic protection constitutes a discretionary right of the State to present an international claim in defense of its nationals who have been subjected to internationally wrongful acts by a foreign State. Its exercise is subject to three key conditions: the existence of a genuine nationality link between the injured person and the claimant State; the exhaustion by the injured person of all available and effective local remedies; and the absence of unlawful conduct on the part of the injured person that could affect the scope of protection.

Consular protection, for its part, possesses an independent legal character: it is normatively enshrined in the Vienna Convention of 1963, and to the extent it concerns the notification of detained persons, it gives rise to obligations rather than merely rights. The precedents established in the La Grand and Avena cases have definitively confirmed the subjective character of the rights provided for by the Article 36 of the Convention.

At the same time, a number of questions remain debatable. The doctrine of the genuine nationality link requires clarification in its application to cases of multiple nationality. The scope of exceptions to the principle of exhaustion of local remedies has not been unified. Finally, the question of whether a State bears duty to exercise diplomatic protection in cases of gross human rights violations requires further elaboration, both in the doctrine and in State practice.

Thus, notwithstanding the considerable progress in codification achieved through the work of the UN International Law Commission, the institutions of diplomatic and consular protection continue to evolve, reflecting the general tendency towards greater individualization of international law.

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