Papers of BAS
Humanities and Social Sciences
Vol. 7, 2020, No. 1

The right to diplomatic protection: Individual human rights vs state's political interest at international level

Diana Kovatcheva

Abstract. The article aims to describe the legal nature of the diplomatic protection of individuals whose rights are violated by a foreign state. It reveals some of the typical features of the diplomatic protection through the constant practice of international courts such as the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).

The author seeks to identify some new tendencies in the traditional assumption that the right to diplomatic protection belongs to the state. It refers to the recent practice of international courts, to the development of the international human rights law and the new status of the individual in the international law. It explores the chances for individual right of diplomatic protection in the contemporary international law, the limits in the discretion of the state and the right to compensation.

The article tackles the issue about the positive obligation to diplomatic protection according to the European Court of Human Rights (ECtHR) based on examples from its jurisprudence.

Keywords: diplomatic protection, European Court of Human Rights, International Court of Justice, individual, human rights

Introduction

It is acknowledged today that the individual is a subject of both national and international law and his/her human rights can be violated by the national state or by any other state where he/she lives or makes business.

In a situation where individual's human rights are violated by a territorial state the individual can seek judicial protection by the national court and after exhaustion of all legal remedies for protection, he/she can approach an international court (if any) to defend his/her infringed rights.

In order to obtain such protection, the individual is not always dependent on the support from his/her national state because of his/her international legal status of a secondary subject of international law (Vidin 199, 149-152; Muleshko-

va 1991, 6). He/she has procedural capacity and the right to bring actions before international courts or conventional human rights bodies.

However, the limited number of international mechanisms available to individuals for protection of their rights and their limited international procedural capacity (especially the capacity to bring actions before international courts) force them, in some specific situations, to look for cooperation by national state.

What is diplomatic protection?

The diplomatic protection (in the strict sense of the word) can be described as an alternative and indirect way of protection of human rights of individuals violated by a foreign state (Caflisch 2013, 28-32; Flauss (ed.) 2003, 73; Flauss 2005, 383-422).

The diplomatic protection is available to individuals located in a foreign state which has obligations in different fields of life, including trade, sailing, commerce, and protection of human rights or property rights. These obligations can derive from international treaties, customary international law or general principles of law.

Some scholars define the diplomatic protection as *ultimate remedium* for the individual whose rights have been violated (Zieck 2001, 209-218).

Legal nature of the diplomatic protection

The lack of international legal norm regulating the right to diplomatic protection of individuals in case of rights violated by a state does not encumber the opportunity to reveal its legal nature.

The diplomatic protection of individuals has been examined by international courts since the early 1920s and their jurisprudence is a valuable source of information about the development of its concept for the diplomatic protection.

One of the main conclusions from the review of the judgements of the international courts is that the approach they take towards the diplomatic protection is quite outdated and is not in line with the developments in the legal status of the individual which took place after the Second World War.

One of the first judgements which concerned this matter was the case *Mavrommatis (Greece v. Great Britain case) adjudicated by the Permanent Court of International Justice (PCIJ) in 1924*.

The initial problem referred to a private legal dispute between an individual and a state but gradually grew into a dispute between two states - Greece and Great Britain. In 1921, the Greek state approached the Permanent Court of International Justice (PCIJ) on behalf of the Greek citizen Mavrommatis who was first granted a concession for construction in Palestine and then deprived of it by means of its cancellation.

In its judgement, the PCIJ established the so-called "formula for diplomatic protection". According to it the state is considered the only applicant even if it is bringing an action before an international tribunal on behalf of a citizen for violation of his/her individual rights.

In the *Mavrommatis case*, the PCIJ outlined three significant features of the diplomatic protection. From a contemporary point of view the conclusions of the *Mavrommatis case* might look quite out of date but it was adjudicated some 100 years ago, in a period when the individual human rights had not yet evolved to reach the significance they have today.

In the first place, according to this case the diplomatic protection is considered a legal fiction, based on the fact of violated rights of the state and on its right to claim for respect of the international law vis-à-vis its citizens.

In the second place, the diplomatic protection is viewed as a discretionary power of the state to exercise its substantive and procedural rights. This means that the state is in position to "filter" citizens' requests for submission of their complaints at international level and gets engaged only with some of them, for example, the most serious violations. In fact, the state acts only in cases which suit its political interests.

In the third place, according to this judgement, as far as the diplomatic protection is concerned, the individual is not treated as subject of the international law and has no legal status (Touzé 2007, 56, para. 30, 36, 100; Anzilotti 2012, 32-43; Borchard 1915, 182-184)[1].

The jurisprudence of the United Nations (UN) International Court of Justice (ICJ) in the field of diplomatic protection of individuals is not quite different from the one of the PCIJ and has remained unchanged for many years. The judgements of the ICJ are in support of the generally accepted view that the diplomatic protection is a right of the state.

Despite of the restrictive character of the diplomatic protection it could be concluded that since the states are in a position to choose whether to further promote the case of violation of the rights of their citizens, individual rights are defendable before an international court. The only hindrance is that in some cases, like in the case of the ICJ, individuals are not accepted as applicants.

That is why it is not surprising that the conditions under which an individual can benefit from diplomatic protection can also be regarded as limitations of his/her rights (Leys 2016, 5-6). All the conditions are based on the concept that the right to diplomatic protection is a right of the state and not a right of the individual.

First, in order to receive diplomatic protection an individual should be represented by a state (Parlett 2011, 87). According to the consultative opinion of the ICJ *Reparation for Injuries Suffered in the Service of the United Nations since 1948*, the protection can be provided either by the national state or by another state.

According to the famous judgement *Barcelona Traction*, human rights are obligations *erga omnes*, unlike the diplomatic protection, which concerns only the obligations of one state towards another state (Leys 2016, 5-6; Pinto 2002, 513-535; Gaja 2003, 63).

[1] According to Anzilotti, the state protects its citizens because they are considered to be its property.

Second, the right to diplomatic protection can be applied only against another state.

And last, in order to benefit from the diplomatic protection, **the individual should have exhausted all internal means for protection**, provided for in the national law of the state, where the violation is committed.

From all this being said, it becomes quite clear that as far as the diplomatic protection is concerned, **the individual's rights are limited by the discretionary powers of the state.**

On the one hand, an individual cannot force the state to take up his/her case and to defend his/her rights before an international court.

On the other hand, once the state has been engaged with the case, the individual does not have any power to further control this process, for example, to withdraw the application before the international court (Leys 2016, 8).

Thus, although the individual has the legal status of a secondary subject of international law and is entitled to international protection of his/her human rights, in some cases, in order to obtain such protection, he/she still needs assistance by a state in order to fully enjoy his/her rights.

Over the last decade, the UN International Law Commission has made serious efforts to update and codify the regulations related to diplomatic protection of individuals. One of the major proposals was to revise the old fiction according to which, in the context of the diplomatic protection, the state defends its own rights when it acts on behalf of an individual whose rights have been violated by another state.

The draft is progressing quite slowly due to the unwillingness of states to acknowledge an individual right to diplomatic protection. The main concern is that such a right could infringe on state's sovereignty and it will bear the obligation to submit every single complaint for violation of human rights by another state before an international court.

Protection of individual human rights vs state's interest at international level

The state is entitled to decide whether to get engaged with the protection of the violated rights of the individual by bringing a claim at international level. Traditionally, according to the *fiction of Vatel*, the diplomatic protection is regarded as right of the state and not as an obligation towards its national. This fiction was confirmed by the *Mavrommartis judgement in 1924* and prevailed for a long time. Some 50 years later, the ICJ emphasized on the discretionary nature of the diplomatic protection in the *Barcelona Traction case*[2].

It was only at the end of the 1990s when the ICJ deviated from its constant practice with the judgement on the *LaGrand case*. According to this judgement, the violation of the rights of the individual is regarded along with a violation

[2] See *Barcelona Traction, Light and Power Co., Ltd., Belgium v. Spain*, 1970, ICJ, para. 79.

of the rights of the state and the concept of the state to bring an action before the international court is seen as act of representation towards the individual in question[3].

The contemporary concept for the legal status of the individual in international law requires a serious change. The view that the physical person is an object of international law is incompatible with the developments in the legal personality of the individual after the Second World War. According to it, the individual is no longer regarded as object of international law because he/she has rights and obligations deriving from international law. The individual is a subject of all human rights regulated by the international treaties, he/she can be a subject of criminal responsibility at international level, and he/she can defend his/her rights before international courts and file complaints before conventional bodies.

There are many arguments in favour of the view that the individual plays a significant role in the process of the provision of diplomatic protection on his/her violated rights.

The violated right belongs to the individual.

The application before the ICJ is triggered upon explicit request by the individual towards the state.

The claim of the state is based on the relationship with the individual and his/her citizenship. It should be mentioned that this bond is not absolute because it can be abolished at any time and because the claim of the infringed person can be raised by a foreign state as well.

As far as the violated right is concerned, the individual is free to decide whether to seek support from the state in order to find redress. If the individual chooses to remain passive and not to raise the issue, the state cannot initiate a claim before an international court unless in defense of its own violated rights.

Another point of interest is the issue about the compensation for the violated rights. On the one hand, according to the practice of the ICJ, the amount of the compensation is determined based on the damage, suffered by the individual. This was confirmed in the judgement *Factory at Chorzów case*[4] and was considered a rule of the customary law (Dubouis 1978, 624; Bollecker-Stern 1973, 98). However, according to the practice of the ICJ (*Barcelona Traction case*) the compensation is always due to the state. As a result, the infringed individual is left without compensation for the damage suffered by him and the state which has exercised this right on the basis of a fiction receives a compensation for damages which it has not actually suffered.

Thus, it happens that the individual is infringed twice: once by a foreign state which violated his/her rights and then by his/her national state which deprived him/her from his/her compensation.

The individual could try to bring a recourse claim before the national court against the state which has received the compensation. In theoretical terms, this

[3] See *LaGrand, Germany v. USA*, ICJ, reports 2011, para. 65.

[4] According to the case *Factory at Chorzow*, "The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State".

claim could also be addressed to an international court in case the individual is entitled to appear before it. In both cases the outcome of such application is difficult to predict.

In this respect, the practice is contradictory. The greater part of the international jurisdictions claims that the infringed person does not have the right to pretend for the compensation, received by the state. However, the European Court of Human Rights (ECtHR) takes the opinion that in the context of the European Convention of Human Rights (ECHR), it is the individual who is directly or indirectly affected by the violation of a right provided for in the Convention. According to the ECHR, even when states are parties to a case for violated rights of an individual, the compensation which is adjudicated is in favour of the person whose rights have been infringed (Peters 2016, 394-395)[5].

The recommendations made by the special rapporteur Dugard in the Seventh report of the UN International Law Commission are in the same direction (Dugard 2006, 103). According to the first recommendation, when defining the amount of the claim the state should consult the individual and consider all damages from the violation on his/her rights.

In addition, the state should transfer the entire amount of the compensation or at least a relevant part of it, to the individual under diplomatic protection for the violation he/she has suffered. In this case, it is appropriate for the state to only keep the expenses related to the claim (Dugard 2006, 103).

Could the right to diplomatic protection be a subject of appeal before the national court?

An important question related to the right to diplomatic protection is whether it can be appealed before a national court. The analysis of the practices in the different states indicates that there are significant differences, although such cases exist (Pergantis 2006, 101).

A recent judgement of the Court of Appeal in London (*Abbasi case*) claims that although being discretionary, the decision of the government to refuse diplomatic protection can be subject to judicial control from the point of view of its rational and the legitimate expectations of the citizens.

The court adjudicated that although the state is not under the obligation to provide diplomatic protection to individual for violation of rights by another state, it should at least consider the request in a serious and genuine manner. The refusal to consider the provision of such protection can be looked upon as a violation itself.

The court of Switzerland shares the same view and allows administrative control over the validity of the refusal of provision of diplomatic protection to

[5] See case Grand Chamber, *Cyprus v. Turkey*, No. 25781/94, 2014, para. 46. See also *Beaumartin v. France*, Application No. 15287/89, judgement of 24 November 1994, Ser. A, No. 296-B, 19 EHRR, 1994, 485 et seq., para. 28.; *Catherine Abraini Leschi and Others v. France,* Application No. 37505/97, decision on admissibility of 22 April 1998.

individuals. This conclusion is based on Art. 6, para. 1 from the ECHR, which can be applied despite the fact that there is no substantial right which can be considered an object of protection (as for example is the right to diplomatic protection).

The positive obligation to diplomatic protection according to the ECtHR

According to the practice of the ECtHR, the right to diplomatic protection is regarded in the context of the protection of violated human rights. However, the ECtHR does not recognize an explicit right to diplomatic protection as an international human right of the individual towards his/her state[6].

Nevertheless, the recent practice of the ECtHR gives rise to considering the existence of such an obligation of the national state under some specific circumstances. An example is the existence of duty to defend the state, coming from the general obligation for human rights protection provided for in Art. 1 from the ECHR (Peters 2016, 40). In particular, some scholars think that the practice of the ECtHR accepts the existence of a "positive obligation for protection with extraterritorial scope, which could lead to obligation of procedural nature" (Flauss 2005, 383-422).

According to the ECtHR, in such specific situations the customary international law and the international treaties do recognize the extraterritorial exercise of jurisdiction on behalf of the state. For example, in the *Bankovich case*, the ECtHR assumed that it was an illustration for extraterritorial scope of application which could be included in the notion for jurisdiction according to Art. 1 of the ECHR[7].

In a similar way, the judgement *Al-Skeini and Others v. the UK*[8] considered that Great Britain was under the obligation to respect human rights in part of the territory of Iraq. Due to the exceptional circumstances and the fact that Great Britain seized the power over the territory of Southeast Iraq in order to maintain the security in the period between 1 May 2003 and 28 June 2004, it exercised jurisdiction on this territory in the sense of Art. 1 (the obligation to respect human rights), with reference to civilians, killed in the operations of British soldiers in Barash.

A similar approach was taken in the judgement on the case *Chiragov and Others v. Armenia*, according to which Armenia exercises effective control over the territory of Nagorno-Karabakh and the surrounding territory[9]. Another example is the *Manoilescu et Dobrescu case*, in which the ECtHR interpreted the case

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[6] See EComHR Bertrand Russell Peace Foundation Ltd v. UK No. 7597/76 of 2 May 1978; EComHR G. Kapas v. UK No 12822/87 of 9 December 1987; EComHR Dobberstein v. Germany No. 250 of 12 April 1966; EcomHR A. Leschi et al. v. France No. 37505/97 of 22 April 1998.

[7] See the case *Bankovic and Others v. Belgium* Case, para. 73 and para. 74.

[8] See the case *Al-Skeini and Others v. the UK*, 7 July 2011.

[9] Se the case *Chiragov and Others v. Armenia,* 16 June 2015, Grand Chamber - judgement on the merits.

Ilaşcu and Others v. Moldova and Russia as follows: *"However, even in the absence of effective control over the Transdniestrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention*" (para. 331)[10].

In view of this development in the practice of the ECtHR, some scholars share their concern that the acknowledgement of a right to diplomatic protection can bring tension among states (Pergantis 2006, 393). Today the traditional political tension is deepened by the negative consequences of terrorism, migrant crisis, distrust and insecurity among states, including the member-states of the European Union (Marin 2019, 177).

These conclusions of the ECtHR can be found in some other judgements as well. For example, in the case *Hassan v. United Kingdom,* the Court adjudicated that the international humanitarian law and the ECHR should be applied simultaneously during active military activities and occupations and thus nothing hampers the application of the jurisdiction in the sense of Art. 1 for activities undertaken during military actions under exceptional circumstances.

A similar conclusion can be found in the case *Pisari v. the Republic of Moldova and Russia*[11]. In its judgement the ECtHR took the opinion that when members of military personnel of the state-party to the ECHR are located on the territory of another state which is not party to the Convention, the extraordinary territorial force which they use could spread the jurisdiction of the state in such a way that it can cover the persons, affected by the activities of the combatants.

Conclusion

In conclusion, despite the efforts of the UN there is still no legal norm regulating the right to diplomatic protection of the individual. Nowadays, the right to diplomatic protection is still considered a right belonging to the state and the chances for an obligation in this respect are still debated only in theoretical terms.

At this stage, the only change can be found in the practice of the national courts which tends to limit the discretion of the state and forces the government to consider in a serious and genuine manner the request for diplomatic protection of human rights violated by another state.

The general obligation of the state to protect the rights of its citizens is regulated by the national law. Although strictly internal in nature, it could be argued that this right has some international implications as far as human rights are concerned.

The evaluation of the legal nature of the right to diplomatic protection should be made in the context of its relation with the human rights and their

[10] See case *Manoilescu et Dobrescu c. Roumanie et Russie*, Application No. 60861/00, ECtHR Ser. A, decision of 3 March 2005.

[11] See case *Pisari v. the Republic of Moldova and Russia*, 20 April 2015.

violations, although for the moment the right to diplomatic protection cannot be treated as a separate individual right (Peters 2016, 405). However, the link with the human rights is obvious: a citizen could usually seek diplomatic protection in view of protection of his/her basic human rights.

In this sense, the impact of the international law of human rights can lead to a process of "humanization" of the right to diplomatic protection due to the changes it brought to the legal status of both the individual and the states.

Although the right to diplomatic protection has political connotations when applied it should observe the rule of law principle which does not allow violation of rights or unlawful behaviour even in the context of the exercise of discretionary powers (Peters 2016, 405).

It can be accepted that the human rights of the individual limit the discretion of the state. This conclusion gains even more legitimacy in the context of serious violations of international legal norms such as the *jus cogens* norms.

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Assoc. Prof. Diana Kovatcheva, PhD
Ombudsman of the Republic of Bulgaria
Member of the Most Excellent Order of the British Empire (MBE)
Institute for Legal Studies
Bulgarian Academy of Science
4 Serdika Str.
1000 Sofia, Bulgaria
Email: dkovatcheva@abv.bg