Diplomatic and Consular Protection of Persons with Dual Citizenship Abroad

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Abstract: The article is devoted to one of the least studied problems in the domestic science of international law, namely diplomatic and consular protection of state's citizens abroad, especially in cases where the latter are endowed with dual and sometimes multiple citizenship. This problem involves a close intertwining of both political and legal norms used in the implementation of this field.

The author distinguishes between diplomatic and consular protection, highlights common features and peculiarities of each of them. Diplomatic measures are clearly outlined, covering all possible procedures by which one state informs another of its claims (protest, negotiations, investigation, etc.). The choice of means of diplomatic protection is influenced by the nature of the rights of the person who has suffered damage from a foreign state; the amount of damage caused, both for the person and for the state of his/her citizenship, as well as the risks of aggravation or deterioration of relations between states. Some legal aspects of citizenship of the European Union and the specifics of protection of the rights and interests of its citizens according to the "delegated" protection and the "governing state" are highlighted.

Keywords: *consular protection, diplomatic protection, effective citizenship, dual citizenship, citizenship of the European Union.*

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1. Introduction

Institutions of diplomatic and consular protection were formed evolutionarily in connection with the expansion and deepening of relations between states in the political, trade, cultural, social and other spheres. However, it is necessary to distinguish between diplomatic protection itself, on the one hand, and diplomatic and consular actions aimed at promoting and protecting citizens, as provided for in the 1961 Vienna Convention on Diplomatic Relations (United Nations, 1961) and the 1963 Vienna Convention on Consular Relations (United Nations, 1963).

In the era of the functioning of classical international law, the main means of protecting foreigners was the use by states of the practice of diplomatic protection, which was seen as a means of realizing the responsibility of the state. And already at the beginning of the last century, diplomatic protection was directed mainly at the investment rights and economic interests of foreigners and was carried out mainly by strong investor states, which led to numerous abuses.

In the second half of the twentieth century, diplomatic protection began to give way to alternative mechanisms for the protection of foreigners, who, according to scholars, are less questionable as to the abuse by powerful states (Condovelli, 2003). It should be borne in mind that diplomatic protection has been formulated in such a way that the violation of a citizen's rights abroad is considered to be detrimental to his or her national state.

It should be noted that with the development of human rights law the idea that diplomatic protection is somewhat outdated began to dominate, and therefore, the right of the state to protect its right when it acts on behalf of its citizen is a somewhat outdated fiction, which must be given up when the national interests of the state are really affected.

Despite the existing theoretical and practical debate on this issue, it is still traditional to think that the state of citizenship acts on its own behalf, as the harm caused to its citizen is at the same time causing damage to the state itself. And this right of the state was confirmed not only in the international legal doctrine (Geck, 1992; Joseph, 1969; Leigh, 1971, p. 453), but also in judicial practice (Nottebohm, 1955).

This institution is present in national law. In particular, part 3 of Art. 25 of the Constitution of Ukraine stipulates that "Ukraine guarantees care and protection of its citizens who are outside it" (Constitution of Ukraine, 1996). However, this article of the Constitution does not specify whether such actions fall under diplomatic protection or consular assistance. However, this provision obliges our state to provide adequate protection to its citizens who are in the territory of other

states, if there are good grounds to claim that the authorities of these states violate the rights of these citizens, enshrined in the law of the host state or arising from international treaties or customs. Therefore, it can be argued that such protection will always be initiated by the Ukrainian state, regardless of whether such a request for protection is received from a person whose rights have been violated by the authorities of the host state or not.

According to international practice, violating international law on the treatment of foreigners, the receiving state does not always agree that it should be accountable to the state of their citizenship (for example, if the victim has dual citizenship).

Based on the above, it should be noted that states in practice seek to avoid the following two extremes, namely:

- a) leave their citizens without any protection;
- b) provide diplomatic protection to its citizens until national remedies of legal protection are exhausted and without taking into account the requirement of "continuity" of citizenship.

2. Theoretical Background

Current trends in diplomatic and consular protection indicate a significant expansion of their scope and limits of application. First of all, in the context of proliferation of international law, in the current environment, foreign relations authorities are entrusted with complex tasks to protect the rights and interests of persons who are citizens of the state, and especially persons with dual and multiple citizenship and citizens of the European Union. In addition, there is a growing number of cases in which diplomatic protection is essential and sometimes the only means of resolving a difficult situation.

In the context of deepening bilateral diplomatic and consular relations, the issue of developing an effective mechanism for protecting the rights of certain groups of individuals abroad is of particular importance.

Modern international legal doctrine does not contain a common approach to the definition of diplomatic and consular protection. Thus, according to I. Lukashuk, diplomatic protection is a procedure "by which a state protects the rights of its citizens in case of violation of international law by another state, in which they could not achieve the restoration of their rights, exhausting local remedies" (Lukashuk, 2000, p. 201). This definition highlights such important elements as international legal action by another state and the exhaustion of local remedies. This

means that the state of citizenship should not prematurely interfere in the process of protecting its citizens abroad.

There are three scientific concepts of diplomatic protection, existing in the science of international law: classical, modern and mixed (Wyler, 1990, pp. 9-11). The main difference between them is the question of who has the right to claim damages caused by a foreign state to a legal or private person, or to the state itself, which protects their interests.

Each of these theories has its own explanation, which can be accepted or not, but in its activities, the International Court of Justice adheres to the classical concept, the main content of which is that the state itself is considered a "victim" of damage to its citizens by foreign state, and therefore only it receives the right to exercise diplomatic protection.

International human rights law does not currently enshrine a citizen's right to diplomatic protection, although in national law this right is present both in the constitutions of some states and in other legislative acts. And as mentioned above, Article 25 of the Constitution of Ukraine essentially obliges to provide protection to its citizens who are on the territory of other states, provided that there is a reason to believe that the authorities of these states systematically or grossly violate the rights of these citizens, enshrined in the legislation of the host state or follow from the content of international treaties and customs.

Thus, it can be argued that such actions can be taken at the initiative of the Ukrainian state, regardless of whether such requests are received from persons whose rights have been violated. But as the special rapporteur of the UN Commission on International Law M. Benoit notes, despite the fact that such an obligation is "mentioned in the texts of a number of constitutions, in fact it is largely a moral rather than a legal obligation, as the intentions of the state of citizenship cause political considerations and the degree of expediency depending on the nature of diplomatic relations" (Bennouna, 1998, pp. 13-14) between these states.

In modern international legal literature, the terms "diplomatic protection", "diplomatic protection and consular assistance", "consular protection", "consular assistance", "diplomatic and consular protection", "intercession", etc. are often used, and accordingly their clear definition does not exist. In addition, these concepts are used in both broad and narrow meanings and depend on the purpose pursued by the state, namely: the protection of already violated rights or the implementation of preventive assistance. This issue has not been addressed in the Draft Articles of the International Law Commission on Diplomatic Protection (2006), which states that

diplomatic protection consists in calling a state, through diplomatic means or other means of peaceful settlement, to the responsibility of another state for harm, caused by the international legal actions of this state to a private or legal person who is a citizen or has the nationality of this state, in order to implement such responsibility (Draft Articles on Diplomatic Protection with commentaries 2006: 26). This definition was supported by UN General Assembly Resolution A/RES/62/6 (2007) (Diplomatic protection, 2007).

In all circumstances, the substantive burden of all terms in the broadest sense covers the exercise by foreign officials of the protection of the rights and interests of their citizens, including the provision of legal assistance by diplomatic missions, namely consular posts and consular institutions. And this protection is an indisputable right, which is due to the peculiarities of state sovereignty, and is seen as a discretionary function of the state.

3. Argument of the paper

With the expansion and complication of international relations, the institute of diplomatic and consular protection gradually began to apply the rules of human rights law as a kind of international standard in combination with the national regime. This ultimately led to the appropriate content of the concept "diplomatic protection", which was confirmed by the International Court of Justice: "limited to violations of minimum standards of treatment of foreigners, and subsequently expanded and began to include, *inter alia*, guaranteed human rights "(paragraph 30) (Case concerning Ahmadou Sadio Diallo Republic of Guinea v. Democratic Republic of the Congo, 24 May 2007, p. 599).

Compared to the protection of human rights provided through universal (International Covenant on Civil and Political Rights, 1966) and regional mechanisms (Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols № 11 and № 14, 1950), diplomatic and consular protection is seen as a more effective means by which respondent states take a more balanced approach than individual complaints to international and domestic institutions who control and monitor the process of observance of human rights. Therefore, given the fact that states remain the main subjects of international legal relations, it is logical that their demands for violations of the rights of their citizens abroad remain the most effective way to protect human rights. And even despite the significant expansion and improvement in the structure of international human rights law, the diplomatic method of protection is likely to maintain its position for a long time, as its

advantages are more obvious and outweigh its disadvantages (Przetacznik, 1971, p. 113), which sometimes occur in practice.

The existence of citizenship is a necessary condition for the protection of such persons by the state of citizenship.

Citizenship as a legal category indicates the affiliation of a person to the relevant state, which covers the system of legal relations between the individual and the state, which are manifested in the existence of mutual rights and obligations. Therefore, the institution of citizenship combines political, legal, cultural, social, psychological, moral and ethical relations and ties that exist between the individual and the state.

In essence, citizenship outlines the relevant framework (limits) of the state's jurisdiction in relations with a person who is abroad. From a legal point of view, this fact is the legal basis for obtaining the necessary protection from the state, as well as the necessary motive for the state to exercise its powers to protect its rights and legitimate interests.

It should be noted that the norms of international law, both in the past and today, do not establish an obligation for a state to exercise diplomatic protection in the interests of its citizens. In addition, the manner in which a state may exercise such protection is at its discretion, and the person in need of such protection unfortunately does not have international rights to sue in this regard.

While in national law the category of "citizenship" applies only to private persons, in international law this term can be used to define the legal status not only of private persons but also of legal persons. For example, in the Consular Convention between Ukraine and Romania of 03.09.1992 in Article 1, paragraph 10, the term "citizen" means "any private or legal person belonging to the accrediting State or the host State in accordance with the laws of those States" (Collection of current international agreements of Ukraine, 2006). It should be noted that the use of such a term for both individuals and legal entities is very rare in bilateral consular conventions, although in practice this approach greatly facilitates the state's efforts to protect its "citizens".

The International Court of Justice has established a standard for determining the nationality of a private person in the *Nottebohm* case (Nottebohm, 1955, para. 4), and noted that "the mere fact of recognizing a person's citizenship by a state in accordance with its domestic law is not enough" because it is also necessary to establish between the state and its citizen (Nottebohm, 1955, para. 22). The main result in *Nottebohm* case was that the court, in determining the nationality of a

person, indicated that such actions were not the exclusive prerogative of the state and that nationality could be recognized as valid for the purposes of international law only if effective. This position of the International Court of Justice is crucial for international law in general, and for the institution of diplomatic and consular protection in particular.

When exercising diplomatic and consular protection, states may resort to both diplomatic measures and judicial proceedings. In particular, diplomatic measures cover all possible legal procedures by which one state informs another state of its claims and concerns, which include protests, requests for negotiations and investigations aimed at resolving the dispute. Defining the wide range of measures available to the state in exercising its right to diplomatic protection, one of the rapporteurs of the UN Commission on International Law on Diplomatic Protection stressed that "the state in principle retains the right to choose means to protect its citizens subject to international obligations and preventive norms of international law. In particular, it cannot resort to the threat or use of force in the implementation of diplomatic protection" (Bennouna, 1998: 15). This means that diplomatic protection must be exclusively peaceful and comply with the principles and norms concerning peaceful means of resolving international disputes (Article 33 of the UN Charter). However, the state is free to choose measures and means of protection of its citizens abroad, but within the current legislation and agreements with the host state.

At the same time, it should be emphasized that the choice of means of diplomatic protection may be influenced by: the nature of the rights of the person who has suffered harm from a foreign state; the degree of severity of the damage caused both to the person and to the state of their citizenship; risks of aggravation or deterioration of relations between states, etc.

Special problems can be caused by a situation in which a person who is a citizen of two or more states needs diplomatic protection, as there are certain restrictions on this when a person who has been arrested, detained or otherwise restricted applies to the consul.

The accrediting state must take into account the actions of the consul in relation to its national, depending on whether that person is registered with the consular post to which they have applied for protection. As noted above, there may be some doubts about the application of the principle of the effectiveness of citizenship.

The principle of effectiveness does not cause significant difficulties in ascertaining the nationality of a person deprived of liberty and not a national of the receiving state. Much more complicated is the situation in which a person has dual

citizenship, is in the territory of the respective state and local authorities have notified the consulate of only one of his/her states of citizenship, and therefore another state may consider that such actions violate the requirements of Art. 36 of the Vienna Convention on Consular Relations (United Nations, 1963). Of course, a state that does not want to be accused of incorrect or biased assessment of citizenship, as well as non-compliance with the provisions of Art. 36 of this Convention, must, at the request of the detained or arrested foreign national, send a confirmation to all consuls of the states of citizenship owned by such a foreigner.

Bilateral consular conventions concluded by Ukraine with all neighboring states set out in detail the obligations of the contracting parties to notify of detention, arrest, imprisonment and visits of a consul to the person concerned. Thus, Article 12 § 1 of the Consular Convention between Ukraine and Romania provides that "the competent authorities of the receiving State shall immediately, but not later than three days, notify the relevant consular officer of the accrediting State of the detention, arrest or any other restriction of liberty of the citizen of the accrediting state" (Collection of current international agreements of Ukraine, 2006). Furthermore, Article 12 § 2 of that Convention lays down a specific period within which the competent authorities of the receiving state shall immediately, but not later than four days after the detention, arrest or any other restriction on the freedom of a national of the accrediting state, exercise the right of a consular officer to visit or deal with such a citizen, including providing him with the necessary legal assistance, if he does not object.

Obviously, it can be noted that in legal relations in which a foreigner uses the services of consuls of two states at the same time, such a situation can be considered, both theoretically and practically, as an excessively privileged person compared to other persons deprived of liberty in similar circumstances. In this case, a person who has dual or multiple citizenship must choose the possibility of applying to a state of which he/she has citizenship and with which he/she maintains effective communication.

In cases where the receiving state maintains bilateral consular relations with the two states of the nationality of the person deprived of liberty or detained, he/she may be guided in his/her assessment of the effectiveness of the relevant nationality by his/her will, etiquette and choice. In making such a choice, the receiving state uses not only the rules of international law, but also political expediency, morality and the rules of diplomatic etiquette. It is sufficient that the authorities of the receiving state, after receiving information on the dual or multiple nationality of the foreigner, inform

him/her of the right to consular protection and ask him/her which consul of his/her nationality must be informed of the fact of detention or imprisonment.

It should be noted here that according to the principle of sovereign equality, both states, whose citizenship is held by a certain person, extend the same (equal) jurisdiction over such a person. However, if one state seeks to protect such a person from the wrongful acts of another state of which that person is also a national, such protection may be refused precisely on the ground that the person is a national of that latter state.

The issue of citizens of the European Union and their diplomatic protection on the territory of third countries deserves special attention. In the international legal literature, this problem is called "delegated" protection. First of all, it should be emphasized here that the introduction of European Union citizenship should be seen as complementary to national citizenship, and in no way alters it or confers dual citizenship.

The peculiarities of diplomatic and consular protection of EU citizens are due to the specific character of the European Union itself, which was enshrined in the original version of the EU Treaty. In essence, this protection covers not only the additional support of citizens outside the EU, but also the assertion of the identity of the European Union itself in the international arena. The Lisbon Treaty has somewhat expanded the EU's competence in the field of diplomatic protection, according to which Article 23 of the Treaty on the Functioning of the EU stipulates that "every citizen of the Union in a third country without a representative of the state he or she is a citizen of, has the right to the protection of the diplomatic and consular authorities of any Member State of the Union on the same terms as nationals of that State".

To implement this norm, in 2015 the EU Council Directive 2015/637 on measures of coordination and cooperation in providing consular protection to citizens whose EU member state is not represented in third countries was adopted. This Directive regulates the actions of diplomatic missions and consular posts in the event of a request for protection (Article 10). In particular, they are obliged to immediately contact the Ministry of Foreign Affairs of the state whose citizen is requesting protection, or, if possible, the relevant embassy or consulate of that state, and provide all necessary information. Such actions also apply to persons with dual or multiple citizenship.

4. Conclusions

In modern conditions, the institution of diplomatic and consular protection is constantly evolving and improving, taking into account existing trends of fragmentation of international law. The problem of protection of foreign nationals, and especially those with dual or multiple citizenship, has always been in the center of attention of international scholars, who summarize the existing practice on this issue and try to inform diplomatic and consular agencies of acceptable approaches to this problem. Unfortunately, to date there is no single codified international legal act that would comprehensively address this problem, although much has already been done in this direction by the UN International Law Commission. Certain legal issues of diplomatic and consular protection are regulated by customary law, contract law, national law and extensive practice of judicial institutions. A special place in this issue is occupied by the provisions of bilateral consular conventions, which detail and expand the possibilities of protection beyond those provided by the Vienna Conventions on Diplomatic and Consular Relations (Vienna Convention on Diplomatic Relations, 1961; Vienna Convention on Consular Relations, 1963).

The principle of effectiveness is a major factor in the process of providing diplomatic and consular protection for persons with dual or multiple citizenship. The choice of priority rights of one state of citizenship largely depends on the host state, and therefore the assessment of the state concerned in its choice in practice is always problematic.

Of particular difficulty is the situation in which a person who is detained, arrested or in any way restricted by the host state is at the same time a citizen with dual citizenship not only of the accrediting state but also of the host state.

Diplomatic and consular protection of persons with dual citizenship within the EU is conditioned by the specific character of the European Union itself. This protection mechanism expresses the idea not only of additional support for citizens outside the EU, but also of the implementation of the principle of solidarity and mutual concern of Member States for their citizens.

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