
NOTES AND REFLECTIONS

NOTES ON THE DISTINCTION BETWEEN DIPLOMATIC PROTECTION AND CONSULAR PROTECTION¹

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In common parlance, what is called diplomatic protection means, in most cases, a consular protection action. The generic notion of diplomatic protection is used to define a variety of possible forms of protection of the national abroad. This paper seeks to reflect on what lies behind the recurrent inaccuracy or error in the application of correct semantics to the type of protection of nationals abroad. Using the hypothetical deductive method, we find that in theory diplomatic and consular protection are clearly differentiated by two main axes. In practice, however, these two institutes overlap and confuse each other frequently. The solution to the problem referred to would not be based on doubt about the theory, but on the practical performance of the international actors themselves. The lack of a precise distinction between the two concepts of protection would occur more by the combination of factors resulting from the exercise of protection, than of a hesitation about theory.

Under international law, the state may exercise two types of protection for the benefit of its nationals: diplomatic protection and consular protection. Nevertheless, semantic confusion occurs in the application of these two concepts. What is called in common language diplomatic protection means, in most cases, a consular protection action. In other words, the generic notion of diplomatic protection is used to define a variety of possible forms of the national's protection abroad.

In theory, though, the distinction between diplomatic protection and consular protection is clear. They are differentiated by two main axes:

- 1) the preventive nature of consular protection as opposed to the corrective nature of diplomatic protection;
- 2) by contrast at the representation level. Therefore, while diplomatic protection is intended to correct or repair damage, consular protection is preventive in nature and is primarily intended to prevent the national from being the victim of an illicit act.

¹ Note translated by Hugo Alves.



It is clear, therefore, that in consular protection it is not necessary to exhaust internal resources, since it is a matter of "technical" assistance provided to nationals in difficulty before the commission of an illicit act².

The other important distinction concerns the level of representation, since diplomatic protection is exercised by representatives of the interests of the injured state before the government of the offending state, while consular protection directly represents the interests of the individual in the face of the central organs of the host state. This means that in consular protection there is no political representation of the state of nationality. Such protection is initially aimed at protecting the rights of the individual and therefore requires his or her consent. On the other hand, the disinterest of the individual or even his or her express opposition to the demand, does not prevent the exercise of diplomatic protection since it is an action of interest to his or her state of nationality³.

In a synthetic way, CAFLISCH clarifies that diplomatic protection is a formal intervention that is based on law and is intended for the execution of international responsibility. And that consular protection consists of assistance provided by consular posts abroad to nationals in distress. For them, they are two different mechanisms, even when consular protection action leads to the exercise of diplomatic protection. This happens quite often since consular protection is revealed as a simpler and less formal means of state action⁴.

Indeed, diplomatic protection is rarer than consular protection. The violation must be exceptionally serious for the state to agree to turn it into an action of international responsibility. To this extent, the fact that generates the action of diplomatic protection, unlike consular protection, must have a dimension or an international interest of its own, capable of motivating the will to intervene of the state of nationality. Yet, this motivation depends not only on the legal order, but also on political opportunity. After all, in diplomatic protection the state exercises a right considered discretionary⁵.

Nonetheless, despite the clear distinction between diplomatic protection and consular protection, in practice these two institutions overlap and confuse each other frequently. In the LaGrand case, for example, the United States of America tried to convince the International Court of Justice (ICJ) that Germany was confusing consular protection with diplomatic protection. In fact, the basis of the case was the exercise of consular protection whereas the mechanism used to trigger the court is that of diplomatic protection. The ICJ, however, accepted the complaint as an exercise of diplomatic protection and considered that both Germany and its nationals were harmed by the violation of the right of consular protection. On the other hand, in the Avena case the court decided otherwise and ruled that the injury to Article 36 of the Vienna Convention

² Cf. Article 55 of the Vienna Convention on Consular Relations of 1963; SHAW, Malcom N., *International Law*, *Op. cit.*, p.688; TAXIL, Bérangère, *L'Individu, entre Ordre Interne et Ordre International: Recherches sur la Personnalité Juridique Internationale.*, p.493; DUGARD, John, *Septième Rapport sur la Protection Diplomatique*, pp.7-8, 11.

³ Cf. Paragraph 1 of Article 36 of the Vienna Convention on Consular Relations of 1963; TAXIL, Bérangère. *L'Individu, entre Ordre Interne et Ordre International: Recherches sur la Personnalité Juridique Internationale.*, *Op. cit.*, p.493; DUGARD, John, *Septième Rapport sur la Protection Diplomatique*, *op.cit.*, pp.7-8 and 11.

⁴ CAFLISCH, Lucius, *La Pratique Suisse de la Protection Diplomatique*, p.77.

⁵ PANCRACIO, Jean-Paul et al., *Communication sur la Protection Consulaire et Diplomatique: Concurrence ou Complémentarité?*, p.80. See also the trial of the Case Concerning Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, par.79.



on Consular Relations caused a direct injury to Mexico. For the ICJ, it was no longer necessary to deal with the Mexican complaint concerning the violation of the right of consular protection under the different angle of diplomatic protection⁶.

Another practical example of confusion between the concepts of diplomatic protection and consular protection stems from the Article 23 of the Treaty on the Functioning of the European Union (TFEU). Such article provides that all Union citizens are protected on foreign territory by the diplomatic and consular authorities of any member state. The European norm, however, ignores the fundamental differences that exist between these two mechanisms, particularly regarding the conditions for the exercise of diplomatic protection⁷.

The confusion is such that a significant part of the doctrine argues that the Article 23 of the TFEU illustrates a case of consular protection and not diplomatic protection. For them, only the amiable nature of consular protection would be able to justify the concept of cooperation proposed in the TFEU. Moreover, the notion of EU citizenship would also not satisfy the nationality requirement in diplomatic protection, because it is mediated by the nationality of one of the EU members states⁸.

Between diplomatic protection and consular protection, we still find one last identification problem related to international practice. The latter has largely shown that states react with a dual purpose: a restorative one, with the aim of constituting the satisfaction of injury, and another of a preventive nature, aiming to guarantee the right to life and property of nationals abroad. CONDORELLI thus developed the concept of preventive diplomatic protection. He believes that the state's preventive actions against the threat or the risk of violation of the international norm should also be part of a wider notion of diplomatic protection. This notion would therefore include the traditional concept of diplomatic protection, which he calls *stricto sensu* diplomatic protection and which represents the reaction of the injured state against an illicit fact already perpetrated with the concept of consular protection, which he prefers to call preventive diplomatic protection, but which is the state's reaction against risk⁹.

This sense of the wider interpretation of diplomatic protection was not, however, welcomed by the 2006 International Law Commission draft Article 1 on diplomatic protection. Its comment clarifies that although it is not necessarily contentious, diplomatic protection is an action after the illicit fact. That is, in TAXIL'S OPINION, a

⁶ *Case of LaGrand (Allemagne c. Etats-Unis d'Amérique)*, CIJ Recueil 2001, par. 77; *Avena et autres Ressortissants Mexicains (Mexique c. Etats-Unis d'Amérique)*, CIJ Recueil 2004, par.40. See also DEEN-RACSMÁNY, Zsuzanna, *Diplomatic Protection and the LaGrand Case*, p.93; ROBERT, Eric, *La Protection Consulaire des Nationaux en Péril? Les Ordonnances en Indication de Mesures Conservatoires redues par la Cour Internationale de Justice dans les Affaires Bread (Paraguay c. États-Unis) et LaGrand (Allemagne c. États-Unis)*, pp.413 et ss; DUPUY, Pierre-Marie, *La Protection Consulaire sous les Feux de la Jurisprudence Internationale*, p.39 et ss.

⁷ Cf. Article 23 of TFEU. See commentary by Moura Ramos on the topic *in* PORTO, Manuel Lopes; ANASTÁCIO, Gonçalo, *Treaty of Lisbon-Annotated and Commented*, pp.262-263.

⁸ Cf. STEIN, Torsten, *Interim Report on "Diplomatic Protection Under the European Union Treaty"*, pp.36-37; PANCRACIO, Jean-Paul et al., *Communication sur la Protection Consulaire et Diplomatique: Concurrence or Complémentarité?*, *op. cit.*, p.83.

⁹ CONDORELLI, Luigi, *La Protection Diplomatique et l'Évolution de son Domaine d'Application Actuelle*, pp.7-8.



logical attitude because the draft articles on diplomatic protection must be understood in strong connection with the text on international responsibility of the state¹⁰.

For the ILC, therefore, diplomatic protection consists in the invocation by a state, through diplomatic action or other means of peaceful settlement, of the international responsibility of another state in the face of injury caused by an internationally wrongful act committed against a subject of nationality of the first state¹¹.

The draft articles of the ILC thus preserve the distinction between diplomatic action and legal action as means of exercising diplomatic protection. The latter, moreover, is part of the expression "other means of peaceful settlement", which covers all lawful forms of dispute disposition, ranging from negotiation, mediation and conciliation to arbitration and judicial arrangement. On the other hand, the term "diplomatic action" extends to all lawful procedures used by states to inform each other of their views and concerns, including protesting and requesting investigation of the dispute¹².

International caselaw goes in that sense and allows diplomatic protection to be admissible only if based on the invocation of the injured interest. Even in the paradigmatic *Barcelona Traction* case, the ICJ clearly stated that there is only international responsibility if the law has been harmed and not only affected¹³.

The Vienna Convention on Diplomatic Relations of 1961 still provides that diplomatic missions have legal competence for the exercise of consular protection. In accordance with paragraph 2 of its article 3, no provision of this Convention may be construed as preventing the exercise of consular functions by the diplomatic mission¹⁴.

Consular agents may also intervene to support the central authorities of the sending state or the diplomatic mission itself in verifying facts on the ground and even in resolving a case of diplomatic protection. Nevertheless, diplomatic action itself needs to be maintained at the level of the central services of the sending state, as it reveals a legal dimension particularly demarcated by a dual interest. It is undeniable that all diplomatic action meets the interests of the individual injured party, but also the interest of his or her state of nationality as a subject of international law.

It is worth mentioning, however, that consular protection is still unfolding in the figure of consular assistance. According to Article 5(a) and (e) of the Vienna Convention on Consular Relations of 1963, protection and assistance are two different consular functions. Whereas in consular protection there is an activity provided by the consular office on a regular and customary basis, consular assistance is provided on an occasional basis, with the objective of rendering assistance to individuals or legal entities of the sending state.

For all this, consular protection activity means the following types of interventions: support for an imprisoned national, action against discriminatory treatment of nationals in the host state, technical support in a judicial procedure in which the national is a victim or perpetrator, as well as the protection of the property interests of the national

¹⁰ TAXIL, Bérangère, *L'Individu, entre l'Ordre Interne et l'Ordre International: Recherches sur la Personnalité Juridique Internationale*, *Op.cit.*, p.496.

¹¹ Cf. Article 1 of the 2006 ILC Draft Articles on Diplomatic Protection.

¹² *Projet d'Articles sur la Protection Diplomatique et Commentaires y Relatifs (2006)*, p. 27. See also DUGARD, John, *Septième Rapport sur la Protection Diplomatique*, *op.cit.* p.7.

¹³ Cf. *Barcelona Traction, Light and Power Company, Limited*, arrêt, C.I.J. Recueil 1970. par.46.

¹⁴ Cf. Article 3 of the Vienna Convention on Diplomatic Relations, 1961.



threatened by a national decision, expropriation, or requisition. On the other hand, consular assistance is the aid provided to indigent or hospitalized nationals, logistical and material assistance in case of repatriation or evacuation, as well as support in the repatriation of sick citizens and in the transfer of remains, among other hypotheses. Whereas consular assistance only requires a situation of disgrace or need of the national, consular protection is motivated by the possibility of violation of domestic or international law¹⁵.

Having clarified the distinction between diplomatic and consular protection in theory, it remains to be understood why such confusion persists in international practice. What would be behind the recurrent inaccuracy or error in the application of correct semantics to the type of protection of the national abroad, if the theory on the subject is clear and right?

The solution to the problem, though, would not be based on uncertainty or doubt about the theory, but in the practical performance of the very international actors in charge of that protection themselves. We believe that the lack of a precise distinction between the two concepts of protection is due more to a combination of factors arising from the exercise of protection, than to a hesitation about the theory. Among the various factors arising from the exercise of protection, we can list at least three, which we consider decisive in fostering confusion between the concepts of consular and diplomatic protection: 1) in international practice, institutional actors are often the same for consular protection action and for diplomatic protection action; 2) diplomatic and consular agents do not usually use a strict language that allows to infallibly dissociate the two protection modalities; and 3) both diplomatic protection and consular protection are even intended to protect the rights and interests of their nationals in the territory of a foreign state.

Finally, in the same sense that we maintain that the reason for the confusion between the concepts of consular and diplomatic protection lies in the actions of the international agents themselves, we also argue that the solution to such inaccuracy will necessarily come from the practice of these same agents. They are, after all, the most interested in clarifying the current limits and possible advances that are observed in the protection of nationals abroad.

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¹⁵ Cf. Article 5 of the Vienna Convention on Consular Relations of 1963; PANCRACIO, Jean-Paul *et al*. *Communication sur la Protection Consulaire et Diplomatique: Concurrence or Complémentarité? Op. cit.* p.79; BROTONS, Antonio Remiro *et al*, *Derecho Internacional*, p.500; LICERAS, Juan Soroeta. *La Protección de la Persona Humana en Derecho internacional*, p.26; RIDRUEJO, José Antonio Pastor, *Derecho Internacional Público y Organizaciones Internacionales*, p.246.



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