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Protecting (unrepresented) EU citizens in third countries – The intertwining roles of the EU and its Member States

Madalina Bianca Moraru

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Abstract

This thesis explores the development of European Union's model of protecting its citizens in the world, demonstrating it to be a unique and complex mixture of EU internal and external policies and instruments that is unlike any other international, regional, or domestic model of protecting individuals abroad. The thesis will critically assess the three main stages of development of the EU model until the present day.

The first stage started in 1993, when the Maastricht Treaty introduced an EU citizenship right to equal protection abroad and this continued for the following decade. It will be shown that during this period the EU model of protecting the Union citizens abroad consisted of a purely horizontal form of cooperation among the Member States that materialised in a *sui generis* type of international agreement that has restricted the efficiency of the EU citizenship right, due to the Member States' reluctance to lose their State prerogatives in favour of the EU.

The second stage of development started in 2004 when a number of international disasters affecting EU citizens in third countries led the Member States to accept cooperation with EU institutions and external policy instruments for the purpose of complementing their capacity to secure the effective protection of unrepresented Union citizens abroad.

The third stage started with the entry into force of the Lisbon Treaty, which conferred an unprecedented power to an international organisation (the EU) to exercise State-like consular protection functions directly with respect to the Union citizens in the world.

The thesis will offer a critical assessment of two decades of application of the least-researched EU citizenship right (to consular and diplomatic protection), its nexus with other EU external relations policies and its implementation by the Member States. It will show the added value of the EU model of protecting citizens abroad for the EU citizens, the Member States and the Union, while also making policy recommendations addressing the shortcomings in its current implementation. The thesis will demonstrate that, in spite of the scholarly critiques of the incompatibility of the Union model with public international law, the international community has widely accepted the Union model which has indeed become highly attractive to other regional organisations.

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Abbreviations

| | |
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| AJIL | American Journal of International Law |
| Art | Article |
| CMLRev | Common Market Law Review |
| EC | European Communities |
| CJEU | Court of Justice of the European Union |
| ECR | European Court Report |
| Ed | Edition |
| EJIL | European Journal of International Law |
| ELR | European Law Review |
| EP | European Parliament |
| EU | European Union |
| GATS | General Agreement on Trade in Services |
| Hous. J. Int'l L. | Houston Journal of International Law |
| Ibid. | Ibidem |
| ICJ | International Court of Justice |
| ILC | International Law Commission |
| ILO | International Labour Organization |
| IPR | Intellectual Property Rights |
| ICLQ | International and Comparative Law Quarterly |
| MJ | Maastricht Journal of European and Comparative law |

| | |
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| MJIEL | Manchester Journal of International Economic Law |
| Mich. J. Int'l L | Michigan Journal of International Law |
| MS | Member State |
| NCA | National Competition Authority |
| OECD | Organization for Economic Cooperation and Development |
| OJ | Official Journal |
| Op. cit | Opere citato |
| Para. | Paragraph |
| RGDIP | Revue Générale de Droit International Public |
| S. Afr. Y.B. Int'l L. | South African Yearbook of International Law |
| TEU | Treaty on European Union |
| TRIPS | Trade-Related Aspects of Intellectual Property |
| WTO | World Trade Organization |
| Yale J. Int'l L | Yale Journal of International Law |
| YEL | Yearbook of European Law |

Introduction

I. The Research Theme

The ‘EU citizenship’ has been a vastly researched topic, approached from different legal angles, and disciplines.¹ A particular EU citizenship right has so far been largely ignored by academia, and when it has been addressed, it has been approached primarily from a single perspective – whether from a public international legal conception, EU citizenship, or the EU’s capabilities.² Since the establishment of the EU citizenship in 1993, the right to equal protection by consular and diplomatic authorities of any of the Member States represented *in situ* has been attached to the legal status of ‘European Union citizenship’ recognised to all citizens of the Member States.³ Several EU countries recognise to their citizens some sort of a right to be protected abroad by the State’s authorities, enshrined in their constitutions, legislation, or established practice.⁴ The novelty of the EU citizenship right to protection abroad consists in the fact that it is not a classical citizenship right, but a right conferred by a sort of supranational citizenship that is based on a pooling of consular and diplomatic protection functions among the EU countries, and recently also on consular and diplomatic

¹ *Inter alia*, A. Raymond, ‘Is Multinational Citizenship Possible?’, (1974) Soc. Res. 638. On the connection existing between the concepts of ‘citizenship’ and the ‘nation-state’, see Ulrich K. Preuß, ‘Problems of a Concept of European Citizenship’, (1995) EUR. L.J., 267; C. Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’, (2007) *Revue européenne de droit public*, 61. See also J. Shaw, ‘Political Rights and Multilevel Citizenship in Europe’ in E. Guild, K. Groenendijk, and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Ashgate (2009); J. Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ in P. Craig and G. de Búrca (eds), *Evolution of EU Law*, Oxford University Press (2011); R. Bauböck and V. Guiraudon, ‘Introduction: Realignment of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance’, (2009) *Citizenship Stud.*, 439; D. Kochenov, ‘The Present and the Future of EU Citizenship: A Bird’s Eye View of the Legal Debate’, *NYU Jean Monnet Working Paper* 02/12.

² See P. Vigni, ‘Diplomatic and consular protection: Misleading Combination or Creative Solution’, *EUI Law Working Paper* 2010/11 and by the same author, ‘The Protection of EU Citizens: The Perspective of International Law’ in J. Larik and M. Moraru (eds), *Ever-Closer in Brussels—Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91–107; A. Vermeer-Künzli, ‘Where the Law Becomes Irrelevant: Consular Assistance and the European Union’, (2011) *ICLQ*, 965; S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, (2011) *Revue des affaires européennes*, 79; J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’ (2012) *Hague Journal of Diplomacy*, 31; other papers have approached the topic largely from an EU external relations perspective, Ramses A. Wessel, ‘Can the European Union Replace its Member States in International Affairs? An International Law Perspective’, in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston: Martinus Nijhoff Publishers (2013), 129-147; or from an EU fundamental rights perspective, e.g., E. Denza, ‘Commentary to Art. 46 of the EU Charter’, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing (2014); or from the perspectives of the EU’s capabilities, see K. Raik, ‘Serving the citizens? Consular role of the EEAS grows in small steps’, *EPC Working Paper* of 30 April 2013.

³ See Art. 8c of the Maastricht Treaty.

⁴ See more details in Chapter 4, section VII. Mapping the Member States’ national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.

protection functions exercised by the EU's institutions and bodies for the benefit of EU citizens in the world.

The EU's legal arrangement of protecting EU citizens abroad is a complex intertwining of various EU policies and instruments, where aspects of EU citizenship and fundamental rights mix with EU external relations and policies. The peculiar EU model, which includes certain traditional State-like functions exercised by the EU institutions and bodies for the purpose of ensuring protection of EU citizens abroad,⁵ challenges the classical norms of public international law recognising an exclusive power to exercise consular and diplomatic protection of individuals abroad to the State of nationality, and exceptionally to an international organisation in relation to its agents.

The present thesis aims to assess the different horizontal inter-connections between the various EU legal policies, instruments and institutions in ensuring protection of EU citizens abroad, as well as the vertical relations between the EU legal framework and public international law and the domestic legal orders of the Member States, in an attempt to fill the gap in the legal literature and present a complete picture of the EU's model of ensuring protection of (unrepresented) Union citizens abroad. The starting premise of the thesis is that the introduction of the peculiar EU citizenship right to equal protection abroad in 1993 has spurred the development of a unique model of protecting EU citizens abroad, which although initially divergent with public international law, is now widely accepted by the international community and highly attractive to other regional organisations.

The objective is to study the EU citizenship right to equal protection of unrepresented Union citizens abroad, and its implementation by the Union and the Member States within the wider context of different EU instruments that have been used for similar purposes, i.e. protection of (unrepresented) EU citizens in third countries. The specific extra-Union application of this right requires close assessment of the implementation of the right within the general international legal framework, which has itself experienced a significant evolution in recent decades, and continues to do so. The EU model of protection of EU citizens in third countries has inevitably impacted on the domestic legal frameworks and practice of the Member States, however only to a limited extent, which proved to be insufficient to ensure a fully effective EU model. This process is nevertheless on-going in light of the current debate

⁵ The State's power to exercise consular and diplomatic protection of nationals abroad has been traditionally perceived as falling under the 'Act of State' or 'acte du gouvernement' doctrines of powers reserved to the State's executive, over which the judiciary had no power of review. See more in W. Bolewski, *Diplomacy and International Law in Globalized Relations*, Springer (2007).

between the EU institutions and the Member States on the evolution of the EU's model and, particularly, the divisions of roles between the EU and the Member States.⁶

This thesis will often use the terms - the 'EU legal regime' or 'EU model' on protection of EU citizens abroad, since the EU citizenship right to equal protection abroad⁷ and the fundamental right of the EU citizen to diplomatic and consular protection⁸ are not the sole legal bases that confer to the EU and the non-national Member States competences to protect the EU citizens abroad.⁹ There are several other legal provisions within the CFSP (Treaty on the European Union) and the Treaty on the Functioning of the European Union, as well as secondary legislation on the basis of which the EU, independently or jointly with the Member States, can exercise consular and diplomatic protection and assistance to the EU citizens in the world.

The thesis will start with an evaluation of almost two decades of application of the EU citizenship right to equal protection abroad, from Maastricht (1993) until Lisbon (2009). The first substantive chapter (*Chapter 1*) aims to uncover the specific legal context introducing this unusual EU citizenship right, unlike any of the other EU citizenship rights that have an internal application. In particular, it explores the reasons for the introduction of such a right, the different views of the Member States towards what the essence of this right should be and, most importantly, the novelty of the right when it was first introduced. The history of European cooperation dates long before the Maastricht Treaty and some of the European countries have shared long historical ties for centuries which would inform the later development of the EU model of protecting EU citizens abroad. In its first section, Chapter 1 will assess whether EU citizenship builds on any of the regional bilateral or multilateral cooperation created among some of the European countries and, if yes, it will attempt to discover the added value of the EU citizenship right to equal protection abroad to the cooperation existing between these Member States outside the Maastricht Treaty.

Following this comparative assessment, Chapter 1 progresses to a critical assessment of the implementation of the EU citizenship right to equal protection abroad during the post-Maastricht Treaty period. It will be demonstrated that during the first decade of

⁶ See the discussion regarding the adoption of a Council Directive on consular protection of Union citizens in third countries, and in particular Chapter 4, Section VII '*Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad*' and Section VIII '*Policy and institutional recommendations to increase the efficiency of protection of the EU citizens in the world*'.

⁷ Arts. 20(2)(c) and 23 TFEU.

⁸ Art. 46 EU Charter.

⁹ For a discussion of the additional legal bases during the pre-Lisbon Treaty period, see Chapter 1, while for the relevant legal basis post-Lisbon Treaty, see Chapter 4.

implementation, the EU citizenship right to equal protection abroad was governed by purely intergovernmental *sui generis* kind of acts adopted by the Member States (Decisions of the Representatives of the Governments of the Member States). The Chapter will critically assess the legal content, nature, and effects of these acts, which are uncommon in the field of EU citizenship, or any other EU policies that might directly affect the rights of the individuals. It will be revealed that although the Decisions aimed to clarify the content of the right, their added value is minimal, if not even prejudicial to the effectiveness of the EU citizenship right. Unlike the other EU citizenship rights, the external dimension of the EU citizenship was left in the hands of a COCON Council Working Group, composed of consular and diplomatic officials whose proposals consist of only soft law guidelines and recommendations. The particular soft law regulatory vision of the EU citizenship right to equal protection abroad corresponded to a view of this right as pertaining exclusively to the field of consular and diplomatic protection of natural persons, which is traditionally conceptualised as falling under the States' discretionary decision-making power. Although partially true, the right is an EU citizenship right which ought to be effective in practice and governed by EU legal acts and not international legal instruments.¹⁰ The application of the EU citizenship right was anything but effective.

Until 2004 this *sui generis* intergovernmental framework of implementation worked well due to the low number of requests from EU citizens, however the increase in international disasters affecting third countries, the increasing number of travelling EU citizens, and the start of the financial crises started to show the inadequacies of the EU's model. The chapter will highlight the main events that triggered a change in the implementation of the right, such as the emergence of forms of vertical cooperation of consular cooperation for the purpose of ensuring an effective protection of EU citizens abroad. Instances of vertical cooperation between the Member States and the Community policies, instruments, and institutions thus started to form what is the current day EU model of protection of EU citizens abroad. It is a period when the EU slowly develops other EU policies that, like the EU citizenship right to equal protection abroad, respond to challenges posed by international disasters, *inter alia*, ensuring protection of EU citizens in consular crises situations. The chapter will assess the nexus between these different Community policies, to show that, ultimately, due to the growing consular challenges, the Member States agreed to complement the purely horizontal framework of cooperation to ensure protection of

¹⁰ See Chapter 1, section III.1 Implementing the EU citizenship right to equal protection abroad - securing effective protection of EU citizens abroad without encroaching on the Member States' sovereign powers.

the EU citizens abroad with vertical cooperation instruments, such as the Civil Protection Mechanism adopted within the civil protection policy, and humanitarian aid capabilities. This positive framework of cooperation, as well as some of the deficiencies registered by the implementation in practice of the EU model, such as the divergent, intransparent implementing framework of the EU citizenship right, and other factual circumstances such as the Member States' budgetary cuts, have led to some of the Lisbon Treaty amendments, which will be assessed in the last section of Chapter 1.

The Lisbon Treaty has strengthened the EU's role in ensuring protection of citizens abroad, introducing actors with competences very similar to the core prerogatives of the State. The EU now has a clearly expressed objective of protecting its citizens in the world.¹¹ It has an impressive external relations institutional machinery formed of the High Representative for Foreign Affairs and supported by the European External Action Service and Union delegations,¹² which cover more third countries than any of the Member States' consulates and embassies, separately or jointly.¹³ The EU now has a network of 140 delegations, which can exercise consular and diplomatic protection functions for private individuals.

This particular legal innovation raises serious problems within the public international legal framework. The classical consular and diplomatic protection mechanisms of public international law, which have been used by States since Antiquity, have very little in common with the EU mechanisms of equal protection of EU citizens abroad. According to the traditional public international concept of consular and diplomatic protection of individuals, the State of nationality enjoys a discretionary, exclusive right to exercise them, in relation to which the individual has no right whatsoever.¹⁴ The mechanism of diplomatic protection requires, under public international law, the fulfilment of three exhaustive pre-requisites of strict application: nationality of claims, existence of an international wrongful act and exhaustion of local remedies.¹⁵ The EU model does not follow this traditional international legal model of protecting citizens abroad. Its premise is the 'European Union citizenship', which has been defined as 'supranational' or 'a plurality of nationalities', but certainly not as a nation State citizenship.¹⁶ The Member States have an EU primary law obligation to equally

¹¹ Art. 3(5) TEU.

¹² Art. 27 TEU, 221 TFEU and the EEAS Council Decision.

¹³ See Annex 1 – 'Member States' External Representations and EU Delegations in third countries'.

¹⁴ See, in particular, the *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment, I.C.J. Reports 1970, p. 3, and paras. 77-79.

¹⁵ See Arts. 1-4 of the 2006 ILC Articles on Diplomatic Protection.

¹⁶ See more in Chapter 3, in the section entitled 'The relation between the 'Union citizenship' and the 'nationality of claims' requirements for the exercise of consular and diplomatic protection of individuals'.

protect the EU citizens, to which a corresponding right is recognised to all unrepresented Union citizens. The conditions for the exercise of the fundamental and EU citizenship right are specifically established by the EU, and have nothing in common with the conditions for the exercise of diplomatic protection or the minimal conditions required for consular protection under public international law.¹⁷

The State-centred public international legal conceptions of consular and diplomatic protection developed in a time when international law did not recognise any role to the individual, and other non-State actors. Current international law has departed from those days, and individuals, international organisations, and other non-State actors have been recognised a place in international relations.¹⁸ Additionally, international human rights law has developed direct access means to judicial and quasi-judicial forums for the individuals. These legal developments have made imperative the updating of the traditional definition of consular and diplomatic protection of individuals under the contemporary public international law.

Chapter 2 will re-consider the classical international legal conception of consular and diplomatic protection of individuals in light of the recent State practice, jurisprudence delivered by international, regional and domestic courts and the legal academic writings. In particular it will look at the international and national practice after 2006,¹⁹ to see whether there has been additional evidence that could indicate a change in the States practice on the perception of consular and diplomatic protection which, coupled with the evidence previously gathered by the International Law Commission in its project on codification of international norms on diplomatic protection,²⁰ might have built a more ‘extensive’, ‘uniform’ and ‘representative’ customary practice²¹ indicating a change in the legal nature, conditions and objectives of consular and diplomatic protection of natural persons under the public international legal framework.

¹⁷ See more in Chapter 3 and Chapter 4, Sections III, IV and V.

¹⁸ See R. McCorquodale, ‘The individual and the international legal system’ and D. Akande, ‘International organisations’ in M. Evans (eds), *International Law* (3rd ed), Oxford University Press (2010).

¹⁹ The moment when the ILC approved the final version of the Articles on Diplomatic Protection, and when States confirmed the refusal of including a State duty to exercise diplomatic protection, see more details in Chapter 2, section II. Reconsidering the Conditions for the Exercise of Consular and Diplomatic Protection of Individuals under the International Legal Framework.

²⁰ In 1995 the International Law Commission decided to include in the Commission’s agenda the topic of ‘Diplomatic Protection’. At its 58th session, the International Law Commission adopted 19 Draft Articles on the topic of diplomatic protection. The Draft Articles were approved by the United Nations in 2007, see Resolution A/62/451 of 6 December 2007, available online at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/67

²¹ ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 4, 734.

The chapter will conclude with a short summary of the changes brought by current international law to the international institutions of consular and diplomatic protection of individuals, and will establish whether their current faces have the potential for diminishing the gap between the international legal framework and the Union legal regime on the mechanisms of protecting citizens abroad.

Chapter 2 will show that consular and diplomatic protection of natural persons is no longer an exclusive discretionary right of the State of nationality, and a certain State duty to exercise consular and diplomatic protection on behalf of nationals subject to grave violations of fundamental rights is currently in formation. The exclusivity and discretion characterising the exercise of consular and diplomatic protection of individuals under the traditional public international legal framework has diminished under the development of international human rights law and the recognition of non-State international actors. The modern conception of consular and diplomatic protection of individuals has made an important leap since the ‘romantic’²² days of international law and currently recognises a foundational role to the individual’s rights in the definition of consular and diplomatic protection.²³ Current customary international law recognised several important exceptions from the strict nationality of claims rule which has been the foundational premise of both consular and diplomatic protection, and has the potential of drawing closer the international and EU model of protecting citizens in third countries. For instance, the elimination of the *Nottebohm*²⁴ ‘genuine’ and ‘effective link’ requirement which the ‘nationality of claims’ had to fulfil under the traditional international customary law is simplifying the conditions which the Union citizenship has to fulfil and is further accommodating of the Union specific regional framework within the general international legal norms. States can now exercise diplomatic protection for various other categories than nationals, such as on behalf of stateless persons, refugees, persons benefiting of subsidiary protection,²⁵ and of course for other categories as long as the *Panevezys* based requirements are fulfilled.²⁶ The current public international legal concept of diplomatic

²² The term was used by Advocate General Tesauro in relation to the public international law existent at the time the *Nottebohm* judgment was delivered, see his Opinion in the *Micheletti* case, (Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria*, [1993] ECR I-4239), para. 5

²³ See Art. 1 of the ILC Articles on Diplomatic Protection; the *LaGrand* Case (*Germany v United States of America*), Judgment of 27 June 2001, ICJ Reports (2001), 466; Case concerning *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment of 31 March 2004, ICJ Reports (2004), 12; *Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Provisional Measures, the Judgment of the ICJ of 24 May 2007; Merits, Judgment of 30 November 2010; Compensation Judgment of 19 June 2012, nyr.

²⁴ *Nottebohm* (Liechtenstein v Guatemala) (Second Phase) [1955] ICJ Rep 4.

²⁵ See Art. 8 of the 2008 ILC Articles on Diplomatic Protection.

²⁶ *Panevezys-Saldutiskis Railway Case* (*Estonia v. Lithuania*), Judgment of 28 February 1939, PCIJ Reports (1939), Ser.A/B, No. 76; *Mavrommatis Palestine Concessions* Case.

protection has a broader material and personal scope meant to ensure protection of more individuals in an international environment characterised by a high migratory flow.

In light of the cosmeticized international look of consular and diplomatic protection of individuals, the specific question about the conformity of the EU's model of protecting EU citizens abroad with the general international legal framework might receive a different answer than under the previous traditional public international legal framework. In this context, *Chapter 3* will examine the relation between the EU regime of protecting EU citizens in third countries and the current international legal framework on consular and diplomatic protection of individuals, in an attempt to understand whether the allegations that the EU-specific regime is divergent, and on certain aspects even incompatible, with the international legal regime are legally founded,²⁷ and if so, what could be the possible solutions.

Regardless of which scholarly opinion we choose to embrace in regard to the legal nature of the European Union, we cannot deny the legal truism that the EU is not a State, and it exists and operates within the broader international legal system, where it needs to respect the principles of international law,²⁸ and thus observe the specific international norms governing the exercise of consular and diplomatic protection of natural persons,²⁹ which do not yet expressly recognise functions of consular and diplomatic protection of private individuals to regional international organisations.³⁰ For more than 20 years, the EU countries have established a specific regional legal framework on ensuring protection of EU citizens abroad, which is not following the traditional legal nature, personal and material scope of the

²⁷ See, *inter alia*, A. Vermeer-Künzli, 'The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance' in by S. Faro, Mario P. Chiti and E. Schweighofer (eds), *European Citizenship and Consular Protection New Trends in European Law and National law* edited, Editura scientifica Napoli (2012), 101-111; A. Vermeer-Künzli, 'Where the Law becomes Irrelevant: Consular Assistance and the European Union', (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance', (2008) *ZaöRV*, 339; T. Stein, 'Interim Report on "Diplomatic Protection Under the European Union Treaty"', in: *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, 'The Protection of EU Citizens: The Perspective of International law' in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

²⁸ See Arts. 3(5) and 21 TEU.

²⁹ See Chapter 2.

³⁰ The customary international law governing the exercise of consular and diplomatic protection of EU citizens is still an exclusive inter-States system, see the 2006 ILC Articles on Diplomatic Protection. The still preponderant inter-States relations nature of the international legal order is a more general problem that the EU has to confront in many areas of activity. See for instance H. Bruyninckx, J. Wouters, S. Basu and S. Schunz (eds.), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Palgrave Macmillan (2012); J. Wouters, Anna-Luise Chané, 'Brussels meets Westphalia: The European Union and the United Nations', *KU Leuven Working Paper* No. 144/August 2014, available online at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp141-150/wp144-wouters-chane.pdf

international legal mechanisms of consular and diplomatic protection of natural persons. The Member States have agreed to limit their internationally recognised discretionary power of exercising consular and diplomatic protection of individuals for the purpose of advancing the protection of the EU citizens abroad, and in this way enlarging the territorial effectiveness of EU citizenship and strengthening the Union's visibility outside the EU.³¹ For this purpose the founding Treaties have established three main exceptions from the general international legal framework. Unlike the international legal framework, where the States have a right to exercise consular and diplomatic protection of individuals, the EU Member States have an EU primary legal obligation to provide protection to all unrepresented Union citizens on the same conditions as to their own citizens, in a third country where they have a consular or diplomatic representation.³² Second, the EU enables non-nationality Member States, and EU institutions and a *sui generis* body (EEAS)³³ to exercise consular and diplomatic protection on behalf of unrepresented Union citizens, thus replacing the State of nationality premise and pre-requisite for the exercise of the international consular and diplomatic protection with a supranational kind of citizenship. Chapter 3 will explore the conformity of the specific characteristics of the EU model of protecting Union citizens abroad with the relevant public international legal norms. It will demonstrate that, in spite of the scholarly debates on the incompatibility between the EU and the international legal framework, the EU model of ensuring the protection of EU citizens abroad has long been accepted by the international community, and similar models are gradually developing, signalling an increasing recognition of its international legitimacy.

The last substantive chapter of the thesis (*Chapter 4*) will explore the added value of the Lisbon Treaty to the EU's role of ensuring protection of unrepresented Union citizens abroad,³⁴ the current legal status, nature and effects of the EU citizenship right to equal protection abroad,³⁵ the question of the extent of consular and diplomatic functions entrusted

³¹ The reasons for adopting the Union citizenship right to protection abroad of unrepresented Union citizens are to be found in the Adonnino Committee Report of 1984, which provided that the Committee was made responsible of adopting Community measures 'to strengthen and promote its identity and its image both for its citizens and for the rest of the world'. See Bull. EC 6-1984, 11: 'A People's Europe'.

³² Arts. 20(2)(c) and 23 TFEU, and Art. 46 EU Charter.

³³ On the legal nature of the EEAS, see Bart Van Vooren, 'A Legal Institutional Perspective on the European External Action Service', (2011) CMLRev., 475.

³⁴ Section II. *The Added Value of the Lisbon Treaty - Strengthening the EU's Role to Ensure Protection of its Citizens in the World.*

³⁵ Section III. *The legal status of equal protection abroad – (fundamental) EU citizenship right or entitlement to legitimate expectations?*; Section IV. *What's in the EU citizen's right to equal protection abroad? Challenges to establish the substantive content of the EU citizenship right*; Section V. *The legal effects of the Union citizenship right to equal protection abroad.*

to the EU³⁶, the impact of the EU legal regime on the Member States consular and diplomatic protection functions³⁷, and it will conclude with assessing possible future developments of the EU's role in the field of protecting unrepresented Union citizens in the world.³⁸ This Chapter aims, *inter alia*, to fill the gap of the current legal literature, which has explored the issue of the EU's diplomatic network from diverse angles, but not specifically from the perspective of ensuring protection of EU citizens abroad.

In the 1990s and early 2000s the question of the specific function of Commission delegations and their establishment and evolution in time was analysed.³⁹ Later the issue started to be addressed from the perspective of the constitutional construction of the EU.⁴⁰ The institutional setting of the EU's diplomatic representation and its practice was compared with those of the Member States' external representations⁴¹ and later the literature concentrated on the impact of EU integration on the foreign ministries in the EU.⁴² Chapter 4 aims to assess topics that have not been specifically addressed by legal scholars, namely: the precise competence of the Union to ensure protection of its citizens abroad, the type of services it can confer to the EU citizens in third countries, and the relation with the Member States' consular and diplomatic functions. In spite of the Member States' resistance to taking full advantage of the EEAS and EU delegations' potential in ensuring protection of EU citizens in the world, the increasing number of international disasters,⁴³ the growing number of EU citizens

³⁶ Section VI. *The complex EU institutional architecture ensuring protection of EU citizens abroad.*

³⁷Section VII. *Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.*

³⁸Section VIII. *Policy and institutional recommendations to increase the efficiency of protection of the EU citizens in the world.*

³⁹ M. Bruter, 'Diplomacy without a state: the external delegations of the European Commission', (1999) *Journal of European Public Policy*, 183-205, on the latter see, G. Edwards and D. Rijks, 'Taking Europe to the World: 50 years of the European Commission's External Service', 2004, Luxembourg: Office for Official Publication of the European Communities; C. Carta, *The European Union Diplomatic Service: Ideas, Preferences and Identities*, Routledge, 2012.

⁴⁰ J. Bátora, 'Does the European Union transform the institution of diplomacy?', (2005) *Journal of European Public Policy*, 44-66.; M. K. Cross, *The European Diplomatic Corps: Diplomats and International Cooperation from Westphalia to Maastricht*, Basingstoke: Palgrave Macmillan (2007); Bart Van Vooren, 'A Legal Institutional Perspective on the European External Action Service', *op.cit.*

⁴¹ F. Aустermann, *The EU Delegations in EU Foreign Policy: A Diplomatic Service of Different Speeds*, Palgrave Macmillan (2014).

⁴² B. Hocking and D. Spence, 'Foreign Ministries in the EU. Integrating Diplomats ad Towards a European Diplomatic System', *Discussion Paper in Diplomacy NNIR 2005*, available at http://www.clingendael.nl/sites/default/files/20050600_cli_paper_dip_issue98.pdf ; 'The EU Foreign Service: how to build a more effective common policy', *EPC Working Paper No. 28/2007*, available at http://www.epc.eu/documents/uploads/555858396_EPC%20Working%20Paper%2028%20The%20EU%20Foreign%20Service.pdf

⁴³ According to the European Commission, '*since 1975 the recorded annual number of crises has increased fivefold and is likely to further increase*', see Executive summary of the Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC (2011) 1555, 14.12.2011, 2.

travelling and residing abroad,⁴⁴ and the serious financial cuts affecting the national Ministries of Foreign Affairs⁴⁵ will, sooner or later, probably lead to further advancement of the vertical cooperation and increasing role of the EU delegations in this field.

The topic of protection of Union citizens abroad entails a discussion of several different EU policies: Union citizenship (Articles 20(2)(c) and 23 TFEU), CFSP (Article 35 TEU), general EU's external relations (Article 3(5) TEU), CSDP (Article 43 TEU), and incidentally also parts of several other EU external policies (e.g. humanitarian aid - Article 218 TFEU). Although the topic of 'protecting EU citizens abroad' is principally treated from the sole perspective of the Union citizenship and fundamental right to equal protection abroad, it involves mechanisms and institutions that are specific to the Union's external relations. If the other three main Union citizenship rights have commonly involved issues related to the Union market and the Area of Freedom Security and Justice, this particular right is not characterised by the paradigms that governed the application of some of the Union citizenship rights, such as the cross-border and economically active paradigms⁴⁶, since the right to equal protection by the consular and diplomatic authorities of the Member States does not require the pre-condition of cross-border movement or a certain degree of integration in the Member State providing help.⁴⁷ The premise of this right is the principle of non-discrimination based on nationality which is an essential attribute of the EU citizenship recognised to the citizens of all the Member States.

Combining international, EU, national and comparative legal analysis, the objective of this thesis is to offer a holistic research approach aimed at answering the main question of what kind of protection do EU citizens currently enjoy when they are outside the Union territory. In short, what benefits does the EU citizenship confer outside the border of the European Union, and how has the EU model of protecting its citizens abroad developed throughout the years, dealt with deficiencies and problems, and what are the future avenues?

⁴⁴ From 2005 until 2008, the number of trips made by EU citizens to third countries increased threefold, and it is expected to further increase. More than 30 million EU citizens were estimated to permanently live in a third country in 2008, but only in four countries are all of the Member States represented, see more in Annex 1.

⁴⁵ See the *CARE Report*, Chapter 3. It was noted that in 2012 the Spanish Foreign Ministry suffered a 54% budgetary cut, and as a consequence agreed to a co-location of diplomatic premises with the EU delegation in Yemen. As a result, 500,000 euros were saved during the first year. See, Igor Merheim-Eyre, 'Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387877/Consular_Evidence.pdf

⁴⁶ See D. Kochenov, 'The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate', *NYU Jean Monnet Working Paper* 02/12.

⁴⁷ See more details on this issue in Chapter 3, section IV.1. The relation between the 'Union citizenship' and the 'nationality of claims' requirements for the exercise of consular and diplomatic protection of individuals.

These questions are topical in light of the current day decreasing external representation network of the Member States, which makes the topic of alternative ways of ensuring protection of EU citizens abroad, as the EU model offers, particularly pertinent.

II. Methodology

To answer the aforementioned questions, the thesis has used mainly a legal dogmatic methodology, assessing mostly legislative acts, soft law documents and jurisprudence on consular and diplomatic protection of individuals or incidentally touching on these topics, and on the implementation of the relevant EU policies. The fact that the thesis adopts a predominantly legal methodology does not make the research any easier due to the scarcity of public legal sources, especially those on national legislation and practice on consular and diplomatic protection of individuals and practice on the implementation of the EU citizenship right. The author collected valuable legislative and jurisprudential evidence during her work as a researcher for the CARE (*Citizens Assistance Regulation in Europe*) Project. The opinions of EU officers, informally gathered during the same period, provide another valuable source.

Chapter 1 will present the three main stages of development of the EU model of protecting EU citizens abroad. For this purpose, EU official and publicly unavailable materials and international agreements concluded by the EU countries touching on consular and diplomatic protection of individuals as well as the national legal frameworks and practice of almost all the Member States were assessed. Legislative databases of the Member States, web pages of the competent national Ministries, embassies and consulates have served also as sources of information. The majority of these materials are now available in the CARE database.

Chapter 2 will depict the current face of consular and diplomatic protection of individuals within the public international legal framework. The following materials were collected and assessed: those demonstrating the attitudes of States; the case law of the International Court of Justice and other regional and domestic courts; the work of other bodies, such as the International Law Association and the International Law Commission; and the views of legal scholars and practitioners publishing on the topic.⁴⁸

⁴⁸ The methodology follows the evidence requirement, as suggested by the First Report of the ILC on the formation of customary international law, see First report on formation and evidence of customary international

Chapter 3 assesses the relationship between the EU model of protecting EU citizens abroad and the international legal framework in an attempt to answer the academic critiques regarding the alleged incompatibility of the EU model with the relevant international legal norms on consular and diplomatic protection of individuals. The research methodology of this Chapter is partially based on conclusions reached in the previous Chapter on the evolution of the written and customary legal norms on consular and diplomatic protection of individuals. Since the Chapter addresses the legal question of compatibility and normative influence between the general international legal regime and a specific regional legal regime (EU), the research methodology is predominantly legal and desk research based. Several sociological studies were consulted for the purpose of comprehending the EU citizenship contribution to the current relationship between the EU citizens and the EU countries, and the EU.⁴⁹

Chapter 4 focuses on assessing the current role of the EU in ensuring protection of EU citizens and its relation with the Member States' legal and institutional settings on consular and diplomatic protection of nationals abroad. In order to present a complete and comprehensive picture of the EU role and the impact of EU policies on domestic legal, policy and institutional frameworks, this Chapter used several methodological tools. First, a desk research of EU legal acts and soft law documents, in particular, information and data from the minutes of the COCON meetings, served for a first collection of data. Second, a comparative analysis of legal rules and practices of the EU countries in providing consular and diplomatic protection of their own citizens and non-national EU citizens was conducted on the basis of the National Reports drafted by national legal experts following the instructions of the CARE Coordination team. The identified problems and gaps in the EU model of ensuring protection of EU citizens abroad were discussed during several workshops with various stakeholders: mainly academics and few EU policy-makers representatives (2010 CARE Workshop in Bologna and 2011 RELEX Workshop in Florence); mainly national practitioners and policy-makers and several academics of different background (2011 Brussels). The latter Workshop was also an occasion to discuss policy options with both EU officials and national

law by Michael Wood, Special Rapporteur, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013.

⁴⁹ See, in particular See the European Commission report on progress towards effective EU citizenship 2011 – 2013, available online at http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf ; European Commission, Directorate-General for Research and Innovation Socio-economic Sciences and Humanities, *Policy Review – Co-creating the European Union Citizenship*, available at http://ec.europa.eu/research/social-sciences/pdf/co-creating_eu_citizenship.pdf; A. Favell, E. Recchi, T. Kuhn, Janne S. Jensen and J. Klein, 'The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identifications Among EU and Third-Country Citizens', State of the Art, EUCROSS Working Paper no.1/2011, available online at http://www.eucross.eu/cms/index.php?option=com_docman&task=cat_view&gid=7&Itemid=157

representatives of Ministries of Foreign Affairs on how the EU could better assist unrepresented citizens and Member States, and how the EU could better support the Member States in assisting unrepresented citizens and Member States.

Chapter 1: The Emergence of an EU Model for Protecting (unrepresented) Union Citizens Abroad

I. Introduction

The protection of citizens in foreign countries, whether ensured through diplomatic or military means, has traditionally been considered the preserve of the State(s) of nationality.⁵⁰ Protection ensured by way of the peaceful mechanisms of consular and diplomatic protection of individuals, or by forceful, military means are some of the oldest institutions of public international law, which have been commonly perceived as part of the specific consular and diplomatic branches of international law.⁵¹ In spite of the public international law developments under the changing international relations and participation of new international actors as subjects of international law,⁵² international consular and diplomatic law has remained a States-dominated field of public international law.⁵³ The State's exercise of protection of citizens in third countries has followed unwritten, customary international norms until relatively recently, in the 1960s⁵⁴, when two multilateral treaties⁵⁵ on the conduct of consular and diplomatic relations were concluded by States, laying down reciprocal rules for

⁵⁰ See the Commentaries to the ILC Articles on Diplomatic Protection.

⁵¹ L. T. Lee and J. Quigley, *Consular Law and Practice*, Third Edition, Oxford: Oxford University Press, 2008; A. James and M. Warren, *A Universal Safeguard: Providing Consular Assistance to Nationals in Custody An Introductory Guide for Consular Officers*, available at: <<http://www.internationaljusticeproject.org/pdfs/GenericVCCRprint.pdf>> (accessed July 2014). See also ICJ, Case concerning United States Diplomatic and Consular Staff in Tehran of 24 May 1980 (US v. Iran), para. 86.

⁵² J. Melissen, *Innovation in Diplomatic Practice*, Palgrave Macmillan (2013); A.F. Cooper, 'The changing nature of diplomacy', in A.F. Cooper, J. Heine and R. Thakur (eds.), *The Oxford Handbook of Modern Diplomacy*, Oxford University Press (2013).

⁵³ P. Okowa, 'Issues of Admissibility and the Law of International Responsibility' in M. Evans (ed), Oxford University Press (2014), 477-509; R. Wessel, Bart van Vooren, 'The EEAS' Diplomatic Dreams and the Reality of European and International Law', paper presented at the UACES Conference Exchanging Ideas on Europe 2012, Old Borders–New Frontiers, 3-5 September 2012, Passau, Germany, available http://doc.utwente.nl/82239/1/Wessel_EEAS.pdf; J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', (2012) *The Hague Journal of Diplomacy*, 31.

⁵⁴ The Vienna Convention on Diplomatic Relations was signed in Vienna on 18 April 1961 and entered into force on 24 April 1964, see: United Nations Treaty Series (UNTS), vol. 500, p. 95, no. 310. The Vienna Convention on Consular Relations signed on 24 April 1963, entered into force on 19 March 1967, UN Treaty Series, vol. 596, p. 261.

⁵⁵ 187 States are party to the 1961 Vienna Convention on Diplomatic Relations and 176 are party to the Vienna Convention on Consular Relations. They have by now become part of the general customary international law, enjoying a global application (see, ICJ, Case concerning United States Diplomatic and Consular Staff in Tehran (US v. Iran), Judgment of 24 May 1980, ICJ Reports (1980), 1-3; Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Judgment of 14 February 2002, ICJ Reports (2002), 1, para. 52).

the receiving and the sending States to follow, *inter alia*, in the treatment of aliens in foreign countries.

The Vienna Conventions on Consular and Diplomatic Relations provide, as primary consular and diplomatic functions of the State, the protection of the interests of the State's own nationals.⁵⁶ The precise consular and diplomatic protection services which can be exercised by a State for the benefit of its citizens abroad are not detailed in the Vienna Conventions, they have developed in practice based on the changing needs of international society, conduct of international relations and development of technology used by consular and diplomatic officials. Consular and, in certain circumstances, also diplomatic officials⁵⁷ can now provide a long list of consular services that contribute to ensuring the protection of citizens of their sending State, such as: facilitating administrative procedures pertaining to repatriation in cases of death or serious illness; the exercise of notary and public register functions; observance of the individuals' trial, detention or other legal proceedings, international judicial co-operation related services; assistance in cases of renewal or loss of passports and identity cards; and the protection of the interests of minors and other persons lacking full capacity.⁵⁸ Some of the situations in which consular assistance is most important are those where there are indications that individuals have been subjected to torture or other illegal mistreatment, or face a real risk of being subjected to such treatment, and, especially in cases of detention or incarceration, where such abuses are more likely to occur.⁵⁹ In these latter situations, the role of the consuls and diplomats is of the utmost importance in ensuring the integrity of the judicial proceedings, and in preventing or stopping mistreatment or abuses from being perpetrated upon citizens. The consular and diplomatic officials can provide information and advice on local legal proceedings and may also protest and seek redress when a wrong is committed against one of their co-nationals by local authorities.

The overall purpose of consular assistance in situations of deprivation of liberty is to provide necessary humanitarian assistance or access to legal assistance to nationals in custody, and to ensure that the public authorities of the receiving third country respect the minimum standards of international human rights protection throughout the legal

⁵⁶ See Art. 3(1)(a) VCDR and Art. 5(1)(a) VCCR.

⁵⁷ Arts. 3 and 70 VCCR.

⁵⁸ However, according to Article 5(m) VCCR, the list is not intended to be exhaustive and consuls can perform functions 'which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State'.

⁵⁹ See the REDRESS Report *Tortured Abroad: The UK's obligations to British Nationals and Residents*, September 2012, available at: <http://www.redress.org/downloads/publications/121001tortured_abroad.pdf>.

proceedings.⁶⁰ Timely consular assistance is essential for ensuring that foreign nationals facing prosecution and imprisonment receive fair and equal treatment by domestic courts and penal authorities. In third countries which still apply the death penalty, receiving prompt consular assistance ensures not only the foreigner's absolute human rights, such as the freedom from torture and inhumane and degrading treatment, and procedural human rights, such as the right to a fair trial, but also the most fundamental of human rights, i.e., the right to life. The importance of the assistance that consular and diplomatic officials can offer to nationals in a foreign country, and the dramatic consequences of the absence of such timely consular support were clearly revealed in the *LaGrand* case.⁶¹ In this case, the fate of two German citizens might well have been different, and their execution could possibly have been prevented, if consular assistance had been provided more promptly by the consular missions of their State of nationality.⁶²

It can therefore be concluded that the absence of an external representation of a State in a third country not only deprives the national of mere administrative services, or endangers his fundamental rights, but in certain urgent circumstances it can actually endanger his life, or even lead to his death.

Several factors internal and external to the Union have prompted the need to speed up the solidarity among Member States, but also the vertical cooperation with the Union, for the purpose of securing the protection of the Union citizens outside the Union borders. The various enlargement waves of the Union brought new Member States with less extensive external representation, which led to an increasing number of unrepresented Union citizens in third countries. The increasing budgetary constraints and the growing number and gravity of disasters affecting third countries, revealed that Member States' traditional public international use of consular and diplomatic protection of nationals abroad can no longer

⁶⁰ The Inter-American Court of Human Rights described the assistance of nationals in foreign countries, especially in situations where they are facing criminal proceedings, to be one of the paramount functions of a consular officer: 'It is evident that the Vienna Convention on Consular Relations recognizes assistance to a national of the sending State for the defence of his rights before the authorities of the host State to be one of the paramount functions of a consular officer...the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance'. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, October 1, 1999, Inter-American Court of Human Rights (Ser. A) No. 16 (1999).

⁶¹ *LaGrand Case (Germany v United States of America)*, International Court of Justice (ICJ), 27 June 2001.

⁶² See the *LaGrand* case. For more legal literature on the *LaGrand* judgment and other similar jurisprudence, see: A. James, M. Cross and M. Warrant (eds.), *Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA. An Introductory Guide for Consulates*, third edition, available at: <http://www.internationaljusticeproject.org/pdfs/VCCRguide.pdf> (accessed February 2013); Note, 'Too Sovereign but Not Sovereign Enough: Are U. S. States beyond the Reach of the Law of Nations?', (2003) Harvard Law Review, 2654; P. Van Alstine, 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection', (2005) GEO. L.J., 1885.

effectively secure the protection of their citizens in third countries. At the same time these citizens were also Union citizens, thus reflecting the image of the Union in the world. Therefore a failure of one of the Member States to protect its citizens abroad would negatively affect the image of both the Member State of nationality and the Union. In the 1980s the Member States started to discuss ways of guaranteeing the protection and security of their citizens outside the Union, within the framework of the elaboration of the Maastricht Treaty. These solidarity endeavours were meant to ensure at the same time the objectives of increasing solidarity among the peoples of the Union and the external image of the Union as a powerful international actor.

The first coordination endeavour entailed a sort of delegation of consular representation tasks among the Member States, whereby they agreed to share consular and diplomatic responsibilities for the purpose of ensuring that none of their citizens is left unprotected outside the EU.⁶³ This protection of citizens outside the Union by pooling the Member States' consular and diplomatic functions and resources was conceptualised as a right attached to the EU citizenship. Among the four EU citizenship rights, the unrepresented Union citizens were guaranteed a right to equal protection outside the Union. Thus, since 1993, the EU citizens located in third countries who did not have an external representation of their Member State of nationality to resort to for help have had an EU citizenship right to receive protection from the consular or diplomatic authorities of the other Member States represented *in loco* on the same conditions as the nationals of these Member States. This particular right is the least researched of all the EU citizenship rights, and it is also the most unusual in light of its features, implementation, and interplay with other EU policies.

After several years of being completely neglected, recent events have brought this right to the fore, and have showed its potential for the EU citizens located in third countries and the Member States overburden with consular tasks. The recent natural and man-made disasters that have occurred across the globe, from the countries of North Africa and the Persian Gulf (Tunisia, Egypt, Libya and Bahrain) to Japan⁶⁴, have shown the importance of the EU citizenship right to equal protection in third countries, highlighting its practical benefits, not only for the EU citizens, but also for the Member States.

⁶³ See more details in the following sub-section.

⁶⁴ Many regions of the world have been hit by major natural or man-made disasters in the last five or six years which have caused a great number of deaths and injuries. For instance, the democratic uprising of the spring of 2011 in the Southern Neighbourhood, the earthquake and the tsunami that hit Haiti in January 2010, the Icelandic volcanic ash cloud of 2010, acts of local or international terrorism (Sharm el-Sheikh 2005, the 11 September 2001 attacks on the World Trade Centre in New York), military conflicts (Lebanon conflict of summer 2006, the Georgian conflict of August 2008).

For instance, when Haiti was hit by a tsunami in 2010, less than half of the Member States had a consular or diplomatic mission *in loco* to which their nationals could have resorted to for help. When the democratic revolution shook Libya in the spring of 2011, only 8 Member States were represented, while a total of 6,000 EU citizens were in need of protection.⁶⁵ The aforementioned crises are not isolated events, but they are part of a phenomenon that has developed over the last decade. More and more EU citizens travel outside of the Union,⁶⁶ while, increasingly, a certain number of them establish themselves in third countries and thus need protection abroad on a regular basis.⁶⁷ While the number of EU citizens in need of protection abroad is increasing, the number of consular and diplomatic representations of the Member States is decreasing, mainly due to the financial crisis that has recently affected them all.⁶⁸ The result is that a higher number of EU citizens than ever before cannot obtain protection in third countries from their home Member States. The increasing international threats post 9/11, the further enlargement of the Union including Member States with less extensive external representations and the financial crisis affecting all the Member States have led to a second development in the EU legal framework on the protection of Union citizens abroad. Since the inter-governmental cooperation among the Member States proved insufficient to guarantee the security of Union citizens in the world, efforts were directed towards increasing vertical cooperation, i.e. between the Member States and the Union, for the purpose of complementing the Member States' capabilities with the Union's resources, leading thus to a supporting role of the Union in ensuring protection of Union citizens in third countries.

This chapter traces the main lines of the development of the EU legal framework on the protection of EU citizens outside the Union. It starts with a historical account of the pre-Maastricht Treaty forms of consular and diplomatic cooperation established among the European countries. The main reason for assessing the pre-Union forms of cooperation among

⁶⁵ Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, COM (2011) 149/2 of 23 March 2011.

⁶⁶ According to a 2007 survey, there are around 7 million Union citizens travelling in a third country where their home Member State is not represented. See Action Plan 2007-2009 and related Impact Assessment, European Commission, Communication to the European Parliament, the EU Council, the Economic and Social Committee and the Committee of Regions, Document COM (2007) 767 final of 5 December 2007 and Document SEC (2007) 1600 of 5 December 2007.

⁶⁷ According to the European Commission 2010 Report on Union citizenship 'more than 30 million EU citizens live permanently in a third country, but only in three countries (United States, China, and Russia) are all 27 Member States represented.' See European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens' rights, doc. COM (2010) 603 of 27 October 2010, p. 9.

⁶⁸ Igor Merheim-Eyre, 'Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders', *EPIN Working Paper* No. 34/2012.

the European countries is to establish whether the EU citizenship right to equal protection abroad introduced by the Maastricht Treaty was inspired by previous regional forms of cooperation, or if it constitutes a completely novel legal construction. It then continues with the assessment of the EU citizenship right to equal protection abroad as introduced by the Maastricht Treaty, and the subsequent implementation of this right by the Member States and the Union until the adoption of the Lisbon Treaty. The last section will critically assess the amendments and innovations brought by the Lisbon Treaty to the field of protection of EU citizens in third countries.

The first section will attempt to answer the question of whether the EU citizenship right is a novel legal construction with no previous legal equivalent or if it builds on previous similar legal concepts or mechanisms. It will be shown that the EU citizenship right to equal protection abroad was not a completely new concept in Europe, since European countries had offered their citizens a similar right even before the creation of the European Community, or their accession to the Union, based on bilateral or multilateral consular and diplomatic cooperation agreements concluded between certain European countries sharing long-established close diplomatic ties. The main added value of the Maastricht Treaty consisted in extending the solidarity existing among certain European countries to all the Member States of the EU under the form of an obligation incumbent upon on all Member States to provide equal protection abroad to all unrepresented Union citizens in third countries.

The second section will explore the history and content of the EU citizenship right to equal protection abroad within the former Union's pillar structure and will unveil the nexus between this policy and other relevant Union policies and instruments that have in time been used for the purpose of ensuring protection of Union citizens abroad.

The third section will critically assess the specific implementation of the EU citizenship right to equal protection abroad immediately after its introduction by the Maastricht Treaty and continuing throughout the different phases of the EU integration process. The legal nature, content, effects and remedies of the EU citizenship right to equal protection abroad will be revealed, as well as the reactions of the Member States towards the transposition of the implementing measures into domestic laws. The various stages of implementation of the EU citizenship right to equal protection abroad, starting with the *sui generis* intergovernmental forms and slowly advancing to accepting also the involvement of the Community and Union institutions and instruments will be chronologically assessed. This section will also explore the interplay between the internal and external dimensions of the EU

citizenship right to equal protection abroad, and the nexus with other complementary EU external relations policies that have been deployed for the purpose of ensuring the protection of Union citizens in cases of crises and emergencies.

Having presented the positive aspects of the implementation of the EU citizenship right to equal protection abroad, particularly the benefits accrued by the EU citizens and increased Member States' solidarity, but also the deficiencies in implementation, the section will continue to critically assess the relevant amendments brought by the Lisbon Treaty. This section will flesh out the changes introduced by the Lisbon Treaty and the legal innovations as regards the EU legal framework on the protection of EU citizens abroad. The impact of the Lisbon Treaty on the EU's role in ensuring protection of EU citizens abroad will be discussed in detail in the final chapter (Chapter 4), which focuses particularly on the Union's role in ensuring protection of EU citizens abroad and its impact on the Member States' consular and diplomatic policies and practice.

In addition to the critical assessment of the relevant legal provisions, policies and practices on ensuring the protection of EU citizens in the world, this chapter also aims to offer a comprehensive overview of the evolution of cooperation among the Member States and between the Member States and the Union, and the divisions of roles between the Member States and the Union. The pre-Lisbon Treaty legal framework, policies and practice are furthermore relevant due to the fact that much of that legal framework is still currently in force, in spite of the legislative innovations introduced by the Lisbon Treaty.⁶⁹

⁶⁹ See in particular Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, [1995] OJ L 314/73 and Decision 96/409/CFSP, on the establishment of an emergency travel document, [1996] OJ L 168/11.

II. The history of the EU citizenship right to equal protection abroad⁷⁰

Since 1993, EU citizens travelling to or living in a third country, which does not have an embassy or consulate of their Member State of nationality to resort to for help, have had an EU citizenship right to receive protection from any of the Member States represented in the those third countries, under the same conditions as the citizens of these Member States. Unlike the traditional conception of international law, whereby consular and diplomatic protection of individuals in foreign countries is a mere discretionary right of the State of nationality,⁷¹ and individuals do not enjoy consular and diplomatic protection related rights from their State of nationality or other States, the Maastricht Treaty on the European Union introduced within the international legal framework an obligation incumbent upon all the Member States of the EU to ensure equal protection to unrepresented Union citizens outside the Union. Introduced as part of the EU citizenship package, the right to equal protection of EU citizens in third countries represented a novelty on the international scene, although it did not confer to the unrepresented Union citizens a right to consular and diplomatic protection as such from the non-nationality Member States. Its main substantive content, as argued by the present thesis, is, so far, the extension of the EU principle of non-discrimination based on nationality to a number of consular and diplomatic protection activities of the Member States. The Maastricht Treaty thus restricted the discretion which international⁷² and also domestic law⁷³ had recognised to States over consular and diplomatic protection matters.

⁷⁰ The conclusions made here are based on empirical data that I collected while I was working as a Legal Expert responsible for drafting the comparative analysis of the national legal frameworks and practice of the then 27 EU Member States on consular and diplomatic protection of citizens, which have been collected within the CARE database and 2012 Report. Some of the conclusions herein advanced have been presented, though in a different structure and form, in previously published work for the Commission, European Parliament or academic purposes.

⁷¹ See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Merits, Judgment of 5 February 1970, ICJ Reports (1970), p. 4 at p. 44. As to the exercise of consular protection of individuals, Article 36 of the VCCR recognises an international individual right to consular assistance only between the foreigner and the receiving State and not between the individual and her State of nationality, see: Case concerning the Vienna Convention on Consular Relations (*Paraguay v. United States of America*), Provisional Measures, Order of 9 April 1998, ICJ Reports (1998), 426; Case concerning *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment of 31 March 2004, ICJ Reports (2004), 12 *Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Provisional Measures, the Judgment of the ICJ of 24 May 2007; Merits, Judgment of 30 November 2010; Compensation Judgment of 19 June 2012. See also, Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing, New York (1916); B. Sen, *A Diplomat's Handbook of International Law and Practice*, Third Revised ed., Martinus Nijhoff Publishers (1988); J. Dugard, 'Diplomatic Protection' in W. Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law*, Amsterdam (2009).

⁷² See more details in Chapter 2.

⁷³ See more details in Chapter 4, section VII. Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.

This right attached to a supranational type of citizenship⁷⁴ did not at that time have an exact correspondent right within other international organisations or regional legal orders.⁷⁵ It is also unusual compared to the individual rights recognised by the Union directly to the EU citizens, whether of a citizenship⁷⁶ or fundamental nature⁷⁷, or derived from EU secondary legislation.⁷⁸ The EU citizenship right to equal protection abroad is to be exercised purely outside the borders of the Union.⁷⁹

The novelty of the EU citizenship right to equal protection abroad is given by the legal benefits attached to it by the EU legal orders, namely the EU principle of primacy, direct effect and effective legal remedies conferred directly to the individuals both within the domestic legal orders and before the EU institutions and courts, rather than the legal content of the right. The extension of the equal treatment based on nationality of the EU citizens outside the Union territory⁸⁰ follows the model of previous agreements on the sharing of consular and diplomatic representation functions concluded among some of the European countries that share a similar culture, language and/or have long-established diplomatic ties. These partnerships were included in bilateral or multilateral agreements concluded among European countries on various subject matters, ranging from formal international treaties to

⁷⁴ Namely the EU citizenship.

⁷⁵ Similar examples of individual's rights have started to occur in other regional organisations only very recently. For instance, regional consular sharing agreements have been signed in the framework of other regional international organisations, such as the ASEAN (see the *Guidelines for the Provision of Emergency Assistance by ASEAN Missions in Third Countries to Nationals of ASEAN Member Countries in Crisis Situation*, Manila, Philippines, 29-30 July 2007) and Andean countries (see the *Decision 548, the Andean Cooperation Mechanism on Consular Assistance and Protection and Migratory Matters*, adopted in 2003, which provides that 'This instrument stipulates that any national of an Andean Community Member Country who is within the territory of a third State where his/her country of origin has no Diplomatic or Consular Representation, may avail him or herself of the protection of the diplomatic or consular officials of any other Member Country.' However, Decision 548/2003 has not yet been implemented). The ASEAN and Andean consular sharing agreements primarily target emergency situations. None of these provisions is so far a legally binding provision, since the ASEAN includes the consular sharing in a soft law instrument. While, within the Andean framework, the said Decision is not yet in force. These provisions do not enshrine an individual right identical to the EU citizenship right to equal protection abroad recognised within the EU legal order, but rather keep the partnership in consular sharing at a purely inter-governmental framework of cooperation, similar to Decision 95/553/EC and Decision 96/409/CFSP.

⁷⁶ See, the free movement and residence rights (Art. 21 TFEU), political representation and voting rights (Art. 22 TFEU), rights related to the communication with the EU institutions (Art. 24 TFEU).

⁷⁷ As established later on by the EU Charter.

⁷⁸ See, inter alia, Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 229/35 of 29 June 2004.

⁷⁹ E. Denza, 'Commentary to Art. 46 of the EU Charter', in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing (2014).

⁸⁰ The substantive scope of the equal treatment does not cover all possible situations of consular and diplomatic assistance and protection, since Decisions 95/553/EC and 96/409/CFSP restricted it to a certain minimum required consular assistance cases. See more on this in the following sub-sections.

informal *ad hoc* agreements, and covering a wide range of areas of cooperation,⁸¹ from quite precise consular and diplomatic representation functions to more general consular and diplomatic matters.⁸² At the time when the Maastricht Treaty was adopted, similar agreements on the sharing of consular and diplomatic representation tasks existed not only within the European continent but were also spread among States around the world.⁸³

It could thus be argued that the creation of the EU citizenship right was inspired by previous regional and bilateral consular and diplomatic cooperation agreements concluded between some of the European countries. Prior to the establishment of the European Community or the accession of the Member States to the Union, several European countries shared consular and diplomatic arrangements similar to former Article 20 EC Treaty type of protection agreement.⁸⁴ This Article builds upon the previous bilateral or regional consular and diplomatic co-operation agreements concluded between the European countries, and extends the cooperation to all the States that are party to the European Union, for the purpose of ensuring that none of their citizens is left unprotected when travelling or residing in third countries.

The Benelux countries⁸⁵, some of the Central and Eastern European countries, the Nordic countries⁸⁶ and the Baltic States⁸⁷ adopted agreements whose substantive scope

⁸¹ See, for instance, the Helsinki Convention on Nordic Co-operation, the Convention on consular cooperation between the Grand-Duchy of Luxembourg and the Kingdom of Belgium of 30 September 1965, available at <http://www.careproject.eu/database/scheda.php?trans=en&caseother=10005>.

⁸² For instance, the Nordic Cooperation Treaty of 23 March 1962 concluded between Denmark, Finland, Iceland, Norway and Sweden; Agreement between Austria and Switzerland on Cooperation in consular matters of 3 September 1979; the Convention on consular cooperation between the Grand-Duchy of Luxembourg and the Kingdom of Belgium of 30 September 1965. For more details, see Chapter Three, Section 2.1.2 of the Final Report of the CARE (*Consular and Diplomatic Protection: Legal Framework in the EU Member States*) Project (hereinafter the *CARE Report*), Section 2.1.2, available at: <http://www.careproject.eu>.

⁸³ See the Agreement between Bolivia, Colombia, Equator, Peru and Venezuela regarding attributions of consular officials of 18 July 1911. Additional examples are mentioned by Lee and Quigley, for example consular services for Libyans were provided by Jordan in Spain, by Lebanon in France and Ghana, by Iraq in Iran and Pakistan, and by the UK in other countries. See G. Haynal, M. Welsh, L. Century and S. Tyle, *The Consular Function in the 21st Century*, A Report for Foreign Affairs and International Trade, Canada, 27 March 2013, 1-11, available online at <http://munkschool.utoronto.ca/wp-content/uploads/2013/06/The-Consular-Function-in-the-21st-Century-.pdf>.

⁸⁴ See, *inter alia*, the Helsinki Convention on Nordic Co-operation (hereinafter the Helsinki Treaty), concluded on 23 March 1962 between the Scandinavian countries (Denmark, Sweden, Finland, Iceland and Norway), or the Agreement on Consular Assistance and Cooperation signed between the three Baltic States of Estonia, Latvia and Lithuania, before they acceded to the EU on 5 February 1999. For the entire list of bilateral and regional agreements between the European countries on consular cooperation, see Chapter Three, Section 2.1.2 of the *CARE Report*.

⁸⁵ The Convention on the field of consular cooperation between the Grand-Duchy of Luxembourg and the Kingdom of Belgium is available in the CARE database, see <http://www.careproject.eu/database/scheda.php?trans=en&caseother=10018>

⁸⁶ The Agreement is available in the CARE database, see <http://www.careproject.eu/database/scheda.php?trans=en&caseother=10005>

included the obligation of the consular and diplomatic officials of the Contracting States to provide assistance and protection, compatible with their functions, to the citizens of another Contracting State that was not represented in certain third countries. The substantive scope of these inter-States cooperation agreements was often broader than the protection envisaged later on by Article 8(c) of the Maastricht Treaty, which was limited by secondary legislation to a minimal number of distress situations.⁸⁸

Each of these agreements governs, *inter alia*, the management of delegation and sharing of consular and diplomatic representational tasks, which also includes delegation of the function of protecting the interests of the nationals by a non-nationality State. These agreements share certain similar traits: first, the principle that the Contracting Parties shall assist citizens of any of the other Contracting Party to the Agreement, should this Party not be represented in the receiving State (which is similar to the principles envisaged by the EU founding Treaties⁸⁹); a second principle is that assistance can only be granted if the receiving State⁹⁰ does not object to this assistance (similar to the principle laid down in Article 8 of the VCCR). The substantive scope of consular assistance of the Baltic and the Benelux Agreements extended to consular services in natural and man-made disasters as well as to consular notarial services. For instance, Article 3 of the Baltic Agreement signed in 1999 includes also notary services within the right of the unrepresented individual to receive protection abroad from a non-nationality Contracting State.⁹¹ The 1965 Agreement concluded among the Benelux countries has a similar wide scope of application.⁹²

⁸⁷ The Baltic cooperation is dedicated entirely to issues of consular assistance. For example, Article 3 of the Baltic Agreement reiterates the cases set out in Article 5(1) of Decision 95/553/EC and adds a new consular function in Article 3(g) – *[the consular and diplomatic officials of the Contracting Parties] acting as notary in capacities and performing certain functions of an administrative nature, in conformity with the laws and regulations of the receiving State*. The Agreement is available in the CARE database, see <http://www.careproject.eu/database/scheda.php?trans=en&caseother=150>

⁸⁸ Article 34 of the Helsinki Treaty reads as follows: ‘Public Officials in the Foreign Services of any of the High Contracting Parties who are serving outside the Nordic countries shall, to the extent that it is compatible with their duties and when no objection is lodged by the country in which they are serving, also be of assistance to citizens of the other Nordic countries, should the latter not be represented in the territory concerned’. See also Art. 3 of the Baltic cooperation agreement.

⁸⁹ See Article 8(c) of the Maastricht Treaty, which later became Articles 20(2)(c) of the EC Treaty and currently Article 20(2)(c) TFEU.

⁹⁰ The *receiving State* is the State where the person is located, which is a country other than the country of nationality and in the framework of this research it is usually a non-EU Member State.

⁹¹ See Article 3(g) which reads as follows: *[the consular and diplomatic officials of the Contracting Parties] acting as notary in capacities and performing certain functions of an administrative nature, in conformity with the laws and regulations of the receiving State*. The entire content of the Baltic Agreement as well as other similar consular and diplomatic cooperation agreements can be accessed in the CARE database, available at: <<http://www.careproject.eu/database/browse.php>>

⁹² According to Arts. 2-9 of the Agreement, Belgian consular and diplomatic officials can provide extended consular protection to unrepresented citizens of Luxembourg; e.g., registration of the Belgian citizens, notarial services, representation and help before the administrative authorities from the receiving State

In light of this context, it seems that the added value of the EU citizenship right to equal protection abroad introduced by the Maastricht Treaty consists, first, in the geographical extension of the previously scattered consular and diplomatic cooperation among some of the European countries to all the States of the European Union. Second, it ensured a stronger protection for the Union citizens, since the EU citizenship right enjoys primacy, direct effect and effective legal guarantees before national courts, features which lacked in regard to the international rights recognised by some of the Member States' arrangements concluded outside the Union's institutional framework. Although the EU citizenship right is not innovative in terms of its substantive scope of application,⁹³ the legal effects and guarantees with which it is endowed, under the EU legal framework, bring the pre-Union or pre-accession inter-States consular and diplomatic cooperation to a new (Union) level of integration, which adds more stringent obligations on the Member States for the benefit of all EU citizens.⁹⁴ This precise legal nature, as an EU citizenship right, comes with additional benefits concerning the legal effects and remedies from which the EU citizens can benefit in case the Member States are not fulfilling their EU primary law obligation.⁹⁵

⁹³ EU law currently requires Member States to ensure consular protection to unrepresented Union citizens in only six mandatory circumstances. See Article 5(1) of Decision 95/553/EC and Decision 96/409/CFSP, more details in the following Section.

⁹⁴ See the Preamble of founding Treaties, Art. 1(2) TEU: '*in which decisions are taken as openly as possible and as closely as possible to the citizen.*' A phrase that has been included in all the different versions of the founding Treaties; see also Opinion 1/91, *First EEA Agreement*, [1991] ECR I-6079.

⁹⁵ For more details see Chapter 4, section: The legal effects of the Union citizenship right to equal protection abroad.

III. The Maastricht Treaty – introducing the EU citizenship right to equal protection of unrepresented Union citizens in third countries⁹⁶

The introduction of an EU citizenship right to equal protection abroad by the Maastricht Treaty, when most of the Member States had already in force similar consular and diplomatic cooperation international treaties, is due to the specific context of the time. The increasing amount of travel made by EU citizens in third countries and the rising number of European citizens who were not represented in third countries drew the attention of EU officials, such as Pietro Adonnino,⁹⁷ who identified the need for a wider solidarity pact among the EU countries to ensure protection for all EU citizens in distress abroad. It was perceived also as a more strategic opportunity to strengthen the solidarity among all the EU Member States, instead of preserving regional division of consular and diplomatic interests and ties, and contribute to the construction of an external image of a unified Union and peoples.

The previous sharing of consular and diplomatic responsibilities was conceived as a Union citizenship right to equal protection abroad, which required from the Member States to ensure protection by their consular or diplomatic authorities represented in the third country where the unrepresented EU citizen was located.⁹⁸ At that time, the international legal framework did not establish an obligation on States to exercise protection of individuals abroad. International customary law categorised consular and diplomatic assistance and protection of individuals as discretionary rights of the State, particularly of the State of nationality, over which the executive enjoyed an exclusive competence.⁹⁹ A similar approach towards consular and diplomatic protection of individuals was endorsed by the then EU Member States, within their domestic legal orders. Of the then Member States, only Portugal

⁹⁶ A more detailed version of this chapter can be found in Madalina B. Moraru and Mario P. Chiti, 'The right to consular protection before and after Lisbon' in S. Faro, Mario P. Chiti, E. Schweighofer (eds.), *European Citizenship and Consular Protection –New Trends in European Law and National Law*, Editoriale Scientifica (2012), 17-41.

⁹⁷ The president of the Committee in charge with the conceptualisation of the EU citizenship. The establishment of a common protection of EU citizens in third countries was put forward for the first time by his Committee, 'Europe des citoyens', after the meeting of the Fontainebleau European Council held in 1984, see Bull. CE supp. 7/85, 22.

⁹⁸ See Point 2.6. of the Report of the ad hoc Committee on a People's Europe to the European Council in Milan, 28 and 29 June 1985, which reads as follows: '*The citizen as traveller outside the Community* - A Community citizen in need of assistance during a temporary stay in a third country where his own country is not represented by an embassy or a consulate should be able to obtain *assistance from the local consular representation of another Member State*. The Committee recommends that the European Council invite Member States to intensify work for such consular cooperation in third countries and to formulate more precise guidelines.'

⁹⁹ Richard B. Lillich, *International Law of State Responsibility for Injuries to Aliens*, Charlottesville: University Press of Virginia, (1983).

recognised a constitutional right to protection abroad for its citizens.¹⁰⁰ Denmark¹⁰¹ and Italy¹⁰² had legislative provisions interpreted as conferring an individual right to protection abroad to their citizens, while the majority of the Member States regarded the area of consular and diplomatic protection of individuals as a matter of policy over which the executive enjoyed exclusive power of decision, with no right recognised to the citizen to receive consular and diplomatic protection services.¹⁰³

There were several reasons why all the Member States agreed to restrict their international discretionary rights in consular and diplomatic matters in spite of the majority opinion that consular and diplomatic protection of individuals are matters falling under the exclusive sovereign competence of the Member States, namely: the numerous examples of successful sharing of consular and diplomatic functions among the European countries based on their previous consular and diplomatic protection international agreements; the fact that there were only five third countries where all of the then Member States were represented;¹⁰⁴ the fact that the EU citizenship right to equal protection abroad was seen as contributing to strengthening the connection between the EU citizens and all the EU countries, as well as with the newly created Union¹⁰⁵, due to the fact that in crisis situations, the individual is furthermore connected to the State or body providing help.

The idea of a ‘European citizenship’ started to materialise in the 1970s,¹⁰⁶ and a first version of Article 8 (c) of the Maastricht Treaty referring to the EU citizenship right to protection abroad would come to light with the adoption of a decision of the Ministers of Foreign Affairs meeting within the European Political Cooperation providing that ‘*Etats membres examineront la possibilité de prêter aide et assistance dans les pays tiers aux ressortissants des Etats membres qui n’y ont pas de représentations*’¹⁰⁷. The idea was further developed in the ‘*Guidelines for the Protection of Non-Represented EC Nationals by EC*

¹⁰⁰ Art. 14 of the Constitution, see more details in the National Report on Portugal, section 4, in the *CARE Report*.

¹⁰¹ Section 1(3) of Act No. 150/13 April 1983.

¹⁰² Art. 45 of Decree of the President of the Republic No 18/1967.

¹⁰³ See the *CARE Report*, Chapter Three – Comparative Analysis, Section 4.1 Right to consular protection.

¹⁰⁴ Second Report on the Citizenship of the Union issued by the Commission, COM/97/230 final, 11.

¹⁰⁵ Misson L. Berthe, E. Delcree, C. Kaens, ‘La protection diplomatique et consulaire est-elle un droit fondamental?’, available at <http://www.scribd.com/doc/25999685/La-Protection-Diplomatique-Et-Consulaire-Est-elle-Un#scribd>

¹⁰⁶ Olsen argues that the idea of a European citizenship preceded the launch of the ‘official’ European citizenship discourse in the 1970s, see Espen D.H. Olsen, ‘The origins of European citizenship in the first two decades of European integration’, (2008) *Journal of European Public Policy*, 40.

¹⁰⁷ See decision of 28 February 1986 of the Ministers of Foreign Affairs meeting within the European Political Cooperation; see more details in F. Poirat, ‘Comment on Art 46 of the EU Charter’, in Laurence Burgogne-Larsen, AN. Levade, F. Picod (eds.), *Traité établissant une Constitution pour l’Europe*, Commentaire article par article, Tome 2, Bruylant (2005), 578-585.

Missions in Third Countries’, which were provisionally applied as of 1 July 1993¹⁰⁸, several months before the entry into force of the Maastricht Treaty.¹⁰⁹ These initiatives were not legally binding, but mere political acts, which were explicitly formalised by the Maastricht Treaty, by way of conferring a legal individual EU citizenship right to equal protection in third countries to all the unrepresented Union citizens.

A new supranational phase of the European integration project was opened by the 1992 Maastricht Treaty, which created the European Union and its flagship citizenship¹¹⁰ (a sort of supranational citizenship that was supposed to complement the classical State citizenship, which all the citizens of the Member States would enjoy). Article 8 of the Maastricht Treaty codified the previous political acts adopted in the inter-governmental framework of the European Political Cooperation and raised it from a mere political concept or a Union policy to an effective legal status of the individual, complementary to the status of citizen of a Member State.¹¹¹ This new fundamental status conferred specific Union rights to all EU citizens, in addition to those deriving from national citizenship, such as: freedom of movement and stay (former Article 8a); the right to vote and stand in local and European elections (former Article 8b); the right to petition the European Parliament (former Article 8d); and, finally the right to equal protection abroad (former Article 8c).

Article 8c of the Maastricht Treaty¹¹² provided specifically that Union citizens that are not represented by their home Member States in the territory of a third country have the right to be protected by the consular and diplomatic authorities of another Member State that is represented in the particular place in which the Union citizen is located. Contrary to the 1993 *Guidelines for the Protection of Non-Represented EC Nationals by EC Missions in Third*

¹⁰⁸ Decision of 241st Political Committee 29-30 March 1993 ‘Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries’, in force since 1 July 1993. The Guidelines were mentioned by the first Report drafted by the Commission on the European Citizenship of 21 December 1993, COM(93)702 final, p. 7. It has to be noted that the title of the Guidelines refers to the protection of unrepresented Union citizens by the EC Missions, and not the missions of the represented Member States. The Maastricht Treaty clarified that protection of unrepresented EU citizens outside the Union falls on the responsibility of the represented non-nationality Member States, and only incidentally by the EC missions.

¹⁰⁹ The Maastricht Treaty entered into force on 1st November 1993.

¹¹⁰ See Art. 8 of the Maastricht Treaty.

¹¹¹ Madalina B. Moraru and Mario P. Chiti, ‘The right to consular protection before and after Lisbon’ in S. Faro, Mario P. Chiti, E. Schweighofer (eds.), *European Citizenship and Consular Protection –New Trends in European Law and National Law*, Editoriale Scientifica, (2012), 19.

¹¹² Art. 8c of the Maastricht Treaty read as follows: ‘Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Before 31 December 1993, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.’

*Countries*¹¹³, which enabled the EC Missions to protect the unrepresented Union citizens, Article 8c followed to a certain extent the international approach by establishing that the responsibility to protect the Union citizens still remained a State responsibility, although, in this particular situation, it was not the responsibility of the State of nationality, but the responsibility of a non-nationality Member State. The Maastricht Treaty thus followed the regional model of sharing consular and diplomatic functions, which were in force among certain of the EU Member States. Unlike the consular and diplomatic cooperation regional agreements, Article 8c placed the emphasis on the equal treatment in the provision of assistance. The Article described the ‘protection abroad’ function as an entitlement of the EU citizens to equal treatment outside the borders of the Union market. The principle of non-discrimination based on nationality, essential to the construction of the internal market,¹¹⁴ was thus extended outside the Union, contributing to the creation of a link between the citizens of the Member States and the Union. In addition to the bilateral or regional consular and diplomatic cooperation agreements, the construction of the EU citizenship right was inspired also by the domestic legal orders of some of the Member States, such as Portugal, which had provided for a constitutional citizenship right to protection abroad.¹¹⁵ The EU citizenship right to equal protection abroad is thus mixing features taken from the domestic legal orders of some of the EU member States, i.e. the constitutional legal nature of protection abroad of individual citizens; the international legal order, by preserving the main responsibility of protection to the State of nationality; and specific feature of the EU legal order constructed on non-discrimination based on nationality, by conceptualising the EU citizenship right to protection of EU citizens abroad on the principle of equal treatment based on nationality among the EU citizens.

Compared to the other EU citizenship rights, the right to equal protection abroad of unrepresented Union citizens is unique due to the fact that it extends the application of the principle of equal treatment characteristic of the internal market to the territory of non-EU

¹¹³ T. Kostakopoulou, *Citizenship, Identity and Immigration in the EU: Between Past and Future*, Manchester University Press, 2001, 56; Madalina B. Moraru and Mario P. Chiti, ‘The right to consular protection before and after Lisbon’, in S. Faro, Mario P. Chiti, E. Schweighofer, *European Citizenship and Consular Protection*, New Trends in European Law and National Law, Editoriale Scientifica, 2012, 17-41.

¹¹⁴ The principle of non-discrimination based on nationality is one of the general principles of EU law, see Case C-1/72 *Frilli v Belgium* [1972] ECR 457, para.19; Case C-103 and 145/77 *Royal Scholten-Honig (Holdings) Ltd v Intervention Board for Agricultural Produce* [1978] ECR 2037, para.26. As to the significant importance of the principle of non-discrimination based on nationality to the creation and advancement of the internal market, see N. Reich, C. Goddard, K. Vasiljeva, *Understanding EU law: Objectives, Principles and Methods of Community Law*, Intersentia (2005), 191ff.

¹¹⁵ See Art. 14 of the Portuguese Constitution which states that Portuguese citizens abroad benefit from the protection of the State for the exercise of their rights. See the *CARE Report*, Portuguese Report, 377.

countries, and confers it with an independent status, dissociated from the exercise of fundamental economic freedoms. The citizens were to be protected for the mere fact of being citizens of the Union, without the need to prove the exercise of one of the fundamental freedoms, the cross-border element or financial resources which the CJEU has made the EU citizenship dependent upon.¹¹⁶ The ambitious objectives of enhancing the Union's visibility on the international sphere¹¹⁷ and instilling trust in the peoples of the Member States on the advancement of the European integration process were not the only reasons behind the provision of this atypical right. The Member States' limited executive capacity, which gradually became insufficient to effectively respond to all the consular and diplomatic demands of their citizens abroad constituted an equally significant reason for the establishment of a shared obligation of ensuring protection of unrepresented Union citizens outside the Union.

The Maastricht Treaty did not, however, define what was meant by 'protection of the unrepresented Union citizens abroad', and the term has not been clarified by the several subsequent Treaty amendments. The term 'protection abroad' of citizens is also to be found in the Constitutions¹¹⁸ and national laws¹¹⁹ of some of the Member States and has usually been interpreted by academics as encompassing both consular and diplomatic protection and assistance.¹²⁰ During the preparation of the Maastricht Treaty some of the Member States proposed more concrete terms, such as consular and/or diplomatic protection.¹²¹ Following the proposal of the Luxembourg Presidency, the final text of the Maastricht Treaty replaced the 'consular' and 'diplomatic' protection with a more general term: '*protection by the diplomatic or consular authorities of any Member States.*' This replacement of terms could have been determined by the different conceptual approaches of the Member States to the provision of

¹¹⁶ For more details, see Chapter 3 IV.2.a section: The relation between Union citizenship and Member State(s) citizenship(s) – derivative or autonomous Union citizenship?.

¹¹⁷ The significant role of the EU citizenship right to equal protection abroad for attaining the objective of enhancing the Union's international image clearly results from the Adonnino Reports and documents preceding the adoption of the Maastricht Treaty and also from the Decisions implementing Art. 8c of the Maastricht Treaty. Decision 95/553/EC provides in its preamble that the 'common protection arrangements' adopted for the purpose of implementing Art. 8c will '*strengthen the identity of the Union as perceived in third countries.*' In addition, the objective of '*strengthening the idea of European solidarity as perceived by the citizens in question*' is also mentioned.

¹¹⁸ Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania; see the CARE Report, Chapter three, point 4.1 at 608.

¹¹⁹ Denmark, Finland, Greece, Slovakia, and Slovenia.

¹²⁰ See S. Faro and M. Moraru, 'Comparative analysis of legislation and practice on consular protection and assistance of the 27 EU countries', in S. Faro, M. P. Chiti and E. Schweighofer (eds.), *European Citizenship and Consular Protection. New Trends in European Law and National Law*, Naples: Editoriale Scientifica Napoli (2012), 157-291.

¹²¹ See for example, Spain's proposal, available in *Documentation de la RIE*, Vol. 18, 1991, 333-338 and 405-409; L. Nuergas, 'De la ciudadanía europea a la ciudadanía de la Unión', (1992) *Gaceta Jurídica*, 93-94.

consular and diplomatic protection of nationals. A general term would ensure the exercise of the EU right to equal protection abroad in spite of the different domestic administrative legal frameworks.¹²² Second, the broad phrasing would not unnecessarily limit the substantive ambit of the right from the start, but leave the door open to include different forms of protection of individuals depending on the future evolution of the Member States and their peoples' needs.

In addition to the right conferred to the Union citizens, Art. 8c of the EC Treaty provided the means of implementation of the Article: '*Before 31 December 1993 the Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.*' The prescribed date was not respected by the then Member States in regard to any of the required positive actions, that is: the internal measures of implementation ('the necessary rules among themselves') and the external measures ('start the international negotiations'). In regard to the latter positive obligation, some of the Member States considered the Presidency verbal note sent to third countries on the newly consented consular functions of the Member States as already fulfilling their obligation to start the international negotiations.¹²³ In regard to the former positive obligation of adopting 'necessary rules' for the implementation of Article 8c, the Member States envisaged them in the form of intergovernmental type of instruments subject to the unanimous consent of the Member States. Until the Lisbon Treaty, all the Treaty amendments¹²⁴ maintained the same wording of this article, only its number was changed. The main reason behind its immutable nature is most probably the fact that, despite accepting to limit their international discretionary right to exercise consular and diplomatic protection of individuals, the Member States still perceived this field as a core element of their Statehood, falling under their exclusive competences. Therefore the Member States excluded for more than a decade any amendments that would lead to a transfer of their decision-making powers to the Union institutions.

¹²² The choice of general concepts for the definition of the EU citizenship right to equal protection of unrepresented EU citizens abroad is not an exception within the process of EU law formation. Similar examples can be traced in many other EU law related areas, and particularly those touching upon foreign policy matters, where Member States have few commonalities and the area is perceived as State reserved. The agreed EU rules are thus a product of complex political bargaining, and the law therefore usually contains a degree of - sometimes even intentional - politically necessary fuzziness. See, K. Koskinen, *Beyond Ambivalence. Postmodernity and the Ethics of Translation*, Tampere: Tampereen yliopistopaino (2000), 86.

¹²³ See the National Report on Germany in the *CARE Report*, 165.

¹²⁴ Art. 8c of the Maastricht Treaty became Art. 17 when the EC Treaty was amended by the Treaty of Amsterdam signed in 1997 and its content and number were preserved entirely by the Treaty of Nice. Art. 8c became the subject of a separate Article, Art. 20 of the ex EC Treaty.

In addition to Article 8c of the Maastricht Treaty, which later became Article 20 EC Treaty,¹²⁵ the then Union pillar structure included other relevant provisions aimed at securing the effective implementation of the EU citizenship right. Under the ambit of the Common Foreign and Security Policy, which was one of the three pillars of the then European Union, ‘*the diplomatic and consular missions of the Member States and the Commission delegations in third countries and international conferences, and their representations to international organisations*’ were required to engage in constant cooperation by way of, *inter alia*, ‘*exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 8c of the Treaty establishing the European Community.*’¹²⁶ The Article was a specific application of the more general principle of systematic cooperation among the Member States and the Union institutions governing the CFSP¹²⁷ in the field of securing protection abroad of unrepresented Union citizens. It indicated that the objective of securing the effective implementation, in practice, of the EU citizenship right was dependent on the close vertical cooperation among the EU and Member States, and not just the Member States’ themselves. The Article did not refer to a precise type of implementing instrument. However, being placed within the ambit of the CFSP Chapter, it could be assumed that one of the specific CFSP instruments, i.e. Joint Actions, Common Positions, Common Strategies or Decisions¹²⁸, could have been a legitimate option for the Council to choose for implementing the obligation of vertical consular cooperation (then Article 20 EU Treaty) for the purpose of securing an effective EU citizenship right to equal protection abroad (Article 20 EC Treaty).

The issue of the exact content of the EU citizenship right to equal protection abroad has been the subject of fervent critiques in the legal literature¹²⁹ and also from certain Member

¹²⁵ Following the Treaty of Amsterdam amendment.

¹²⁶ See Article J.6 of the Treaty of Maastricht.

¹²⁷ Art. 16 TEU (current Art. 32 TEU).

¹²⁸ The Treaty on the EU provided the possibility for the EU to act by way of CFSP Decisions when implementing a joint action, common position, or common strategy (Art. 12 EU Treaty), and when appointing a special representative (Art. 18 EU Treaty). However, in the CFSP practice, the Council acted also by way of *sui generis* Decisions, meaning Decisions that were adopted on the basis of Art. 13 of the EU Treaty.

¹²⁹ See, *inter alia*, A. Vermeer-Künzli, ‘The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance’ in by S. Faro, Mario P. Chiti and E. Schweighofer (eds), *European Citizenship and Consular Protection New Trends in European Law and National law* edited, Editura scientifica Napoli (2012), 101-111; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339; T. Stein, ‘Interim Report on “Diplomatic Protection Under the European Union Treaty”’, in: *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, ‘The Protection of EU Citizens: The Perspective of

States.¹³⁰ The main allegations concern the lack of clarity of former Article 20 EC Treaty in relation to its substantive scope of application. It was argued that it is not clear whether the drafters of the Treaties intended to confer both a right to consular and diplomatic protection and, if they did intend to confer also a right to diplomatic protection, it was contended that the EU provisions would be incompatible with the international legal framework. An additional critique referred to the lack of clarity of whether the drafters of Maastricht referred to consular protection or assistance¹³¹, since in certain Member States, consular assistance and consular protection are two distinct concepts. The personal scope of the Article was also not very detailed, since the EU Treaty provisions did not clarify whether ‘representation’ included consulates, embassies and Honorary Consuls, and whether they could be located anywhere in the third country of residence of the unrepresented Union citizen.

The issues of the substantive and personal scope of application of the EU citizenship right to equal protection abroad were addressed, to a certain extent, by the subsequent implementing norms, which the Member States were required to adopt to ensure the effective application of the EU citizenship right.

International law’ in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

¹³⁰ See the national Reports on France, Ireland, Poland, and the UK in the *CARE Report*. In addition, see also the contribution of the Portuguese delegation during the written and oral stages of the public hearing held in Brussels on the European Commission’s Green Paper on Diplomatic and Consular Protection of Union Citizens in Third Countries, available at <http://www.careproject.eu/database/schedaEU.php?eulex=EUpublichearing&lang=6>

¹³¹ Portugal has such a difference, see National Report on Portugal in the *CARE Report*.

1. Implementing the EU citizenship right to equal protection abroad - securing effective protection of EU citizens abroad without encroaching on the Member States' sovereign powers

a. A critical legal assessment of the scope of the implementing measures

Former Article 20 of the EC Treaty provided that the Member States shall establish the necessary measures amongst themselves to secure the protection required under that Article. Following this EU primary law positive obligation to adopt implementing measures, the Member States have adopted three measures in the peculiar legal form of Decisions of the Representatives of the Governments of the Member States meeting within the Council.¹³² The first of these Decisions was adopted on 19 December 1995, and clarified to a certain extent the personal and substantive scope of the EU citizenship right to equal protection. Although the right is recognised to all EU citizens, only those unrepresented by their Member State in the territory of a third country can exercise it. Former Article 20 EC Treaty did not offer further details on what 'unrepresented' actually means in practice. For instance whether only embassies and consulates qualify under the ambit of consular and diplomatic authorities, or also the Honorary Consuls, and what is the territorial area to be taken into consideration, i.e. the entire third country or the city close to the place where the EU citizen is located. Article 1 of Decision 95/553 clarified to a certain extent the meaning of 'unrepresented' by including both permanent representations and Honorary consuls, as long as they are competent to ensure consular protection, of the Member State of nationality or of '*other States representing it on a permanent basis*' within the ambit of the 'representation' of the Member State of nationality.

As to the territorial coverage, the decisive criterion is the inaccessibility of the permanent representation or Honorary Consul from '*the place in which he [the EU citizen] is located*'.¹³³ This criterion ensures that those EU citizens located hundreds of

¹³² Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, [1995] OJ L 314/73; Decision 96/409/CFSP, on the establishment of an emergency travel document, [1996] OJ L 168/11; Decision of the representatives of the Governments of the Member States, meeting within the Council, Measures implementing protection for EU citizens by diplomatic and consular representation (doc. 11107/95), 19 December 1995 (source: Council of the European Union, CFSP handbook – Compilation of selected texts applicable in CFSP, doc. 16074/06.)

¹³³ See Art. 1 of Decision 95/553/EC.

kilometres away from a permanent representation or Honorary Consul will benefit from protection through the representation of another Member State that is situated closer to them. In practice, these favourable provisions have not been properly implemented by the Member States, since none of the Member States have used specific criteria concerning the geographic distance or travel time to define the term ‘*accessible permanent representation*’. The criterion used most frequently is the concept of ‘considerable geographic distance’, which is interpreted on a case-by-case basis depending on pragmatic motivations justifying or not the provision of consular assistance.¹³⁴

As to the material scope of the EU citizenship right to equal protection abroad, although the title of the Decision (95/553/EC) refers to the protection in general of citizens of the European Union by diplomatic and consular representations, its content refers only to consular assistance functions in five limited situations. Therefore Decision 95/553/EC limited the substantive scope of the Treaty based EU citizenship right to equal protection abroad to consular protection in the following five mandatory situations: death; serious accident or serious illness; arrest or detention; victims of violent crime; and relief and repatriation of distressed citizens. The short Decision did not include details on the steps to be followed in providing consular assistance and protection in the aforementioned situations. Detailed guidelines are provided by way of a separate Decision of the Representatives of the Member States (11107/95).¹³⁵ For instance, a list of the Member States pursuing the impounded or marked passport practice in case of repatriation of the unrepresented Union citizen, as a guarantee following an advance of public funds, is provided therein, alongside other very specific consular assistance guidelines such as: the extent to which excess baggage costs can be covered; details of the detainee which the consular or diplomatic officials would have to provide to his home country officials; the international human rights standards which the consular and diplomatic official of the represented Member State would need to observe throughout the detention period; the particular assistance to be given in cases of visits, legal representation, and the procedure to be followed in cases of petitions for pardons, easy releases and transfer of detainees.

¹³⁴ See more details in Chapter III of the *CARE Report*, Section 4.1.

¹³⁵ Decision of the Representatives of the Governments of the Member States, meeting within the Council, Measures implementing protection for EU citizens by diplomatic and consular representation (doc. 11107/95), 19 December 1995 (not published, source CARE Database, http://www.careproject.eu/database/upload/EUeu11107/EUeu11107_en_Text.pdf). The Decision can be found in the CARE Database, or in the Annex of S. Faro, M. P. Chiti and E. Schweighofer (eds.), *European Citizenship and Consular Protection. New Trends in European Law and National Law*, Editoriale Scientifica Napoli (2012).

Article 5(2) of Decision 95/553/EC permits the Member States to offer consular assistance in situations other than the five mandatory situations. The reaction of the Member States to the exercise of this discretionary power has, so far, diverged. While certain Member States opine that consular assistance under former Article 20 EC Treaty must be distinguished from the provision of visa, passport and notarial services,¹³⁶ and that the *‘Member States are under no obligation to provide these services to unrepresented nationals on a non-discriminatory basis, but approached as limited to the list of services under Article 5 of Decision 95/553/EC which does not include other consular services (with the exception of crisis situations)’*,¹³⁷ other Member States were willing to provide assistance to Union citizens beyond the limited circumstances laid down in Article 5(1) of Decision 95/553/EC. Certain Member States manifested this intention even prior to their accession to the Union¹³⁸, while others have extended the scope of consular protection within the framework of the national measure implementing the aforementioned Decisions.¹³⁹ Although, so far, this fragmented regime has not created many problems in practice, it is recommended that for the elaboration of future instruments on this matter, a more careful balancing assessment should be carried out between: the advantages of increased consular protection of certain unrepresented Union citizens, with the disadvantages of lack of clarity and an ultimately discriminatory regime whereby several unrepresented Union citizens in similar situations and the same third

¹³⁶ See the National Report on the UK in the *CARE Report*.

¹³⁷ *Ibid.*

¹³⁸ According to the bilateral agreements concluded by certain Member States after the entry into force of the Maastricht Treaty, such as Austria and Hungary (see the Agreement between the Federal Minister for Foreign Affairs of the Republic of Austria and the Foreign Minister of the Republic of Hungary on cooperation of foreign representatives which entered into force on 20 December, 2005). See more details in Chapter Three of the *CARE Report*.

¹³⁹ Such as: the Czech Republic (According to Art. 4(2) of the Guidelines on consular assistance of EU citizens, *‘Moreover, the mission can assist – in accordance with its competences – citizens of the European Union which have requested for it in other situations.’*), Estonia (Although section 53 of the 2009 Consular Act is not clear enough about whether paragraph 2 should be interpreted as restricting the material scope of paragraph 1: *‘Provision of consular assistance to citizens of Member States of European Union: (1) A representation of the Republic of Estonia protects the interests of a citizen of a Member State of the European Union if the Member State of the European Union where the person is a citizen does not have a representation in the receiving State and if the receiving State has no objections thereto. (2) At the request of a Member State of the European Union, consular assistance shall be provided if a citizen of the country is in an emergency, has been detained or is serving sentence, also in the event of death or other unforeseeable and extraordinary circumstances.’* On the other hand it has to be noticed that Estonia has very few representations and it is probably more likely to be in a situation of requesting consular assistance than providing it, which limits the relevance of the aforementioned question of interpreting the two paragraphs of section 53), Latvia (Art. 11(2) of the Consular Statute provides that consuls should assist and protect personal, material and other rights and interests of those EU citizens who have no consular representative in a specific area), Lithuania, Spain (See Circular Order n. 3.213, available in the CARE Database) and Sweden (According to Regulation (UF 1996:9) regarding Assistance to Citizens in the European Union, Swedish embassies and consulates may assist Union citizens in other matters. See more on this in the CARE National Report on Sweden).

country receive different consular assistance from different Member States represented *in loco*.

The purpose of Decisions 95/553 and 11107/95 was to ensure a minimum common denominator of the type of consular services and practices to be followed by all the Member States' consular and diplomatic officials in the specific five mandatory circumstances where unrepresented EU citizens should be equally protected abroad. The consular services and practices established by Decision 11107/95 are commonly provided by the State consular missions. Although, at first value, these Decisions seem to restrict the substantial scope of the Treaty based EU citizenship right to equal protection abroad and consequently take a step backward for the effectiveness of the EU citizenship right,¹⁴⁰ it has to be remembered that the Member States follow very different consular and diplomatic protection approaches.¹⁴¹ These divergent domestic legal frameworks complicate the process of establishing common rules on the exercise of consular and diplomatic protection within the ambit of a provision that does not require harmonisation of consular and diplomatic protection rules, but establishes a mere prohibition of discriminatory protection based on nationality by the consular and diplomatic authorities of the different Member States. In this light, the common detailed consular conduct prescribed by Decision 11107/95, which establishes a considerable number of detailed minimum standard rules on the consular protection of EU citizens in third countries, is quite an achievement.

A second implementing measure was adopted on 25 June 1996 focusing on a precise consular problem, namely repatriation in cases where citizens have lost their passport. On the basis of Decision 96/409/CSFP establishing a common European Emergency Travel Document, the Member States agreed to offer assistance in cases of loss of travel documents by issuing a European Travel Document that would allow the EU citizen to return to his EU country of residence.¹⁴² All Member States offered some kind of

¹⁴⁰ Certain authors have contended that Decision 95/553 is incompatible with the Treaty based EU citizenship right due to the restriction of the substantive scope of the protection abroad to the prescribed consular situations. See, in particular, T. Stein, 'Diplomatic Protection under the European Union Treaty' (Interim Report on International Law Association Report on the 70th Conference, New Delhi, 2002), 277, 278.

¹⁴¹ See, in detail, Chapter three of the *CARE Report*.

¹⁴² Decision 967409/CFSP of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document, [1996] OJ L 1684 of 6.7.1996.

assistance for nationals in financial need, although this assistance tended to be very restrictive.¹⁴³

It can thus be noticed that the substantive scope of the Member States' obligation to equal protection abroad of the unrepresented Union citizens does not include all the internationally prescribed consular functions.¹⁴⁴ Consular functions such as passport and visas, refugees, marriage and divorce, extradition and civil procedure, child abduction, other notarial functions, international, cultural, scientific and tourist functions, shipping and aviation, promotion and protection of trade are not included under the mandatory consular services list which the Member States' consular and diplomatic authorities have to provide as required by the EU citizenship right. These functions may be covered by other Union provisions¹⁴⁵, or be included by the Member States within the services that they decide to provide to unrepresented Union citizens under the discretionary power recognised to them under Article 5(2) Decision 95/553.

Decisions 95/553 and 96/409 entered into force in 2002 and were subject to a mandatory requirement of amendment after five years from the moment of their entry into force.¹⁴⁶ So far, there has been no amendment of the Decisions, and following the entry into force of the Lisbon Treaty, the amendment plan seems to have been dropped and replaced with a proposal for a completely different instrument, i.e. a Council Directive.¹⁴⁷ However, until the Directive is adopted, the two Decisions will continue to be in force as the main measures adopted by the Member States for the purpose of implementing the EU citizenship right to equal protection abroad of the unrepresented Union citizens.

In addition to these three Decisions adopted by the Representatives of the Governments of the Member States acting within the Council, an impressive amount of

¹⁴³ This kind of financial aid is provided mainly for the purposes of helping citizens to return to their home country (repatriation), and on condition that a reimbursement commitment is undertaken by the EU citizen; more on the comparative analysis of the Member States' practice in this area can be found in the *CARE Report*, Section 4.5.6.

¹⁴⁴ As enumerated under Art. 5 VCCR. Although the exercise of consular functions is the prerogative of consular officials, under certain circumstances, diplomatic officials can also exercise consular functions (Arts. 3 and 70 VCCR).

¹⁴⁵ See A. M. Fernandez, 'Consular Affairs in the EU: Visa Policy as a Catalyst for Integration?', (2008) *The Hague Journal of Diplomacy*, 21. However, as rightly pointed out by Denza, in some of the Art. 5 VCCR cases, the diplomatic or consular officer would not be competent or entitled to perform services, in regard to non-nationals, such as visas or registration related functions (see E. Denza, *Commentary to Art. 46 EU Charter*, *op.cit.*, para. 46.42).

¹⁴⁶ See Art. 7 of Decision 95/553/EC, which reads as follows: '*Five years after its entry into force, this Decision shall be reviewed in the light of experience acquired and the objective of Article 8c of the Treaty establishing the European Community*'. A similar Article was incorporated into Decision 96/409/CFSP.

¹⁴⁷ For more details see the last section of this Chapter: The entry into force of the Lisbon Treaty - innovating the EU citizenship right to equal protection of (unrepresented) Union citizens abroad.

soft law was adopted by the Council, in particular the COCON¹⁴⁸ Working Group, and the Commission, during the period from the adoption of the Maastricht Treaty until the adoption of the Lisbon Treaty: Council Conclusions and Guidelines¹⁴⁹ and numerous papers issued by the Commission.¹⁵⁰ However the measures do not have legally binding effect on the Member States.¹⁵¹ Both the COCON Working Group and the Commission proposals concentrated on the implementation of the consular assistance and protection aspect of the EU citizenship right to equal protection abroad. The Commission adopted soft law documents in the form of: Green Paper, Action Paper, Assessment Paper of the envisaged Action Plan and a considerable number of Communications made to the other Union Institutions concentrating on proposals on how to tackle the problems of lack of awareness of the EU citizens of their right to equal protection abroad, the increasing

¹⁴⁸ The COCON (Groupe Affaires Consulaire) Working Group began to function within the Council in 1993, its main task being that of organising exchanges of information on best national practices, see Green Paper ‘Diplomatic and Consular Protection of Union citizens in third countries’, COM (2006) 712 final, 28 November 2006.

¹⁴⁹ The COCON committee has adopted in its 15 years of existence an impressive number of conclusions and guidelines in the field of consular protection, which however maintain a very broad language, sometimes simply limited to reiterating the relevant Treaty provisions: see Guidelines approved by the Interim PSC on 6 October 2000, Cooperation between Missions of Member States and Commission Delegations in Third Countries and to International Organisations, 12094/00; Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5.11 2010; Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON on 26 June 2006 – 10109/2/06 REV 2; ‘Lead State Concept in Consular Crises’, Conclusions adopted by COCON, 10715/07, 12.07.2006; ‘Common Practices in Consular Assistance’ and ‘Crisis Coordination’ adopted by the COCON, 10698/10, 9.06.2010; Guidelines for further implementing a number of provisions under Decision 95/553/EC adopted by COCON, 11113/08, 24.06.2008. The initial work of the COCON was not disclosed to the public.

¹⁵⁰ Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Communication from the Commission, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Summary of the Impact Assessment (SEC/2007/1601) - Commission staff working document, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Impact Assessment (SEC/2007/1600) - Commission staff working document, 05/12/2007; European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens’ rights – 27/10/2010; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU On progress towards effective EU Citizenship 2007-2010 – 27/10/2010.

¹⁵¹ See, for example, the emphasis that the Commission places on the principle of equality in the implementation of the right to consular and diplomatic protection by the Member States in its Green Paper, Action Plan, and Assessment of the Action Plan. The facts revealed in the press regarding the evacuation of Union citizens in Libya in February 2011 showed that initially the Foreign Ministries were not thinking in terms of giving equal help to the Union citizens in the evacuation procedure. Only later, after making sure that all their citizens had been given a means of transport, did they offer the spare places to other Union citizens on a first-come first-served basis and not necessarily on the principle of equal number of places for the Member States.

number of unrepresented EU citizens travelling abroad and problems concerning the fragmented domestic legal framework of the implementation of the EU citizenship right.¹⁵²

The COCON Working Group proposals were commonly entitled Conclusions or Guidelines and focused on the division of responsibilities among the Member States' consular and diplomatic authorities, and increasing efficiency of consular burden sharing, particularly in consular crisis situations. Following a series of consular crises affecting third countries which were triggered by both natural and man-made disasters, the COCON Working Group decided to adopt recommendations that would complement the Decisions 95/553 and 11107/95 in the specific circumstances of consular crises affecting third countries. Although Article 5(1)(e) of Decision 95/553 included the relief and repatriation of distressed citizens among the mandatory situations where non-nationality Member States have to provide consular protection, the implementing Decision 11107/95 did not include any guidelines to be followed in consular crises situations, where urgent evacuation of a high number of EU citizens would be required. For the purpose of covering this particular scenario, Council Guidelines were adopted in 2006 aiming to encourage the Member States to adopt rules and procedures to be followed during the different phases of a consular crisis¹⁵³: a pre-crisis phase organisation by establishing contingency plans among the consular and diplomatic authorities of the Member States in the particular third country, and during the crisis phase by drafting emergency plans in order to secure an efficient protection of EU citizens. The Guidelines proposed that the Member States adopt rules regarding the sharing of responsibility between the represented Member States in terms of information, management of the consular protection services such as: evacuation and handling the reimbursement of cost procedure, maintaining contact with the Member States and other States and institutions represented in the locality. The responsibility of drafting the contingency and emergency plans was left to the discretionary power of the consular and diplomatic authorities of the Member States, to be decided on the basis of the specific local circumstances. A recommendation of review on a regular basis was inserted. These plans, like the majority of the soft law

¹⁵² See fn 148.

¹⁵³ The Council Conclusions did not address all four stages of a disaster (prevention, mitigation, relief, and recovery), but concentrated only on pre-crisis, prevention type of measure and handling the emergency during the crisis. For the four stages, see more in F. Forni, 'The Consular Protection of EU Citizens during Emergencies in Third Countries', in A. de Guttry, M. Gestri and G. Venturini (eds.), *International Disaster Response Law*, TMC Asser Press (2012), 164-172.

documents adopted by the Council, were not made publicly available in the Official Journal or the relevant website of the Institution.

Despite the fact that these soft law documents do not have a binding legal effect, the Member States have followed them closely. For instance, in 2007, the ‘Lead State’ concept was introduced by the Council Conclusions¹⁵⁴, whereby a Member State that is represented in a particular third country accepts primary responsibility on behalf of all the other represented Member States for the purpose of securing consular assistance to all the unrepresented EU citizens. The mechanism was first put into practice by France in Chad, in early 2008, when it evacuated more than 1,200 citizens from 12 Member States and several third countries (60 nationalities in all).¹⁵⁵ According to the Council Guidelines, the responsibility of the Lead State is limited to transporting the Union citizens to a place of safety. Once the evacuation of all Union citizens in need of assistance has been accomplished the mission of the Lead State ends.¹⁵⁶

Independently of the Lead State role, both small and large Member States have continued to assume the responsibility of evacuating EU citizens of other nationalities than their own, when they are in urgent need of help. For instance, Estonia, in spite of its limited consular capabilities, evacuated non-national EU citizens during the 2008 Georgian conflict. After the earthquake that hit Haiti in 2010, Italy arranged the evacuation of 1,300 EU citizens of which around 250 were not represented by diplomatic or consular authorities of their EU country of nationality.¹⁵⁷ More recently, when the democratic revolution shook Libya in the spring of 2011, only 8 Member States were

¹⁵⁴ Council Conclusions, General Affairs and External Relations, 2808th Council meeting, 10654/07, Presse No. 137.

¹⁵⁵ Madalina B. Moraru, ‘Practical and Legal Consequences of Absence of EU and Member States’ External Representations for the Protection of EU Citizens in Third Countries’, in Jean T. Arrighi, R. Bauböck, M. Collyer, D. Hutcheson, M. Moraru, L. Khadar and J. Shaw (eds.), *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Citizens Residing in Third Countries. Study of the European Parliament, Policy Department of Citizens' rights and Constitutional Affairs*, 2013.

¹⁵⁶ Madalina B. Moraru, ‘Securing Consular Protection of the EU Citizens Abroad: what Role for the EU?’ in I. Govaere and S. Poli (eds.), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises*, Brill Nijhoff (2014), 147, 166.

¹⁵⁷ As happened, for example, during the 2008 Georgian conflict, when Estonia secured the repatriation of non-national EU citizens. After the earthquake that hit Haiti in 2010, Italy arranged the evacuation of 1,300 EU citizens of which around 250 were not represented by diplomatic or consular authorities of their EU country of nationality. Numbers and facts come from the *CARE Report* and from the European Commission Communication *Consular protection for EU citizens in third countries: State of play and way forward*, COM (2011) 149/2 of 23 March 2011.

represented, while a total of 6,000 EU citizens, many of whom were not represented, were evacuated.¹⁵⁸

In addition to Decisions of the Representatives of the Member States and soft law documents adopted by the Commission and the Council, the Member States have also adopted an *ad-hoc* type of common agreement on the basis of Article 4 of Decision 95/553.¹⁵⁹ These arrangements have not commonly been made public, not even in situations where the Member States decided to make use of the Lead State mechanism¹⁶⁰ and decided to attribute responsibility for consular protection to one particular Member State. The Lead State was announced either by way of press releases announcing which Member State will assume the Lead State responsibility¹⁶¹ or attached as an Annex to Council soft law documents.¹⁶² These co-sharing agreements are established on a pragmatic and case-by-case basis, their content and the precise responsible Member States are not easily accessible to the EU citizens.¹⁶³

The implementation of Article 4 Decision 95/553 by way of these *ad-hoc* arrangements has been criticised¹⁶⁴ for restricting the personal scope of the former Article 20 EC Treaty based obligation of the Member States to secure protection by shifting the choice of the protecting Member State from the EU citizen to the Member State, although the Treaty provision clearly gives the choice to the EU citizen. Another criticism regards the fact that the lack of transparency of these arrangements delays the protection an unrepresented Union citizen is entitled to receive, since he is not aware of the existence and content of the restrictive agreement. There are also no clear guidelines on the basis of which the responsible Member State for providing consular protection is established. Therefore, reasons other than the effective protection of unrepresented Union citizens

¹⁵⁸ European Commission - ECHO, *Libyan Crisis*, Factsheet, 21 June 2011, available at: http://ec.europa.eu/echo/files/aid/countries/libya_factsheet.pdf

¹⁵⁹ Art. 4 of Decision 95/553 reads as follows: ‘Without prejudice to Article 1, diplomatic and consular representations may agree on practical arrangements for the effective management of applications for protection.’

¹⁶⁰ Lead State Concept in Consular Crises, Conclusions adopted by COCON, 10715/07, 12.07.2006.

¹⁶¹ Sometimes published on the website of the European Commission DG Humanitarian Aid and Civil Protection, <http://ec.europa.eu/echo/>

¹⁶² See Commission Proposal for a Council Directive on Consular protection for citizens of the European Union abroad, Explanatory Memorandum, Brussels, 14.12.2011 COM(2011) 881 final, 4. Accordingly, ‘Lead States are currently established in 29 third countries out of 146 where at least one Member State is represented.’

¹⁶³ According to the Report on Austria within the *CARE Report*, ‘Austria is – jointly with Denmark – a “Lead State” for Bhutan. No particular practice has been reported so far. Co-sharing arrangements are followed on a pragmatic basis. Resources are pooled with Hungary, Czech Republic and Switzerland in Podgorica (Montenegro).’

¹⁶⁴ See Madalina B. Moraru, Mario P. Chiti, S. Faro and E. Schweighofer, ‘Consular protection of EU citizens: State of the art, current challenges and the future prospects’ in Chapter four Conclusions and Recommendations of the *CARE Report*.

abroad and reasonable sharing of the financial burden among the represented Member States might be the criteria for designating the responsible Member State. For instance, preference could be given to those Member States that treat the protection abroad of citizens as a discretionary matter of policy, instead of those Member States that recognise an individual right to consular protection endowed with clear domestic judicial remedies guarantees, thus purposely and discretionally restricting the scope of application of the EU citizenship right to equal protection abroad. The responsible Member State should not be chosen on the basis of whether it recognises a right to consular protection under its domestic legislation, and the extent of the executive's discretionary decision-making power, since the aim of the Decision is to implement an EU citizenship right and not a discretionary power of the Member States to deliver the protection of individuals abroad. This particular State-driven situation should in practice be avoided, and instead ensure the publicity of these arrangements and not lose focus of the primary objective of these local arrangements which should be to ensure effective protection of the unrepresented Union citizens, while trying to additionally ensure a balanced consular burden sharing among the Member States.

b. A critical assessment of the legal nature, effects and remedies of the implementing measures

The measures adopted by the Member States for implementing their EU primary obligation to 'establish the necessary rules' for securing the equal protection abroad of EU citizens are of a special nature,¹⁶⁵ not falling under any of the classical Community or ex-EU type of instruments.¹⁶⁶ They are entitled 'Decision of the Representatives of the Government of the Member States meeting within the Council', and should be distinguished from Decisions adopted by the Council under any of the ex-pillars of the Union. These Decisions are international agreements, different from the category of Decisions that were adopted by the Council on the basis of former Article 249 EC Treaty or former Article 12 EU Treaty.¹⁶⁷ As

¹⁶⁵ According to former Art. 20 EC Treaty.

¹⁶⁶ The type of EU secondary legal instruments that were available under the ex Community pillar were the following: Regulations; Directives, Decisions, Recommendations, and Opinions. The instruments available under the second and third pillar were: Joint Actions, Common Strategies, Common Positions, and Decisions.

¹⁶⁷ For a detailed comment on this type of legal act, see B. de Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements', in B de Witte, D. Hanf and E. Vos (eds), *The Many Faces of Differentiation in EU law*, Intersentia (2001), 261-62; and for a legal assessment of the nature of these two particular Decisions (95/553/EC and 96/409/CFSP), see Mario P. Chiti and M. Moraru, 'The right to consular protection before and after Lisbon', in S. Faro, Mario P. Chiti and E. Schweighofer (eds.),

suggested by the title, Decisions 95/553/EC and 96/409/CFSP are Decisions adopted by national governmental representatives within the Council, by switching their hats from Council representatives to representatives of their Member States.

Four different types of Decisions were available under the former pillar structure, one under each of the EU's pillar competence and one outside the EU's competence although adopted within the institutional framework of the Council. Sometimes both types of Decisions were adopted during the same meeting of the Member States within the Council, by way of a single act, which was split into two separate parts, one adopted and signed by the Member States' representatives in their capacity of Council representatives, and the other part adopted and signed in their capacity of representatives of the national governments.¹⁶⁸ It can thus be extremely difficult to establish in which capacity the Member State acted and consequently determine the correct legal nature of the instrument.

The use of the labels 'EC' and 'CFSP' in the title of these Decisions has misled even renowned legal scholars, confusing their legal nature with Decisions adopted under former Article 249 EC Treaty¹⁶⁹ or with Decisions adopted within the CFSP framework.¹⁷⁰ This category of Decisions constitute international agreements concluded in a simplified form,¹⁷¹ in the sense that there is no need for formal ratification acts to be adopted by the Member States for their entry into force.¹⁷² The added value of the simplified format of adoption¹⁷³ consists in

European Citizenship and Consular Protection. New Trends in European Law and National Law, Naples: Editoriale Scientifica Napoli (2012), 17 – 41.

¹⁶⁸ These are 'hybrid acts', as mentioned by AG Sharpston in Case C-114/12, *European Commission v Council of the European Union*, Judgment of 4 September 2014, nyr. 'Hybrid acts' are decisions that purport to merge a decision of the Council acting as an EU institution and a decision of the Representatives of the Member States into one single document.

¹⁶⁹ For instance, see Wyatt & Dashwood, *EU Law*, fifth edition, Oxford University Press (2006), footnote 5 at 701; S. Kadelbach, 'Part V – The Citizenship Rights in Europe', in D. Ehlers (eds), *European Fundamental Rights and Freedoms*, De Gruyter Recht – Berlin, (2007), 567 and footnote 133 at 565; P. O'Neill and Susan R. Sandler, 'The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante or Merely Vigilant Treaty Guardian?', (2008) *Richmond Journal of Global Law & Business*, see footnote 69, 21; M. Lindstrom, 'EU Consular Cooperation' in S. Olsson (eds.), *Crisis Situations in Crisis Management in the European Union – Cooperation in the Face of Emergencies*, Springer (2009), 113.

¹⁷⁰ See Siofra O'Leary, 'EU Citizenship – The Options for Reform', (1996) IPPR, 63.

¹⁷¹ They are simplified international agreements because first, they are concluded by the Representatives of the Governments of the EU Member States and not by the Heads of States and second, they do not require formal ratification. On the distinction between formal and informal ratification, which differentiates formal from simplified international agreements, see also Fuad S. Hamzeh, 'Agreements in simplified form – Modern Perspective', (1968-9) *BYIL*, 179.

¹⁷² A 'simplified international agreement' or 'executive agreement' is an international agreement that is immediately operational upon signature by the representatives of the governments without the need to go through formal ratification by their national parliaments. For the specific topic of Decisions of Representatives of the Member States as executive agreements, see B. de Witte, 'Chameleonic Member States: Differentiation by means of partial and parallel international agreements' in B. de Witte, D. Hanf and E. Vos (eds), *The Many Faces of Differentiation in EU Law*, Intersentia (2001) and by the same author, 'The emergence of a European system of public international law: The EU and its Member States as strange subjects' in J. Wouters, A.

a speedier entry into force, avoiding tedious and long-drawn international and domestic ratification procedures. Although the Member States aimed to secure the speedy entry into force by concluding the Decisions in a simplified format, in practice, the entry into force of the two Decisions took seven years after their signing, ‘*due to the cumbersome legislative procedures required for its adoption in Member States.*’¹⁷⁴

Decisions of the Representatives of the Member States have been adopted since the very beginning of the European Community¹⁷⁵, following an express legal provision in primary¹⁷⁶ or secondary¹⁷⁷ EU legislation or when there were no other appropriate Union or Community measures for the implementation of a particular EU matter.¹⁷⁸ This type of non-EU instrument adopted for the purpose of implementing an EU related subject is a sort of oddity, an exception from the main rule according to which the functioning of the Union is governed primarily by acts of the Union Institutions benefiting from the principles of supremacy over the Member States’ legislations, and of a wide panoply of specific legal remedies.¹⁷⁹ Decisions of the Representatives of the Member States have so far commonly

Nollkaemper, Erika de Wet (eds), *The Europeanisation of International Law*, Cambridge University Press (2008), 39-55; B. de Witte, ‘Using International Law in the Euro Crisis Causes and Consequences’, ARENA WP 4/2013, available at <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf>

¹⁷³ An international treaty is concluded in a simplified format if it is concluded on the basis of an exchange of notes/letters. See Linda A. Malone, *International Law*, Aspen Publishers (2008), 9.

¹⁷⁴ Fifth Report from the European Commission of 15 February 2008 on Citizenship of the Union, COM (2008) 85 final.

¹⁷⁵ The first Decision of this type dates from 1954. See T.C. Hartley, *The Foundations of European Union Law*, Oxford University Press, 7th edition (2010), 94.

¹⁷⁶ See Art. 253 TFEU (former Art. 223 TEC), which provides that the procedure for appointing members of the Court of Justice is taken by common accord of the governments of the Member States; Art. 341 TFEU (former Art. 289 TEC) provides that the seat of the institutions of the Union shall be determined by common accord of the governments.

¹⁷⁷ Art. 26 of the Joint Action 2004/551/CFSP of 12.07.2004 on the establishment of the European Defence Agency provides that the privileges and immunities necessary in the performance of the duties of the Agency shall be provided for in an agreement between participants Member States. The Member States thus are invited to adopt by way of agreement the act providing the privileges and immunities of the European Defence Agency staff.

¹⁷⁸ Under the duty of loyal cooperation (current principle of sincere cooperation), see: Decisions adopted pursuant to Art. 218 TFEU for establishing the position of the Member States in a body set up by a mixed agreement, e.g.: Internal Agreement of 18 September 2000 between the Representatives of the Governments of the Member States meeting within the Council on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement (Published in [2000] OJ L/317/376); and the Internal Agreement of 10 April 2006 amending the Internal Agreement of 18 September 2000 (published in [2006] OJ L/247/48). Internal Agreements concern the adoption of the positions under the Partnership Agreement on matters for which the Member States are competent; the decision of the Representatives of the Government of the Member States meeting within the Council approving the accession of Vietnam to the WTO adopted pursuant to former Art. 133(6) EC Treaty (COM/2005/0659 final-ACC 2006/0215). This Agreement was assessed by the AG Kokott in Case 13/07 *Commission v Council*, case withdrew on 10 June 2010.

¹⁷⁹ R. Barents, *The autonomy of Community law*, The Hague, Kluwer Law International (2004), European monographs, 45; C.W.A. Timmermans, in P.J.G. Kapteyn c.s. (eds.), *The Law of the European Union and the European Communities*, Kluwer Law International (2008), 71-82.

been adopted for the purpose of operational, administrative reasons, and have not directly affected the rights of the individuals. In the course of the evolution of the European integration, the number of international agreements between the EU Member States has gradually declined: firstly due to the deletion from the founding Treaties of the provisions enabling the Member States to act by way of international agreements¹⁸⁰ and secondly due to the creation of the possibility of the EU Member States to pool their cooperation within the EU's institutional framework, under the enhanced cooperation mechanism as first introduced by the Treaty of Amsterdam.¹⁸¹ In spite of this evolution, as long as Member States retain powers to act internally and externally, they will continue to use the option of concluding international agreements in matters connected with EU law matters, especially when consensus is not reached among all the EU Member States,¹⁸² or in areas that they perceive as pertaining to their core sovereign powers.¹⁸³

It has to be noticed that the three main EU citizenship rights, which apply within the Union internal market, were implemented by way of Directives.¹⁸⁴ In regard to the implementation of the EU citizenship right to equal protection abroad, the Member States decided to use the classical international legal toolbox of instruments, excluding even the possibility of acting by way of an inter-governmental CFSP act. The main reason behind this choice of legal instrument is not an express legal provision requiring implementation by Decisions of the Representatives of the Governments of the Member States, but the fear of certain Member States of losing one of their last remaining prerogatives in favour of the Union, which has also determined the allocation of the topic of ensuring protection of EU citizens abroad to the COCON Working Group. This particular Council's Working Group is

¹⁸⁰ Former Articles 293 EC Treaty and 34(2)(d) EU Treaty were deleted by the Lisbon Treaty.

¹⁸¹ According to Bruno de Witte, the provision was designed to make *inter se* agreements concluded outside the EU legal framework unnecessary. See more in by Bruno de Witte, 'Using International Law in the Euro Crisis Causes and Consequences', *ARENA Working Paper* 4/2013, <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf>

¹⁸² As happened in the case of the financial crisis, the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) were concluded in the form of Decisions of the Representatives of the Member States meeting within the Council.

¹⁸³ As in the case of the EU citizenship right to equal protection abroad which impacts on the consular and diplomatic protection of citizens by the Member States.

¹⁸⁴ The right to free movement and residence – Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States published in [2004] OJ L 158/77 of 30.04.2004; electoral rights - Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals published in [1994] OJ L 368/23 of 31.12.1994; the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language – related EU secondary legislation, Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

composed only of consular or diplomatic officials of the Member States, approaching thus the topic from the perspective of their specific training and formation in public international law. It will be shown in the second Chapter that under public international law, the field of consular and diplomatic protection of nationals has remained under the exclusive competence of the States. Consequently, it is no surprise that the COCON Working Group chose a type of legal instrument that is more faithful to the public international legal framework than to the Union legal order, thus reflecting the principal training, formation and views of the Working Group's members. The COCON Working Group seems to follow the same pattern of 'implementation' in all its documents: sharing experiences between the diplomatic and consular representatives so as to establish common practice. All the documents adopted by the COCON Working Group mention from the very start that the guidelines/conclusions are not legally binding and that primary responsibility in consular matters falls on the national authorities.¹⁸⁵

The EC and CFSP Decisions have been harshly criticised by legal academics¹⁸⁶ for being an inadequate legal measure for the implementation of an EU citizenship right to equal protection abroad, and for substantially and personally limiting the scope of application of this Treaty-based right. Usually, this format of legal measure does not regulate substantive matters, nor does it have legal effects on individuals.¹⁸⁷ The EC and CFSP Decisions, on the other hand, establish the substantive scope of a Treaty based right of the Union citizen to equal protection abroad, and the conditions that Union citizens have to fulfil in order to exercise this right. Acting in this way, it seems the Member States aimed to sidestep the complex institutional balance of the EU and the jurisdiction of the Court over the implementation of the EU citizenship right to equal protection abroad,¹⁸⁸ and keep the area under their exclusive and discretionary control, in spite of having already been included in the founding Treaties.

¹⁸⁵ See documents enumerated in fn 147.

¹⁸⁶ Alessandro I. Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', (2011) *European Public Law*, 91-109; Madalina B. Moraru, 'Protection of EU citizens abroad: A legal assessment of the EU citizen's right to consular and diplomatic protection', (2011) *Perspectives on Federalism*, 67; E. M. Poptcheva, 'Judicial and non-judicial guarantees of the right to consular protection', in S. Faro, Mario P. Chiti and E. Schweighofer, (eds.), *European Citizenship and Consular Protection –New Trends in European Law and National Law*, Editoriale Scientifica (2012), 111 – 123.

¹⁸⁷ See R. H. Lauwaars, 'Institutional Structure' (Chapter IV) in P. J. G. Kapteyn, A. M. McDonnell, K. J. M. Moterlmans and C. W. A. Timmermans (eds.), *The Law of the European Union and the European Communities*, fourth edition, Alphen aan den Rijn: Kluwer Law International (2008), 221; B. de Witte, 'Chameleonic Member States: Differentiation by means of partial and parallel international agreements' in, *op. cit.*, 261-65.

¹⁸⁸ See more details on this issue in the followin sub-section.

By restricting the substantive scope of the Treaty based right of the unrepresented EU citizens to equal protection abroad in five consular protection situations,¹⁸⁹ these two Decisions clearly create legal effects for EU citizens, even though this type of Decision is not designed to directly affect the rights of individuals. This category of act is commonly used for regulating procedural, EU institutional matters, and therefore, even if, in certain limited circumstances, such acts have produced binding legal effects, these were limited to the Member States, having no direct impact on the rights and obligations of individuals.¹⁹⁰ Therefore, in the light of their limited legal effects, the fact that individuals enjoyed limited judicial guarantees against these international agreements did not create any problems, in practice, for the protection of the individual rights of the EU citizens.

On the other hand, the two Decisions adopted in the field of protection of EU citizens abroad are exceptions from this rule since they directly affect the EU citizens' right to equal protection abroad by restricting the substantive and personal scope of the EU citizen's right,¹⁹¹ without conferring upon the EU citizens sufficient legal remedies to challenge them before national and European courts.¹⁹² Despite being part of EU law, the legal nature of international agreements under these Decisions excludes the list of legal remedies which were commonly available in relation to the then Community and Union secondary legislative measures, such as: the infringements procedures which the Commission or another Member States can start against a Member State that fails to conform to the EU secondary legislation, preliminary references, direct action of annulment, or actions for damages submitted by the EU citizens before national courts or the Court of Justice.¹⁹³ EU legal remedies were available only in regard to the implementation of the EU primary law provisions, and not the sui-generis Decisions. Therefore, the Commission could start infringement procedures against a Member States for inappropriate implementation of the EU citizenship right to equal protection abroad

¹⁸⁹ See Art. 5 of Decision 95/553/EC and Art. 1 of Decision 96/409/CFSP.

¹⁹⁰ For a detailed analysis of this type of act, see B de Witte, *op.cit.*, 261-62.

¹⁹¹ The EU primary law right guaranteeing equal protection to EU citizens abroad has been substantially limited by Decision 95/553/EC to five mandatory cases of consular assistance: death; serious accident or serious illness; arrest or detention; victims of violent crime; and relief and repatriation of distressed citizens. In addition Decision 96/409/CFSP include the consular services of issuing an ETD within the mandatory list of consular protection services under the EU citizenship right to equal protection abroad.

¹⁹² Since these Decisions are not an EU law act, they are not among the acts whose (in)validity the Court of Justice can establish, either in a direct action for annulment or in a preliminary reference on validity. See R. H. Lauwaars, *op. cit.*, p. 221, and Bruno de Witte, 'Using International Law in the Euro Crisis Causes and Consequences', *ARENA Working Paper* 4/2013, <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2013/wp4-13.pdf>

¹⁹³ See R. H. Lauwaars, 'Institutional Structure' (Chapter IV) in P. J. G. Kapteyn, A. M. McDonnell, K. J. M. Moterlmans and C. W. A. Timmermans (eds.), *The Law of the European Union and the European Communities*, fourth edition, Alphen aan den Rijn: Kluwer Law International, (2008), 221; B. de Witte, 'Chameleonic Member States: Differentiation by means of partial and parallel international agreements' in, *op. cit.*.

by way of adopting simplified international agreements. The main effective judicial remedy that the EU legal order conferred upon individuals, namely the direct action of annulment, is not available to the injured EU citizens against these Decisions. Domestic courts can refer preliminary questions to the CJEU on the interpretation and application of these Decisions, only insofar as their adoption constitutes a violation of the institutional balance of the EU legal framework and substantive allocation of competences between the Union and the Member States.¹⁹⁴ Additionally, national courts cannot afford damages to individuals on the basis of claims seeking the civil liability of the State, unless related directly to the EU Treaty provision enshrining the EU citizenship right.¹⁹⁵

The limited judicial guarantees enjoyed by individuals under the EU and national legal framework have prevented the citizens of the EU from lodging complaints against domestic violation of their EU citizenship right to equal protection abroad, and this also contributed to the minimal exercise and knowledge of this right by EU citizens.¹⁹⁶

The questions that follow are: first, does the formal denomination of the Decision of the Representatives of the Member States give the final reply to what the legal nature and effects of an act adopted in relation to EU law matters should be, or are there other criteria on the basis of which to establish the legal nature of an act to be adopted within a particular EU law related area; second, is the Member States' choice of implementing act, namely an international agreement, respecting the vertical division of competence between the Union and the Member States, or was it designed to exclude the supranational institutions of the EU?; third, are there plausible reasons explaining the use of the international legal toolbox, or are the Member States sidestepping the Union institutional framework infringing the competence allocation and thus damaging the constitutional integrity of the European Union?

¹⁹⁴ See Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012. See also Case C-13/07 *Commission v Council*, case withdrawn, see the Opinion of the AG (concerning the legal basis of the Union's decision on the approval of Vietnam's accession to the WTO); Case 114/12 *Commission v Council*, Judgment of 4 September 2014 (concerning an action of annulment brought by the Commission against a hybrid act, partially a Council Decision, and the other part adopted as Decision of the Council and the Representatives of the Governments of the Member States meeting within the Council, on the participation of the European Union and its Member States in negotiations for a Convention of the Council of Europe on the protection of the rights of broadcasting organisations).

¹⁹⁵ On the legal status, effects and judicial remedies against Decisions of the Representatives of the Governments of the Member States concluded within the Council, in general, see R. H. Lauwaars, *op. cit.*, 221; and B. de Witte, *op. cit.*, 261-62.

¹⁹⁶ According to the information collected by the following surveys: *Eurobarometer* No. 188 of July 2006 and *Flash Eurobarometer* No. 213 of February 2008. Along the same line, see also the more recent *Flash Eurobarometer* No. 294 'EU citizenship' of March 2010.

The formal denomination – Council Decision or Decision of the Representatives of the Member States – has never constituted the final answer to the question of the legal nature of an act, since the legal content and effects of the act might indicate the need to use a different legal basis determining thus a different legal nature of the measure.

The legal issue of establishing the correct legal nature of an act adopted by the Member States within the Council is one of the recurrent issues in the CJEU jurisprudence on the law of EU external relations, commonly dealt with under the broader constitutional issue of establishing the correct legal basis of the act.¹⁹⁷ As early as the 1970s, in the famous *ERTA* case¹⁹⁸, the Court had to establish whether a contested Council Decision was an act of the Council acting in its capacity of an institution of the European Economic Community or an act of the Member States whereby the latter coordinated their external powers.¹⁹⁹ The Council Decision was a peculiar act, since even though it bears the title of ‘Council Decision’, its content referred to the position that the Member States were to adopt in regard to the revision of an international agreement to which only the Member States were parties. The Court established the leading principles, confirmed by its subsequent jurisprudence, which should guide the legal assessment of a particular instrument adopted by the Member States within the Council.

First of all the formal label of an instrument adopted by the Member States within the Council, namely a ‘Decision’, whether adopted on the basis of the former Community or CFSP basis²⁰⁰ or outside the EU legal framework, should not be considered as an irrevocable presumption indicating the correct legal nature of the act and the remedies that injured parties benefit of.²⁰¹ The Member States might have erroneously adopted a Member States’ instead of a Union Decision, due to their desire to preserve their sovereign powers over a particular

¹⁹⁷ The issue of establishing the legal basis of an EU act is a significantly important constitutional issue, since it determines whether the EU has competence to act, sets the limits of that competence, the role of the EU institutions in the elaboration of that act, the voting rules in the Council and the scope of judicial review by the CJEU (see Case C-370/07 *Commission v Council* [2009] ECR I-8917; Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713; and Opinion 1/08 (GATS) [2009] ECR I-11129).

¹⁹⁸ Case C-22/70 *The European Road Transport Agreement* (ERTA): Commission of the European Communities v Council of the European Communities [1971] ECR 263.

¹⁹⁹ The issue of distinguishing between an act of the Council and an act of the Member States acting within the Council arose as a result of a plea of inadmissibility of the action of annulment, invoked by the Council.

²⁰⁰ The entry into force of the Lisbon Treaty has only to a certain extent unified the category of acts that the Union can adopt. The division between CFSP and non-CFSP matters in relation to the adoption of the Decision was maintained, in spite of the abolition of the pillar structure.

²⁰¹ The CJEU clearly held that ‘Consequently, it is not enough that an act should be described as a “decision of the Member States” for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.’, see Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* (‘Bangladesh’) [1993] ECR I-3685, para. 14.

subject area or because they were not aware of the EU's evolving competence or consensus which precludes the Member States from acting outside the EU legal framework.²⁰² According to the *ERTA* doctrine, the legal nature of an act is the result of a legal assessment that starts with the question of whether the Union has the competence to act, what types of competence and whether the act produces legal effects towards third parties. The legal assessment will have to take into consideration the content²⁰³, context²⁰⁴, and aim of the act.²⁰⁵ Following this legal assessment, if the Union has been conferred or has acquired exclusive competence, or reached consent on a certain aspect falling under the scope of shared competence,²⁰⁶ then the Member States are prohibited from acting separately outside the Union framework and, are instead required to use the established Union institutional and procedural mechanisms.²⁰⁷

Following the aforementioned jurisprudential guidelines, the first question that would need to be answered is whether the Union had, in the first place, the competence to act in relation to the EU citizenship to equal protection abroad. Certain legal academics and EU officials have argued that the phrasing of former Article 20 EC Treaty excluded the Community competence from the field of consular and diplomatic protection of the Union citizens.²⁰⁸ However the general provision of the Member States adopting the necessary implementing measure cannot be interpreted as expressly or implicitly prohibiting the

²⁰² Case C-246/07 *Commission v Sweden*, Judgment of 20 April 2010.

²⁰³ See C-45/86 *Commission v Council*, [1987] ECR I-1493, para. 11; Case C-300/89 *Commission v Council* (the 'Titanium dioxide case') [1991] ECR I-2867, para. 10; Case C-268/94 *Portugal v Council* [1996] ECR I-6177, para. 22; Opinion 2/00 *Conclusion of the Cartagena Protocol on Living Modified Organisms* [2001] ECR I-9713, para. 22; and Case C-176/03 *Commission v Council* [2005] ECR I-0000, para. 45; Case C-94/03 *Commission v Council* (Rotterdam Convention), [2006] ECR I-1, para. 34.

²⁰⁴ Initially the only objective factors amenable to judicial review established by the CJEU were the aim and content of the measure. In Opinion 2/00 (*Conclusion of the Cartagena Protocol on Living Modified Organisms*) [2001] ECR I-9713, the Court added an additional objective factor amenable to judicial review, i.e. the context of the adoption of the act.

²⁰⁵ Case C-300/89 *Commission v. Council* [1991] ECR I-2867 ('Titanium Dioxide'), para. 10: '*The choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure.*'

²⁰⁶ Case C-246/07 *Commission v Sweden*, Judgment of 20 April 2010.

²⁰⁷ Case 22/70 *The European Road Transport Agreement* [1971] ECR 263; Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* ('Bangladesh') [1993] ECR I 3685; Case C-316/91 *Parliament v Council* [1994] ECR I-625; Case C-13/07 *Commission v Council* (Accession of Vietnam to WTO) removed from registry; Case C-370/07 *Commission v Council*, Judgment of 01 October 2009.

²⁰⁸ See the declaration of the President-in-Office of the Council during the debate within the European Parliament of 4th February 2009 on the topic of consular protection given to the EU citizens: '*The 1995 decision is a decision between the Member States, reflecting the fact that consular assistance and protection is an **exclusive national responsibility** and that consular relations are governed mainly by the Vienna Convention on Consular Relations.*' [emphasis added]. On the same vein see S. Kadelbach, 'Part V – The Citizenship Rights in Europe', *op.cit.*; H. U. J. d'Oliveira, 'Union Citizenship: Pie in the Sky?' Chapter 4 in Allan Rosas and Esko Antola (eds), *A Citizens' Europe, In Search of a New Order*, SAGE Publications (1995), 75; Alessandro I. Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', (2011) *European Public Law*, 91.

Community's competence, but rather as the absence of mentioning a precise legal act and procedure to follow in the implementation process. It could be argued that if the intention of the drafters was 'exclusion', then the Article would have been drafted similar to former Articles 149(1) and 151 of Chapter three on Education, Vocational training and youth of the EC Treaty. These Articles²⁰⁹ clearly provide that certain aspects of the educational and culture policies will be left to the Member States' responsibility. Therefore, in the absence of a clear exclusion of the Community's competence or exclusive allocation to the Member States' competences, the only certain conclusion resulting from the general phrasing of former Article 20 EC Treaty is that the Community does not have an exclusive competence. It can also be interpreted as a restatement of the Member States' obligation of 'conform implementation' of the Union norms.

The Treaty drafters were aware that they could not envisage all possible specific situations where action by the Community would prove necessary. For this purpose they created former Article 308 of the former EC Treaty, which allowed the Community to adopt the necessary action in the form of one of the traditional Community instruments as laid down in former Article 249 EC Treaty but also any other form of action which might be appropriate²¹⁰ if the following four conditions were cumulatively fulfilled: 1) action by the Community was necessary since action taken by the Member States cannot achieve the pursued aim (added value condition or a restatement of the principle of subsidiarity²¹¹); 2) there was no specific legal basis in the former EC Treaty that could have been used to achieve the objective (negative condition)²¹²; 3) the general competence can be used by the Community only for the purpose of achieving Community objectives (positive condition)²¹³; 4) action under Article 308 EC Treaty should relate to the 'operation of the common market'

²⁰⁹ Art. 149(1) EC Treaty provides: '[...] fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.' Art. 151 (2) EC Treaty provides: 'Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas [...].'

²¹⁰ See R. H. Lauwaars, 'Institutional Structure' (Chapter IV) in P. J. G. Kapteyn, A. M. McDonnell, K. J. M. Moterlmans, C. W. A. Timmermans (eds), fourth edition, Kluwer Law International (2008), 221.

²¹¹ The Edinburgh European Council underlined what is already stated in the wording of Art. 308 EC Treaty, namely that the principle of subsidiarity must be respected in the application of Art. 308 EC Treaty. See Bull. EC 12-1992 point 15.

²¹² See Case 45/86 *Commission v Council* (generalized tariff preferences) where the Court stated: 'it follows from the very wording of Article [308] that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question'; Case C-295/90 *European Parliament v Council (Students residence case)* [1992] ECR I-4193. This conclusion has been restated by the Court's more recent cases, see Case C-166/07 *Parliament v Council* [2009] ECR I-7135 (dual legal basis for internal legislation, Art. 308 EC Treaty can be used when the scope of the Community's action exceeds that of the specific legal basis), Case C-436/03 *Parliament v Council* [2006] ECR I-3733 (use of Art. 308 EC Treaty when the specific requirements of Art. 95 EC Treaty cannot be used).

²¹³ Opinion 2/94 [1996] ECR I-1759; See Case T-315/01 *Kadi v Council* [2005] ECR II-3649, paras. 16-17.

(Community conditionality – exclusion of Union objectives).²¹⁴ It could be argued that the general Community competence under former Article 308 EC Treaty could have been used for the purpose of implementing the EU citizenship right. We will now assess whether the aforementioned conditions for having had recourse to the fall-back Community competence were fulfilled so as to have justified the use of Article 308 EC Treaty for adopting a Community instrument, instead of the Decisions of the Representatives of the Governments of the Member States for the purpose of implementing the Union citizen's right to equal protection in third countries.

The first condition was indisputably fulfilled, as the EC Treaty provision introducing the right to equal protection abroad of unrepresented Union citizens did not expressly confer legislative competence to the Community, but included only a general provision referring to the Member States' obligation to adopt the necessary implementing measures. There was no other provision in the EC Treaty or Community act adopted by the Union Institutions, which could have been interpreted as conferring an implied power to the Union.²¹⁵ As to the second condition - the existence of a Community objective- it has to be noticed that Article 20 EC Treaty provided a clear objective to ensure effectiveness of equal protection of the unrepresented Union citizens in third countries.

Use of former Article 308 EC Treaty was further conditioned by the principle of subsidiarity and necessity of a Community action for the operation of the internal market. The principle of subsidiarity could not have been endangered in this particular case if a Community rather than a Member State international agreement was adopted, since an implementing measure was necessary and the objective of ensuring the effectiveness of an EU citizenship right was better fulfilled by a Community measure rather than an international agreement with a cumbersome ratification, entry into force, and amendment procedure touching on what is a Union, and not a domestic, right and with an impact on the image of the Union in third countries.

In principle, former Article 308 EC Treaty could have been used as the appropriate legal basis to adopt implementing measures by way of a possible Community Decision. There

²¹⁴ See Case T-315/01 *Kadi v Council* [2005] ECR II-3649, para. 120; Cases T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para. 156. See also T. Tridimas and Jose A. Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions Against Terrorism: The Judiciary in Distress?' (2008) *Fordham International Law Journal*, 668, where it is argued that '*Article 308 EC cannot be used to attain one of the objectives of the Treaty of the European Union on the ground that its elevation to an inter-pillar basis would run counter to the constitutional architecture of the distinct pillars.*'

²¹⁵ Former Art. 20 EU Treaty also referred to the effective implementation of the EU citizenship right to equal protection, however it expressly referred only to the obligation of vertical cooperation between the Member States' consular and diplomatic missions and the Union's external missions.

is a significant difference between a Decision adopted under former Article 308 EC Treaty and a Decision of the Representatives of the Member States in terms of guarantees conferred to the EU citizens. While the former act was fully subject to the Union legal regime, the latter legal instrument is an international agreement, which despite having a close link with the functioning of the Union law, it is not entirely subject to the Union legal regime. Due to the direct connection of the Decisions of the Representatives of the Member States with the founding Treaties or Union secondary legislation²¹⁶, they are subject to certain Union legal remedies, such as: infringement proceedings brought by the Commission against the Member States for not adopting the necessary measures for the implementation of the EU citizenship right;²¹⁷ preliminary references addressed by the national courts on the interpretation of the relevant founding Treaties' provisions;²¹⁸ action of annulment founded on the argument of incorrect legal basis and action of damages brought by the individual against a Member State on the basis of damages caused to the applicant as a result of a breach of Union obligations by the Member State.²¹⁹

The choice of a Decision of the Representatives of the Member States adopted within the Council instead of a Community Decision disrupts the institutional balance within the European Union, since the Commission and the European Parliament are excluded from the decision-making procedure. Furthermore, the CJEU has a limited role²²⁰ since, according to its settled case law²²¹, it has no competence to review actions of annulment brought against this type of Decision. There is also a limited judicial review of the national courts in regard to the provisions and implementation of these Decisions, since first of all it is not clear whether they

²¹⁶ See the assessment of Decisions of Representatives of the Member States acting within the Council in section 2 of this Chapter.

²¹⁷ Usually the Member States are not required, but have only a possibility to act by way of decisions of the representatives of the Member States. However, there are also cases, as with Art. 20 EC Treaty, where the Member States are required to act by means of common measures.

²¹⁸ See Art. 234(1)(a) EC Treaty, maintained under current Art. 267(1)(a) TFEU; hybrid acts and decisions of the representatives of the Member States can be subject to the preliminary reference procedure, although they are not EU legal acts, due to the CJEU circumlocutory approach of establishing jurisdiction, whereby 'the Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of [a non-EU legal act] are compatible with European Union law' (the CJEU judgment in the *Pringle* case C-370/12, para. 80).

²¹⁹ Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-05357, paras. 33 and 34.

²²⁰ The CJEU is part of the Institutions of the Union, pre-Lisbon this conclusion resulted from the place of the rules on the CJEU in the EC Treaty: Part Five (Institutions of the Community), Chapter one (The Institutions). The Lisbon Treaty clarifies this issue, and in Art. 13 TEU, the Union courts are provided as Union Institutions.

²²¹ See the jurisprudence discussed in section 2 of this chapter.

have the obligation of conform interpretation with the EU general principles of EU law, while disapplication and other judicial tools required by the EU law are completely excluded.²²²

The choice of action of the Member States between acting unanimously in the Council through Community acts and acting unanimously outside of the Union framework has important legal consequences on the role of the Union Institutions and the effective judicial guarantees of human rights. These different legal consequences raise the question of whether the Member States had the option of choosing between the two forms of actions, or whether they were compelled by Union law to use the Community general competence and Community/Union secondary instruments for ensuring the implementation of consular protection of the Union citizens.

Since the first years of the Community's existence, the CJEU has developed the principle that the Member States and the Union Institutions cannot evade the procedures prescribed by the EC Treaty (later on TFEU) as to decision-making and roles of the Institutions.²²³ The extensive jurisprudence on the correct legal basis of Community/Union actions has raised the aforementioned principle to the level of a general EU law principle, which the Union Institutions or the Member States cannot disregard to serve their own interests of increasing/preserving their powers, or avoiding delays in action. The principle of respecting the constitutional order established by the founding Treaties has been reaffirmed by the Court in relation to the choice between different Community competences, between Community and Union competences and between the Community and Member States competences.²²⁴

So far, the Court has only indirectly addressed the legal question of Member States' options for action between Decision of Representatives of the Member States and Council Decision under Art. 308 EC Treaty.²²⁵ The main conclusion was that by their action, the Member States cannot prejudice the constitutional setting envisaged by the Treaty, and the Member States have to conform to the long-standing principle of respecting '*the rules of the Treaty on the forming of the Council's decisions and on the division of powers between the*

²²² On the different judicial tools which a national judge can use directly on the basis of EU law, see Madalina B. Moraru and K. Podstawa, *Handbook on Judicial Interaction Techniques – Their potential and use in the field of the European Fundamental Rights* available at <http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/2FinalHandbook.pdf>

²²³ Former Art. 47 EU Treaty, current Art. 40 TEU.

²²⁴ See, particularly, Opinion 2/00 *Cartagena Protocol* [2001] ECR I-9713 and Opinion 1/08 *GATS* [2009] ECR I-11129; Case C-114/12 *Commission v Council*, Judgment of the CJEU 4 September 2014.

²²⁵ See C-181/91 *Bangladesh* and C-316/91 *EDF*.

Institutions'.²²⁶ Since Article 308 EC Treaty is part of the Treaty rules, and the strict conditions of Article 308 EC Treaty are cumulatively fulfilled, then, in principle, the Member States would have had to adopt implementing measures in the form of Community instruments on the direct basis of former Article 20 EC Treaty or jointly with Article 308 EC Treaty instead of the Decisions of Representatives, as this latter choice disregarded the Treaty rules on the '*division of powers between the Institutions*.' For instance, the European Parliament did not have a role, while the Court did not enjoy full jurisdiction in relation these Decisions, which directly impacted on the EU rights of the Union citizens. The fact that these Decisions restricted the substantial and personal scope of the EU citizenship right to equal protection abroad would have reasonably required its implementation by way of a Community act, since only in these circumstances would those affected by these limitations have the legal means to challenge the choices made by the Member States.

The fact that the Member States failed to use the fall-back competence of the Community and implement the EU citizenship right to equal protection abroad by way of a Community secondary legislative act does not absolve the Member States from bearing the legal consequences of their decisions. It was previously pointed out that the Court of Justice emphasised that the true legal nature and effects of Decisions of the Representatives of the Member States are not established on the basis of the formal name of the act, but also on the basis of the legal effects these Decisions produce. The fact that the content matter of Decisions 95/553/EC and 96/409/CFSP could have been implemented by using the former Community fall back competence to adopt Community Decisions and that these Decisions clearly produce direct effects on the EU citizens indicate that their formal title of 'Decisions of the Representatives of the Member States' does not correspond to their content. Thus Member States cannot hide behind their formal choice to avoid the jurisdiction of the Court of Justice or legal remedies that EU law would normally make available to individuals suffering injuries of their EU rights derived from EU secondary legislative measures.

In addition to former Article 20 EC Treaty, the former EU Treaty included a provision requiring close cooperation between the Member States' consular and diplomatic missions and the Commission delegations for the purpose of securing an effective implementation of the EU citizenship right to equal protection in third countries. The Article was placed under the ambit of the CFSP, however no CFSP measure has been adopted, so far, for the purpose of implementing the said requirement. Furthermore due to the strict prohibition imposed by

²²⁶ Case C-8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson* [1973] ECR I-897, para. 4. See also in the same vein, H. R. Lauwaars, *Institutional Structure*, *op.cit.*, 220.

former Article 47 EU Treaty of using Union competences, when Community competences are available, it is questionable whether the CFSP measures could have been used as first and sole measure implementing the EU citizenship right.²²⁷ From the point of view of the legal remedies available to the individuals, a CFSP measure would not have offered significantly more legal guarantees to the EU citizens compared to the Decisions of the Representatives of the Member States, since actions of annulment and infringement procedure were not available in regard to this category of acts. Moreover, if the preliminary reference could, in principle, be used against the national measures implementing the Decisions on the basis of the argument of its objective of implementing former Art. 20 EC Treaty, the preliminary reference procedure was clearly not a possible legal means in relation to former CFSP measures.²²⁸

The ‘informal’ nature of the Decisions have meant that certain Member States have not adopted specific legislative provisions or amended the existing consular and diplomatic related domestic legal provisions. Most of the Member States decided to implement the Decision by way of amending their existing executive acts on consular protection of individuals,²²⁹ or adopting internal circulars informing the consular and diplomatic officials and the staff of the Ministries of Foreign Affairs, which were, for the most part, not made publicly available. Only two Member States adopted specific legislative measures²³⁰ and a few amended their existing legislative provisions.²³¹ The number of EU countries adopting measures transposing Decision 96/409/CFSP is even lower, and the status regarding the legal force and transparency of these implementing measures is similar to those domestic measures implementing the EC Decision.²³²

²²⁷ See former Art. 47 TEU and the CJEU relevant jurisprudence: Case C-70/94 *Fritz Werner Industrie-Ausrüstungen v Germany* [1995] ECR I-3189, and the famous statement of the CJEU on the delimitation between CFSP and non-CFSP matters during the pre-Lisbon Treaty: ‘Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the EC Treaty, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the EC Treaty on the Community.’ (Case C-91/05 *Commission v Council* (ECOWAS) [2008] ECR I-3651, para. 77).

²²⁸ See former Art. 46 EU Treaty, with the only exception provided by former Art. 47 EU Treaty. See also P. Eeckhout, *External Relations of the European Union - Legal and Constitutional Foundations*, Oxford University Press (2004), 417; E. Denza, *The Intergovernmental Pillars of the European Union*, Oxford University Press (2002), 337.

²²⁹ Austria, Belgium, Cyprus, Denmark, Finland, France, Hungary, Luxembourg, Malta, Portugal, Romania, Slovakia, Spain, and Sweden. See Chapter Three, Comparative analysis of legislation and practice of EU countries in the *CARE Report*, Section 2.2.1. - Implementation of Decision 95/553/EC.

²³⁰ Belgium and Greece.

²³¹ See, for instance, Estonia, Hungary, Lithuania and Slovenia.

²³² Examples of good practice can be found in the Austrian, Greek, Czech, Latvian, Luxembourg, Portuguese, and Slovenian legislation, which implemented the Decision by way of precise and transparent legislative or executive national provisions.

This specific fragmented transposition framework seems not to have created problems in practice, to date. However it can also be interpreted that due to the lack of transparency in relation to the implementation of Decisions 95/553/EC and 96/409/CFSP, of the lack of publicity of the *ad hoc* arrangements establishing the responsible Member States, many of the EU citizens have not been aware of their right to equal protection while in third countries, and thus the Member States have not been confronted with an increased number of requests for ensuring consular protection in both day-to-day and crisis situations. The duty of cooperation in good faith places the Member States under a duty to exercise their international powers without detracting from EU law or from its effectiveness, which, in the specific case of implementing the EU citizenship right to equal protection abroad, would have probably required them to have recourse to the Community secondary legislation tools, instead of the *sui-generis* international agreements.²³³ It seems that the initial political enthusiasm of the Member States to establish a workable Europe wide-cooperation to ensure protection of all their citizens abroad, under the umbrella of the Union integration project, gradually diminished after the introduction of the EU citizenship right, when they realised the legal repercussions of their initiative.

At the time of writing, the EC and CFSP Decisions are still in force without ever having been amended, even if the Decisions provided for a mandatory amendment by the end of 2007.²³⁴

²³³ To a certain extent, this problem has been remedied by the Lisbon Treaty which expressly provides that the Council can adopt by way of special legislative procedure Directives to ensure the effective implementation of the EU citizenship right to equal protection abroad, see Art. 23(2) TFEU.

²³⁴ Article 7 of Decision 95/553/EC reads as follows: '*Five years after its entry into force, this Decision shall be reviewed in the light of experience acquired and the objective of Article 8c of the Treaty establishing the European Community*'. A similar Article was incorporated into Decision 96/409/CFSP. Furthermore, the Commission's proposal for a Council Directive on the Consular Protection of Union citizens abroad has not yet passed the qualified majority voting in the Council. Several Member States, in particular the UK are fervently opposing this initiative, in spite of several Member States holding the EU Presidency pushing for the approval of this necessary endeavour. For a short summary of the evolution of negotiations for the adoption of the Directive at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-v/21910.htm>

2. The nexus between the EU citizenship right to equal protection abroad and EU external relations policies

The previous sections addressed the protection of EU citizens abroad from the perspective of the EU citizenship right to equal protection abroad, as part of the internal former Community related EU citizenship policy. The specific territorial application of this right outside the Union's borders, and the fact that the embassies and consulates of the Member States were required to cooperate with the Commission delegations to ensure the effective implementation of this right²³⁵ connect the implementation of the EU citizenship right with the EU external relations policies and law. Since the entry into force of the Maastricht Treaty, the Union developed several external relations policies addressing the consequences of man-made and natural disasters affecting third countries for the purpose of managing disaster response, and providing, *inter alia*, relief, rescue and humanitarian aid to the population of the affected third country, but also to the EU citizens *in loco*.²³⁶ The EU currently has a wide variety of crisis management instruments used for a broad range of purposes, such as state-building, protecting ships, to repatriating EU citizens.²³⁷

During the evolution of the European integration process, the Union extended the scope of application of some of its external relations policies targeting the protection of the population of the affected third countries to include also the protection of its own citizens located in these parts of the world. Gradually, the protection of unrepresented Union citizens in third countries has come to be secured by all the Member States not only as a Union obligation based on the EU citizenship right and implementing *sui generis* international agreements²³⁸, but also *via* other former Community external relations policies, such as the civil protection policy and Mechanism²³⁹, incidentally the humanitarian aid policy,²⁴⁰ and

²³⁵ See former Art. 20 EU Treaty.

²³⁶ See more in M. Cremona, 'The EU and Global Emergencies: Competence and instruments', in A. Antoniadis, R. Schutze and E. Spaventa (eds.), *The European Union and Global Emergencies: A Law and policy analysis*, Oxford/Portland, Hart Publishing (2011), 11-31.

²³⁷ For a more detailed analysis of the EU's capacity to address crisis, see A. Boin, M. Ekengrem, M. Rhinard, *The European Union as a Crisis Manager: Patterns and Prospects*, Cambridge University Press (2013).

²³⁸ Decisions 95/553/EC and 96/409/CFSP.

²³⁹ See Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast) (2007/779/EC, Euratom), replaced now by Council Decision 1313/2013 of the European Parliament and Council on a Union Civil Protection Mechanism, [2013] OJ L 347/924, 17.12.2013.

²⁴⁰ See the *European Consensus on Humanitarian Aid*, December 2007; Commission Communication of 5 March 2008 on Reinforcing the Union's Disaster Response Capacity: COM (2008) 130 final; Commission Communication 'Towards a stronger European disaster response: the role of civil protection and humanitarian assistance', COM/2010/0 600 final.

Union policies such as the CFSP and ESDP military and civilian missions^{241, 242} Of all these external relations policies, the civil protection policy has been the most often employed policy for the purpose of securing consular assistance of EU citizens abroad, and through it consular assistance has been provided also by CFSP and ESDP missions.²⁴³

In the pre-Lisbon Treaty period, the exercise of consular protection of EU citizens outside the Union under the different internal and external policies of the Union was initially characterised by insufficient coordination of the different policies and instruments and tensions between the principles of solidarity and state sovereignty that characterises this field. The insufficient coordination translated into a missed opportunity to effectively exploit the Union capabilities, while the Member States' resistance to delegating authority to the Union over a matter perceived as being reserved to States has led to the development of policies that, although bearing the 'Community' or 'Union' label, were largely based on horizontal inter-governmental cooperation.

Under external and internal factors, the Member States have slowly accepted the involvement of the Community and Union with their instruments for the purpose of effectively implementing the EU citizenship right. The conferral of power to the Union, although very limited, has come at the Member States' own initiative, following a realisation of their insufficient national and collective capabilities to efficiently cope with the increasing consular demands of EU citizens abroad. For the purpose of fulfilling the growing consular demand of national citizens, without incurring additional budgetary costs, the Member States have consented to the expansion of the personal and substantive scope of the civil protection policy and mechanism, humanitarian aid and the use of the CSDP civil and military capabilities to complement the national disaster response capabilities.

²⁴¹ According to the Guidelines on the Use of Military and Civil Defence Assets in International Disaster Relief — 'Oslo Guidelines' (re-launched by UN OCHA in November 2006).

²⁴² See more details in the following sub-section of this chapter.

²⁴³ See more details in Florika F-Hooijer, 'The EU's Competence in the Field of Civil Protection (Articles 196, Paragraph 1, a-c TFEU)' in I. Govaere and S. Poli (eds), *EU Management of Global Emergencies Legal Framework for Combating Threats and Crises*, Brill Nijhoff (2014), 137-147.

a. The Civil Protection policy and Mechanism as instruments securing the protection of Union citizens both within and outside the Union borders

The pre-Lisbon Treaty model of implementing the EU citizenship right of equal protection of Union citizens abroad was carried out primarily by way of horizontal consular cooperation among the Member States. The choice of this model was determined by the Member States' desire to preserve their full powers in the field of consular protection of citizens abroad. Slowly, the Member States started to feel overwhelmed by the growing demand for consular assistance coming from their EU citizens located in third countries affected by an increasing number of devastating disasters.

Following several major consular crises occurring at the beginning of the 21st century,²⁴⁴ it became evident that the EU citizens' need of urgent relief and evacuation from third countries exceeds the single or horizontally coordinated capabilities of the represented Member States. One of the consular functions that is most difficult to fulfil is the immediate consular help to citizens abroad in cases of natural and man-made crises affecting the receiving State. In these situations, the citizens may be in need of urgent medical help and repatriation, which is technically difficult to ensure due to the deteriorated infrastructure of the affected third country. Furthermore, in these situations, the Member States have multiple concomitant tasks to secure in addition to rescuing EU citizens, such as providing humanitarian aid and relief to the population of the affected third country. Very often the burden of providing consular protection of EU citizens outside the Union would fall on a small group of Member States that have a more extensive external representation network. This fact might have additionally played a role in changing the Member States' resistance towards recognising a role for the Union in securing consular protection of Union citizens abroad.

Forms of vertical consular cooperation started to appear in the aftermath of the 2004 tsunami that hit South East Asia, when the Council Presidency requested the involvement of a Community instrument and bodies in securing the relief and evacuation of the EU citizens. At the Presidency's request, the Commission's Monitoring and Information Centre ('MIC')

²⁴⁴ For instance, the 2004 South East Asia tsunami, the July 2006 Lebanon crisis, the January 2007 Chad evacuation, and the 2008 terrorist attacks in Mumbai.

established within the Civil Protection Mechanism²⁴⁵ was asked to become involved in the process of evacuating EU citizens. As a result of this additional request, the MIC transmitted to the Member States that there is additional need for medical assistance, and search and rescue teams for evacuating the EU citizens²⁴⁶ and the Member States together with the Commission managed to pool all their available resources so as to evacuate all Union citizens.²⁴⁷ This positive experience, showed the Member States the clear added value of using the relevant Community instruments and institutions for the purpose of securing an aspect of the EU citizenship right to equal protection abroad. These successful evacuation procedures made the Member States to realise that the Community Civil Protection cooperation, which mostly takes place within the borders of the Union for the purpose of helping one of the Member States affected by natural disasters, can successfully be extended also outside the borders of the Union, namely in the territory of third countries as a tool serving to ensure the protection of Union citizens.

In November 2007 the Member States formalised this extra-EU territorial application of the civil protection cooperation by adopting a Council Decision that extends the geographical scope of application of the Community Civil Protection Mechanism to the affected third country and its population²⁴⁸ for the purpose of ensuring consular assistance of the EU citizens.²⁴⁹ Following a series of positive experiences in the application of the Community Civil Protection Mechanism for the purpose of securing the effective implementation of the EU citizenship right, the Member States agreed to recognise certain powers to the Union institutions, formalised in a Community instrument. It thus took the Member States 15 years to accept delegation of authority to the Union in the field of consular protection of Union citizens abroad. The Member States finally agreed to extend the

²⁴⁵ Council Decision of 23 October 2001 establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions (2001/792/EC, Euratom), [2001] OJ L 297/7 of 15/11/2001.

²⁴⁶ M. Ekengren, N. Matzen, M. Rhinard, M. Svantesson, 'Solidarity or Sovereignty? EU Cooperation in Civil Protection', (2006) *European Integration*, 468. The initial information was taken by the authors from Commission (2005b) EU Civil Protection Assistance in South East Asia, Memorandum, MEMO/05/6, Brussels, 11 January 2005, which is no longer available online.

²⁴⁷ This experience was repeated during latter consular conflicts, such as in 2006, in Lebanon (for a comparative analysis of the Member States' and the Union's effort during this conflict, see the *CARE Report*, Chapter 3 – Comparative Analysis, Section 4.6.4 Military conflicts); the Mumbai terrorist attack in November 2008.

²⁴⁸ The application of the civil protection cooperation for relief given to third countries and their population affected by disasters was already formalised in 2001. See Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community Mechanism to facilitate reinforced cooperation in civil protection assistance [2001] OJ L 297, p.7. However, this Council Decision did not provide for the use of this civil protection tool for the population of the Union located in these third countries, but only to ensure protection of the population of the affected third country.

²⁴⁹ See Article 2(10) and recital 18 of the preamble of Council Decision 2007/779/EC of 8 November 2007 published in [2007] OJ L 314/9 of 1.12.2007.

application of a Community Decision for the purpose of ensuring an effective implementation of the EU citizenship right to equal protection abroad.²⁵⁰ This change in the Member States' conduct can be explained firstly by the increase of prompt consular assistance demands of their citizens and secondly, by the nature of the Civil Protection Mechanism implementation. The Mechanism is principally based on *ad-hoc*²⁵¹ cooperation among the Member States, where the Commission is involved mostly for coordination of the Member States, which has probably made the Member States accept the limited delegation of authority to the Commission, via a type of instrument - Community Decision – that was previously rejected for the implementation of the EU citizenship right to equal protection abroad.

The adoption of the 2007 Council Decision is the result of a gradual evolution experienced by the civil protection Community policy. The first stage of development was the adoption of the Maastricht Treaty, which in Article 3(1)(u) EC Treaty enumerated civil protection as one of the Community fields of activity serving the main Community objective of strengthening the internal market.²⁵² It can be noticed that the Maastricht Treaty established the Community civil protection activity as a purely internal activity. Unfortunately, the Maastricht Treaty did not define the concept of civil protection, nor did it provide a specific legal basis for the Community civil protection. This absence was maintained until the Treaty amendment brought by the Lisbon Treaty.²⁵³ It can be argued that, as happened in regard to other Union policies which were intentionally defined in broad and abstract wording,²⁵⁴ the absence of legal basis and definition of the civil protection policy was a conscious choice of the Member States that wanted to preserve their freedom of developing the civil protection according to their own interests.²⁵⁵

²⁵⁰ Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast) (2007/779/EC, Euratom). The Decision was adopted on the former Art. 308 EC Treaty, since civil protection was not expressly provided as a Community competence in the pre-Lisbon Treaty period.

²⁵¹ See the Crisis and Risk Network Report, 'Risk Analysis, Cooperation in Civil Protection: EU, Spain and the UK' (2010).

²⁵² See Art. 2 of the EC Treaty.

²⁵³ The Lisbon Treaty introduced a specific legal basis for the Union's policy of civil protection (Art. 196 TFEU), it has also included it in the list of the categories of Union policies provided at the beginning of the TFEU (Art. 6(f) TFEU). More details on the innovations brought by the Lisbon Treaty is provided in the next sub-section.

²⁵⁴ See the Title V of the EU Treaty on CFSP.

²⁵⁵ On the logic that a broad definition or absence of definition of Union policies is not a coincidence, but a result pursued by the Member States, especially in the politically sensitive field of the foreign and security policy, see M. Koskeniemi, 'International Law Aspects of Common Foreign and Security Policy', in M. Koskeniemi (ed), *International Law Aspects of the European Union*, Martinus Nijhoff Publishers (1998), 27-35.

A second stage of development was the adoption of a Council Decision,²⁵⁶ in 1999, which implemented the aforementioned EC Treaty internal objective and provided for the civil protection cooperation among the Member States, in view of preparing and carrying out the rescue and relief of people, property and the environment in the event of a crisis affecting one of the Member States. Thus, the second stage of development of the civil protection policy concentrated on establishing a purely intra-Community application of the policy.

The defining stage in the development of the Community civil protection policy was the adoption of a second Council Decision, in 2001,²⁵⁷ which established the Civil Protection Mechanism and made it applicable also outside of the Union's borders. According to the 2001 Decision, third countries in distress had the possibility of requesting that the MIC trigger the Mechanism. In case the Union Presidency approved the application of the Mechanism in third countries, the Member States' capabilities were put at the disposal of the affected third country and its population.

This development was an expected consequence of the fact that the Member States were already providing disaster relief to countries outside of the EU by using the same capabilities that they would normally use in situations of disasters within the Union.²⁵⁸ The 2001 Council Decision has thus formally extended the geographical scope of application of the civil protection policy to third countries, making the Civil Protection Mechanism both an internal and external Community instrument.²⁵⁹ Continuing the trend of expanding the scope of application of the civil protection policy, the 2000 Feira Council agreed to allow the use of the Civil Protection Mechanism by the ESDP for the purpose of securing rescue and relief of EU citizens. A Joint Declaration²⁶⁰ was adopted three years later formalising the agreement, and made the Community mechanism of Civil Protection Mechanism available to the CFSP crisis management missions. The Mechanism became a cross-pillar instrument,²⁶¹ used to

²⁵⁶ Council Decision 1999/847/EC of 9 December 1999 establishing a Community action programme in the field of civil protection published in [1999] OJ L 327/53 of 21. 12. 1999.

²⁵⁷ See Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community Mechanism to facilitate reinforced cooperation in civil protection assistance OJ L 297, p.7.

²⁵⁸ See EU Crisis Management – A Humanitarian Perspective, VOICE Briefing Paper, Brussels, January 2004, available at http://60gp.ovh.net/~ngovoice/documents/VOICE_EU_CrisisMgmt_2001_04.pdf

²⁵⁹ The 2001 Community Decision provided also a first more elaborate definition of the civil protection policy: *'the provision of assistance to humanitarian actors in covering the immediate survival and protection needs of affected populations'*, See Presidency Report to the Göteborg European Council on European Security and Defence Policy, Annex III, Göteborg European Council (15-16 June 2001) Presidency Conclusions.

²⁶⁰ M. Ekengren, N. Matzen, M. Rhinard, M. Svantesson, 'Solidarity or Sovereignty? EU Cooperation in Civil Protection', *op.cit.*. The Joint Declaration of the Commission and the Council has not been publicised.

²⁶¹ The Mechanism was established by a first pillar measure (Council Decision – Arts. 249 and 308 EC Treaty) but was later used as a tool within the Community and CFSP/ESDP pillars: Community – while it applied for

address both internal and external Community crisis situations. The use of the ESDP civilian and military capacities was authorised for the purpose of complementing the civil protection capabilities, notably in large-scale natural disasters.²⁶² The use of military assets to provide assistance in third countries was only a last resort option, i.e. when there was no other available civilian alternative to support the urgent provision of humanitarian help.²⁶³

In light of the practice of successfully using the Civil Protection Mechanism in several consular crises²⁶⁴, the extension of the personal scope of application of the Civil Protection Mechanism to EU citizens brought by the 2007 Council Decision was, in fact, a codification of an already established practice. The 2007 Council Decision provides that the protection of the EU civilian population outside of the Union will be ensured under the ambit of the broader consular assistance²⁶⁵ that is given to the Union citizens in international crisis.

In practice, it has to be observed that the Civil Protection Mechanism works as a form of *ad-hoc* cooperation between the executives of the Member States (the different departments of the Government but also between the consular and diplomatic authorities) which are informed, by the Monitoring and Information centre ('MIC') established within the Council, of the exact forms of technical help that is needed in the affected third country so as to ensure the evacuation of the Union citizens. Through its 24/7 network linking the Member States' administrations, the Mechanism could have provided useful operational assistance, in particular by exchanging information on victim identification teams, repatriation and (medical) evacuation needs²⁶⁶ of all Member States. It results that the civil protection policy, in its consular assistance ambit, required close cooperation between the Member States and between the Member States and the Union Institutions, without requiring the establishment of pre-determined core assets. It could be argued that the effectiveness of the civil protection policy depended entirely on how these *ad-hoc* and voluntary forms of cooperation worked in

disasters occurring intra-Community, CFSP/ESDP as it was designed to be used also by civilian and military ESDP missions in third countries affected by crisis. See the Table in Annex 2.

²⁶² Guidelines on the Use of Military and Civil Defence Assets in International Disaster Relief — 'Oslo Guidelines' (re-launched by UN OCHA in November 2006); European Consensus on Humanitarian Aid, para. 61 http://ec.europa.eu/echo/files/policies/consensus/consensus_en.pdf

²⁶³ Military assets can fill in critical capacity gaps in areas such as transportation, logistics support, engineering, or medical support, such as during the earthquake and tsunamis in the Indian Ocean in December 2004 and the 2010 Pakistan floods. See more in Commission Communication 'Towards a stronger European disaster response: the role of civil protection and humanitarian assistance', COM/2010/0 600 final.

²⁶⁴ See the European Commission, 'Towards a stronger European disaster response: The role of civil protection and humanitarian assistance' (Brussels, 26 October 2010).

²⁶⁵ See Council Decision 2007/779/EC of 8 November 2007. The civil protection is only part of the consular assistance that is conferred to the Union citizens in international crises, which encompasses also help with travel documents, visa issues, etc.

²⁶⁶ As happened in the case of the 2004 South East Asia tsunami.

practice. The results of the evacuation procedures in the 2004 South East Asia Tsunami and the 2006 Lebanese conflict are a perfect illustration that the success of the civil protection policy depends primarily on the willingness and rapid reaction of the Member States, thus making the success of the use of the Civil Protection Mechanism something of a lottery.

It has to be observed that the 2007 Community Decision did not place substantial obligations on the Member States compared to the post-Lisbon amended Decision on the civil protection mechanism.²⁶⁷ It only extended the scope of application of the Civil Protection Mechanism to include consular assistance of the Union citizens in international crises situations. Under the former EC and EU Treaties the Member States had two EU primary law obligations²⁶⁸: a Community obligation to ensure equal treatment of EU nationals in cases of requests for consular assistance²⁶⁹ and a Union obligation of cooperation with the Community delegations for the purpose of ensuring the aforementioned equal treatment obligation.²⁷⁰ The Civil Protection Mechanism seems to address both of the vertical and horizontal cooperation which the Treaties required for the purpose of ensuring protection of unrepresented Union citizens abroad.

Interestingly, all of the three civil protection Community Decisions as well as the subsequent Decisions adopted for the implementation of the Mechanism²⁷¹ were based on former Article 308 EC Treaty.²⁷² The situation will change after the entry into force of the Lisbon Treaty when Article 196 TFEU will be used as the legal basis for the adoption of a new Union Decision ensuring the continuance of the Union Civil Protection Mechanism to address the consequences of disasters from both within and outside the Union, and to protect both the population of affected third countries and the Union citizens.²⁷³

²⁶⁷ See Decision Council Decision 1313/2013 of the European Parliament and Council on a Union Civil Protection Mechanism, [2013] OJ L 347/924 of 17.12.2013.

²⁶⁸ After the entry into force of the Lisbon Treaty, the member States still have the two obligations, still located in two different Treaties, only the Treaties have different names and there is a new numbering of the relevant articles.

²⁶⁹ Art. 20 EC Treaty.

²⁷⁰ Art. 20 EU Treaty.

²⁷¹ See the state of play of civil protection legal texts as presented by the European Commission Humanitarian Aid & Civil Protection site, available at http://ec.europa.eu/echo/civil_protection/civil/prote/legal_texts.htm (last checked at 04.04.2011). In this section only the Decisions on civil protection adopted pre-Lisbon are assessed, as post-Lisbon, the Union has specific power to adopt civil protection measures, see Art. 196 TFEU.

²⁷² In addition to the Art. 308 EC Treaty, these Decisions had also Art. 203 Euratom Treaty as a legal basis, which is the Euratom correspondent of Art. 308 EC Treaty.

²⁷³ See Decision Council Decision 1313/2013 of the European Parliament and Council on a Union Civil Protection Mechanism, [2013] OJ L 347/924 of 17.12.2013.

b. The nexus between the Humanitarian Aid policy and the EU citizenship right to equal protection abroad

During the Union's pillar structure, the Community²⁷⁴ developed three different but complementary policies tackling problems resulting from international (humanitarian) crises affecting third countries: civil protection, humanitarian aid and development cooperation. Of these, civil protection and humanitarian aid policies, which address short-term relief, have also been used for the purpose of securing consular protection to the EU citizens located in third countries.

Similarly to the civil protection policy, humanitarian aid did not have an explicit legal basis in the pre-Lisbon Treaty period.²⁷⁵ Humanitarian aid slowly made its appearance as an external Community competence during the Yaoundé Convention, whose Article 20 mentioned the possibility of exceptional economic difficulties or natural disasters.²⁷⁶ The notion was later replaced with emergency aid and addressed both man-made and natural disasters. Its scope has enlarged throughout the years to cover all developing countries and types of disasters. The increasing humanitarian aid related activities of the Community in the 1990s led to the creation of a separate directorate within the Commission, given the specific task of ensuring the effective implementation of the humanitarian aid policy (ECHO).²⁷⁷

Reading the objectives of the Community humanitarian aid policy as provided by the Community Regulation²⁷⁸ governing the conferral of humanitarian aid, one sees that they are strikingly similar to those laid down in the 2001 Council Decision establishing the Civil

²⁷⁴ In addition to the Community pillar based policies, the CFSP and military and civilian ESDP mission have also served to secure consular protection to the EU citizens in third countries. Interestingly, the first Decision adopted on the basis of former Article 17 TEU concerned the evacuation of EU nationals whenever they are in danger in third countries. It was adopted as a *sui generis* Decision that was not published in the Official Journal. See Doc. 8386/96, Decision de Conseil du 27 juin 1996, relative aux opérations d'évacuations de ressortissants des Etats membres lorsque leur sécurité est en danger dans un pays tiers – see more in Ramses A. Wessel, *The European Union's foreign and security policy: a legal institutional perspective*, Dordrecht: Martinus Nijhoff Publishers (1999), 133.

²⁷⁵ Unlike development cooperation, which was mentioned in the founding Treaties as early as the Treaty of Rome, see Part IV entitled Association of the Overseas Countries and Territories.

²⁷⁶ Peter Van Elsuwege and J. Orbie, 'The EU's Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis', in I. Govaere and S. Poli, *EU Management of Global Emergencies Legal Framework for Combating Threats and Crises*, Brill Nijhoff (2014), 21-47.

²⁷⁷ Originally ECHO was defined as the 'European Office for Emergency Humanitarian Aid', it later became the 'European Community Humanitarian Office', and is currently the 'European Commission office for Humanitarian Aid and Civil Protection'.

²⁷⁸ Council Regulation (EC) No 1257/96 of 20 June 1996 published in [1996] OJ L 163/1 of 2.7.1996.

Protection Mechanism.²⁷⁹ Despite the similar vocation²⁸⁰ of the civil protection and the humanitarian aid for prevention and relieving human suffering in third countries, the operation and resources used for their deployment differ considerably.²⁸¹ While the EU Civil Protection Mechanism engages primarily the Member States' national capabilities,²⁸² the Community humanitarian aid policy involves the Community's own financial resources. The operation of the civil protection is also different from the operation of the Community humanitarian aid, while the latter is implemented through partner organisations: European NGOs, the UN, and the Red Cross. The Community civil protection relies primarily on the Member States' teams of experts, transport, and other necessary capabilities, with the Community usually contributing in the form of coordinating the action of the Member States.²⁸³ Depending on the gravity and urgency of the international crises, the Community could have exceptionally dispatched additional teams of experts or confer financial support for the transport of the Member States' utilities.

One of the salient differences concerning the operation of the two policies is that the use of the Mechanism outside the Union, similarly to within the Union, needs the previous request of the affected third country, while the Community humanitarian aid is directly provided to the people in distress, regardless of any request from the affected country, and, sometimes even against its wishes.²⁸⁴ Therefore, despite the common objective pursued by civil protection and humanitarian aid, the above-mentioned differing principles that define the operation of the two policies clarify that they are two distinct, but complementary Community

²⁷⁹ See in particular the principal objectives of the EC humanitarian aid operations as stipulated by the EC Regulation: *'to save and preserve life during emergencies, natural disasters and their immediate aftermath; to provide the necessary assistance and relief to people affected by long-lasting crises arising, in particular, from outbreaks of fighting or wars; to help finance the transport of aid and efforts to ensure that it is accessible to those for whom it is intended for; to carry out short-term rehabilitation and reconstruction work, especially on infrastructure and equipment, with a view to facilitating the arrival of relief; to cope with the consequences of population movements (refugees, displaced people and returnees) caused by natural and man-made disasters; to ensure preparedness for risks of natural disasters or comparable exceptional circumstances and use a suitable rapid early warning and intervention system; to support civil operations to protect the victims of fighting or comparable emergencies, in accordance with current international agreements.'* Council Regulation (EC) No 1257/96.

²⁸⁰ See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Region on Reinforcing EU Disaster and Crisis Response in third countries, COM (2005) 153 final of 20.04.2005.

²⁸¹ See the assessment of the instruments the Union has at its disposal to respond to crisis situations in third countries, *VOICE Briefing Paper*, 'EU Crisis Management – A Humanitarian Perspective', January 2004, especially, p. 5.

²⁸² Council Decision 2007/162/EC, Euratom of 5 March 2007 establishing a Civil Protection Financial Instrument OJ L 71, 10.3.2007, p. 9–17. See *inter alia* Art. 2(b), which clarifies that financial support by the Community is subsidiary to the help given by the Member States, and, if given, has to be reimbursed.

²⁸³ See J. Orbie, *Europe's Global Role: External Policies of the European Union*, Ashgate (2009), 103.

²⁸⁴ See Council Regulation 1257/96 of 20 June 1996.

policies.²⁸⁵ It is precisely due to this complementarity, but also to the partial overlapping objectives of the civil protection and humanitarian aid policies, that the Commission has embarked since 2008²⁸⁶ on a more integrated approach to managing disaster response. In particular, within the response phase of the disaster, the Union committed to achieve an effective coordination of the relevant Union instruments and Member States capabilities for the purpose of, *inter alia*, ensure an effective protection of the Union citizens abroad.²⁸⁷

Humanitarian aid has come to be delivered in situations where also other instruments related to crisis management are employed, such as civil protection and consular assistance. Practice seems to indicate that synergies between these policies are developing, following the Union's recent objective of ensuring coordination of its different policies and secure a unified and efficient response to external crises.²⁸⁸ The example of the 2010 Arab spring revolution is reflective of this²⁸⁹ The Civil Protection Mechanism was triggered, and its application coordinated with the humanitarian aid capabilities for the purpose of securing, *inter alia*, the relief and safe evacuation of the EU citizens *in situ*. The European Union seems to have developed an integrated crisis management toolkit including several different policies of an external relations nature, such as: humanitarian aid, civil protection and development cooperation, with those of an internal nature, such as the EU citizenship right to equal protection abroad, which although exercised exclusively outside the Union, it is enshrined within the Union internal EU citizenship policy.

²⁸⁵ The relation between civil protection and humanitarian aid is similar to the situation that arose in the Bangladesh case between Community action under humanitarian aid (development cooperation legal basis) and action by the Member States serving the same objective as the development cooperation, i.e. urgent financial help, see Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* ('Bangladesh') [1993] ECR I 3685.

²⁸⁶ The European Commission realised the partial overlapping of the civil protection and humanitarian aid policies in terms of their potential for securing consular protection to EU citizens in third countries affected by disasters and merged the two policies within the same Directorate General of the European Commission. Civil Protection was moved from DG Environment to DG Humanitarian Aid (ECHO), which was renamed DG Humanitarian Aid & Civil Protection. This has been interpreted as an indication of the EU's efforts to build a more coherent approach to disaster response by bringing the two main instruments (humanitarian assistance for emergencies outside the EU) and civil protection (cooperation within the EU, but often activated to assist countries outside the EU) together (see the Crisis and Risk Network Report, 'Risk Analysis, Cooperation in Civil Protection: EU, Spain and the UK' (2010)).

²⁸⁷ See the European Commission and the High Representative, 'The EU's comprehensive approach to external conflicts and crises', JOIN (2013) 30 final Brussels, 11 December 2013; A. De Guttry, M. Gestri and G. Venturi (eds), *International Disaster Response*, Springer (2012).

²⁸⁸ A communication from the European Commission to the European Parliament and the Council, 'Towards a stronger European disaster response: The role of civil protection and humanitarian assistance', COM(2010) 600 final, Brussels, 26 October 2010.

²⁸⁹ In particular, two grants (with a value of 112,000 Euro) were awarded to two Member States that had evacuated about 150 EU citizens. See Commission Staff Working Paper, Impact Assessment, accompanying the document, *Proposal for a Directive of the Council on co-ordination and co-operation measures regarding consular protection for unrepresented EU citizens*, SEC (2011) 1556 final, Brussels, 14.12.2011, p. 18.

c. Conclusion

Co-operation among the external representations of the Member States for the purposes of securing the protection of EU citizens abroad has, for the most part, been a success story. However, several problems have been reported by national surveys.²⁹⁰ For example, during the 2008 terrorist attacks in Mumbai, it was reported that certain Member State representations rescued only their own citizens while refusing to assist EU citizens of other nationalities.²⁹¹ Problems have also been encountered by EU citizens when trying to obtain European Travel Documents in non-crisis situations.²⁹² But perhaps the most serious problem was the lack of EU citizens' awareness of the existence of the EU citizenship right to equal protection abroad, let alone what this right actually conferred to them.²⁹³

The lack of awareness among EU citizens of their right to equal protection abroad and its content was probably due to the great variety of domestic legal frameworks and practices implementing this right before the entry into force of the Treaty of Lisbon. The EU citizenship right only introduced a prohibition of discriminatory conduct and not a right to consular and diplomatic protection as such. Therefore the different domestic consular and diplomatic legal frameworks remained which meant that an EU citizen could receive, in practice, different responses from the Member States, depending on whether the Member State endorsed a right- or policy-based approach to the provision of consular and diplomatic protection,²⁹⁴ and on the particular substantive and personal scope of consular and diplomatic

²⁹⁰ See the National Reports in the *CARE Report*, and Chapter III, Section 7-Summary.

²⁹¹ See the Article entitled 'MEP attacks EU consular reaction in Mumbai' in *EU Observer*, available at: <<http://euobserver.com/justice/27253>> (accessed on March 2013). See also F. Forni, brief comment on the situation in 'The Consular Protection of EU Citizens during Emergencies in Third Countries', in A. de Guttry, M. Gestri and G. Venturini (eds.), *International Disaster Response Law*, Springer T.M.C Asser Press (2012), 155 – 177.

²⁹² See the *CARE Report*, Chapter Three, Section Five.

²⁹³ For instance, in 2006 only 23% of those interviewed had heard of the EU citizenship right to equal protection abroad, see Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Effective consular protection in third countries: the contribution of the European Union – Action Plan 2007-2009, COM (2007) 767 final, 5 December 2007. On the persistent unawareness of the EU citizens of their EU citizenship right to equal protection abroad see, *inter alia*, European Parliament, Resolution of 2 April 2009 on problems and prospects concerning European Citizenship P6_TA(2009)0204; European Commission, Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, COM (2011) 149 final, 23 March 2011.

²⁹⁴ Certain Member States recognise a fundamental right to their nationals, others only a right, while others have an approach whereby consular and diplomatic protection is a matter of policy under the executive's control. See details in Chapter 4, section VII - Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad ' and Chapter III of Comparative analysis of legislation and practice of EU countries in the *CARE Report*.

protection recognised by the Member States in relation to their own citizens.²⁹⁵ The publicity of the EU citizenship right and its content was also different depending on the forms of the domestic transposition of the relevant EU primary legal provision conferring the EU citizenship right to equal protection abroad and of the *sui generis* consular protection Decisions.²⁹⁶ In addition, there were several other differences among the domestic legal frameworks implementing the EU citizenship right and the national based legal provisions, *inter alia*, regarding legal remedies²⁹⁷ and the definition of ‘honorary consuls’. In practice, there were very few common features of the provision of consular protection among the Member States. There was a high commitment in terms of pooling resources among the Member States to ensure prompt evacuation and relief to the EU citizens in distress abroad, especially in cases of consular crisis, which somehow compensated for the discrepant national frameworks implementing the EU citizenship right to equal protection abroad.

The solution, so far, in cases of Member States facing difficulties in ensuring prompt consular assistance for all their nationals abroad, has generally come from horizontal consular cooperation, whether initiated solely through intergovernmental cooperation mechanisms²⁹⁸ or through EU instruments.²⁹⁹ However with the financial crises diminishing the Member States’ budgets, horizontal cooperation had already proved to be insufficient and will become increasingly insufficient in light of the growing number of unrepresented Union citizens, especially in third countries where no Member States are represented.³⁰⁰

²⁹⁵ See more details in Chapter 4, section VII - Mapping the Member States’ national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.

²⁹⁶ Moreover, Member States have transposed the Decision 95/553/EC into their national legislation at different times and in different ways (e.g., through laws, circulars, and constitutions) or in some cases they have failed to transpose both this Decision and Decision 96/409/CFSP entirely. For a detailed analysis, see the *CARE Report*, Chapter Three, Section 2.3.1.

²⁹⁷ In addition to the unclear *ratione personae* and *ratione materiae* scope of the right to equal protection of the EU citizen abroad, the concrete implementation of this right by the Member States and the EU was also not well established. For instance, the functioning of the co-ordination and co-operation among the Member States’ external representations, and the precise role of EU delegations on the ground is unclear; additionally the procedure for the reimbursement of consular assistance services was cumbersome and not uniform across domestic jurisdictions. For more on this see the *CARE Report*, Chapter Three, and S. Faro and M. Moraru, ‘Comparative analysis of legislation and practice on consular protection and assistance of the 27 EU countries’, in S. Faro, M. P. Chiti and E. Schweighofer, (eds.) *op. cit.*, 157-291.

²⁹⁸ For example, under Decisions of the Representatives of the Governments of the Member States 95/553/EC and 96/409/CFSP, or *ad-hoc* arrangements concluded between the Member States’ external representations existent in a third country, by way of Lead State arrangements.

²⁹⁹ As for example, under the Civil Protection Mechanism, Council Decision 2007/779/EC Euratom establishing the EU Civil Protection Mechanism (Recast), [2007] OJ L 314/9.

³⁰⁰ There are 27 countries outside the EU where no Member State is represented, while the EU has a delegation in 2 of these third countries and cover the rest of the other third countries by way of bilateral EU delegations, see Annex 2.

The solution to the on-going reduction of the external representation network of the Member States and their reduced budgets for consular and diplomatic assistance might thus come from outside single or collective national capabilities. The Treaty of Lisbon has revolutionised the conduct of EU foreign affairs both substantially and institutionally.³⁰¹ Among the most relevant amendments with regard to ensuring protection of EU citizens in the world, it is worth pointing out the establishment of a diplomatic service for the EU³⁰² which includes around 140 Union delegations operating globally and making the EU better represented externally than most of the Member States.³⁰³ Indeed, in several third countries³⁰⁴ only the EU has an ‘embassy’.³⁰⁵ In this context, the potential of the EU delegations in ensuring the protection of unrepresented EU citizens *in situ* by providing certain consular services or opening their premises to EU citizens becomes evident.

³⁰¹ Spatial constraints do not allow an in-depth analysis here of all substantive and institutional amendments brought about by the Treaty of Lisbon in the field of the EU’s external relations. For a complete assessment of the Treaty of Lisbon changes in EU external relations, please see M. Cremona, ‘Defining Competence In EU External Relations: Lessons from the Treaty Reform Process’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge University Press (2008), and by the same author, ‘The Union’s External Action: Constitutional Perspectives’, in G. Amato, H. Bribosia and B. de Witte (eds), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l’Europe à la lumière des travaux préparatoires et perspectives d’avenir*, Bruxelles: Bruylant, (2007).

³⁰² The European External Action Service established by Article 27(3) TEU and Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, [2010] OJ L 201/30.

³⁰³ See Annex 1.

³⁰⁴ See Annex 1.

³⁰⁵ Although the founding Treaties and the Council Decision establishing the EEAS refer formally to Union delegations, academics have also used the term Union ‘embassy’ when referring to Union delegations, unlike the Member States, notably, the UK, which have long fought for the Treaty of Lisbon to drop any reference to the terms ‘embassy’ or ‘Minister for Foreign Affairs’ used by the Constitutional Treaty. See J. Wouters and S. Duquet, ‘The EU and International Diplomatic Law: New Horizons?’, (2012) *Hague Journal of Diplomacy*, 31.

3. The entry into force of the Lisbon Treaty - innovating the EU citizenship right to equal protection of (unrepresented) Union citizens abroad

The Treaty of Lisbon, which entered into force on 1 December 2009, brought important amendments to the area of EU citizens' protection in third countries.

A first legal addition is the provision of the protection of Union citizens outside the Union as an express Union objective,³⁰⁶ which is said to guide the Union '*in its relations with the wider world*'. A similar proposal was never put forward during the previous Treaty amendments, not even during the elaboration of the Treaty establishing a Constitution for Europe, which established several important Union symbols, such as an EU flag and passport.

This new Union objective came at France's proposal, and exactly what led France to put forward this proposal is unknown.³⁰⁷ However, one may speculate, on the basis of France's experience with the implementation of the EU citizenship right to equal protection abroad, that a first reason might have been France's concern of overburdening itself with the tasks of ensuring consular protection for an increasing number of unrepresented EU citizens. France might have been actually inclined to accept a shift of the consular and diplomatic protection burden from the Member States to the Union since, due to its extended consular network,³⁰⁸ France might have ended up having to assume the role of Lead State³⁰⁹ in many third countries, and the ensuing consequences – namely, considerably high human resources, and costs and legal responsibility for such operations – might have motivated France to put forward this new Union objective and accept a possible vertical sharing of burden depending

³⁰⁶ Art. 3(5) TEU: '*In its relations with the wider world, the Union shall [...] contribute to the protection of its citizens.*'

³⁰⁷ Especially in light of the fact that France has been one of the most fervent opponents of the transfer of powers from the Member States to the Union in the field of consular and diplomatic protection of EU citizens in third countries. See National Report on France in the *CARE Report*.

³⁰⁸ Some of the EU Member States have more representations in third countries than other Member States (usually the smaller EU Member States). For instance, France, Germany, the UK, Italy and Spain (combined population of 314,815,000) have representations in more than 50% of all third countries, Luxembourg, Malta, Estonia, Latvia and Cyprus (combined population of 5,301,000) have representations in less than 10% of all third countries, see Madalina B. Moraru, 'Practical and legal consequences of the absence of diplomatic and EU representation for EU citizens residing in foreign countries', Chapter in European Parliament Report - Franchise and electoral participation of third country citizens residing in the European Union and of the European Union citizens residing in third country, 01/2013, edited by J. -Thomas Arrighi, R. Bauböck, M. Collyer, D. Hutcheson, M. Moraru, L. Khadar, J. Shaw, *Study for an Impact Assessment on Coordination and Cooperation Measures to Facilitate the Right to Consular Assistance for Unrepresented EU Citizens*.

³⁰⁹ On the concept of consular Lead State see the Conclusions of the General Affairs and External Relations Council meeting on 18 June 2007 which aim to 'strengthen consular cooperation between EU Member States through the implementation of the consular Lead State concept' and the EU Guidelines on the implementation of the consular Lead State concept OJ C 317/6 of 12/12/2008.

on the evolution of circumstances. Another reason might have been France's desire to ensure a back-up plan for the protection of Union citizens when the Member States cannot agree on the evacuation procedure³¹⁰ or when a certain situation is to be considered as a 'crisis'.³¹¹ Regardless of the reasons behind the legally binding Union objective of ensuring protection of EU citizens in the world, Article 3(5) TEU is a welcome addition, capable of supporting the Union's initiatives in the field of consular and diplomatic protection of Union citizens abroad.

The insertion of *a Union* objective to protect *the Union* citizens in the *Union's* relations with the wider world has some salient, symbolic 'federalist'³¹² features. In addition to the already existent federalist elements of the European Union's own territory and citizens³¹³, the Reform Treaty added another federalist feature – the Union's own objective to protect its citizens, thus showing to the entire world it now has both the will and the means to act for its citizens.

Important changes were introduced in regard to the Union citizenship, making this legal status 'additional' instead of 'complementary' to the Member State's citizenship. The dependent relationship of the Union citizenship on the State's citizenship seems to have been diminished and has spurred a scholarly trend whereby the EU citizenship might become the fundamental, primary status of the EU citizenship in time.³¹⁴

The second salient change brought by the Lisbon Treaty is the new structure of Article 20 TFEU (former Article 17 EC Treaty) in the format of a non-exhaustive list of rights for the Union citizens. Paragraph 2c stipulates the right of the unrepresented Union citizen to be protected by the consular and diplomatic authorities of any of the Member States represented in a third country which reiterates the first sentence of former Article 20 EC Treaty. This new

³¹⁰ As pointed out in the minutes of the COCON meeting of 11th July 2008, the French EU Presidency already distributed a draft Decision on the implementation of the Lead State concept. Some Member States (Spain, Finland, Netherlands, Portugal, Sweden and UK) were against the use of a legally binding instrument and believed that Guidelines would be more appropriate.

³¹¹ As happened, for instance during the 2008 military conflict in Georgia. According to the 'Study on Member States' Legislations and Practices in the field of Consular Protection', which was entrusted to the Barcelona Instituto Europeo de Derecho (IED) by the European Commission, DG Justice, Liberty, Security, Fundamental Rights and Citizenship Directorate, 86: '*in Georgia in 2008, according to Latvia, the Lead State concept did not work very well, as some Member States did not perceive the situation as a crisis.*'

³¹² Referring to Armin van Bogdandy's use of the term 'federalism'. He asserted, based on the Amsterdam Treaty developments, that the then developments were sufficient to compare the Union to a federalist entity. See Armin van Bogdandy, 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty', (2000) *Columbia Journal of European Law*, 27, 33.

³¹³ This aspect is underlined by the Commission in its recent Communication: Consular protection for EU citizens in third countries: State of play and way forward, doc. COM (2011) 149/2 of 23 March 2011. See also EU citizenship Report 2010 - Dismantling the obstacles to EU citizens' rights - Report - 27.10.2010.

³¹⁴ See, *inter alia*, G. Martinico and R. Castaldi, 'Rethinking (EU) citizenship', (2011) Special issue of Perspectives on Federalism; A. Schrauwen, European Citizenship in the Treaty of Lisbon: Any Change at all (2008) *Maastricht Journal of European and Comparative Law*, 55, 59-60; J. Shaw (ed.), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' *EUI RSCAS Working Paper* 2011/62.

format makes clear that the TFEU establishes an individual right and not a mere policy of the Union.³¹⁵

Third, with the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights becomes part of the Union primary law and legally binding on the Member States, with two exceptions, the UK and Poland. The innovation brought by the Charter to the field of international protection of the Union citizens, does not necessarily consist in the conferral of a fundamental status³¹⁶ to the right embedded in Article 20(2)(c) TFEU, as argued by certain academics³¹⁷, but in the title given to this right – consular and diplomatic protection, which has the potential to clarify the convoluted content of the Treaty based right.³¹⁸ A second valuable change consists of the rights enshrined in Article 41 of the Charter. According to this Article, the Member States are required to respect the guarantees of ensuring good administration and effective judicial remedy³¹⁹, in relation to the exercise of protection of EU citizens abroad. Moreover, it guarantees that the domestic executive will adequately answer the request of protection of the unrepresented Union citizens, and in case of violation, the EU citizen will have an appropriate judicial remedy against the executive's conduct. The added value of Article 41 of the Charter to the consular and diplomatic protection is considerable due to the specificities of the national regulatory frameworks on consular and diplomatic protection of the nationals. Certain Member States did not confer, before the entry into force of the Charter, the rights enumerated in Article 41 in the form of domestic rights to their own nationals and consequently neither to non-national EU citizens under the implementation of the EU citizenship right to equal protection abroad.³²⁰ Article 41 now ensures that the Union

³¹⁵ As argued by the UK, see 'Study on Member States' Legislations and Practices in the field of Consular Protection', which was entrusted to the Barcelona Instituto Europeo de Derecho (IED) by the European Commission, DG Justice, Liberty, Security, Fundamental Rights and Citizenship Directorate; certain legal authors contested also that the protection laid down in former Art. 20 EC Treaty is a right, since it looks more like a cooperation policy between the Member States: C. Closa, 'Citizenship of the Union and nationality of Member States', (1995) CMLRev, 487; S. Kadelbach, 'European Integration: The New German Scholarship', *NYU Jean Monnet Working Paper* 9/03.

³¹⁶ The fundamental status as such does not add guarantees other than those already existent for the Union citizen's rights under the EU law.

³¹⁷ Alessandro I. Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', (2011) *European Public Law*, 91.

³¹⁸ This aspect will be detailed in Chapter 4, Section IV - What's in the EU citizen's right to equal protection abroad? Challenges to establish the substantive content of the EU citizenship right.

³¹⁹ See Art. 47 EU Charter.

³²⁰ For example, Italy (according to L. R. Perfetti, 'Diritto ad una Buona Amministrazione, determinazione dell'interesse pubblico ed equità', (2010) *Rivista Italiana di Diritto Pubblico Comunitario*, 802) and Romania. It has to be noted that the exercise of consular and diplomatic protection of citizens abroad is falling under administrative law. See S. Battini, 'The Impact of EU Law and Globalisation on Consular Assistance and Diplomatic Protection' in E. Chiti, Bernardo G. Mattarella (eds.), *Global Administrative Law and EU administrative Law, Relationships, Legal Issues and Comparison*, Springer (2011).

citizens have minimum safeguards in their relations with the consular and public authorities, as part of the national executive, when requesting consular protection.

There are several other salient changes brought by the Lisbon Treaty, which have the effect of changing the area of ‘protection by the consular and diplomatic authorities of the Member States’ from a purely inter-governmental area to an area where strong signs of supra-nationality appear. For instance, Article 23 TFEU transforms the EU regulatory framework from one dominated by collective measures to a field where the Council can also act by way of a Union Directive. According to Article 23(2) TFEU, the Council was given for the first time specific legislative power to adopt directives through qualified majority voting at the Commission proposal and after consulting the European Parliament. The second change is a replacement of the former Article 20 EC Treaty phrase: ‘*Member States shall adopt the necessary provisions [...]*’ with: ‘*Member States shall establish the necessary rules among themselves [...]*’. It can be observed that the word which established the inter-governmental nature of the regulatory field, ‘themselves’, was erased, thus strengthening the new role of the Council alongside those of the Member States in the implementation of the EU citizenship right.

Article 23 TFEU thus comes with an element of supra-nationality, the Member States stopped being the only actors competent to adopt rules governing the field, as the Council steps in with the competence to adopt legislative acts by way of qualified majority voting. A certain intergovernmental aspect is preserved since the European Parliament does not have an equal co-legislator role within the special procedure prescribed by Article 23(2) TFEU. Despite these inter-governmental elements mitigating the supranational effect of Article 23 TFEU, there are numerous Union features infused into the implementing regime of the EU citizenship right to equal protection abroad, which bring this right closer to the other EU citizenship rights in terms of implementing regime. For instance, the fact that the Union Institutions have now legislative powers to adopt Union measures for the implementation of the EU citizenship right to equal protection abroad,³²¹ and that the EU principle of uniformity governs the implementation of the Council directive, will certainly limit the discretionary

³²¹ The Commission can make proposals for Council Directives under Art. 17 TEU and Art. 23 (2) TFEU, the European Parliament has a consultative role, while the Council can adopt the Commission’s proposal after the reading of the proposal by the European Parliament and the reaction of the Commission, via the special legislative and QMV procedure.

powers of the Members to act solely according to their own interests and without due regard to time constraints and effectiveness of the EU citizenship right.³²²

The umbilical link between former Article 20 EC Treaty (current Article 23 TFEU) and Article 20 of the former EU Treaty (current Article 35 TEU) has been maintained, obliging the Member States and the Union's external representation to cooperate sincerely for the purpose of securing an effective implementation of the EU citizenship right to equal protection abroad. The wording of former Article 20 EU Treaty has mostly remained unchanged, except for the reference to the 'Commission delegations', which has been replaced with the 'Union delegations'. Some of the legal³²³ as well as the political science³²⁴ authors have argued that the establishment of the European External Action Service (EEAS), of which the Union delegations are a part, is the most innovative change brought by the Reform Treaty due to its consequences for the legal structure of the Union as a federalist entity and for the positive effects it will most likely have on the coherence of the Union external action.³²⁵ With the entry into force of the Lisbon Treaty, the external representation of the Union is primarily the task of the High Representatives for Foreign Affairs and the EEAS.³²⁶ The latter body has taken over the tasks of the previous Commission delegations, replacing also the Rotating Presidency representational responsibilities in third countries and

³²² As regards the time constraints, notice that the Council is competent to adopt Directives, which the Member States are bound to implement in the time framework provided therein. The Member States have obligation during the period of implementation - Case C-129/96 *Inter-Environnement Wallonie ASBL v Region Wallone* [1997] ECR I-7411; Case C-1144/04 *Mangold v Helm* [2005] ECR I-9981, paras.76-78; and an obligation to implement in the time period provided by the Directive, with clear liability of the Member if non-implementing the said Directive based on Art. 4(3) TFEU: Joined Cases C-6 and C-9/90 *Francovich v Italian Republic* [1991] ECR I-5357; Joined Cases C-178, C-179, C-188 and C-190/94 *Dillenkoffer v Germany* [1996] ECR I-4845. See the numerous actions of infringement brought by the Commission against the Member States (Austria, Greece, Germany, Luxembourg, Portugal) for failure to transpose within the prescribed time limit the Directive 2003/9/EC on minimum standards for reception of asylum seekers, which is a minimum standards Directive like the future Directive on consular and diplomatic protection.

³²³ J. Wouters, D. Coppens and Bart de Meester, 'The European Union's External relations after the Lisbon Treaty' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty*, Springer, (2008).

³²⁴ S. Nuttall, 'Coherence and Consistency' in C. Hill and M. Smith (ed) *International Relations and the European Union*, Oxford University Press (2008).

³²⁵ See L. Rayner, 'The EU Foreign Ministry and Union Embassies', *The Foreign Policy Centre*, June 2005; R. Wessel and B. van Vooren, 'The EEAS' Diplomatic Dreams', in P. Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *EU Diplomacy Papers* 8/2011. It is interesting to notice an assumption made by Magnette in 1999. According to her, the provision of European protection to EU nationals outside the Union would require a federal structure in which the EU itself would be vested with legal status and a diplomatic infrastructure. It seems that, ten years after, the conditions for the EU's federalist structure, as envisaged by Magnette, have been achieved, following the amendments brought by the Lisbon Treaty, namely: the merger of the pillar structure into one international organisation being conferred expressed legal personality (Art. 47 TEU), separate from the Member States, and endowed with a diplomatic structure able to represent the interests of the Union and its citizens outside the Union borders – the EEAS. (Paul Magnette, *La citoyenneté européenne: droits, politiques, institutions*, Imprint Bruxelles: Editions de l'Université de Bruxelles (1999)).

³²⁶ See Art. 27(3) TEU.

adding all the Union policies to its representation tasks³²⁷, unlike the Commission delegations whose functions were limited to the competences for which the Commission was competent to act.

The EEAS is a *sui generis* body that does not fall under the Commission or Council,³²⁸ and is said to be the first structure of a common European diplomacy,³²⁹ which may have the potential to replace the exercise of the consular functions of the Member States.³³⁰ Article 35(3) TEU and Article 5(10) of Council Decision establishing the organisation and functioning of the EEAS³³¹ already establish a supporting role for the EEAS in the area of consular and diplomatic protection of Union citizens. Following the Council's new power of implementation of the EU citizenship right to equal protection abroad, it seems that implementation of this right by way of Member States' actions is now appropriate only in relation to the implementation of Article 35 TEU.³³² Member States can continue to conclude agreements between themselves on burden sharing, co-location³³³, Common Visa Application Centers³³⁴ or Common Administrative Centers.³³⁵

As to the role of the EEAS in the field of consular and diplomatic protection, the Council Decision establishing the EEAS provides in Article 5(10) that:

'The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis.'

³²⁷ See Art. 221 TFEU.

³²⁸ Bart Van Vooren, 'A Legal Institutional Perspective on the European External Action Service', (2011), *op.cit.*, 475.

³²⁹ Here, by EEAS is meant not only the Brussels-based department but also the EU diplomatic delegations, the previous Commission's diplomatic delegations – Art. 221 TFEU

³³⁰ J. Wouters, 'Can the EU Replace its member States in International Affairs?' in I. Govaere (eds), *Essays in Honour of Marc Maresceau*, Brill (2014); R. Wessel and B. van Vooren, 'The EEAS' Diplomatic Dreams', in P. Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *EU Diplomacy Papers* 8/2011; F. Austermann, *The EU Delegations in EU Foreign Policy: A Diplomatic Service of Different Speeds*, Palgrave Macmillan (2014);

³³¹ Council Decision No. 427 establishing the organisation and functioning of the EEAS of 26 July 2010, [2010] OJ L 201/30 of 3.8.2010.

³³² However the Member States would have to show respect to the CFSP norms, and the new post-Lisbon Treaty CFSP instruments which have been reduced to only one type – Decisions, see Art. 21 TEU.

³³³ Co-location means the concentration of two or more diplomatic and/or consular missions in one building or facility.

³³⁴ Common Visa Application Centres are mutual accreditation of an external service provider at a joint visa application centre.

³³⁵ Common Administrative Centres are created for the issue of Schengen visas by several Member States in the same building or by one Schengen member in full representation of all Schengen partners in visa matters.

Despite the limited powers of the EEAS in the area of consular and diplomatic protection of Union citizens to support the Member States when the latter so request, the role of the EEAS is not insignificant and this is shown by Article 13(2) of the same Decision, which provides that: ‘*The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.*’

For the moment, the role of the EEAS in the area of ensuring protection of Union citizens in the world is now in an embryonic form and it will probably take several years until the competences of the EEAS increase to more than a supporting role. If, in the area of consular and diplomatic protection of Union citizens, the EEAS is only supporting the Member States, which are the principle actors to ensure the right to protection abroad of the Union citizens, the EEAS, through the activity of the Union delegations, has from its very establishment an independent competence to act by way of concluding co-location³³⁶, burden-sharing agreements with the Member States and coordination of humanitarian assistance. This increased power of the EEAS in the field of consular activity was accepted by the Member States due to the limited impact of these arrangements on the Member States’ sovereign powers.

³³⁶ Germany, France, Italy and the UK share the location of their diplomatic missions with the Union delegation in Kazakhstan (in Astana and Almaty); Germany, Italy and the Netherlands share the location of their diplomatic mission with the Union delegation in Nigeria (Abuja); and, Germany, the Netherlands and the UK share the location of their diplomatic mission with the Union delegation in Tanzania (Dar Es Salaam). Information taken from 2009 ‘Study on Member States’ Legislations and Practices in the field of Consular Protection’, which was entrusted to the Barcelona Instituto Europeo de Derecho (IED) by the European Commission, DG Justice, Liberty, Security, Fundamental Rights and Citizenship Directorate.

Conclusion of Chapter 1

The formation of the EU legal framework on protection of EU citizens abroad has been a relatively slow process. It formally started in 1993 with the creation of the Union, Union citizenship, and the introduction of the right to equal protection abroad among the four EU citizenship rights. The introduction of the EU citizenship to equal protection abroad by the Maastricht Treaty came at a time when all the Member States were represented in only five third countries and the number of citizens travelling and residing abroad was increasing, making impossible the objective of efficiently responding to the citizens' consular demand and expectations for the Member States. The then 15 Member States consented to extend the previous scattered regional agreements on sharing of consular and diplomatic protection functions to a partnership among all the Union's Member States in an attempt to not only alleviate their consular and diplomatic tasks but also to advance the protection of the EU citizens abroad, and, in this way, to enlarge the territorial effectiveness of EU citizenship and strengthen the Union's image also outside the EU.³³⁷

The Maastricht Treaty introduced the new legal status of 'EU citizenship' that '*is destined to become the fundamental status of the citizens of the Member States*'³³⁸ and endowed it with several rights, of which includes the right of the EU citizen to receive protection while in a third country, where his Member State of nationality is not represented, from the diplomatic or consular authorities of any Member State that are represented, on the same conditions as the nationals of that State. The introduction of this EU citizenship right to equal protection abroad has been the result of compromises reached between the different interests and approaches that the Member States had towards the field of consular and diplomatic protection of individuals. Some Member States approached consular and diplomatic protection of individuals as a matter of policy reserved to the State, others had domestic legal provisions which recognised a limited individual right to protection abroad in certain circumstances,³³⁹ while one of the then Member States recognised a fundamental right to protection abroad to all its citizens.³⁴⁰ A compromise was reached and the Member States recognised an EU citizenship right to equal protection abroad for all unrepresented Union citizens.

³³⁷ The reasons for adopting the Union citizenship right to equal protection abroad of unrepresented Union citizens is to be found in the Adonnino Committee Report of 1984, which provided that the Committee was responsible for adopting Community measures 'to strengthen and promote its identity and its image both for its citizens and for the rest of the world'. See Bull. EC 6-1984, 11: 'A People's Europe'.

³³⁸ Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

³³⁹ Italy.

³⁴⁰ Portugal.

The EU citizenship right to equal protection abroad is a historically important innovation within both international relations and international law, since it then had no equivalent in other continents or international organisations. Traditionally, the protection of citizens abroad has been the sole responsibility of the individual's Member State of citizenship. The Union, an international organisation, established a sort of supranational citizenship and it attached to it a right to equal protection to all those Union citizens unrepresented in the world. The holder of the obligation to protection is not the Member State of nationality, but any of the Member States that has a consular or diplomatic protection 'in the place' in the third country where the citizen is located. The term 'in the place' has to be differentiated from 'in the third country' since it confers the right to the Union citizen to ask for protection from any of the Member States that has a consular or diplomatic representation in a place nearer to where he is located instead of having to travel hundreds of kilometres to reach the consular or diplomatic representation of his own Member State within the same third country. The Member States have thus assumed responsibility to ensure not only their own peoples' safety, but also that of other Member States' citizens.

The implementation of this right has not, on the other hand, been very novel, since the Member States decided to act only by way of a horizontal *sui generis* type of intergovernmental cooperation in the first 15 years. The right to consular and diplomatic protection of the Union citizens has so far remained quite underdeveloped in comparison with the other EU citizenship rights. Due to the Member States' majoritarian view of consular and diplomatic protection of individuals as a field reserved to the State of nationality, the EU citizenship right, although part of the Community internal market policies, was implemented by way of *sui generis* international agreements and its supervision allocated to a Working Group within the Council composed of State consular and diplomatic officials. The different views and approaches of the Member States on the consular and diplomatic protection of individuals, ranging from a matter entirely reserved to the State of nationality's executive, recognising a limited individual right, to a constitutional citizenship right to protection abroad has slowed down the development of EU policies and the building of a coherent and fully efficient Union mechanism guaranteeing security and protection of Union citizens in third countries.

In the aftermath of the 2004 tsunami affecting South East Asia, it became evident that not even the Member States benefiting of the widest external representation network can cope individually or collectively with natural and man-made disasters, which seem to be of an

increasing frequency and magnitude. Increased coordination of the Member States under the guidance of the Union institutions and bodies and complementing the horizontal cooperation with the Union crisis management capabilities were necessary to fill the gaps in securing protection of EU citizens abroad, especially in large-scale disasters. A second stage was thus prompted in the development of the EU legal framework on protection of EU citizens abroad, namely the recognition of consular protection competence to a supranational organisation, the European Union. It can be observed that following the positive example of the vertical cooperation in the 2004 South East Asia consular crisis, the EU activities in securing protection of EU citizens abroad intensified, in spite of certain Member States' resistance to the delegation of competence over a traditionally State reserved area, such as consular protection of citizens abroad, to the European Union.³⁴¹

In 2007, the Community Civil Protection Mechanism,³⁴² commonly used to address the management of disasters occurring primarily within the Union, was formally extended to include also consular protection of EU citizens in third countries affected by all types of disasters. Complementary to the Civil Protection Mechanism, the protection of unrepresented Union citizens in third countries could also have been secured through the military and civilian capabilities of ESDP missions,³⁴³ but only in cases of emergencies, and only for the purpose of evacuating European citizens.³⁴⁴ However, military assets can only be used for humanitarian purposes as a last resort and where there is no other available civilian alternative.³⁴⁵

Consequently, the protection of Union citizens abroad became a hybrid area where Community internal policies (EU citizenship right to equal protection abroad) intertwined with Community external policies (civil protection and humanitarian aid) and Union policies (the obligation of cooperation between the Member States consular and diplomatic missions

³⁴¹ The persistent objector is the UK.

³⁴² Council Decision 2007/779/EC Euratom establishing the EU Civil Protection Mechanism (Recast), *OJ*, 2007, L 314/9. The Civil Protection Mechanism has been triggered for the purpose of consular assistance of Union citizens only in crisis situations affecting third countries.

³⁴³ According to Article 43(1) TEU, according to which CSDP missions have, *inter alia*, rescue and assistance tasks.

³⁴⁴ Interestingly, the first Decision adopted on the basis of former Article 17 TEU concerned the evacuation of EU nationals whenever they are in danger in third countries. It was adopted as a *sui generis* Decision that was not published in the Official Journal. See Doc. 8386/96, Decision de Conseil du 27 juin 1996, relative aux opérations d'évacuations de ressortissants des Etats membres lorsque leur sécurité est en danger dans un pays tiers – see more in R. A. Wessel, *The European Union's foreign and security policy: a legal institutional perspective*, Dordrecht: Martinus Nijhoff Publishers (1999), 133.

³⁴⁵ Guidelines on the Use of Military and Civil Defence Assets in International Disaster Relief — 'Oslo Guidelines' (re-launched by UN OCHA in November 2006); European Consensus on Humanitarian Aid, para.61, http://ec.europa.eu/echo/files/policies/consensus/consensus_en.pdf

with the Commission missions) and implementation measures in the form of *sui generis* inter-States acts (Decisions of the Representatives of the Governments of the Member States meeting within the Council). The consular and diplomatic protection of unrepresented Union citizens in the world, as an external dimension of Union citizenship, is thus only one aspect of the protection of EU citizens abroad. Consular protection and assistance of the Union citizens in third countries affected by crises could have been conferred also under other external relations policies and instruments of the Union and the Community: the Community civil protection policy and Civil Protection Mechanism, humanitarian assistance, crisis response under the Instrument for Stability³⁴⁶ by the Community delegations, and ESDP civilian and military capabilities. However the primary responsibility fell on the Member State of nationality, then on the horizontal cooperation among the Member States, and only in large-scale consular crises would the Member States also have recourse to the Community or Union capabilities. In concrete terms, the protection of unrepresented EU citizens abroad during the pre-Treaty of Lisbon period could have been secured through different EU instruments and under different pillars (Community³⁴⁷ and CFSP³⁴⁸).

The Member States did not chose to implement the EU citizenship right to equal protection abroad by way of a Community act, Directive or Decision, or CFSP measures, instead, they preferred to keep the exercise of protection of EU citizens abroad under their exclusive control, as a *sui generis* inter-governmental area of action. The Member States adopted three simplified international agreements entitled Decisions of the Representatives of the Member States, and soft law documents providing for *ad-hoc* horizontal cooperation among the consulates and embassies of the Member States for implementing an essential EU citizenship right. Decisions 95/553/EC, 11107/95 and 96/409/CSFP limited the material and personal scope of application of the EU citizenship right to equal protection abroad to six mandatory consular situations,³⁴⁹ and the EU citizen's choice of the Member State to resort to

³⁴⁶ EC Regulation No 1717/2006 Regulation Establishing an Instrument for Stability, [2006] OJ L 327/1 of 24.11. 2006.

³⁴⁷ Former Art. 20 EC Treaty, former Articles 308 and 3(u) EC Treaty.

³⁴⁸ Former Articles 20(1) and 12 EU Treaty. Consular protection of EU citizens abroad could have been secured also by the civilian and military ESDP missions.

³⁴⁹ Namely: (1) Death; (2) Serious accident or serious illness; (3) Arrest or detention; (4) Victims of violent crime; (5) Relief and repatriation of distressed citizens. In addition, Member States agreed to offer assistance also in cases of (6) loss of travel documents by issuing a European Travel Document that will allow the EU citizen to return to his or her EU country of residence. Incidentally, all Member States offered some kind of assistance in cases in which a national finds himself or herself in financial need, although this assistance tends to be very restrictive. This kind of financial aid is provided mainly for the purpose of helping citizens to return to their home country (repatriation) and on condition that a reimbursement commitment is undertaken by the EU citizen; more on the comparative analysis of the practices of the Member States can be found in the *CARE Report*, section 4.5.6.

for help in third countries. It was demonstrated that the content of the *sui generis* Decisions resembles that of Directives rather than Decisions of the Representatives of the Member States. These Acts, entitled Decisions or Conclusions³⁵⁰, have usually been political acts or, even if entailing legal effects, they affected only the Member States, and not directly the rights of individuals. Their character as international agreements and the consequent exclusion of certain EU legal remedies did not have the potential of prejudicing the Union citizens' rights and freedoms. The *sui generis* EC and CFSP Decisions are exceptions to this practice, since due to their purpose, i.e. implementing the EU citizenship right to equal protection abroad, their impact on the EU derived individual rights is not an incidental effect, but constitutes the primary effect of the implementing measures. The fact that certain Member States considered the protection of citizens abroad as an exclusive right of the State of nationality and thus falling under the sole responsibility of the Member State of nationality has altered the understanding of the protection of EU citizens from an EU citizenship right, as established by the Maastricht Treaty, to an area of purely inter-governmental cooperation. Thus, it is no surprise that the Member States decided to act on the basis of Decisions of the Representatives of the Member States, when the nature of a 'citizenship right' of protection abroad of EU citizens was overshadowed by some of the Member States' rationale of a 'discretionary right of the State of nationality'.

The fact that the *sui generis* Decisions and the *ad-hoc* administrative arrangements for designating the responsible Member States to secure the protection of EU citizens *in loco* lacked transparency, precision and predictability have led to the stark unawareness of the Union citizens of the benefits they entail under the EU citizenship right, and consequently of its limited exercise, especially in day-to-day situations.

It has to be pointed out that even if the Member States act by way of international agreements concluded outside of the Union framework, they are bound by the duty of sincere cooperation, in its negative ambit, to exercise their international powers in respect of the EU legal order with its constitutional precepts. This obligation requires the Member States first to act in such a way that the EU institutional balance is not jeopardised by their international actions, therefore the choice of a Community measure on the basis of the former Article 308 jointly with Article 20 EC Treaty would have better ensured the respect of the constitutional principles of sincere cooperation and respect of the Union institutional balance, than the use of the international legal toolbox for the implementation of an EU citizenship right. Second,

³⁵⁰ Joined Cases C-181/91 and C-248/91 *Bangladesh*.

the implementation of the *sui generis* consular protection Decisions by circulars and unpublished administrative³⁵¹ acts was clearly contrary to the principle of legal certainty in the implementation of the EU citizenship right and the principle of sincere cooperation. The measure adopted by the Member States for the transposition of the three *sui generis* Decisions vary considerably among the Member States in terms of their legal form, personal and material scope and legal remedies.

Despite the intensification of Member States' requests for the Union's involvement in helping them to protect the Union citizens abroad post-2004, the pre-Lisbon Treaty framework on protection of Union citizens in third countries was characterised by a strong resistance among the Member States about the delegation of competence to the supranational level. This approach has led to the development of a *sui generis* legal framework restricting the scope of application of the EU citizenship right, *ad-hoc* horizontal cooperation of limited transparency coupled with an *ad-hoc* supranational intervention of the Union at the arbitrary requests of the Member States. The equal treatment based content of the EU citizenship right coupled with the great variety existing among the Member States' systems of consular and diplomatic protection of citizens led to an incoherent EU framework of protection of EU citizens abroad. The combination of the specific conception of the EU citizenship right to protection abroad as an equal consular protection treatment, the differences among the national systems of consular and diplomatic protection of citizens, and the constant tension between delegation of authority to the Union and state sovereignty, characterising this politically sensitive field, have negatively impacted on building a coherent and efficient EU legal framework of protecting Union citizens abroad.

It was shown that the innovations and amendments brought by the Lisbon Treaty have the potential for remedying these negative aspects, especially through the exercise of the Union's new legislative competence to ensure the efficiency of the EU citizenship right. A proposal for a Directive establishing common standards on consular protection of Union citizens abroad was already put forward by the Commission in 2011.³⁵² However, until the adoption of the Directive by the Council, the three Decisions adopted for the purpose of implementing former Art. 20 EC Treaty are still in force,³⁵³ in spite of the legal requirement to amend them in 2007.

³⁵¹ See for more details the *CARE Report*, sections 2 and 4.

³⁵² See Commission Proposal for a Council Directive on Consular protection for citizens of the European Union abroad, Explanatory Memorandum, Brussels, COM(2011) 881 final 14.12.2011.

³⁵³ Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, [1995] OJ L 314/73; Decision 96/409/CFSP, on the establishment of an emergency travel

To sum up, in spite of the identified deficiencies in securing protection of EU citizens abroad, it is clear that the European Union has developed its own specific legal regime on securing protection of EU citizens in the world, which has no exact equivalent at the international level, nor does it follow the classical international legal framework on consular and diplomatic protection of individuals. The traditional international legal framework defines consular and diplomatic protection of individuals as a discretionary right of the States of nationality, with limited exceptions codified by Article 8 Vienna Convention on Consular Relations and Article 45 Vienna Convention on Diplomatic Relations, whereby Member States can consent to delegate consular and diplomatic functions to another State on the basis of strict conditions. The EU Member States have an obligation, and not a right to secure protection abroad of non-national EU citizens who are not represented in third countries. In an attempt to enhance the protection abroad of EU citizens, the Lisbon Treaty has also strengthened the role of the Union institutions, i.e. the Commission, the EEAS and EU delegations, in securing protection of EU citizens in the world at the request of the Member States. Therefore, in addition to non-national Member States, the organs of an international organisation were made competent to exercise State like functions for EU citizens. This particular consular protection function endowed to the institutions and bodies of a supranational organisation has no equivalent under the international legal framework, which has so far recognised only a ‘functional protection’ competence on international organisations.³⁵⁴ These particular distinctive features of the EU model of securing protection of Union citizens abroad have raised concerns regarding the compatibility of the Union specific legal regime with the traditional public international legal framework on consular and diplomatic protection of natural persons. In the following Chapter the evolution of the public international legal concepts of consular and diplomatic protection of natural persons will be assessed for the purposes of identifying the current appearance of the international regulatory

document, [1996] OJ L 168/11; Decision of the representatives of the Governments of the Member States, meeting within the Council, Measures implementing protection for EU citizens by diplomatic and consular representation (doc. 11107/95), 19 December 1995 (source: Council of the European Union, CFSP handbook – Compilation of selected texts applicable in CFSP, doc. 16074/06.)

³⁵⁴ International Court of Justice, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174–220. In this Opinion, the ICJ established the concept of ‘functional protection’ defined as the right of an international organisation to bring an international claim against the responsible *de jure* or *de facto* Government, ‘with a view to obtaining reparation for the damage caused to the United Nations and to the individual victim to the victim or to persons entitled through him’, where the victim is an agent of the international organisation. L. Gramlich, ‘Diplomatic Protection Against Acts of Intergovernmental Organs’, (1984) *German Yearbook of International Law*, 386; J. Dugard, ‘Functional Protection’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (2009); Myriam B. Carabot and Ubéda-Saillard Muriel, ‘Functional Protection’ in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility*, Oxford University Press (2010), 1073–1084.

framework and establishing whether the EU innovatory legal regime of ensuring protection of EU citizens abroad is or is not compatible with the relevant international legal norms.

Chapter 2: Reconsidering the Classical Public International Legal Institutions of Consular and Diplomatic Protection of Individuals

I. Introduction

The previous chapter discussed the evolution of the EU's model of protecting the EU citizens abroad, in particular, the EU citizenship right to equal protection abroad and its nexus with various other EU legal norms and instruments. It was pointed out that since 1993, the citizens of all the EU Member States have enjoyed a Union citizenship right which requires the Member States to confer to the unrepresented Union citizen the same consular protection treatment they would confer to their own citizens. The scope of the EU citizenship right has remained the same throughout the different Treaty amendments, including the last one brought by the Lisbon Treaty. It was shown that the classical international treaty nature of the implementing measures raised problems on their conformity with EU primary law and principles. The consular assistance Decisions limited the scope of application of the EU citizenship right to equal protection abroad, while conferring only limited legal remedies to individuals in cases of violation of their EU citizenship right. Furthermore, the measures chosen for the implementation of the EU citizenship right to equal protection abroad raised problems for the respect of the institutional balance within the EU and the principle of sincere cooperation by the Member States.

The EU architecture on protection of Union citizens abroad is unlike any other domestic, regional or global model. It departs from the traditional conception of securing protection of nationals abroad³⁵⁵ by way of advancing solidarity and cooperation among the European countries at both an inter-governmental and supranational level, which is unique within the general international legal framework. The EU model of protecting Union citizens abroad, although respecting the traditional conception of the State of nationality bearing the primary responsibility to protect its nationals abroad, adds new actors, with new responsibilities to protect the Union citizens abroad. The non-nationality Member States have been, since 1993, the bearers of an EU primary law obligation to ensure equal protection abroad to unrepresented Union citizens, incidentally, the institutions and bodies of a supranational organisation – the European Union – were recognised direct powers to secure

³⁵⁵ Based on the State of nationality model.

consular protection of Union citizens in cases of consular crisis.³⁵⁶ This specific bottom-up delegation of authority to exercise consular protection, and possibly also diplomatic protection of individuals in third countries to the EU,³⁵⁷ was argued to raise another series of problems, this time from the perspective of public international law.

It seems that the Member States presumed the conformity of the EU-specific regime with public international law by introducing an obligation upon the Member States ‘*to start the international negotiations required to secure this protection*’.³⁵⁸ However, the legal novelties introduced by the Maastricht Treaty and especially by the Lisbon Treaty, and their potential for future development in EU secondary legislation,³⁵⁹ have no analogous example in other regions of the world and have considerably departed from the classical public international legal theories of consular and diplomatic protection as *fictio juris* and State of nationality prerogative.³⁶⁰ The traditional conception of consular and diplomatic protection depicts these mechanisms as exclusive rights of the State of nationality, in relation to which individuals are not recognised any rights or roles. Under this classical definition, the State of nationality decided when to exercise these mechanisms, in relation to whom, and to what extent; and, how much of the compensation received from the perpetrator State, as remedy for the wrongful act committed, to confer to the injured national, while the latter had no legal remedy against the State’s decisions under public international law.³⁶¹

³⁵⁶ The EEAS and Union delegations according to current Art. 35 TEU (former Art. 20 TEU), the EEAS Decision and Instrument contributing to Stability and Peace (Regulation No 230/2014 Establishing an instrument contributing to stability and peace, 11 March 2014, OJ L 77/1, succeeding the Instrument for Stability), bodies established within the Commission under the Union Civil Protection Mechanism and the CSDP civilian and military missions.

³⁵⁷ See more details in Chapter 4.

³⁵⁸ See Art. 23 (1)(2) TFEU, initial Art. 8(c) of the Maastricht Treaty.

³⁵⁹ See the proposal for a Council Directive on Consular Protection for Citizens of the Union Abroad, Brussels, 14.12.2011 COM(2011) 881 final 2011/0432 (CNS) approved with amendments by the European Parliament, see Report on the proposal for a Council directive on consular protection for citizens of the Union abroad (COM(2011)0881 – C7-0017/2012 – 2011/0432(CNS)), of the Committee on Civil Liberties, Justice and Home Affairs Rapporteur: Edit Bauer (PE 492.575v03-00) of 10 October 2012.

³⁶⁰ See Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Bank Law Publishing, New York (1916); Frederick S. Dunn, *The Protection of Nationals: A Study in the Application of International Law*, Baltimore, The Johns Hopkins Press (1932); R. Lillich, ‘Editorial Comment on Diplomatic Protection of Nationals Abroad’, (1975) *AJIL*, 359; Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford University Press (2008); *Mavrommatis Palestine Concessions (Greece v. U.K.)*, Judgment 30 August 1924, *PCIJ Reports* (1924), Series A, No 2; *Nottebohm case (second phase) (Liechtenstein v. Guatemala)*, Judgment 6 April 1955, *ICJ Reports* (1955), 4; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Merits, Judgment of 5 February 1970, *ICJ Reports* (1970), 3.

³⁶¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Merits, Judgment of 5 February 1970, *ICJ Reports* (1970), 3, and paras. 77-79.

On the other hand, the EU specific regime of protecting EU citizens abroad confers a primary role to the EU citizen, and not the Member States, at least in theory.³⁶² The expressly stated main objective of the EU consular and diplomatic protection mechanisms is the EU citizen.³⁶³ The (unrepresented) EU citizen enjoys a fundamental right to receive equal protection from the consular and diplomatic authorities of any of the Member States represented *in situ*.³⁶⁴ The EU citizen can complain of a violation of his fundamental right before domestic courts and the CJEU, and he is entitled to receive effective legal remedies for such violations by the State or Union's institutions.³⁶⁵ In order to increase the effectiveness of such specific protection, the Union delegations, 'embassies' of an international organisation,³⁶⁶ were expressly authorised to complement the Member States in fulfilling their obligation to secure the fundamental right to equal consular and diplomatic protection.³⁶⁷

These peculiar features were argued³⁶⁸ to place the EU and the international legal regimes in opposition. The international and EU mechanisms of ensuring protection of nationals abroad seem to be different legal mechanisms, with different premises³⁶⁹, legal natures³⁷⁰, conditions,³⁷¹ and effects,³⁷² although they serve, to a certain extent, similar objectives – the protection of nationals abroad.

³⁶² See the discussion on the implementation of former Art. 20 EC Treaty by way of Decisions of the Representatives of the Governments of the Member States in Chapter 1, Section III.1 Implementing the EU citizenship right to equal protection abroad - securing effective protection of EU citizens abroad without diminishing on the Member States' sovereign powers

³⁶³ See the preamble of the Decision 95/553/EC, which started with the following recital: 'Resolved to continue building an ever closer Union to its citizens.' 'Strengthen[ing] the identity of the Union as perceived in third countries' is the other main objective of the EU provisions on protection of EU citizens abroad.

³⁶⁴ See Art. 46 EU Charter.

³⁶⁵ See Arts. 41 and 47 EU Charter and the Communication from the Commission to the European Parliament and the Council - Consular protection for EU citizens in third countries: State of play and way forward, COM (2011) 149/2, 23.3.2011.

³⁶⁶ The terms 'embassies' has been often used by the legal and political science literature in relation to the Union delegations. However it does not mean that the EU delegations are actual embassies in their national State like meaning. See, *inter alia*, M. Comelli and R. Matarazzo, 'Rehashed Commission Delegations or Real Embassies? EU Delegations Post-Lisbon', *IAI Working Paper* 11/23 July 2011; F. Austermann, 'Towards Embassies for Europe? EU Delegations in The Union's Diplomatic System', *Policy Paper* 8/ January 2012.

³⁶⁷ See Art. 35(3) TEU and Arts. 5(9) and (10) of the EEAS Council Decision 2010/427/EU of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service, [2010] OJ L 201/30.

³⁶⁸ See in particular the opinions of Professors A. Vermeer-Künzli and John Dugard. *Inter alia*, A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', (2011) ICLQ, 965; J. Dugard, *Seventh Report on Diplomatic Protection*, ILC 58 Session 2006 A/CN 4/567.

³⁶⁹ 'Nationality of claims' v European citizenship.

³⁷⁰ Exclusive right of the State v Obligation of the EU Member States.

³⁷¹ 'Nationality of claims', existence of an international wrongful act, and exhaustion of local remedies v 'European citizenship', no accessible permanent representation of the Member States of nationality or another representing State or of a competent Honorary Consul in the third country where the EU citizens is located.

³⁷² No domestic right is recognised in favour of the individual under public international law compared to the EU legal order where the EU citizens can complain before domestic courts of a State liability for not fulfilling its EU primary law obligation.

Famous international legal specialists³⁷³, as well as some of the Member States,³⁷⁴ have pointed out that there is a growing legal tension between the traditional public international legal model of diplomatic and consular protection of individuals and the EU norms governing the protection of EU citizens abroad.

The European Union legal order is undoubtedly part of the international legal order, but it has adapted the general framework to its own essential characteristics³⁷⁵, and thus at times, has to create exceptional, autonomous norms.³⁷⁶ The relationship between international law and EU law has often been said to be one of conflict,³⁷⁷ based on the not so scarce jurisprudence of the Court of Justice of the EU on the compatibility of EU primary³⁷⁸ and secondary norms³⁷⁹ with general international law, including customary international norms.³⁸⁰

³⁷³ A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', *op.cit.*; J. Dugard, *Seventh Report on Diplomatic Protection*, *op.cit.*.

³⁷⁴ See the UK's position from a recent report in relation to the Commission's proposal for a Directive on consular protection of unrepresented Union citizens: 'The Government's view — endorsed by both the Committee and its predecessor — has consistently been that: *consular services are the responsibility of Member States*; are, quite rightly, at the top of Ministers' and officials' agenda, at home and abroad; a good level of cooperation between Member States already exists, and work was underway to improve it further; missions staffed by EU officials could not provide a service of the same standard, with the level of immediate accountability that ensured that it remained thus; the *Government would resist the expansionist elements in these proposals with vigour and determination*'. (emphasis added). See the Thirty-third Report of Session 2012-13 of the Foreign and Commonwealth Office, available at: <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86-xxxiii/8615.htm>> (accessed June 2013).

³⁷⁵ See CJEU Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Judgment of 18 December 2014.

³⁷⁶ M. Ličkova, 'European Exceptionalism in International Law', (2008) *Eur J Int Law*, 463; J. Manuel Cortes Martin, 'Exceptionalism in International Law? The European Union and the System of International Responsibility' in *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Maurizio Ragazzi ed., Brill (2013).

³⁷⁷ G. de Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi', (2009) *Harvard International Law Journal*, 1; J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) *Cambridge Journal of International and Comparative Law*, 696; K. Ziegler, 'International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation', in A. Orakhelashvili, *Research Handbook on Theory and History of International Law*, Edward Elgar Publishing (2013), 269.

³⁷⁸ See for instance, the *Kadi* legal saga (C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351). The *Kadi* case started from the incompatibility of the EU smart sanctions Regulation with the UNSC Resolutions listing certain individuals as terrorists and making them subject to international sanctions; this legal question, has later on turned into a more constitutional question on the compatibility of the EU general principle of protecting fundamental rights with Art. 103 of the UN Charter; Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012, nyr (the compatibility of Art. 21 TFEU with international diplomatic law).

³⁷⁹ Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755 (the compatibility of the EU ETS Directive with a number of international treaties and principles of customary international law); C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079 (the Biotech Directive case).

³⁸⁰ The international legal framework governing consular and diplomatic protection of individuals is made of both international treaties (VCCR and VCDR) and customary norms (as gathered by the ILC in the Articles on Diplomatic Protection). See *ILC First Report on Diplomatic Protection*, p. 10, para. 31

However, the EU has an obligation to respect international law in its actions³⁸¹, and the CJEU has long recognised the precedence of international law over secondary EU law.³⁸²

Before assessing the existence of a normative conflict between the EU and the international legal framework governing the mechanisms of consular and diplomatic protection of individuals, a principal question has to be answered: does current public international law still portray consular and diplomatic protection as an exclusive right of the State of nationality? From Antiquity, continuing with famous international legal writers such as Vattel³⁸³ and Borchard³⁸⁴, and until the mid-20th century, consular and diplomatic protection mechanisms of protecting individuals abroad were the only remedial means whereby the rights of aliens could be protected, due to the fact that international law recognised legal capacity only to States. Legal fiction types of procedural mechanisms, such as diplomatic protection, were constructed solely for the purpose of transferring the individual's remedies rights to the State of nationality, which, unlike the individual, was a recognised subject of international law.

Since then, international society and law has departed from the Westphalian model of international relations and law. The growing development of international human rights and the replacement of war and conflicts with negotiations and concern for security and the protection of human rights have impacted on the ways of conducting consular and diplomatic relations as well as on the peculiar function of consular and diplomatic authorities of securing the interests of their co-nationals abroad.³⁸⁵ Furthermore, the increasing number of international actors and increasing competence to act internationally has made room for new actors to exercise protective functions for individuals.³⁸⁶

This chapter will re-consider the classical international legal conception of consular and diplomatic protection of individuals in light of the recent State practice, jurisprudence delivered by international, regional, and domestic courts and legal doctrine. In particular it will look at the international and national practice after 2006,³⁸⁷ to see whether there is any

³⁸¹ See Art. 3(5) TEU.

³⁸² See, to that effect, C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3633, paras. 45 and 46.

³⁸³ Emer de Vattel, *The Law of Nations*, (1758) Béla Kapossy & Richard Whatmore (eds) (2008).

³⁸⁴ E. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, Banks Law Publishing Co. (1916).

³⁸⁵ Riccardo P. Mazzeschi, 'Impact on the Law of Diplomatic Protection' in M. Scheinin and Menno T. Kamminga, *The Impact of Human Rights Law on General International Law*, Oxford University Press (2009).

³⁸⁶ The express recognition of a functional protection competence to international organisations by the ICJ (International Court of Justice, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174).

³⁸⁷ The moment when the ILC approved the final version of the Articles on Diplomatic Protection, and when States confirmed their initial refusal of Dugard's proposal for a limited State duty to exercise diplomatic protection.

additional evidence that could indicate a change in the States' practice on the perception of consular and diplomatic protection which coupled with the evidence previously gathered by Rapporteur Dugard³⁸⁸ might have built a more 'extensive', 'uniform' and 'representative' customary practice³⁸⁹ indicating a change in the legal nature, conditions and objectives of consular and diplomatic protection of individuals. It will also assess the current international legal norms on the capacity of international organisations to exercise consular and diplomatic protection of private individuals.

The chapter will conclude by providing a short summary of the changes brought by current international law to the international institutions of consular and diplomatic protection of individuals and establishing whether their influence over the international legal framework brings the latter closer to the Union legal regime. The specific question of the conformity of the EU's model of protecting EU citizens abroad with the general international legal framework will be discussed at large in the next chapter, after first clarifying in this chapter the precise features of the current legal nature, content, conditions, and objectives of the international institutions of consular and diplomatic protection of natural persons.

³⁸⁸ J. Dugard, *Seventh Report on Diplomatic Protection*, ILC 58 Session 2006 A/CN.4/567.

³⁸⁹ The requirements of 'extensive', 'uniform' and 'representative' that a practice needs to fulfill in order to be considered an international custom are provided by the ILC, *Final Report of the Committee on the Formation of Customary (General) International Law*, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principles 12 and 14, p. 734. The principles are based on the ICJ jurisprudence: ICJ, *North Sea Continental Shelf cases*, Judgment, 20 February 1969, ICJ Reports 1969, p. 43, para. 74; ICJ, *Asylum case (Colombia v. Peru)*, Judgment, 20 November 1950, ICJ Reports 1950, p. 277; ICJ, *Fisheries case (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports 1951, p. 131; ICJ, *Continental Shelf case (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, 24 February 1982, ICJ Reports 1982, p. 74, para. 100; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986.

II. Reconsidering the Conditions for the Exercise of Consular and Diplomatic Protection of Individuals under the International Legal Framework

The institutions of consular and diplomatic protection of individuals are among the oldest institutions of public international law. Although they were recognised as formal institutions of public international law relatively late,³⁹⁰ they existed as powers exercised by the State since the very early days of the international society. The precise temporal origin of the consular and diplomatic protection institutions is still a disputed topic. Some scholars suggest it was when they formally became institutions of international law,³⁹¹ which was relatively late, in the 20th of century, while other scholars³⁹² point out that incipient forms of these mechanisms had existed since the formation of the nation-State.³⁹³ The fact that consular and diplomatic protection are two different institutions of public international law is reflected, according to certain scholarly opinions, also by their different origins. Authoritative scholars argue that consular protection has an earlier origin than diplomatic protection, dating back to Antiquity,³⁹⁴ and with a more varied history. International treaty law is clearly placing the origins of both diplomatic and consular services in ancient times.³⁹⁵ Consular and diplomatic protection has evolved in line with the evolution of the international society, its needs, and the development of relations among the international actors. Therefore, the establishment of the nation-State and intensification of trade relations among nation States led to the increasing exercise of consular and diplomatic protection of citizens abroad.³⁹⁶ Since individuals did not

³⁹⁰ Chittharanjan F. Amerasinghe, *op.cit.*

³⁹¹ Chittharanjan F. Amerasinghe, *op.cit.*

³⁹² S. Peté and Max du Plessis, 'South African Nationals Abroad and their Right to Diplomatic Protection-Lessons from the Mercenaries case', (2006) South African Journal of Human Rights, 438.

³⁹³ J. Dickie, *The British Consul: Heir to a Great Tradition*, London: Hurst & Company (2007), 5; Maaïke Okano-Heijmans, 'Consular Affairs', in Andrew F. Cooper, J. Heine, and R. Thakur (eds), *The Oxford Handbook of Modern Diplomacy*, Oxford University Press (2013); C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, Kluwer International Law (2001).

³⁹⁴ Luke T. Lee, *Consular Law and Practice*, 2011, 1; B. Sen, *A Diplomat's Handbook of International law and Practice*, Springer (1979), 201; C. Economides, 'Consuls', in R. Bernhardt (ed), *Encyclopedia of Public International Law Vol. 1* (1992), 770. It was argued that in ancient Greece, the city states looked after the interests of their citizens in others' territory and that among the principles of law developed by the Greek cities, the institution of 'proxenoi' is considered a forerunner of modern consular protection. See more details in R. Jones-Bos & M. van Dalen, 'Trends and Developments in Consular Services: The Dutch Experience', (2008) *The Hague Journal of Diplomacy*, 88; F. Przetacznik, 'The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection)', (1971) *Österreichische Zeitschrift für öffentliches Recht*, 69, 75. See also Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice*, Longmans Green (1938), 76-79.

³⁹⁵ Both the VCCR and the VCDR start by 'recalling that peoples of all nations from ancient times have recognized the status of diplomatic agents', respectively of 'consular relations'.

³⁹⁶ F. Przetacznik, 'The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection)' (1971) *Österreichische Zeitschrift für öffentliches Recht*, 69, 113; C. Tiburcio, *op.cit.*

have independent legal standing in international relations to claim remedy for the injuries committed by the receiving State, their only means of redress was through the espousal of their claims by their State of nationality. The conclusion of the Jay Treaty between Great Britain and the United States in 1794 was an important moment in the evolution of diplomatic protection. This Treaty established an arbitration commission to settle, *inter alia*, claims by US subjects regarding confiscated debts and reciprocal claims of illegal seizure of American ships by the British government.³⁹⁷ This Treaty established a framework for settling aliens' claims through the exercise of diplomatic protection by the State of nationality of the injured aliens, a framework that would later come to be increasingly resorted to by States on behalf of their nationals.³⁹⁸

The establishment of the Permanent Court of International Justice brought an additional judicial forum to the existent arbitral tribunals, where compensation for injuries could be claimed via the legal fiction of the diplomatic protection mechanism. In the often cited 1924 *Mavrommatis* case, the Permanent Court of International Justice (PCIJ) noted that the institution of diplomatic protection was already an '*elementary principle of international law*'³⁹⁹ and, in the 1926 Case Concerning *Certain German Interests in Polish Upper Silesia*, the Court recognised the existence of '*a common or generally accepted international law respecting the treatment of aliens [...] which is applicable to them despite municipal legislation*'.⁴⁰⁰ In these cases, the PCIJ set out the first definition of diplomatic protection as an institution of customary international law, which would later on be re-stated in all its diplomatic protection related case law: '*[b]y 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*'.⁴⁰¹ This particular jurisprudential definition of diplomatic protection as an *ius fictio*, a complete transfer of the individual's claim to the State of nationality, had its basis in the 18th century work of Vattel.⁴⁰² Although Vattel's Law of Nations does not deal with the institutions of consular and diplomatic protection as such, his

³⁹⁷ Chittharanjan F. Amerasinghe, *op.cit.*

³⁹⁸ Chittharanjan F. Amerasinghe, *op.cit.*, 13.

³⁹⁹ Case *Mavrommatis Palestine Concessions* (Greece v. UK), Judgment 30 August 1924, PCIJ Reports (1924), Series A, No 2, 12.

⁴⁰⁰ Case *Concerning Certain German Interests in Polish Upper Silesia*, Judgment of 25 August 1925 (Preliminary Objections), and Judgment of 25 May 1926 (Merits), see the publication online of the PCIJ, <http://www.icj-cij.org/pcij/series-a.php?p1=9&p2=1>.

⁴⁰¹ Case *Mavrommatis Palestine Concessions*, Permanent Court of International Justice, Series A. No. 2, 30 August 1924.

⁴⁰² Emer de Vattel, *The Law of Nations*, (1758) Béla Kapossy & Richard Whatmore, (eds)(2008).

famous dictum on the treatment of individuals – ‘*Whoever ill-treats a citizen injures the State*’ – has been widely accepted by academia as one of the first doctrinal sources of the public international legal institution of diplomatic protection.⁴⁰³ He further explained that ‘*the sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.*’⁴⁰⁴ Although Vattel did not use the notion of diplomatic protection, he did present his opinion on what the role of the State should be in cases when its nationals are injured by foreign States. Based on these famous statements, the 20th-century legal literature and international jurisprudence have deduced the definition of diplomatic protection as an *jus fictio* whereby the individual’s claim against a foreign State is entirely transferred to his State of nationality from the moment the latter decides to espouse the individual’s claim for remedy against the receiving State.⁴⁰⁵ The State of origin is recognised as having complete power over the exercise of this international procedural mechanism.⁴⁰⁶

The classical Vattelien formulation of diplomatic protection reflected the dominant positivist view of international law of that time. According to that perspective, states were the only subjects of international law, and individuals did not possess any international rights and obligations, and could not take part directly on the international sphere.⁴⁰⁷ The only subjects of international law were the States, which had the legal capacity to claim remedies in case of violation of international obligations whether it affected the State directly, or indirectly through its nationals. Thus, if an individual sought to obtain remedy for injury he or she had suffered at the hands of a foreign State authority, they would need to seek the protection of their State of nationality, which would bring the international claim for remedy against the receiving State. As a consequence, the lack of capacity to possess international rights and obligations prohibited individuals from appearing as direct claimants before international judicial and quasi-judicial forums where they could seek recourse against violations of

⁴⁰³ A. Vermeer-Künzli, ‘Diplomatic Protection as a Source of Human Rights Law’, D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press (2013).

⁴⁰⁴ ILC Report on Diplomatic Protection of 1998, para 6, citing Vattel 1758, vol 1, p. 309, para. 71.

⁴⁰⁵ E. Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, Banks Law Publishing Co. (1916); Frederick S. Dunn, *The Protection of Nationals: A Study in the Application of International Law*, Baltimore, The Johns Hopkins Press (1932); Lillich, ‘Editorial Comment on Diplomatic Protection of Nationals Abroad’, (1975) *AJIL*, 359; Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford University Press (2008); *Mavrommatis Palestine Concessions* (Greece v. U.K.) case; *Nottebohm* case (second phase) (Liechtenstein v. Guatemala)⁴; *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) case.

⁴⁰⁶ See the *Barcelona Traction* judgment of the ICJ, para. 78.

⁴⁰⁷ S. Gorski, ‘Individuals in International Law’, in Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford University Press (2012); A. Clapham, ‘The Role of the Individual in International Law’, (2010) *European Journal of International Law*, 25; B. Stephens ‘Individuals Enforcing International Law: The Comparative and Historical Context’, (2002–3) *DePaul Law Review*, 433.

international law or secure their own protection against foreign receiving States. Until the mid-20th century, whenever the rights of an alien were violated and the individual did not find remedy before the domestic authorities of the receiving State, he could have found remedy only through the legal fiction of diplomatic protection whereby the individual injury was transformed into a direct injury to the State of his nationality. Tribunals were not determining individual's rights, but only States' rights. Whether international claims were submitted to arbitrary tribunals created specifically for that particular dispute or operating beyond the specific case, they were conceived as claims submitted by one state against another for injury suffered by the claimant state in the person of its national. Therefore, in a time when public international law was the law among States, and the latter held the monopoly over international relations, the procedural mechanism of 'diplomatic protection' was, for centuries, the only procedural mechanism whereby the aliens' claims concerning their treatment in a foreign country could be brought to the international fora.

In an exhaustive survey of the international claims practice from the late 18th until the 20th century, Parlett reveals the characteristics of these dispute settlement mechanisms.⁴⁰⁸ The author found that the majority of these arbitration forums dealt with disputes submitted only through the diplomatic protection procedural mechanism,⁴⁰⁹ which involved only inter-state claims, while the awards were paid directly to the state of nationality rather than to the injured individuals. The state of nationality had exclusive control over the claim including its presentation and argument. These State-centric characteristics of the diplomatic protection institution were also present in the definition given by the PCIJ and later by its successor, the ICJ, to the mechanism of diplomatic protection of individuals. In one particular paragraph in the *Barcelona Traction* judgment⁴¹⁰, the ICJ pointed out that international law recognised an

⁴⁰⁸ K. Parlett, *The individual in the international legal system: state-centrism, history and change in international law*, Cambridge University Press (2011).

⁴⁰⁹ Parlett invoked the 1794 Jay Treaty as the first international claims commission (US–Great Britain, 19 November 1794). In further arbitration claims commissions or tribunals, only states could submit claims, and there was no role for the individual during the taking of decisions for exercising diplomatic protection, during the international proceedings, or during the award of compensation: Spanish-US commission, 27 October 1795; France–Spain, 15 February 1851, 105 CTS 153, A. de Clerq (ed.), *Recueil des Traite's de la France* (Paris, Arnot, 1864), vol. VI, p. 81; see also US–Peru, 23 December 1862, Moore, *International Arbitrations*, vol. II, p. 1610; US–Brazil, 14 March 1870, *ibid.* vol. II, p. 1733; Spain–US, 16 June 1870, *ibid.* vol. II, p. 1007; Japan–Peru, June 1873, *ibid.* vol. II, p. 5034; US–Colombia, 17 August 1874, *ibid.* vol. II, p. 1421; Netherlands–Dominican Republic, 26 March 1881, *ibid.* vol. V, p. 5036; Haiti–US, 24 May 1884, *ibid.* vol. II, p. 1749 (the claim of Antonio Pelletier); US–Denmark, 6 December 1888, *ibid.* vol. II, p. 1185; Venezuela–US, 1 January 1892, *ibid.* vol. II, p. 1693. For a detail list of all arbitration forums until the second World War, see Annex II and III of Parlett, *op.cit.*.

⁴¹⁰ 'The Court here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by the extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they

absolute discretion to States in relation to the exercise of diplomatic protection of their nationals, from the decision of whether to submit an international claim to the awarding of reparations.

For centuries, the institutions of diplomatic protection and consular protection have remained mostly immutable due to the persisting general characteristics of public international law and the international society as dominated by States. Following the revolutionary impact of international human rights law⁴¹¹ and multiplication of international actors on the international sphere⁴¹², the classical conception of consular and diplomatic protection as entirely State-centric mechanisms, rejecting the recognition of any role for the individual in their exercise, was challenged as being outdated, which risked turning these long-standing mechanisms into obsolete institutions under the contemporary international legal framework if their definition, requirements, and scope were not updated to contemporary realities.⁴¹³

Unlike diplomatic protection, consular assistance and protection is provided more often by the State to its nationals, since it does not involve such delicate political issues as

have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally. 79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.’ Barcelona Traction, Light and Power Company, Limited, case, p. 44 paras. 78 and 79.

⁴¹¹ A revolution also described by the academic literature as the ‘humanization’ of international law - the term was first employed by M. Bourquin in *La technique et les principes du droit public: études en l’honneur de Georges Scelle*, 1950, vol. I, 21 and was later on used by Judges Theodor Meron and A.C. Trindade, and shared by many other legal scholars, see in particular T. Kamminga, A. Petters, J. Klabbers, *Constitutionalisation of International Law*, Oxford University Press (2009), 174; See B. Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’, (2012) *Journal of International Dispute Settlement*, 7. There is an abundance of scholarly work on the impact of international human rights on international law which, despite their varying perspectives, all agree that human rights did have and still influences the evolution of international law: J. Crawford, ‘The ILC’s Draft Articles on Diplomatic Protection’, (2006) *S. Afr. Y.B. Int’l L.*, 19; E. Milano, ‘Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?’, (2004) *Netherlands Yearbook of International Law*, 85. For more details on how international law in general is changing, see A. C. Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International law’, (2009) *Leiden Journal of International Law*, 1, 22.

⁴¹² According to R. Ambast and V. Tyagi ‘if the preceding century was marked by a rise of nations, the present century is witness to the emergence of global actors who transcend national and regional divides’ (R. Ambast and V. Tyagi, ‘Ambassadors of Europe: An Insight into the Evolution of the European Union and International Diplomatic Law’, (2008) *Studia Diplomatica*, vol. LXI, 6; R. Lillich, ‘The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack’, (1975) *AJIL*, 362; A. Bremen and R.A. Wessel, ‘The International Legal Status of Informal International Lawmaking Bodies: Consequences for Accountability’ in J. Pauwelyn, R.A. Wessel and J. Wouters (eds.) *Informal International Lawmaking*, Oxford University Press (2012), 35-62.

⁴¹³ Stephen C. Neff, ‘A Short History of International law’ in Malcom D. Evans (ed.), *International Law*, fourth ed., Oxford University Press (2014), 1-27.

diplomatic protection does: namely, accusing a foreign State of breach of an international obligation and claiming remedy for its international wrongful act. Consular protection addresses the basic needs of the individuals, which do not commonly involve a violation of rights by the receiving State, but rather aim to help individuals in distressing situations or provide administrative services. Due to this specificity, the mechanism of consular protection has evolved under the influence of slightly different factors than the diplomatic protection mechanism. Namely, the growing demand for consular assistance as a reaction to the growing international migratory phenomenon and the novelty and growing gravity of challenges consuls have to face around the globe.⁴¹⁴ The institution of consular protection has thus undergone changes mostly in relation to the modalities of exercise, while certain aspects regarding consular communication and notification have evolved under the impact of international human rights law.⁴¹⁵ Although the mechanisms of consular and diplomatic protection are equally important in practice, diplomatic protection has attracted more attention than consular protection⁴¹⁶ from both the ILC and the academic literature.⁴¹⁷

⁴¹⁴ See more in Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy', The Hague, Netherlands Institute of International Relations 'Clingendael' *Clingendael Diplomacy Papers* No. 26/2010 and by the same author, 'Consular Affairs', *op.cit.*; G. Haynal, M. Welsh, L. Century and S. Tyle, 'The Consular Function in the 21st Century', A Report for Foreign Affairs and International Trade, Canada, 27 March 2013, 1-3 – 1-5, available online at <http://munkschool.utoronto.ca/wp-content/uploads/2013/06/The-Consular-Function-in-the-21st-Century-pdf>.

⁴¹⁵ According to Maaïke Okano-Heijmans, 'while the essence of consular affairs as 'assistance to individuals'—often limited to "protection of citizens"—in foreign lands remains the same, fundamental changes occur in the character of the "individual" and of "assistance", as well as in the environment in which consular services are delivered.', see 'Consular affairs' in *op.cit.*, 475.

⁴¹⁶ The literature on consular affairs has started to grow only recently. Textbooks on public international law focus principally on the institution of diplomatic protection, while consular protection is only briefly touched upon, see I. Brownlie, *Principles of Public International Law*, 8th edition, Oxford University Press (2008), 349ff; Nguyen Q. Dinh, P. Daillier, Patrick, A. Pellet, *Droit international public*, 4e edition, LGDJ, Paris (1992), 646ff. Of the books dedicated to consular affairs, see particularly, J. Melissen and Ana M. Fernandez (eds.), *Consular Affairs and Diplomacy*, Martinus Nijhoff (2011); C. Economidès, 'Consular Relations, and Consuls' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume I, North-Holland, Amsterdam (1992), 765-768 and 770-776; Luke T. Lee and J. Quigley, *Consular Law and Practice*, Oxford University Press, 3rd edition (2008); J. Quigley, William J. Aceves, and A. Shank, *The Law of Consular Access: A Documentary Guide*, Routledge Research in International Law (2011) (however the latter deals in particular with the practice and jurisprudence on the application of Art. 36 VCCR); Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy', The Hague, Netherlands Institute of International Relations 'Clingendael' *Clingendael Diplomacy Papers* No. 26/2010.

⁴¹⁷ Monographs on diplomatic protection, *inter alia*: Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Publishing, New York, (1916); M. Bennouna, 'La protection diplomatique, un droit de l'État?', in J.-F. Flauss (ed.), Boutros Boutros-Ghali *amicorum discipulorumque liber: paix, développement, démocratie*, Bruxelles, Bruylant, (1998), vol. 1 and by the same author, *La protection diplomatique. Mutations contemporaines et pratiques nationales*, Bruxelles, Nemesis, Bruylant, (2003); A. Vermeer-Künzli, *The Protection of Individuals by means of Diplomatic Protection*, Ph.D. thesis, University of Leiden, (2007); Chittharanjan F. Amerasinghe, *Diplomatic Protection*, Oxford Monographs in International Law, Oxford University Press, (2008); E. Denza, *Diplomatic law: commentary on the Vienna Convention on Diplomatic Relations*, 3rd ed., Oxford University Press, (2008); A. Bassu, *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica*, Giuffrè, (2008).

The classical conception of diplomatic protection has been subjected to more criticism than that of consular protection. Legal scholars have argued that it risked becoming ‘*an ancient and often forgotten principle of international law*’⁴¹⁸, and indicated the necessity for updating the institution to the current day international society and law.⁴¹⁹ Namely, consular and diplomatic protection should be accepted as outdated institutions of public international law or their definition and exercise should be updated in light of the contemporary parameters of the international society and law.⁴²⁰ Certain academics have even challenged the possibility of updating this institution to the current international reality, since they argued that international human rights systems, whether universal or regional, are more effectively fulfilling the remedial needs of aliens,⁴²¹ thus allegedly rendering useless the classical institution of diplomatic protection. The added value of diplomatic protection, as a procedural mechanism of bringing international individual claims, was argued to have been considerably diminished by international human rights law, raising the question of what the role of diplomatic protection in the contemporary international society might actually be.⁴²²

As rightly pointed out by Rapporteur Dugard in his First Report on Diplomatic Protection submitted to the ILC, ‘*international human rights systems still lack effective access of individuals to judicial remedies and implementation mechanisms, in spite of their increasing proliferation.*’ Gaps in the effective implementation of international human rights systems will continue to exist for as long as membership to these treaties remains voluntary in certain geographical regions, States challenge the international judgments pronounced within these legal systems,⁴²³ and there is a lack of uniform protection of human rights across the different geographical regions of the world. While Europe benefits from several partially

⁴¹⁸ C. Forcese, ‘The Capacity to Protect: Diplomatic Protection of Dual Nationals in the ‘War on Terror’’, (2006) EJIL, 369.

⁴¹⁹ L. Condorelli, ‘L’évolution du champ d’application de la protection diplomatique’, in J-F. Flauss (ed.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, Brussels, Nemesis-Bruylant, (2003), 3-28; Mariana S. Albornoz, ‘Legal nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges’, (2006) *Anuario Mexicano de Derecho Internacional*, 377, 398.

⁴²⁰ J. Briely, *The Law of Nations*, Clarendon Press (1963), 276; M. Bennouna, ‘La protection diplomatique, un droit de l’Etat?’, in Boutros Boutros-Ghali *Amicorum Discipulorumque Liber. Paix, Développement, Démocratie*, Bruxelles 1998, 245-250; J. Dugard, ‘Diplomatic Protection’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Amsterdam: North-Holland (2003), 116;

⁴²¹ F.V. Garcia-Amador, ‘State Responsibility. Some New Problems’, (1958) *Recueil des Cours*, 435-6; J. Bederman, ‘State-to-State Espousal of Human Rights Claims’, (2011) *Virginia Journal of International Law Online*, 8.

⁴²² See E. Milano, *op.cit.*; Mariana S. Albornoz, ‘Legal nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges’, (2006) *Anuario Mexicano de Derecho Internacional*, 377; K. Nobuyuki, ‘The Role of Diplomatic Protection in the Implementation Process of Public Interests’, in T. Komori and K. Wellens (eds.), *Public Interest Rules of International Law Towards Effective Implementation*, Ashgate (2009), 193ff.

⁴²³ See J. Dugard, *First Report on Diplomatic Protection*, 2000, Doc. A/CN.4/506.

overlapping legal systems conferring direct action to individuals in relation to human rights protection and a cross-fertilization of regional courts with human rights protection that are, to a certain extent, filling the gaps in each other's legal systems,⁴²⁴ other geographical regions do not benefit of the same level of human rights protection.⁴²⁵ As rightly pointed out by Rapporteur Dugard:

*To suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provide individuals with effective remedies for the protection of their human rights is to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The sad truth is that only a handful of individuals, in the limited number of States that accept the right of individual petition to the monitoring bodies of these conventions, have obtained or will obtain satisfactory remedies from these conventions.*⁴²⁶

Despite the fact that a variety of specialised treaty-based dispute settlement procedures have proliferated and individuals have gained an unprecedented standing in international law, the allegedly outdated institution of diplomatic protection is still of relevance today, as proved by the recent international practice and jurisprudence, and it undoubtedly represents an

⁴²⁴ In the *M.S.S. v Greece and Belgium* (Appl. No. 30696/09, Judgment of 21 January 2011), the European Court of Human Rights (ECtHR) highlighted the deficiencies of the EU secondary rules on asylum, in particular the implementation of the Dublin II Regulation (Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one of the Member States by a third-country national, [2003] OJ L 50/1, 25 Feb. 2003). It found that the implementation of the EU Dublin II Regulation by the Belgium courts violated the human rights to prohibition of ill-treatments (Art. 3 ECHR) and to an effective remedy (Art. 13 ECHR). See more on this judgment and the relation with EU law in P. Mallia, 'Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation', (2011) *Refugee Survey Quarterly*, 107. Another example of a 'race to the top' between the two Courts (ECtHR and CJEU) happened in the field of the implementation of the principle of non-discrimination, see the judgments of the ECtHR, *Andrle v the Czech Republic*, Appl. No. 6268/08, judgment of 17 February 2011, and CJEU in C-366/99 *Griesmar*, Judgment of 29 November 2000. For more details on this topic, see M. Moraru and K. Podstawa, *Handbook on Judicial Interaction Techniques – Their potential and use in the field of the European Fundamental Rights*, 33, available at <http://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/2FinalHandbook.pdf>

⁴²⁵ In particular by conferring to individuals direct access to effective judicial remedies, and an effective implementation of regional judgments. If a person who is subject to the jurisdiction of the Council of Europe countries has several different legal paths to present direct claims against the European States, the situation is different if the same individual is located, for example, in an Asian or Arabic country. The case of *Van Nguyen*, an Australian national facing the mandatory death sentence in Singapore, who did not have access to any of the numerous international human rights instruments and courts, is revealing about the fact that consular and diplomatic protection are and will remain in the near future necessary mechanisms for the protection of human rights. See Li-Ann Thio, 'The Death Penalty as Cruel and Inhuman Punishment before the Singapore high Court? Human Rights Norms, Constitutional Formalism and Supremacy of Domestic Law in *Public Prosecutor v Nguyen Tuong Van*', (2004) *Oxford University Commonwealth Journal*, 213; N. Klein and L. Knapman, 'Australians Sentenced to Death Overseas: Promoting bilateral dialogues to avoid international law disputes', (2011) *Monash University Law Review*, 89.

⁴²⁶ J. Dugard, *First Report on Diplomatic Protection*, 2000, para. 25 (ILC Report A/56/10/2001).

important tool in human rights protection.⁴²⁷ For instance, the cases of the suspects of terrorism detained in Guantánamo Bay and other camps in Arab countries⁴²⁸, the cases of the aliens on death row in the US⁴²⁹, or individuals subject to smart sanctions⁴³⁰, show that the procedural mechanism of diplomatic protection still serves the needs of a part of the current society that does not find effective remedies before international human rights systems. The customary legal nature of the international norms establishing diplomatic protection and the impact a State claim has on other States, compared to the claims submitted by individuals, are aspects which can contribute to the longevity of the diplomatic protection remedial system, in spite of the concurrent existence of international human rights systems.

Today, the international human rights systems and the diplomatic protection regime are increasingly intertwined. States support the claims of their nationals against other states by way of third parties intervention before human rights courts,⁴³¹ but they also claim remedies on behalf of their nationals by exercising diplomatic protection either by way of international claims before judicial or quasi-judicial forums⁴³² or through direct negotiations with the receiving State. This cross-fertilization between partially overlapping legal systems is to be supported since it can fill gaps in human rights protection and contribute to enhancing the level of protection, especially in those parts of the world where human rights protection is not effective.⁴³³

⁴²⁷ A. Shapovalov, 'Should a Requirement of 'Clean Hands' Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate', (2005) *American University International Law Review*, 4; David J. Bederman, 'State-to-State Espousal of Human Rights Claims', (2011) *Virginia Journal of International Law Online*.

⁴²⁸ See more details in the sub-section Jurisprudence from countries with common law systems in Section V – The Legal nature of Diplomatic Protection: State's right, Individual Right or Human Right?

⁴²⁹ See more details in A. Rilwan, 'Medellin v Dretke', (2006) *New England International and Comparative Law Annual*, 48; S. Babcock, 'The Role of International Law in United States Death Penalty Cases', (2002) *Leiden Journal of International Law*, 367; A. Bishop, 'The Death Penalty in the United States: An International Human Rights Perspective', (2001) *South Texas Law Review*, 1115; J. Quigley, William J. Aceves and S. Adele Shank, *The Law of Consular Access: A documentary guide*, Routledge Research in International Law (2013).

⁴³⁰ Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council* [2008] ECR, I- 0000, para. 335; Case T-228/02 *Organisation des Modjahedines du Peuple d'Iran (OMPI 1)* [2006] ECR II-4665. See more details in the sub-section The jurisprudence of the EU Courts – diplomatic protection as a remedial mechanism for filling the gaps in European and international human rights law within Section V – The Legal nature of Diplomatic Protection: State's right, Individual Right or Human Right?

⁴³¹ See, for instance, the possibility provided by Art. 36 ECHR.

⁴³² See, for instances, the *LaGrand*, *Avena*, and *Diallo* cases before the ICJ.

⁴³³ On the advantages of overlapping remedial systems, i.e. human rights systems and diplomatic protection see A. Vermeer-Künzli, 'Unfinished Business: Concurrence of Claims Presented before a Human Rights Court or Treaty Body and through Diplomatic Protection', (2010) *Human Rights Law Review*, 269; A. Vermeer-Künzli, 'Diplomatic Protection as a Source of Human Rights Law', D. Shelton (ed), *The Oxford Handbook of International Human Rights Law*, Oxford University Press (2013), 11; on diplomatic protection as complementary to human rights systems, see E. Wyler, 'La protection diplomatique: La concurrence des réclamations' in *Société Française pour le Droit International* (ed), *Les compétences de l'Etat en droit international: Actes du Colloque de Rennes, 2–4 juin 2005*, Paris: Pedone (2006), 239.

In light of the so-called humanization phenomenon of international law,⁴³⁴ and the empowering of the individual in international affairs, numerous legal scholars⁴³⁵ have called for the reform of the international legal conception of diplomatic protection for the purpose of making it correspond to the contemporary status of international law. An updated definition of diplomatic protection would thus need to reflect the balancing of the public interests of the State with the recognition of the private interests of the individual, instead of being a purely State-centred definition.

The process of updating the classical public international legal conception of diplomatic protection began in 1996, when this topic was included on the ILC's list of subjects for the codification and progressive development of international law.⁴³⁶ Under the work of Rapporteur Bennouna⁴³⁷, and particularly Rapporteur Dugard, the definition, legal nature and norms governing the conditions necessary for the exercise of diplomatic protection were updated to correspond to the contemporary reality. The ILC, under the guidance of Rapporteur Dugard, re-fashioned the classical conception of diplomatic protection by ensuring a balance between preserving the old State-centric conception and introducing the progressive development of international law. To a large extent, the ILC Articles on Diplomatic Protection incorporate international human rights conceptions, as reflected by the numerous exceptions introduced to the requirements for the exercise of diplomatic

⁴³⁴ The 'humanization' of international law - the term was first employed by M. Bourquin in *La technique et les principes du droit public: études en l'honneur de Georges Scelle*, 1950, vol. I, 21 and later on used by Judges Theodor Meron 'The Humanization of Humanitarian Law' (2000) AJIL, 239; and by the same author *The Humanization of International Law*, Martinus Nijhoff Publishers (2006) and Antônio Augusto Cançado Trindade (International Law for Humankind Towards a New Jus Gentium, second revised edition, Martinus Nijhoff Publishers (2013)). A. Petters, J. Klabbers, G. Ulfstein, *Constitutionalisation of International Law*, Oxford University Press (2009), 174; V. Pergantis, 'Towards a 'Humanization' of Diplomatic Protection?' (2006) ZaōRV, 351; Arnold N. Pronto, "'Human-Rightism' and the Development of General International Law' (2007) Leiden Journal of International Law, 753; Nicholas T. Hooge, 'Responsibility to Protect (R2P) as Duty to Protect?—Reassessing the Traditional Doctrine of Diplomatic Protection' in *Light of Modern Developments in International Law*, 2010 Master of Laws thesis.

⁴³⁵ See Special Rapporteur, Mohammed Bennouna International Law Commission: Preliminary Report on Diplomatic Protection, A/CN.4/484, 4 February 1998.

⁴³⁶ See Yearbook of the International Law Commission of 1996, vol. II (Part Two), p. 97, para. 248, and p. 137, annex II, addendum 1.

⁴³⁷ Special Rapporteur Mohammed Bennouna was appointed in 1997 and issued his first and only report in 1998: Preliminary report on diplomatic protection, presented by M. Bennouna to the International Law Commission during its 50th session, UN Doc. A/CN.4/484 and A/CN.4/484/Corr. 1, February 4th, 1998. In 1999, Special Rapporteur John Dugard was appointed and delivered seven reports: First report, (UN Doc. A/CN.4/506 (7 March 2000) and Corr. 1 (7 June 2000) and Add. 1 (20 April 2000)); Second report (UN Doc. A/CN.4/514 (28 February 2001) and Corr. 1 (27 July 2001)); Third report (UN Doc. A/CN.4/523 (7 March 2002) and Add. 1 (16 April 2002)); Fourth report (UN Doc. A/CN.4/530 (13 March 2003) and Add. 1 (6 June 2003)); Fifth report (UN Doc. A/CN.4/538 (4 March 2004)); Sixth report (UN Doc. A/CN.4/546 (11 August 2004)); Seventh Report (ILC Report A/60/10, 2005, Ch. IV).

protection.⁴³⁸ This normative approach has thus created a bridge between the classical institution of diplomatic protection and the modern international human rights law, two institutions of public international law that ultimately share the same objective: ensuring the protection of individuals whose rights have been breached by States.⁴³⁹ Whilst some of the most radical human rights driven proposals put forward by Rapporteur Dugard were not approved by the ILC – prescribing a State duty to exercise diplomatic protection, the prohibition of the use of military force as a diplomatic protection measure, and defining diplomatic protection as an entirely individual-centered mechanism – the 2006 Articles reflect a balance between the interests of the States and those of the individual, and between the ‘traditionalist’ and ‘progressive’ opinions on diplomatic protection. The ILC Articles seem to have succeeded in updating the institution of diplomatic protection so that it remains a current and useful institution of public international law.⁴⁴⁰

The absolute *fictio juris* definition of diplomatic protection, as well as the specific premise and conditions of the exercise of diplomatic protection of natural persons were amended⁴⁴¹ to reflect the empowered position of the individual within international relations⁴⁴² and the ‘humanization’ of international law.⁴⁴³

In its Articles on Diplomatic Protection, the ILC codified norms that reflect the contemporary customary international practice up until 2005. Thus starting from 2006,⁴⁴⁴ the definition of diplomatic protection was no longer the traditional one established in the *Mavrommatis Concessions* case, but a more nuanced definition in which the individual interests were recognised alongside those of the State. Article 1 shifts the focus from the classical legal fiction definition of diplomatic protection to its essential characteristics as a procedural mechanism. Thus diplomatic protection is defined as the invocation by a State of ‘the responsibility of another State for an injury caused by an internationally wrongful act of

⁴³⁸ J. Dugard, *First Report on Diplomatic Protection*, UN Doc. A/CN.4/506 (7 March 2000), at 7 (§ 21)

⁴³⁹ One of the main differences between the remedial legal frameworks of ‘diplomatic protection’ and ‘international human rights law’ is that the former is directed primarily against non-nationality States, while the later against primarily the State of nationality.

⁴⁴⁰ Ames L. Kateka, ‘John Dugard's Contribution to the Topic of Diplomatic Protection’, (2007) *Leiden Journal of International Law*, 921.

⁴⁴¹ For a brief overview of these amendments, see the Introductory Note to the 2006 ILC Articles on Diplomatic Protection, written by Prof. J. Dugard, available online at <http://legal.un.org/avl/ha/adp/adp.html>

⁴⁴² See R. McCorquodale ‘The Individual and the International Legal System’ in A Bianchi (ed) *Non-State Actors and International Law*, Ashgate Farnham (2009), 121–46; G. Gaja ‘The Position of Individuals in International Law: An ILC Perspective’ (2010) *EJIL*, 11.

⁴⁴³ See James L. Kateka, ‘John Dugard's Contribution to the Topic of Diplomatic Protection’, (2007) *Leiden Journal of International Law*, 921; P. Escameia, ‘Professor Dugard as an Innovator in the Work of the International Law Commission’ (2007) *Leiden Journal of International Law*, 931.

⁴⁴⁴ The year when the final version of the ILC Articles on Diplomatic Protection was adopted.

that State to *a natural or legal person that is a national of the former State*'.⁴⁴⁵ Article 1 makes clear that the international responsibility is owed for the injury caused to an individual, and it is no longer about the direct injury of the State.⁴⁴⁶ In the *Diallo* judgment, the ILC definition was confirmed by the ICJ, which added that customary international law reflects this change of definition of diplomatic protection, thus signalling that diplomatic protection has followed the evolution experienced by the general international law under the ambit of international human rights.⁴⁴⁷

In the following paragraphs, this section will concentrate on bringing into light the modernisation of the international rules governing the conditions for the exercise of diplomatic protection. It will focus mostly on the transformation experienced by the pillars of the institution: the nationality of claims, existence of an international wrongful act and exhaustion of local remedies, which seem to have been re-drafted from a human rights perspective. It will be revealed that the contemporary international norms governing the exercise of diplomatic protection had to reflect the changes that had occurred in the States' practice. Consequently, the first section will demonstrate that nationality is no longer the sole link legitimating the exercise of diplomatic protection. The second sub-section will show how the public international legal norms governing the requirement of exhaustion of legal remedies have changed under the impact of international human rights law, particularly in regard to the exemptions provided in cases of ineffective local remedies. The last sub-section will assess how the scope of the international wrongful act in light of the growing body of international human rights law conferring rights directly to individuals. Due to the limited space, the focus will be on those particular amendments that have the potential for bringing the international conception of diplomatic protection closer to the EU conception of protection of Union citizens abroad, rather than attempting an exhaustive overview of all the amendments brought by the ILC to the institution of diplomatic protection.

⁴⁴⁵ UN Doc A/61/10, at 25, para.4. [emphasis added]

⁴⁴⁶ See commentary of Art. 1, para. 9, 2006 ILC Articles on Diplomatic Protection.

⁴⁴⁷ Case Concerning *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of Congo) Case, Judgment of 30 November 2010, para. 39: '*diplomatic protection consists of 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 of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).*'

1. The changing role of nationality⁴⁴⁸ in the field of consular and diplomatic protection of individuals

The concept of ‘nationality’ is a complex political-legal-sociological term⁴⁴⁹ that emerged during a time when the nation-States were the sole actors on the international plane and there was limited migration of natural persons. Individuals commonly lived within one single State, namely the one whose nationality they possessed. In this specific international society, the specific legal-political and sociological conceptions of nationality coexisted more easily. People owed allegiance and in return received rights and protection from one single nation-State, for which they also felt a strong and unique feeling of belonging.⁴⁵⁰ The fragmentation of international law and intensifying migratory trend made it increasingly difficult for the concept of nationality to serve one single function in public international law⁴⁵¹ and to reflect both legal-political and sociological dimensions into one single individual nationality. Within the public international legal order, the development of conventional instruments recognising to the individual the possibility to directly submit claims regarding their rights eroded the relevance of the citizenship link for the public international law institutions.⁴⁵²

Within the particular field of consular and diplomatic protection, nationality has developed a particular and strictly defined function, which can be briefly summarised as a

⁴⁴⁸ In this section the terms ‘nationality’ and ‘citizenship’ are used interchangeably. ‘Citizenship’ is however conceived as a matter of domestic law, and is associated with eligibility for a range of social and political rights and entitlements that a State confers, including the right to vote, marry, work, and carry a passport. The term ‘nationality’ is more commonly used in international law and indicates the connection that an individual has to a particular state which affords certain benefits and entitlements while travelling outside the borders of the State of nationality (See J. Kunz, *The Nottebohm Judgment (Second Phase)* (1960) *AJIL*, 536, 546; L. Barry and N. Klein, ‘A human rights perspective on diplomatic protection: David Hicks and His Dual Nationality’, (2007) *AJHR*, 1, 25). In international law, nationality has been described as the: ‘[...] *juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as the result of an act of the authorities is in fact more closely connected with the population of the State conferring nationality than that of any other State.*’ [Nottebohm, 1955, at 24.]

⁴⁴⁹ The political-legal definition of ‘nationality’ commonly describes this status of a natural person as a tie of allegiance, which materialises in duties owed to the nation-State in return for which it benefits from rights, and thus presupposes the prior existence of a nation-State. The sociological definition defines nationality as the individual’s feeling of belonging to a group that has several attributes in common, such as language, territory, tradition. Hence, the sociological understanding of nationality is a state of mind that can exist even before the creation of the State. Therefore the definitions are corresponding, they can co-exist but they are also independent of each other. For more details see C. Tiburcio, *op.cit.*, 3-5; Sir Robert Jennings & Sir Arthur Watts (eds) *Oppenheim’s International Law*, 9th ed., Oxford University Press (1992), 849, 857–59; K. Kruma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge*, Martinus Nijhoff Publishers (2014).

⁴⁵⁰ T. Hobbes, *Leviathan*, 1651, edition by M. Oakeshott, Oxford University Press, 1960, 467ff.

⁴⁵¹ See the established international legal theory of functional approach of nationality, I. Brownlie, *International Public Law*, Oxford University Press (2008), 406, ‘*there seems to be general acquiescence in this splitting up of the legal content of nationality for particular purposes.*’

⁴⁵² See, Francisco O. Vicuna, ‘Interim Report on The Changing Law of Nationality of Claims’, *International Law Association, Committee on Diplomatic Protection 2000*, p. 638; M.I. Papa, ‘Protezione diplomatica, diritti umani e obblighi erga omnes’, (2008) *RDI*, 711.

legitimizing factor for a State willing to exercise consular and diplomatic protection on behalf of natural persons.⁴⁵³ Due to this particular salient role of justification for the limitation of the principle of non-intervention in the domestic affairs of another State, and its strict application,⁴⁵⁴ the bond of nationality has been commonly perceived as hierarchically superior to the other two prerequisites for the exercise of diplomatic protection⁴⁵⁵, being described as the foundation of the State's right to exercise diplomatic protection.⁴⁵⁶

Within the public international legal institution of diplomatic protection, the requirement of nationality of claims has been more strictly imposed than within the consular protection institution⁴⁵⁷, since the former raised the international responsibility of a foreign State and thus led to more serious legal implications on the international arena, consequently making nationality an almost absolute⁴⁵⁸ requirement for the exercise of diplomatic protection.⁴⁵⁹ Changes in the international society and international law, in particular the aforementioned decoupling of the political-legal perception of nationality from the sociological perception, the growing role of the individual on the international arena, and the development of international human rights systems, have also impacted on the traditional public international norms defining the bond of nationality within the institutions of consular and, particularly, diplomatic protection. A short overview of the classical international standards governing 'nationality' will first be presented, and then this section will continue with an analysis of the changes recently introduced to these international norms.

⁴⁵³ Since the institution of diplomatic protection developed in a time when the principle of non-interference in the domestic affairs of the state and equal sovereignty were almost absolute principles of international law, the nationality of the alien within a State was found to be the triggering factor of the jurisdiction of another State. See Art. 5(a) VCCR, and Art. 3 (a) VCDR and Art. 1 ILC Articles on Diplomatic Protection.

⁴⁵⁴ According to the traditional approach, '[c]itizenship is usually an essential condition of diplomatic protection. In the matter of the presentation and enforcement of international claims, no rule is more strictly observed'; see Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad, or The Law of International Claims*, Banks Law Publishing Co. (1915), 462. Additionally, no replacements were commonly permitted under the classical conception. See A. Vermeer-Künzli, 'Nationality and diplomatic protection - A reappraisal', in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law*, Routledge (2013), 76-96.

⁴⁵⁵ Namely, the existence of an international wrongful act and exhaustion of legal remedies.

⁴⁵⁶ See, in particular, *Panevezys-Saldutiskis Railway (Est. v. Lith.)*, 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28): 'This right [to resort to 'diplomatic action or international judicial proceedings'] is necessarily limited to intervention on behalf [of the state's] own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.' See also, J. Dugard, First and Seventh Reports, *op.cit.*

⁴⁵⁷ See J. Dugard, *Seventh Report on Diplomatic Protection*, *op.cit.*, 19.

⁴⁵⁸ I.e., allowing no derogations.

⁴⁵⁹ J. Dugard, *Seventh Report on Diplomatic Protection*, *op.cit.*

a. Traditional international standards on the ‘nationality of claims’ requirement for the exercise of diplomatic protection

The first definition of the bond of nationality, or the ‘nationality of claims’ requirement for the exercise of diplomatic protection, was set out by the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway* case⁴⁶⁰:

This right [to exercise diplomatic protection] is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.

The PCIJ did not define ‘nationality’ as such, but rather it established the function it plays within the public international law institution of diplomatic protection.

In its 1955 *Nottebohm* judgment,⁴⁶¹ the ICJ added precise criteria that the bond of nationality had to fulfil in order to legitimise the exercise of diplomatic protection. The defendant State, Guatemala, had confiscated the property of Mr Nottebohm based on his German nationality, although, at that time, he no longer possessed that nationality, but that of a war neutral State, Liechtenstein. Guatemala sought to obtain the rejection of Liechtenstein’s claims, brought by means of diplomatic protection, by contending that Mr Nottebohm had fraudulently acquired nationality of Liechtenstein, in violation of the domestic law and consequently also of customary international law. Before this judgment, the main condition which nationality had to fulfil, under international law, for the purpose of legitimising an exercise of diplomatic protection, was to be acquired in conformity with the national legislation, while States were recognised discretionary power to establish the criteria for the acquisition of nationality.⁴⁶² Guatemala’s main defence argument was that Mr Nottebohm’s acquisition of nationality by way of naturalisation was not in conformity with the national legislation of Liechtenstein. The Law on nationality of Liechtenstein was argued to have been breached in two aspects: the order of the procedure for naturalisation was argued to have been

⁴⁶⁰ *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Judgment of 18 November 1953, ICJ Reports (1953), 111–125.

⁴⁶¹ *Nottebohm case (second phase)*, Liechtenstein v Guatemala, ICJ Reports 1955.

⁴⁶² Art. 1 of Hague Convention governing Certain Questions Relating to the Conflict of Nationalities - ‘*It is for each State to determine under its law who are its nationals.*’ Art. 2 reads as follows: ‘*Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.*’

inversed; and certain essential requirements laid down in the Law were said to have not been fulfilled, such as the requirement of three years residence in Liechtenstein. Consequently, the grant of nationality by way of naturalisation was argued to have been acquired fraudulently for the sole purpose of obtaining a change in Mr Nottebohm's legal status from a national of "a belligerent country to one of a neutral country". The link existing between Nottebohm and Liechtenstein was argued to be a sham, which could not be legally opposed to the defendant.⁴⁶³

The *Nottebohm* case was a controversial and ground-breaking judgment in the field of diplomatic protection and, more generally, in international law, since the Court limited the exclusive competence of States in matters of nationality by establishing an additional criterion to be fulfilled by nationality, namely: to be 'genuine' and 'effective'.⁴⁶⁴ The Court established that nationality, as the premise of the exercise of diplomatic protection, should be the legal expression of '*a social fact of attachment*' and reflect '*a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*'.⁴⁶⁵ The ICJ's *Nottebohm* judgment became the reference case for the 'genuineness' requirement that the 'nationality of claims' as prerequisite for the exercise of diplomatic protection had to fulfil. Based on the minimum presence of Nottebohm in Liechtenstein (limited to transitory visits), the fact there were no concrete indications of his intention to transfer his economic interests, and his few family ties in the country, the Court concluded that he had minimal genuine connections with the country and thus proved he had no intention of settling in Liechtenstein. These facts were found to essentially prove the 'absence of genuineness required of an act of such importance as naturalization.' The fact that *Nottebohm* had renounced his previous German citizenship in favour of that of Liechtenstein, which was, at that time, a neutral country, was considered a sort of forum shopping making the individual's choice of State nationality fraudulent, and thus diminishing the 'genuineness' of his naturalisation.

The underlying rationale of the ICJ judgment ruling in the *Nottebohm* case was the prohibition of fraudulent acquisition of nationality by individuals, and abuse of State's prerogatives in the field of nationality matters aimed at avoiding the laws on war. However, the Court did not base its judgment on these general principles, which were already

⁴⁶³ The issue of fraudulently using 'nationality' to obtain benefits occurred also in the CJEU jurisprudence, see, for instance, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

⁴⁶⁴ *Nottebohm* case (second phase), *Liechtenstein v Guatemala*, ICJ Reports 1955, 4, 24 and 26.

⁴⁶⁵ *Nottebohm* judgment, ICJ Reports of Judgments, 1955, 24.

recognised by the customary international norms of the time,⁴⁶⁶ instead, the Court, in a questionable exercise of innovative thinking, created the ‘genuine’ and ‘effective’ nationality standard, on which it based its judgment. The *Nottebohm* judgment has been equally criticized by academics⁴⁶⁷ and practitioners⁴⁶⁸, receiving also a considerable number of dissenting opinions from the judges sitting at the ICJ.⁴⁶⁹ The main criticisms centred on the lack of empirical international evidence for creating this international standard, and the unfair consequence it creates for individuals, who, due to this new criterion, are ultimately treated by public international law as stateless individuals.⁴⁷⁰ For a long period of time, the scope of application of the *Nottebohm* principle has been over-emphasised, mainly by legal academics⁴⁷¹, by treating it as a general principle applicable to the nationality of claims requirement for the exercises of diplomatic protection.

The principle of continuous nationality of the individual on behalf of which diplomatic protection is exercised is a second general international standard that the bond of nationality had to fulfil to legitimise the international exercise of diplomatic protection. According to this classical international principle, a State could exercise its right to diplomatic protection only if the injured individual had possessed his nationality continuously from the time of the injury until the time of presentation of the international claim.⁴⁷² The legal definition of diplomatic protection as a legal fiction whereby the injury of the individual was transferred to the State of nationality upon the latter’s espousal of the claim, and the States’ fears of nationality shopping contributed to the development of this difficult to prove international standard.⁴⁷³

In addition to these two requirements, a few others applied in cases of dual or multiple nationalities of the injured individual aiming at either singling out one nationality as the dominant one, or prohibiting all together claims being brought to the international fora by

⁴⁶⁶ C. Tiburcio, *op.cit.*, 37ff.

⁴⁶⁷ Glazer, ‘Affaire Nottebohm’ (Liechtenstein v. Guatemala) - A Critique, (1956) *Geo. L.J.* 313, 325; J. Kunz, ‘The Nottebohm Judgment’, (1960) *AJIL*, 536, 543; A. Randelzhofer, ‘Nationality’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Elsevier (1997).

⁴⁶⁸ R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press (1994), 52; Advocate General Tesauro Opinion in Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 5, where the AG held that the principle of genuine nationality resulted from the ‘romantic’ period of international relations, and the judgment itself is ‘extremely controversial’.

⁴⁶⁹ Three dissenting opinions were formulated, by Judge Read, Judge Klaestad and Guggenheim.

⁴⁷⁰ J. Kunz, *op.cit.*, 536, 543.

⁴⁷¹ Brownlie, *op.cit.* and A. Vermeer-Künzli, ‘Diplomatic Protection as a Source of Human Rights Law’, *op.cit.*

⁴⁷² *Panevezys-Saldutiskis Railway case*, PCIJ, 28 February 1939, series A/B F. Orrego Vicuna, ‘Interim Report on the Changing law of Nationality’, *op.cit.*, para. 168; Commentary to the Art. 5 of the 2006 ILC Articles on Diplomatic Protection; J. Crawford, Brownlie’s *Principles of Public International Law*, Oxford University Press (2012), 434ff and chapter 31.

⁴⁷³ Edwin M. Borchard, ‘The protection of citizens abroad and change of original nationality’, (1934) *Yale LJ*, 379; F. Battaglia and F. Perrini, ‘La Regola della continuità della cittadinanza’ in L. Panella (eds.), *La Protezione Diplomatica Sviluppo e Prospettive*, Giappichelli (2009), 57, 59.

way of diplomatic protection. It has to be noted that for a long period of time⁴⁷⁴ dual and multiple nationalities were addressed by public international law as problems to be tackled.⁴⁷⁵ For this purpose the principle of effective nationality was jurisprudentially established in an attempt to choose one single nationality, the effective, dominant one⁴⁷⁶, that itself alone could act as the legitimating factor for the exercise of diplomatic protection on behalf of a natural person.⁴⁷⁷ In case the injury was committed by one of the States of nationality, international law prohibited for a long period of time⁴⁷⁸ the invocation of its international responsibility by way of diplomatic protection, based on the traditional public international legal principle of equal sovereignty, whereby States cannot be held internationally responsible for the treatment of their nationals. Therefore, classical public international law established the absolute rule of non-responsibility for international wrongful acts committed against an individual, in the specific case that the individual possessed dual or multiple nationalities, of which one was the nationality of the State perpetrator of the international legal violation.⁴⁷⁹

The imposition of the ‘genuine’, ‘effective’ and ‘continuous’ criteria to be fulfilled by the bond of nationality have been subject to strict application, making the bond of nationality an almost absolute condition for the exercise of diplomatic protection of natural persons. International jurisprudence has not admitted exceptions or if, in principle, admitting them, the practice showed little acceptance for them.⁴⁸⁰ The situation was different as regards the rules on acquisition, loss, withdrawal, and domestic rights and obligations associated with nationality. On these aspects, public international law has generally admitted the exclusive

⁴⁷⁴ It seems the issue has recently resurfaced, stirred by nationalist parties. For instance, see M. Fritsma, ‘Amendment of the State Law on Dutch Nationality in relation to multiple nationality and other issues related to nationality’ Kamerstukken 31 813 (R1873), 19 January 2010.

⁴⁷⁵ See the preamble of the 1930 Hague Convention. In 1954 the UN ILC put forward the following rule as regards nationality: ‘Every person has the right to a nationality – but to only one’ see Institut de Droit International, *Tableau General des Resolutions 1873-1956*, 1957, 41.

⁴⁷⁶ Different terms were used by the tribunals with similar meaning, e.g. ‘dominant’, ‘effective’, and ‘predominant’. See A. Vermeer-Künzli, ‘Nationality and diplomatic protection - A reappraisal’, in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law*, Routledge (2013), 76-96, 83.

⁴⁷⁷ See Case A/18 concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality (*Mergé*) International Legal Material 1984, 489; see also Thomas A. Aleinikoff, D. Klusmeyer (ed), Part II-The issue of Plural Nationality’, in *Citizenship Today: Global Perspectives and Practice*, Carnegie Endowment for International Practice (2001).

⁴⁷⁸ Namely until 2006, when the ILC introduced an exception within its Articles on Diplomatic Protection.

⁴⁷⁹ Art. 4 of the 1930 Hague Convention, rule changed by the ILC Articles on Diplomatic Protection. See also the judgment of the PCIJ in *Panevezys case*, ‘Where the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.’

⁴⁸⁰ R. Donner, *The Regulation of Nationality in International Law*. 2d ed. Irvington-on-Hudson, NY: Transnational (1994); C. Force, ‘Shelter from the Storm: Rethinking Diplomatic Protection of Dual Nationals in Modern International Law’, (2005) *George Washington International Law Review*, 85; P. Klein, ‘La protection diplomatique des doubles nationaux: Reconsidération des fondements de la règle de non-responsabilité’ (1988) *Revue belge de droit international*, 184.

States' competence to establish domestic rules. The nationality of claims condition for the admissibility of a diplomatic protection claim required only that the State would prove that the individual, in relation to which the international wrongful act was committed, possessed its nationality, while the domestic rules on the basis of which the individual acquired nationality were almost automatically considered internationally legitimate.⁴⁸¹

Conferral of nationality and the rights associated with nationality are commonly held to be an exclusive matter of domestic law of the state concerned.⁴⁸² The Permanent Court of International Justice articulated this position in the Nationality Decrees judgment, stating that: '*In the present state of international law, questions of nationality are, in principle, within the reserved domain of States.*'⁴⁸³ This rule was then codified by Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality (the Hague Convention 1930) which confirmed that '*[i]t is for each State to determine under its own law who are its nationals.*' The consequence of such wide discretion recognised to States led to a diversity of domestic norms governing the conferral, acquisition, loss, and withdrawal of nationality, as well as the rights conferred to the nationals. In time, the domestic norms governing these issues have more or less converged towards a short list of variables, which has now been codified, to a certain extent, by the ILC. There are a few elements that States recognise as criteria of the acquisition of nationality, and Article 4 of the ILC Articles on Diplomatic Protection mentions those most commonly used: birth (*jus soli*), descent (*jus sanguinis*), naturalisation and succession of States. However this list is not exhaustive as the ILC recognises there can be other legitimate connecting factors, as long as they are consistent with international law.⁴⁸⁴

International law has established a few limitations to the States' prerogative over nationality matters, which have been commonly enshrined in a few relevant treaties and customary international legal norms.⁴⁸⁵ There are few international treaties governing this area, and they focus on dealing with problems stemming from multiple nationalities, or

⁴⁸¹ Art. 1 of Convention on Certain Questions Relating to the Conflict of Nationality Laws art. 1, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter 1930 Hague Convention] reads as follows: '*It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.*' See also the *Panevezys* judgment.

⁴⁸² Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary, International Legal Regulation of Nationality', (2009) Harvard International Law Journal, 1.

⁴⁸³ Nationality Decrees in Tunis and Morocco, Advisory Opinion of 7 February 1923 (Series B, No. 4); Acquisition of Polish Nationality, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7, at 16 (Sept. 15).

⁴⁸⁴ See Art. 4 of the ILC Articles on Diplomatic Protection and the commentary of this Article.

⁴⁸⁵ For a complete list of the international norms governing citizenship, see the EUDO-Citizenship database, available online at: <http://eudo-citizenship.eu/databases/international-legal-norms/?stype=3>

nationalities issues concerning vulnerable groups of peoples (e.g. women⁴⁸⁶ and children⁴⁸⁷). Many of their provisions are outdated, corresponding to a past international society.⁴⁸⁸ In addition to the written norms, there is a short list of customary international norms whose content is still difficult to define today.⁴⁸⁹ In short, these customary international norms⁴⁹⁰, placing limitations on the still recognised exclusive States' competence over nationality matters, can be summarised as follows: prohibition of abuse of rights in relation to acquisition of nationality;⁴⁹¹ recognition of the individual's right to a nationality⁴⁹², with its correspondent States' obligation to eliminate statelessness;⁴⁹³ and prohibition of discrimination.⁴⁹⁴

In case the domestic rules on nationality do not conform to international conventions, international custom, and the principles of law generally recognised with regard to nationality⁴⁹⁵, the sanction established by international law is international in-opposability of the said norms,⁴⁹⁶ and the consequential inadmissibility of the international claim brought by

⁴⁸⁶ Convention on the Nationality of Women, O.A.S. Treaty Series No. 4, 38, entered into force Aug. 29, 1934.

⁴⁸⁷ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990.

⁴⁸⁸ For instance, Art. 4 of the 1930 Hague Convention, which prohibits diplomatic protection being exercised between States of nationality; Art. 5 allowing states to treat individuals with multiple nationalities as possessing only one, namely that of principle residence or closest connection.

⁴⁸⁹ Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) Harvard International Law Journal, 1. See also, A. Sironi, 'Nationality of individuals in public international law A Functional approach', in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law*, Routledge (2013), 54-76.

⁴⁹⁰ These customary international norms have largely remained un-altered and are raised in few cases. For the application of the prohibition of discrimination, see ECtHR, *Genovese v Malta* (Appl. 53124/09, judgment of 11 October 2011), and for changes of nationality done exclusively for the purpose of eluding the internal rules of an international organisation by one of its staff members, see, United National Administrative Tribunal, Case No. 1383, judgment of 29 September 2006.

⁴⁹¹ An example of abuse of rights in the field of conferral of State nationality is provided in the commentary to Art. 1 of the 1930 Hague Convention: '*If State A should attempt, for instance, to naturalize persons who have never had any connection with State A, who have never been within its territory, who have never acted in its territory, who have no relation whatever to any persons who have been its nationals, and who are nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law.*'

⁴⁹² Inter-American Court of Human Rights Advisory Opinions of 1984 (OC-4/84) held that nationality was an inherent right of all human beings. The Court held that domestic regulation of nationality is no longer deemed to be within the State's sole jurisdiction, but it is circumscribed by their obligations to ensure the full protection of human rights. For the qualification of the right to nationality as one of the most fundamental of an individual's human rights, see C. Tiburcio, *op.cit.*; J. M. M. Chan, 'The Right to a Nationality as a Human Right', (1991) HRLJ, 1.

⁴⁹³ See the Convention on the Reduction of Statelessness (30 August 1961, United Nations, Treaty Series, vol. 989, p. 175); Convention Relating to the Status of Refugees (28 July 1951, United Nations, entered into force on 22 April 1954); Convention Relating to the Status of Stateless Persons (28 September 1954, United Nations, Treaty Series, vol. 360, p.117, entered into force on 6 June 1960); Art. 5 of the European Convention on Nationality.

⁴⁹⁴ Arts. 4 and 5 of the European Convention on Nationality, Convention on the Nationality of Women which prohibits all sex-based discrimination regarding nationality and Art. 1(3) of the Convention on the Elimination of All Forms of Racial Discrimination.

⁴⁹⁵ See Art. 1 of the 1930 Hague Convention.

⁴⁹⁶ See the *Nottebohm* judgment; A. Vermeer-Künzli, 'Nationality and diplomatic protection - A reappraisal', *op.cit.*

way of diplomatic protection. International law, as interpreted by the ICJ⁴⁹⁷, has thus made a distinction between nationality at the domestic level and nationality at the international level. If nationality can be legal within the territorial boundaries of the State, and no state can interfere in this regard, at the international level, domestic legislation establishing the conferral or withdrawal of nationality may be challenged, and if nationality is not internationally recognised, then neither will the diplomatic protection exercised by that state for its nationals.

The bond of nationality has played a crucial role in relation to the public international law institution of diplomatic protection, being defined by specific rules of very strict application. The absolute conditionality of diplomatic protection on the bond of nationality, and the international requirements of ‘genuineness’, ‘effectiveness’ and ‘continuity’ significantly restricted the personal scope of application of diplomatic protection of individuals. Public international law has changed greatly since its ‘romantic’⁴⁹⁸ period under the impact of international human rights, the growing role of individuals and other non-state actors in international relations, and the increasing migration of populations. The following sub-sections will assess the extent to which these general trends have impacted also on the classical international standards imposed on the bond of nationality as admissibility requirement for the exercise of diplomatic protection. The main questions that will be addressed in the following sub-sections are the following: is the classical bond of nationality still required as a mandatory, exclusive link for the exercise of consular and diplomatic protection of individuals, or is the contemporary international practice signalling that factors other than ‘nationality’ are starting to be slowly accepted as alternative premises for the institution of diplomatic protection? Has the ‘humanization’ phenomenon extended the personal scope of diplomatic protection?

⁴⁹⁷ See the following judgments in: *Mavrommatis*, *Panevezys*, *Nottebohm*, *Barcelona Traction*, *Tehran Hostages* cases.

⁴⁹⁸ The term was used by Advocate General Tesaurò in relation to the public international law existent at the time the *Nottebohm* judgment was delivered, see his Opinion in the *Micheletti* case, (Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria*, 1993 ECR I-4239), para. 5.

b. Restricting the principle of continuous nationality of diplomatic protection claims

The classical principle of continuous nationality has been subject to vehement critiques in relation to both its content and its legal basis.⁴⁹⁹ The principle was criticised as unfounded from both the classical *ius fictio* conception of diplomatic protection and the current individual oriented conception of the institution. According to the Vattelian legal fiction definition of diplomatic protection, the injury of the individual is retroactively considered a direct injury to the State. Since the State is considered the sole holder of the right to claim remedy from the moment it decides to exercise diplomatic protection, there seems to be no logic behind the requirement of continuous possession of nationality, from the moment of lodging the international claim and until the resolution of the international claim. In light of the growing international role of the individual, the logic of the rigid principle of continuous nationality is questionable.

The 2006 ILC Articles on Diplomatic Protection maintained this highly challenged and unfair⁵⁰⁰ international customary norm, perpetuating, to a certain extent, the existence of the classical norm.⁵⁰¹ Rapporteur Dugard's initial proposal was to eliminate the rule altogether since it no longer corresponds to the present day society. He argued that maintaining such a prerequisite would only lead to numerous individual claims submitted on the basis of diplomatic protection being rejected, when diplomatic protection should serve to ensure the protection of individual's rights.⁵⁰² This individual rights oriented approach was not shared by all States, some of whom raised concerns about potential nationality shopping by individuals – with the sole purpose of finding a State that would agree to espouse their claims. Such a significant amendment was argued to lead to complications in practice, in case there are concurrent States' claims to espouse the same individual's claim. Thus the Working Group did not approve Rapporteur Dugard's radical proposal.

⁴⁹⁹ For more details on this issue, see J. Dugard, *First Report on Diplomatic Protection*, Chittharanjan F. Amerasinghe, Chapter 'Nationality of Claims' in *Diplomatic Protection*, Oxford University Press, 2008.

⁵⁰⁰ See in particular the critique raised by Judge Fitzmaurice, who noted in his separate opinion in the Barcelona Traction case: '[T]oo rigid and sweeping an application of the continuity rule can lead to a situation in which important interests go unprotected, claimants unsupported and injuries un-redressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act. This situation is the less defensible at the present date in that what was always regarded as the other main justification for the continuity rule, namely the need to prevent the abuses that would result if claims could be assigned for value to nationals of States whose Governments would compel acceptance of them by the defendant State, has largely lost its validity.' in *Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain)* [1970] ICJ Rep. 4, 23

⁵⁰¹ Art. 5(1) ILC Articles on Diplomatic Protection.

⁵⁰² See J. Dugard, *First and Seventh Reports on Diplomatic Protection*.

The final version of the Article, as approved by the ILC and the UN, reflects a more flexible approach that attempts to balance two radically opposed approaches, namely, the progressive individuals-centric approach of Rapporteur Dugard⁵⁰³ and the classical States-centric approach, which aimed at preventing abuses of diplomatic protection.⁵⁰⁴

In a second attempt, Rapporteur Dugard convinced the Working Group to loosen the very strict and limitative norm by establishing exceptions to the rule. First of all, a rebuttable presumption of continuous possession of nationality was recognised based on the possession of nationality at the moment of the injury and at the moment when the State of nationality espouses the individual's claim. Secondly, paragraph 2 of the Article 5 of the ILC Articles on Diplomatic Protection introduces a second exception, whereby a State may exercise diplomatic protection in respect of a person who was a national at the time of the official presentation of the claim but not at the time of the injury, provided certain conditions are met.⁵⁰⁵

c. Discarding the Nottebohm principle of 'genuine' and 'effective' nationality under current public international customary law

The ICJ judgment in the *Nottebohm* case has been criticised both by practitioners⁵⁰⁶ and by international and EU legal academics⁵⁰⁷ for two main reasons. First, for assessing the facts of the case in light of erroneous legal assumptions. It was argued that there were no relevant international custom, treaty provisions, principles or international jurisprudence that could sustain the Court's conclusion that State nationality had to fulfil the condition of 'genuineness' in cases of diplomatic protection for the benefit of single nationals. If such a condition can have an explanation in cases of dual nationalities, where both States of

⁵⁰³ Whereby the individual is '*the ultimate beneficiary of diplomatic protection*', see the ILC First Report of 2001, para.169.

⁵⁰⁴ This approach focused on the States' fears that in the absence of the continuous nationality rule, the mechanism of diplomatic protection would be abused by individuals shopping for the nationality of States that would more willingly espouse their claims, or for the nationality of more powerful States; or diplomatic protection would be abused by States by way of conferring nationality only for the purpose of gaining economic or political benefits by espousing individual's claims in strategic disputes.

⁵⁰⁵ Art. 5(2) reads as follows: '*A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim.*'

⁵⁰⁶ See the dissenting opinion of Judges Klaestad, Read and Guggenheim in the *Nottebohm* case.

⁵⁰⁷ D. Kochenov, 'Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters', in J. Shaw (ed.), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?*, *EUI Robert Schuman Centre for Advanced Studies Working Paper* 2011/62, 11-16; D. Ruzié, 'Nationalité, effectivité et droit communautaire', (1993) *Revue générale de droits internationaux public* 107,113.

nationality are equals from the point of view of international law, the situation is radically different in a case where the diplomatic protection is exercised against a non-nationality State. Secondly, the Court's judgment given in a single nationality case is creating a gap in the legal protection of individuals by placing them in a situation equivalent with statelessness. Many scholars⁵⁰⁸ do not accept the genuine link requirement as a rule of customary international law, except for dual citizenship cases. They argue that should the *Nottebohm* doctrine be extended to other cases than those between the States of nationalities of the injured individual, the rule would considerably deprive millions of people of the benefit of diplomatic protection, which, in certain circumstances, might be the only legal remedy available to individuals.⁵⁰⁹ Other scholars⁵¹⁰ contend that the pre-*Nottebohm* literature and national judicial decisions support the 'genuine link' doctrine as a general principle with applications also outside the context of dual nationality. Overall, scholars seem to agree on the need to apply the principle with flexibility and adapt it to the changing needs of the international community.⁵¹¹ Rapporteur Dugard, in his first Report prepared for the ILC on Diplomatic Protection, clearly stated that the *Nottebohm* principle of effective and genuine nationality cannot be considered as a rule of customary international law in cases other than dual nationality.⁵¹² His conclusion seems to be supported by the post-*Nottebohm* international jurisprudence of the ICJ⁵¹³ and arbitral tribunals. Contemporary practice shows that the *Nottebohm* 'genuine' and 'effective' nationality link is no longer a general principle of international law limiting the international opposability of diplomatic protection claims.⁵¹⁴

In light of the numerous critiques brought against the general application of the principle of genuine and effective nationality, without differentiating between cases of single, dual or multiple nationalities, the ILC Project revisited the classical conception of this principle. During the elaboration of the 2006 ILC Articles on Diplomatic Protection,

⁵⁰⁸ A. Randelzhofer, 'Nationality', in R. Bernhardt (ed), *Encyclopedia of Public International Law*, vol. 3. Amsterdam, Elsevier, 1997, 507; C. Parry, 'Some considerations upon the protection of individuals in international law', *Recueil des cours de l'Académie de droit international de La Haye*, 1956–II. Leiden, Sijthoff, 1957, 707; Josef L. Kunz, 'The *Nottebohm* judgment (second phase)', *op.cit.*, 536.

⁵⁰⁹ J. Dugard, *First Report on Diplomatic Protection*, *op.cit.*, 41. For instance, in the case of individuals subject to terrorist related sanctions, see the cases of the Guantánamo Bay detainees.

⁵¹⁰ See I. Brownlie, 'The relations of nationality in public international law', (1963) *British Yearbook of International Law*, 349.

⁵¹¹ Francisco O. Vicuna, 'Interim Report on The Changing Law of Nationality of Claims', *op.cit.*, 27

⁵¹² J. Dugard, *First Report on Diplomatic Protection*, *op.cit.*

⁵¹³ Cases decided post-*Nottebohm* judgment rejected the application of the *Nottebohm* doctrine, as proved by the *LaGrand* and *Avena* judgments, where the exercise of diplomatic protection by Germany and Mexico were not rejected by the ICJ as ineffective and not genuine, although it seemed there was a stronger link between the injured individual and the defendant State rather than with the applicant State.

⁵¹⁴ For instance, the *Flegenheimer* case of the Italian-United States Conciliation Commission, decision No. 182 of 20 September 1958 (UNRIAA, vol. XIV (Sales No. 65.V.4), p. 327)

divergent views were expressed within the specific Working Group in relation to the codification or not of the *Nottebohm* doctrine as a requirement to be generally applied to the nationality link. The final commentary approved by the ILC Working Group excludes the general application of the *Nottebohm* criteria to other cases than those with circumstances similar to the *Nottebohm* case.⁵¹⁵ Therefore, the *Nottebohm* ‘genuine’ nationality link doctrine can be considered as no longer reflecting the current international practice.⁵¹⁶ The only circumstance where a sort of ‘genuineness’ is still applied to the nationality of diplomatic protection claims is in cases of multiple nationalities, where a claim is lodged by one of the States of nationality against another State of nationality.

It can thus be noticed that the *Nottebohm* ‘genuine’ link has been abandoned by the current international law. The current test imposed to the ‘nationality of claims’ no longer requires the ‘genuineness’ of the nationality. As rightly pointed out by Rapporteur Dugard, maintaining the classical general principle of ‘genuine’ nationality, in the current day international society, would have led to eliminating millions of persons who are moving into a different country than their country of nationality, without acquiring the former country’s nationality, while also losing the real connection with their country of nationality.⁵¹⁷ To a certain extent, the underlying rationale of the ‘genuine link’ doctrine still persists today, reformulated under the general international principle of prohibition of abuses of rights. Today, the very fact that a state is willing to grant an individual its nationality or recognise an individual as a national, while respecting the general international legal principles of prohibition of discrimination and abuse of rights, should be a sufficient proof of a link existing between the state and that national.⁵¹⁸

d. Eliminating the non-responsibility rule in dual and multiple nationalities cases

The development of international human rights law and of a scholarly trend approaching diplomatic protection as an alternative mechanism, filling the gaps of human rights legal systems, contributed to the elimination of the traditional international rule of non-responsibility of States in cases of dual nationality. The absolute non-responsibility rule in

⁵¹⁵ Namely that of a State of nationality with ‘extremely tenuous’ links with the injured individual, which brings an international complaint by way of diplomatic protection against another State where the individual, although not possessing its nationality, has had a solid and close link for a long period, based on residence and economic interests.

⁵¹⁶ See Art. 7 of the ILC Articles on Diplomatic Protection (2006).

⁵¹⁷ See ILC Diplomatic Protection Articles 2006a, Art. 4, Commentary, para. 5.

⁵¹⁸ See L. Kunz. *op.cit.*, 553.

cases submitted between States of nationalities corresponds to a time when individuals spent most of their lives within the territory of a single State, acquiring its nationality by way of birth or descent. In 2006, the ILC amended this rule by changing its character from absolute to relative, and introducing an exception based on the ‘predominant’ nationality criterion. Thus, the current international customary law, as codified by Article 7 of the ILC Articles on Diplomatic Protection, recognises the opportunity to exercise diplomatic protection also between States of nationalities, as long as the State lodging the claim is the ‘predominant’ State, *‘both at the date of injury and at the date of the official presentation of the claim’*. The factors that can be taken into consideration when deciding which nationality is the predominant one are not expressly provided in the Articles, but they are mentioned in the commentaries of the Rapporteur added to the Articles.⁵¹⁹ The adjective of ‘predominant’ was chosen from a varied list of suggestions, including the ‘effective’ and ‘dominant’ criteria, which were also previously used by the international jurisprudence. Rapporteur Dugard preferred the relativity implied by the word ‘predominant’ compared with the other adjectives, especially in light of the elimination of the *Nottebohm* ‘effective’ nationality requirement. The issue in this situation is not to establish the effectiveness in general of one of the nationalities of the individual, but, to establish which of the two nationalities, of the claimant or of the defendant States, is the predominant one at the moment of exercising diplomatic protection.

Although, in principle, the non-responsibility rule still exists, satisfying the concerns of the prudent States, the newly codified exception is a step forward for the advancement of the individual’s rights protection via the diplomatic protection mechanism. Using the ‘predominant nationality’ limitation, instead of the ‘dominant’ or ‘effective’ nationality, creates an opportunity for individuals to more easily fulfil the prerequisites necessary to benefit from diplomatic protection. The ‘effectiveness’ of the nationality is assessed only at the precise time of the injury and lodging of the international claim, and in relation only to the States involved in the international claim. This particular amendment and its phrasing signal

⁵¹⁹ *‘The authorities indicate that such factors include habitual residence, the amount of time spent in each country of nationality, date of naturalization (i.e., the length of the period spent as a national of the protecting State before the claim arose); place, curricula and language of education; employment and financial interests; place of family life; family ties in each country; participation in social and public life; use of language; taxation, bank account, social security insurance; visits to the other State of nationality; possession and use of passport of the other State; and military service. None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case.’* (Commentary to Art. 7 of the ILC Articles on Diplomatic Protection, para. 5, p. 46)

that the bond of nationality is no longer required to be unique and corresponding to one single State, but that different nationalities can be equally important.

e. Increasing exceptions to the exclusive ‘nationality link’ requirement

The bond of nationality has been for centuries the fundamental premise for the exercise of diplomatic protection. It fulfilled two important functions within the institution of diplomatic protection: a national function determining the State entitled to exercise diplomatic protection and an international law function legitimising the State’s use of diplomatic protection on the international plane. At the domestic level, nationality reflects a bond between an individual and a State which acts as a triggering factor of a State’s interest, capable of outweighing the disadvantage of jeopardising its foreign affairs with another State. At the international level, nationality triggers the personal scope of the state sovereignty, even outside the territorial border, and it can thus justify the limitation of the general international legal principle of non-intervention in the domestic affairs of a State.⁵²⁰ These two functions that nationality has exclusively fulfilled for a long period of time within the field of diplomatic protection have started to be gradually fulfilled by other criteria, such as ‘residence’. A long-term residence can reflect a political-legal-sociological situation of a natural person similar to that reflected by nationality. Rights are being accrued as well as obligations, while a feeling of belonging may be even stronger than in the case of nationality.⁵²¹ As from the perspective of international law, international human rights law has attributed to ‘residence’ the role of triggering international responsibility and thus legitimising external State intervention.⁵²²

The parameters of the international society and relations have changed drastically since the time the institution of diplomatic protection was formed. We can no longer think of nationality as the exclusive foundation for diplomatic protection in the same way it used to be 100 years ago. The institution of diplomatic protection needs to reflect the current day society where individuals commonly have multiple nationalities, and/or take residence and live in another country than the one of their nationality. In international practice, residence starts to slowly gain an important place as a factor reflecting a link between an individual and a State,

⁵²⁰ See the ICJ in the *Barcelona Traction* judgment held that: ‘Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction.’, para. 37.

⁵²¹ As for instance in the case of refugees or persons benefiting of subsidiary protection.

⁵²² According to *Loizidou v Turkey* (Appl. No. 15318/89, Judgment of 18 December 1996, paras. 62 and 77), the essential element is the effective jurisdiction over the individual.

and in certain situations it can reflect a stronger, or more genuine link than nationality.⁵²³ Stateless people, refugees, and individuals benefiting of subsidiary protection are the perfect example of such a situation. This category of people has also increased in the last decades, and their status in society cannot simply be ignored. In their situation it is not nationality, but residence, which reflects a genuine connection between the individual and a country.

While nationality undoubtedly still commonly reflects the bond between an individual and a state, which legitimises the State of nationality intervention into the domestic affairs of a foreign State, other ties are gradually recognised as being as strong and sufficiently effective as nationality, and could thus constitute the international legitimising factor for the exercise of diplomatic protection. Long-term or permanent residence is one such tie that has been held by the ILC as a sufficiently strong bond that can justify the exercise of diplomatic protection by a State in certain situations. As early as 1939, the ICJ recognised that, in exceptional circumstances, bonds other than nationality can legitimise an exercise of diplomatic protection, if based on consent of the State parties to the litigation.⁵²⁴ The current debate is focused on identifying these other internationally recognised bonds.

The 2006 ILC Articles on Diplomatic Protection introduced a ground-breaking step for the advancement of customary international legal norms governing the institution of diplomatic protection of individuals. Article 8 departs from the traditional rule that only nationals may benefit from the exercise of diplomatic protection and allows the State of legal and habitual residence of the refugee, the individual benefiting of subsidiary protection and the stateless person to exercise diplomatic protection on behalf of these individuals. The condition necessary for the exercise of diplomatic protection is that the residence in the applicant State is 'lawful' and 'habitual' both at the time of the injury and at the date of the official presentation of the claim.⁵²⁵ However, this particular legal innovation is not generally endorsed as a customary legal norm binding on States. The UK Court of Appeal challenged Article 8 on the grounds that it was not reflective of generally accepted customary international law.⁵²⁶ Article 8 of the ILC Articles on Diplomatic Protection was found to be 'something of a distraction'.⁵²⁷ Regardless of the opposition from certain States, Article 8 is an

⁵²³ See J. Dugard, *First Report on Diplomatic Protection*, *op.cit.*

⁵²⁴ '**In the absence of a special agreement**, it is the bond of nationality between the State and the individual which alone confers upon the state the right of diplomatic protection.' *Panevezys case*, (ser A/B no 76, at 1).

⁵²⁵ For a detailed analysis of diplomatic protection of refugees, see V. Silvestri, 'La Protezione Diplomatica dei Rifugiati' in L. Panella (ed), *La Protezione Diplomatica: Sviluppi e Prospettive*, Giappichelli (2009), 289-313.

⁵²⁶ *Al Rawi and Others v Secretary of State for Foreign Affairs and Another* [2006] EWHC 458, para. 115 (Admin) available at <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1279.html>

⁵²⁷ *Ibid.*, para. 120.

important step towards the recognition of alternative legal premises to the classical absolute application of the ‘nationality link’. ‘Residence’ is thus gaining relevance on the international sphere as a legitimate founding premise of diplomatic protection in circumstances where the application of the nationality prerequisite would pre-empt the individual from enjoying access to a mechanism that can ensure protection of his rights and interests.

It has to be noticed that ‘lawful and habitual’ residence is not the only exception recognised so far by international practice. Further exceptions have developed in the field of international organisations, such as employment relations. In the *Reparation for Injuries* case, the ICJ recognised a right of international organisations to exercise functional protection for its agents. This functional protection involves the lodging of international claims asking for damages from States for the international wrongs committed on the officials of an international organisation.⁵²⁸

2. Extending the material scope of the international wrongful act prerequisite for the exercise of diplomatic protection of individuals

The second requirement commonly imposed by general international law to the exercise of diplomatic protection is the existence of an international wrongful act committed by the receiving State, which directly injured an individual alien while on its territory.⁵²⁹ This requirement involves an assessment of the international wrongful act according to the rules of international responsibility of States.⁵³⁰ Therefore, the injury must have been committed by the State, be it an organ pertaining to the executive, legislative or judiciary branches of the State’s power, or exceptionally by private individuals, but only if it can be established that the State had a positive obligation to prevent the injury or punish it.⁵³¹ As diplomatic protection is merely a procedure whereby the international responsibility of States is invoked, the circumstances provided by the ILC Articles on International Responsibility of States as

⁵²⁸ However, functional protection has to be differentiated from the classical diplomatic protection, although they serve similar objectives, namely of protecting an individual. While diplomatic protection is designed for the protection of private individuals, the functional protection covers only individuals who have suffered an injury while exercising their official duties. The national state may intervene when the agent is acting for his/her personal aims. See more in Chittharanjan F. Amerasinghe, *op.cit.*, p. 53. See also the 1949 Advisory Opinion of the ICJ in the case *Reparation for Injuries suffered in the service of the UN*; Myriam B. Carabot and Ubéda-Saillard Muriel, ‘Functional Protection’ in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility*, Oxford University Press (2010), 1073–1084; J. Dugard, ‘Diplomatic Protection’ in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Oxford University Press (2009).

⁵²⁹ J. Crawford, *Brownlie’s Principles of Public International Law*, Oxford University Press (2014), Chapters 25 and 26.

⁵³⁰ See ILC *Articles on International Responsibility of States for International Wrongful Acts*, U.N. Doc. A/56/10 (2001).

⁵³¹ See C. Tiburcio, *op.cit.*, 48.

exonerating of international responsibility will equally apply to the diplomatic protection institution, *inter alia*: consent, countermeasures, force majeure and fortuitous event, distress, and self-defence.⁵³²

In terms of the substantive international norms whose violation could lead to the establishment of an international wrongful act and thus legitimise the exercise of diplomatic protection, the classical definition of diplomatic protection included norms providing for a core of individual rights whose scope and legal understanding corresponded to the European and United States' conceptions, and were qualified as falling under the 'international minimum standard' doctrine.⁵³³ The principle of 'international minimum standard' was defined as early as 1910 by the famous American international lawyer, Elihu Root, as a general international legal standard to which every national law related to the treatment of aliens had to conform.⁵³⁴ The basis for this opinion was a decision of the Claims Commission under the Convention between the United States of America and the United Mexican States rendered in 1926, which is the first official legal account recognising the principle of the International Minimum Standard on the protection of aliens: '[...] *the propriety of governmental acts should be put to the test of international standards [...] the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international.*'⁵³⁵

Following the European States' abuses of the diplomatic protection mechanism for the purpose of intervening in the domestic affairs of developing States⁵³⁶, the latter developed an

⁵³² See Arts. 21-25 of ILC Articles on International Responsibility of States for International Wrongful Acts, U.N. Doc. A/56/10 (2001).

⁵³³ See more details in Chittharanjan F. Amerasinghe, Chapter 'The International Law Violated', *op.cit.*; C. Tiburcio, Chapter 'Historical Development of the Treatment of Aliens', *op.cit.*; A. Roth, *The Minimum Standard of International Law Applied to Aliens*, A. W. Sijthoff (1949).

⁵³⁴ E. Root, 'The basis of protection to citizens residing abroad', (1910) AJIL 517, 521: '*Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization. [...] If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.*'

⁵³⁵ See case *L. Fay, H. Neer and Pauline Neer (USA) V. United Mexican States*, Reports of International Arbitral Awards, 15 October 1926, Vol. IV, 60-66.

⁵³⁶ Specifically during the 19th and early 20th century, when powerful imperialist States abused the diplomatic protection that was initially aimed to protect their nationals carrying out commercial activities in developing States. For example, the Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of Witwatersrand, and the United States' military interventions in Dominican Republic in 1965, in Grenada in 1983 and in Panama in 1989 were justified in the same way. The US force interventions were carried out on the pretext of defending US nationals in those countries. For more details

alternative to the ‘international minimum standards’ doctrine, namely ‘national standards doctrine’ whereby aliens were recognised the same treatment as the one applied to the local citizens.⁵³⁷ The so-called *Calvo* doctrine was supported in particular by Latin American countries based on the general principle of public international law of equal respect of State sovereignty and prohibition of intervention into the domestic affairs of a State.⁵³⁸ The doctrine has never been endorsed outside the Latin American region, being criticised as a construction aimed at releasing the State from its responsibilities towards other States.⁵³⁹ The international minimum standard received wider endorsement and became the applicable international norm delimitating the material scope of diplomatic protection. This theory established a list of minimum rights from which every individual should benefit regardless of his nationality and regardless of the country in which he was located. In time, and under the influence of the growing role of international human rights, the content of the international minimum standard has grown, including the prohibition of slavery, torture, ill-treatment, and discrimination, as well as relative international human rights, such as the right to a fair trial.⁵⁴⁰

Numerous legal scholars⁵⁴¹ have suggested that the international minimum standards should include also the entire body of international human rights law. According to Rapporteur Dugard:

‘[i]n considering the question of whether an alien has been mistreated, international tribunals may accordingly turn to the jurisprudence of the European Court of Human Rights and similar human rights tribunals for guidance. In this way the international minimum standard for the treatment of aliens and the human rights standards of a state's own nationals are likely to merge.’⁵⁴²

However, Rapporteur Dugard has not codified his approach in the 2006 Articles on Diplomatic Protection, leaving the material scope of diplomatic protection outside its

see, *First Report on diplomatic protection*, presented by J. Dugard to the International Law Commission during its 52nd session, UN Doc. A/CN.4/506, 7 March 2000, 5-6, para. 14.

⁵³⁷ Drago developed the doctrine in response to action taken by Italy, Germany and Great Britain against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those States. The results of his actions materialised in the 1907 Porter Convention Respecting the Limitation of the Employment of Force for the recovery of Contract Debts (Convention II of the 1907 Hague Peace Conference). The national treatment doctrine was later on elaborated by Calvo. For an analysis of the Calvo doctrine see C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law*, *op.cit.*, 43-53.

⁵³⁸ C. Tiburcio, *op.cit.*, 46ff.

⁵³⁹ Freeman, *Recent Aspects of the Calvo Doctrine and the Challenger to International Law*, (1946) AJIL 121.

⁵⁴⁰ M Shaw *International Law* 5ed (2003); J Dugard *International Law - A South African Perspective* 2ed (2000)

⁵⁴¹ C. Warbrick and D. McGoldrick, ‘Diplomatic Representation and Diplomatic Protection’, (2002) ICLQ, 723; R. Lillich, ‘The Human Rights of Aliens in Contemporary International Law’, Manchester University Press (1984); C. Tiburcio, *op.cit.*

⁵⁴² 2006 ILC Articles on Diplomatic Protection with commentaries.

codification object, due to the primary nature of these rules, which were considered as best kept separate from the secondary, procedural rules of diplomatic protection.

The issue of whether international human rights are part of the material scope of diplomatic protection has, however, been recently clarified by the ICJ in its judgment delivered in the *Diallo* case. The ICJ expressly recognised that the material scope of the international minimum standards has now come to include also the growing body of international human rights law: ‘Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, [...] diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.’⁵⁴³

3. The ‘humanization’ of the requirement of exhaustion of local remedies

The principle of prior exhaustion of local remedies is one of the oldest principles of international law.⁵⁴⁴ Accordingly, an alien in a foreign State has to comply with the local legal system and thus give the opportunity to the receiving State authorities to remedy the violation of an international obligation that affected him or her, before the international wrongful act is raised at the international level. Until local remedies are exhausted, the injury can still be considered a national issue.⁵⁴⁵ The traditional norm on the exhaustion of local remedies as a prerequisite for the exercise of diplomatic protection by a state on behalf of an individual is now codified in Article 14 ILC Articles on Diplomatic Protection.⁵⁴⁶ The Article endorses the classical definition of this principle as established by the ICJ’s traditional international jurisprudence, whereby the ‘exhaustion of local remedies’ was already qualified as ‘a well-

⁵⁴³ Case concerning *Ahmadou Sadio Diallo* (Republic of Guinea Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24 May 2007, para. 39.

⁵⁴⁴ Chittharanjan F. Amerasinghe, *Local Remedies in International Law*, Cambridge University Press (2004); A.A. Cancado Trindade, ‘Origin and Historical Developments of Exhaustion of Local Remedies in International Law’, (1976) RBDI, 449.

⁵⁴⁵ C. Tiburcio, *op.cit.*, 39.

⁵⁴⁶ Art. 14 reads as follows: ‘A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies. 2. ‘Local remedies’ means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury. Local remedies shall be exhausted where an international claim, or request for a declaratory judgment related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.’

established rule of customary international law'.⁵⁴⁷ However, the ILC has also introduced significant legal innovations to the classical principle, which are modelled on the definitions and standards distilled in international human rights law, and the more recent judgments of the ICJ delivered in diplomatic protection cases. For instance, the notion of 'legal remedies' is defined following the standards developed in the jurisprudence of the European Commission for Human Rights. Accordingly, Article 14 clarifies that only legal remedies that give '*the possibility of an effective and sufficient means of redress*'⁵⁴⁸ need to be exhausted. Within the field of mixed claims, an exception from the prior exhaustion of legal remedies is accepted when the State's and the individual's rights, and thus also their injuries, are inter-dependent.⁵⁴⁹

The most evident changes to the traditional conception of the exhaustion of local remedies requirement were brought via Article 15 of the ILC Articles on Diplomatic Protection,⁵⁵⁰ which codifies a list of five situations where the requirement does not need to be fulfilled prior to the lodging of the international claim. These five derogations are clearly modelled upon the rules developed in international human rights law, instead of the States-centred general international law.⁵⁵¹ The first two exceptions refer to shortcomings in the legal and/or judicial systems of the receiving states, while the last three exceptions refer primarily to objective circumstances attributable to the individual. The criteria chosen by the ILC to define the type of local remedy that exonerates the individual from exhausting the domestic legal remedies are not the stringent ones applied by general international law⁵⁵² – 'obvious futility' – but the more flexible criterion applied by international human rights law – 'no

⁵⁴⁷ The *Interhandel* case (Switzerland v. United States of America) Preliminary objections, I.C.J. Reports 1959, p. 6 at p. 27; in the *Elettronica Sicula* (ELSI) case 'the exhaustion of local remedies' was referred to as 'an important principle of international law', 1989 ICJ Reports 42, para. 50.

⁵⁴⁸ See fn 179 mentioned in para. 4 of the commentary to Art. 14, 2006 ILC Articles on Diplomatic Protection.

⁵⁴⁹ The ICJ judgment in the *Avena* case was cited. See *Avena and Other Mexican Nationals* (Mexico v. United States of America), at paras. 135-143. According to the commentary of Art. 14, 'in cases of 'mixed claims' containing elements of both injury to the State itself and injury to the nationals of that State, a 'preponderance' test is applied to ascertain which claim is to prevail.' See the Introductory Note written by Prof Dugard to the 2006 ILC Articles on Diplomatic Protection.

⁵⁵⁰ Art. 15 reads as follows: 'Local remedies do not need to be exhausted where: (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) The injured person is manifestly precluded from pursuing local remedies; or (e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.'

⁵⁵¹ See V. Zambrano, 'La regola del previo esaurimento dei ricorsi interni: il Progetto della Commissione di Diritto Internazionale della protezione diplomatica' in L. Panella (ed.), *La Protezione Diplomatica: Sviluppi e Prospettive*, Giappichelli (2008), 191, 207.

⁵⁵² See the commentary to Art. 15 ILC Articles on Diplomatic Protection, paras. 1 and 2.

*reasonable possibility of effective redress.*⁵⁵³ The ineffectiveness of local remedies is to be decided by the competent international tribunal.

A recent case where the ICJ follows the ILC's more flexible application of the exhaustion of local remedies requirement is the *Diallo* case. Guinea alleged that several individual and human rights of Guinea citizen Mr Diallo were violated by the Democratic Republic of Congo, while Mr Diallo was doing business there. In relation to one particular international wrongful act, it was alleged that the requirement of exhaustion of local remedies was not fulfilled by the applicant, namely in relation to his alleged illegal expulsion. The Court noted that expulsion was characterised by the Democratic Republic of Congo as a 'refusal of entry' when it was carried out, therefore the fulfilment of the exhaustion of local remedies should have been assessed in relation to the act qualified as 'refusal of entry'. Based on estoppel, the Court considered that the Democratic Republic of Congo was prevented from re-labelling the 'refusal of entry' as 'expulsion' and found that a 'refusal of entry' was not 'appealable under Congolese law', and an application for grace was the only permitted domestic 'remedy'.⁵⁵⁴ This particular remedy was not characterised by the ICJ as a legal remedy that must be exhausted for the diplomatic protection claim to be considered admissible. It then rejected the Democratic Republic of Congo's objection based on non-exhaustion of local remedies.

It can thus be observed that the ILC updated the prerequisites of the diplomatic protection following to a certain extent the 'humanization' trend that has also generally influenced public international law. The infused innovation is not just an exercise of progressive development, since the ICJ recently confirmed in the *Diallo* judgment the ILC amendments of the legal definition and conditions for the exercise of diplomatic protection.

4. Conclusion

For centuries the institution of diplomatic protection has been perceived as a purely inter-States mechanism primarily for the protection of States' interests.⁵⁵⁵ The changing international framework and rules have impacted on this classical State-centric conception of

⁵⁵³ Ibid., para.3 and 4.

⁵⁵⁴ See *Diallo*, Preliminary Objections, ICJ judgment of 2007, para. 47 '[...] of submitting a request for reconsideration of the expulsion decision to the administrative authority having taken it, that is to say the Prime Minister, in the hope that he would retract his decision as a matter of grace cannot be deemed a local remedy to be exhausted.'

⁵⁵⁵ J. Dugard, *Seventh Report, op.cit.*, para.3; N. Kato, 'The Role of diplomatic protection in the implementation process of public interest', in T. Komori and K. Wellens, *Public Interest Rules of International Law: Towards Effective Implementation*, Asghate (2009), 189-206.

diplomatic protection, mainly by recognising within the definition of diplomatic protection the individual's interests alongside those of the State, and considerably extending the personal scope of diplomatic protection to permit wider categories of natural persons to benefit from this institution, in case it is their last resort for remedying injuries suffered abroad. Several academics have now confirmed the impact of international human rights law on the development of general international norms regarding diplomatic protection and the consular protection/assistance rights.⁵⁵⁶

The conditions for the exercise of diplomatic protection: nationality of claims, existence of an international wrongful act and exhaustion of local remedies were revisited by the 2006 ILC Articles on Diplomatic Protection. Furthermore, the progressive development infused by Rapporteur Dugard in the codification process have to a certain extent been confirmed as binding international law by the ICJ.⁵⁵⁷

The link of nationality is no longer essential for the capacity to bring international claims. The development of international human rights law and general international law have introduced more and more exceptions to the tie of nationality, which was traditionally required whenever an international claim was brought by means of diplomatic protection.

Several paramount innovations were brought by the ILC in relation to the nationality of claims premise of diplomatic protection: discarding the unfair *Nottebohm* requirements of the 'genuine' and 'effective' character of the nationality; introducing a presumption of continuous nationality, and other exemptions from this general requirement; the absolute effective character of the nationality required in multiple nationalities cases has been replaced by the relative 'predominant' requirement; and recognising the possibility of an exercise of diplomatic protection between States of nationality insofar as the claimant State is the one of predominant nationality of the individual.. These ILC Articles dealing with the issue of nationality of claims requirement lead to extending the personal scope of diplomatic protection, permitting a wider category of individuals⁵⁵⁸ to have access to this procedural mechanism in order to protect their rights and interests.

⁵⁵⁶ See S. Sheeran, R. Rodley (eds), *Routledge Handbook of Human Rights Law*, Routledge (2013); C. Cerna, 'Impact on the Right to Consular Notification' in M. Scheinin and T. Kamminga (eds) *The Impact of International Human Rights Law on General International Law*, Oxford University Press (2009); *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR, Advisory Opinion OC-16/99 of 1 October 1999, (1999) Series. A No.16, Dissenting opinion of Judge Cançado Trindade, para. 35. Available on the IACtHR website: <<http://www.corteidh.or.cr>>.

⁵⁵⁷ See, for instance, the ICJ judgment in the *Diallo* case, op.cit.

⁵⁵⁸ It enlarged the category of nationals resident abroad by eliminating the 'genuine' link; the category of dual nationals; added refugees, people benefiting of subsidiary protection and stateless persons.

The development of international human rights law has impacted on both the substantive and procedural aspect of diplomatic protection. Individual's human rights have slowly become part of the 'diplomatically protectable' rules, and in 2010 the ICJ formally recognised this incorporation.⁵⁵⁹

The role of the individual in the institution of diplomatic protection is currently straightforwardly accepted. The ILC has recognised the individual's role in all of the phases of the exercise of diplomatic protection: from the definition of the institution (Art. 1), and the conditions for the exercise of the mechanism by making them more flexible (Arts. 1-9, 14, 15), to the last phase of diplomatic protection, namely the transfer of the award to the individual (Art. 19).⁵⁶⁰ It used to be the case that the individual had no role to play in any of the stages of the exercise of diplomatic protection, including the award of remedies, even though it was clearly done for the benefit of the individual victims, which was probably one of the most illogical aspects of the institution. The ILC has recognised that satisfaction in inter-States diplomatic protection cases should always be done for the benefit of individual victims (Art. 19). Alongside the new balanced definition of diplomatic protection, the ICJ has also endorsed the ILC amendment of the award of remedy in the *Diallo* case, where it noted that Article 19 recommends '*[t]ransfer[ring] to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions*'.⁵⁶¹

Consular and diplomatic protection definitely have a new face today when compared with the romantic period of public international law. In spite of scholarly critiques, the 'humanization' trend and the work of Rapporteur Dugard, who is a great supporter of advancing diplomatic protection as an instrument of enhancing the effectiveness of international human rights, have definitely changed the classical definition, requirements, and exercise of diplomatic protection. The flexibility infused into the conditions for the exercise of diplomatic protection has revived this mechanism so as to serve more easily the remedial needs of the individuals.⁵⁶²

⁵⁵⁹ See the *Diallo* judgment.

⁵⁶⁰ This article seems to codify the prevailing academic opinion and practice, see G. Gaja, 'Droits des Etats', *op.cit.*, 69: '[c]'est en tout cas l'individu seul qui devrait être le bénéficiaire de la réparation. La pratique est déjà nettement orientée dans ce sens, ce qui encore s'harmonise mieux avec la conception de l'existence des droits individuels plutôt qu'avec la conception traditionnelle.'

⁵⁶¹ Moreover, the ICJ has expressly indicated that '*the sum awarded to [the applicant State] in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury*' (see *Diallo* (Guinea v. Democratic Republic of the Congo) (Compensation), ICJ Rep. 2012, para. 57).

⁵⁶² Mariana S. Albornoz, 'Legal nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges', (2006) *Anuario Mexicano de Derecho Internacional*, 377, 380.

III. Differentiating consular assistance from diplomatic protection as State's mechanisms for protecting citizens abroad

International law recognises two types of mechanisms that States may exercise to ensure protection of their nationals abroad: consular assistance or protection⁵⁶³ and diplomatic protection, which are two different legal mechanisms governed by different legal regimes and requiring different conditions for their exercise under general international law. Practice, law⁵⁶⁴, and sometimes even academia, have, however, made it very difficult, so far, to clearly differentiate these two institutions.⁵⁶⁵ For example, in the 1997 Rudolph Bernhardt's edition of the Encyclopaedia of Public International Law, diplomatic protection is described as including also the consular protection type of action in addition to the remedial type of protection which diplomatic protection commonly offers to nationals:

⁵⁶³ The terms 'consular assistance' and 'consular protection' are generally used interchangeably in the doctrine and practice (see J. Núñez Hernández and X. Martí, *La Función Consular en el Derecho Español*, Ministerio de Asuntos Exteriores, Madrid, third ed. (2009), 313-314); there is only a small distinction between the two notions: consular protection is commonly used in relation to consular services provided to nationals in cases of natural or man-made disasters, while assistance usually refers to the rest of services that consular officials can provide to citizens abroad. For a different distinction between 'consular assistance' and 'consular protection', see National Report on Spain in the *CARE Report*, 465. Certain States have a clear policy of differentiating between the two terms (see the German Consular Act commented in the National Report on Germany in the *CARE Report*).

⁵⁶⁴ One of the critiques brought against the EU citizenship right to equal protection abroad is that it confuses between consular and diplomatic protection, since it refers to the broad concept of protection by the consular and diplomatic authorities of the Member States, without ensuring that the international legal conditions for the exercise of diplomatic protection of individuals are respected. See, A. Vermeer-Künzli, 'Where the Law becomes Irrelevant: Consular Assistance and the European Union', (2011) *International and Comparative Law Quarterly*, 965-995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance', (2008) *ZaöRV*, 339-340; P. Vigni, 'The Protection of EU Citizens: The Perspective of International law' in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107; F. Forni, 'Diplomatic Protection in EU Law: What's New under the Sun?' (2014) *The Hague Journal of Diplomacy*, 150.

⁵⁶⁵ G. Perrin, 'Réflexions sur la protection diplomatique', in *Mélanges Marcel Bridel: Recueil de travaux publiés par la Faculté de Droit, Lausanne 1968*, 379, 379-380; J. Peake, 'Diplomatic Protection for Dual Nationals: Effective Nationality or non-responsibility?' (2007) *Trinity C.L.Rev.*, 98. L. Klein argued that 'among the actions associated with diplomatic protection are 'consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retorsion, severance of diplomatic relations, economic pressure and, the final resort, the use of force' (see C. Forcese, *op.cit.*, 473); Luke T. Lee confuses consular protection with diplomatic protection when commenting on the *Abbasi* and *Khadr* cases. The author notes that the Applicant challenged the government decision to provide consular protection while an exercise of diplomatic protection was at issue, see Luke T. Lee, *Consular law and practice*, 2008 edition, 134-136; G. Distefano writing on the position of the individual in relation to the diplomatic protection mechanism extensively cites and comments on the ICJ judgments on violation of Art. 36(1)(b) VCCR, as evidence for the development of individual rights within the diplomatic protection field (see G. Distefano, 'The position of individuals in public international law through the lens of diplomatic protection: the principle and its transfiguration', R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Edwar Elgar Publishing (2013), 70). See generally on this subject, A. Vermeer-Künzli, 'Exercising diplomatic protection: the fine line between litigation, demarches and consular assistance', *op.cit.* Several domestic legislations confuse consular protection with diplomatic protection. See for instance the legislation of Portugal, Romania, the UK, as discussed in the *CARE Report*, 606-7.

*‘A State's right of diplomatic protection comprises two aspects: firstly, the helping and protecting of nationals abroad in the pursuance of their rights and other lawful activities by consular or diplomatic organs [...]; secondly, the claiming of compensation from a State which has treated the nationals of the protecting State in a manner incompatible with international law’.*⁵⁶⁶

Other scholars have made a similar error by referring to diplomatic protection as including both mechanisms of protection, even though they have different legal basis in international law (see the two different multilateral international treaties: the VCCR and the VCDR).⁵⁶⁷ Even domestic legislation on consular functions and their interpretation by practitioners confuses the two mechanisms, including diplomatic protection action within the mechanism of consular protection.⁵⁶⁸

The international legal norms governing these mechanisms follow such a similar codification pattern that it seems almost impossible to distinguish between them based on a literary interpretation of these norms.⁵⁶⁹ After centuries of having performed consular and diplomatic functions based on customary international law, in 1963, the Convention on Consular Relations (VCCR) entered into force, and one year later the Convention on Diplomatic Protection (VCDR) followed. The two Conventions were drafted following a similar codification pattern, and sometimes even identical wording, which can be identified in terms of the objectives stated in the preamble, the rules governing the establishment of consular and diplomatic relations and posts, the functions consular and diplomatic posts can exercise⁵⁷⁰ and also other consular and diplomatic relations matters.⁵⁷¹ The similar codification

⁵⁶⁶ A. Randelzhofer, ‘Nationality’, in Rudolph Bernhardt (ed.), *Encyclopedia of Public International Law* Amsterdam: North-Holland (1997), 506.

⁵⁶⁷ See C. Force, ‘The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad’, (2007) *U.N.B.L.J.*, 102.

⁵⁶⁸ See the domestic legislation of Romania, Portugal, Spain and the UK in *CARE Report*, 606-7. Rapporteur Dugard also criticised the EU Treaty provisions establishing the EU citizenship right to consular and diplomatic protection as a grave confusion of the two mechanisms, i.e. diplomatic protection and consular assistance, when the EU provisions should have made clear that the only protection mechanism secured to unrepresented EU citizens abroad is consular assistance (see J. Dugard, *Seventh Report*, *op.cit.*, para.19)

⁵⁶⁹ See E. Denza, *Diplomatic Law, a Commentary on the Vienna Convention on Diplomatic Relations* (2nd edition), Oxford University Press (1998), 40.

⁵⁷⁰ The two most important functions of consular and diplomatic officials are almost identically phrased in the two Conventions, namely: furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations (Art. 5(b) VCCR, Art. 3 (e) VCDR); and protecting in the receiving State the interests of the sending State and of its nationals (Art. 5(a) VCCR, Art. 3(b) VCDR).

⁵⁷¹ See more details in E. Denza, *op.cit.*; Luke T. Lee, *The Vienna Convention on Consular Relations with Text and commentaries*, A.W. Sijthoff Leyden/Rule of Law Press – Durham N.C. (1966).

style and substance of norms as well as the interchangeability between the consular and diplomatic functions⁵⁷² permitted by the two Conventions greatly narrows down the differences between diplomatic and consular functions. The VCCR provides a definition of the specific function of consular assistance of nationals abroad drafted in broad language and identical to the definition of diplomatic protection of nationals abroad enshrined in the VCDR. The first consular function mentioned in Art. 5 VCCR is the function of the consular officials ‘protecting’ the interests of their State’s nationals as well as helping and assisting them abroad. The same identical function of protecting the interests of the nationals of the sending State in the receiving State is mentioned also by the VCDR among the functions which a diplomatic mission can exercise (Art. 3(b) VCDR). The broad wording used to describe the consular and diplomatic protection functions was necessary in order to achieve consensus among the numerous Contracting States which had ‘diverse national, regional, and ideological interests, [and thus] the fact that a convention was concluded at all was in itself a remarkable feature.’⁵⁷³

To confuse the demarcation even more, Article 3 of the VCCR⁵⁷⁴ provides that consular functions can be exercised also by diplomatic missions in accordance with the provisions of the VCCR. While Article 17 of the VCCR provides a corresponding function for the consular officials, namely that consuls in a country without a diplomatic mission may also perform diplomatic functions.⁵⁷⁵ In light of this permitted interchangeability between consular and diplomatic functions⁵⁷⁶, the difference between consular and diplomatic

⁵⁷² Art. 3(2) VCDR and Art. 3 VCCR provide that consular functions can be exercised by diplomatic officials without the need to obtain previous state approval; while consuls in a country without a diplomatic mission may also perform diplomatic functions (Art. 17 VCCR). While interpreting the VCDR, E Denza confirms that ‘*[i]n determining the legal rules applicable to members of a diplomatic mission exercising consular functions, it must be borne in mind that there is no clear dividing line between diplomatic and consular functions*’, see E. Denza, *op.cit.*

⁵⁷³ Luke T. Lee, ‘Vienna Convention on Consular Relations’, (1969) International Conciliation, 41, 48 and by the same author, Vienna Convention on Consular Relations, Text and Commentaries, A.W. Sijthoff (1966), see Commentary of Article 5.

⁵⁷⁴ An equivalent provision is enshrined in Art. 3(2) VCDR.

⁵⁷⁵ Art 17 VCCR distinguishes three conditions that have to be met for a consular officer to be authorised to execute diplomatic functions: (1) the sending state does not have a diplomatic mission of its own in the state concerned nor is represented by a diplomatic mission of a third state, (2) the consular officer has the consent of the receiving state, (3) and this performance of diplomatic functions cannot affect its consular status. See more details in J. Wouters, S. Duquet, and K. Meuwissen, ‘The Vienna Conventions on Diplomatic and Consular Relations’ in Andrew F. Cooper, J. Heine, and R. Thakur (eds), The Oxford Handbook of Modern Diplomacy, Oxford University Press (2013).

⁵⁷⁶ Recent studies on the management of consular affairs have pointed out that very often, and especially in managing crises, ‘consulates increasingly undertake “diplomacy-like” tasks and other non-traditional functions, breaking down the traditional divide between consular services and diplomacy.’ See Report on the consular functions today prepared by the University of Toronto for the Foreign Affairs and International Trade of Canada, G. Haynal, M. Welsh, L. Century & S. Tyler, Consular Function in the 21st Century, 27 March 2013 at 5; see

protection does not reside in the nature or level of the public official exercising the protection, namely consular or diplomatic officials. It can thus be concluded that the international treaties governing the specific topics of consular and diplomatic relations do not establish clear demarcation lines between the two public international legal institutions.

In practice, the level of confusion is similarly high due to the complex situations which often require a high level of interchangeability and increased connectivity between the functions exercised by consular and diplomatic officials, to which a list of many other complex factors adds up.⁵⁷⁷ Today's world is characterised by millions of individuals travelling abroad, moving away from their State of nationality, and taking up short- or long-term residence in States whose nationality they never acquire, or in the best case scenario where they acquire a second nationality. There is an increasing number of individuals possessing the citizenships of multiple States⁵⁷⁸ that have different approaches to conferring consular and diplomatic protection to their citizens, thus increasing the complexity of establishing which type of protection the individual requires in a particular situation.⁵⁷⁹ The mounting number of natural and man-made disasters⁵⁸⁰ places a growing number of foreigners in difficult situations while abroad, requiring them to face more often an extraneous legal system, culture, procedure, and language. For example, when a foreigner is arrested, regardless of whether or not it is a legitimate arrest, the individual is extraneous to the specificities of the local legal systems and legal customs.⁵⁸¹ Unaware of the peculiar legal features and very often unable to speak the local language, his fate is determined by the presence of consular and diplomatic officials of the sending State who can help him understand his rights and obligations, his options to ensure a fair process and prompt release,

Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy,' in J. Melissen and Ana M. Fernandez, eds., *Consular Affairs and Diplomacy* (Leiden: Martinus Nijhoff, 2011).

⁵⁷⁷ See, for instance, complications that have arisen with modern globalization and its new complexities, such as dual citizenship, multiple passports, and the responsibilities expected from a state, as noted by Maaïke Okano-Heijmans in *Consular Affairs Chapter in The Oxford Handbook of Modern Diplomacy*, Andrew F. Cooper, J. Heine, and R. Thakur (eds.), Oxford University Press, 2013.

⁵⁷⁸ T. Faist and J. Gerdes, 'Dual Citizenship in an Age of Mobility', TransAtlantic Council on Migration, Migration Policy Institute, 2008.

⁵⁷⁹ See the case of the Mr Khadr, with dual nationality, that of Canada and the UK, the case is discussed in the Section on National jurisprudence under the Diplomatic Protection.

⁵⁸⁰ Recent statistics point out that the recorded annual number of disasters has increased fivefold – from 78 in 1975 to nearly 400 currently, and disasters are likely to continue increasing, see the European Commission's Proposal for a Council Directive on consular protection for citizens of the Union abroad, Brussels, 14.12.2011, COM(2011) 881 final 2011/0432 (CNS) p.10.

⁵⁸¹ The difficulties of understanding a foreign legal culture, systems and procedures apply to all situations when an alien has to deal with legal/judicial proceedings, regardless of whether it is due to distress caused by other persons or due to distress caused to a citizen of the receiving State.

contact with his family, and prevent ill-treatment or other human rights violations, or if such instances have already occurred, they can help the individual to find redress.⁵⁸²

There are plenty of harmful events, or difficult situations to which an individual can be exposed while in a foreign country, and different services, or measures, which a consular and/or diplomatic official can provide. There is no doubt that consular access and protection have become matters of great practical importance in recent years⁵⁸³, but at the same time,⁵⁸⁴ also of great legal complexity.⁵⁸⁵ For instance taking the aforementioned example of the arrested foreigner, in a first scenario, it falls to the local consul of the sending State to visit him in prison, advise him how best to protect his interests, notify his relatives if he requests this, put him in touch with a local lawyer and an interpreter, attend any criminal proceedings, and perhaps repatriate him if he finds himself released without any funds. But if he complains, for example, that he has been held for several months without any charge being brought, or that he has been brutally treated by the police, or that there is no form of legal redress open to him, then the specific circumstances of the case will require a different sort of protection, namely diplomatic protection. In the latter scenario, it will usually be the embassy, on the basis of its specific competence to exercise diplomatic protection, which will make representations on behalf of the individual to the ministry of foreign affairs, proposing the latter to intervene and ensure that the violation of the individual's human rights is remedied. While consular assistance is the form of State protection exercised in the first scenario and by consular officials. Once the individual complains of violation of his international human rights, and he has not found a remedy to this violation based on local remedies, then a different mechanism applies, namely, diplomatic protection.

Scholars, rather than international treaties, have clarified what the function of consular assistance comprises. Consular assistance is now widely accepted as including both '*day-to-day consular assistance in cases of individuals who have found themselves in distress while abroad and the more demanding, and complex consular assistance tasks required in 'large-*

⁵⁸² See more details and cases in the 2012 *REDRESS Report*, 'Tortured Abroad: The UK's Obligations to British Nationals and Residents', available online http://www.redress.org/downloads/publications/121001tortured_abroad.pdf

⁵⁸³ According to Maaïke Okano-Heijmans, consular assistance is the main function of consular officials, see 'Consular affairs', *op.cit.*

⁵⁸⁴ I. Roberts, *Satow's Diplomatic Protection*, Oxford University Press (2011), 263.

⁵⁸⁵ The *Breard*, *LaGrand* and *Avena* cases reviewed by the ICJ are examples of the legal complexity involved when delimitating, in practice, between consular and diplomatic protection. While the merits of the cases involved in addition to the violation of these States' rights, also the violation of consular assistance of the individuals, the cases were brought before the Court through the procedural mechanism of diplomatic protection, at least for the consular assistance part of the merits.

scale consular emergency management”, as well as documentary services.⁵⁸⁶ Unless the individual requests a simple notary or public register service, all the other consular functions that can be exercised in the above-mentioned situations – such as facilitating administrative procedures pertaining to repatriation in the cases of death or serious illness, evacuation, etc. – can also be performed by diplomatic officials.⁵⁸⁷

The criteria differentiating between the two legal institutions have been clearly noted only recently, by the ILC in its 2006 commentaries to the Articles on Diplomatic Protection⁵⁸⁸ and further discussed during the debate stirred by the (2007) European Commission Green Paper on diplomatic and consular protection of Union citizens in third countries.⁵⁸⁹ The definition given by the ILC to diplomatic protection⁵⁹⁰ covers a wide variety of acts of State, ranging from diplomatic demarches (direct communication and negotiations at the ministerial level) to judicial and arbitral proceedings, which can be differentiated as falling under the scope of consular or diplomatic protection based on criteria such as the moment in time when the act is adopted or provided, and specific conditions which have to be previously fulfilled before the exercise of protection.⁵⁹¹ The point in time of exercising protection can help to

⁵⁸⁶ K. Tindall, ‘Governments’ Ability to Assist Nationals in Disasters Abroad: What Do We Know about Consular Emergency Management?’ (2012) *Journal of Contingencies and Crisis Management*, 103; Luke T. Lee and John Quigley, *Consular Law and Practice*, 3rd ed, Oxford University Press (2008); Maaike Okano-Heijmans, ‘Consular Affairs’, *op.cit.*

⁵⁸⁷ Ana M. Fernández, ‘Consular Affairs in the EU: Visa Policy as a Catalyst for Integration?’, (2008) *The Hague Journal of Diplomacy*, 21.

⁵⁸⁸ See paras. 9-11 of Commentary to Art.1 of ILC Articles on Diplomatic Protection (2006), available on the UN website, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

⁵⁸⁹ Former CJEU judge Jean-Pierre Puissech provided legal clarification by adding that there are fundamental differences between these two types of protection ‘Diplomatic protection is always discretionary as the State is not obliged to endorse the citizens’ request while consular protection is a citizens’ right meaning that such assistance should always be provided’ (see Summary report of Public hearing of 29 May 2007 on the Green Paper on diplomatic and consular protection of Union citizens in third countries). In the same vein see also the European Parliament Working document on diplomatic and consular protection for citizens of the Union in third countries: ‘There are, of course, differences between diplomatic and consular protection as regards their nature, structure and the triggering of their procedures: while consular protection may, at least in some cases, be an obligation, in the case of diplomatic protection one is always in the area of a discretionary power, and in any case in the area of a relationship between one State and another.’

⁵⁹⁰ Art. 1 of the ILC Articles on Diplomatic Protection reads as follows: ‘diplomatic protection consists of 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 of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.’ ILC Articles on Diplomatic Protection of 2006 approved in 2011.

⁵⁹¹ Rapporteur Dugard, Seventh Report of Diplomatic Protection of 7 March 2006, Agenda Item 2, A/CN.4/567: ‘Any intervention, including negotiation, at inter-State level on behalf of a national vis-à-vis a foreign State should be classified as diplomatic protection (and not as consular assistance), provided that the general requirements of diplomatic protection have been met—i.e. that there has been a violation of international law for which the respondent State can be held responsible, that local remedies have been exhausted and that the individual concerned has the nationality of the acting State. That such a broad view of “action” in the context of diplomatic protection is warranted is supported by doctrine and both international and national judicial decisions.’ (para. 16)

establish which type of protection is needed in the particular case, and it is intrinsically connected with the conditions necessary for the exercise of diplomatic protection. For instance, if the harm inflicted on the individual does not involve a violation of an international obligation incumbent upon the State, then the harm or distress to which the national has been subjected is simply a domestic/national event and consular protection is usually the form of protection that the State provides. When the harm inflicted on the national constitutes an international wrongful act, and none of the available local remedies have provided redress to the inflicted injury, then the protection commonly considered is diplomatic protection.

The UK, in its response to the (2007) EU Commission Green Paper on Diplomatic and consular protection of Union citizens in third countries, has eloquently highlighted the main characteristics differentiating the two mechanisms:

“[D]iplomatic protection [...] is formally a state-to-state process by which a state may bring a claim against another state in the name of a national who has suffered an internationally wrongful act at the hands of that other state. Conversely, consular assistance is the provision of support and assistance by a state to its nationals [...] who are in distress overseas”⁵⁹²

The point in time also dictates the difference in objectives pursued by the two institutions. Consular assistance is mainly preventive, i.e. preventing harm or helping to put a stop to the ongoing harmful situation in which an individual finds himself. On the other hand, diplomatic protection is mainly remedial, thus coming at a later stage than the need for consular assistance, i.e. once harm has been done and the individual seeks to obtain remedy for the harm inflicted at the hands of a foreign state, and usually diplomatic protection is the last resort remedy for him.

The essential differences between consular and diplomatic protection are: the point in time at which they intervene, thus consular protection usually comes before diplomatic protection, and the latter usually intervening after an exercise of consular assistance, when, in practice, the latter failed to prevent or remedy the violation of the individual’s international right(s);⁵⁹³ the qualification of the harm inflicted upon the individual as an international wrongful act.

⁵⁹² See UK response to the (European) Commission’s Green Paper on Diplomatic and consular protection of Union citizens in third countries, March 2007, para. 1.5, available at <http://www.careproject.eu/database/upload/UKresponseGP/UKresponseGPText.pdf>.

⁵⁹³ The two international mechanisms are thus in an inter-dependent relation. According to the latest edition of Satow’s Diplomatic Practice, consular and diplomatic protection can be exercised successfully or even simultaneously in respect of the same events, see I. Roberts, *Satow’s Diplomatic Protection*, Oxford University Press (2011), 275. For instance, in cases of torture or ill-treatment of nationals, consular assistance and diplomatic representations are inter-dependent. Consular assistance types of measures will be provided to the individual to either prevent the occurrence of such harm, especially in countries having a record of ill-treatments,

Legal scholars⁵⁹⁴ and practitioners⁵⁹⁵ have pointed out two other salient differences between consular and diplomatic protection, which stem from their specific features, i.e. the representational nature of the diplomatic protection function and the different interests that these two legal institutions serve.⁵⁹⁶ Consular functions are said to lack representative or political character and are instead of a more commercial, practical, and administrative nature.⁵⁹⁷ The absence of the representational function is argued to consequently impede a consular agent to bring or defend legal proceedings on behalf of his State in the receiving country, except when expressly mandated to do so. As to the interests these two mechanisms serve, the current conception of diplomatic protection as serving both the State's and the individual's interests, instead of solely the State's interests as specific to the classical conception of diplomatic protection, has brought diplomatic protection closer to the institution of consular protection, which is argued to serve primarily the interests of the injured individual. Thus the different interests based argument commonly raised by international legal scholars has slightly lost its relevance.

In spite of the existence of several criteria that can be applied to identify which type of protection to provide to a national abroad, Lee and Quigley note that, because of the growing interconnectedness of politics, and economic and commercial affairs of sending States abroad, in many instances, a complete distinction between diplomatic and consular functions is considered unfeasible.⁵⁹⁸ Certain legal scholars seem to reject a too strict delimitation between the two institutions. They are usually those who approach consular and diplomatic protection as mechanisms working for a common objective, superior to the traditional conceptions

or to identify the local remedies available to the individual, or a lawyer to help the individual to identify them in case the ill-treatment has occurred. This record of consular protection measures will help to build the case of the individual, in case the local remedies have not provided any remedy and the State decides to act on behalf of the individual via diplomatic protection measures. It has thus been emphasised by reports of States' foreign affairs departments and NGOs involved in the protection of nationals abroad, that although consular assistance is primarily preventative and protective in individual cases, '*it is also more than that, as it can and should also lay the ground for reparation.*' See the 2012 *REDRESS Report*, at 22.

⁵⁹⁴ See, in particular, J. Zourek, 'Quelques Problèmes Théoriques du Droit Consulaire', (1963) *Journal de Droit International*, 54-5; A. Vermeer-Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance', (2006) *ZaöRV*, 321; E. Milano, *op.cit.*

⁵⁹⁵ See F. Przetacznik, 'The Protection of Individual Persons in Traditional International Law (Diplomatic and Consular Protection)', (1971) *Österreichische Zeitschrift für öffentliches Recht*, 69.

⁵⁹⁶ Rapporteur Dugard, *Seventh Report of Diplomatic Protection*, Agenda Item 2, A/CN.4/567: '*This means that consuls are permitted to represent the interests of the national but not the interests of the State in the protection of the national. This is a matter for the diplomatic branch.*' (para. 17.)

⁵⁹⁷ J. Wouters, S. Duquet, and K. Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations' in Andrew F. Cooper, Jorge Heine, and Ramesh Thakur (ed), *The Oxford Handbook of Modern Diplomacy*, Oxford University Press (2013).

⁵⁹⁸ Lee and Quigley, *Consular Law and Practice*, *op.cit.*, 541.

underpinning public international law (securing/protecting State's interests), namely, protection of individual's (human) rights.⁵⁹⁹

Other scholars have harshly criticised the confusion or the conscious option of treating the two legal mechanisms as interchangeable or a singular mechanism, in spite of sharing the former scholars' human rights approach of consular and diplomatic protection.⁶⁰⁰

Having exposed the difficulties in differentiating between the two legal institutions, one may question why is it important in the first place to differentiate between the two? Is it simply a matter of legal formalism whether we use the adjective 'consular' or 'diplomatic'?⁶⁰¹ From a legal point of view, the two institutions actually possess important differences regarding salient aspects such as: the legal requirements for their exercise; their substantial scopes; and the rights and remedies they can offer to the injured individuals, which, in case they are not respected, may lead in practice to opposition from the receiving State, inopposability of the type of protective measure on the international plane, and ultimately negatively impact on the situation of the individual.

IV. The current status of Consular Protection of Individuals: Discretionary State Prerogative, International Individual or Human Right?

1. The current face of consular protection of individuals in public international law

The consular protection institution is one of the oldest in international relations.⁶⁰² The protection of nationals, whether natural or legal persons, in foreign countries is arguably one of the most important functions of consular representatives⁶⁰³ and one that has a great impact

⁵⁹⁹ N. Klein, *op.cit.*; C. Force, *op.cit.*

⁶⁰⁰ See mainly A. Vermeer-Künzli, 'Exercising Diplomatic Protection: The Fine Line between Litigation, Demarches and Consular Assistance', *op.cit.*, who provides examples of erred classification of States actions as diplomatic protection when they should have been considered as instances of consular protection, or the vice-versa, made by legal scholars, including renowned ones, practitioners and domestic courts.

⁶⁰¹ The legal consequences of using the two adjectives 'consular' and 'diplomatic' are important to identify also from the perspective of the EU law, which refers to the concept of 'protection by the consular and diplomatic authorities' instead of 'consular protection' and 'diplomatic protection'. See Arts. 20(2)(c) and 23 TFEU.

⁶⁰² See B. Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd ed, 1988, Martinus Nijhoff Publishers, 201; C. Economides, 'Consuls', in R. Bernhardt (ed), *Encyclopedia of Public International Law*, Vol. 1 Oxford University Press (1992), 770; Luke T. Lee, *Consular Law and Practice*, second ed., Oxford: Clarendon Press (1991), 124; I. Roberts, *Satow's Diplomatic Practice*, 7th edition, Oxford University Press (2013), 259.

⁶⁰³ See I. Roberts, *op.cit.*, 260; Manual of Consular Instructions of Canada (2007), para. 2.4.9, quoted in Luke T. Lee and John Quigley, *Consular Law and Practice*, *op.cit.*, 138.

on the life of the national abroad. For instance, the protection a consul can provide to nationals, who subject to criminal proceedings in a foreign country that applies the death sentence, has the potential of saving that national from a fatal sentence, and can help him conduct his case in a way that will multiply the chances of ensuring the respect of his human rights or obtaining remedies.⁶⁰⁴ In addition to being one of the most basic consular functions, its role within the realm of consular functions has gained importance over the years,⁶⁰⁵ due to the growing number of travelling citizens and the decline of the consul's other functions.⁶⁰⁶ Furthermore, the need for consular assistance of nationals abroad is expected to increase in the following years.⁶⁰⁷

As to the nature of consular assistance, the traditional conception of public international law describes consular assistance as a State prerogative.⁶⁰⁸ Under the impact of the changing position of the individual in international relations, growing importance of international human rights, increasing number of travels and of nationals taking up of residence outside the country of nationality, the traditional conception is gradually giving way to a new conception, whereby some States believe their consular officials have a sort of duty to provide the necessary protection to co-nationals in distress abroad.⁶⁰⁹

This section plans to assess international treaties, States' practice and decisions of international and national courts on the exercise of consular assistance of nationals abroad for the purpose of identifying whether there has been a change in the exercise of the classical international institution of consular protection of individuals, and whether this change brings the international conception of consular protection closer to the unique EU conception of consular protection of EU nationals.⁶¹⁰

The current section is divided in three sub-sections separately assessing each type of the aforementioned evidence for the purpose of identifying the current legal nature of consular protection of individuals.⁶¹¹ Thus, the first sub-section will address the question of whether

⁶⁰⁴ In this sense, see the arguments of the applicant State, Mexico, in the *Avena* case reviewed by the ICJ.

⁶⁰⁵ I. Roberts characterises consular protection as the most important function of a State's consular official, see Satow's *Diplomatic Protection*, *op.cit.*, 262 and 267.

⁶⁰⁶ Luke T. Lee and J. Quigley, *op.cit.*, 116.

⁶⁰⁷ See European Commission, Green Paper: Diplomatic and consular protection of Union citizens in third countries, 28 November 2006, para. 1.5., EU Doc. COM/2006/0712; Canada Consular Affairs Bureau, *Kidnapping, Hostage Taking and Hijacking: Consular Policy, Procedures and Practices* (July 2000).

⁶⁰⁸ I. Roberts, *op.cit.*, 276.

⁶⁰⁹ See sub-section 3 dedicated to State practice.

⁶¹⁰ See Art. 46 EU Charter which provides for a fundamental right to diplomatic and consular protection recognised to all unrepresented Union citizens outside the Union.

⁶¹¹ On the methodology of customary international law norm formation, see London Statement of Principles Applicable to the Formation of General Customary International Law (with commentary); N. Johanna Arajärvi, 'Genesis of Customary International Law and International Criminal Law' in *The Changing Nature of*

there is evidence in recent international treaties of an individual right to receive consular protection from the State of nationality or other States. The following sub-section will assess whether States, through their executive branches, have expressly or tacitly endorsed an obligation to exercise consular protection of their nationals or other individuals abroad. And, finally, the recent jurisprudence of international, regional, and domestic courts on this topic will be analysed to search for judgments that might have recognised an individual right to consular protection. The opinion of scholars on the topic will be integrated within each of these sub-sections.

2. International treaty law

The topic of consular protection is regulated under public international law by the Vienna Convention on Consular Relations (VCCR). In 1955 the ILC received the task of drafting a treaty that would codify the existing customary international legal rules. The adoption of the text of the VCCR in 1963 by the UN has been considered as ‘*undoubtedly the single most important event in the history of the consular institution.*’⁶¹² The Convention is now ratified by 176 States⁶¹³, which represent nearly all States existent in the international community, and regulates the management of inter-states consular relations, namely the functions, powers, and immunities of the consular personnel and premises of the States parties.⁶¹⁴ Article 5 (a) of the VCCR provides as one of the functions of the consular officials, the protection of interests of the sending State’s nationals. This particular function has been widely characterised by courts⁶¹⁵ and practitioners⁶¹⁶ as one of the paramount functions of the consular officials. However, the Treaty does not specify what is meant by ‘protection of nationals’ interests’ and what kinds of actions fall under this function. Based on States’ practice, academics have

Customary International law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals, 2011 *EUI PhD Thesis*, 11-52.

⁶¹² Luke T. Lee and John Quigley, *Consular Law and Practice*, op.cit., 25; J. Quigley, J. Aceves, A. Shank, (eds.), *The Law of Consular Access: A documentary guide*, Routledge Research in International Law (2013), 10.

⁶¹³ Vienna Convention on Consular Relations, United Nations Treaty Collection, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3&lang=en (last checked on January 2015).

⁶¹⁴ H. S. Schiffman, ‘Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention’, (2000) *Cardozo Journal of International and Comparative Law*, 1132.

⁶¹⁵ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999), para.80.

⁶¹⁶ See, inter alia, Luke T. Lee, op.cit., I. Roberts, op.cit., J. Quigley, William J. Aceves and A. Shank, op.cit.

elaborated non-exhaustive lists including various actions falling under the ambit of consular protection,⁶¹⁷ while a definition of consular protection as an institution of public international law is to be found only in scholarly works. Based on the wording of Articles 5(a), (e) and 8 of the VCCR, legal scholars have elaborated a definition phrased along the following lines:

*‘[C]onsular protection or assistance is the provision of immediate help and assistance by a State to its nationals, natural and legal persons, or to nationals of another State when in distress abroad. The consular protection function is provided by career or honorary consuls to co-nationals or non-nationals, by assisting them in asserting their rights under the legal system of a foreign State, provided that the individual concerned has given his consent.’*⁶¹⁸

Salient rights in relation to securing consular assistance of nationals abroad are established by the VCCR, especially in Article 36 VCCR.⁶¹⁹ Consuls have the right to communicate with and assist their co-nationals. While aliens have rights inter-linked⁶²⁰ to the consul’s rights, namely individual rights to have access and communication with consular officials of his sending State, the right to be immediately informed by the local authorities of the receiving State of the alien’s right to notification and communication with the consular officials of his sending State by the local authorities of the receiving State, when the alien is

⁶¹⁷ See, for instance, I. Roberts, *op.cit.*, 263, 275.

⁶¹⁸ The definition is merging different scholarly definitions given to consular protection, see, in particular, Luke T. Lee and J. Quigley, *op.cit.*; I. Roberts, *op.cit.*, 270ff; and B. Nascimbene, who makes a summary of the different definitions given to the public international legal institution of consular protection of individuals, in Briefing Paper, *Consular Assistance and Demarches to Support EU nationals in third countries*, 2009, 1, available online at http://www.europarl.europa.eu/RegData/etudes/note/join/2009/407001/EXPO-DROI_NT%282009%29407001_EN.pdf.

⁶¹⁹ See Art. 36 VCCR, entitled *-Communication and contact with nationals of the sending State* – reads as follows: ‘1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (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 be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. 2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.’

⁶²⁰ The ICJ described Article 36 of the VCCR as ‘an interrelated regime designed to facilitate the implementation of the system of consular protection.’ *Avena and Other Mexican Nationals* judgment of the ICJ, para. 46.

detained abroad. These provisions are regarded as foundational for good consular relations.⁶²¹ Furthermore, they also apply to those nations that have not yet ratified the VCCR, since due to the wide and long established acceptance of the VCCR, its norms are now considered part of customary international law.⁶²²

Article 36 of the VCCR has been a much disputed article in the international jurisprudence and literature in relation to the type of rights and obligations it confers.⁶²³ Being part of an inter-states multilateral agreement it was presumed that the rights conferred by Article 36 would be rights recognised only to the sending and receiving States. However, the ICJ clarified the individual nature of some of the rights prescribed by Article 36.⁶²⁴ Article 36(1)(a) provides for mutual rights, pertaining to the sending State and its nationals abroad, of access and communication. The second paragraph of Article 36(1) recognises the similar rights in the specific circumstances of arrest, custody, or other forms of deprivation of liberty of the sending State's national. Due to the specific circumstances of the alien's deprivation of liberty, Article 36(1)(b) of the VCCR recognises additional guarantees regarding access and communication, namely the right of the detained alien to be immediately informed about his

⁶²¹ See J. Quigley, William J. Aceves, A. Shank, 'Introduction' in *op.cit.*

⁶²² Luke T. Lee, *The Vienna Convention on Consular Relations with Text and commentaries*, A.W. Sijthoff Leyden/Rule of Law Press – Durham N.C. (1966), 15ff; and by the same author, *Consular Law and Practice*, *op.cit.*, 26. Similarly to the Vienna Convention on Diplomatic Relations, see E. Denza, *Introductory Note on The Vienna Convention on Diplomatic Relations*, 1961 <http://legal.un.org/avl/ha/vcdr/vcdr.html>

⁶²³ William J. Aceves, 'International Decisions: Avena and Other Mexican Nationals (Mexico v. United States) Provisional Measures Order', (2003) AJIL, 923; William J. Aceves, 'International Decisions: LaGrand (Germany v. United States)', (2002) AJIL, 210; William J. Aceves, 'International Decisions: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)', (1999) AJIL, 924; William J. Aceves, 'International Decisions: Application of the Vienna Convention on Consular Relations (Paraguay v. United States)', (1998) AJIL, 517; William J. Aceves, 'The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies', (1998) Vand. J. Transnat'l L., 257; Linda E. Carter, 'Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations', (2005) Duke J. Comp. & Int'l L., 259; Linda E. Carter, 'Compliance with ICJ Provisional Measures and the Meaning of Review and Reconsideration Under the Vienna Convention on Consular Relations: Avena and Other Mexican Nationals (Mex v. U.S.)', (2003) Mich. J. Int'l L., 117; M. Halberstam, 'LaGrand and Avena Establish a Right, but Is There a Remedy? Brief Comments on the Legal Effect of Lagrand and Avena in the U.S.', (2005) ILSA J. Int'l & Comp. L., 415; Mark J. Kadish, 'Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul', (1997) Mich. J. Int'l L., 565; M. Mennecke & Christian J. Tams, 'LaGrand Case (Germany v. United States of America)', (2002) ICLQ, 449; Sean D. Murphy, 'Implementation of Avena Decision by Oklahoma Court', (2004) AJIL, 581; Sean D. Murphy, 'U.S. Position before International Court of Justice in Mexican Death Penalty Case', (2003) AJIL, 434; Jordan J. Paust, 'Breard and Treaty-Based Rights under the Consular Convention', (1998) AJIL, 691; Howard S. Schiffman, 'Breard and Beyond: The Status of Consular Notification and Access Under the Vienna Convention', (2000) Cardozo J. Int'l & Comp. L., 27; D. Shelton, 'Case Concerning Avena and Other Mexican Nationals (Mex v. U.S.)', (2004) AJIL, 559.

⁶²⁴ The ICJ majority judgment in the *LaGrand* case was criticised by some of the other judges who dissented from the majority decision. Judge Shi criticised the judgment for reaching the decision on the individual character of the Art. 36(1)(b) VCCR right solely based on literary interpretation, when purposive and contextual methods should have also been used and, in this case, a different decision would have been reached in light of the alleged purely inter-states nature and objectives of the VCCR (see Judge Shi Separate Opinion, para. 4, *LaGrand* Case (Germany v. United States of America), judgment of 27 June 2001, ICJ Reports (2001)).

rights to access and communication with a consular official of his sending State. The fact that Article 36(1)(b) VCCR provides also for international rights for the individuals is no longer debatable, since it has been confirmed on several occasions by the ICJ.⁶²⁵ In spite of being located within an inter-states treaty, Article 36 VCCR provides for a considerable number of consular related individual rights: 1) to be informed without delay by the detaining authority of the right to consular notification and communication; 2) to choose whether or not to have the consulate of his sending State contacted; 3) to have the consulate contacted without delay by the detaining authority; 4) to communicate freely with the consulate; 5) to accept or decline any offered consular assistance. It can be noticed that, so far, these rights possessed by the individuals do not have a corresponding obligation incumbent upon the State of nationality to provide consular protection to the national abroad, not even in cases of detention. The possessor of the obligation corresponding to the aforementioned individual rights is the receiving State.⁶²⁶ The third sub-paragraph of Article 36(1) VCCR does provide for the type of consular services that the consuls of the sending State can provide once informed of the arrest of their nationals.⁶²⁷ The type of consular assistance that can be provided under Article 36 VCCR encompasses the recommendation of legal representation, explanation of the judicial system and proceedings of the country concerned, and facilitation of the location of evidence or witnesses.⁶²⁸

Therefore the consular assistance services provided under Article 36(1) VCCR are exercised as rights of the sending State, with obligations on this aspect incumbent only on the receiving State. Therefore the related individual rights to consular access and communication do not prescribe some sort of corresponding obligation on the part of the consular officials vis-à-vis their co-nationals.⁶²⁹ The last paragraph of Article 36 creates an obligation

⁶²⁵ See the ICJ judgments in the *Breard*, *op.cit.*, *LaGrand*, *op.cit.*, *Avena*, *op.cit.*, and *Diallo* cases.

⁶²⁶ See Luke T. Lee, *Consular Law and Practice*, *op.cit.*, section 10 – Consular Access as a Right of the detained National in Chapter – National Charged with Criminal Offences.

⁶²⁷ Art. 36(1)(c) VCCR reads as follows: ‘(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.’

⁶²⁸ J. Quigley, ‘LaGrand: A Challenge to the U.S. Judiciary’, (2002) Yale J. Int’l L., 435, 435.

⁶²⁹ If Art. 36 VCCR based jurisprudence of the ICJ (*Breard*, *LaGrand*, and *Avena*) did not address the question whether this Article establishes certain obligations on the part of the sending State to exercise consular protection to its nationals, certain domestic courts have rejected the deduction of such an obligation from the wording of Art. 36 VCCR. See the case of *Kuijt v Minister of Immigration and Integration*, Administrative appeal, No. KG 03/137, 18 March 2003, ILDC 149 (NL 2003), where the Dutch Court interpreted Art. 36 VCCR and held that this article does not impose an obligation upon Dutch consulates to fulfil the request of detained Dutch nationals to consular protection.

incumbent, similarly to the previous paragraph, on the receiving State, whereby its laws and regulations should ‘*enable full effect to be given to the purposes for which the rights accorded under this Article are intended.*’

The *travaux préparatoires* of the VCCR reveal that some of the members of the ILC were of the opinion that the purpose of Article 36(1)(b) VCCR should be to safeguard human rights.⁶³⁰ Germany pointed out that the US representatives agreed during the ILC discussion leading up to the conclusion of the VCCR that the right of a foreigner to communicate with the consulate of his or her home state is ‘*a very fundamental human right*’.⁶³¹ This discussion has not materialised into a concrete provision expressly providing a human right of the individual to consular assistance related services.

Therefore the purpose of Article 36 VCCR is to ensure that consular officials are able to exercise their Article 5 VCCR administrative functions and, in particular, that they have access to the national, especially when the latter is detained abroad. In this circumstance, it has been argued that the rationale of Article 36(1)(b) VCCR is to ensure the basic human rights of the nationals, in particular, to ensure that the local police and judicial systems treat the foreign detainee fairly.⁶³²

While the VCCR represents the point of analytical departure for the legal assessment of consular protection, there are other specialised treaties containing consular related provisions. For instance, the Convention against Torture,⁶³³ the Migrants Workers Convention⁶³⁴ and the International Convention for the Protection of All Persons from Enforced Disappearance⁶³⁵ have provisions recognising consular communication rights to individuals, similar to those provided in Article 36(1) VCCR.⁶³⁶ However they do not depart

⁶³⁰ See *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 25, para. 48.

⁶³¹ Memorial of the Federal Republic of Germany, submitted for the ICJ in the *LaGrand* case, para. 4.98.

⁶³² Victor M. Uribe, ‘Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice’, (1996-1997) *Hous. J. Int'l L.*, 390; Lee and Quigley, *Consular Law and Practice*, 140. The Canadian Alberta Court of Appeal in *R. v. Van Bergen*, (2000) A.J. No., 882, reported 225 W.A.C. 386, agreed with the Canadian Minister of Justice that the purpose of Article 36 VCCR was ‘*to ensure that foreign detainees receive equal treatment under the local criminal justice system and are not disadvantaged because they are not familiar with and do not understand the proceedings against them.*’

⁶³³ The Convention against Torture provides in Art. 6(3) that any persons in custody for a torture-related offense ‘*shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.*’

⁶³⁴ Art. 23 of the Migrants Workers Convention provides that migrants have a right of recourse to consular notification as well as to consular protection and assistance. Art. 7(a) confers to migrants a right equivalent to Art. 36(1)(b) VCCR.

⁶³⁵ See Art. 17, U.N. Doc. A/RES/61/177 (Dec. 20, 2006).

⁶³⁶ For a detailed analysis of treaty norms similar to Art. 36 VCCR, see M. Warren, ‘Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights’, (2013) *Southern Illinois University Law Journal*, 27, 37-42.

from the Article 36 VCCR template of relations between States, and the State of nationality and the individual. It seems, therefore, that the multilateral international treaty regulating consular relations (VCCR) and specialised international treaties with incidental provisions on consular access and communication do not establish a State duty to provide consular protection services to its nationals or other individuals abroad.

If general consular related international treaties are not yet a source of individual rights to receive consular protection from State(s), then international human rights, placing the individual at the centre of their objectives, might be such a source of consular protection related individual rights. There is a growing amount of scholarly work⁶³⁷ arguing that a State obligation to provide consular (and diplomatic) protection to its nationals abroad may be deduced from international human rights law. Although international human rights norms do not recognise an express human right of the individual to ask for and/or receive consular protection from the State of nationality or another State, the general provision of the International Covenant on Civil and Political Rights⁶³⁸, as well as States' membership to regional human rights treaties, have been interpreted as requiring the State of nationality to exercise some sort of consular protection so as to ensure respect of its nationals' human rights in third countries.⁶³⁹ Additionally, specific international human rights provisions have been interpreted as establishing a State obligation to precise consular services, such as an obligation upon the consular officials of the sending State to not arbitrarily refuse the issuance of a passport to citizens as derived from Article 12(4) ICCPR.⁶⁴⁰

The IACtHR Advisory Opinion No. 16 has been referred to as evidence supporting the recognition of a (human) right to consular access based on pre-existing human rights.⁶⁴¹ The

⁶³⁷ Victor M. Uribe, 'Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice', (1996-1997) *Hous. J. Int'l L.*, 397ff; N. Klein and L. Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality', (2007) *Australian Journal of Human Rights*, 1; N. Karazivan, 'Diplomatic Protection: Taking Human Rights Extraterritorially', (2006) *Canadian Yearbook of International Law*, 299; Francisco O. Vicuna, *International Dispute Settlement in an Evolving Global Society*, Cambridge University Press (2004); A. A. C. Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice', (2007) *Chinese Journal of International Law*, 1; Luke T. Lee, *Consular Law and Practice*, op.cit., 136; Christina M. Cerna, 'Impact on the Right to Consular Notification', Menno T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law*, Oxford University Press (2009).

⁶³⁸ Art. 2(3) ICCPR: 'any person whose rights or freedoms as herein recognised are violated shall have an effective remedy'.

⁶³⁹ Klein, op.cit.; Karazivan, op.cit.

⁶⁴⁰ Luke T. Lee, op.cit., 136.

⁶⁴¹ The IACtHR pointed out that the evolutive interpretation and application of international human rights law have had 'a positive impact on International Law in affirming and developing the aptitude of this latter to regulate the relations between States and human beings under their respective jurisdictions'. The Court thus accepted the inter-connected and dependent relation between an international individual right to consular

justification of a State obligation to exercise consular protection to their nationals abroad based on international human rights law⁶⁴² has been criticised for being contrary to the doctrine of territorial jurisdiction⁶⁴³ required by international human rights law as a condition for holding the international responsibility of a State for violation of international human rights law.⁶⁴⁴ According to the doctrine of territorial jurisdiction, the violation of an international human right has to be committed within the territory of the State whose international responsibility is claimed⁶⁴⁵ – a condition which is evidently not fulfilled in the case of consular protection of nationals whose rights are violated within the territory of another State than the sending State. Recent jurisprudence has recognised in certain limited circumstances the international responsibility of a State other than the territorial State, namely the State of the agent exercising authority,⁶⁴⁶ or the State exercising effective control over the territory,⁶⁴⁷ or when acts within the territory of the State of nationality cause an individual to suffer violations of his human rights outside the territory.⁶⁴⁸ Certain scholars⁶⁴⁹ argue that the

notification and access and several human rights such as the right to a fair trial and life within the framework of ‘*the evolution of the fundamental rights of the human person in contemporary International Law*’ (Advisory Opinion No. 16 of the Inter-American Court of Human Rights [IACtHR] on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law* of 01.10.1999, paras. 114–115). For a commentary of the Advisory Opinion No 16/1999 in light of the impact of international human rights law on public international law, see A. A. C. Trindade, *The access of individuals to justice*, *op.cit.*, 145–147; and by the same author, ‘The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice’ (2007) *Chinese Journal of International Law*, 1.

⁶⁴² A State duty to exercise diplomatic protection has been argued on the basis of the same interpretation of international human rights law, see Karazivan, *op.cit.*

⁶⁴³ State sovereignty remains a general and foundational principle in international law, and within its territory the exercise of judicial, legislative, and executive jurisdiction by a state constitutes an essential corollary of that sovereignty. State jurisdiction extends over the whole territory and whoever is present there, including non-state subjects. A. Aust, *Handbook of International Law*, 2nd edition, Cambridge University Press (2010), 43; I. Brownlie, *Principles of Public International Law*, 7th edition, Oxford University Press (2008), 299.

⁶⁴⁴ A. Vermeer-Künzli, ‘As If ...’ *op.cit.*; and by the same author, ‘Diplomatic Protection as Human Rights Law’, *op.cit.*; and *The protection of individuals by means of diplomatic protection: diplomatic protection as a human rights instrument*, 2007, Doctoral Thesis.

⁶⁴⁵ F. Berman, ‘Jurisdiction: The State’, in P. Capps, M. Evans, K. Konstantinides (eds), *Asserting Jurisdiction: International and European Legal Perspectives*, Hart Publishing (2003).

⁶⁴⁶ *Ocalan* (Appl. No. 46221/99, Judgment of the Grand Chamber of 12 May 2005), *Al-Saadoom v UK* (Appl. No. 61498/08, Judgment of 2 March 2010).

⁶⁴⁷ *Ilascu v Moldova and Russia* (Appl. No. 48787/99, Judgment of 8 July 2004); *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, (Appl. No. 52207/99, Judgment of 12 December 2001), *Al-Skeini and others v The United Kingdom* (Appl. No. 55721/07, Judgment of 7 July 2011).

⁶⁴⁸ See *Soering* (Appl. No. 14038/88, Judgment 7 July 1989); for a description of this specific condition, see *Abbasi & Anor., R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598 (06 November 2002), para. 71.

⁶⁴⁹ See M. Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’, in Coomans and Kamminga, (eds), *Extraterritorial Application of Human Rights Treaties*, Antwerp-Oxford: Intersentia (2004), 73–76.

territorial standard of control over the territory has to be replaced in certain circumstances⁶⁵⁰ with the standard of control over the person, facts or events giving rise to the violation of human rights.

The permeation of international human rights into general international consular law is a phenomenon widely accepted by legal scholars.⁶⁵¹ The general recognition of the individual nature of the rights to consular notification and access provided by Art. 36(1)(b) VCCR has been widely accepted as an effect of the impact of international human rights. Reading into multilateral and regional human rights treaties a State duty to exercise consular protection of their nationals when their human rights are in danger is, however, not generally accepted by the legal academia.

Therefore bilateral and international treaties do not establish rights and obligations within the relationship between a sending State and its national. The only State duties related to consular assistance expressly recognised by international treaties are the following: a duty of the receiving State towards the sending State to notify its consular officials of the detention/arrest of their co-national, and to ensure access and communication with the detained individual; and another duty of the receiving State towards the detained foreigner to inform him of his right to ask for the notification of the consular officials of his State and ensuring communication with them.⁶⁵² Treaty law thus provides for a classical public international State duty owed towards another State, and another duty towards the residing alien. According to public international law, a sending State has a right to assist, but no obligation to do so towards its national or another individual. Such an obligation may however arise from State authorities practice or jurisprudence, which will be discussed in the following sections.

⁶⁵⁰ In cases of denial of a passport to citizens residing abroad, assassinations, and abductions.

⁶⁵¹ C. Cerna, 'The Rights to Consular Notification as a Human Right', (2008) *Suffolk Transnational Law Review*; and by the same author, 'Impact on the Right to Consular Notification in The Impact of Human Rights Law', in Menno T. Kamminga and M. Scheinin (eds), *op.cit.*.

⁶⁵² On the basis of Art. 36 VCCR.

3. State practice

Although there is no international legal norm recognising an individual right to consular protection in general, there is a considerably high number of States that attach to their citizenship a right to receive protection abroad from the government. Through constitutional or ordinary legal provisions⁶⁵³ or executive acts, these States include among the citizenship rights the right of their nationals to be protected by the State while they are located in foreign countries.⁶⁵⁴ The domestic legal norms do not recognise an express right to consular protection, however the right has been interpreted as including a right to consular protection.⁶⁵⁵ What exactly this individual right to consular protection includes is not precisely defined or delimited. The substantive content is to a certain extent provided by domestic consular acts implementing and detailing the provisions of the VCCR or summarised in consular guidelines. Fernandez and Mellissen argue that '*in most of the countries consular assistance includes documentary services, individual assistance to citizens in distress and assistance at times of crisis.*'⁶⁵⁶ However precisely what this 'assistance' entails depends on the local culture, diplomacy, and legal system.

⁶⁵³ States with constitutional legal provisions recognising a right to their nationals to be protected abroad: Bulgaria, China as interpreted by the Constitutional Court, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Russia; countries having a legislative provision that is interpreted by legal experts as providing a right to consular protection: Brazil, Georgia, Kazakhstan, Ukraine, Denmark, Finland, Mexico, Norway, Slovakia and Slovenia; countries having no specific legislative provision, however, according to national legal experts consular protection is granted as a right based on the interpretation of the specific national legislation, as a whole, and the relevant national case-law: Italy, Sweden. Data collected during the research work carried out within the Project Citizens Consular Assistance Regulation in Europe, Final Report, Chapter three: Comparative analysis, section 4.1., Right to consular protection, 608-614, available online at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf> and available also in S. Faro and M. Moraru, 'Comparative analysis of legislation and practice on consular protection and assistance of the 27 EU countries', in S. Faro, Mario P. Chiti, E. Schweighofer (eds.), *European Citizenship and Consular Protection New Trends in European Law and National Law*, Editoriale Scientifica (2012), 143-150; and J. Quigley, William J. Aceves, S. Adele Shank, 'The Statutory right to sending state protection', in *The Law of Consular Access A documentary guide*, Routledge Research in International Law (2013), 97-101.

⁶⁵⁴ The inclusion of domestic law within the methodology on formation of customary international law has been criticised by certain legal scholars, see P. Weis (Nationality and statelessness in international law, in Brownlie, I. *Principles of International Law*, Oxford University Press (1998), 98) who argued that '*concordance of municipal law does not yet create customary international law; a universal consensus of opinion of states is equally necessary. It is erroneous to attempt to establish rules of international law by methods of comparative law, or even to declare that rules of municipal law of different states which show a certain degree of uniformity are rules of international law.*' However, legislation has been considered as evidence of a State's position on a certain topic and recognised as among the evidentiary material for the formation of customary international law, see J. Dugard, *First Report on Diplomatic Protection*, *op.cit.*

⁶⁵⁵ See the national Reports on those countries that recognise an individual right to protection abroad in the *CARE Report*, Chapter two, available online. On the interpretation of the non-EU countries legal provision, see Luke T. Lee, *Consular Law and Practice*, *op.cit.*, 131-137.

⁶⁵⁶ See Maaïke Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy,' in J. Mellissen and Ana M. Fernandez (eds.), *Consular Affairs and Diplomacy*, Martinus Nijhoff (2011), 22, which is one of the most updated studies on the topic of consular affairs written from both legal and international relations perspectives.

Other States have a different approach to consular protection, which is not provided as a legal right of the individual, but approached as a matter of State's discretion.⁶⁵⁷ For instance, the Commonwealth countries treat consular protection as a matter of State discretion, thus citizens are consequently not entitled to claim such services as a legal right from these countries. The cases and times when consular protection can be exercised is left to the Secretary of State's discretionary decision-making power.⁶⁵⁸ There is however more and more State practice whereby even these States, that have applied the traditional conception of consular protection of individuals, are gradually embracing a modern conception of the institution by way of recognising an obligation of the consular officials to exercise consular protection of nationals, particularly in cases of violation of their citizens' human rights, or when nationals are detained in foreign countries. States from different geographical regions of the world (some of the Latin American, European, and Commonwealth States) have developed a practice of approaching consular protection of citizens in situations of extreme distress as a State obligation.⁶⁵⁹

For instance, with the exodus of citizens from Latin American States to the US, and many of them becoming subject to legal proceedings in the receiving country,⁶⁶⁰ their States of nationality started to adopt a conduct both internally and externally that reveals their commitment to ensuring consular protection to nationals.

On the external plane, a string of executive agreements were concluded between certain Latin American countries and other foreign countries that host large communities of their nationals, for the purpose of ensuring the consular access and communication rights of Latin American countries' nationals in the receiving States. For instance, Mexico concluded a string of Memoranda of Understanding with the US regarding the consular protection of their respective nationals.⁶⁶¹ Starting at the turn of the century, Latin American countries concluded between themselves agreements delegating the power to exercise consular assistance of their nationals to other contracting Latin American countries that were represented *in situ*,⁶⁶² in an attempt to ensure that their nationals would not be left unprotected in case of need. The topic

⁶⁵⁷ For instance, Commonwealth countries, many of the Latin American countries, and France.

⁶⁵⁸ See Canada Manual on Consular Instruction of 2007 and Luke T. Lee, *op.cit.*

⁶⁵⁹ See Luke T. Lee, *op.cit.*, 130-150.

⁶⁶⁰ See more on this in Luke T. Lee, *op.cit.*

⁶⁶¹ See the 1996 Memorandum of Understanding between Mexico and the US regarding consular protection of their nationals; the string of Memoranda of Understanding between the Consular General of Mexico in several different counties in the US State of California and the public authorities of those counties regarding consular assistance in custody proceedings involving Mexican minors.

⁶⁶² These agreements are similar to the type of bi-lateral and multilateral agreements concluded between the European States on, *inter alia*, delegation of consular assistance functions.

of ensuring the nationals' right of access to consular officials also became prominent during international conferences, signalling the importance given to the topic in this region of the world.⁶⁶³ When diplomatic negotiations, the adoption of treaties and local remedies proved to be ineffective for ensuring respect of the rights to consular access and communication of the Latin American countries' nationals, particularly in the US, these countries passed to the next stage, namely that of bringing the US's violations of these international individual's rights before the IACtHR and ICJ.⁶⁶⁴ The *Breard*, *LaGrand* and *Avena* cases, as well as the request for an Advisory Opinion from the IACtHR⁶⁶⁵ by Mexico revealed the strong commitment of the respective applicant States, Paraguay, Germany, and Mexico, and the intervening Latin American States,⁶⁶⁶ towards ensuring consular assistance for their nationals. Following the US denial of these States' right to be notified of the detention of their nationals, to promptly contact them and, ultimately, to provide consular assistance to their co-nationals, these States made recourse to diplomatic protection and lodged international judicial proceedings against the receiving State. The cases of detained nationals abroad, especially in countries where capital punishment is still in force, have revealed the seriousness, commitment and sense of duty with which consular officials approach the exercise of their consular function to protect their co-nationals abroad in such extreme circumstances. 'Mexicans on Death Row', the book written by the consul general of Mexico in Houston, Texas, US, during the famous trials of Ricardo Aldape and the Mexican nationals in the *Avena* case highlights the enormous consular efforts made by the Mexican government to protect its citizens abroad, often at the initiative of the government itself.⁶⁶⁷

⁶⁶³ See the Iberian Meeting of the Community of Brazilians abroad, 2002; for more details, see Trindade, *International Law for Humankind: Towards a New Ius Gentium*, second revised edition, 2013, 494- 497. The trend was mainly due to the increased number of Latin American nationals being detained, tried and sentenced to death without having had access to consular officials of their State of nationality during these legal proceedings.

⁶⁶⁴ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999).

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Seven other Latin American countries intervened in support of Mexico's request for an Advisory Opinion from the IACtHR, thus proving wide support of Mexico's claim. It seemed these States shared the opinion of the important role consular assistance plays for the protection of human rights, as well as for proving a similar conduct towards the exercise of consular assistance to prevent violations of the human rights of their nationals abroad.

⁶⁶⁷ R. Ampudia, *Mexicans on Death Row*, Arte Publica (2010).

These international initiatives⁶⁶⁸ show a clear commitment of the Latin American countries to ensure consular protection of their citizens abroad as a form of preventing violations of the human rights of their nationals.⁶⁶⁹

On the internal plane, several soft law documents were adopted by certain Latin American countries whereby consular assistance programmes were developed.⁶⁷⁰ Mexico's consular assistance programme's main goal was to ensure financial support to Mexican citizens subject to legal proceedings abroad for the purpose of ensuring that their nationals will benefit from adequate legal representation and thus avoid capital punishment or at least achieve commutation to a prison sentence.⁶⁷¹ When learning of cases where their nationals were tried for criminal offences without having first being informed of their right to have the consular posts contacted by the receiving State authorities, Latin American countries have challenged the respective detention measures and criminal sentences before the domestic courts.⁶⁷² Three main objectives have motivated these States in starting suits before courts: first, a desire to suspend or prevent the violations of the consular rights of their nationals, second, to ensure remedy for the injuries suffered by their nationals and their families, and third, to ensure that other nationals will not be subject to similar international wrongful acts in the future.

Some European States have had a similar approach to the exercise of consular and diplomatic protection of citizens abroad. Certain countries confer a constitutional right to

⁶⁶⁸ In addition to the initiatives herein mentioned, Judge Augusto Cançado Trindade mentions several other initiatives of Latin American countries supported also by European States, before the US courts based on the IACtHR AO No. 16/99, aimed at obtaining a reconsideration of the death penalty of their nationals due to the US violations of their Article 36 VCCR consular rights. See Augusto Cançado Trindade, 'The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice' (2007) *Chinese Journal of International Law*, 1.

⁶⁶⁹ Similar actions were adopted also by other States. For instance, Spain adopted a legal act whereby Spanish citizens facing the death penalty abroad would benefit of free legal assistance (see Circular Order AEC/2292/2009 on Spaniards arrested and imprisoned abroad). The Spanish Report in the *CARE Report* refers to five cases in which the individuals benefited of financial help to cover the costs of their legal representation before courts.

⁶⁷⁰ R. Ampudia, *op.cit.*; T. Lee, Chapter three Protection of Nationals in *Consular Law and Practice*, *op.cit.*

⁶⁷¹ See R. Ampudia, *op.cit.*.

⁶⁷² See the case started by Paraguay before the Supreme Court of the US in *Paraguay v Gilmore*, Governor of Virginia, 523 U.S. 371 (1998); the case started by Germany against the US before the Supreme Court of the US, *Federal Republic of Germany v US*, 526 U.S. 111 (1999); see Mexico's Application for Reprieve and Application for Commutation of Death Sentence to Lesser Penalty and Memorandum in Support Thereof at 7, In re Irineo Tristan Montoya, Before the Governor for the State of Texas and the Board of Pardons and Parole (1996): 'By custom and practice the Mexican Consulate actively intervenes as soon as it is notified of a Mexican National's detention and/or arrest. The Consulate meets with the National, informing them of his rights [...] The Consulate also provides a list of Spanish-speaking attorneys. Once a lawyer is appointed or obtained, the Consulate meets with the lawyer and offers to assist in any way possible. Further, the Consulate may attend trial on a daily basis to ensure the National's rights are protected. This assistance is not to be minimized-in fact-it is recognized as imperative and instrumental in avoiding the death penalty.' (p.19)

protection abroad to their citizens and access to courts to seek remedy for violation of this right⁶⁷³, others confer a legal right to protection abroad,⁶⁷⁴ while other European countries, although not expressly prescribing such an individual right,⁶⁷⁵ have, in practice, showed a strong endorsement of a State duty to exercise some sort of consular and diplomatic protection for their nationals facing grave violations of their individual human rights abroad^{676, 677}

Significant changes have occurred also in the practice of the Commonwealth countries, known for treating consular protection as a full discretionary power of the State, where citizens are not entitled to claim such services as a legal right.⁶⁷⁸ Post-2000, changes in the US, Canada, the UK and Australia's conduct of consular assistance services could be observed whereby the protection of citizens in distress abroad, especially those arrested or detained, was approached as an obligation to exercise some sort of consular assistance services. The cases of the terrorist suspects detained in the Guantánamo Bay camp or in the Arab countries have showed increased efforts and willingness of the States of nationality to exercise consular assistance of their nationals. Consular assistance in the form of visits paid by consular officials to detained co-nationals, and keeping close contact with them were common practice of the Commonwealth countries' consular officials in relation to their detained nationals in the 'war on terror'.⁶⁷⁹ In these specific circumstances consular access and assistance was perceived as contributing to the respect of these individuals' human rights.⁶⁸⁰

The above-mentioned domestic legal provisions of a considerable number of States, the practice of governments towards their nationals detained in foreign countries for terrorism related events, the States' practice of using the diplomatic assurances institution⁶⁸¹ are all case

⁶⁷³ See Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania.

⁶⁷⁴ European countries having a legislative provision that is interpreted by the national scholars as providing a right to consular protection: Denmark, Finland, Greece, Slovakia and Slovenia.

⁶⁷⁵ European countries having no legislative provision, which according to the national scholars, is interpreted as including a similar right: Italy, Sweden.

⁶⁷⁶ See the case of Germany, and its efforts for the LaGrand brothers, see the *LaGrand* case.

⁶⁷⁷ For more details on the legal nature of consular and diplomatic protection of individuals within the national systems of the Member States of the European Union, see Chapter 4, Section VII - Mapping national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.

⁶⁷⁸ The definition of consular protection in the Canadian Manual is representative for all Commonwealth countries' approach on consular protection of their citizens. See Canada Manual of Consular Instructions of 2007, para. 20.1.

⁶⁷⁹ These cases will be analysed in more detailed under the Section *Diplomatic Protection as a Duty to Protect: Examining the Formation of a Customary Rule of International Law*.

⁶⁸⁰ M. Warren, 'Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights' (2013) Southern Illinois University Law Journal, 27.

⁶⁸¹ It will be discussed in more details in the following Section on International, regional and domestic jurisprudence.

studies indicating the recognition of some sort of consular protection duty by several States, at least in cases where the human rights of their nationals were at stake.

In a nutshell, it can be observed that there is a growing practice among States of recognising some sort of consular assistance and/or protection duty in regard to their nationals abroad, especially when they are subjected to grave violations of their most fundamental rights, such as prohibition of torture and other ill-treatments, right to life and deprivation of liberty. Even States that do not have enshrined in their national constitutions or legislation an express individual right to protection abroad have, in the last decade, made more balanced choices between preserving their foreign relations interests and ensuring the security and safety of their nationals abroad. Cases such as *Breard*, *LaGrand*, *Diallo* and *Avena* are just some of the famous examples, however they are part of a growing trend following the more general ‘humanization’ phenomenon of consular affairs.

Securing consular protection to nationals abroad is increasingly important for worldwide States, which explains the growing State practice of concluding consular cooperation agreements with other States from the same geographical region or similar culture or legal systems, which commonly include a provision on sharing the function of consular assistance of each other’s citizens in third countries. Latin American, the Commonwealth and various European States have agreed to delegate the function of consular assistance and protection of their citizens to non-nationality Contracting States in third countries, where they are not represented, for the purpose of ensuring that their citizens are not left unprotected in third countries.⁶⁸² The provisions of these bilateral or multilateral consular treaties offer an important but often overlooked source of authority on the contemporary understanding of consular assistance and protection. Although States have no express treaty duty to provide consular protection to their citizens abroad and are reluctant to

⁶⁸² See, for instance, the Accord entre la Bolivie, la Colombie, l’Equateur, le Pérou et le Venezuela relative aux attributions des consuls respectifs dans chacune des Républiques contractantes of July 1911. Nordic countries have long-standing consular cooperation going back to 1954, see the *CARE Report*. Consular services for Libyans were provided by different States in different parts of the world, for instance: Jordan in Spain, by Lebanon in France and Ghana, by Iraq in Iran and Pakistan, and by the UK in other countries. The UK may provide consular services for citizens of some Commonwealth countries: Ghanaians, Canadians and Sri Lankans in the absence of consulates of those States in third countries. Australia began issuing visas for New Zealanders in Argentina in 1984, and providing services for Papua New Guineans in 1975. For more recent examples of consular sharing agreements, see Art. 20(2)(c) TFEU for European Union countries, and similar agreements, although not benefiting of the specific EU legal guarantees, procedure and institutional architecture, were concluded among the ASEAN and Andean countries. See more details in Lee & Quigley, *Consular Law and Practice*, *op.cit.* 62ff; G. Haynal, M. Welsh, L. Century and S. Tyle, ‘The Consular Function in the 21st Century’, A Report for Foreign Affairs and International Trade, Canada, 27 March 2013, 1-12ff, available online at <http://munkschool.utoronto.ca/wp-content/uploads/2013/06/The-Consular-Function-in-the-21st-Century-.pdf> ; *CARE Report*, Section 2.1.2. Other multilateral and bilateral agreements on mutual cooperation and assistance on consular protection.

include such an express duty in international treaty law, they have, in practice, changed their conduct towards consular access and protection under the impact of international human rights law, the media and national society pressures. The increasing acceptance by States of an obligation to provide consular assistance and protection of non-nationals in exchange of the guarantee that another Contracting State will secure a similar consular service to their own nationals indicate the increasing implicit recognition by States of a duty to provide consular assistance to citizens in distress abroad, and the changing classical international conception of consular protection as prerogative of the State of nationality. Other actors than the State of nationality are exercising consular assistance and protection functions for individuals abroad. Non-nationality States seem to be a common presence on the international scene. The enlargement of the circle of actors exercising consular protection functions signals that traditional international norms on consular assistance and protection of individuals are relative norms, from which States are increasingly derogating in favour of safeguarding the human rights of their nationals abroad, without strong opposition from third countries.

4. The position of international, regional and national courts on the individual's right to consular protection

Having explored the conduct of the legislature and the executive of States from around the globe on the consular protection of their national abroad, this section explores the position taken by courts – international, regional and domestic – on the legal nature of consular protection of nationals in foreign countries. Have courts admitted complaints from nationals regarding the executive's refusal, inadequate or ineffective exercise of consular assistance? Have courts recognised some sort of consular assistance or protection rights to the citizen against his State of nationality or to other individuals against a non-nationality State? These are some of the questions that this section seeks to answer.

Under the classical international conception of consular protection, the State's decisions on the exercise of consular protection was considered a sovereign State prerogative that is non-justiciable.⁶⁸³ This conception corresponds to a time where travelling, or living abroad were not so common as today, and when international human rights laws were not yet developed.

The increase in travelling and living abroad of nationals has led to an increase of individual claims being lodged before courts from different jurisdictions and legal orders

⁶⁸³ Lee, *op.cit.*, 125; Victor M. Uribe, *op.cit.*, 375.

complaining about the sending States' refusal of, or inadequate or ineffective provision of consular protection. The development of international human rights law and its permeation throughout the different fields of public international law and domestic law has also impacted on the courts' approach towards reviewing the executive's conduct in both consular and diplomatic protection claims.⁶⁸⁴ International, regional and domestic courts have widely agreed that this aspect of the executive's competence can no longer be left completely outside the jurisdiction of courts.⁶⁸⁵ International and domestic jurisprudence has thus developed on the legal nature of consular assistance and protection and the consular rights and duties of States towards nationals and other individuals. Two main string of cases can be identified based on the actors in dispute and the claims they have against each other. The first string of cases addressed the international individual consular rights of aliens sentenced to the death penalty or facing a death sentence in the US, who were persistently denied their Art. 36 VCCR based consular rights by the US public authorities. A second string of cases addressed the international, but mostly domestic consular assistance rights of aliens detained in the 'war on terror', who felt their State of nationality or of residence did not do enough in terms of consular assistance and protection for the purpose of securing their human rights allegedly violated abroad.⁶⁸⁶ Both strings of cases have attracted vast scholarly attention,⁶⁸⁷ due to their potential of establishing a ground-breaking shift in the legal definition of the international institutions of consular protection and assistance of individuals. The main questions addressed

⁶⁸⁴ See, for instance, the *Abbasi* judgment of the UK Court of Appeal, which signals a significant shift in the UK courts deference towards the executive conduct of foreign affairs, and consular and diplomatic protection actions as part of the executive's prerogative over the conduct of foreign affairs.

⁶⁸⁵ See M. Attanasio, C. Malara, S.F. Nicolosi, 'Il 'judicial review' del rifiuto statale di agire in protezione diplomatica', in L. Panella (ed.), *La Protezione Diplomatica: Sviluppi e Prospettive*, Giappichelli (2008).

⁶⁸⁶ Additionally, the European Commission of Human Rights and the ECtHR have assessed the topic of a State duty to exercise consular protection in few cases, and recently domestic courts have had to review the policy of their Government regarding consular financial assistance to their citizens facing the death penalty abroad. These cases will be assessed towards the end of this sub-section.

⁶⁸⁷ William J. Aceves, 'Individual rights under Vienna Convention on Consular Relations-duty to inform detained foreign nationals of right to seek consular assistance-protections against arbitrary deprivation of life advisory jurisdiction of Inter-American Court of Human Rights', (2000) *American Journal of International law*, 560; Christina M. Cerna, 'Impact on the Right to Consular Notification', in Kamminga and Scheinin (eds), *The Impact on the Law of Diplomatic Protection*, Oxford University Press (2009); Riccardo P. Mazzeschi, 'Impact on the Law of Diplomatic Protection', in Kamminga and Scheinin (eds), *The Impact on the Law of Diplomatic Protection*, Oxford University Press (2009); M. Mennecke, 'Towards the Humanization of the Vienna Convention of Consular Rights — The LaGrand Case before the International Court of Justice', (2001) *German Yearbook of International Law*; N. Klein, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of Its Citizens Abroad', (2011) *Melbourne University Law Review*; for a more detailed analysis of the *Beard* case, see Michael K. Addo and Malcolm D. Evans, 'Vienna Convention on Consular Relations (Paraguay v. United States of America) ('Breard') and Lagrand (Germany v. United States of America), Applications for Provisional Measures', (1999) *ICLQ*, 673ff; Monica F. Tinta, 'Due Process and the Right to Life in the Context of the VCCR: Arguing the LaGrand case', (2001) *EJIL*, 363; M. Warren, 'Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights' (2013) *Southern Illinois University Law Journal*, 27.

by this international and domestic jurisprudence sought to establish whether individuals enjoy first, under international law, and if negative, then under domestic law, individual consular rights enforceable against the receiving and sending States. The VCCR based cases dealt with the duty of the receiving State to inform the alien of his right to consular notification and access, while the ‘war on terror’ second string of cases⁶⁸⁸ assessed the State duty to exercise consular protection related services to its citizens, long-term residents and refugees detained abroad.

The widespread denial of timely consular access and communication to foreigners detained in the US and facing a death penalty, in plain violation of the VCCR, has led to a wealth of cases submitted by the States of nationality of these individuals against the receiving State – US.⁶⁸⁹ The international, regional and domestic courts, as well as academic literature have mainly focused on the rights conferred by Article 36 VCCR to foreign nationals subject to capital punishment in the United States.⁶⁹⁰ It is settled case law that rights of the national to consular access and communication with the consular officials of their sending State are individual rights guaranteed by Article 36 (1)(b) VCCR, which oblige the authorities of a receiving State to inform a foreign national detainee about his rights to notify without delay the consular post of his state of nationality about the arrest.⁶⁹¹ This duty has in practice often been ignored and as a consequence many arrested individuals in various States around the globe have not been able to receive support from their consular posts. This has led to a string of cases before national and international courts raising the question of the legal consequences of such omissions, and of the appropriate remedy for the detained or sentenced individuals.

The literature⁶⁹² and jurisprudence, both national⁶⁹³ and international⁶⁹⁴, have so far widely agreed on the individual character of the right to consular notification and access conferred by Article 36(1)(b) VCCR.

⁶⁸⁸ These cases are dealt in more detail in the following section.

⁶⁸⁹ All these cases arouse, mainly, out of the same factual and legal background, namely the detention, trial and sentencing to the capital punishment of foreigners in the US, without the US public authorities having complied with their international obligation to inform them of their right to have the consulate notified of their detention without delay, and freely communicate with them as required under Art. 36(1) VCCR.

⁶⁹⁰ See, for example, M. Warren, ‘Timeframes for Consular Notification and Access: Determining Contemporary State Practice’, (2009) Human Rights Research; J. Quigley, William J. Aceves and S. Adele Shank, *op.cit.*; and Barbara H. Bean, ‘Guide to Research on Vienna Convention on Consular Relations Notification Requirements’, NYU, 2007, available online at http://travel.state.gov/content/dam/travel/CNAttrainingresources/CNAManual_Feb2014.pdf

⁶⁹¹ See the *LaGrand* and *Avena* judgments of the ICJ.

⁶⁹² M. J. Kadish, ‘Article 36 of the Vienna Convention on Consular Relations: A search for the right to consul’, (1996–1997) Mich. J. Int’l. L., 565; M. Mennecke, ‘Towards the Humanization of the Vienna Convention of Consular Rights – The *LaGrand* Case before the International Court of Justice’, (2001) GYIL, 430; M.

Certain regional courts⁶⁹⁵ went even further by recognising a human right character to the international individual right to consular notification and access. The difference between the natures of an ‘individual’ *versus* ‘human’ right is not simply an issue of semantics. The label of ‘human right’ comes with the benefit of a self-standing right of the injured individual

Mennecke and C. Tams, ‘LaGrand Case (Germany v. United States of America)’, (2002) ICLQ, 449; C. Tams, ‘Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ’s Judgement in the LaGrand Case’, (2002) EJIL, 257; T. Stephens, ‘The LaGrand Case (Federal Republic of Germany v. United States of America). The Right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for What Purpose?’, (2002) Melbourne Journal of International Law, 143; S. Baker, ‘Germany v. United States in the International Court of Justice: An International Battle Over the Interpretation of Article Thirty-six of the Vienna Convention on Consular Relations and Provisional Measures Orders’, (2001-2002) Ga. J. Int’l & Comp. L., 277; J. Fitzpatrick, ‘Symposium on the LaGrand Case: The Unreality of International Law in the United States and the LaGrand Case’, (2002) Yale J. Int’l L., 427; M.J. Kadish, ‘Article 36 of the Vienna Convention on Consular Relations: The International Court of Justice in *Mexico v. United States (Avena)* speaks emphatically to the Supreme Court of the United States about fundamental nature of the right to consul’, (2004–2005) Geo. J. Int’l L., 1; N. Klein, ‘Avena and Other Mexican Nationals (Mexico v. United States of America): Case notes’, (2004) Austl. Int’l L.J., 143.

⁶⁹³ Certain national courts considered the non-notification of rights under Article 36 VCCR a violation of an individual right: the German Constitutional Court ruled that non-compliance with Article 36 VCCR, as established in international case law (see the ICJ *LaGrand* and *Avena* case, discussed *infra*) constituted a violation of the complainants’ constitutional right to a fair trial. German Consular Notification Case, Joint constitutional complaint, Bundesverfassungsgericht, 2 BvR 2115/01, 19 September 2006, ILDC 668 (DE 2006). See also: Bundesgerichtshof, 5th Zivilsenat, Beschluss, 12 May 2011, Aktenzeichen: V ZB 23/11; Bundesgerichtshof, 5th Zivilsenat, Beschluss, 18 November 2010, Aktenzeichen: V ZB 165/10, and Bundesverfassungsgericht, 2nd Senat, 2nd Kammer, Stattgebender Kammerbeschluss, 8 July 2010, Aktenzeichen: 2 BvR 2485/07, 2 BvR 2513/07, 2 BvR 2548/07 available at <www.juris.de>. In the Netherlands, courts upheld a similar reasoning in e.g. Court of First Instance’s-Gravenhage, AWB 08/34834, 9 June 2006. The Dutch Courts however did not always recognise an individual right based on Art. 36 VCCR; see Court of First Instance Amsterdam, AWB 06/918, 2 June 2006 and Court of First Instance Amsterdam, AWB 06/742, 7 October 2008, all available at <www.rechtspraak.nl>. In certain cases, the national courts did not find any violation of the rights of defence because of an Art. 36 VCCR violation; see Court of Cassation (2nd Chamber.), No. P.00.0788.N, 13 juin 2000 (D.), available at <www.cass.be> (Belgium). In Canada, the statements given by a detainee were considered admissible, even though there was a clear violation of Art. 36 VCCR, Ontario Supreme Court, *R. v. Partak*, 2001 CanLII 28411 (ON SC), 31 October 2001, available at <<http://www.canlii.org/en/on/onsc/doc/2001/2001canlii28411/2001canlii28411.html>>. Courts in the United States have proven to be even more reluctant to reverse convictions based on Art. 36 violations. District Court for the Western District of North Carolina (USA), *Garcia v. United States*, Decision on motion to vacate, 16 October 2008, ILDC 1216 (US 2008), para. 3; Court of Appeals for the Ninth Circuit (USA), *Cornejo v County of San Diego and others*, Appeal Judgment, 504 F3d 853 (9th Cir 2007), 24 September 2007, ILDC 1080 (US 2007). In *Sanchez-Llamas v. Oregon* (2006), it was assumed, without deciding, that the VCCR created rights that were judicially enforceable by individuals (para. 18). The US Supreme Court nevertheless decided that evidence did not have to be excluded solely based on the fact it was obtained in violation of Article 36 of the VCCR: United States Supreme Court, *Sánchez-Llamas v. Oregon*, 548 U.S. 331 (2006), 28 June 2006 (United States of America), ILDC 697.

⁶⁹⁴ IACtHR; the ICJ on the other hand, although asked to pronounce on the arguably human rights character of the individual right provided by Art. 36(1)(b) VCCR, it avoided to answer the question, see the *LaGrand* and *Avena* cases.

⁶⁹⁵ IACtHR Advisory Opinion No. 16/1999; Germany and Mexico have asked the ICJ to pronounce on the human right nature of the right to consular notification and access, but the ICJ, unlike the IACtHR, refused to address the question on the basis of the lack of impact of the answer to the solution of the case (*LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12).

to his/her own reparation.⁶⁹⁶ However modern these rights are, compared to the traditional conception of consular protection, they establish a right which the national does not possess vis-à-vis the State of his nationality, but towards the receiving State. The Vienna Convention on Consular Relations does not establish an obligation on the part of the State of nationality to provide consular assistance starting from the moment it has been notified by the receiving State of the detention to one of its nationals. The fact that part of the international jurisprudence has approached the individual rights to consular notification and access provided by Art. 36(1)(b) VCCR as closely interlinked with the human rights to due process (Art. 14 IACHR), prohibition of arbitrary deprivation of liberty (Art. 6 ICCPR), private life (Art. 8 ECHR)⁶⁹⁷ and life, does not lead to the establishment of an individual right to consular protection enforceable against the State of nationality. The bold Advisory Opinion No. 16/99 of the IACtHR and the *Breard*, *LaGrand*, and *Avena* judgments of the ICJ assessing the nature of rights enshrined in Article 36 VCCR do not address the sending State of nationality or of residence duties towards their nationals or residents abroad, but only the consular rights and duties between the alien and the receiving State and between the sending and receiving States. Therefore the judgments of the ICJ and IACtHR are of relevance for this chapter and section only to the extent they can reveal a change in the States of nationality practice to exercise consular protection of their nationals. The position of most Latin American and EU countries, made evident during the memorials and oral hearings before international courts, can indicate a change in the *opinio juris* of these States towards the legal nature of consular protection of individuals abroad. Before the IACtHR and the ICJ, Mexico, Paraguay, Germany and the intervening States, emphasised the important role of providing consular assistance to their nationals, which arguably could have prevented the fatal end of their judicial trial. It was argued by the Applicant States that, had they been able to provide prompt consular assistance to their nationals, for instance to explain to them (in a language they understand) the differences in legal systems, the specificities of the judicial trial and the severe sentence that they face, and had their nationals enjoyed the legal representation of a lawyer with experience in similar cases, which could have been secured with the help of the consulate's logistic and financial support, the sentence of the nationals would perhaps have

⁶⁹⁶ See C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, 3rd ed. (2014), 284-5.

⁶⁹⁷ See *Silver and Others v UK*, Appl. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7113/75, 7136/75, Judgment of the ECtHR of 25 March 1983, para.104. In this case Austrian prison authorities delayed three weeks the forwarding of an US national letter to a US consulate and the VCCR individual right was analysed as a situation of a possible violation of the right to privacy as guaranteed under Art. 8 ECHR.

been less severe. The case law of the IACtHR⁶⁹⁸ and of the ICJ related to the interpretation and application of Art. 36(1) VCCR eloquently shows that consular assistance is an important guarantee for several human rights, both procedural and substantive ones, and that States would go to great lengths to secure consular assistance to their nationals facing the death penalty abroad. Consular assistance provides a means for the accused to defend himself, and this has an effect on the defendant's other procedural rights, especially the rights connected with due process management, and ultimately, as shown by the *Avena* case, also a decisive impact on the outcome of the case,⁶⁹⁹ which is probably the reason why the conduct of the applicant States resemble an exercise of a State duty.

It is important to emphasise that neither the IACtHR, nor the ICJ changed the State right legal nature of the consular assistance of the individuals by the State of nationality. Instead, they referred to it as the right of the State of nationality to assist their nationals by way of an official consular intervention. These Courts recognised only an individual right to have access to consular officials for the purpose of seeking consular assistance.⁷⁰⁰

Another field that might provide additional jurisprudential evidence concerning the State obligation to provide consular protection to nationals and non-national residents abroad is the institution of diplomatic assurances. The development of international human rights has led to the establishment of the institution of diplomatic assurances, particularly in the context of extradition, expulsion or other forms of removals of individuals from the territory of the receiving State to the requesting State, as a form of safeguarding the right of the individual not to be subjected to torture and other ill-treatments.⁷⁰¹ Obtaining diplomatic assurances '*is common in death penalty cases, but assurances are also sought if the requested State has concerns about the fairness of judicial proceedings in the requesting State, or if there are fears that extradition may expose the wanted person to a risk of being subjected to torture or other forms of ill-treatment*'.⁷⁰² Diplomatic assurances are commonly sought when a sending

⁶⁹⁸ Application to the Inter-American Court of Human Rights in the Case of Jesús Tranquilino Vélez Lóor (Case 12.581) against the Republic of Panama; Case of *Castillo Petruzzi et al. v. Peru*, Judgment of May 30, 1999; See more details on the case in H. Bicudo, *The Inter-American Commission on Human Rights and the Process of Democratization in Peru*, (2002) Human Rights Brief, 18.

⁶⁹⁹ Especially in cases of foreigners convicted to the death penalty.

⁷⁰⁰ See the Inter-American Court of Human Rights, Advisory Opinion OC-16/99, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law', para. 80.

⁷⁰¹ According to the UNHCR, diplomatic assurances can be defined as: '*The term "diplomatic assurances", as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.*' See the UNHCR Note on Diplomatic Assurances and International Refugee Law, available online at <http://www.refworld.org/pdfid/44dc81164.pdf>

⁷⁰² 2006 UNHCR Note, available at <http://www.refworld.org/pdfid/44dc81164.pdf>

State seeks to obtain guarantees with regard to the proper treatment of a person by the State from which he will be expelled.

The institution of diplomatic assurances has thus a preventive nature, meant to safeguard the individual from any injury to his/her absolute fundamental right of not being subject to torture or inhuman or degrading treatment by the State of residence of the individual. It is a sort of compromise institution, meant to strike a balance between two competing community values: protection of human rights, on the one hand, and protection of the national/international security and the elementary principle of international law of equal state sovereignty.

It is precisely this preventive nature, and the fact that diplomatic assurances involves the diplomatic channels of two States, of which, very often, one is the State of nationality of the individual, which determines the nature of diplomatic assurances as an institution falling under the consular protection functions of the State. The fact that an actual international wrongful act has not yet occurred pre-empts the qualification of the diplomatic assurances institution as a diplomatic protection form of action of the State.

Although the institution of diplomatic assurances is not yet generally perceived as a legally binding international obligation on States, there is wide State practice, stemming from jurisprudential evidence, reflecting the approach of States towards this institution as fulfilling a sort of obligation to uphold the prohibition of torture or other mistreatments.⁷⁰³ The requesting States, in an attempt to ensure respect of their commitments under international human rights law, commonly ask for diplomatic assurances from the State of transfer of the individual that the latter will not be subjected to violation of fundamental human rights. It is thus often perceived as a first step in assessing the risk the individual might face if transferred to the requesting State. It seems to be perceived as forming an integral part of the positive obligations incumbent upon States under international human rights obligations.

During its existence, the European Commission of Human Rights had to review several claims concerning the duties of consular and diplomatic authorities to intervene on behalf of their co-nationals in diverse situations.⁷⁰⁴ One such case, is the famous case *X v*

⁷⁰³ *Chahal v United Kingdom* (Appl. No. 22414/93, Judgment of 15 November 1996); *Saadi v Italy* (Appl. No. 37201/06), Judgment 28 February 2008); *Abu Qatada v UK* (Appl. No. 8139/09 Judgment of 17 January 2012); *Manickavasagam Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada* (Suresh v Canada), 2002, SCC 1, File No. 27790, January 11, 2002.

⁷⁰⁴ For more details of these cases, please see K. da Costa, *The Extraterritorial Application of Several Human Rights Treaties*, Martinus Nijhoff Publishers (2013), 96-99.

UK⁷⁰⁵, where a British mother complained that the British consul in Amman, Jordan, helped the father to legitimise his custody over the child, in spite of the mother's legal custody having been granted by the UK courts and the claims submitted in Jordan against the father. Upon examination of the facts, the Commission found that the British consul complied with its functions, namely to insert the name of the child on the passport of the mother, and consequently rejected the claim as inadmissible, without considering the aspect of the help the consul should have given to the British mother in retrieving the child and securing his return to her. In this particular case, and other similar ones, the Commission, although recognising that '*diplomatic and consular representatives [...] perform certain duties with regard to [nationals of a contracting state abroad] which may, in certain circumstances, make that country liable in respect of the Convention*', has never found a violation of one of these duties *vis-à-vis* the nationals.

Domestic jurisprudence also signals a shift in the approach of the exercise of consular protection of individuals. Based on the consular guides and practice of the States, more and more domestic court recognise a State's duty to provide consular protection to their nationals abroad. For instance, in a 2004 judgment, the Federal Court of Canada held that the Canadian Consular Guide as well as previous actions of the Canadian Government have created '*a legitimate and reasonable expectation that a Canadian citizen detained abroad will receive many of the services*' which a citizen has requested. '*Indeed, Canadians abroad would be surprised, if not shocked, to learn that the provision of consular services in an individual case is left to the complete and unreviewable discretion of the Minister.*'⁷⁰⁶ The US Supreme Court held that the issuance of a passport by the US authorities is establishing upon the Government an obligation to protect.⁷⁰⁷

A ground-breaking judgment for the consular assistance rights of the individual was delivered by the UK Supreme Court on 16 July 2014.⁷⁰⁸ The main issue of debate was the legality of the UK general consular assistance policy of refusing to grant financial help to nationals for legal representation purposes. Ms Sandiford is a British national sentenced to capital punishment by the Indonesian courts for the offence of drug trafficking. Following her

⁷⁰⁵ *X v UK*, European Commission of Human Rights, Appl. No. 7547/76, UK, decision of 15 December 1977, 12 DR (1977) 73.

⁷⁰⁶ See Federal Court of Canada, *Khadr v Canada* (Minister of Foreign Affairs) 2004, F.C. 1145, 18 August 2004.

⁷⁰⁷ See *US v Laub*, 385 U.S. 475, 481 (1966): '*an US passport recognises the right of the bearer to protection and good office of American diplomat and consular officers.*'

⁷⁰⁸ *R (on the application of Sandiford) (Appellant) v The Secretary of State for Foreign and Commonwealth Affairs* (Respondent) [2014] UKSC 44, Judgment of 16 July 2014 [hereinafter *Sandiford* case]

arrest, she cooperated with the police, enabling them to arrest and convict four Indonesian nationals involved in a drug cartel, which determined the prosecutor to change his request, in appeal, from the death sentence to a custodial one. As Ms Sandiford did not speak the local language and did not possess the financial means to hire a specialised lawyer who would defend her case before the appeal court, she thus sought financial support from the UK Government to pay the costs for her legal representation, but was refused this consular assistance service. The Government provided an alternative consular service, namely it facilitated the meeting between Ms Sandiford and an experienced lawyer working on a *pro bono* basis. Unfortunately, as the legal proceedings went on, her lawyer was no longer able to represent her at a certain point in time. Throughout the legal proceedings, the Government's representatives submitted memorials and supportive amicus curiae briefings before the Indonesian courts. It refused, however, to financially contribute to the costs of the accused's legal representation by a new lawyer based on the 'Support for British Nationals Abroad: A Guide' policy.⁷⁰⁹ Before resorting to the UK Courts, the appellant's last resort to have her sentence commuted was to apply to the Supreme Court of Indonesia to ask for the reopening of her case or to apply to the President for clemency. Both of these actions required money, which, again, she did not possess.

The specific circumstances of her case, namely that she could not afford to pay for legal representation, and no such assistance was available to her in Indonesia, the irreversible sentence she was facing, and the expedient nature of the Indonesian legal proceedings and judgments which did not take into account the mitigating circumstances of her case, were invoked by Ms Sandiford as reasons that might have justified a change of the UK alleged general policy of refusing consular assistance in the form of financial support for legal representation.⁷¹⁰

Ms Sandiford based her claim before the Supreme Court of the UK on Art. 6(3) ECHR and domestic law. The UK Supreme Court rejected the application in relation to both grounds. The application of the ECHR was rejected on the ground of not fulfilling the conditions for the exceptional application of extra-territorial jurisdiction in cases of 'acts of diplomatic or

⁷⁰⁹ Other EU countries have a policy of providing financial assistance, or ensuring free legal assistance to their citizens facing a death penalty abroad, e.g. Spain. See the National Report on Spain in the *CARE Report*.

⁷¹⁰ It has to be noted that other countries organised financial programmes meant to cover legal representation of their citizens detained abroad, giving priority to those risking the death sentence. Mexico is one of the most famous examples of such countries, explained by the high number of Mexican citizens detained in the US and sentenced to the death penalty.

consular agents' when they 'exert authority and control over others'.⁷¹¹) As to the Government requirements imposed by domestic law, the Court first established whether it has jurisdiction to review a prerogative power of the State, which would, in principle, confer absolute discretionary decision-making to the government. Invoking the *Abbasi* judgment, the Court held that it has jurisdiction to review the exercise of the State's prerogatives on the basis of the limitations the State itself placed by the published policy and practice.⁷¹²

Having assessed the policy of the Government and the facts of the case, the Supreme Court rejected the appeal based on considerations that the Government had provided reasonable assistance to the applicant.⁷¹³ The fact that the money was in the end provided by the family of the applicant also played a role in the Court reasoning, pointing out that the financial help of the Government was not that urgent and indispensable.

The ground-breaking part is only now to come. Even if the Court rejected the appeal, it continued by making a recommended suggestion to the Secretary of State to urgently review the application of its general policy in light of the precarious situation of Ms Sandiford and the negative record of human rights of the Indonesian courts.⁷¹⁴ This is the first judgment where a UK court has made a recommendation for a precise consular assistance measure to be considered by the Secretary of State. So far, although accepting jurisdiction over consular/diplomatic protection claims of the individuals against the Government, the UK court has limited the judicial review to assessing whether the executive decisions were arbitrary or irrational, expressly excluding the possibility of indicating any precise measures to the Government, as this would imply a substitution of the executive with the judiciary in foreign affairs matters, and lead to a breach of the separation of powers principle.⁷¹⁵ However, in this case, the court limited itself to the review of the challenged consular service, namely the financial help, without indicating other alternative or additional consular services to the

⁷¹¹ *Sandiford* case, para. 24.

⁷¹² 'In so far as reliance is placed on legitimate expectation derived from established published policy or established practice, it is to the policy or practice that one must look for the limits, rigid or flexible, of the commitment so made, and of any enforceable rights derived from.' (para. 62 of the *Abbasi* Judgment)

⁷¹³ The Government was held to have responded 'with appropriate urgency to the wholly unexpected death sentence. They were able to put the appellant in contact with an experienced local lawyer who was willing to conduct the appeal on an expenses only basis.' (para. 64)

⁷¹⁴ '[...] the Secretary of State ought now to revisit the question whether the policy should be broadened or an exception made in order to accommodate the particular case of Mrs Sandiford in the light of the fresh information about the course of the proceedings in Indonesia. But that is not because the Secretary of State has a duty to broaden his policy to make an exception. It is because he has already undertaken a review of that policy on the information available to him at the time, and because consistency and rationality require him not to treat that review as closed at a time when relevant further information is still becoming available which might alter his assessment.' (para. 85)

⁷¹⁵ See the *Abbasi* judgment of the UK Court of Appeal.

executive. Furthermore, the Court was very careful in its wording not to establish a legal binding obligation on the part of the Government to confer financial help, but suggested the Government to re-consider its general policy in light of the exceptional case of Ms Sandiford, who was subject to an irreversible sentence after a grave violation of her human rights had been committed abroad.

5. Conclusion

A particular State practice can become a customary international law if it is repeated over a long period of time and is 'uniform, extensive and representative'.⁷¹⁶ The precise number of States that have to endorse a certain practice in order to form an international customary rule is not precisely established under public international law. Article 38(1)(b) of the ICJ Statute refers simply to a general practice. It is well established that unlike international treaties, customary rules do not require universal consent for acquiring legally binding effect, however the traditional norm on formation of international customary rules still imposes a high number of States' recognition, not universally, but at least 'an overwhelming majority of States'.⁷¹⁷ In the *North Sea Continental Shelf* case, Judge Lachs argued that the 'overwhelming majority' standard has been replaced by a lower threshold, namely 'a great number of States',⁷¹⁸ as long as those States that have participated in the establishment of a particular conduct as an international customary rule represent different political, economic and legal systems and their participation was determined by States' interests. Judge Lachs and later also Judge Higgins⁷¹⁹ have persuasively argued that the different social and scientific characteristics of the present society militate in favour of recognising the replacement of the traditional norm of public international law that an 'overwhelming if not almost universal consent of States' is needed for the formation of an international customary rule with a more updated and refined norm, accepting a smaller number of necessary States as long as they have explicitly or implicitly recognised the conduct to be proclaimed as customary norm. In spite of Judge Lachs' proposal, the ICJ maintains its traditional approach based on the interpretation of

⁷¹⁶ ILA, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, Principle 4, 734.

⁷¹⁷ ICJ, Case *Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), judgment of 27 June 1986; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 226; J. Tasioulas, 'Customary international law and the Quest for Global Justice' in Perreau-Saussine, Amanda and Murphy, James B (eds), *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives*, Cambridge University Press (2007).

⁷¹⁸ At 229.

⁷¹⁹ R. Higgins, *Theories and Themes of Public International Law*, *op.cit.*, 112-3.

international law as an inter-States consensual relation, whereby an ‘overwhelming majority’, if not all members of the international community, need to consent to a certain conduct in order to ascertain the establishment of an international customary rule.⁷²⁰

The opinion put forward in this thesis is that State practice on consular protection of nationals has not yet reached the required public international ‘overwhelming majority’ threshold. However, there is a widespread State practice, whereby consular assistance to citizens located in areas affected by disasters, or facing a death sentence, are treated as cases wherein the State needs to secure a certain consular assistance or protection to the citizen. Additionally, a practice of providing consular protection to nationals whose most basic human rights are in danger abroad is gradually developing. Nonetheless, it would be overly optimistic at this point to argue that such practice reflects a universal consensus of opinions among the States that creates an international customary individual right to consular protection abroad.

The situation is a bit more nuanced at the regional level. European countries have concluded between them numerous bilateral, or multilateral consular and diplomatic cooperation arrangements for the purpose of ensuring the widest possible representation of their foreign interests and protection of their citizens in the world, long before the creation of the EU, or their accession to the EU.⁷²¹ European countries with long-standing cultural and diplomatic ties, such as the Benelux countries, some of the Central and Eastern European countries, and the Baltic States,⁷²² have concluded regional agreements recognising among them a State duty to ensure consular assistance of the nationals of the other Contracting States that were not represented in a particular foreign country. Starting from 1992, the Maastricht Treaty has united this fragmented consular and diplomatic cooperation framework under the

⁷²⁰ See *Continental Shelf Tunisia v Libya*, at 38, and *Continental Shelf Libya v Malta*.

⁷²¹ See, *inter alia*, the Helsinki Treaty, concluded on 23 March 1962 between the Scandinavian countries (Denmark, Sweden, Finland, Iceland and Norway). For more detailed information on this type of regional agreements between the EU countries, see Chapter three, section 2.1.2 of the *CARE Report*.

⁷²² The Baltic cooperation is dedicated entirely to issues of consular assistance. For example, Article 3 of the Baltic Agreement reiterates the cases set out in Article 5(1) of Decision 95/553/EC and adds a new consular function in Article 3(g) – [*the consular and diplomatic officials of the Contracting Parties*] acting as notary in capacities and performing certain functions of an administrative nature, in conformity with the laws and regulations of the receiving State. See also See, *inter alia*, the Helsinki Convention on Nordic Co-operation (hereinafter the Helsinki Treaty), concluded on 23rd of March 1962 between the Scandinavian countries (Denmark, Sweden, Finland, Iceland and Norway), or the Agreement on Consular Assistance and Cooperation signed between the three Baltic States of Estonia, Latvia and Lithuania, before they acceded to the EU on 5 February 1999. For the entire list of bilateral and regional agreements between the European countries on consular cooperation, see Chapter Three, Section 2.1.2 of the *CARE Report*, available at: <http://www.careproject.eu> (accessed February 2013).

ambit of the EU, and imposed on all Member States the obligation to provide equal consular protection of all Union citizens who are unrepresented in third countries.

It could be argued that the time and space requirements necessary for the formation of a regional customary international rule recognising to nationals an individual right to equal consular protection abroad have been fulfilled within the current EU's territory. Such a regional customary international norm could represent a stepping-stone for the formation of a general international customary norm on ensuring a certain consular protection of citizens abroad.

There is a growing pressure exerted by citizens, NGOs, media, and scholars on national governments to assume a duty to provide consular protection to nationals abroad in certain critical circumstances, such as disasters or grave violations of human rights.⁷²³ It seems that it is only a matter of time until a general customary international norm recognising a limited State duty to provide consular protection to its nationals abroad, at least when facing grave violations of human rights, will be recognised. Until then, although international law reserves consular protection to the State of nationality decision-making, current practice admits new actors with consular protection functions, such as the non-nationality States which can increasingly perform this function on the basis of the growing number of consular cooperation international treaties.

V. The legal nature of Diplomatic Protection: State's right, individual or human right?

1. Introduction - Diplomatic Protection as a Duty to Protect: Examining the Formation of a Customary Rule of International Law

The public international legal institution of diplomatic protection has traditionally been defined as an exclusive State right, over which States can discretionarily decide whether to exercise it, for the benefit of which natural person, when, and how.⁷²⁴ Therefore all the aspects related to the exercise of diplomatic protection of individuals have been traditionally

⁷²³ Maaike Okano-Heijmans, 'Change in Consular Assistance and the Emergence of Consular Diplomacy', in J. Melissen and Ana M. Fernandez (eds.), *Consular Affairs and Diplomacy*, Leiden: Martinus Nijhoff (2011).

⁷²⁴ *Panevezys-Saldutiskis Railway Case*, (1939) PCIJ Series A/B, No. 76 16, 17; *Mavrommatis Palestine Concessions Case* (1924), PCIJ Series A No. 2; the *Nottebohm Case*, 1955 ICJ Reports, 24; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ 1970; Borchard, *The Diplomatic Protection of Citizens Abroad*, op.cit.; Joseph, *Nationality and Diplomatic Protection—The Commonwealth of Nations* Leyden: A. W. Sijthoff (1969), 1.

conceived as falling entirely under the exclusive and discretionary power of the State, more precisely, the State of nationality. This has become the classical conception of diplomatic protection portrayed as a State-centric mechanism of international law.⁷²⁵ However, at the basis of this State's right to exercise diplomatic protection are individual rights, namely those of its nationals, who were breached by a foreign state. However, they have not acquired a place within the classical general international customary norm which defines diplomatic protection.⁷²⁶ This definition emerged in a time when individuals did not exist on the international plane, and their protection had to be ensured via a legal fictional transfer of the individual's pleas against a foreign State to an international actor that was recognised as having a place in international relations, namely the State of nationality of the individual. The legal fiction of diplomatic protection was thus created as no more than 'a means to an end'.⁷²⁷ As clearly stated by the ICJ in the *Barcelona Traction* case, the protection of the individual rights lost a place also in the 'end', i.e. the objective driving diplomatic protection, being replaced with the State's own public interests. For a particularly long time, diplomatic protection was thus an entirely State dominated international mechanism, which, although initially legitimised by a violation of an individual right, was made entirely dependent on State's discretionary decision-making and the interests driving diplomatic protection were not primarily related to the safety and protection of the nationals abroad.

A revolutionary shift, produced in the aftermath of the Second World War, when individuals were gradually recognised a place in international relations, concretised in the development of international human rights systems. The international legal system, although still principally controlled by States, now also encompasses a broad range of other actors: international organisations, non-governmental organisations, including with increasing regularity, individuals.⁷²⁸ The ICJ has already expressly admitted in the *Jurisdiction of the Courts of Danzing* case that the individual can acquire international rights directly under international treaties, thus offering the possibility of considering the individuals as possible subjects of international law. The thesis of the individual as a full subject of international law

⁷²⁵ See Chittharanjan F. Amerasinghe, *op.cit.*, 23ff.

⁷²⁶ '[...] 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 right, the right to ensure, in the person of its subjects, respect for the rules of international law.' See *Mavrommatis*, 12. The *Mavrommatis* formula has been latter reaffirmed in several other leading cases of the ICJ and to a certain extent still acknowledged by the ILC.

⁷²⁷ See A. Vermeer-Künzli, *op.cit.*, PhD Thesis, 2007, 35.

⁷²⁸ See K. Parlett, *The Individual in the International Legal System. Continuity and Change in International Law*, Cambridge University Press (2010); R. McCorquodale, 'The Individual and the International Legal System', in Evans (ed.), *International Law*, 3rd ed., Oxford (2010).

with capacity to acquire and exercise international rights and obligations is not yet generally accepted in the international practice and academia, on the other hand, the title of participant in international relations is widely accepted in relation to the individual.⁷²⁹ This position reflects already a significant change in public international law compared to several decades ago, and has also fuelled the debate on whether the role of the individual should be formally recognised within the institution of diplomatic protection. This particular development within the public international legal framework led certain academics to challenge the classical, State-centric definition of diplomatic protection as old-fashioned.⁷³⁰

Under the previous section, dedicated to consular protection, it was concluded that the current face of consular protection is different from the classical public international legal conception of this institution. The development of international human rights, the increased migratory flow of natural persons, the pressures exerted by citizens and domestic communities on the Governments' conduct of consular protection have instilled new characteristics on the public international legal conception of consular protection. In short these changes can be summarised as a sort of 'humanization' updating of consular protection.

The present section aims to assess the impact of these trends on the classical conception of diplomatic protection as a discretionary State right. Some remarks have already been advanced in the second section of this chapter, dedicated to the conditions for the exercise of consular and diplomatic protection. It was argued that, as regards the requirements and scope of diplomatic protection, the current international legal framework has departed from the State-centric conception and evolved into an institution that is more effectively serving the protection of individuals and their rights. The present section aims to assess whether a similar evolution can be identified as regards the legal nature of diplomatic protection: is it still defined as a purely discretionary State right, or has the individual been given a place, and if so, how has this re-definition impacted on the legal nature of diplomatic protection. The 2006 ILC Articles on Diplomatic Protection, the opinions of renowned legal academics, State practice and international, regional and domestic jurisprudence will be assessed with the purpose of answering a question that was raised by the legal literature as

⁷²⁹ R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford: Clarendon Press, Oxford (1994), 49; see also *Jurisdiction of the Courts of Danzig* case, PCIJ Reports Series B No. 15 (1928).

⁷³⁰ G. Amador, 'State Responsibility. Some New Problems', (1958) Hague Recueil, 437–9, 472; G. Amador, Second Report to the ILC, (1957) YBILC, 112–16; M. Bennouna, *Preliminary Report on Diplomatic Protection*, UN Doc. A/CN.4/484, paras. 34–7; Chittharanjan F. Amerasinghe, *op.cit.*, 23.

early as the 1970s,⁷³¹ but has not yet find a final answer: is there an international customary norm establishing a State duty to exercise diplomatic protection on behalf of individuals?

2. Diplomatic Protection as a Duty to Protect: Examining the Formation of a Customary Rule of International Law

a. Opinions of scholars

This sub-section will assess the contribution of academics to the development of the institution of diplomatic protection of individuals, starting with the classical Vattelian legal fiction conception of diplomatic protection, continuing with the opinions establishing the ‘humanization’ trend and until the current day growing academic trend of recognising a limited State duty to provide some sort of diplomatic protection measures to the nationals abroad who have been subjected to grave violations of human rights. The objective of this overview of legal thought is to understand whether there has been a paradigm shift in the scholarly conception of diplomatic protection from a State-monopolised mechanism to one where the individual and the State are sharing positions, and whether this paradigm shift has currently reached the level of a majoritarian academic view recognising a limited (human) individual right to diplomatic protection and finally the impact of the academics’ view on the international normative framework.

Vattel⁷³², the legal scholar to which the first definition of diplomatic protection has been generally ascribed, is argued to have been the first to refer to the legal nature of diplomatic protection as a right of the State based on a transfer of the injured individual’s right to the State of his nationality.⁷³³ It has to be noted that although there is a unanimous academic consensus that the origins of diplomatic protection are to be found in Vattel’s Law of Nations, the author has not treated the topic of diplomatic protection as such. Diplomatic protection would be formally recognised as an institution of public international law only

⁷³¹ Richard B. Lillich, ‘Commentary, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack’, (1975) American Journal of International Law, 359, 359; P. Weis, ‘Diplomatic Protection and International Protection of Human Rights’, (1971) HRJ, 675. They are among the first legal scholars arguing in favour of re-fashioning diplomatic protection based on a ‘humanist’ based vision, which gained strong support once the individual acquired rights under the international scene. Accordingly, the State acts as an agent on behalf of the injured individual and enforces the right of the individual rather than that of the State.

⁷³² E. de Vattel, *The Law of Nations* (1758), (reprint of the translation by J. Chitty of 1854), New Jersey 2005.

⁷³³ Chittharanjan F. Amerasinghe, *op.cit.*, fn 11 at 23; I. Roberts, *Satow’s Diplomatic Protection.*, *op.cit.*, 11ff, and 145.

centuries later.⁷³⁴ In his treaties on international law as a law between and for States, Vattel addressed the particular situation of citizens ill-treated by foreign States. On closer inspection, his famous passage associated with diplomatic protection seems to indicate the opinion that States have a duty to protect their nationals injured abroad: *‘Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection’*.⁷³⁵

A textual interpretation would indicate that he speaks not of a State’s right but of a State’s obligation to protect its citizens. Words such as *‘must protect’*, *‘must avenge the deed’*, and *‘force the aggressor to give full satisfaction or punish him’* indicate that Vattel frames the relationship between the State and the individual as one where the State bears a duty of protection towards its national that has been injured by a foreign State. Vattel thus seems to be the first international legal scholar referring to a State duty to protect its citizens abroad.

At the beginning of the 20th of century, Borchard would indicate that Vattel’s referral to a State obligation to ensure protection of its citizens abroad is simply a moral and not a legal obligation incumbent upon the State, which the latter is free to manage as it pleases.⁷³⁶ During this time, diplomatic protection was formally recognised as part and parcel of public international law,⁷³⁷ and its legal nature was undisputedly established as a discretionary right of the State. According to Borchard, the protecting State is the sole holder of rights in relation to diplomatic protection, rejecting the agent or trustee doctrine.⁷³⁸ There was unanimous scholarly agreement that after the individual submitted his claim for protection before the Government, he lost all power over the fate of the proceedings. The approval of the individual’s claim, the choice of means for diplomatic protection, the sequence of the proceedings and the remedy awarded by the accused state were all considered issues falling

⁷³⁴ See Chittharanjan F. Amerasinghe, *op.cit.*, 23ff.

⁷³⁵ Vattel, E. de, *Le droit de gens ou les principes de la loi naturelle* (London, 1758), in *The Classics of International Law*, Washington, D.C., Carnegie Institution of Washington, 1916, vol. I, book II, p. 309, para. 71.

⁷³⁶ *‘[...] it is clear that at international law there is no legal duty incumbent upon the State to extend diplomatic protection. Whether such a duty exists towards the citizen is a matter of municipal law of his own country, the general law being that even under municipal law the State is under no legal duty to extend diplomatic protection.’* (Borchard, *The Diplomatic Protection of Citizens Abroad* (1916)) 29. The writers cited by Borchard include Grotius and Vattel)

⁷³⁷ See ICJ in the *Panevezys* case and arbitration tribunals Administrative Decision No. V (UNRIAA, 7, 153).

⁷³⁸ Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing, New York, (1916), 358.

under the arbitrary power of the State.⁷³⁹ Until relatively recently, the prevailing school of thought has thus described diplomatic protection as a right of the State, in which only the State can decide in which circumstances to exercise this right and over which the judiciary had no judicial control.

The progressive development of international human rights law and the general changing public international legal framework, in the aftermath of the Second World War, have influenced legal scholars to change their classical approach of the institution of diplomatic protection. In the 1970s, American legal scholars such as Lillich, Root and Paul Weis⁷⁴⁰ started to approach diplomatic protection as a sort of moral and legal obligation of the State to help citizens in distress while abroad.

In the 1980s and 1990s, and especially post-2000, more and more international lawyers and scholars⁷⁴¹ started to call for a reform of the international law governing diplomatic protection for the purpose of making it correspond to the contemporary status of international law, which in the recent decades focused increasingly on empowering and protecting the individuals.⁷⁴² The increased recognition of the role of the individual in international relations and law, and the changing definition of the State sovereignty have determined certain academics to argue that individuals are gaining certain diplomatic protection rights vis-à-vis their sending State.⁷⁴³ The development of States' obligations in the field of international human rights and the acquisition of individual's rights on the international scene have fuelled an academic trend recognising the role of the individual and individual rights within the traditional diplomatic protection institution. At the start of the 21st century, a growing number of legal scholars started to argue that the influence of international human rights law on the traditional institution of diplomatic protection should be accepted and explored. A State duty

⁷³⁹ Vattel, *op.cit.*; D. Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', (1906) RGDI, 5; Borchard, *op.cit.*; J. Dugard, First Report, *op.cit.*, para. 62.

⁷⁴⁰ E. Root, 'The Basis of Protection to Citizens Residing Abroad', (1979) AJIL, 517; Richard B. Lillich, 'Commentary, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack', (1975) AJIL, 359, 359; P. Weis, 'Diplomatic Protection and International Protection of Human Rights', (1971) HRJ, 675.

⁷⁴¹ G. Gaja, *op.cit.*; M. Benouna, *op.cit.*; Dugard, *op.cit.*; Trindade, *op.cit.*; Karazivan, *op.cit.*

⁷⁴² A. Peters and J. Klabbers argue that the current international law is evolving towards empowering the individual, see *Constitutionalisation of International Law*, see *op.cit.*, 174.

⁷⁴³ Robert B. Lillich, *International Law of State Responsibility for Injuries to Aliens*, Charlottesville (University Press of Virginia), 1983; *The Human Rights of Aliens in Contemporary International Law*, Manchester (Manchester University Press), 1984; R. Higgins, *Problems and Process, International law and how we use it*, Oxford: Clarendon Press (1994); M. Benouna, 'La protection diplomatique, un droit de l'Etat?' in Balletbo and others (ed), Boutros Ghali *Amicorum discipulorumque Liber*, Vol. I Bruxelles: Bruylant (1998), 245; C. Dominice, 'L'émergence de l'individu en droit international public', (1987-1988) *Annales d'études internationales*. Latter on G. Gaja would follow this trend, see 'Droits des états et droits des individus dans le cadre de la protection diplomatique' in J. F. Flauss, (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, Brussels, Nemesis-Bruylant, 2003.

to exercise diplomatic protection was subsequently based on the international human rights law and practice.⁷⁴⁴ Strong academic support is developing on framing diplomatic protection as an obligation of the State when the international wrongful act at issue consists of a breach of basic human rights of the individual as they are defined in international human rights law, especially those provided by *jus cogens* norms.⁷⁴⁵ A State duty to protect nationals abroad seems to be accepted also in cases when individuals do not have access to international jurisdictions.⁷⁴⁶ Therefore this scholarly theory seems to bridge the traditional understanding of diplomatic protection as a discretionary right of the State with the contemporary strong doctrine of human rights vested in individuals.⁷⁴⁷

The classical State-centred theory of diplomatic protection has now been replaced by theories which try to balance the aforementioned human rights based theory of diplomatic protection with the political considerations inherent in the institution of diplomatic protection. This theory argues that attention should be paid to practice and reality, and admit the role political considerations are playing and will continue to play in the State's decision-making procedure on the exercise of diplomatic protection.⁷⁴⁸ Currently, the majority of legal scholars agree that the individual plays a more considerable role within the institution of diplomatic protection, even if not on an equal par with that of the State.⁷⁴⁹ Among them, there is a growing number of scholars who argue that the State either has a duty based on State practice and jurisprudence⁷⁵⁰ or that it ought to have a duty *de lege ferenda*.⁷⁵¹

⁷⁴⁴ Karazivan, *op.cit.*; Dugard, *op.cit.*; G. Ress/T. Stein (eds.), *Dieser Diplomatische Schutz im Völker- und Europarecht, aktuelle probleme und entwicklungstendenzen*, 1996 ; Pieter H. Kooijmans, 'Is the Right to Diplomatic Protection a Human Right?', in *Studi di Diritto Internazionale in Onore di Gaetano Arangio Ruiz*, Napoli (2004), 1980-1981; L. Condorelli, 'L'évolution du champ d'application de la protection diplomatique', en J. F. Flauss, (dir.), *La Protection Diplomatique: Mutations contemporaines et pratiques nationales*, Brussels, Nemesis-Bruylant, 2003, 3-28; M. Pinto, 'De la protection diplomatique à la protection des droits de l'homme' (2002) RGDIP, 513; C. Tiburcio, *op.cit.*; T. Hooge, *Responsibility to Protect (R2P) as Duty to Protect? – Reassessing the Traditional Doctrine of Diplomatic Protection in light of Modern Developments in International Law*, LLM Thesis, 2010, available at: <https://tspace.library.utoronto.ca/bitstream/1807/25618/1/Hooge_Nicholas_T_201011_LLM_thesis.pdf>

⁷⁴⁵ Karazivan, *op.cit.*; Trindade, *op.cit.*; Dugard, *op.cit.*; Tiburcio, *op.cit.*; N. Kato, *The Role of Diplomatic Protection in the Implementation Process of Public International Law*, *op.cit.*

⁷⁴⁶ See Hooge, *op.cit.*

⁷⁴⁷ E. Prochaska, 'Testing the Limits of Diplomatic Protection: *Khadr v The Prime Minister of Canada*', EJIL Analysis, available at <http://www.ejiltalk.org/testing-the-limits-of-diplomatic-protection-khadr-v-the-prime-minister-of-canada/>

⁷⁴⁸ See Pergantis, *op.cit.*; Alborno, *op.cit.*; A. Vermeer-Künzli, *op.cit.*; Koopmans, *op.cit.*

⁷⁴⁹ Pergantis, *op.cit.*; Hooge, *op.cit.*; A. Vermeer-Künzli, *op.cit.*; S. Touzé, *La Protection Des Droits Des Nationaux À L'étranger - Recherches Sur La Protection Diplomatique*, Paris, Pedone, 2007; Chittharanjan F. Amerasinghe, *op.cit.*

⁷⁵⁰ C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford University Press (2012), 185-188; N. Kato, 'The Role of Diplomatic Protection in the Implementation Process of Public International Law', *op.cit.*; Karazivan, *op.cit.*; Trindade, *op.cit.*

⁷⁵¹ Dugard, *op.cit.*; Klein, *op.cit.*; Condorelli, *op.cit.*

The most significant contribution brought by legal scholars to updating the institution of diplomatic protection is found in the work of Professor John Dugard, and Judge Bennouna, who have acted as Rapporteurs appointed by the ILC for the codification and progressive development of the international rules on diplomatic protection. In 1996 the International Law Commission identified the topic of diplomatic protection as being ripe for codification and progressive development⁷⁵² and appointed Judge Bennouna⁷⁵³ for fulfilling the task of articulating the relevant rules.⁷⁵⁴ In its First Report, Rapporteur Bennouna stressed the need to update the classical institution of diplomatic protection to the current reality of international relations, which would no longer support the *Mavrommatis* legal fiction definition. Rapporteur Bennouna was replaced in 2000⁷⁵⁵ by Professor Dugard who completed the draft Articles on Diplomatic Protection in 2006.⁷⁵⁶

Professor Dugard's innovative way of satisfying both States' interests, namely of preserving their discretionary right of exercising diplomatic protection, and the current needs of international society, where individuals are active participants in international relations, when defining diplomatic protection materialised in three proposals, some more revolutionary than others. Article 1 of the 2006 ILC Articles on Diplomatic Protection enshrines the current generally accepted definition of diplomatic protection. It describes the institution as a procedural means with the help of which a State can invoke the international responsibility of a State '*for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State*'. Therefore the role of the individual is expressly recognised as a foundation of diplomatic protection. Neither Article 1, nor other subsequent Articles clarify whether the State asserts its own rights or those of the national. This codification solution keeps open both the traditionalist and the modern interpretations of

⁷⁵² See Report on the Work of the International Law Commission during its 48th session (1996), UN Doc. A/51/10 (General Assembly, Official Records, Supplement No. 10), para. 249 and Annex II, addendum 1. In the same year, the International Law Association established a Committee on the Diplomatic Protection of Persons and Property, which would closely follow the work of the ILC.

⁷⁵³ Judge Bennouna was appointed as Special Rapporteur in 1997, (1997) II Part 2 International Law Commission Yearbook para. 190.

⁷⁵⁴ The topic of diplomatic protection was first considered to be included in the agenda of the ILC during the study of the State responsibility. Garcia Amador argued that diplomatic protection norms are secondary, procedural rules which should be kept separate from the substantial rules of international law on responsibility of States for international wrongful acts. First Report of Garcia Amador (1956) 11 ILC Yearbook 173 192ff (A/CN.4/96).

⁷⁵⁵ In 1999, Rapporteur Bennouna was elected to the International Criminal Tribunal for the former Yugoslavia, which led to his replacement with the renowned South African Professor John R. Dugard.

⁷⁵⁶ *Seventh Report on Diplomatic Protection*, ILC 58 Session 2006 A/CN.4/567. See also Dugard, 'Diplomatic protection and human rights: The Draft Articles of the International Law Commission' (2005) 24 Australian YIL 75. The final Draft Articles on Diplomatic Protection with commentaries are at ILC *Report of the Fifty-eighth Session* (2006) A/CN.4/L.684.

diplomatic protection, without rejecting any of them. This compromise can be considered a more positive step for the recognition of the individual's place in international relations than the previous norm expressly excluding the right of the individual from the diplomatic protection mechanism.

The other two proposals put forward by Rapporteur Dugard with relevance for the legal nature of diplomatic protection refer to the express recognition of a State duty to exercise, in limited circumstances, diplomatic protection on behalf of its nationals. A first proposal was put forward in Article 4⁷⁵⁷ of Dugard's First Report submitted to the ILC in 2000. It was an exercise of progressive development of the practice, providing a State legal duty to exercise diplomatic protection on behalf of the injured nationals in the particular circumstances of a 'grave breach of *jus cogens* norms'. Rapporteur Dugard also added the obligation of States to provide in their municipal law the right of the individual to an effective judicial remedy in case the State of nationality violates its international legal obligation. The practice on the basis of which the Rapporteur ascertained a State duty to exercise diplomatic protection included the domestic legal provisions of several States recognising a right of the national to receive protection from the State when abroad, and the domestic jurisprudence assessing individual claims to receive diplomatic protection. Dugard's proposal for a State duty to exercise diplomatic protection in cases of violations of *jus cogens* norms was not well received by either the States' representatives or scholars. Most of the criticisms referred to the lack of clarity of the normative proposal as to whom the State duty was owed – the national or the entire community, and the limited owner of the duty – the State of nationality, when the norms violated were of a *jus cogens* nature, and should thus be considered binding on the entire international community.⁷⁵⁸ Second, the absence of a clear understanding of the scope

⁷⁵⁷ Art. 4 reads as follows: '1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State. 2. The State of nationality is relieved of this obligation if: (a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people; (b) Another State exercises diplomatic protection on behalf of the injured person; (c) The injured person does not have the effective and dominant nationality of the State. 3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.'

⁷⁵⁸ See, inter alia, J.F. Flauss, 'Vers un aggiornamento des conditions d'exercice de la protection diplomatique?', in J.F. Flauss (dir.), *La protection diplomatique: mutations contemporaines et pratiques nationales*, Bruxelles, (2003), 31; V. Pergantis, 'Towards a 'Humanization' of Diplomatic Protection?', (2006) *ZaöRV*, 351, 377-379; Kooijmans argued whether the same objective pursued by Dugard's revolutionary proposal, namely of filling the gap in the present system of human rights protection, could be achieved by less dramatic transformations, see, Pieter H. Kooijmans, 'Is the Right to Diplomatic Protection a Human Right?', *op.cit.*, 1980-1981; G. Gaja, 'Is a State Specially Affected When Its Nationals' Human Rights Are Infringed?', in L.C. Vohrah et al. (eds.), *Man's Inhumanity to Man: Essays in Honour of Judge Antonio Cassese*, The Hague : Kluwer Law International (2003),

of *jus cogens* norms was argued to create confusion rather than providing clear limits to the discretionary nature of the State's right to exercise diplomatic protection. It has to be recalled that at the moment when draft Article 4 was discussed, the notion of *jus cogens* had not been formally endorsed by the ICJ; it was only in 2006 that the ICJ recognised the notion in the *Armed Activities on the Territory of the Congo* case.⁷⁵⁹

Finally, the 6th ILC Committee refused Rapporteur Dugard's revolutionary proposal to recognise a limited State duty to exercise diplomatic protection on behalf of nationals on the basis of the alleged insufficient evidence of an *opinio juris* recognising diplomatic protection as a State duty in situations of violations of *jus cogens* norms by a foreign State. The several domestic legal provisions recognising a State duty to exercise protection of nationals abroad⁷⁶⁰ were held to be insufficient evidence of the necessary *opinio juris* that would support an international obligation upon the State.⁷⁶¹ In addition, it was argued that, firstly, '*there were not very many contemporary writers who thought that diplomatic protection was a duty of the State*' and, secondly, that the conclusion reached by Rapporteur Dugard '*that there were signs*' in recent State practice of support for that viewpoint' was held to be an optimistic assessment of the actual materials available.⁷⁶² Whether these reasons were well-founded is arguable, since there were several established scholars that supported the theory of a State's legal duty to exercise diplomatic protection to its nationals in cases of human rights violations. For example, during the same year that Rapporteur Dugard proposed to include a State's duty to exercise diplomatic protection, Francisco Orrego Vicuna, Rapporteur of the ILA within the Committee on Diplomatic Protection of Persons and Property, put forward before the ILA an article with a similar content as Dugard's draft Article 4 which passed the approval of the ILA.⁷⁶³

Important developments have occurred since 2000, in both State practice, and international and domestic jurisprudence, which bring significant evidence in support of a

373-382; *ibid.*, 'Droits des États et droits des individus dans le cadre de la protection diplomatique', *op.cit.*, 63-69.

⁷⁵⁹ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, General List No. 126

⁷⁶⁰ See more details in the subsequent sub-section.

⁷⁶¹ It has to be noted that the States' representative opinions were supported also by academics, see in particular, V. Pergantis, 'Towards a 'Humanization' of Diplomatic Protection?', *op.cit.*, 351, 378;

⁷⁶² See Report of the International Law Commission on the work of its Fifty-eighth Session, U.N. Doc. A/61/10 (2006), 78.

⁷⁶³ Francisco O. Vicuna, Interim Report on The Changing Law of Nationality of Claims' submitted to the ILA Committee on Diplomatic Protection of Persons and Property in the 2000 Conference, 28-44; For a common examination of the ILC and ILA codification projects, see Pieter H. Kooijmans, 'Is the Right to Diplomatic Protection a Human Right?', *op.cit.*, 1975-1984.

developing individual's right to diplomatic protection in certain specific circumstances. Additionally, many more scholars have shown their support for the imposition of duty upon States to exercise diplomatic protection for their nationals in cases of grave violation of fundamental human rights.⁷⁶⁴ The proposed Article 4 was ultimately removed from the Draft Articles and Professor Dugard proposed instead a significantly toned down Article. Not willing to completely give up the proposal, which was a step towards furthering diplomatic protection for the protection of international human rights, the Rapporteur replaced the *legal duty* with a *recommendation* for the state to consider exercising diplomatic protection in the same circumstances as those enshrined in the previous Article 4. Current Article 19(a) provides that a State '*should [...] [g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred*'. In the commentary of Art. 19, the Rapporteur noted that ' *[...] there is growing support for the view that there is some obligation, however imperfect, on States [...] to protect their nationals abroad when they are subjected to significant human rights violations*'.⁷⁶⁵ The Constitutions of many States recognising an individual right to receive diplomatic protection for injuries suffered abroad and the decisions of a number of domestic courts were invoked as evidentiary support for the recommended practice.⁷⁶⁶

The State practice and jurisprudence until 2006 was thus held by Rapporteur Dugard and approved by the ILC to suggest '*that international law already recognizes the existence of some obligation on the part of a State to consider the possibility of exercising diplomatic protection on behalf of a national who has suffered a significant injury abroad*'.⁷⁶⁷

The 2006 ILC Articles⁷⁶⁸ have brought salient changes to the institution of diplomatic protection, reflecting a more balanced conception between the traditional view of diplomatic protection as State-centric, and the modern conception of international law, where the individual is recognised a place in the international fora. This normative updating has been

⁷⁶⁴ E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning Tradition?', (2004) NYIL, 85, 94-97; Mariana S. Albornoz, 'Legal Nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges', (2006) Anuario Mexicano de Derecho Internacional, 377-417; and Kooijmans, *op.cit.*; A. Bassu, *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica*, Giuffrè, 2008; Karazivan, *op.cit.*; Crawford, J. Crawford, 'The ILC's Draft Articles on Diplomatic Protection', (2006) S. Afr. Y.B. Int'l L, 19.

⁷⁶⁵ Report of the International Law Commission, Fifty-eighth Session, U.N. Doc. A/61/10 (2006), 96.

⁷⁶⁶ Report of the International Law Commission, Fifty-eighth Session, U.N. Doc. A/61/10 (2006), 96.

⁷⁶⁷ Report of the International Law Commission, Fifty-eighth Session, U.N. Doc. A/61/10 (2006), 96-97.

⁷⁶⁸ In 2008 the United Nations decided to accept the ILC proposal to consider the adoption of a Convention on Diplomatic Protection, see 62nd session, Resolution adopted by the General Assembly, 8 January 2008, 62/67. In 2013 the UN decided to establish a Working Group in order to fulfill the mandate conferred by the General Assembly, see Resolution 65/27 of 7 October 2013.

the result of Rapporteur Dugard's view of approaching the task of codifying the international norms governing diplomatic protection from the perspective that human rights and diplomatic protection serve a common remedial objective, namely protection of individual (human) rights, and, consequently, the rules governing diplomatic protection should contribute to making diplomatic protection a tool for increasing the effectiveness of international human rights. His proposals as regards the definition of diplomatic protection and recognition of an international norm in formation establishing a State duty to exercise diplomatic protection have revolutionised the classical conception of diplomatic protection of individuals, and recognised the individual and his human rights among the driving forces of the institution.

In conclusion, it can be observed that, regarding the legal nature of diplomatic protection, international legal scholars are now divided in two main categories. On the one hand, the supporters of a human rights based conceptualisation of diplomatic protection, who argue that a State duty to protect citizens abroad exists, or is in the process of creation, based on domestic legislation and jurisprudence, and on the States' duties resulting from international human rights law.⁷⁶⁹ The second category includes scholars who argue that in spite of the increasing role of the individual in international relations, a State duty to protect nationals abroad cannot be established based on the existent practice that is insufficient and establishes very loose, moral rather legal, obligations on the part of the State.⁷⁷⁰ These international legal scholars also argue that such a State duty should not be established since the reality is that diplomatic protection is a highly political institution that better serves the individual if it remains political and exceptional instead of formalising it as a right of the individual, which will lead diplomatic protection to lose its international impact.

b. State practice

In spite of the fervent critiques brought to the institution of diplomatic protection as being an obsolete institution of public international law⁷⁷¹, practice proves that diplomatic protection undoubtedly continues to be valuable and current.⁷⁷²

⁷⁶⁹ Main supporters: J. Dugard, *op.cit.*; Karazivan, *op.cit.*; P> Klein, *op.cit.*; and Trindade, *op.cit.*

⁷⁷⁰ Pergantis, *op.cit.*; A. Vermeer-Künzli, *op.cit.*; G. Gaja, *op.cit.*; O de Schutter, *International Human Rights Law: Cases and Materials, Commentary*, Cambridge University Press (2014), 5, 15.

⁷⁷¹ International Law Commission, *International Responsibility. Second Report by F.V. García Amador, Special Rapporteur*, U.N. Doc. A/CN.4/106 (1957) at 112-116; see also, F. V. García Amador, 'State Responsibility. Some New Problems' (1958), 94 *Recueil des Cours* 421; L. Condorelli, 'La protection diplomatique et l'évolution de son domaine d'application', 86 *RDI* (2003), 5-26; Preliminary Report on Diplomatic Protection by Mohamed Bennouna, UN Doc. A/CN.4/484 (4 February 1998), at 2-3, points out that the legal fiction based

The fact that in public international law the legal nature of diplomatic protection has for a long period been predominantly considered as only a discretionary right of the State did not pre-empt the development of domestic legislation stipulating a right of the individual, usually the citizen, to receive diplomatic protection from the Government of the State of nationality or other sending States. The ICJ had confirmed this possibility in 1970, highlighting that, although international law does not recognise an individual right to diplomatic protection, municipal law may choose differently, and prescribe a duty of the State to protect its citizens abroad.⁷⁷³

As has already been pointed in the previous section on the legal nature of consular protection of individuals, over the years, a wealth of States have decided to adopt some type of legal act ranging from constitutional, statutory, ordinary legislation, to executive acts or soft law documents recognising some sort of State obligation to ensure protection of nationals abroad. The legislative provisions have been, for the most part, drafted in broad wording, using the general term of ‘*protection of citizens/nationals abroad*’ and not consular and/or diplomatic protection as such. There are several States with constitutional provisions prescribing a duty of the State to ensure protection of their citizens abroad. These States spread over the entire globe, covering various geographical regions.⁷⁷⁴ These constitutional provisions are all formulated in similarly vague language, whether formulated from the perspective of the State, namely as a State obligation/duty, or from the perspective of the individual, namely as a fundamental right, they all are phrased along the following line: *citizens abroad benefit from the protection of the State*.⁷⁷⁵ As to the EU countries, it has to be noted that most of the EU countries conferring a constitutional right to the citizen to protection abroad are the Eastern European countries, which adopted these constitutional provisions after the fall of the communist regime. The constitutional provisions follow the

diplomatic protection is obsolete and it requires a new definition correspondent to the contemporary reality of the international relations.

⁷⁷² See for a similar point of view, J. Crawford, ‘The ILC’s Draft Articles on Diplomatic Protection’, (2006) S. Afr. Y.B. Int’l L., 19.

⁷⁷³ Barcelona Traction Company Case (1970) ICJ Rep, para. 78: ‘[...] and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions.’

⁷⁷⁴ For instance, some of the EU countries, Albania, Belarus, Bosnia and Herzegovina, Cambodia, China, Georgia, Guyana, Kazakhstan, Lao People’s Democratic Republic, Republic of Korea, Russian Federation, the Republic of Macedonia, Turkey, Ukraine, Vietnam, and the Federal Republic of Yugoslavia.

⁷⁷⁵ The constitution of the Republic of Macedonia is bit vaguer, stating that the State ‘cares for’ the well-being of its nationals abroad, see ILC *First Report on Diplomatic Protection*, 83.

same pattern, however most of them construct the protection of citizens abroad as a fundamental right of the citizens, rather than a duty of the State.⁷⁷⁶

In addition to the fundamental provisions, there are several other States with ordinary legislative provisions which either expressly refer to a sort of State duty to protect its citizens abroad, or have been so interpreted by academics or practitioners. Denmark, Finland, Slovakia and Slovenia have a legislative provision that is interpreted as providing a right to consular protection included in their laws regulating the functions of the Foreign Affairs Ministries.⁷⁷⁷ Italy and Sweden do not have a specific legislative provision providing an individual right or State duty to provide diplomatic protection. However, according to the literature, consular protection is granted as a right based on the interpretation of the specific national legislation, as a whole, and the relevant national case-law.⁷⁷⁸ In other EU countries, although having internal legislative provisions recognising an obligation of the State to protect the rights and interests of their citizens abroad, the wide discretion recognised by the national judiciary to the State in relation to the exercise of diplomatic protection negatively impacts on the individual right.⁷⁷⁹ Another sub-group of EU countries, although not

⁷⁷⁶ Article 25(5) of the Bulgarian Constitution: ‘Any Bulgarian citizen abroad shall be accorded the protection of the Republic of Bulgaria.’; § 13 of the Estonian Constitution: ‘Everyone has the right to the protection of the State and of the law. The Estonian State shall also protect its citizens abroad.’; Article 69(3) of the Hungarian Constitution: ‘All Hungarian citizens are entitled to enjoy the protection of the Republic of Hungary while legally residing or staying abroad.’; Article 98 of the Latvian Constitution: ‘Everyone having a Latvian passport shall be protected by the State when abroad and has the right to freely return to Latvia.’ Article 13 of the Lithuanian Constitution: ‘The State of Lithuania shall protect its citizens abroad.’; Article 36 of the Polish Constitution: ‘A Polish citizen shall, during a stay abroad, have the right to protection by the Polish State.’ Article 14 of the Portuguese Constitution: ‘Les citoyens portugais qui séjournent ou résident à l’étranger jouissent de la protection de l’Etat pour l’exercice de leurs droits et sont obligés aux devoirs qui ne sont pas incompatibles avec leur absence du pays.’; Article 17 of the Romanian Constitution: ‘Romanian citizens while abroad shall enjoy the protection of the Romanian State and shall be bound to fulfil their duties, with the exception of those incompatible with their absence from the country.’

⁷⁷⁷ Section 1(3) of Act No. 150 of 13 April 1983 on the Danish Foreign Service Act: ‘The Foreign Service provides assistance to Danish citizens as well as assistance to Danish businesses in their commercial relations with foreign countries.’ Section 2(1) of the Consular Services Act of 1999: ‘Unless a consular service is subject to other provisions, consular services referred to in Chapters 3 to 10 of this Act may be provided for a Finnish legal person or a Finnish citizen or for a foreign citizen residing permanently in Finland, who is in possession of or has been granted a permit to reside or work in Finland either permanently or in a comparable manner.’ According to the national Rapporteur, on the basis of Art. 14 of the Law No. 151/2010 on Foreign State Service, ‘The Ministry of Foreign Affairs ensures protection of rights and interests of the Slovak Republic and its citizens abroad.’ Art. 24(1) of the Slovenian Foreign Affairs Act: ‘A consulate shall perform the following functions: 1 protect the interests of the Republic of Slovenia and its citizens and legal entities, and conduct consular-legal affairs [...]’. In the same vein as Art. 14 of the Slovak Foreign Services Act, Art. 24(2) of the Slovenian Foreign Affairs Act has been interpreted by the national Rapporteur as establishing an obligation for the Ministry of Foreign Affairs’ staff to ensure the protection of rights of the Slovenian citizens, which have, as a counter-part of the MFA’s obligation, a right to consular protection. For more details see the National Reports and section 4.1 in the CARE Report.

⁷⁷⁸ See the CARE Report, Section 4.1.

⁷⁷⁹ For instance, Germany, see the National Report on Germany in the CARE Report.

recognising a right to diplomatic protection to their citizens, have, on the other hand, a consular law⁷⁸⁰ establishing some sort of diplomatic protection duties on the State.⁷⁸¹

It seems thus that there are a considerable number of States, from around the globe, recognising a State duty to ensure protection abroad of their citizens.⁷⁸² The question that follows is whether these domestic legal provisions are sufficient to prove the necessary *opinio juris* for the creation of an international customary norm providing a State duty to exercise diplomatic protection. Most of the aforementioned domestic legal provisions were already invoked by Rapporteur Dugard in support of his initial proposal for a State duty, which unfortunately was rejected by States based on lack of sufficient *opinio juris*. Additionally, certain scholars contested the contribution of these domestic legal provisions to the formation of an international customary norm⁷⁸³ due to the clear demarcation established by the ICJ between the domestic and international legal orders with no influence of the former over the latter legal order.⁷⁸⁴ The unclear nature of the obligation enshrined in these legal provisions, namely whether moral or legal, has been invoked as an additional barrier to their added value for the formation of international law. Thus, what the precise scope of the domestic right of the citizen to protection abroad actually is remains uncertain, namely: whether it goes beyond the right of access to consular officials abroad, simple consular assistance or minimal informal diplomatic intervention. On the other hand, they clearly establish a duty upon these States to consider diplomatic protection for their nationals abroad, and that some sort of diplomatic action is required from the Government for the benefit of their citizens abroad.

In addition to the domestic legislation, States are developing other forms of practice that can act as evidence of the formation of a customary international rule of a State's duty to provide diplomatic protection to their nationals. For instance, the South African Deputy Minister of Foreign Affairs, in an interview with the media regarding the Government's position towards citizens in distress abroad, mentioned that:

'[A]s their government, we have to ensure that all South African citizens, whatever offence they have carried out or are charged with, must receive a fair trial,

⁷⁸⁰ The concept of 'law' is to be construed largely as encompassing every act adopted by vote of the nationals of EU countries or the State authorities, i.e., Constitution, Law, acts adopted by the Government and Ministry of Foreign Affairs and other Ministries.

⁷⁸¹ The Czech Republic, France, Luxembourg, and Spain. See *CARE Report*, Section 4.1.

⁷⁸² The duty is phrased along the lines of three main types of language: duty to protect nationals abroad containing either an explicit and indeterminate form of a duty to protect, an individual right of the citizen travelling abroad, or as a sort of guarantee of government protection for the citizen travelling abroad.

⁷⁸³ V. Pergantis, 'Towards a 'Humanization' of Diplomatic Protection?', *op.cit.*, 351.

⁷⁸⁴ '[...] all these questions [the existence of domestic remedies for controlling the State in the exercise of diplomatic protection] remain within the province of municipal law and not affect the position internationally.' *Barcelona Traction Case*, *op.cit.* 44, para.78.

*they must have access to their lawyers, they must be tried within the framework of the Geneva Convention, they must be held in prison within the framework of the Geneva Convention and International law and we will always, it is our constitutional duty[,] ensure that this is getting out within the framework of the Geneva Convention and that there is a fair trial.*⁷⁸⁵

Several countries have openly supported an interpretation of their right to provide diplomatic protection as encompassing also some forms of obligations in precise circumstances. For instance, during the sessions of the ILC Working Group on diplomatic protection, Italy fervently supported Rapporteur Dugard's proposal for a limited State duty to provide diplomatic protection in cases of violation of *jus cogens* types of norms. It also proposed amendments to Professor Dugard's proposal for a recommendation of a State duty⁷⁸⁶ meant to clarify the material scope of the *jus cogens* norms, and the legal effects of the violation that triggers the State duty to exercise diplomatic protection, that could help the proposal to find wider approval among the States' representatives as a legal duty rather than a mere recommendation.

Commonwealth countries have traditionally endorsed a sort of moral duty to exercise diplomatic protection on behalf of their nationals whose human rights had been violated in foreign countries.⁷⁸⁷ Since the early 20th of century they have departed from the definition of diplomatic protection as a purely discretionary royal prerogative, and started to incorporate instances of State's legal duty to exercise diplomatic protection. It can be argued that the US had developed such an approach when it espoused the human rights claims of its nationals

⁷⁸⁵ The statement is mentioned in *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5, Judgment of the Constitutional Court of South Africa of 4 August 2004, para. 68.

⁷⁸⁶ The amendments read as follows: '*that [...] an exception to that rule would be appropriate in some particular and very limited circumstances, from the perspective of the progressive development of international law, when the protection of fundamental values pertaining to the dignity of the human being and recognized by the international community as a whole is at stake. The Special Rapporteur, Mr. John Dugard, following the above approach, provided for a similar exception in cases of breach of jus cogens norms. By contrast, Italy maintains that a more precise and more limited exception should be included in draft article 2 under the following conditions: (a) in the case of grave violations of fundamental human rights and, more precisely, with respect to the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and the prohibition of racial discrimination; and (b) if, in addition, following those violations it is impossible for the individual victim to resort to international judicial or quasi-judicial organs able to afford reparation. When the two cumulative conditions are present, the national State should have the duty to exercise diplomatic protection in favour of the injured individual and the subsidiary duty to provide, in favour of the individual, for an effective domestic remedy against its own refusal.*' See Comments and observations received from Governments, A/CN.4/561 and Add. 1–2, p.38

⁷⁸⁷ See the famous statement of Lord Palmerstone: '*[...] a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.*' *Hansard*, third series, cxii (25 June 1850) at 444.

following the 1987 Iraqi attack on the USS Stark⁷⁸⁸, the assassination of US citizens in 1976 by Chilean individuals⁷⁸⁹, detention in the Nazi camps⁷⁹⁰, 2008 terrorist acts in Libya⁷⁹¹.⁷⁹² The Commonwealth countries' reactions to their nationals' detention in the Guantánamo Bay camp show a strong willingness of those governments to provide consular and diplomatic assistance and also to espouse their nationals' human rights claims against the US *via* diplomatic actions. It is true that of all the Commonwealth countries with nationals detained in Guantánamo Bay, the UK has been the most persistent in extensively using its diplomatic channels for the purpose of ensuring the protection of its nationals' human rights, and obtaining their repatriation. Canada and Australia have also deployed diplomatic actions in regard to their nationals detained in Guantánamo Bay, however they were less willing to request repatriation.⁷⁹³

In parallel to the State practice signalling the creation of a State duty to exercise some sort of diplomatic protection action, there are countries in favour of maintaining the traditional conception of diplomatic protection as a discretionary right of the State. This stance has been defended by several State representatives during the ILC Working Group sessions on diplomatic protection. The Nordic countries, the UK, and Israel are some of the countries that have made it crystal clear that diplomatic protection should not be construed as a State duty, not even in the limited case of violation of *jus cogens* norms, based on the insufficient evidence for an international customary norm recognising such a duty.⁷⁹⁴ The representative of Israel pointed out that one of the possible reasons behind this position could be the persistent concerns of the States that they might be put in a difficult and delicate position on the international plane by their nationals' requests for diplomatic protection interventions. Instances of such a difficult position were created by some of the Guantánamo

⁷⁸⁸ 'State Responsibility for Injuries to Aliens: Damages for Wrongful Death', 2 Nash (Leach) DIGEST, at 2337–40. Evidence of similar conduct of US authorities are noted in International Claims and State Responsibility, 1991–1999 DIGEST § 8, at 1125; See W. Michael Reisman & Robert D. Sloane, 'Commentary, The Incident at Cavalese and Strategic Compensation', (2000) AJIL, 505, 510–13.

⁷⁸⁹ See International Claims and State Responsibility, *op.cit.*, at 1072–73.

⁷⁹⁰ See Immunities and Related Issues: Sovereign Immunity, 1991–1999 DIGEST § 10, at 1191–93.

⁷⁹¹ See Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008); see also Foreign Claims Settlement Comm'n of the U.S., U.S. DEP'T OF JUSTICE, 2009 Annual Report, 8–10 (2010).

⁷⁹² Generally on the US approach to espousing human rights claims, see David J. Bederman, 'State-to-State Espousal of Human Rights Claims', (2011) Virginia Journal of International Law Online, 1–11.

⁷⁹³ For more details, see the sub-section *Domestic Jurisprudence – Jurisprudence from the Commonwealth countries*.

⁷⁹⁴ Statements made during the debates in the 6th Committee of the ILC on the topic of Diplomatic Protection, see Document A/CN.4/561 and Add. 1–2 Comments and observations received from Governments.

Bay detainees asking for diplomatic protection from one of their States of nationality, where they have never lived or did not have close links with.⁷⁹⁵

Some of the States who were opposed to the codification of a State duty to diplomatic protection, even if limited to the circumstances of grave violations of human rights, are giving mixed signals on the subject of the legal nature of diplomatic protection. There have been instances when States decided to espouse the claims of their nationals whether of their own motion, or at the request of the national.⁷⁹⁶ It is common international practice that, during the process of customary international law formation, there is often a mismatch between the state practice and the states' *opinio juris*.⁷⁹⁷ In the case of diplomatic protection, the situation is similar, in the sense that often the State's foreign ministry or Government representatives declare that they do not recognise a State duty to exercise diplomatic protection, but the consular programme, official statements, sometimes even concrete practice proves otherwise.⁷⁹⁸ Therefore, the mere declaration of a State, even if official and during an international reunion, might not be the one to engage the State, if there is a contrary and sustained (in time) practice of the State.

The recent development of the notion of 'Responsibility to Protect'⁷⁹⁹ as an obligation of States to intervene and cooperate by way of diplomatic measures for the purpose of reacting to mass atrocities inflicted on the local population or including also aliens, has been interpreted as a sign of the favourable *opinio juris* of the international community to

⁷⁹⁵ For instance the case of the dual national Hicks, who turned to ask for help from the UK to be repatriated from Guantánamo Bay although he has never lived in the UK (case commented in the following sub-section *Domestic Jurisprudence – Jurisprudence from the Commonwealth countries*); or of the non-British long term residents application in *R (Al Rawi & Others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] HRLR 42.

⁷⁹⁶ See for instance the case of the UK government in the case of the Guantánamo Bay detainees. Cases are commented in detail in the sub-section *Domestic Jurisprudence – Jurisprudence from the Commonwealth countries*.

⁷⁹⁷ A famous case is the *Nicaragua* case, where the ICJ found a discrepancy between the State saying they are regarding a certain rule as binding, and their actual *opinio juris*, *Nicaragua Case*, 1986 I.C.J. Rep. 14; Brian D. Lepard, 'The Necessity of Opinion Juris in the Formation of Customary International Law', Discussion Paper for Panel on 'Does Customary International Law Need *Opinio Juris*?'.

⁷⁹⁸ An interesting case reflecting this duality is the case of the UK government's reaction to their nationals detained in Guantánamo Bay. Although initially rejecting these nationals' requests for concrete diplomatic protection measures, most of which were in the form of requests of repatriation or legal intervention in the domestic cases opened by these nationals before US courts (see the *Abbasi* case commented in *Domestic Jurisprudence – Jurisprudence from the Commonwealth countries*), the UK government subsequently asked for and obtained repatriation of all of them. On the release of British nationals from Guantánamo Bay, see I. Cobain, 'Guantánamo Bay files: Profiles of the 10 released British prisoners', article in *The Guardian* (2011), <http://www.theguardian.com/world/2011/apr/25/guantanamo-files-british-prisoners-profiles> and *Khadr v Canada*, [2009] F.C.J. No. 462, para. 85.

⁷⁹⁹ The Responsibility to Protect, Ottawa: International Development Research Centre (2001) (hereinafter 'ICISS Report'); U.N.G.A., Resolution 60/1. 2005 World Summit Outcome. U.N. Doc. A/Res/60/1 (2005); U.N.S.C., Resolution 1674. U.N. Doc. S/Res/1674 (2006); U.N. Doc. A/63/677 (2009).

recognising a State's obligation to exercise diplomatic measures which take also the form of the classical diplomatic protection when exercised in favour of its own nationals.⁸⁰⁰ Although the notion of 'Responsibility to Protect' is a different notion from diplomatic protection, this specific part of the exercise of diplomatic protection measures for the aliens, existent among the affected population, fulfils also the classical requirements of the diplomatic protection institution. It can be observed that with each international reunion discussing the legal nature and content of the 'Responsibility to Protect' notion, its nature is evolving from a moral to a legal obligation of States to intervene, and having a more precise material scope.⁸⁰¹ These developments have determined certain scholars to conclude that '*R2P has, in some sense, confirmed the progressive development of the law of diplomatic protection that the ILC and Special Rapporteur Dugard began.*'⁸⁰²

It can be concluded that there is a growing State practice signalling a trend among States of assuming a duty to provide, in urgent circumstances, some sort of diplomatic protection measures. However, it cannot be ignored that, in deciding whether to exercise diplomatic protection and the precise type of action to be taken, States are always balancing their foreign policy interests vis-à-vis the receiving State or the welfare of the entire national population's well-being with the interest of the injured individual(s). It could be that, in many cases, a particular State would decide to exercise diplomatic protection on behalf of its nationals abroad, simply because it serves its interests.⁸⁰³ The nature of those interests, whether of the State or of the injured individual, that determined the State to intervene by means of diplomatic protection, does not make the practice less important. It can anyhow contribute to the formation of a custom in relation to the State, which obliges the latter to provide, in the future, diplomatic protection to nationals in similar situations abroad, based on either the domestic doctrine of legitimate expectations or the international doctrine of estoppel.

⁸⁰⁰ See T. Hooge, *Responsibility to Protect (R2P) as Duty to Protect? Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law*, University of Toronto, 2010, Master Thesis.

⁸⁰¹ Nina H. B. Jorgensen, 'The Responsibility to Protect and Obligations of States and Organisation under the Law of International Responsibility', in J. Hoffmann & A. Nollkaemper (eds), *Responsibility to Protect from Principle to Practice*, Pallas Publication (2012); see more generally the book mentioned herein edited by Hoffmann and Nollkaemper.

⁸⁰² T. Hooge, *op.cit.*, 57.

⁸⁰³ This particular argument has been raised by academia as another argument against the formation of a customary international norm recognising a State duty to exercise diplomatic protection on behalf of nationals abroad. See V. Pergantis, *op.cit.*

c. Jurisprudence

The decisions of international and domestic courts provide another relevant source of law, and can play an important role in the formation of an international custom. The significant normative role of international adjudication is today beyond dispute.⁸⁰⁴ Regional courts and the ICJ can identify customary international rules, and also ‘*shed much light on the general approach to the formation and evidence of customary international law*’.⁸⁰⁵ As to domestic courts, one of their main roles in relation to international law is that of ‘*law creation*’.⁸⁰⁶ Domestic jurisprudence, as official decisions of the State’s public authorities, reflect the *opinio juris* of the State and thus contribute to the formation of international legal customs.⁸⁰⁷ International courts and scholars have emphasised the important role played by national courts in the formation of international customs as they can indicate what the custom/norm is.⁸⁰⁸ However when domestic jurisprudence is contradicted by the practice of other branches of the State’s power, then it is likely that it will be contested by States, and thus be less determinative in the process of formation of a particular international legal custom.⁸⁰⁹

Rapporteur Dugard has already assessed considerable international, regional and domestic jurisprudence in his research on the codification and progressive development of diplomatic protection undertaken for the ILC.⁸¹⁰ The selected jurisprudence was analysed mainly for the purpose of identifying the international custom on the legal nature of diplomatic protection. The present section does not purport to reproduce the evidence already collected and examined by the Rapporteur, but rather to assess the new jurisprudential developments, and to establish its added value to the pre-2004 jurisprudence, which was already analysed by Rapporteur Dugard.⁸¹¹

⁸⁰⁴ Armin von Bogdandy and I. Venzke, ‘The Spell of Precedents: Lawmaking by International Courts and tribunals’, in Cesare P.R. Romano, Kare J. Alter and C. Avgerou, *The Oxford Handbook of International Adjudication*, Oxford University Press (2013).

⁸⁰⁵ First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur, International Law Commission Sixty-fifth session Geneva, 6 May-7 June and 8 July-9 August 2013, para. 54.

⁸⁰⁶ A. Roberts, ‘Comparative International Law? The Role of National Court in creating and enforcing international law’, (2011) ICLQ, 57, 59.

⁸⁰⁷ Brownlie, *op.cit.*, 6; M. Shaw, *International Law*, 6th ed., Cambridge University Press (2008), 82; Oppenheim, *op.cit.*, 26, 41–42; Philip M. Moremen, ‘National Court Decisions as State Practice: A Transjudicial Dialogue?’ (2006) North Carolina J Intl L & Commercial Regulation, 259.

⁸⁰⁸ Brownlie, *op.cit.*, 19; A. Nollkaemper, ‘Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY,’ in G. Boas and W. Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY*, Martinus Nijhoff Publishers, Leiden (2003), 277.

⁸⁰⁹ A. Roberts, *op.cit.*, 57, 63.

⁸¹⁰ See the First (2000) and Second (2004) Reports on Diplomatic Protection, *op.cit.*

⁸¹¹ Rapporteur Dugard submitted seven Reports to the ILC on codification of international norms on diplomatic protection, the last dating from 2006, however, in the last two Reports, no new national jurisprudence dealing with the particular topic of the legal nature of diplomatic protection was added.

The relevant jurisprudence of the ICJ, of several regional courts,⁸¹² and domestic jurisprudence delivered by national courts from different geographical regions, legal systems and cultures will be assessed, in the following sections. The main purpose is to identify whether the incipient judicial trend, identified by Rapporteur Dugard in 2001⁸¹³ has, more than a decade later, geographically spread and consistently developed so much so that it could be argued that a common judicial view recognising an international individual right to some sort of diplomatic protection currently exists.

Jurisprudence of the International Court of Justice

The first definition of the diplomatic protection given by the ICJ dates from the time of its predecessor, namely the PCIJ, in 1924⁸¹⁴ and was later restated in several judgments,⁸¹⁵ with a famous judgment dating from 1970⁸¹⁶ when the discretionary power of the State in relation to the exercise of diplomatic protection was confirmed to exist throughout all possible stages of the mechanism: whether to exercise it or not; in relation to whom; when; to which extent and when to put a stop to the exercise; the State's decisions regarding the transfer of the awards established within the legal proceedings started by means of diplomatic protection. The State was not required to offer justification for its decisions, but if it did, they could have been either purely political considerations or individually related ones. No legal remedy was available to individuals, under public international law, against the sending State decisions on the exercise of diplomatic protection.⁸¹⁷

Despite the development of more effective remedial means provided by international human rights, the traditional inter-States remedial mechanism of diplomatic protection continued to be used, and the ICJ continued to receive States claims brought on behalf on

⁸¹² Inter-American Court of Human Rights, European Court of Human Rights and the European Union's courts.

⁸¹³ See J. Dugard, 2000 *First Report*, *op.cit.*, paras. 86-88.

⁸¹⁴ *Mavrommatis Palestine Concessions Case* (1924), P.C.I.J. (Ser. A) No. 2: '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 right, the right to ensure, in the person of its subjects, respect for the rules of international law.'

⁸¹⁵ *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania), judgment of 28 February 1939, PCIJ Ser.A/B, No. 76; *Nottebohm case* (Lichtenstein v. Guatemala), [1955] I.C.J. Rep. 4 at 24

⁸¹⁶ *Barcelona Traction, Light and Power Company, Limited Case* (Belgium v. Spain), judgment of 5 February 1970, ICJ Reports (1970), 3 et seq., at paras 45 and 75 (hereinafter *Barcelona Traction Case*).

⁸¹⁷ *Ibid*, paras. 45 and 75: '[W]ithin the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is its own right that the State is asserting. Should the national or legal person on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to international law, if means are available, with a view to furthering their cause or obtaining redress. ...The State must be viewed as the sole judge to decide whether its protection will be granted, and to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.'

their nationals against another State that had violated their national's rights. The question that this sub-section seeks to address is whether the ICJ's conception of diplomatic protection has changed in the recent jurisprudence⁸¹⁸ compared to the earlier traditionalist State-centric approach of diplomatic protection.

Between 1998 and 2012, several States have decided to espouse the claims of their nationals for the purpose of securing a legal remedy to the violation of their international individual rights. The *Breard*⁸¹⁹, *LaGrand*⁸²⁰, *Avena*⁸²¹ and *Diallo*⁸²² cases are amongst the most famous recent cases of diplomatic protection heard by the ICJ. The first three cases are mixed claims, of the applicant States in their own rights based on violation of the sending State rights under Art. 36(1)(b) and (2) VCCR and on behalf of their nationals,⁸²³ while the latter case is based entirely on a diplomatic protection claim brought on behalf of Mr Diallo, claiming violation of his human rights and his rights as a shareholder.

In the first three cases the same individuals rights were argued to have been violated, namely Art. 36 VCCR based individual rights: to be informed without delay about the right of the individual to have the consular officials informed of his detention and the right to communicate with them. The corresponding international obligation was, in these cases, incumbent on the US, the receiving State, which did not inform these aliens of Paraguayan, German, and Mexican nationality, about their international consular rights, and thus committed an international wrongful act. Following an unsuccessful exhaustion of the available US legal remedies, the State of nationality of these individuals brought actions against the US before the ICJ, as a last resort remedial means for obtaining reparation of the

⁸¹⁸ In particular, Case Concerning the Vienna Convention on Consular Relations (*Paraguay v USA*) 1998 ICJ Rep 248,250; *LaGrand* Case (Germany v USA) 2001 ICJ Rep. In the Case Concerning *Avena and Other Mexican Nationals* (Mexico v USA), 2004 ICJ Rep; Case Concerning *Ahmadou Sadio Diallo* (Preliminary Objections), (Republic of Guinea v Democratic Republic of the Congo), Judgment of 24 May 2007 and Judgment on the merits of 30 November 2010, Judgment Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea of 19 June 2012. See also the contention raised in the Case Concerning *the Arrest Warrant* of 11 April 2000 whereby the case was transformed into one of diplomatic protection after the Foreign Minister of the DRC left office. The DRC had brought the case by way of diplomatic protection and the court rejected the Belgian position: 2002 ICJ Rep. *Fisheries Jurisdiction* case (Spain v Canada) 1998 ICJ Rep 1998.

⁸¹⁹ Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, order of 9 April 1998, ICJ Reports (1998), 248ff (hereinafter *Breard* case).

⁸²⁰ *LaGrand* Case (Germany v. United States of America), Judgment of 27 June 2001, ICJ Reports (2001) (hereinafter *LaGrand* case).

⁸²¹ *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgement of 31 March 2004, ICJ Reports (2004), 12ff (hereinafter *Avena* case).

⁸²² *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), judgment on preliminary objections of 27 May 2007, judgment on the merits of 30 November 2010, judgment on compensation of 19 June 2012 (hereinafter *Diallo* case).

⁸²³ O. Spiermann, 'The LaGrand case and the individual as a subject of international law', (2003) *Zeitschrift für öffentliches Recht*, 197; J. Dugard, Seventh Report, *op.cit.*, (para. 18).

US violation of the individual international rights to consular notification and access. These cases show thus a closely inter-linked connection between consular and diplomatic protection as mechanism for protecting individuals. Diplomatic protection was the procedural means whereby the applicant States brought their claims against the US for having violated both their State's consular rights (to be informed by the US authorities of their national's detention) and their nationals' consular rights (to be informed about the consular notification rights as enshrined in Art. 36(1)(b) VCCR).

Certain legal scholars have interpreted the ICJ's recognition of an individual right to consular notification and access based on Art. 36(1)(b) VCCR as establishing a core obligation also on the part of the detainee's own State.⁸²⁴ However this interpretation presents several flaws. Firstly, an *ad litteram* interpretation of the ICJ judgment would not support such an interpretation. The ICJ recognised a State obligation only on the part of the receiving State. Secondly, the rights at issue in these judgments are consular assistance and protection rights, while diplomatic protection was only the procedural mechanism whereby the violation of the consular rights was brought before the ICJ. These legal scholars seem to presume that consular notification and access are part of the diplomatic protection which is an erroneous understanding of the mixed claims involving two international rights of a different nature, one substantial and the other procedural.

These judgments do not recognise an international individual right to diplomatic protection, however, they show an evolution in both the States practice and the ICJ approach of the institution, reflective of the general international law trend of the growing role of the individual in the international community. Firstly, it has to be noticed that unlike previous diplomatic protection cases brought before the ICJ for violation of economic related rights of the individual, the core of these three cases was an international individual right to access consular officials connected with human rights guarantees.⁸²⁵ Secondly, the ICJ recognised the

⁸²⁴ C. Warbrick, 'Diplomatic Representations and Diplomatic Protection', (2002) ICLQ, 723, 731; M. Pinto, 'De la protection diplomatique à la protection des droits de l'homme', (2002) RGDIP, 513, 524.

⁸²⁵ The starting premise in all these cases was the fact that the nationals of Paraguay, Germany and Mexico were convicted to death sentences, which might have been prevented had the consular officials of their States of nationality been immediately informed by the receiving State public authorities of their nationals' detention. For instance, Paraguay made clear in its Request for provisional measures submitted in the *Breard* case that one of the main reasons for its application was the protection of the right to life of Mr Breard as protected by Article 6 of the International Covenant on Civil and Political Rights. Germany, in its application submitted in the *LaGrand* case underlined several times that the case before the ICJ was an exercise of diplomatic protection meant to ensure protection of several human rights of the *LaGrand* brothers: right to life and due process. Thus the consular related rights were closely connected with the nationals' human right to life and fair trial. The close connection had been previously confirmed by the IACtHR in its Advisory Opinion No.16/99, see the following sub-section and sub-section 4. The position of international, regional and national courts on the individual's right to consular protection from his State of nationality.

rights of the individual in the determination of the appropriate remedies,⁸²⁶ thus expanding the role of the individual within the institution of diplomatic protection and implicitly offering more criteria for the judicial assessment of the executive's decisions related to the exercise of diplomatic protection.

The *Diallo* case is a showcase of the great influence played by the international human rights doctrine and judicial dialogue over the traditional diplomatic protection doctrine. The case arose as a result of the mistreatment of a Guinean businessman by the DR Congo over several decades. The mistreatment was inflicted on Mr Diallo personally, but also on his two companies. The innovative part of the judgment is the one concerning the individual injuries, namely his illegal arrest and detention, and arbitrary expulsion from DR Congo. As to the injuries experienced personally by Mr Diallo, Guinea claimed that the DR Congo violated several of his human rights guaranteed by international treaties,⁸²⁷ to which both countries are parties to, and which, thus, legitimated its international complaint brought before the ICJ on the basis of an exercise of diplomatic protection on behalf of Mr Diallo.

The Court first ruled in 2007 in relation only to the preliminary objections. It held that Guinea had the right to exercise diplomatic protection on behalf of Mr Diallo's individual and direct rights, and his rights as a member of the private limited liability companies, rejecting thus the Congolese objections. In 2010 the ICJ delivered its judgment on the merits.⁸²⁸ We will not analyse the entire judgment, as the only relevant part for our purposes is the one concerning the exercise of diplomatic protection for the violation of Mr Diallo's human rights. First of all, the judgment of the ICJ brings important changes to the classical institution of diplomatic protection of natural persons. It replaced its traditional *Mavrommatis* definition of diplomatic protection with the ILC's more balanced definition, as provided in Article 1 of the 2006 ILC Articles on Diplomatic Protection.⁸²⁹ It thus officially recognised that the ILC

⁸²⁶ See the opinion of V. Pergantis, *op.cit.*

⁸²⁷ Prohibition of arbitrary expulsion as guaranteed by Art. 13 International Covenant of Civil and Political Rights; Art. 12(4) African Charter on Human and Peoples' Rights; prohibition of arbitrary detention and arrest as guaranteed by violation of Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights and Article 6 of the African Charter; prohibition of mistreatments as guaranteed by Articles 7 and 10, paragraph 1, of the International Covenant on Civil and Political Rights; Article 5 of the African Charter on Human and Peoples' Rights.

⁸²⁸ Judgment of 30 November 2010. There is also a third judgment in the case, regarding the compensation owed by the Democratic Republic of the Congo to the Republic of Guinea, delivered on 19 June 2012.

⁸²⁹ The *Mavrommatis* based definition reads as follows: '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 right, the right to ensure, in the person of its subjects, respect for the rules of international law', while in *Diallo* the ICJ completely endorsed the ILC Art. 1 on Diplomatic protection as it had been finally adopted by the ILC in 2006: 'The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the 'ILC'), 'diplomatic

definition reflects the new understanding of the diplomatic protection notion.⁸³⁰ Second, it updated the material scope of the diplomatic protection to the current characteristics of the international reality, by recognising that international human rights are part of the substantive scope of the diplomatic protection institution: *'[o]wing to substantive development in international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection [...] has subsequently widened to include, inter alia, internationally guaranteed human rights.'* (para. 39)

It has to be noticed that the Republic of Guinea resorted to diplomatic protection in order to address, *inter alia*, the injuries inflicted upon Mr Diallo's human rights. An initiative which clearly supports the idea that diplomatic protection can be used to address human rights violations. The case shows that states can use diplomatic protection as a last resort when their nationals have been unable to secure redress for violations of their human rights by way of domestic legal remedies.⁸³¹

The cases discussed under this section prove the growing connection between diplomatic protection and human rights and also the growing willingness of the States to use diplomatic protection of their own initiative for remedying human rights and international individual rights of their nationals, even when the latter have taken residence for a long period of time in a another State (e.g., as in the *LaGrand* case).

Jurisprudence of regional international courts

Inter-American Court of Human Rights (IACHRS)

The IACtHR had the opportunity to review the legal nature of the rights enshrined in Article 36 VCCR and their role in the protection of human rights of nationals abroad in a request for an Advisory Opinion submitted to it by Mexico, in 1997. At that time, Mexico's application received great support from seven other Latin American States, indicating these countries'

protection consists of 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 of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility' (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).⁸³⁰ ICJ Judgment on Preliminary Objections of 24 May 2007, para. 39.

⁸³⁰ A. Vermeer-Künzli, 'Diallo and the Draft Articles: The Application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo Case', (2007) *Leid. J. Int'l. L.*, 941.

⁸³¹ According to Judge Trindade Separate Opinion in Diallo, the Diallo judgment is the first judgment of the ICJ where it established violations of two human rights treaties: ICCPRs and the African Charter; see also A. Vermeer-Künzli, 'Diallo and the Draft Articles: application of the Draft Articles on Diplomatic Protection in the Ahmadou Sadio Diallo case', (2007) *Leiden Journal of International Law*, 941.

common view of the high relevance of individual consular rights in ensuring the protection of human rights of nationals abroad. The factual and legal circumstances of Mexico's request were almost identical to the background of the trio of cases that would later be reviewed by the ICJ (the *Bread*, *LaGrand* and *Avena* cases). Namely, the detention of several nationals (this time of Mexican nationality) by US authorities which failed to inform them of their right to have their consulate notified of their detention and of freely communicating with Mexico's consular officials. These nationals were tried and ultimately sentenced to death without having received a remedy for the violation of their international individual rights to consular notification and communication. Due to the human rights character of the Court, Mexico's claim was based on the role played by the individual rights to consular notification and communication for ensuring respect of several human rights of the Mexican nationals sentenced to the death penalty.⁸³² We will not engage in a full analysis of the Advisory Opinion, but simply point out certain aspects of the decision that are relevant for the present section.

In its memorial, Mexico pointed out, almost emphatically, that its worldwide network of consular and diplomatic missions are ready to intervene and provide consular assistance to their citizens that risk receiving a death sentence in foreign countries.⁸³³ Mexico's efforts to pursue different remedial avenues (before the IACtHR and the ICJ) for the purpose of obtaining an international judgment that would sanction the persistent violation of their national's consular rights by the US and the aforementioned clear formulation of a sort of obligation on the part of consular and diplomatic officials to intervene on behalf of nationals facing the death sentence abroad seem to indicate a State practice of willingly espousing the individual claims of their nationals. This practice seems to indicate the *opinio juris* of several Latin American States towards approaching diplomatic protection of its nationals abroad as a State duty, at least in the specific circumstances of nationals risking the death sentence.

⁸³² Such as the rights to private life, due process and life. Art. 64 of the American Convention authorises the members of the Organization of American States (OAS) to request the Inter-American Court to provide an interpretation of the American Convention 'or of other treaties concerning the protection of human rights in the American states.'

⁸³³ Advisory Opinion No. 16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, October 1, 1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999), para. 27. In these cases, the foreign country was usually the US.

Jurisprudence of the European Court of Human rights (ECtHR) – use of Art. 33 ECHR inter-states mechanism as a form of diplomatic protection mechanism for the protection of human rights

The European Convention of Human Rights (ECHR) does not include an explicit individual right to diplomatic or consular protection from the State of nationality or another State. The rationale of the Convention, as with most of the human rights treaties, is the protection of the basic human rights of the individual irrespective of their nationality, giving a *locus standi* against both the State of nationality and resident State, or the State exercising effective control over his person or the territory where the individual suffered the injury.⁸³⁴ Although the Convention covers, in principle, also injuries inflicted on aliens, its rationale is to confer a direct claim to the individual, instead of transferring the injury to the State of nationality that would later espouse its claim against the defendant State, as is characteristic for the diplomatic protection institution. The Convention, as interpreted by the Commission and the ECtHR, has been held to establish, firstly, that a certain duty exists upon consular and diplomatic officials to exercise protective measures on behalf of their nationals against a foreign State, and secondly that, in cases of grave or spread violations of human rights, States will resort to the inter-states and third party intervention mechanisms to protect their nationals and non-nationals whose fundamental human rights were violated by another State party to the ECHR.

Although the European Commission and the Court itself have repeatedly stated that the Convention does not contain an individual right requiring the signatory States to exercise diplomatic protection, or espouse an applicant's complaint under international law or otherwise to intervene with the authorities of another State on his or her behalf,⁸³⁵ the

⁸³⁴ *Assanidze v Georgia*, Appl. No. 71503/01, Judgment of 8 April 2004; *Al-Skeini and others v United Kingdom*, Appl. No. 55721/07, Judgment of 7 July 2011. Similarly for other regional human rights legal orders, see the IACtHR, Advisory Opinion, OC-2/82, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, 24 September 1982, see also O. de Schutter, 'Diplomatic Protection, Section 5 –Introduction' *International Human Rights Law: Cases, Materials, Commentary*, 2nd ed., Cambridge University Press (2014).

⁸³⁵ See for example, *Bertrand Russell Peace Foundation Limited v. United Kingdom*, Appl. No. 7597/76, Dec. 2.5.78, D.R. 14 p. 117 at 123, 124; *Kapas v the United Kingdom*, Appl. No. 12822/87, Commission Decision of 9 December 1987, Decision and Reports (DR) 54, *L. v Sweden*, Applic. No. 12920/87, Commission decision of 13 December 1988, and *Dobberstein v Germany*, Appl. No. 25045/94, Commission Decision of 12 April 1996; *M and others v Italy and Bulgaria*, Appl. No. 40020/03, Judgment of 31 July 2012. When individuals lodged claims before the ECtHR founded on a violation of the State's duty to exercise diplomatic intervention on their behalf against other Member States, these applications have consistently been declared incompatible *ratione materiae* with the Convention and thus rejected as inadmissible.

Commission retained in *X v Federal Republic of Germany*⁸³⁶ that ‘*diplomatic and consular representatives [...] perform certain duties with regard to [nationals of a contracting state abroad] which may, in certain circumstances, make that country liable in respect of the Convention.*’⁸³⁷ In the above-mentioned case, one of the applicant’s claims against Germany was that the consular officials did not help him to obtain redress in a property case against the Moroccan officials, nor did they oppose his deportation. Mr X’s claim was rejected as inadmissible on the basis that ‘*the consular authorities had done all that could be reasonably expected of them.*’⁸³⁸ Therefore the Commission did recognise that consular and diplomatic officials have certain duties in relation to their co-nationals, however, it refused to find a violation of such a duty under one of the Convention articles.

Even though the ECHR legal system is primarily an individual-centred remedial system, the ECHR also recognises an inter-states mechanism under Art. 33 ECHR. This mechanism offers thus the context for the Contracting States to exercise diplomatic protection on behalf of individuals under its personal jurisdiction or within the *actio popularis* judicial proceedings. As the ECtHR has rightly noted, this is a ‘*category of inter-State complaint where the Applicant State denounces violations by another Contracting Party of the basic human rights of its nationals (or other victims).*’⁸³⁹ In fact such claims are substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection, that is, ‘*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 of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.*’⁸⁴⁰

Over the years, the inter-States mechanism has only rarely appeared in the ECtHR jurisprudence.⁸⁴¹ States’ practices of illegal or arbitrary detention and torture, or inhuman or degrading treatment have most commonly triggered the use of this procedural mechanism by

⁸³⁶ European Commission of Human Rights, *X v Federal Republic of Germany*, Decision of 25 September 1965, Appl. No. 1611/62, 8 (1965) Yearbook of the ECHR, 158. For a similar case, see *M v Denmark*, Appl. No. 17392/90, Decision of the European Commission of Human Rights of 14 October 1992.

⁸³⁷ European Commission of Human Rights, *X v Federal Republic of Germany*, Decision of 25 September 1965, Appl. No. 1611/62, para. 168.

⁸³⁸ European Commission of Human Rights, *X v Federal Republic of Germany*, Decision of 25 September 1965, Appl. No. 1611/62, para. 168.

⁸³⁹ *Cyprus v Turkey*, Appl. No. 25781/94, Judgment 12 May 2014, para. 45.

⁸⁴⁰ *Cyprus v Turkey*, Appl. No. 25781/94, Judgment 12 May 2014, para. 45.

⁸⁴¹ For an almost complete list of Art. 33 inter-States complaints, see the ECtHR list, available online at http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf this lists does not include the latest of the application filled by Ukraine against Russia, namely, Appl. No. 43800/14.

the State of nationality of the victims or by non-nationality States acting as defenders of the European public order.⁸⁴² Based on Art. 33 ECHR inter-states mechanism, Contracting States can submit an application, acting as guardians of the European public order, or on behalf of specific victims.⁸⁴³ While the former category is a form of *actio popularis*⁸⁴⁴, the latter category is a form of subrogation of the State into the individual victims' claims, which resembles diplomatic protection claims.⁸⁴⁵ These are cases in which a Contracting State expressly seeks redress for violations of identified victims, who can be both its nationals and nationals of another Contracting State. This category is illustrated by the cases brought by *Denmark against Turkey*⁸⁴⁶, concerning treatment contrary to Article 3 ECHR inflicted upon a Danish citizen by Turkish police officers. This Art. 33 ECHR application included both elements of diplomatic protection – infringements by a State of the rights of aliens, and elements more characteristic of human rights regimes – such as violations of the Convention by a State in regard to its own nationals. Denmark thus requested the ECtHR to examine both the treatment of its citizen and whether the interrogation techniques used on him were commonly used in Turkey. According to the ECtHR this was '*the only case in which the doctrine of "diplomatic protection" as recognised in international law has been applied in the context of an individual who was identifiable from the time of lodging of the application.*'⁸⁴⁷

The third category of cases submitted under Art. 33 ECHR refers to those where a Contracting State seeks to assert interests '*in so far as it represents or is closely linked to*

⁸⁴² See the first two cases of this type introduced by *Greece v UK* for measures adopted by the colonial government of Cyprus such as collective punishments, arrests, detentions and deportations, Appl. Nos. 176/56 and 299/57; the 1960s series of inter-States cases brought by Denmark, Norway, Sweden and the Netherlands against Greece for violations of human rights committed by the military regime of Greece against their own nationals but also other non-national victims, Appl. Nos. 3321/67 to 3323/67 and 3344/67, 4448/70; two cases brought by Ireland against UK for acts committed in the Northern Ireland at the beginning of 1970, Appl. Nos. 5310/71 and 5451/72; four cases brought by Cyprus v Turkey post-1970 invasion; a string of cases brought by Nordic States against Turkey, and the cases brought by Georgia against the Russian Federation, of which two have been settled, the last judgment of the Grand Chamber deciding in favour of the applicant, Georgia; and two cases lodged in 2014 by Ukraine against the Russian Federation for events in Crimea, Appl. Nos. 20958/14 and 43800/14.

⁸⁴³ *Denmark, Norway, Sweden and the Netherlands v. Greece* ('the Greek case' – Appl. Nos. 3321/67, 3322/67, 3323/67 and 3344/67, Committee of Ministers Resolution of 15 April 1970). One might also cite the case of *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (Appl. Nos. 9940-9944/82, Commission decision of 6 December 1983); *Cyprus v Turkey*, Appl. No. 25781/94.

⁸⁴⁴ *Cyprus v Turkey*, Appl. No. 25781/94, ECtHR, Judgment of 12 May 2014: '*vindicating the public order of Europe within the framework of collective responsibility under the Convention.*' See in particular the speech of Dean Spielmann, President of the ECtHR to Gray's Inn 'The European Court of Human Rights as guarantor of a peaceful public order in Europe' of 7 November 2014, available online at http://www.echr.coe.int/Documents/Speech_20141107_Spielmann_GraysInn.pdf

⁸⁴⁵ D. Spielmann, presentation before the Gray's Inn, *op.cit.*

⁸⁴⁶ *Denmark v Turkey*, Appl. No. 34382/97, Judgment of 5 April 2000.

⁸⁴⁷ As stated in a subsequent case, see *Case Cyprus v Turkey*, Appl. No. 25781/94, ECtHR, para.3.

individuals alleged to be victims of acts occurring in the context of a political dispute between two countries’,⁸⁴⁸ such as the cases brought by Cyprus against Turkey,⁸⁴⁹ *Ireland v. the United Kingdom*⁸⁵⁰ and by Georgia and Ukraine against the Russian Federation.⁸⁵¹ While in some of the cases introduced by Cyprus and Georgia, victims were identified, in the case of *Ireland v. the United Kingdom*⁸⁵² the victims were not identified, which means that this latter exercise of Art. 33 ECHR by Ireland cannot be qualified as a classical diplomatic protection claim.

The role of these inter-states cases is that of reflecting the position of certain States towards violations of human rights. Although the claim of the individual is sufficient for the ECtHR to find a violation of a Convention human right and establish direct injury and remedy, these States of nationality chose, of their own initiatives, to officially support their nationals’ claims, by way of exercising a sort of diplomatic protection mechanism. It can thus be interpreted as another string of evidence supporting the idea of a growing *opinio juris* of States that persistent, widespread, or grave violations of absolute or fundamental human rights trigger a certain duty on the State of nationality, and more widely on the community of States, to exercise diplomatic protection on behalf of (non)-nationals on whom such treatments are inflicted.

In addition to the Article 33 ECHR type of mechanism, the ECHR offers another modern remedial route that can be interpreted as falling under the category of diplomatic protection claims. Article 36 (1) of the Convention, taken together with Rule 44 (1) (a) and (b) of the Rules of Court, allows a State to intervene in support of a case lodged before the Court by one of its nationals against another State party.⁸⁵³ This specific third party intervention procedure has been held to reflect a disguised classical form of diplomatic

⁸⁴⁸ *Cyprus v Turkey*, para.3.

⁸⁴⁹ Cases *Cyprus v Turkey*, Appl. Nos. 6780/74, 6950/75, 8007/77.

⁸⁵⁰ Two cases submitted by *Ireland v UK*, Applic. Nos. 5310/71 and 5451/72, Judgment of 18 January 1978.

⁸⁵¹ *Georgia v Russian Federation*, Appl. Nos. 13255/07, 38263/08, 61186/09; *Ukraine v Russian Federation*, Appl. Nos. 20958/14 and 43800/14.

⁸⁵² Two cases submitted by *Ireland v UK*, Appl. Nos. 5310/71 and 5451/72, Judgment of 18 January 1978.

⁸⁵³ The ECtHR qualifies the provision as reflecting ‘*the right of diplomatic protection which gives a State an opportunity to protect its nationals in a situation where they suffer an injury as a result of a breach of public international law by another Member State*’ case of *I v Sweden* (Appl. No. 61204/09, Judgment of 5 September 2013) para. 42. See the following cases, as examples of State practice of Art. 36(1) ECHR: *Sisojeva and Others v. Latvia* (striking out) [GC], Appl. No. 60654/00, Judgment of 15 January 2007 (Russia); *Slivenko v. Latvia* [GC], Appl. No. 48321/99, para. 6, Judgment of 9 October 2003 (Russia); *Somogyi v. Italy*, Appl. No. 67972/01, Judgment of 2004 (Hungary); *Scozzari and Giunta v. Italy* [GC], Appl. Nos. 39221/98 and 41963/98, Judgment of 13 July 2000 (Belgium); and *Demades v. Turkey*, Appl. No. 16219/90, 31 July 2003 (Cyprus)).

protection which gives States the right to intervene in cases taken by one of their nationals against another State party to the ECHR.⁸⁵⁴

The use of Articles 33 and 36 ECHR mechanisms by the Contracting States can offer evidence of States' position towards the institution of diplomatic protection, and the extent to which they change their traditional position of diplomatic protection as serving primarily States interests.⁸⁵⁵ The jurisprudence discussed above seems to show that when the human rights, in particular absolute human rights, of their nationals are stake, States feel obliged to act on behalf of their injured (non)-nationals abroad and help them obtain remedies for these human rights violations.

Furthermore, the Court has never rejected the idea of consular and diplomatic officials' duty to intervene on behalf of their nationals, on the contrary, the Commission had clearly pointed out that '*diplomatic and consular representatives [...] perform certain duties with regard to [nationals of a contracting state abroad] which may, in certain circumstances, make that country liable in respect of the Convention (X v Germany).*' Additionally, the Court has limited the discretionary power of the State over diplomatic protection matters, when in the *Beaumartin v France* case,⁸⁵⁶ the ECtHR held that a citizen has a right to receive compensation paid by a foreign state to his state of nationality obtained in legal proceedings started by means of a diplomatic protection claim. Therefore, it could be argued that the ECtHR recognised an individual right to obtain the remedy attributed to his State of nationality in legal proceedings opened by way of exercising diplomatic protection.

Another case that is of interest for this particular section is the complex case of *Ilascu v Moldova and Russia*.⁸⁵⁷ In 1999, four Moldavian citizens brought an application before the ECtHR against Moldova and Russia for violation of Arts. 3 and 5 of the ECHR. The applicants were charged with the murder of two Transnistrian officials and fighting by illegal means against the State of Transnistria. They were detained and one of the men was later sentenced to death (Mr Ilascu), while the other Moldavian citizens were sentenced to long-term imprisonment and confiscation of property. The case is complex and involves several different issues such as the conformity of the applicants' detention pending judicial proceedings with Art. 5 ECHR and of the detention conditions with Art. 3 ECHR. Before

⁸⁵⁴ Dean Spielmann, President of the ECtHR to Gray's Inn 'The European Court of Human Rights as guarantor of a peaceful public order in Europe' of 7 November 2014, available online at http://www.echr.coe.int/Documents/Speech_20141107_Spielmann_GraysInn.pdf

⁸⁵⁵ Namely of an absolute discretionary State power.

⁸⁵⁶ *Beaumartin v. France*, Appl. No. 15287/89, Judgment of 25 November 1994.

⁸⁵⁷ *Ilascu et al v Moldova and Russia*, Appl. No. 48787/99, Judgment of 4 July 2001.

starting the complex analysis of which of the Convention Articles were violated, the Court had to establish whether the Republic of Moldavia or/and Russian Federation bear the responsibility for the violation of the human rights, which, thus implied a prior assessment of the procedural legal issue of the extent of territorial jurisdiction. The facts leading to the contested violations occurred in the Transnistria territory, over which the Republic of Moldova lost *de facto* control in 1990, while Russia had been supporting the separatist forces' control over this part of the territory, which was however still recognised internationally as part of the Moldavian Republic. The ECtHR held that even if a State no longer exercises *de facto* sovereignty over a territory, it is still bound within the limits of its authority to protect its citizens from that territory from human rights violations. In conclusion, the ECtHR retained that Moldova had '*a positive obligation under Art. 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) The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. (para. 333)*'. Paragraph 334 of the Court's judgment⁸⁵⁸ is of utmost importance as, here, the Court recognised precise diplomatic protection duties on the part of the State of nationality. It first starts by recognising a sort of minimum standards diplomatic protection duty, by requiring the State of nationality to show due diligence in the decision-making procedure regarding the exercise of diplomatic protection on behalf of its nationals. The Court continues by establishing a clear duty on the state to take particular effective diplomatic protection actions when violation of absolute human rights are at issue.⁸⁵⁹ The Court concludes by recognising its jurisdiction to review the appropriateness and sufficiency of the diplomatic protection measures chosen by the State in view of securing the human rights of their nationals, thus, further limiting the public international law recognised State discretion in the exercise of diplomatic protection.

⁸⁵⁸ 'Although it is not for the Court to indicate which measures the authorities should take in order to comply with their obligations most effectively, it must verify that the measures actually taken were appropriate and sufficient in the present case. When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention.' Case *Ilascu and others v the Republic of Moldavia and Russian Federation*, para. 334

⁸⁵⁹ Case *Ilascu and others v the Republic of Moldavia and Russian Federation*, paras. 334- 335.

In casu, the Court held that the Moldavian authorities did not properly fulfil their positive obligations to secure the rights guaranteed by the Convention, and failed to take enough measures to secure the ECHR rights on behalf of the four Moldovan citizens held in the Transnistria territory. The Court found that while the Moldovan Government did engage in exchanges for the purpose of ensuring the release of Mr Ilascu, it did not engage in similar efforts as regards the other three applicants. Furthermore, the Court noted that, after 2001, the case of the applicants has not been raised either with the Transnistrian authorities or the Russian government. The Court underlined that the Moldovan Government failed to raise the fate of the applicants in the context of negotiations with the Russian Federation, which was acting as a guarantor State. Accordingly, the Court concluded that ‘*Moldova's responsibility could be engaged under the Convention on account of its failure to discharge its positive obligations with regard to the acts complained of which occurred after May 2001.*’⁸⁶⁰

Although the jurisprudence of the ECtHR does not offer numerous instances of recognition of a State duty to exercise some sort of diplomatic protection, the *X v Federal Republic of Germany*,⁸⁶¹ *Ilascu v Moldova and Russia* and *Beaumarin v France* cases do show that States have been recognised a positive obligation to exercise diplomatic protection measures, and that they no longer possess a completely discretionary power to exercise diplomatic protection, at least within the ambit of the ECHR system. The *Ilascu* case also indicates that the measure(s) which a State takes to ensure its positive obligation to exercise diplomatic protection for the purpose of ensuring the protection of its nationals’ human rights will be carefully scrutinised, and inaction, arbitrary refusal or insufficient measures will be sanctioned as violations of the very ECHR based human rights at issue.

Whether the jurisprudence herein discussed gives sufficient evidence to sustain a State duty to exercise diplomatic protection on behalf of nationals, in certain extreme cases, is a debatable issue. An evolution in the Court’s jurisprudence from the first decades of the European Commission of Human Rights functioning, when diplomatic protection cases were dismissed without much assessment, can definitely be identified. It can be safely stated that the *Beaumarin*, *Ilascu* and Articles 33 and 36 ECHR based cases reflect a certain growing States’ *opinio juris* that, in cases of grave or widespread violation of human rights of nationals, States and courts recognise a State duty to exercise diplomatic protection measures.

⁸⁶⁰ Ibid., para. 352.

⁸⁶¹ European Commission of Human Rights, *X v Federal Republic of Germany*, decision of 25 September 1965, Appl. No. 1611/62, para. 158. For a similar case, see *M v Denmark*, Appl. No. 17392/90, Decision of the European Commission of Human Rights of 14 October 1992.

However, no precise diplomatic protection measures have been established as incumbent on the State, but, for the moment, only a due diligence type of diplomatic protection action.

The jurisprudence of the EU Courts – diplomatic protection as a remedial mechanism for filling the gaps in European and international human rights law

The 9/11 attacks showed that terrorism was an international threat that needed to be urgently tackled by coherent norms throughout the globe. The response at the international level was the adoption by the UNSC of a series of resolutions providing sanctions in the form of asset freezing and travel bans against individuals⁸⁶² who were allegedly involved in terrorist activities. The Resolutions further called upon all States and all international and regional organisations to act strictly in accordance with the provisions of the resolutions, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement. The measures imposed by the initial Resolutions 1267 (1999) and 1333 (2000) were maintained and improved by several subsequent Security Council Resolutions.⁸⁶³

The EU, as an actor that wants to affirm itself on the international arena, and whose Member States are all members of the UN, some sitting in the UNSC, had legal and security interests⁸⁶⁴ to comply with the above-mentioned UNSC resolutions. The Council of the EU adopted EU internal secondary legislation closely implementing all the Resolutions adopted by the UNSC.⁸⁶⁵ The implementing procedure followed a two-step procedure: first, a common position was adopted under the then second pillar (CFSP) transposing all the UNSC

⁸⁶² Following the hijackings in the US on 11 September 2001, the UNSC adopted several resolutions, 1373/2001, 1390/2002 and 1453/2002 directed against the Taliban, Osama bin Laden, and Al-Qaeda. The sanctions imposed by these Resolutions are known as the ‘targeted’ or ‘smart’ sanctions. The first resolution of this type was adopted by the UNSC in 1999, against individuals associated with Osama bin Laden, who were active on the territory of Afghanistan (Resolution instituting the 1267 al-Qaeda and Taliban sanction regime), and provided a list of individuals and sanctions applied to them, *inter alia*, freezing of assets and travel ban. In addition, the Resolution established also a committee of the Security Council composed of all its members (‘the Sanctions Committee’), responsible in particular for ensuring that the States implement the measures, and in particular the sanctions established by the UNSC. The freezing of funds and flight ban were later on further strengthened by Resolution 1333 (2000) of the Security Council requiring ‘the States to freeze without delay funds and other financial assets of Usama bin Laden and of individuals and entities associated with him as designated by the Sanctions Committee and to ensure that no funds or financial resources were made available, by their nationals or by any persons within their territory, directly or indirectly, for the benefit of Usama bin Laden or individuals and entities associated with him, including the Al-Qaida organization.’ (para. 8(2)).

⁸⁶³ *Inter alia*, 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004) and 1617 (2005); see more in J. Heliskoski, ‘Commentary of the Ayadi and Hassan cases’, (2007) CMLRev, 1143.

⁸⁶⁴ As shown by the bombings in London 2004 and Madrid 2005.

⁸⁶⁵ For more details on the adoption of the black lists by the UN and their implementation by the EU, see R. Cadin, ‘Le ‘listen ere’ del Consiglio di sicurezza e il loro recepimento da parte dell’Unione europea: quali rimedi per I sospetti terroristi?’, in M.R. Saulle, L. Manca (eds.), *Terrorismo e migrazioni: due fenomeni impropriamente abbinati*, ESI, Napoli (2006).

resolutions sanctions, second, a then EC Regulation was adopted on the basis of ex-Arts. 60, 301 and 308 EC Treaty concerning the imposition of the freezing of all funds, financial assets and economic resources of the listed persons.⁸⁶⁶ In addition to implementing the UNSC lists of targeted individuals, the EU also drafted its own list of so-called ‘home’ terrorists who were however subject to a different set of EU instruments and decision-making, placing the so-called ‘international’ terrorists⁸⁶⁷ under an even more precarious legal regime, from the perspective of fundamental rights protection.

Several of these listed ‘international’ individuals brought actions of annulment of the EU Regulations⁸⁶⁸ that were nominating them, (see for e.g. Ayadi, Hassan, Kadi) based on similar arguments: infringement of several of their fundamental rights⁸⁶⁹ and the then Community’s lack of competence to adopt these instruments.⁸⁷⁰ We will concentrate on the cases brought by individuals subject to EU Regulations implementing the UNSC Resolutions and in particular on the cases brought by Ayadi and Hassan against the EU Council. These cases are reflective of how the classical international institution of diplomatic protection can still be, in this day and age of multiple remedial means for the protection of human rights, the only effective remedial route for individuals listed as ‘international’ terrorists trying to obtain a remedy against the violation of their human rights.

⁸⁶⁶ The UNSC first resolution against the Taliban was implemented by the EU *via* the CFSP Common Position (Common Position 1999/727/CFSP concerning restrictive measures against the Taliban, [2000] OJ L 294/1) and an EC Regulation (Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, [2000] OJ L 43/1). The procedure governing the adoption of targeted sanctions post-Lisbon has changed, for a detailed article regarding this issue, see P. Van Elsuwege, ‘The Adoption of ‘Targeted Sanctions’ and the Potential for Inter-institutional Litigation after Lisbon’, (2011) *Journal of Contemporary European Research*, 488, paper available also online at <http://www.jcer.net/index.php/jcer/article/viewFile/401/306>

⁸⁶⁷ The ‘home’ terrorists were listed in ex-third pillar instruments, whose scope of judicial review was very limited, and were not complemented by first pillar type of instruments as in the case of ‘international’ terrorists. For more details on the distinction of the legal regimes governing the situation of ‘international’ v ‘home’ terrorists, see the *Segi* case (Case C-355/04, *Segi and others v. Council* ECR [2007] I-1657) and E. Spaventa, ‘Fundamental Rights and the Interface between the Second and Third Pillar’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations. Salient Features of a Changing Landscape*, Cambridge, Cambridge University Press (2008), 132. More details on the pre-Lisbon sanctions regime of the EU can be found in the M. Cremona, ‘EC Competence, ‘Smart Sanctions’ and the Kadi Case’, (2009) *Yearbook of European Law*, 559; A.D. Casterleiro, ‘The Implementation of Targeted Sanctions in the European Union’ in A.D. Casterleiro and M. Spornbauer (eds), *Security Aspects in EU External Policies, EUI Working Papers 1/2009*, 39-50.

⁸⁶⁸ It has to be recalled that pre-Lisbon Treaty, the CFSP instruments could have been challenged under only one legal argument, namely the incorrect legal basis, if the decision-making procedure should have been the one under the then first pillar instead of the second one, see former Art. 47 TEU.

⁸⁶⁹ Usually the right to property, fair trial and effective remedy were claimed to have been violated by the challenged EU instruments.

⁸⁷⁰ Joint Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, [2008] ECR I-6351, para. 169. For a critical assessment of the CJEU choice of legal reasoning justifying the choice of Arts. 60, 301 and 308 EC Treaty for the adoption of secondary instruments fighting international terrorism and securing international peace (previous EU objectives), see C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights. The Case of Individual Sanctions*, Oxford University Press (2009).

Chafiq Ayadi, a Tunisian citizen resident in Ireland, and Faraj Hassan, a Libyan citizen resident in the UK, were subject to the UNSC list of targeted terrorists provided by Resolution 1333 (2000) of the Security Council. This Resolution required that their funds and financial assets be frozen without delay. The EU conformed by way of adopting two different types of instruments under the then two different pillars: first the Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban⁸⁷¹ complemented by the Council Regulation No. 881/2002.⁸⁷²

Under the EU legal system, the legal remedies available to the individuals listed as ‘international’ terrorists were scarce, as they could only start an action of annulment against the EC Regulation, while the Common Position was not subject to such a direct legal action.⁸⁷³ The situation regarding access to courts of these individuals was even more precarious within the UN ‘blacklisting’ regime, which was strongly criticised for its failure to provide access to effective legal remedies, thus violating human rights, in spite of the several amendments brought to this regime.⁸⁷⁴ It should be recalled that initially the criteria for listing individuals were extremely broad.⁸⁷⁵ The listed individuals could not directly challenge the decision of the Sanction Committee, and the reasons behind the listing were not communicated to them. According to section 8 of the Guidelines of the (Sanctions) Committee for the conduct of its work, the listed individual had no right to directly challenge the listing decision, or to be heard directly by the Sanction Committee.⁸⁷⁶ The only legal remedy made available by the UNSC Resolution was the right of the individuals to request their state of nationality or residence to review all the relevant information concerning the listing of the individual. Based on the State’s interpretation of the information, the petitioning government had discretion to decide on whether to seek to persuade the designated government to submit a request for de-

⁸⁷¹ Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban amending Common Position 96/746/CFSP, OJ 2001 L 57, p. 1.

⁸⁷² Their names were listed in Annex I to Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, OJ 2002 L 139/9.

⁸⁷³ It is precisely the ‘smart sanction’ string of cases which showed the remedial gaps in the EU smart sanctions regime, triggering salient discussions during the Revision Treaty (Lisbon Treaty) negotiations on the appropriate EU legal regime governing the decision-making procedure and the legal and judicial remedies available to individuals whose rights have been violated by this type of EU sanctions. See, F. Francioni, ‘Kadi and the Vicissitudes of Access to Justice’ in M. Cremona, F. Francioni, S. Poli (eds.), *Challenging the EU Counter-terrorism measures through the Courts*, *Academy of European Law Working Paper 2009/10*.

⁸⁷⁴ See I. Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, in (2003) *Nordic JIL*, 1; F. Merget, F. Hoffmann, ‘The UN as a Human Right Violator? Some Reflections on the United Nations Changing Human Rights Responsibility’, (2003) *Human Rights Quarterly*, 314.

⁸⁷⁵ See the 1267 and 1373 UNSC Resolutions regimes.

⁸⁷⁶ See the ‘Guidelines of the [Sanctions] Committee for the conduct of its work’ (‘the Guidelines’), adopted on 7 November 2002, amended on 10 April 2003 and revised (without substantial amendment) on 21 December 2005, provide in section 8, entitled ‘De-listing’.

listing (see 8(d) of the Guidelines).⁸⁷⁷ Therefore the UN regime initially provided only for classical diplomatic protection remedial means, as a prerogative of the State to discretionally decide whether to exercise it or not.

The action of annulment that could have been lodged by ‘international’ terrorists against the EC Regulation listing them as associated with terrorist regimes is thus a significant improvement compared to the legal black hole that existed for a long period of time at the UN level. The effectiveness of the EU based action of annulment is, however, questionable, since the EU is merely implementing the UN sanctions. Therefore a de-listing achieved at the EU level would be inefficient if the individual was still listed at the UN level. A truly effective de-listing at the EU level would thus, in practice, need to be complemented by an action of the Member State of the nationality or residence of the listed individual towards the designated government seeking to convince the latter to espouse the de-listing claim of the individual before the UN Sanction Committee.

In 2002, Ayadi and Hassan brought actions of annulment of the EC Regulation 881/2002 on grounds of lack of competence of the EU to adopt the challenged measures, and violation of the applicants’ fundamental human rights, the principle of proportionality and the principle of subsidiarity by the challenged measures.⁸⁷⁸ One of the human rights which the applicants complained had been violated by the EU *via* the contested measure was the right to an effective judicial review due to the fact the EU Regulation was closely following the UNSC ineffective mechanism for reviewing the individual measures for the freezing of funds.⁸⁷⁹ The applicants also complained of the Member States of residence lack of reply to their request for assistance in obtaining the removal of their names’ from the Sanctions Committee list. According to the complainants, this passive attitude coupled with the ineffective UN remedial machinery led to the violation of their right to an effective judicial remedy against the sanction of freezing their funds.⁸⁸⁰

⁸⁷⁷ According to para. 145 of the CFI judgment in Case T-253/02 *Ayadi v Council*, Judgment 12 July 2006. ‘*The Sanctions Committee having, with its Guidelines, interpreted the Security Council resolutions in question as conferring on interested persons the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute.*’

⁸⁷⁸ Case T-253/02, *Chafiq Ayadi v. Council*, Judgment of the Court of First Instance of 12 July 2006; Case T-49/04, *Faraj Hassan v. Council and Commission*, Judgment of the Court of First Instance of 12 July 2006. The circumstances of these cases were similar to the famous *Kadi* case, *op.cit.*

⁸⁷⁹ *Ibid.*, para. 134.

⁸⁸⁰ *Ibid.*, para. 102.

To the surprise of the legal academia⁸⁸¹, the reply of the former CFI to the applicants' allegations provides more evidence in support of a *statu nascendi* international customary rule recognising an individual right to diplomatic protection in cases of violation of fundamental human rights.

The CFI clarified what it considered to be the obligations of the EU countries when they receive requests for de-listing from targeted individuals. The Court held that the individual right conferred by the UN Guidelines, namely '*the right to present a request for review of their case to the government of the country in which they reside or of which they are nationals, for the purpose of being removed from the list in dispute*', is also recognised under the EU level, due to the transposition nature of the EC Regulation. The recognition of a right to submit a claim does not add much to the protection of the individual. The added value brought by the then CFI to the diplomatic protection of the individual rests in the limitation of the Member State's margin of discretion in considering the request:

*'[...] the margin of assessment that those authorities enjoy in this respect must be exercised in such a way as to take due account of the difficulties that the persons concerned may encounter in ensuring the effective protection of their rights, having regard to the specific context and nature of the measures affecting them. Thus, the Member States would not be justified in refusing to initiate the review procedure provided for by the Guidelines solely because the persons concerned could not provide precise and relevant information in support of their request, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question or the evidence supporting those reasons, on account of the confidential nature of those reasons or that evidence.'*⁸⁸²

The Court established precise guarantees in favour of the individuals, which the Member States had to respect in relation to submitting the individuals' requests, which thus significantly limited their discretionary power to exercise diplomatic protection type of actions:

'[...] that individuals are not entitled to be heard in person by the Sanctions Committee, with the result that they are dependent, essentially, on the diplomatic protection afforded by States to their nationals, the Member States are required to act promptly to ensure that such persons' cases are presented without delay and fairly and impartially to the Committee, with a

⁸⁸¹ M. Gani & P. Mathew, *Fresh Perspective on the 'War on Terror'*, ANU Press (2008), 258-9; N. Lavranos, 'Judicial Review of UN Sanctions by the Court of First Instance', (2006) *European Foreign Affairs Review*, 482.

⁸⁸² *Ibid.*, para. 148.

*view to their re-examination, if that appears to be justified in the light of the relevant information supplied.*⁸⁸³

The CFI underlined that the right of the individual to have his de-listing request reviewed in good faith and appropriately is subject to domestic judicial review based on the laws of the State of the petitioned Government. As an example of good practice, the Court pointed out the judgment of the Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), which ordered the designated State to request, as a matter of urgency, the Sanctions Committee to remove the names of two persons from the list in question, on sanction of paying a daily penalty.⁸⁸⁴ The then CFI clearly held that national law preventing judicial review ‘*of refusal of national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals*’ is contrary to EU law. This statement corresponds to the current day conception of State sovereignty as a concept including also responsibility towards the citizen, and framing diplomatic protection not just as a State prerogative but also as a State duty subject to limitations imposed by the judiciary.⁸⁸⁵

The CFI recognised a sort of diplomatic protection obligation on the part of the State of nationality or residence of the listed individual in the form of starting diplomatic discussions and exchanges of information that could help it to decide whether to seek to convince the designated state to request the removal of the individual’s name from the UN list. If the state of nationality or residence is the designated state, then the latter has the obligation to consider in good faith the request of the individual and submit a request ‘*if that appears to be justified in light of the relevant information supplied*’. Once the request of removal has been submitted, the state of nationality or residence has the obligation ‘*to act promptly to ensure that such persons’ cases are presented without delay, fairly and impartially to the Committee, with a view to their re-examination, if that appears to be justified in the light of the relevant information supplied*’.⁸⁸⁶ This procedure is of utmost importance for the individual, since he cannot be heard directly by the Sanction Committee according to the 1297, 1333, 1373 Resolutions based regimes.⁸⁸⁷ The CFI required the

⁸⁸³ *Ibid.*, para. 149.

⁸⁸⁴ See Tribunal de première instance de Bruxelles (Court of First Instance, Brussels), Fourth Chamber, judgment of 11 February 2005 in the case of *Nabil Sayadi and Patricia Vinck v Belgian State*, case mentioned in para.150 of the *Ayadi* judgment of the CFI.

⁸⁸⁵ See para. 152 of the Judgment in the *Ayadi* case.

⁸⁸⁶ *Ibid.*, para.150.

⁸⁸⁷ See more in R. Cadin, ‘La Procedura del ‘Delisting’ davanti al Consiglio di Sicurezza: Protezione Diplomatica o ‘Supplica’ al Grande Inquisitore?’, *op.cit.*

Member States to provide for judicial review of a refusal by national authorities to take action with a view to guaranteeing the diplomatic protection of their nationals. It held that prompt state action before the Sanctions Committee is required, unless the concerned State puts forward sufficient reasons justifying its refusal to act, which are then submitted to the scrutiny of the domestic judiciary.

Many of the legal scholars who commented on the *Ayadi* and *Hassan* judgments have interpreted the judgments of the CFI as establishing an obligation on the part of the Member States to exercise diplomatic protection to which an individual's right to receive diplomatic protection corresponds.⁸⁸⁸ The CFI is prudent when referring to diplomatic protection and the Member States' obligations *vis-à-vis* the listed nationals or residents. The content of the CFI recognised individual right to diplomatic protection resembles the *Abbasi*⁸⁸⁹ type of individual right, whereby an individual is entitled to have his request considered in good faith and appropriately, while the executive has an obligation to provide reasons for the refusal which are amenable to judicial review.⁸⁹⁰ The CFI did not recognise an outright State obligation to exercise diplomatic protection, except in the very limited situation when the request for removal had already been submitted by the designated State and under the old Sanction Committee regime, when the individual was denied any right to be heard directly before the UN body.⁸⁹¹

In casu, the CFI found that the applicants had the right to contest the lack of reply of the resident Member State to their request of removal before the national courts, which are bound to admit these claims on the basis of the principles of equivalence and effectiveness of EU law. The faith of the claim was then left entirely in the hands of the national courts.

⁸⁸⁸ See, *inter alia*, T. Tridimas, EU Law, 'International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?', *Queen Mary School of Law Legal Studies Research Paper No. 11/2009*; G. Porretto, 'The EU, Counter-Terrorism Sanctions against individuals and human rights protection' in M. Gani and P. Matthews (eds) *Fresh Perspectives on the 'War on Terror'* ANU Press (2008), 260-261; N. Lavranos, 'Judicial Review of UN Sanctions by the CFI', (2006) *European Foreign Affairs Review*, 483; F. Francioni, 'The Right of Access to Justice to Challenge the Security Council's Targeted Sanctions' in U. Fastenrath, R. Geiger, Daniel-E. Khan, A. Paulus, Sabine von Schorlemer, and C. Vedder, *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, Oxford University Press (2011), 916; Brierly, *Brierly's Law of Nations: An Introduction to the Role of International Law*, Oxford University Press (2012), 260.

⁸⁸⁹ Case No. C/2002/0617A; [2002] EWCA civ 1958, *Abbasi v Secretary of State*, Court of Appeal (civil division), 6 November 2002.

⁸⁹⁰ Please see the details in the following section on *Domestic Jurisprudence - Jurisprudence from countries with common law systems*.

⁸⁹¹ On the evolution of the Sanction Committee regime, from the perspective of the EU, see J. Kokott, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?', (2012) *EJIL*, 1015; from the perspective of international human rights law, L. Ginsborg, *The new face of the Security Council since 9/11: global counter-terrorism, human rights and international law*, EUI PhD thesis (2014); B. Hayes and G. Sullivan, 'Blacklisted: Targeted sanctions, preemptive security and fundamental rights', *European Center for Constitutional and Human rights Report* (2010); R. Cadin, 'La Procedura del 'Delisting' davanti al Consiglio di Sicurezza: Protezione Diplomatica o 'Supplica' al Grande Inquisitore?', *op.cit.*

It can be observed that the State duty to exercise diplomatic protection was derived by the Court from both international law (the 1267 and 1373 UNSC Resolutions regimes) and EU law.⁸⁹² Such a duty was recognised in the specific circumstances of cases where diplomatic protection was the only remedy available to an individual whose fundamental rights were significantly restricted by the UN resolutions and respectively by the EU secondary measures. The Court did not establish different State duties to exercise diplomatic protection depending on whether the listed individual was a national of a Member State or a resident within the EU. Therefore it could be presumed that the same obligation would apply to the Member States also in relation to their own nationals or the national of another Member State if he was listed at the UN level. The duty is not restricted based on the nationality of the listed individual, but on the fact of being listed as involved in terrorist activities, under the old 1267 and 1373 UNSC Resolutions regimes.

In light of the revision undergone by the UN Sanctions Regime⁸⁹³, the diplomatic protection duty is no longer the only procedural mechanism whereby a request of de-listing can be submitted before the UNSC. Therefore it could be that the decision of the Court would today differ, had the Court be confronted with a similar issue, and possibly no longer arrive at the conclusion of establishing a duty to exercise diplomatic protection upon the Member States.

In addition to these cases establishing a Member States' duty to exercise diplomatic protection by way of espousing the de-listing claim of 'international' terrorists listed also by EU Regulations, there is another string of jurisprudence of the CJEU which can reflect the position of the Member States towards the mechanism of diplomatic protection. The EU Treaties have provided since the beginning an inter-States mechanism whereby a Member State may bring an action before the CJEU against another Member State for an alleged infringement of an obligation under the Treaties (current Art. 259 TFEU).⁸⁹⁴ These EU based

⁸⁹² EU law which guarantees the protection of fundamental rights within the scope of EU law, see *Ayadi and Hassa* Judgments.

⁸⁹³ The Security Council Resolution 1904 (2009) of 17 December 2009 established an 'Office of the Ombudsperson' and granted to the affected individual the possibility to submit de-listing requests before the Ombudsperson. The effectiveness of this remedy has been challenged by the CJEU on several occasions, including in the latest of its judgment in the *Kadi* saga (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P), however this is not necessarily of relevance in the present case, since it was not the lack of effectiveness of a remedy that was at issue in *Ayadi and Hassan*, but the total absence of a remedy, except *via* the request of the State.

⁸⁹⁴ 'In order to rule on these two heads of complaint, it must be noted that the procedure established under Article 259 TFEU is designed to obtain a declaration that the conduct of a Member State is in breach of EU law and to terminate that conduct (see, to that effect, Joined Cases 15/76 and 16/76 *France v Commission* [1979] ECR I-321, para. 27; Case C 456/05 *Commission v Germany* [2007] ECR I-10517, para. 25; and Joined Cases C

obligations can include also those related to individual rights derived from EU law. Therefore the action brought by a Member State against another Member State for having violated the EU rights of its nationals resembles a diplomatic protection claim. Scholars⁸⁹⁵ have described this EU dispute settlement mechanism as ‘plainly politically sensitive’ since it challenges the close and good diplomatic relationship existent between the Member States of the EU, on which the Union is founded.⁸⁹⁶ To date, there have been very few cases, namely only four reaching the CJEU.⁸⁹⁷ The first two cases were brought for the purpose of ensuring protection of economically related EU rights of the nationals of the applicant State (fishery and free movement of goods related rights), while the subsequent two cases moved away from economic to political rights of EU citizens.⁸⁹⁸

The first case was brought by France against the UK in 1979 concerning violation of the UK’s fishery rights of French boats.⁸⁹⁹ This case is a follow-up of the fishery contention between France and the UK already present in the *Kramer* case.⁹⁰⁰ In spite of the CJEU judgment in the *Kramer* case, establishing the loss of the UK’s exclusive competence over fishery policies in its territorial waters as a result of the exclusive competence acquired by the Community over the common agricultural policies, the UK continued to adopt internal Orders regulating fishing as well as fishing near its borders by foreign vessels. The fact which triggered France’s decision to exercise diplomatic protection on behalf of its nationals was the sanctioning of several captains of French vessels caught fishing contrary to the UK’s internal Orders, which the UK had already lost competence to adopt. Both the Commission and the Court sided with France and held that the UK internal Orders were contrary to Community law, since the Community had gained exclusive competence to regulate the fishing policy in the Member States waters. The case can be seen as a diplomatic protection case, where

514/07 P, C 528/07 P and C 532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, para. 119).’ – para. 67 of Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012.

⁸⁹⁵ See S. Weatherill, *Cases and Materials on EU law*, 11ed., Oxford University Press (2014), 83; K Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford University Press (2014), 5.35 at 183-4; A. Cygan, ‘Current Developments in European Union Law: Citizenship of the European Union’, (2013) *International and Comparative Law Quarterly*, 492; M. Filippin, ‘A change for future intra-European diplomatic relations? Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012, not yet reported’, see (2013) *Maastricht Journal*, 120.

⁸⁹⁶ In the words of the preamble to the EU Treaty, ‘an ever closer union among the peoples of Europe’.

⁸⁹⁷ Case C-141/78 *France v. United Kingdom* [1979] ECR I-02923; Case C-388/95 *Belgium v. Spain* [2000] ECR I-03123; and Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-07917.

⁸⁹⁸ It seems the evolution of the Union from an economic to a political Union might have also impacted on the Member States’ interests in bringing actions by way of this specific EU based diplomatic protection claim.

⁸⁹⁹ Case C-141/78 *France v. United Kingdom* [1979] ECR 02923.

⁹⁰⁰ Joined Cases 3, 4, and 6/76 *Cornelis Kramer and others* [1976] ECR I-1279.

France's actions before the Commission and the Court were based on the injuries suffered by its nationals at the hands of another State violating a piece of regional international law.

The subsequent example of an exercise of diplomatic protection by a Member State against another Member States based on rights citizens derive from EU law came decades later. In 1995 Belgium brought a case against Spain before the CJEU, in an attempt to protect the economic related rights of the wine producers based on strict designation of origin rules of the Spanish authorities for Rioja wine.⁹⁰¹

A decade later Spain challenges the UK's actions regarding the rights of Gibraltar citizens to participate in the election of representatives to the European Parliament.⁹⁰² This case resembles more the traditional exercises of diplomatic protection by powerful States wishing to assert their own territorial interests rather than those of their citizens. Spain's complaint over the UK legislation concerning the voting rights of the Commonwealth citizens of Gibraltar seems to be a disguised Spanish territorial claim over Gibraltar rather than proof of actual concern of the voting rights of the Gibraltar citizens.

The last case to be discussed under this category is a case where the classical conception of diplomatic protection intertwines with the current, more modern conception of the institution. A Member State espouses the claims of its national for both political State reasons and protection of individual rights. The *Hungary v Slovakia*⁹⁰³ case arose out of Slovakia's restriction of the right of entry to its territory of the Head of the Hungarian State on a significant date when the former Czechoslovak Socialist Republic was invaded by the troops of the Warsaw Pact, including the troops of the former Hungarian Socialist Republic. Hungary decided to ask the Commission to start infringement proceedings against Slovakia under Art. 259 TFEU on the basis that the entry restriction imposed on the President, an EU citizen, could not be justified by any of the restrictions permitted by Directive 2004/38.⁹⁰⁴ The Commission's refusal to bring an infringement action against Slovakia, and Slovakia's persistent position that it had not violated EU law by restricting the access of the Hungarian Head of State, determined Hungary to bring an action before the CJEU. The Court decided to reject Hungary's action alleging a violation of EU law by Slovakia based on a restriction to the free movement of EU citizens not expressly provided by EU law, on grounds that the

⁹⁰¹ Case C-388/95 *Belgium v. Spain* [2000] ECR I-03123.

⁹⁰² This is the only case out of the four that resembles an action concerning State rights rather than being related to the voting rights of the citizens of Gibraltar.

⁹⁰³ Case C-145/04 *Spain v. United Kingdom* [2006] ECR I-07917.

⁹⁰⁴ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158 of 30 April 2004.

restriction was justified on the basis of the *lex specialis* public international customary norms on the special status of Heads of States.

Whether raising economic or political individual rights, these cases raised sensitive issues among the Member States and are capable of breaking their good diplomatic relations. Across these cases, the Court has sided either with the applicant or the defendant Member State, depending on which of these State's claims and thus defended interests correspond with the Union interests, reflective of the specific moment in the Union's evolution. Namely, in the 1970s, the advance of the economic union and ensuring respect of the Union's newly established competences (*France v UK*), in the 1990s, defining of the limits of the four fundamental freedoms (*Belgium v Spain*), the start of the 21st century the political rights of the Union citizens as established in the founding Treaties (*Spain v UK*), and recently the preservation of the diplomatic relations between the Member States which are increasingly shaken by sensitive national history (*Hungary v Slovakia*).

We do not have the space here to engage in a detailed comment of these cases, the reason for referring to them is the diplomatic protection nature of these inter-states claims, which could show the Member States and European court's position to the use of modern diplomatic protection mechanisms. The signals these cases give in relation to the modern use of diplomatic protection of individuals are varied and depend on the perspective one takes in their interpretation. On the one hand, if they are interpreted from a contextual perspective, they could be seen as evidence that States have gradually renounced classical international claims to solve their disputes and impose their interests. In light of all the potential cases that the Member States could have brought against each other throughout the European integration process, there have been only four such cases, of which only *Spain v UK* and *Hungary v Slovakia* resemble a contention over State's powers rather than the protection of individual rights. The EU project has impacted on the diplomatic affairs of the Member States, which started to replace diplomatic disagreements and power battles by use of force or formal last resort diplomatic protection actions,⁹⁰⁵ with diplomatic discussions within the Council and European Council framework. These four cases submitted within a period of more than 60 years are examples of the changing diplomatic affairs and of the Member States' eagerness to protect the EU conferred rights of their citizens.

On the other hand, the cases heard by the CJEU on the basis of Article 259 TFEU seem to indicate that the conception of diplomatic protection actions has not advanced much,

⁹⁰⁵ That is judicial or arbitral claims submitted before courts.

since in all these cases the Member States had something to win economically or politically by seeking to protect their citizens' EU rights that were violated by another Member State. One can never know what interests, e.g. the protection of the individuals' rights or the economic and political interests of the Member States, have tipped the balance in favour of introducing an international claim against a Member State, and thus possibly endangering good diplomatic relations which the Union fervently promotes.⁹⁰⁶

Regardless of the extent of changes of the Member States' conduct of their diplomatic affairs, the cases analysed in this sub-section showed that the European courts have departed from the traditional conception of diplomatic protection. In the 'smart sanctions' judgments, the CFI established a duty on the Member States to exercise precise diplomatic protection measures on behalf of EU citizens and residents, going as far as having to submit a request of removal before the specialised UN body. The inter-Member States cases showed that the European courts, although promoting the effectiveness of EU law as a primary objective, will give priority to customary international law on diplomatic relations when it is not in conflict with fundamental rights. These judgments are thus supporting the current general international trend that diplomatic protection can be an effective complementary tool to human rights systems for securing protection of human rights, and that in cases of stark violation of fundamental rights, courts are gradually establishing a duty on the part of States to exercise diplomatic protection as a sort of last remedial mechanism on behalf of the injured individual.

National jurisprudence

It has been argued that '*domestic courts are often the primary stage of international law developments*'.⁹⁰⁷ This sub-section is dedicated to the study of domestic jurisprudence from different geographical regions and legal systems in an attempt to distil the current approach of national courts *vis-à-vis* the nationals' claims against the State(s) refusing to exercise, or improperly or insufficiently exercising diplomatic protection.

⁹⁰⁶ In his opinion in the *Hungary v Slovakia* case, AG Bot argued that the diplomatic conduct of a Member States that would lead to a break in diplomatic relations with another Member State could constitute a violation of EU law: '*the Member States should not exercise their diplomatic competence in a manner that might lead to a lasting break in diplomatic relations between two Member States. Such a break would, in fact, be incompatible with the integration process aimed at creating, in the words of the preamble to the EU Treaty, 'an ever closer union among the peoples of Europe' and would constitute a barrier to the attainment of the essential objectives of the Union, including the aim of promoting peace.*' para. 58 of AG Bot Opinion in *Hungary v Slovakia*.

⁹⁰⁷ N. Karazivan, 'Diplomatic Protection: Taking Human Rights Extraterritorially', (2006) *Canadian Yearbook of International Law*, 299, 300.

It has to be pointed out that not many cases of alleged violation of consular and/or diplomatic rights reach domestic courts.⁹⁰⁸ There are several reasons for the scarcity of domestic jurisprudence on diplomatic protection, such as: absence of precise legal obligations binding the consular officials towards the nationals, lack of transparency of the executive decisions in this field,⁹⁰⁹ very limited feedback reaching the individual, difficulty in precisely identifying the misconduct of the consular or diplomatic official, and the urgency of the help which the individual commonly needs.

The focus in this section will be the judgments delivered by national courts in relation to individuals' claims against their government for failure to exercise diplomatic protection. The individuals' common complaints reaching courts seems to concern the violation of their human right(s) to prohibition of torture and ill-treatments, arbitrary detention and unfair trial. Cases such as those lodged by the Guantánamo Bay detainees against their States of nationality have been among the most mediatized diplomatic protection cases. Several controversial cases following the 9/11 attacks will be assessed in this section together with other cases of detained nationals complaining of ill-treatment, unfair trials and risk of being sentenced to the death penalty while detained abroad.⁹¹⁰ These cases required national Governments to weigh the protection of the human rights of their nationals abroad with the national security interests and preservation of good foreign relations with powerful States. Sometimes, the national interests at stake were of high political importance for the State, as shown in the *Kaunda* case reviewed by the South African Constitutional Court. In this particular case, South Africa had to consider that a diplomatic intervention on behalf of their nationals would have been interpreted by Zimbabwe and Equatorial Guinea as an interference in their judicial or legal systems and thus received as a threat to the relatively newly acquired national sovereignty of these countries.

In many of these cases of detention of nationals abroad, consular assistance has been preferred by the State of nationality as a much safer choice for the country's conduct of foreign affairs than the exercise of diplomatic protection. The cases to be discussed in this section will show that when the country's own nationals are in custody abroad, the State of

⁹⁰⁸ According to the *CARE Report, Section 4.1.2 Remedies against a refusal to provide consular protection* (which refers also to cases related to diplomatic protection), the judiciary of certain Member States (Cyprus, the Czech Republic, Greece, Ireland, Malta, Luxembourg, Slovakia, Slovenia) have not so far had the occasion to deal with complaints against the refusal of consular officials to provide consular assistance/protection.

⁹⁰⁹ For example when a female consular official was the one handling the difficult situation of a detained national in an Islamic country, and her subsequent failure to achieve anything was then kept from the detainee, see the UK – *Redress Report* of 2012, *op.cit.*

⁹¹⁰ The cases collected in this sub-section are both disparate case studies and cross-case research.

nationality will most probably start with different sorts of consular assistance actions, continue with ‘quiet’ diplomatic negotiations once the violation of human rights is clear and resort to stronger forms of diplomatic protection measures, including lodging of international claims, only when the situation deteriorates and the violation of fundamental human rights of the individual in custody abroad is persisting. ‘Quiet diplomacy’⁹¹¹ seems to have been the preferred diplomatic protection strategy by the UK, Canada and Australia, in relation to their nationals detained in Guantánamo Bay. This type of diplomatic protection action is characterised by a lack of transparency of the negotiations between the diplomats of the two countries. This lack of transparency increased the uncertainty surrounding the precarious situation of the Guantánamo Bay camp detainees and other similar individuals detained for allegedly having committed terrorist acts, and who were subjected to ill-treatment and held captive with no access to judicial remedies for months.⁹¹² Beyond this diplomatic assistance, States may take further steps pursuant to international treaties, as well as bring international legal proceedings via the procedural mechanism of diplomatic protection.

The failure of the US legal and judicial systems to afford adequate legal remedies to non-US citizens detained in Guantánamo Bay has led these individuals to ask the Governments of their States of nationality to intervene on their behalf against the US. When faced with the domestic Governments’ refusal to act or to pursue specific measures, the detainees lodged complaints before the domestic courts of their States of nationality (Australia, Canada, and UK) seeking to force their Governments to take action on their behalf before the US government. They argued that absolute and relative human rights were violated by the US, and that their Government is complicit to such international violations by not taking proper diplomatic action on their behalf. It was assumed by these detained individuals that diplomatic protection was their last resort remedy, or that it would enhance their prospects for being freed and obtain reparation. Confronted with prolonged deprivation of liberty, subject to alleged ill treatments, not privy to the Government’s concrete efforts to ensure the respect of their human rights, being consistently refused access to US courts, and facing their Government’s refusal to take any action stronger than just informal or quiet diplomacy acts, the Guantánamo Bay detainees started judicial proceedings before the

⁹¹¹ D. Bonner, ‘Diplomatic Protection and Guantanamo Detainees: Individuals, the Courts and the Executive’ in D. Bonner, *Executive Measures, Terrorism and National Security Have the Rules of the Game Changed*, Asghate (2007).

⁹¹² To be noticed that had these individuals been detained in Europe, Art. 5(3) ECHR would have required the local authorities to bring them promptly before a judge, and a custody longer than 4 days was held by the ECtHR in breach of this Article (See *Oral and Atabay v. Turkey*, Appl. No. 39686/02, Judgment of 23 July 2009; *Nastase-Silvestru v. Romania*, Appl. No. 74785/01, Judgment of 4 October 2007).

national courts of their countries of nationality or residence. Their applications commonly claimed that the Government should undertake firmer diplomatic action and ensure their release. These requests were clearly clashing with the generally accepted conception of diplomatic protection as a right of the State over which the national executive enjoys broad discretion.

The cases brought before domestic courts by the Guantánamo Bay detainees and other individuals from Arab countries detained in camps for having committed terrorist acts, have raised the question of whether the state of nationality or of residence has a duty to exercise diplomatic protection for its nationals or long-term residents. Such cases have attracted wide attention from the press and scholars mostly because they have shown how, in spite of the numerous international human rights norms, these can still be ineffective when powerful States consider them as a direct threat to their national security. It is ironic how in spite of the evolution of modern international law, it is still the widely criticised classic inter-states institution of diplomatic protection that ensured reparation of these individuals' injuries.⁹¹³

Since the moment when the ILC rejected the codification of an international norm imposing a State duty to exercise diplomatic protection in cases of violation of *jus cogens* norms, national courts have heard new cases of individual's complaints regarding their Government's conduct of exercising diplomatic protection, which might shed a new light on the matter of the legal nature of diplomatic protection. In the following paragraphs recent domestic jurisprudence will be assessed in an attempt to understand whether domestic courts from different geographical regions and legal systems still show deference to the executive's power to exercise diplomatic protection⁹¹⁴ and exclude their jurisdiction over these matters. Or have domestic courts departed from the classical conception of diplomatic protection as a purely discretionary State prerogative, and reached consensus on a more modern conception of the institution?

⁹¹³ A mechanism that was argued in 2000 to be impenetrable by international human rights due to the rejection of Rapporteur Dugard's proposal to introduce a State duty to exercise diplomatic protection. See G. Erasmus and L. Davidson, 'Do South Africans have a Right to Diplomatic Protection?' 25 S.A.Y.B. International Law, 113, 127.

⁹¹⁴ French courts used to apply the 'acte du gouvernement' doctrine whereby courts held themselves to lack jurisdiction to review foreign affairs matters, including the exercise of diplomatic protection on behalf of nationals abroad (see more in P. Serrand, *L'acte de gouvernement. Contribution e la theorie des fonctions juridiques de l'Etat*, These Paris II 1996); Commonwealth countries apply a similar doctrine, 'act of States': 'the Acts of State doctrine is defined as a common law principle of uncertain application which prevents the English courts from examining the legality of certain acts performed in the exercise of sovereign authority within a foreign country.' (Lord Nicholls, in House of Lords, November 25, 1998, ex parte Pinochet (1st judgment), ILM 1998, vol. 37, 1302); on a similar doctrine of courts' deference to the executive conduct of foreign affairs, see the 'political questions' doctrine, T.M. Franck, *Political questions/Political answers. Does the rule of law apply to foreign affairs?* Princeton University Press 1992.

Jurisprudence from countries with continental legal system

The *Rudolf Hess* case⁹¹⁵ of the German Federal Constitutional Court of 1946 is one of the most cited cases as an example of the courts limited recognition of a State duty to exercise diplomatic protection.⁹¹⁶ The case concerns an individual convicted of crimes against peace by the Tribunal of Nuremberg and sentenced to imprisonment. The Constitutional Court was required to assess the failure of the government to take appropriate and effective measures in order to secure the release of the prisoner. The Government had in fact asked for the release of the detainee solely on considerations of humanity in light of Mr Hess's old age and precarious health condition. The court concluded that, while the state had an obligation to provide diplomatic assistance to its nationals based on the interpretation of a broadly worded constitutional provision, the government had wide discretion in choosing how to fulfil this obligation.⁹¹⁷ The government obligation was to respect the criteria of rationality and non-arbitrariness when assessing a national's claim to diplomatic protection, while '*the role of administrative courts was confined to the review of actions and omissions of the Federal Government for abuses of discretion*'.⁹¹⁸ It can be argued that the German Constitutional Court was well in advance of other national courts that, at the time, were still tributary to the acts of Government or its equivalent doctrines.

The *Groupement X v Conseil Federal* judgment of the Swiss Federal Court is a more daring judgment accepting to control the validity of a refusal to exercise diplomatic protection and establish the applicability of the administrative legal remedies.⁹¹⁹ The Court established the individual right to judicial remedy over the executive's diplomatic protection decision-making based on an autonomous interpretation of Art. 6 (1) ECHR, which was considered relevant to the case, in spite of the absence of a substantive right to diplomatic protection.⁹²⁰ The Swiss courts established the State's responsibility for refusal to exercise diplomatic

⁹¹⁵ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 1980, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 55,349 (Ger.), translated in (1980) I.L.R. 386.

⁹¹⁶ Although the case was referred by Rapporteur Dugard, this thesis takes a different take on this judgment, which is why it was included in the present section.

⁹¹⁷ See more in Bederman, 'State-to-State Espousal of Human Rights Claims', (2011) Virginia Journal of International Law Online, 1, 8.

⁹¹⁸ International Law Reports, vol. 90, p. 395.

⁹¹⁹ See J.F. Flauss, 'Le contentieux des décisions de refus d'exercice de la protection diplomatique : à propos de l'arrêt du Tribunal fédéral suisse du 2 juillet 2004, *Groupement X C./Conseil fédéral* (1re Cour civile)', (2005) RGDIP, 407, 407-419.

⁹²⁰ V. Pergantis, *op.cit.*, 383.

protection based on domestic norms prescribing the responsibility of the executive for damages caused by its personnel.

It seems that there is a growing number of domestic courts from continental legal systems accepting jurisdiction to review diplomatic protection claims.⁹²¹ However they seem to assess the conduct of the Government with increased deference, most often not finding violations, except when in cases of lack of total answer from the Government to the individual's requests.⁹²²

Jurisprudence from countries with common law systems

Before embarking on the legal analysis of the recent and relevant jurisprudence from the Commonwealth countries, it is important to note that their domestic laws do not include a legal obligation of the State to provide diplomatic protection to their nationals abroad. The protection of nationals abroad is part of the administrative category of public law, commonly perceived as falling within the realm of the foreign affairs prerogative of the State and, for a considerably long period, being held outside the domestic courts' jurisdiction.⁹²³ The cases analysed under this sub-section will show that in the last decade significant changes have occurred such as: the 'judicialisation'⁹²⁴ of the area of consular and diplomatic protection of the nationals abroad, limiting the State's discretion in exercising diplomatic protection to the extent that in certain jurisdictions and particular circumstances, a legal obligation to exercise diplomatic protection and of a certain type was recognised as incumbent upon the State.⁹²⁵

UK courts – Abbasi case⁹²⁶: the doctrine of legitimate expectations as a limited State duty to exercise diplomatic protection of nationals abroad

Mr Abbasi is a British national who was captured in Afghanistan by the US Army and transferred to Guantánamo Bay where he was placed in indefinite detention. Having already spent eight months without access to a lawyer and unable to challenge the legality of his

⁹²¹ The conclusion is reached also on the basis of the *CARE Report*'s Section 4 from each of the 27 National Reports.

⁹²² See the *CARE Report*, Section 4.1.2 and the sections on cases and practice within Section 4 of each of the National Reports in the *CARE Report*.

⁹²³ *R (on the application of Abbasi) v. Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598.

⁹²⁴ The term 'judicialization' has been first used in the field of diplomatic protection of individuals by V. Pergantis, see, III.B The 'Judicialization' Paradigm: *Judicial Review of Foreign Policy Discretion* in 'Towards a 'Humanization' of Diplomatic Protection?', (2006) *ZaöRV*, 351, 379ff.

⁹²⁵ See, in particular, *Khadr v Canada*, [2009] F.C.J. No. 462 (the case is commented under the subsequent section dedicated to the analysis of the Canadian courts jurisprudence).

⁹²⁶ *R (on the application of Abbasi) v. Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598 (hereinafter *Abbasi*).

detention before a court, his mother decided to start legal proceedings before the UK courts to press the UK Foreign Office to make representations on his behalf before the US Government or at least explain why this had not already been done. Although initially this application was rejected by the UK Supreme Court,⁹²⁷ on appeal, the UK Court of Appeal, took a ground-breaking decision and granted leave to intervene, convinced by the gravity and importance of the issues raised by the case. The central complaint was the responsibility of the UK government to make representations before the US Government or to take other action on behalf of Mr Abbasi, a British national, for the purpose of putting an end to his arbitrary detention. The case thus raised the question of whether the UK had a sort of duty to exercise diplomatic protection of a specific type on behalf of Mr Abbasi, and on which legal basis: domestic law, regional human rights law or general international law. Furthermore, given the long established doctrine of lack of jurisdiction of UK courts over the exercise of the State prerogative over the conduct of foreign policy, the UK Court of Appeal also had to establish whether this claim was justiciable, whether the Secretary of State had some sort of duty to exercise diplomatic protection, and if so, what the remedy for the violation of this duty by the Government could be.

In particular, Mr Abbasi's lawyer argued that the UK Government should petition the US for his release and return to the UK or at least for ensuring the judicial review of his detention, which was persistently rejected by the US courts. In fulfilling this end result, the counsellor argued that it was up to the Government to choose the appropriate diplomatic means and channels. Unlike similar cases raised before the South African or Canadian courts (see the following sections), the counsellor based its application on violation of an allegedly *jus cogens* norm of international law, i.e. prohibition of arbitrary detention⁹²⁸ by the US public authorities.

The first legal question that the UK Court of Appeal had to examine was not however the *jus cogens* nature of the international norm, but a more basic legal question, namely, whether it had jurisdiction to examine the legality of a foreign State action. According to the *Buttes* doctrine:

'An English court will not sit in judgment on the sovereign acts of a foreign government or state. It will not adjudicate upon the legality, validity or acceptability of such acts, either under domestic law or international law. For a court to do so would offend against the principle

⁹²⁷ Due to the common law doctrine of the courts' lack of jurisdiction to review the conduct of a foreign country or the executive's conduct in foreign affairs.

⁹²⁸ As provided by Art. 9 Universal Declaration, Art. 9 ICCPRs, Art. 5 ECHR, Art. 7 American Convention of Human Rights.

*that the courts will not adjudicate upon the transactions of foreign sovereign states. This principle is not discretionary. It is inherent in the very nature of the judicial process.*⁹²⁹

The Court held that it was competent to hear the case despite the fact that the contested act was an act adopted by a foreign country, which, based on the principle of comity, would, in principle, fall outside its jurisdiction. The UK Court of Appeal justified its choice on the fact that the apparent violation of fundamental right to liberty and security is a right recognised by both common law systems, and by Art. 9 ICCPR, which binds both of the countries.⁹³⁰ It seems that the failure of Mr Abbasi to have his claim reviewed by US courts played an important role in the decision of the UKCA to admit the case.⁹³¹

After having assessed the issue of its competence based on the act of a foreign state doctrine, the UKCA assessed whether the doctrine of the foreign acts of the own State pre-empts the court to judicial review the individual claim.

The representative of the Government opposed the justiciability of the claim based on a long-established doctrine developed in the UK jurisprudence that ‘*decisions taken by the executive in its dealing with foreign states regarding the protection of British citizens abroad are non-justiciable.*’⁹³²

In spite of retaining the general rule, whereby the Foreign Office’s discretion to exercise its prerogative powers in such a case is ‘*a very wide one*’ and ‘*the court cannot enter the forbidden areas, including decisions affecting foreign policy*’, the UKCA made a ground-breaking decision to hold that there is ‘*no reason why its decision or inaction should not be reviewable*’.⁹³³

Having established its jurisdiction to review the inaction of the Government, the Court went on to examine whether the Government is held by an international, regional or domestic norm to exercise diplomatic protection for its nationals abroad.

The court noted that international law had not yet recognised any general duty for a state to intervene by diplomatic means.⁹³⁴ The *Barcelona Traction* case and the cautionary language of Rapporteur Dugard were invoked as clear indications for the lack of recognition of such a State duty. The applicant’s lawyer had in fact recognised that this State’s duty is law

⁹²⁹ See *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888, 932.

⁹³⁰ See para. 64 of the *Abbasi* judgment.

⁹³¹ See para. 66 of the *Abbasi* judgment.

⁹³² *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai* (107 ILR 462 (1985)); *Suresh and Manickavasagam v. Secretary of State for the Home Department* [2001] EWHC Admin 1028 (unreported, 16 November 2001).

⁹³³ *Ibid.*, para. 106.

⁹³⁴ *Ibid.*, para. 69.

in progress but argued that the UK should actively contribute to this law in progress.⁹³⁵ The UK Court of Appeal was not willing to adopt such a revolutionary approach. It held that such a duty can be accepted only if provided by ‘*established principles of international law*’.

Having found that international law does not recognise a State duty to exercise diplomatic protection for its nationals abroad, the Court passed to the examination of the application of ECHR to the present case, and whether this Convention imposes such a State obligation. The Court rejected also the argument of a State duty deriving from the ECHR. First of all the Court denied the applicability of the Convention in the present case, as it did not agree with the personal jurisdiction as a basis for the applicability of the Convention. The Court held that Art. 1 ECHR establishes the applicability of the Convention based on territorial jurisdiction, which evidently lacked in this case.⁹³⁶

The last legal norm considered by the UKCA as possible legal basis for the UK duty to exercise diplomatic protection was the domestic law based on established government policy statements or practices, underpinned by the law of legitimate expectation and justiciable in accordance with the principles established in the *GCHQ* case.⁹³⁷ The Court assessed several soft law documents (ministerial orders, parliamentary discussions, and papers submitted by the Government to the ILC) in order to establish whether the doctrine of legitimate expectations is applicable. According to the Court ‘*the doctrine of legitimate expectations provides a well-established and flexible means for giving legal effect to a settled policy or practice for the exercise of an administrative discretion.*’ The expectation may arise from an express promise or ‘*from the existence of a regular practice which the claimant can reasonably expect to continue.*’⁹³⁸

The Court passed to the examination of the State policy to establish whether a duty to diplomatic protection in the form requested by the applicant could have been formed as a legitimate expectation of the applicant.

The UK Court of Appeal concluded that there is clear evidence of acceptance ‘*by the Government of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice.*’⁹³⁹ According to the Court, the expectations that the Government could have created to its nationals could not have been that

⁹³⁵ *Ibid.*, para. 39.

⁹³⁶ *Ibid.*, para. 71.

⁹³⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, paras. 81ff.

⁹³⁸ *Abbasi*, para. 82.

⁹³⁹ *Ibid.*, para. 71.

they have a right, but *‘merely that the UK will consider making representations, which will be triggered by the belief that there is a breach of the international obligations.’*⁹⁴⁰

The UK Court of Appeal extended its jurisdiction over an area that had been long considered under the discretionary power of decision of the State, and outside the realm of judicial review. If in *CCSV v Minister for Civil Service* the Court held that areas of high policy, such as *‘the conduct of foreign affairs, the making of treaties or the defence of the realm, were regarded as non-justiciable’*, in the *Abbasi* judgment, the Court ruled that it does have jurisdiction over one of these high policy areas – the conduct of foreign affairs. The basis for this extension was the doctrine of legitimate expectation: as long as the Government has acted in a way that creates legitimate expectations to individuals that *‘if subjected abroad to a violation of a fundamental right, the British Government will not simply wash their hands of the matter and abandon him to his fate’*. According to the Court, the UK citizen has a legitimate expectation that his request for diplomatic protection will be *‘considered’*, and *‘that in that consideration all relevant factors will be thrown into the balance.’* On the concrete question of deciding whether to give satisfaction to the applicant’s requests or not, the Court did not depart from its previous jurisprudence, since it concluded that it could not speak with a different voice from the executive, thus rejecting the application on the facts.

On the basis of the policy papers presented by the UK Government, the Court held that the legitimate expectations that these statements have created for the British nationals are very limited, and do not give a legal entitlement to Mr Abbasi to have legitimate expectations that he will receive diplomatic assistance in the form he requested.⁹⁴¹

The Court continued by assessing whether the actions already taken by the Government can be considered as fulfilling the obligations arising from the legitimate expectations that had been created. The UK Government proved that it had had direct discussions with the US Secretary of State and that the official of the UK Foreign Office obtained permission to visit the UK detainee in Guantánamo Bay on three separate occasions. The purpose of the communication and visits was to ascertain the well-being and the treatment of the detainees and not the release of the appellant or the arbitrary nature of his detention, as requested by Mr Abbasi’s lawyer.

⁹⁴⁰ *Ibid.*

⁹⁴¹ *‘They indicate that where certain criteria are satisfied, the Government will consider making representations. Where to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. [...] The Secretary of State must be free to give full weight to foreign policy considerations, which are not justiciable. However, that does not mean that the whole process is immune from judicial scrutiny. The citizen’s legitimate expectations is that his request will be considered, and that in that consideration all relevant factors will be thrown into the balance.’* *Abbasi Judgment*, para. 99.

The court held that such acts were sufficient to fulfil the legitimate expectations and rejected the relief sought by the appellant for specific representations. This actually reflects the wide discretion recognised by the Court to the executive. The national is not entitled to receive under the UK law the external representations that he would like to receive on his behalf from the Government, but his legitimate expectations are limited to those directly promised by the Government or previously publicly stated based on his freedom of conducting the State's foreign affairs.

The *Abbasi* judgment does not recognise an individual right to diplomatic protection under domestic, regional human rights, or international law. Its added value for the topic of diplomatic protection of individuals is, however, invaluable, due to the domestic judiciary's significant change of its long-standing doctrine of absolute deference towards the executive. Just one year before the *Abbasi* judgment, the *Buttes* doctrine⁹⁴² precluded the UK courts from reviewing the foreign affairs, especially if related to national security, conduct of the executive. Following the *Abbasi* judgment, the executive prerogative over the exercise of consular assistance and diplomatic protection was held to be justiciable. Additionally, the executive had to comply with the obligation to consider the individuals' requests in good faith and as much as possible to provide reasons for refusal.

In conclusion, it can be argued that the *Abbasi* judgment made two significant advances in the field of diplomatic protection of individuals within the common law system. It first extended judicial review over the executive consular and diplomatic protection prerogative of the Government, including in the delicate matters of violations of human rights committed by a foreign State.⁹⁴³ Second, the UKCA recognised that in certain circumstances the British national might have a legitimate expectation to receive diplomatic protection from the UK Government, and this legitimate expectation is judicially reviewable.

Jurisprudence of the South African courts – recognising a limited State duty to exercise diplomatic protection of nationals abroad

Starting from 2004 a string of diplomatic protection cases were brought before South African courts by citizens against their Government.⁹⁴⁴ Of these, the *Kaunda* case⁹⁴⁵ decided by the

⁹⁴² *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Ferhut Butt* (1999) 116 ILR 607.

⁹⁴³ More details on this issue can be found in Charlotte Kilroy, 'Reviewing the Prerogative', (2003) EHRLR, 222.

⁹⁴⁴ *Kaunda v President RSA* [2005] (4) SA 235 (CC), *Roothman v President RSA* [2005] (3) All SA 600 (T); *Thatcher v Minister of Justice and Constitutional Development* [2005] (1) SA 375 (C); *Van Zyl v Government of*

South African Constitutional Court in late 2004, and the *Von Abo* case decided in 2009⁹⁴⁶ and 2011⁹⁴⁷ are proof of the growing recognition of a State duty to exercise diplomatic protection. We will first examine the judgment of the South African Constitutional Court in the *Kaunda* case, proceed with the *Von Abo* case and conclude by summarising the common and recent position of the South African courts on the issue of the legal nature of diplomatic protection, and point out the avant-garde approaches.

In 2004, 69 South African citizens held in Zimbabwe on a variety of charges for their alleged involvement in plotting a coup against the President of Equatorial Guinea brought judicial proceedings initially before the High Court in Pretoria against the Government of South Africa and other South African public authorities officials, seeking, in short, to compel the Government to take action at the diplomatic level to ensure the applicants' repatriation in South Africa. They also asked that, should the nationals be put on trial in Zimbabwe or Equatorial Guinea, the Government would ensure their constitutional rights to dignity, freedom, security of the persons (section 9), fair conditions of detention and trial (section 35), prohibition of torture and other ill-treatments (section 12), and respect of their dignity be upheld at all times by Zimbabwe and Equatorial Guinea.⁹⁴⁸ The High Court considered that the main legal issues raised by this application was whether the Constitution established an obligation on the State to exercise protection of the applicants in relation to the detention conditions in Zimbabwe and the prosecution they face there, as well as in light of the death sentence which they may face in Equatorial Guinea, if they were extradited to this country. These issues were held to '*involve the reach of the Constitution, and the relationship between the judiciary and the executive and the separation of powers between them.*'⁹⁴⁹ Therefore they were constitutional matters of great importance not only for the applicants but for the entire society.

The High Court rejected the application on the basis of absences of an explicit right of the individual to diplomatic protection in international or domestic law, and lack of extraterritorial application of the constitutionally protected rights. It is possible that due to the

the RSA [2005] (4) All SA 96 (T), *Von Abo v Government of RSA* [2009] (2) SA 526 (T) and *Government of RSA v Von Abo* case no 283/10 [2011] 3 All SA 261 (SCA).

⁹⁴⁵ *Samuel Kaunda and Others v. President of the Republic of South Africa and Others*, Constitutional Court of South Africa, decision of 4 August 2004, reprinted in: (2005) ILM, 173-233.

⁹⁴⁶ *Von Abo v President of the Republic of South Africa* (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC) (5 June 2009).

⁹⁴⁷ *Government of the Republic of South Africa and Others v Von Abo* (2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA)) [2011] ZASCA 65; 283/10 (4 April 2011).

⁹⁴⁸ *Samuel Kaunda and Others v. President of the Republic of South Africa and Others*, Constitutional Court of South Africa, decision of 4 August 2004, see paras. 4 and 17.

⁹⁴⁹ *Ibid.*, para. 19.

constitutional nature of the claims and the legal consequences of the judgment that could impact on the constitutional relation between the judiciary and executive, and thus on the entire society, the High Court was extremely prudent in its findings and preferred to leave the task of legal innovation to the Constitutional Court decision, in case the applicants decided to appeal.

Following the dismissal, the applicants appealed to the Constitutional Court of South Africa. The main gist of the numerous applicants' claim was that the Government failed to comply with their demands of ensuring protection of their constitutional rights to dignity, life, freedom and security of the person, the right not to be treated or punished in a cruel, inhuman or degrading way, and also the right to a fair trial (sections 10, 11, 12 and 35 of the Constitution), which had been violated by Zimbabwe. Additionally, they complained that the Government did not take steps to ensure their repatriation in South Africa, which was necessary in light of the possibility of being subjected to a death sentence if extradited to Equatorial Guinea. Relying on section 7(2) of the Constitution, which requires the State to '*respect, protect, promote and fulfil the rights in the Bill of Rights*', the counsel of the applicants contended that the State is obliged to protect these rights of the applicants, and the only way it can do so in the circumstances of this case is to provide them with diplomatic protection, which in the present case should take the concrete form of a request for repatriation of the applicants.⁹⁵⁰ Therefore, the Constitutional Court had to assess two main legal issues: whether South Africa had a duty to exercise diplomatic protection either under domestic or international norms, and whether constitutional rights could apply outside the South African borders.

The Constitutional Court started its legal reasoning by asking whether a duty of the State to exercise diplomatic protection in certain cases is recognised by international and/or domestic law. As for the legal nature of diplomatic protection as recognised by international law, the Court sided with the Government's arguments that the general international law practice recognises diplomatic protection only as a discretionary right of the State of nationality. The Court invoked the failure of Rapporteur Dugard's proposal for an article providing a State duty to exercise diplomatic protection on behalf of nationals as evidence that the traditional conception of diplomatic protection is still in force. .

⁹⁵⁰ *Kaunda* judgment, para. 21.

The Constitutional Court held that a duty might still be deduced from domestic law and continued by assessing whether the constitutional provisions of sections 7⁹⁵¹ or 3⁹⁵² recognise an explicit or implicit right of the citizen to diplomatic protection from the State, which, *in casu*, would take the form of compelling the Government to seek the repatriation of the applicants. Justice Chaskalson, writing for the majority, held that the Constitution did not provide an express individual right to diplomatic protection. He also rejected the argument of the applicants that an implicit right to diplomatic protection can be deduced from the constitutional rights to life, dignity, and not to be treated in a cruel, inhuman or degrading way, unless the South African Government has been involved in the extraterritorial violation of these fundamental rights.

However, the Court did recognise that in certain limited circumstances, South African citizens enjoy an entitlement to request diplomatic protection as part of the constitutional guarantee given by section 3.⁹⁵³ However this entitlement to request diplomatic protection imposes only an obligation of means and not of results. The corresponding obligation of this entitlement is that the executive is obliged ‘*to consider the request and deal with it consistently with the Constitution*’.⁹⁵⁴ With the recognition of this entitlement, the Court does not substantially contribute to the formation of a customary rule of an individual right to diplomatic protection, it just adds one more jurisdiction to the plethora of domestic courts that have already recognised such a minimum entitlement for the individual which does not pose significant problems to the Government’s classical discretionary power to exercise diplomatic protection of nationals abroad.⁹⁵⁵

In the next paragraphs the Court does go further by admitting that:

‘[If] the request is directed to a material infringement of a human right that forms part of customary international law, one would not expect our government to be passive. Whatever

⁹⁵¹ Section 7(2) of the South African Constitution requires the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.

⁹⁵² Section 3 of the South African Constitution provides: ‘(1) There is a common South African citizenship. (2) All citizens are — (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship. (3) National legislation must provide for the acquisition, loss and restoration of citizenship.’

⁹⁵³ *Kaunda* judgment, para. 67.

⁹⁵⁴ *Ibid.*, para. 67.

⁹⁵⁵ Certain legal scholars have argued that the majority’s decision recognised a meaningless ‘right’ within the context of diplomatic protection, see Pergantis, *op.cit.*, and Booysen ‘The Administrative Law implication of the ‘customary law is part of the South African law’ doctrine.’ (1997) SAYIL, 46.

theoretical disputes may still exist about the basis for diplomatic protection, it cannot be doubted that in substance the true beneficiary of the right that is asserted is the individual.'⁹⁵⁶

In the limited circumstances of '*a gross abuse of international human rights norms*', the Court recognises a duty of the Government, consistent with its international obligations to '*take action to protect its citizens*' against such violations.⁹⁵⁷ The Court finds that situations, where its nationals are subject to such egregious breaches of international human rights that might prevent the nationals from asking for assistance, require the Government to take of its own initiative, action and secure diplomatic protection.⁹⁵⁸ The Court immediately tempers this innovative position by pointing out that '*A court cannot tell the government how to make diplomatic interventions for the protection of its nationals*' and cites scholars and foreign domestic jurisprudence in support of this statement.⁹⁵⁹ In spite of the recognition of a State duty to diplomatic protection in cases of egregious violation of international human rights, and of the jurisdiction of the courts to review the executive conduct in these matters, the Court still recognises a wide discretion to the Government in foreign affairs. '*Courts required to deal with such matters will, however, give particular weight to the government's special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters.*'⁹⁶⁰

It is noticeable that the Court referred not only to international judgments but also to domestic foreign judgments. This exercise of comparative analysis is laudable, however it seemed to come after the Court had already made its decision, and served only for cherry picking for the judicial opinions, whether international or domestic, that would support the predetermined choices, instead of having recourse to the comparative legal analysis to help it find a decision after a careful examination of the cited evidence. The Court confined itself to cases already cited by Rapporteur Dugard in support of his proposal for a State duty to exercise diplomatic protection.⁹⁶¹ The Constitutional Court closely followed the approach of the UK Court of Appeal in *Abbasi*, as regards the role of courts in reviewing the conduct of the Government in diplomatic protection matters. The Court held that rationality and bad faith

⁹⁵⁶ *Kaunda*, para. 69.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.*, para. 70.

⁹⁵⁹ *Ibid.*, para. 70.

⁹⁶⁰ *Ibid.*, para. 144.

⁹⁶¹ This case law was already interpreted by the 6th ILC Committee and other domestic courts as insufficient to prove an international duty to diplomatic protection, an opinion that was taken up by the Court without much analysis.

are two main grounds on the basis of which it can review the decisions of the executive regarding the exercise of diplomatic protection.⁹⁶² Similarly to the UK Court of Appeal, the South African Constitutional Court emphasised that an arbitrary refusal will be subject to judicial review.

In spite of the advancement of the scope of judicial review over the executive's decision-making in diplomatic protection matters, the Court deferentially concluded that the application had to be rejected on the basis of the following grounds: absence of an explicit right to diplomatic protection in international or domestic law; the constitutional protected rights invoked by the applicants do not apply extraterritorially based on the still applicable traditional principle of international law of sovereign equality of States, as established in the *Lotus* case, which generally prohibits the extraterritorial application of domestic law; if a South African official had been involved, or was complicit in the violation of these constitutional rights abroad, then this participation would have engaged their liability towards their citizens, however in the present case the participation of a Government official was not proved.

It has been argued that the Court dispatched too easily the issue of the applicability of international customary law to the case.⁹⁶³ Surely human rights, such as those invoked by the applicants – the right to life, the right not to be tortured and subjected to ill-treatments, and the right to a fair trial – are provided by numerous international treaties, including the Universal Declaration of Human Rights, which is held to codify international customary law, in the ICCPR and the African Charter of Fundamental Rights which bound all the countries involved in the case: South Africa, Zimbabwe and Equatorial Guinea. Since the Court held that the Government has a duty to exercise diplomatic protection in cases of egregious violation of human rights, more attention should have been paid to the identification of such violations in the present case. At times the Court seems to have contradicted itself. For instance, although the Court admitted that there might be a real possibility that the applicants would be extradited to Equatorial Guinea (paras.104-105), it later asserted that:

‘[...] if the allegations by the applicants that they will not get a fair trial in Equatorial Guinea prove to be correct, and they are convicted and sentenced to death, there will have been a grave breach of international law harmful to our government's foreign policy and its

⁹⁶² *Ibid.*, para. 80.

⁹⁶³ See Pete and du Plessis, ‘South Africans Abroad and their right to diplomatic protection’, (2006) SAJHR, 439; M. Olivier, ‘Diplomatic Protection: Right or Privilege’, (2005) SAYIL, 238.

aspirations for a democratic Africa. As far as the applicants are concerned the consequences would be catastrophic, and they will have suffered irreparable harm.⁹⁶⁴

However, several paragraphs later it points out that the danger is scarce since the applicants ‘*are not in Equatorial Guinea and they have not been put on trial there. No injury has been done to them by that country and no injury will be done unless they are put on trial there.*’

As regards the respect of the individual’s entitlement to have his request for diplomatic protection duly taken into consideration, the Court pointed out that the applicants’ requests for assistance in regard to their deplorable detention conditions, abuses, and denied access to lawyers in Zimbabwe, have been taken up by the South African High Commission. And that the latter presented these matters to the Zimbabwean authorities. These representations were held as fulfilling the Government duty to consider rationally and in good faith its citizen’s requests for diplomatic protection. The Court concluded that due to the great sensitivity of the events of which the applicants were accused (i.e. the alleged coup plotters, mercenaries equipped with large quantity of ammunition – see para. 11), it would not be appropriate for ‘*a Court to require or propose any approach with regard to timing or modalities different to that adopted by government.*’⁹⁶⁵

There seems to be more support for an individual right to diplomatic protection in the minority judgment. The concurring Opinions of Justices O’Regan, Ngcobo and Sachs offer a clearer answer to the question of whether a constitutional duty on the government to exercise diplomatic protection exists under the South African law. The Justices recognised that the Constitution conferred upon the individuals an entitlement to make representations but it also imposed based on section 3 an obligation on the state ‘*to take steps to seek to protect citizens against fundamental breaches of their human rights as recognised by customary international law or the African Charter on Human and People’s Rights.*’⁹⁶⁶ Both of the Justices held that the death sentence, which the applicants could very well face abroad, was serious enough to justify a clear obligation on the Government to take steps to provide diplomatic protection.⁹⁶⁷

The scope of this section is not to criticise or praise this judgment, nor to offer an exhaustive analysis of the legal and political context of this judgment, but to identify whether this controversial judgment does contain seeds of evidence of a recognition of an individual

⁹⁶⁴ See *Kaunda* judgment, para. 124.

⁹⁶⁵ *Ibid.*, para. 144.

⁹⁶⁶ *Ibid.*, para. 97.

⁹⁶⁷ *Ibid.*, paras. 88, 94, 116.

right to diplomatic protection, in which circumstances, and to what extent. The Court did recognise a duty of the Government to ‘*take action to protect its citizens*’ against ‘*a gross abuse of international human rights norms*’.

There were other diplomatic protection cases following the *Kaunda* case. In 2005, the Constitutional Court reviewed two more cases, *Roothman*⁹⁶⁸ and *Van Zyl*⁹⁶⁹, based on complaints against the Government’s inaction towards the applicants’ requests to exercise diplomatic assistance on their behalf against foreign States. In the *Roothman* case, the applicant attempted to convince the Government to exercise diplomatic pressure on the Democratic Republic of Congo to ensure the enforcement of a favourable judgment, while in the second case, *Van Zyl* attempted to convince the South African Government to exercise diplomatic protection for the purpose of obtaining compensation for an expropriation of his property in the Kingdom of Lesotho. The Court rejected both claims on the grounds of absence of an applicable international law that could lead to an international wrongful act in the first case, while in the second case, absence of extraterritorial application of constitutional provisions and of the Government involvement in the alleged extraterritorial violation of rights.

The next prominent case is the one brought by Von Abo before a South African High Court and, contrary to the above-mentioned string of cases, this one clearly recognises an individual right to diplomatic protection.⁹⁷⁰ The 2009 judgment of this court was very controversial giving rise to either harsh critiques or high praise.⁹⁷¹ This judgment is certainly a breakthrough for the conception of diplomatic protection as a right of the individual and for the increasing role of the courts *vis-à-vis* the executive in foreign relations matters.

After several years of re-investments, Von Abo, a South African national, acquired considerable farming properties in Zimbabwe. Following a State policy scheme of the Zimbabwe government to expropriate land owned by white farmers, Von Abo was deprived of a large part of his farmland without compensation. His efforts to ensure remedy *via* judicial proceedings proved ineffective. Following an unsuccessful exhaustion of local remedies in

⁹⁶⁸ *Roothman v President of the Republic of South Africa and Others* (29087/04) [2005] ZAGPHC 266 (Judgment of 9 June 2005).

⁹⁶⁹ *Van Zyl and Others v Government of Republic of South Africa and Others* (170/06) [2007] ZASCA 109; [2007] SCA 109 (RSA); [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA) (Judgment of 20 September 2007).

⁹⁷⁰ *Von Abo v Government of RSA* [2009] (2) SA 526 (T).

⁹⁷¹ For positive reactions to the judgment, see Leon ‘Von Abo Ruling exposes empty promises on Zimbabwe Business Day’; ‘Government didn’t protect FS farmer’ in News24 (29-07-2008); Pretorius ‘Landmark win for farmer: Court says man who lost land, business in Zim is entitled to SA Government Protection’ in Pretoria News; see more details in D. Tiadi, ‘Right to Diplomatic Protection, The Von Abo Decision, and One Big Can of Worms: Eroding the Clarity of Kaunda’, (2009) Stellenbosch L. Rev., 14. For critical article, see S. Singh, ‘Diplomatic protection in the light of the Von Abo judgment’, (2011) S. Afr. Y.B. Int’l L., 298.

Zimbabwe, Mr Von Abo tried for 6 more years to convince the South African Government to act against Zimbabwe's expropriation of his farmland, but again without success. He then started judicial proceedings against the Government of his country of nationality for the alleged failure of the latter to '*take diplomatic steps to protect or fulfil his rights*' without '*meaningful explanation for the failure and/or refusal*' based on his constitutional rights.⁹⁷² In a 2009 judgment, the High Court of North Gauteng held that the South African Government had failed to fulfil its obligation to exercise diplomatic protection on behalf of Von Abo whose property rights had been violated by Zimbabwe.⁹⁷³

The High Court first found that '*the requirements necessary for a state to assert a claim for diplomatic protection on behalf of its citizen were present*', namely the nationality of the country from which diplomatic protection was sought; '*there had been a violation of an international minimum standard; and that the claimant had previously exhausted all available internal remedies.*'⁹⁷⁴ The legal basis of the State's obligation to exercise diplomatic protection was the constitutional provision of section 3 and the previous judgment of the South African Court in the *Kaunda* case. Additionally, the Government's continuous reluctance to address Von Abo's request for diplomatic protection following his expropriation without compensation by the Zimbabwe Government was held by the Court to show improper consideration of the applicant's request. As remedy to the violation of the individual's right to diplomatic protection, the Court obliged the Government to take all necessary steps to obtain on behalf of the applicants a remedy of their injury caused by the Government of Zimbabwe, and to report to the court within a 60 day period the steps that had been taken in this regard.

The South African Government appealed this judgment before the Supreme Court, which overturned the decision of the High Court in a decision from 2011. The Supreme Court has shown in the past a deferential approach to the executive's foreign affairs powers (see the *Van Zyl* judgment of 2008) and continued on the same line also in the *Von Abo* judgment. The Court noted that even though the *Kaunda* judgment was invoked by the High Court in support of its reasoning, it was an erred interpretation of that judgment, based more on the minority opinion than on the majority one.

The common thread throughout these South African cases, starting from 2004 until 2011, is that international law has been constantly held as not yet recognising a right of a national to diplomatic protection, based primarily on the ILC Articles on Diplomatic

⁹⁷² Para. 17.

⁹⁷³ *Von Abo v Government of RSA* [2009] (2) SA 526 (T).

⁹⁷⁴ *Ibid.*, para. 111.

Protection, which were concluded in 2006. From 2006 until 2011 important national judgments were delivered, recognising a right of the individual to diplomatic protection in cases of violation of fundamental human rights,⁹⁷⁵ however they were not cited by the South African courts, especially the Supreme Court in the latest *Von Abo* case. The Courts seem to have agreed only with the more prudent stance of recognising to the nationals only a *right to have the executive consider their request for diplomatic protection*. The accepted legal norms on the basis of which the individual could enforce such a right against the South African State have pertained to domestic law, and in particular the constitutional provisions. The Courts have unanimously agreed that the South African citizen has a right to have his request for diplomatic protection considered in good faith and rationally by the executive. This right was also recognised by the UK courts to UK citizens.

These were minimum entitlements, which would have entailed no cost for the executive to fulfil, thus it does not reflect a revolutionary change in the traditional conception of diplomatic protection.⁹⁷⁶ Certain South African courts dared to go beyond these minimum requirements and interpreted the constitutional provisions as implicitly establishing more than a right to have the request for diplomatic protection considered, namely a right to receive diplomatic protection.⁹⁷⁷ Justices O'Reagan and Ngcobo, representing the minority in the *Kaunda* judgment of the South African Constitutional Court recognised a State duty to exercise diplomatic protection in cases of violation of fundamental human rights based on sections 3 and 7 of the Constitution and the international human rights treaties, in particular the African Charter of Fundamental Rights, which bind South Africa. The majority also recognised a duty to diplomatic protection, though more limited than the one recognised by the minority, namely in cases of egregious violation of human rights, and as long as the Government was involved or participated in the alleged extraterritorial violations. This modern conception was immediately tempered by emphasising that in no circumstance can courts replace the executive in the choices that need to be made in foreign affairs matters.

It was documented, based on jurisprudence delivered until 2012, that South Africans invoked a right to diplomatic protection from their Government in matters related to debt

⁹⁷⁵ See, for instance, the *Khadr* judgment of 2009 of the Canadian Federal Court of Appeal discussed in the following sub-section, as well as the General Court of the EU judgments in the *Ayadi* and *Hassan* cases discussed above.

⁹⁷⁶ S. Singh, 'Constitutional and international law at a crossroads: diplomatic protection in the light of the *Von Abo* judgment: South African judicial decisions', (2011) South African Yearbook of International Law, 298-307.

⁹⁷⁷ See the *Von Abo v Government of RSA* [2009] (2) SA 526 (T), discussed above.

collection,⁹⁷⁸ arrest and detention,⁹⁷⁹ extradition,⁹⁸⁰ and expropriation of property.⁹⁸¹ Although the South African courts, especially the Constitutional and Supreme Courts, were criticised for showing too much deference to the Government, as except for *Von Abo*, all applications were ultimately rejected.⁹⁸² In spite of political considerations, which seem to trump in the eyes of the court when faced with the individuals' request for a particular diplomatic protection exercise, the aforementioned judgments of the South African courts represent the seeds of a movement towards recognising an individual right to diplomatic protection. The first change registered by the judicial approach in this field is the willingness of courts to admit diplomatic protection cases for judicial review. Second, there is a general recognition of an individual right to have his/her request considered in good faith and rationally by the Government. Third, a right to diplomatic protection has been recognised in cases of egregious violations of fundamental human rights, and as long as the Government was involved or participated in the alleged extraterritorial violations. In spite of all the criticism of the *Kaunda* judgment for having recognised only minimal and theoretical rights to diplomatic protection, where, it was argued, there were sound reasons for giving effect to the applicant's claim, the judgment has had an important impact on the subsequent jurisprudence, as proved by the 2009 judgment of the High Court in the *Von Abo* case.

It is clear that cases submitted by individuals before domestic courts, against the Government's reaction to their requests for diplomatic protection, increased in South Africa in the last decade, and are likely to continue increasing. The willingness of courts to judicially review such cases and assess the merits of the cases also increased, as well as their boldness to establish a duty to act on the part of the government, especially in extreme cases, such as those where grave violations of human rights of nationals are at issue. A certain variation in terms of the scope and force of the State duty to exercise diplomatic protection does exist among the different judgments, ranging from a minimal recognised duty to not act arbitrarily and provide reasons for the Government's decisions, to a more stringent and clear duty to secure protection in cases of gross abuses of international human rights norms. This duty has been more often recognised in the recent jurisprudence⁹⁸³, which could be interpreted as

⁹⁷⁸ *Roothman v President of RSA*.

⁹⁷⁹ *Kaunda, Thatcher v Minister of Justice, Mohamed v President of RSA*.

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Van Zyl and Others v Government of Republic of South Africa and Others* (170/06) [2007] ZASCA 109; [2007] SCA 109 (RSA); [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA) (20 September 2007).

⁹⁸² And even the *Von Abo* case was rejected on appeal by the Supreme Court.

⁹⁸³ See the *Von Abo* judgment of 2009 and to a certain extent also the opinion of the Supreme Court in its 2011 judgment in the same case, which although rejecting the plea of *Von Abo* against the Government based on the

supporting the development of a trend recognising a State duty to act on behalf of the national in cases of grave violations of his human rights abroad.

Canada – the Khadr case: recognising a limited State duty to exercise diplomatic protection, beyond the legitimate expectations doctrine

Within the framework of the ‘war on terror’, several Canadian citizens with single or dual nationalities were detained without a due process and subjected to torture and ill-treatment in Arab countries and the US Guantánamo Bay military base. The Canadian Government’s reaction to these cases has been criticised as passive and, in certain cases, as even supportive of a policy of extraordinary rendition of terrorist suspects to regimes using ill treatments as tactics to obtain confessions or evidence.⁹⁸⁴

The case of one of the Guantánamo Bay detainees attracted wide media attention, due to the fact that he was a minor at the time of his arrest and detention by the US authorities. Mr Khadr is a dual national of Canada and Egypt, who had lived almost his entire life in Canada. He was first detained in Afghanistan for allegedly having thrown a grenade that killed a US soldier. A few months later he was transferred to Guantánamo Bay while still a minor. Between 2004 and 2008, Mr Khadr brought several complaints against the Canadian Government before the domestic courts of Canada asking, in some of these cases, for remedy of the damages he has suffered as a consequence of the Canadian Government’s general passivity towards his situation, and involvement in the US actions that violated his absolute right to be protected against torture and mistreatments.⁹⁸⁵ In other judicial claims, Mr Khadr asked the Government to disclose data related to the abusive interviews he was subjected to in Guantánamo Bay.⁹⁸⁶ Following a series of repeated applications for judicial review of the Government’s refusal to seek his repatriation,⁹⁸⁷ in 2009, the Federal Court of Vancouver⁹⁸⁸

facts, it did clearly recognise a duty to exercise diplomatic protection on the part of the Government, see *Government of the Republic of South Africa and Others v Von Abo* (2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA)) [2011] ZASCA 65; 283/10 (4 April 2011).

⁹⁸⁴ See e.g. Amnesty International (Canada), ‘Restoring his rights, addressing his wrongs. Amnesty International’s closing submissions to the Committee of Inquiry’ (10 September 2005); see more details in C. Forcese, ‘The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad’, (2007) U.N.B.L.J., 102.

⁹⁸⁵ *Khadr v. The Attorney General of Canada and the Minister of Foreign Affairs*, 2005 FC 1076, T-536-04; *Khadr v. The Minister of Foreign Affairs*, 2004 FC 1145, T-686-04.

⁹⁸⁶ *Khadr v. Canada* (Minister of Justice), 2006 FC 509; *Khadr v. Canada* (Minister of Justice), 2007 FCA 182; *Canada (Justice) v. Khadr* (Minister of Justice), 2008 SCC 28.

⁹⁸⁷ For a summary of the different applications submitted by the family of Mr Khadr in 2004, 2006, 2007 and 2008, please see the Judgment written by Justice O’Reilly in case *Khadr v Canada*, [2009] F.C.J. No. 462, judgment of 23 April 2009, paras. 19-28.

finally established a legal duty on Canada to protect Mr Khadr under section 7 of the Charter (prohibition of ill-treatment). Subsequently it found that Canada failed to fulfil its legal obligation and established as a legal remedy the obligation of the government to request the applicant's repatriation. This finding was also upheld in appeal. In the final appeal of the Government before the Supreme Court of Canada, the latter partially retained the revolutionary judgment of the Federal Court of Appeal. The Supreme Court concurred with the previous courts' finding of Canada's violation of section 7 of the Charter based on the sufficient connection between the Government's participation in the US illegal deprivation of Mr Khadr's liberty and security and the ill-treatment of the minor. The Supreme Court departed however from the finding of a remedy in the precise form of the Government's request for repatriation of the applicant to Canada. Although establishing that the royal prerogative over the foreign relations of the executive does not exonerate the latter from constitutional scrutiny⁹⁸⁹, and that courts have the power '*to give specific direction to the executive branch of the government*', the Supreme Court quashed the previous judgment establishing an obligation of the Government to request repatriation:

*'The appropriate remedy in this case is to declare that K's Charter rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the Charter.'*⁹⁹⁰

It has to be noted that the decision of the Supreme Court to leave the choice of the appropriate remedy to the executive is a step back from the human rights based judgment delivered by the Federal Court. On the other hand it can be interpreted also as recognition of the fact that courts might not have access to the full picture and the complexity of the case, and it could be in the best interests of the individual and Canada's broader national interests to leave the choice of remedy to the executive. The Supreme Court does not mention how repatriation would jeopardise Canada's national interest and how it could be against the interests of the individual, especially when Mr Khadr's desire was precisely to be repatriated. Furthermore, unlike the previous courts⁹⁹¹, the Supreme Court does not place Canada's duty to act towards the individual, and the remedy for the violation of section 7 as falling under the ambit of a State duty to exercise diplomatic protection. In the following paragraphs, the first

⁹⁸⁸ *Khadr v Canada*, [2009] F.C.J. No. 462.

⁹⁸⁹ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 36.

⁹⁹⁰ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, paras. 39 and 41.

⁹⁹¹ *Khadr v Canada*, [2009] F.C.J. No. 462, see, for instance, paras. 42, 48, 89.

judgment of the Federal Court will be assessed, since it puts forward ground-breaking observations on the legal nature and effects of diplomatic protection as an individual right.

Following the Government's disclosure of information⁹⁹², which proved the Government's conscious participation in ill-treatment practices of the US towards Mr Khadr, and the US Supreme Court judgment in *Hamdan v Rumsfeld*⁹⁹³ holding the Guantánamo Bay regime as being in violation of the Geneva Convention, the family of Mr Khadr submitted a new application challenging the refusal of the Canadian Government to seek his repatriation from Guantánamo Bay to Canada.⁹⁹⁴ Similarly to previous applications, the application submitted in 2008 was based on several sections of the Canadian Charter of Rights and Freedoms (sections 6⁹⁹⁵, 7⁹⁹⁶ and 12⁹⁹⁷) and the international obligations incumbent on Canada, requiring it to protect individuals under its jurisdiction from torture, ill-treatments and to ensure the protection of the rights of the child. This time, the applicant hoped that the newly disclosed information, which proved the Government's conscious involvement in the US ill-treatment of the applicant, and the US Supreme Court's judgment holding the international illegality of the Guantánamo Bay regime, would be held by the Canadian Federal Court as sufficient evidence to prove the connection between the Government's conduct and the extraterritorial violation of human rights. It has to be noted that previous applications were rejected by the Federal Court precisely on the basis of the *US v Burns*⁹⁹⁸ doctrine which required a sufficient link between the acts of the Government and the extraterritorial violation of the human rights in order to hold the Government liable under the Canadian Charter of Rights and Freedoms.⁹⁹⁹

In assessing his complaint, the Federal Court held that it would need to respond to four main legal questions: 1) Have the issues he raised been decided in other previous judicial proceedings? 2) Is there a decision of the Government that can be judicially reviewed; and, if there is, then is this decision reviewable by the court? 3) Does the Government have a legal

⁹⁹² Based on requirement established the Supreme Court in its judgment delivered in *Canada (Justice) v. Khadr* (Minister of Justice), 2008 SCC 28.

⁹⁹³ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

⁹⁹⁴ *Khadr v Canada*, [2009] F.C.J. No. 462.

⁹⁹⁵ Section 6 of the Canadian Charter of Rights and Freedoms includes the mobility rights: right to enter, remain, leave, move, and gain livelihood in Canada and its limitations.

⁹⁹⁶ Section 7 of the Canadian Charter of Rights and Freedoms includes the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

⁹⁹⁷ Section 12 the Canadian Charter of Rights and Freedoms prohibits cruel and unusual treatment or punishment.

⁹⁹⁸ *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

⁹⁹⁹ *Khadr v Canada*, [2009] F.C.J. No. 462, section IV *Issues* of the judgment.

duty to protect Mr Khadr? and finally, 4) what is the appropriate remedy if that duty is found to have been violated?¹⁰⁰⁰ This section will not exhaustively assess all these questions, but will focus on the issues of the justiciability of the Government's decision on diplomatic protection matters and on the existence of a State duty to exercise diplomatic protection, and possible remedies in case such a duty has been breached.

The Court started its assessment with the delicate question of whether a decision of the Government which touches upon highly sensitive foreign affairs policy choices is amenable to judicial scrutiny. The Court admitted that '*decisions about foreign affairs fall naturally and properly to the executive*'.¹⁰⁰¹ However, it continued by summarising the exceptions to this rule as established in previous judgments:

*'the exercise of Crown prerogative is beyond the scope of judicial review, except, of course, when a right guaranteed by the [Charter] is violated';*¹⁰⁰² *'Decisions involving pure policy or political choices in the nature of Crown prerogatives are generally not amenable to judicial review because their subject matter is not suitable to judicial assessment. But where the subject matter of a decision directly affects the rights or legitimate expectations of an individual, a Court is both competent and qualified to review it. (Smith v. Canada (Attorney General), 2009 FC 228, at para. 26.)'*¹⁰⁰³

After clarifying that there is no absolute discretionary right of the executive to exercise State prerogatives, the Court, in an eloquent exercise of comparative law, assessed the jurisprudence of other Commonwealth countries for the purpose of settling the issue of the domestic courts' power *vis-à-vis* that of the executive in scrutinising the exercise of diplomatic protection of individuals. The *Abbasi* and *Mohamed* judgments of the UK Court of Appeal were clustered together with the *Hicks* case of the Federal Court of Australia as indicative of a clear stance that there is no clear duty to protect citizens under international law, or under the common law. These cases were differentiated from the *Kaunda* case decided by South Africa's Constitutional Court, where a limited duty to protect was established on the

¹⁰⁰⁰ For a more detailed analysis of the judgment, see C. McLachlan, *Foreign Relations Law*, Cambridge University Press (2014), 367-371; C. Forcese, 'The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad', (2007) U.N.B.L.J.

¹⁰⁰¹ See para. 40.

¹⁰⁰² *Copello v. Canada* (Minister of Foreign Affairs), 2003 FCA 295, at para. 16, relying on *Black v. Canada* (Prime Minister) (2001), 54 O.R. (3d) 215 (C.A.).

¹⁰⁰³ See *Khadr*, para. 41.

part of the State, together with the accepted power of the court to scrutinise, in certain circumstances, the discretionary right of the executive to exercise diplomatic protection.

This jurisprudence was held to establish the domestic court's power to scrutinise the entitlement of the state to exercise diplomatic protection. It was thus used as a legal argument in favour of establishing the Canadian court's power to judicial review of the Government's decision on the basis of the Charter, while also recognising the Government's margin of discretion when dealing '*with matters that affect international relations and foreign affairs.*'¹⁰⁰⁴

Turning to the third legal issue, the State's duty to exercise diplomatic protection, the Federal Court assessed the Canadian Charter of Rights, then several international treaties,¹⁰⁰⁵ in order to establish whether Canada had certain particular obligations stemming from the domestic law and international treaties to ensure that particular human rights were respected by the US in the person of the Canadian citizens, Mr Khadr. Based on the aforementioned treaties, the Court held that Canada had a clear and judicially enforceable fundamental positive and negative obligations in relation to torture and other ill-treatments inflicted by foreign States on its minor nationals. The substantive scope of the duty to protect was made of the substantive requirements deriving from the aforementioned international treaties and the domestic positive obligation of Canada to take action that would ensure their respect (section 7 of the Charter).¹⁰⁰⁶ The Court did not establish a general duty to protect upon the Canadian executive *vis-à-vis* Mr Khadr. Instead the Court established a more specific obligation incumbent upon the State based on the gravity of the injury suffered and the specific circumstance of the complainant, namely being a minor throughout all the mistreatments in dispute, which justified the imposition of a duty to protect as a principle of fundamental justice.¹⁰⁰⁷

The consequence of finding such a fundamental duty to protect was that Canada should have taken the appropriate steps to ensure that Mr Khadr's treatment conformed with the alleged international human rights norms, which, in the present case, was not ensured. Finding, first, a violation of the international human rights by the US authorities based on a US domestic court judgment, second, the 'complicity' of Canadian officials in this violation, and finally, Canada's positive and negative constitutional obligations to secure respect of

¹⁰⁰⁴ *Ibid.*, para. 49.

¹⁰⁰⁵ ICCPR, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child.

¹⁰⁰⁶ See *Khadr*, para. 74.

¹⁰⁰⁷ *Ibid.*, paras. 71-75.

those international human rights in the person of its national, the Federal Court decided that the appropriate remedy to compensate the violation of domestic obligations by the executive was to require Canada to do what it initially should have done, namely to request the repatriation of Mr Khadr from the US Guantánamo Bay detention camp.

It is important to notice that the Court rejected the arguments of the Government, that to exercise the required protection would undermine Canada's good foreign relations with the US and also the ongoing efforts to ensure the good treatment of Mr Khadr, on the grounds that this justification is not supported by evidence. Justice O'Reilly, responsible for the present judgment of the Federal Court, showed that neither the foreign relations with the US, nor the situations of the detainees were imperilled in the cases of other countries' requests of repatriation of their detained nationals.

The 2009 judgment of the Federal Court stands as evidence that domestic courts are influenced by foreign judgments, even in matters as delicate and nationally specific as the diplomatic protection of citizens. Similarly to the UK jurisprudence, the doctrine of legitimate expectations was the sole entitlement recognised until 2009 to the Canadian nationals *vis-à-vis* their executive, when injured abroad. If until 2007, the Canadian courts rejected the requests to recognise a duty to protect nationals in cases of egregious violation of fundamental human rights on the part of the State based on the domestic doctrine of the sufficient connection link between the acts of Government and the extraterritorial violation of human rights, new evidence influenced the Court to reconsider its previous approach. Thus, in the 2009 judgment, the Federal Court clearly recognised a duty on the part of the State to exercise diplomatic protection of citizens abroad, the violation of which was held to give rise to a very concrete remedy in the form of a request for repatriation.

In the final judgment of the *Khadr* case, the Supreme Court did not speak of a duty of the State to diplomatically intervene, but rather places the emphasis on the executive's violation of a domestic provision due to the Canadian officials' involvement in the extraterritorial violation of international human rights. To somehow balance this intrusive finding of a violation on the part of the executive, the Supreme Court recognised a certain margin of discretion of the executive in deciding the appropriate remedy for the violation. The moderate and deferential judgment of the Supreme Court proves that the legal nature of the diplomatic protection of nationals abroad is far from being a settled topic, not only among different jurisdictions, but also within the same domestic jurisdiction.

Australia – the Hicks case: judicialisation of diplomatic protection

Mr Hicks, a dual national of Australia and the UK, was detained for almost six years in the Guantánamo Bay camp without being formally charged. During this period, several concerns were raised regarding violations of his human rights to due process, prohibition of torture and other ill-treatments by the US authorities.¹⁰⁰⁸ Mr Hicks followed two means of redress, both based on the diplomatic protection an individual could obtain from his country of nationality. First, he attempted to force the UK to ask for his release – similar to previous cases of British citizens in which the UK had obtained their release from Guantánamo Bay. In fact, after three years of being detained in Guantánamo Bay, the UK had achieved Mr Abbasi's release, a result which was acclaimed in the Australian media and legal scholarship¹⁰⁰⁹, and which Mr Hicks also hoped to obtain, after his 6 years of detention. In order to present a diplomatic protection request, Mr Hicks first had to acquire British nationality, which he did not possess while in the US custody but was entitled to. After considerable efforts to convince the British Government to grant him nationality, eventually Mr Hicks was successful. However, he did not enjoy this status for very long as the following day the British Government stripped him of his British citizenship. The legal proceedings brought by Mr Hicks contesting this removal were not successful. Faced with this negative result, Mr Hicks then instituted proceedings before the Federal Court of Australia, seeking an order of habeas corpus and judicial review of the decision by the Government not to request his release from the Guantánamo Bay camp.¹⁰¹⁰ The applicant argued that the Government had violated his duty to lawfully consider his request and therefore it should be obliged to re-consider it in accordance with the law, without taking into consideration irrelevant considerations.

The Government started its defence with a request to reject the application as inadmissible based mainly on two doctrines: the acts of a foreign State cannot be subject to judicial review; and the 'political question' doctrine.

In reply to the Government's plea, Justice Tamberlin, responsible for the judgment of the Federal Court, held that the doctrine of the acts of State would not preclude him from assessing the merits of the case since there is a general presumption that detention is unlawful until proved otherwise based on lawful authority. Furthermore, the extraterritorial character of

¹⁰⁰⁸ See generally Leila Zerrougui et al, Situation of Detainees at Guantánamo Bay, UN ESCOR, 62nd sess, Agenda Items 10 and 11, UN Doc E/CN.4/2006/120 (27 February 2006).

¹⁰⁰⁹ See 'Timeline: Guantanamo Bay Britons', BBC News (online), N. Klein and L. Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and His Dual Nationality' (2007) Australian Journal of Human Rights 1; N. Klein, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the legal parameters of Australia's protection of its citizens abroad', (2011) Melbourne University law review, 134.

¹⁰¹⁰ *Hicks v Ruddock* (2007) 156 FCR 574.

the injury suffered by the applicant does not impede the government to act, as proved by the successful result achieved by UK, whose nationals were released by the US from Guantánamo Bay following UK's diplomatic efforts. As to the justiciability of the claim, the Court relied heavily on the *Abbasi* judgment and held that the discretionary exercise of the executive's right to diplomatic protection had to be subjected to judicial control. Justice Tamberlin added that the court would review whether the government took into account irrelevant considerations in their decision-making process whether to exercise or not diplomatic protection on behalf of the individual. Unlike the UK courts, which clearly established the limits of the judiciary review in the *Abbasi* case, the Australian Federal Court held that '*the extent to which the court will examine executive action in the area of foreign relations and Acts of State is far from settled, black-letter law*'.¹⁰¹¹ The case was not heard on the merits, since Mr Hicks pleaded guilty to a lesser charge, in exchange for his extradition to Australia where he would serve his sentence.¹⁰¹²

This case shows that Canadian courts follow the general jurisprudential trend of departing from the classical doctrines of act of State, limiting the judicial review power of domestic courts, and accepting as a general rule to assess the reasonableness and soundness of the Government's decision in relation to exercising diplomatic protection on behalf of their nationals. The case discussed herein places the Canadian courts within the modern jurisprudential trend which establishes clear diplomatic protection measures to be taken as a duty to act incumbent on the executive.

Conclusions on the National Jurisprudence addressing claims of diplomatic protection of individuals

In his First Report, Rapporteur Dugard invoked certain national judgments delivered by British, Dutch, Spanish, Austrian, Belgian and French courts in cases submitted by citizens dissatisfied with the reply of their States of nationality to their claims for diplomatic protection. Although the cases were not decided in the favour of the applicants, the Rapporteur viewed these claims as an indication that these nationals had reasons to believe that they had a right to receive diplomatic protection from their State of nationality.¹⁰¹³ Since then, more cases have been heard by national courts, and more judgments pronounced in

¹⁰¹¹ *Ibid.*, para. 93.

¹⁰¹² N. Klein, 'David Hicks, Stern Hu, Scott Rush, Jock Palfreeman and the Legal Parameters of Australia's Protection of its Citizens Abroad', (2011) Melbourne University Law Review, 134.

¹⁰¹³ J. Dugard, First Report, *op.cit.*, p. 225.

favour of the citizens seeking redress against the State conduct on diplomatic protection matters.

The jurisprudence developed after the 9/11 attacks in the aforementioned Commonwealth countries does not support the existence of diplomatic protection as a fully-fledged duty of the State vis-à-vis its nationals abroad, not even in situations of violation of absolute human rights or *jus cogens* norms. However it does indicate the existence of a legitimate expectation of the individual to receive protection by means established by the State in certain circumstances. These circumstances are more clearly delimited in the UK jurisprudence, such as: when the State formulated a policy capable of giving rise to a legitimate expectation, when the State made a promise to the injured individual for diplomatic intervention or the normal expectation of a citizen that is subjected abroad to a violation of an absolute right. In these particular circumstances the British government is required to not ‘*abandon*’ the citizen, but ‘*extend its long arm to protect him*’.¹⁰¹⁴ In addition, the jurisprudence discussed above also supports the expansion of the domestic courts’ jurisdiction over complaints regarding consular and diplomatic protection, a subject matter of foreign affairs which was for a long period excluded from judicial review.

It is evident that from the Commonwealth countries, South Africa has developed a body of jurisprudence which is more advanced in supporting the development of a sort of State duty to ensure protection abroad of its nationals as part of the constitutional rights recognised to the citizen. On the other hand, Australia, Canada, and the UK seem to share the same minimal approach towards the legal nature of diplomatic protection, still viewed as the discretionary rights of the States. However, by expanding the role of domestic courts over the foreign affairs actions and decisions of the executive a step forward has been made, and an incipient judicial trend of recognising a more concrete State duty to exercise diplomatic protection is also developing in these latter Commonwealth countries. Therefore, the executive’s decisions concerning diplomatic protection are now amenable to scrutiny under these countries’ public law, as administrative and constitutional matters (South Africa), and certainly as part of administrative law for the other Commonwealth countries.

The obligation of the executive to consider the request of an individual for diplomatic protection seems to be generally recognised by domestic courts from different continents. The legitimate expectation of a national to receive diplomatic protection based on the State’s foreign policy or individual promise is the common minimum denominator that all

¹⁰¹⁴ Words first stated by Lord Palmerstone and later reproduced in jurisprudence, see, *inter alia*, the *Abbasi* and *Sandiford* cases.

Commonwealth domestic courts seem to recognise. Certain jurisdictions went further by recognising a limited duty of the State to exercise diplomatic protection. The South African Constitutional Court has for example in the 2004 *Kaunda* judgment recognised a State obligation to exercise diplomatic protection in extreme cases of egregious violations of fundamental human rights. The Canadian Federal Court of Appeal has also recognised a duty incumbent upon Canada to secure concrete diplomatic protection actions for its nationals as long as there was a sufficient connection between the Government and the extraterritorial violation of human rights.

One of the main objections raised by the Commonwealth courts against the recognition of a general State duty to diplomatic protection was that once citizens cross the national borders, their State of nationality no longer has an obligation to ensure human rights protection to its nationals, given the territorial application of international human rights treaties and of the domestic bills of rights.¹⁰¹⁵

The domestic jurisprudence analysed under this sub-section shows there are two trends common to both legal systems (continental and common law): nationals have been recognised at least a legitimate expectation that their State of nationality will consider their claim for diplomatic protection; the executive's decision to exercise or not diplomatic protection is subject to judicial scrutiny in regard to its arbitrariness, good faith and reasonableness. Certain national courts went beyond these two *de minimis* obligations imposed on the State, and recognised a more stringent State duty to act on behalf of their nationals. Some courts¹⁰¹⁶ have placed the issue of controlling the State's discretionary exercise of diplomatic protection within the realm of guarantees to the right to a due process.

It is true that these judgments are not in a number that could support an unqualified right to diplomatic protection for the individual. However they seem to indicate an evolving practice whereby the individual has a general entitlement to protection from their State, and in the specific circumstances of grave violation of human rights, the individual seems to be entitled to receive more attention and care from the Government, which might be required to materialise in concrete diplomatic protection measures. Additionally, this jurisprudence seems to suggest that national courts are more and more inclined to review what used to be a

¹⁰¹⁵ See the *Abbasi*, *Kaunda* cases and more details in Karazivan, 'Diplomatic Protection: Taking Human Rights Extraterritorially', *op.cit.*, 325.

¹⁰¹⁶ *Groupement X. c. Conseil fédéral*, Tribunal fédéral suisse (1^{ière} cour civile), decision of 2 July 2004, Switzerland, and *Khadr* and *Von Abo* cases of South African courts, where diplomatic protection was closely interlinked with the right to life and liberty.

‘political question’ decision of the executive. Except of the US courts,¹⁰¹⁷ which seem to have maintained unaltered the political question doctrine, national courts ask from their State’s executive to provide reasons for its decision to espouse or not a request from their national for an exercise of diplomatic protection. An evolving practice is incrementally spreading in Europe and outside, whereby the State can no longer abuse their once discretionary legal right to exercise diplomatic protection.¹⁰¹⁸

It is thus likely that in the near future, an individual right to diplomatic protection, at least in the limited cases proposed by Rapporteur Dugard, will be recognised as a customary international norm due to the growing domestic jurisprudence recognising such an individual right.

It cannot be ignored that certain academics have emphasised the pitfalls of the increasing role of courts in the realm of foreign affairs matters. Peté and du Plessis¹⁰¹⁹ argued that courts are not the appropriate forum to decide if protection abroad is to be ensured to nationals – and if so, what kind and when – since this is an aspect of foreign policy which is essentially the function of the executive. Furthermore, it was argued that there are more efficient alternative ways of ensuring protection of citizens abroad, namely by engaging in negotiation, which the involvement of courts might actually undermine. Similarly Pergantis argues that the limitation of the executive’s discretion over foreign policy matters and empowering of courts should not be hailed as a step towards the ‘humanization’ of international law, but as a shift of discretion from the executive to the judiciary which ultimately risks undermining the democratic foundations of the society.¹⁰²⁰ For the moment domestic courts have adopted a balanced approach between the traditionalist conception of complete deference to the executive and a modern human rights based conception of determining concrete diplomatic protection measures to be adopted by the Government as form of remedy to the violation of the individual’s right to diplomatic protection. It remains to be seen how practice will evolve in the future.

¹⁰¹⁷ In a similar way, see also the very deferential position of French courts towards this matter, which is still widely interpreted as falling under the ‘act du gouvernement’ doctrine that would require national courts to reject jurisdiction to review foreign affairs related matters. See more in *National Report on France* in the *CARE Report*.

¹⁰¹⁸ See Resolution No. 5/2006 *Diplomatic Protection of Persons and Property*, the 72nd Conference of the International Law Association, held in Toronto, Canada, 4-8 June 2006; Bederman, ‘State-to-State Espousal of Human Rights Claims’, (2011) *Virginia Journal of International Law Online*, 1, 9.

¹⁰¹⁹ S. Pete and M. Du Plessis, ‘South African Nationals Abroad and Their Right to Diplomatic Protection - Lessons from the Mercenaries Case’, (2006) *S. Afr. J. on Hum. Rts.*, 439.

¹⁰²⁰ Pergantis, *op.cit.*, 386.

Conclusion of Chapter 2

For centuries, the international legal institutions of consular and diplomatic protection of natural persons have remained immutable. Society, and in particular its changing needs, has directly impacted on these legal institutions, which need to be in a dynamic state of constant evolution if they are to survive.¹⁰²¹ There have been two significant developments in modern international law which have impacted on the traditional doctrines of consular and diplomatic protection: (i) the development of international human rights and the growing role of the individual in international relations; and, (ii) the re-defining of the Westphalian State sovereignty by including a State obligation towards its population within its territory, but also an obligation towards outside populations in cases of significant natural disasters and gross violations of human rights.¹⁰²² These developments, together with the changing needs of the international society characterised by an increased migratory flow of natural persons, have led to an increase in individuals' requests for consular and diplomatic protection from their State of nationality or other sending States, which have pressed States to change their traditional reactions towards the difficulties their nationals face abroad. These international legal and social developments have impacted on all public authorities of the State, from the consular and diplomatic officials, to legislature, including domestic courts that have recently contributed actively to the so-called 'humanization' and 'judicialisation' of the diplomatic and consular protection powers of the State.

The opinions and positions formulated in the legal literature¹⁰²³ and practice show how the evolution of the institution of consular and diplomatic protection of individuals oscillates between preserving as far as possible the classical State-centric conception of these institutions, accepting only a very limited recognition of the role, rights and interests of individuals, and shifting to an innovative individual-centric conception of consular and diplomatic protection, whereby the interests and rights of the individuals are recognised a

¹⁰²¹ D. Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in Trubek, David. & Santos, Alvaro (eds.) *The New Law and Economic Development. A Critical Appraisal*, Cambridge University Press (2006).

¹⁰²² See the 'Responsibility to Protect' concept developed for the first time by the International Development Research Centre in 2011, *The Responsibility to Protect*, later developed by the UN in the 2005 World Summit Outcome Document, U.N.G.A., Resolution 60/1. 2005 World Summit Outcome, U.N. Doc. A/Res/60/1 (2005) (hereinafter 'World Summit Outcome'). See T. Hooze, *Responsibility to Protect (R2P) as Duty to Protect? Reassessing the Traditional Doctrine of Diplomatic Protection in Light of Modern Developments in International Law*, University of Toronto, 2010, Master Thesis, available also online; J. Hoffmann & A. Nollkaemper, *Responsibility to Protect from Principle to Practice*, Pallas Publication (2012).

¹⁰²³ F. de Vittor, 'Immunità degli Stati dalla giurisdizione e tutela dei diritti umani fondamentali', RDI 2/2002; M. Attanasio, C. Malara, Salvatore F. Nicolosi, 'Il Judicial Review del Rifiuto Statale di Agire in L. Panella (ed), *Protezione Diplomatica in La Protezione Diplomatica: Sviluppo e Prospettive*', Torino (2009), 453-533, 464-467.

place alongside the State's rights, occasionally even superseding the latter in the decision-making balance. The innovative individual-centric conception has gradually gained significant support among academics, practitioners, and States' authorities.

The ILC's Articles on Diplomatic Protection extensively reflect this conception by updating the definition of diplomatic protection to recognise also a role for the individual's interests and lessening the rigidity of diplomatic protection requirements.

Although the ILC and ICJ have not entirely discarded the traditional legal fiction conception of diplomatic protection, nor completely endorsed the concept of diplomatic protection as a mechanism whereby the State is entirely at the individual's disposal, they have unequivocally embraced a modern conception of diplomatic protection by recognising that the individual's interests play a role in the exercise of diplomatic protection. This is reflected by the new definition of diplomatic protection endorsed by the ICJ in the *Diallo* judgment and the recommendation made by the ILC to States, whereby recourse to diplomatic protection is encouraged when grave violations of *jus cogens* norms or fundamental human rights are perpetrated by a foreign State to their nationals and non-nationals.

The current modern conception of diplomatic protection is a balanced approach between opposing views of the institution. It is evident that the traditional concept of diplomatic protection had to be revisited in terms of its foundations, prerequisites, and objectives following the evolution of contemporary public international law in order to ensure the continuity and relevance of these institutions on the international scene. The ILC Articles reflect the departure from the classical State dominated conception and they have also been recently endorsed by the ICJ and States. The revision could not however lead to making diplomatic protection a completely individual-centric institution, whereby the State acts only as an agent representing solely individual rights. There is evidently a difference between the institution of diplomatic protection and international human rights systems based on the different roles played by States in the exercise of these mechanisms. This particular difference should be preserved since it is precisely the State oriented characteristics of diplomatic protection, which give external force to the institution to secure compliance with international obligations and complement the enforcement of international human rights norms. Take for instance the case of violations of international humanitarian law, where diplomatic protection seems to be the best remedial route for claiming compensation on behalf of a high number of victims who have suffered grave injuries, and do not usually have the means to overcome the procedural hurdles to claim compensation alone. There will always be a State interest

involved when one of its nationals is injured abroad, ‘whatever name [it has] - self-preservation, peaceful coexistence or intercourse’¹⁰²⁴ or even some sort of financial interests, which will determine the State to bring an international claim against another State. The claim of the individual will most probably have more impact on the perpetrator foreign State if supported by a State on the international plane, and possibly with higher probability of success than the sole individual claim, due to the impact of such a claim on the international relations of the violating State. It also has the advantage of alleviating the individual’s cost of legal proceedings, as reflected also by the jurisprudence of the ECtHR.¹⁰²⁵

As part of this current modern conception of diplomatic protection, a State obligation to exercise diplomatic protection in cases of violation of *jus cogens* norms is increasingly finding endorsement among academics, supported also by State practice and jurisprudence.¹⁰²⁶ While this individual right to diplomatic protection is, for the moment, in *statu nascendi*, an individual, and at times even a ‘human’, right to consular communication and access to consular assistance is already well-established.¹⁰²⁷ However, this new qualification does not discard the role played by the State in the exercise of consular protection, nor does it establish an individual right to receive consular assistance and protection, but an obligation upon the receiving State to inform the alien of his individual (human) right to an immediate and uninterrupted communication with the consular officials of his sending State, including thus also the right to ask for consular assistance, but not also to receive consular assistance from the sending State.

The exercise of consular assistance and/or protection will usually be preferred by States compared to diplomatic protection, and generally it precedes the exercise of diplomatic protection measures, due to the fact that the former means of protecting citizens abroad does not involve raising the international responsibility of the receiving state, and thus raising politically sensitive issues that put to the test the good diplomatic relations between the sending and receiving States.

According to the modern international conception of consular and diplomatic protection of individuals, the State has lost its near-sacrosanct discretion to exercise these

¹⁰²⁴ Maria S. Albornoz, *op.cit.*.

¹⁰²⁵ See the specific cases of *Georgia v Russian Federation*, Appl. Nos. 13255/07, 38263/08, 61186/09; *Ukraine v Russian Federation*, Appl. Nos. 20958/14 and 43800/14.

¹⁰²⁶ See C. Focarelli, *op.cit.*.

¹⁰²⁷ *LaGrand Case* (Germany v. United States of America), Judgment of 27 June 2001, ICJ Reports (2001).

¹⁰²⁷ *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgement of 31 March 2004, ICJ Reports (2004), 12ff (hereinafter *Avena Case*); Advisory Opinion No. 16/99 of the IACtHR.

functions, which now recognise and are guided by a complementary mix of the State's and individual's interests. At the same time States are showing an increased interest in efficiently securing protection of all their nationals abroad, and have more often recourse to delegation of consular and diplomatic representation functions to other States from their region or with whom they share historical or cultural ties. New actors are thus recognised on the international scene, in addition to the State of nationality, signalling that the nationality link is no longer an absolute mandatory requirement for the exercise of international consular and diplomatic protection of individuals abroad.

The current consular and diplomatic protection, as described in international jurisprudence and custom, reflect the ability to metabolize the benefits of international human rights law and modern public international law, while at the same time its operability is sometimes regulated by classical norms. This is particularly reflected within the approach of domestic courts, which although making salient steps to establish a general judicial review competence over the executive's decision-making in these fields, still preserves a certain deference towards the executive's prerogative over consular and diplomatic protection understood as part of the external affairs prerogative of the government. Courageous steps are gradually being made by the national judiciaries limiting the absolute discretionary power of the executive, in the sense of requiring the Government to respect the principle of adequacy, proportionality and non-discrimination, but also in making recommendations for specific actions or measures, or even imposing particular consular or diplomatic action on the part of the State *vis-à-vis* its citizens. The legal nature of diplomatic protection has been a topical issue raised before several national courts around the globe since the 9/11 attacks. They seem to agree on the recognition of a State duty to exercise some sort of diplomatic protection under national law.¹⁰²⁸

It is thus likely that in the near future, an individual right to consular and/or diplomatic protection, at least in the limited circumstances of grave violations of fundamental rights, as proposed by Rapporteur Dugard, will be recognised as a customary international norm. Even assuming that such an individual right to protection abroad will not be internationally recognised, the institution of diplomatic protection will not disappear from the international scene. The particular procedural and financial advantages of having the State espouse the

¹⁰²⁸ *Abbasi and another v. Secretary of State for Foreign and Commonwealth Affairs and another, Kaunda and Others v. President of the Republic of South Africa and Others and Van Zyl and Others v. Government of the Republic of South Africa and Others.*

individual's claim¹⁰²⁹ and the gaps in the effective implementation of international human rights law will ensure the continuity and relevance of the consular and diplomatic protection institutions in the future.

¹⁰²⁹ Particularly present in cases of multiple victims, see for instance the *Avena* case, or cases of violation of international humanitarian law, see Emanuela C. Gilliard, 'Reparation for Violation of International Humanitarian Law', (2003) *International Review of the Red Cross*, 529, 549 and E. Benvenisti, 'Individual Remedies for Victims of Armed Conflicts in the Context of Mass Claims Settlements', in Holger P. Hestermeyer, D. König, Nele Matz-Lück, V. Röben, Anja Seibert-Fohr, Peter-Tobias Stoll and S. Vöneky (es), *Coexistence, Cooperation and Solidarity*, Volume II, Martinus Nijhoff Publishers (2012), 1085-1107, at 1088.

Chapter 3 - The Relationship between the International and EU Legal Frameworks on Protecting Individuals Abroad

I. Introduction

The previous chapter aimed to discover the current legal features of the classical public international legal institutions of consular and diplomatic protection of private individuals. The purpose was to establish the current legal nature, conditions and effects of consular and diplomatic protection of individuals, and the international actors involved in providing these forms of protection to individuals abroad. It found that the current international legal framework governing the exercise of consular and diplomatic protection of individuals has made significant advancements from the traditional State-centric model of consular and diplomatic protection of natural persons. According to the traditional Vattelien conception of diplomatic protection,¹⁰³⁰ States enjoyed discretionary rights of exercise without any corresponding duties towards the nationals. This traditional doctrine, applicable to both consular and diplomatic protection, no longer reflects an honest picture of the current institutions of consular and diplomatic protection of natural persons. The development and growing importance of international human rights and growing role of the individual in international relations have led to structural changes in the definition and exercise of the international mechanisms of consular and diplomatic protection of natural persons.

First of all the definition of diplomatic protection expressly mentions that the exercise of diplomatic protection is premised on the injury caused to a natural or legal person. Individuals are acquiring an increasing list of consular related rights, namely: the right to access and communication with the consular officials of their sending State, and to be promptly informed by the receiving State of these consular rights; in cases where individuals are subject to proceedings facing a death sentence, a growing number of States is also recognising a domestic right to free legal assistance from their Governments;¹⁰³¹ finally, domestic and regional jurisprudence is increasingly recognising an individual right to consular and diplomatic protection from the State of nationality or residence in cases of grave violation of human rights abroad. The discretion of the States in exercising consular and diplomatic protection of individuals is furthermore limited by the now widely accepted competence of domestic courts to review the executive's prerogative to exercise protection of

¹⁰³⁰ Which corresponded also to consular protection.

¹⁰³¹ For instance, Spain and Mexico, see more details in previous Chapter, section IV.

nationals abroad. Furthermore, the increasing use of diplomatic protection as a complementary remedial means for the protection of human rights is gradually contributing to the formation of a customary norm recognising a State duty to exercise diplomatic protection.

The conditions for the exercise of protection of individuals abroad, in particular diplomatic protection, have changed under the impact of the current needs of society and became more accommodating to the needs of the individuals in distress. The 'nationality' condition necessary for the exercise of diplomatic protection does not need to fulfil the *Nottebohm* 'genuine' and 'effective' requirement, and it is no longer required as an absolute requirement for the exercise of diplomatic protection, since habitual and lawful residence has been widely recognised as a legitimate alternative premise.

New actors have been given the power to exercise consular and diplomatic protection of individuals, such as non-nationality Member States and international organisations. In the last decades an increasing number of bilateral and regional agreements were concluded among States delegating the function of consular and diplomatic representation of the Contracting States and their nationals' interests; while international organisations were recognised the competence to exercise functional protection of their agents abroad.

Although consular and diplomatic protection of individuals are still primarily defined as rights of the State of nationality, their current international regime has recognised limitations on the exercise of State's discretion in relation to the individuals, and have acquired a wider personal and substantive scope in application.

In light of this modernisation of the public international law, the relevant international norms on the exercise of consular and diplomatic protection of individuals and the specific EU model of protecting Union citizens abroad seem to be more congruent. As depicted in the first Chapter, the current EU legal regime of protection of citizens abroad is based on three main models: first, the traditional protection of citizens abroad by the individual's Member States of citizenship, which still bears the primary responsibility; second, the intergovernmental protection of EU citizens abroad by non-nationality Member States, which are represented in the third State where the unrepresented EU citizen is located; third, the supranational protection of EU citizens abroad by various EU institutions and bodies and under various EU policies and instruments, complementing the Member States' capabilities. From a substantive point of view, the EU does not yet confer to the (unrepresented) Union citizen an individual right to consular and diplomatic protection as such from any of the Member States or the EU institutions. But, through the EU citizenship, it confers a right to

equal treatment in consular and diplomatic protection, enforceable against any of the non-nationality Member States, but not directly against the EU institutions.¹⁰³² For the moment, the Member States' rights to exercise consular and diplomatic protection of individuals is thus not altered, but they are required to extend their national consular and diplomatic protection systems to all the unrepresented Union citizens abroad.

In a nutshell, the main innovations of the EU legal framework, from the perspective of the general international legal framework, are: the EU wide geographical level of consular and diplomatic protection, previously limited to a few Member States; endowing an international treaty based obligation to equal protection of citizens abroad with the essential characteristics of the Union legal systems (primacy, direct effect and increased level of justiciability);¹⁰³³ and, last, and perhaps the most innovative of all, is the EU's competence to exercise protection, in particular consular, of EU citizens abroad at the request of the Member States.¹⁰³⁴

In spite of the revival of international norms on the substantive and personal scope of application of consular and diplomatic protection of individuals, and of the primarily inter-governmental model of the EU legal regime, academics have widely criticised the EU legal framework for disregarding the general public international norms governing consular and diplomatic protection of individuals.¹⁰³⁵ Looking at the European Union as an international organisation that should show respect to international law,¹⁰³⁶ renowned international legal scholars have fervently criticised the EU model for creating norms in conflict with international legal norms, which the Union ought to respect, since it is part of the international

¹⁰³² For the moment, the role of the Union in providing direct protection to EU citizens abroad is of supporting the Member States in ensuring the effective implementation of the EU citizenship right to equal protection abroad. See more details in Chapter 4.

¹⁰³³ Therefore, any other similar provisions enshrined in a consular and diplomatic cooperation agreement do not benefit from these specific characteristics existent only within the EU legal order.

¹⁰³⁴ See Chapter 4.

¹⁰³⁵ See, *inter alia*, A. Vermeer-Künzli, 'The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance' in by S. Faro, Mario P. Chiti and E. Schweighofer (eds), *European Citizenship and Consular Protection New Trends in European Law and National law* edited, Editura scientifica Napoli (2012), 101-111; A. Vermeer-Künzli, 'Where the Law becomes Irrelevant: Consular Assistance and the European Union', (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance', (2008) *ZaöRV*, 339; T. Stein, 'Interim Report on "Diplomatic Protection Under the European Union Treaty"', in: *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, 'The Protection of EU Citizens: The Perspective of International law' in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

¹⁰³⁶ Henry G. Schermers, Niels M. Blokker, *International Institutional Law: unity within Diversity*, 5th revised ed. Brill (2011).

community.¹⁰³⁷ The definition of the EU citizenship right to equal protection abroad is criticised as being worded inappropriately, leading to confusion about whether it includes both consular and diplomatic protection.¹⁰³⁸ Scholars have argued that, if the EU citizenship right to equal protection abroad is considered as including also diplomatic protection, then the EU legal framework is ‘fundamentally inconsistent’ with the general public international legal norms for two main reasons.¹⁰³⁹ First of all due to the violation of the principle of *pacta tertiis nec nocent prosunt*¹⁰⁴⁰ by imposing on third countries the EU inter-governmental and supranational model of exercising consular and diplomatic protection of EU citizens without having first obtained the consent of third countries,¹⁰⁴¹ which in regard to diplomatic protection is mandatory.¹⁰⁴² Therefore the provisions of the VCCR (Article 8), VCDR (Article 46) and Article 34 VCLT are said to have been violated by the EU Treaties.¹⁰⁴³ The second scholarly objection relates to the non-conformity of the EU citizenship with the mandatory requirement of ‘nationality of claims’ in the case of the exercise of diplomatic protection. The EU model does not fall under the few permitted exceptions by current customary international law from the nationality of diplomatic claims requirement, i.e. in the case of refugees, persons benefiting from subsidiary protection and stateless persons. Furthermore, the EU citizenship is argued to not automatically confer the nationality of all the EU Member States, nor to ensure the *Nottebohm* requirement of ‘*genuine connection of existence, interests and*

¹⁰³⁷ A. Vermeer-Künzli, ‘Where the Law Becomes Irrelevant: Consular Assistance and the European Union’, (2011) ICLQ, 965–995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10.

¹⁰³⁸ *Ibid.*

¹⁰³⁹ A. Vermeer-Künzli, ‘The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance’ in S. Faro, Mario P. Chiti and E. Schweighofer, *European Citizenship and Consular Protection New Trends in European Law and National law*, Editura Scientifica Napoli (2012), 101–111; A. Vermeer-Künzli, ‘Where the Law Becomes Irrelevant: Consular Assistance and the European Union’, (2011) ICLQ, 965–995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) ZaöRV, 339; T. Stein, ‘Interim Report on “Diplomatic Protection Under the European Union Treaty”’, in ILA Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi, 2002, 36–7; P. Vigni,

¹⁰⁴⁰ The principle is enshrined in Art. 34 VCLT.

¹⁰⁴¹ According to Rapporteur J. Dugard, in the *Seventh Report*, ‘*Third States are not bound to respect any of the provisions contained in treaties and conventions in force within the Union and are not obliged to—and with respect to diplomatic protection are unlikely to—accept protection by States that are not the State of nationality of an individual Union citizen.*’ (para. 20, p.9).

¹⁰⁴² In relation to consular protection this can be presumed in the absence of opposition, however the third country could always decide to oppose if it had not expressly consented to the non-nationality Member States’ exercise of consular protection.

¹⁰⁴³ A. Vermeer-Künzli, ‘Nationality and EU citizenship’ in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis (2007), 88.

*sentiments, together with the existence of reciprocal rights and duties*¹⁰⁴⁴ between a national of an EU Member State and any other EU Member State.

Since the EU has not yet severed its umbilical cord with the international legal order, in spite of the increasing jurisprudence of the CJEU building the autonomous status of the EU,¹⁰⁴⁵ the issue of the relation between the EU regime of protecting EU citizens abroad and the current international legal framework on consular and diplomatic protection of individuals needs to be addressed. This chapter will specifically address this issue, in an attempt to understand whether the critiques brought against the ‘flawed’¹⁰⁴⁶ EU-specific regime are legally founded. First, it will assess the more general relation between the international treaty and customary norms and the EU law in an attempt to identify the legal and jurisprudential rules binding on the EU, and the identification of the legal methods devised by the EU for avoiding and solving conflicts between the two legal regimes.

In spite of the substantial, institutional and procedural modernisation of the institutions of consular and diplomatic protection of citizens, the international legal framework does not provide norms for the exercise of consular and diplomatic protection of private individuals by international organisations. The EU model of protecting EU citizens abroad does provide for a supranational model of protecting EU citizens in the world, which has been furthermore reinforced post-Lisbon Treaty. In light of these facts, the second section of this chapter will assess whether the public international law contains relevant norms binding on the EU in its exercise of the supranational model of protection of EU citizens abroad, and whether the EU provisions have so far respected them.

The last section will address the conformity of the EU provisions establishing the inter-governmental model of protection of EU citizens, which have been argued to fundamentally sidestep the international framework. Particular attention will be dedicated to the assessment of the requirements of ‘nationality’ and ‘consent’ for the exercise of consular and diplomatic protection of individuals, since they have been argued to raise fundamental objections to the EU legal regime conformity with the general international legal framework. In addition, the specificity of the legal nature, the material and personal scope of consular and diplomatic protection of EU citizens will be addressed and it will be pointed out that due to the relative nature of the relevant public international legal norms, the specific characteristics

¹⁰⁴⁴ *Nottebohm*, para. 23, A. Vermeer-Künzli, *op.cit.*, 88.

¹⁰⁴⁵ The EU Treaties provisions are clear in relation to the EU obligation to respect international law. The CJEU is bound to respect the wording of the Treaties, otherwise it acts *ultra vires*.

¹⁰⁴⁶ See J. Dugard, Seventh Report, *op.cit.*, para. 20, p. 9.

of the EU model of protecting citizens abroad are not violating or disregarding the general international legal framework.

In addition to the ‘external-internal’¹⁰⁴⁷ relationship between public international law and EU law, the chapter will also make some concluding remarks on the internal-external influence of the EU-specific regime on the development of international customary norms on consular and diplomatic protection of individuals. It will be pointed out that the relationship between the international customary norms and EU norms in the field of protection of citizens abroad is a two-way fertilisation route.

II. The Relation between International Customary Law and EU law – assessing the EU’s obligation to respect public international law

Legal commentators have described the relationship between international and EU legal orders in somewhat contradictory terms, either presenting the EU as a good international citizen¹⁰⁴⁸ or, as being in a ‘closed’ or ‘conflictual’ relationship.¹⁰⁴⁹ The relationship between the European Union and public international law has always been a complex legal issue,¹⁰⁵⁰ with the academic debate recently emphasising the increasing tensions between the principles

¹⁰⁴⁷ This term is preferable to the ‘outsider-insider’ notion used by certain EU external relations scholars (see J. Wouters, ‘Can the EU Replace its member States in International Affairs?’ in I. Govaere (eds), *Essays in Honour of Marc Maresceau*, Brill (2014), 130) in relation to the influences of international law on the EU law, since it aims to avoid subjective connotations in favour of more neutral ones such as ‘external-internal’ influences.

¹⁰⁴⁸ T. Dunne, ‘Good citizen Europe’, (2008) *International Affairs*, 13; R. Uerpman-Witzack, ‘The Constitutional Role of International Law’, in A. Von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, 2nd edn, Hart (2010), 138, 143; M. Mendez, ‘The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques’ (2010) *EJIL*, 83, 88.

¹⁰⁴⁹ It has to be emphasised that the CJEU, more so than the EU legislator, has recently contributed to the so-called ‘closed’ or ‘conflictual’ relation of the EU towards international law. See, in particular, J. Odermatt, ‘The Court of Justice of the European Union: International or Domestic Court?’ (2014) *Cambridge Journal of International and Comparative Law*, 696; G. de Búrca, ‘The European Court of Justice and the International Legal Order After Kadi’ (2009) *Harvard ILJ* 1, 2.; G. de Búrca, ‘The ECJ and the international legal order: a re-evaluation’, in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press (2011); F. Casolari, ‘Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation’, in E. Cannizzaro, P. Palchetti & R. A. Wessel (eds), *International Law as Law of the European Union*, Brill (2011), 395; J. Klabbbers, ‘Presumptive Personality: The EU in International Law’ in M. Koskeniemi (ed), *International Law Aspects of the EU*, Kluwer Law International (1998), 231-253. Recent jurisprudence, in particular the Opinion 2/13, puts in a different perspective earlier academic articles which described the CJEU as adopting a ‘very open approach to the effects of international agreements within the EU legal order’, see C. Kaddous, ‘Effects of International Agreements in the EU Legal Order’, in M. Cremona & B. de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (2008), 311.

¹⁰⁵⁰ C. Timmermans, ‘The EU and Public International Law’, (1999) *European Foreign Affairs Review*, 181; J.W. van Rossem, ‘Interaction between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding the Member States but not the Community’, (2009) *Netherlands Yearbook of International Law*, 183; J. Klabbbers, ‘International Law and Community Law: The Law and Politics of Direct Effect’, (2002) *Yearbook of European Law*, 292, 292-295.

of ‘autonomy’, ‘respect’ and ‘reception’, which define the relation between European and international law.¹⁰⁵¹

The rules governing the relationship between international and EU legal orders are to be found in both international and the EU legal orders. While public international law has few relevant provisions, of a general nature, of which the most relevant is Article 31 of the VCLT, the EU has developed a wealth of specific norms,¹⁰⁵² meant to protect the autonomous character of the Union legal order, while attempting to ensure the respect of general international law and international agreements concluded by the Member States prior to their accession to the Union.¹⁰⁵³

Under the EU legal order, the norms governing the relationship between international and EU law have been mostly crafted by the CJEU as autonomous rules primarily meant to safeguard the effectiveness of the specific EU legal order,¹⁰⁵⁴ while respecting also international legal norms. These rules do not properly fall under either of the monist¹⁰⁵⁵ or dualist¹⁰⁵⁶ doctrines on the classical relationship between the international and domestic legal orders.¹⁰⁵⁷ A first step in establishing the position of international law within the EU legal order was made by the CJEU in 1974, when the Court established that international treaties

¹⁰⁵¹ See, in particular Opinion CJEU 2/13 (which builds on the dualist construction of the relation between the international and EU law of the CJEU) and the academic comments on this Opinion, in particular, Sionaidh Douglas-Scott, ‘Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice’ (available at <http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>) and T. Streinz, The Autonomy Paradox (available at <http://www.verfassungsblog.de/the-autonomy-paradox/#.VRfns2dxmUk>)

¹⁰⁵² Post-Lisbon Treaty amendment, the founding Treaties have several provisions on the relation between international and EU law. See, Arts. 3(5) and 21 TEU on the general obligation of the EU to respect international law, and Art. 351 TFEU, mostly (1) and (2), for a more specific provision regarding the relation between pre-accession agreements concluded by the Member States and EU law. The wealth of rules regarding the status of international legal norms within the hierarchy of EU norms, the validity and legal effects of international law within the EU legal order are to be found in the CJEU jurisprudence and not EU primary law.

¹⁰⁵³ See Art. 351(1) TFEU.

¹⁰⁵⁴ See, in particular, Opinion 2/13 on the EU Accession to the ECHR, Judgment of 18 December 2014.

¹⁰⁵⁵ For supporters of the ‘monist’ view of the EU legal order, see C. Eckes, ‘International Law as Law of the EU: The Role of the Court of Justice’, and J.W. van Rossem, ‘The EU at Crossroads: A Constitutional Inquiry into the Way International Law is Received within the EU Legal Order’, in E. Cannizzaro, P. Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff Publishers (2011); as well as F.G. Jacobs, ‘Direct Effect and Interpretation of International Agreements in the Recent Case Law of the European Court of Justice’, in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge University Press (2008), 13-33.

¹⁰⁵⁶ See Opinion of AG Poiares Maduro in Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 21.

¹⁰⁵⁷ Ramses A. Wessel, ‘Reconsidering the Relationship between International and EU Law: Towards a Content-based Approach?’ in E. Cannizzaro, P. Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff Publishers (2011), 10; Gráinne de Búrca and J. H. H. Weiler, *The Worlds of European Constitutionalism*, Cambridge University Press (2011); Katja S. Ziegler, ‘International Law and EU law: Between Asymmetric Constitutionalizations and Fragmentation’ in A. Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*, Edward Elgar (2011).

signed by the EU form ‘*an integral part of the Community legal order*’.¹⁰⁵⁸ In 1992 the same status was also recognised to customary international law.¹⁰⁵⁹ Based on this direct incorporation status of international law within the EU legal order, the Court held that the EU has to respect international law, including customary international law, in the exercise of its powers.¹⁰⁶⁰ The fact that the EU is an international organisation has, so far, excluded the EU from many international treaties, especially those concluded in times when only States were recognised as international actors. However, in certain legal areas, international treaties codified customary international norms,¹⁰⁶¹ and thus an international rule can have dual legal basis, customary and written treaty form. In such cases, even if the Union is not a party to an international treaty, as long as there is an international customary norm with a similar content to a treaty provision, the latter norm will bind the Union and ‘*serve as a criterion for the validity of activities of the institutions of the European Union*’.¹⁰⁶²

Towards the end of the 1990s, the Court also clarified the precise rank of international law,¹⁰⁶³ including customary international law,¹⁰⁶⁴ within the hierarchy of EU norms, placing the international customary norms and treaties, to which the Union is a party, above EU secondary norms and just below EU primary law.¹⁰⁶⁵ Some of the jurisprudentially developed norms governing the relationship between international and EU law were codified by the Lisbon Treaty in 2009. First of all, the EU gained an express international legal personality (Article 47 TEU), and it was thus formally recognised as an international actor with legal capacity to acquire rights and obligations on the international scene. The founding Treaties now require the EU to contribute to the ‘strict observance and development of international

¹⁰⁵⁸ Case C-181/73 *Haegeman v Belgium* [1974] ECR 449, para. 5; Case C-104/81 *Kupferberg v Hauptzollamt Mainz* [1982] ECR 3641, para. 13; C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3633, para. 46; C-308/06 *Intertanko et al. v Secretary of State for Transport* [2008] ECR I-4057, para. 38; C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-00000, para. 101 (‘ATAA’), paras. 73, 101.

¹⁰⁵⁹ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019. See also *Racke, op.cit.*; CFI, Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39; Case C-84/95 *Bosphorus Hava Yolları Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications and Others* [1996] ECR I-3953.

¹⁰⁶⁰ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9.

¹⁰⁶¹ Which is also the case of consular and diplomatic law.

¹⁰⁶² See AG Kokott Opinion in Case C-533/08, *TNT Express Nederland BV v. AXA Versicherung*, ECR I-04107, [2010], para. 65. A similar conclusion was reached by the Court in the *Racke* case (paras. 24, 45, 46) in regard to the VCLT, and in *Poulsen* in regard to the Geneva Conventions on the Territorial Sea and the Contiguous Zone (1958), ‘*in so far as they codify general rules recognized by international custom.*’ (see *Poulsen*, para. 10). In the specific case of protecting citizens abroad, the international legal framework includes both customary international law and treaty provisions (VCCR and VCDR), the latter being a codification of customary international law, see E. Denza, *Diplomatic Law, a Commentary on the Vienna Convention on Diplomatic Relations* (Second Edition), Oxford University Press (1998), 33ff.

¹⁰⁶³ Case C-179/97 *Kingdom of Spain v Commission* [1999] ECR I-1251.

¹⁰⁶⁴ See *Racke, op.cit.*, para. 45.

¹⁰⁶⁵ Case C-179/97 *Kingdom of Spain v. Commission* [1999] ECR I-1251, para. 11.

law' (Article 3(5) TEU) and to guide its external actions by 'the respect of the principles of the UN Charter and international law' (Article 21 TEU), and provide that the Union, its institutions and the Member States are bound to respect the international agreements concluded by the EU (Article 216 (2) TFEU). These Treaty norms are said to codify long established jurisprudence of the CJEU.¹⁰⁶⁶ Furthermore Article 3(5) TEU provides that the Union shall contribute to the development of international law, indicating that its regional norms could add to the international practice and thus contribute to the creation of international customary legal norms. However, the precise rank of international norms within the EU normative hierarchy, the validity and legal effects of international law within the EU legal order have not been codified by the Lisbon Treaty, and they continue to be governed by jurisprudentially developed rules.

The rules on the specific aspects of validity, effects and methods of solving conflicts¹⁰⁶⁷ between customary international law and EU law can be found in a few landmark judgments of the CJEU: *Racke*,¹⁰⁶⁸ *Opel Austria*,¹⁰⁶⁹ *Intertanko*,¹⁰⁷⁰ *ATAA*¹⁰⁷¹ and *Hungary v Slovakia*.¹⁰⁷² In 2002 Wouters and van Eeckhoutte provided a taxonomy of the rules governing the aforementioned aspects, as well as of the role played by customary international norms in the interpretation of EU law based on the jurisprudence of the CJEU.¹⁰⁷³ Their survey is still accurate, with a few judgments decided by the Court post-Lisbon Treaty, which add some new facets to the role played by customary international law within the EU legal order.

¹⁰⁶⁶ Such as *Poulsen*, *Racke*, *Haegeman*, see AG Kokott Opinion in *ATAA* case and R. Schutze, *European Union Law*, Cambridge University Press (2015), 298ff.

¹⁰⁶⁷ See, for instance, the 'declaration of competences' list attached to international agreements, commonly in the form of an Annex, which are meant to clarify for third parties the unique division of competences between the Union and the Member States, and possibly also the specific representational issues. See Andrés D. Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) *European Foreign Affairs Review*, 491–509 and M. Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', EUI Working Paper 2006/22.

¹⁰⁶⁸ Case C-162/96 *Racke* [1998] ECR I-3655.

¹⁰⁶⁹ Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39.

¹⁰⁷⁰ Case C-308/06 *Intertanko* [2008] ECR I-4057.

¹⁰⁷¹ C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-00000.

¹⁰⁷² Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012, nyr. An additional case on the relationship between international customary law and EU law is the *Diakite* case (Case C-285/12, *Aboubacar Diakité v Commissaire Général aux Réfugiés et aux Apatrides* Judgment of 30 January 2014, nyr). This latter case is not discussed separately as the Court seems to follow the approach it took in *ATAA* and *Hungary v Slovakia*, namely of openness towards customary international law. However in the *Diakite*, the Court did not have to assess the validity of EU law on the basis of customary international law, but only to establish whether the meaning of the 'internal armed conflict' is to be given the meaning established by international humanitarian law or a separate, autonomous meaning for the purposes of European law (see more in J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?', op.cit., 696, 714ff.

¹⁰⁷³ J. Wouters and D. van Eeckhoutte, 'Giving Effect to customary international law Through European Community Law', *Institute of International Law KU Leuven WP* No. 25/2002.

In *concreto*, the 1998 *Racke* judgment of the CJEU confirmed that customary international law and international treaty law enjoy the same hierarchical rank within the EU legal order, and can thus both be used as standards of assessment of the validity of the EU secondary legislation.¹⁰⁷⁴ In *Opel Austria* and *Intertanko*, customary international law was again used by the Court as an instrument for solving conflicts between an international treaty signed by the EU¹⁰⁷⁵ or argued to be binding on the EU,¹⁰⁷⁶ and EU law. However, in spite of the quite frequent invocation of customary international law in cases raising normative conflicts,¹⁰⁷⁷ customary international law was used as an indirect legal basis for challenging the validity of EU law, namely as a sort of source of inspiration for finding analogous EU principles on the basis of which the conflict was actually solved.¹⁰⁷⁸ It was only in the much later judgments delivered in the *ATAA* and *Hungary v Slovakia* cases, that the Court assessed the validity of EU primary and secondary norms directly in light of customary international law.¹⁰⁷⁹

The *ATAA* case¹⁰⁸⁰ could be argued to be the first case where the Court assessed the validity of an EU Directive – the European Emission Trading Scheme Directive¹⁰⁸¹ – directly in light of international (aviation) law, including relevant principles of customary international law. The CJEU was asked to assess whether the ETS Directive, which was applied to airlines operating flights also outside the EU and partially over the high seas, infringes several customary international law principles, namely: the principle that each State has complete and exclusive sovereignty over its airspace; the principle that no State may validly purport to subject any part of the high seas to its sovereignty; and the principle of freedom to fly over the high seas.¹⁰⁸²

¹⁰⁷⁴ *Racke*, para. 46. See also, Katja S. Ziegler, ‘The Relationship between EU law and International Law’, *University of Leicester School of Law Research Paper* No. 13-17/2011, 10.

¹⁰⁷⁵ See *Racke*.

¹⁰⁷⁶ See *Intertanko*.

¹⁰⁷⁷ See T. Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’, (2012) *German Law Journal*, Special Issue *EU law qua Global Governance Law*, 1177.

¹⁰⁷⁸ See *Racke*.

¹⁰⁷⁹ See AG Kokott Opinion in the *ATAA* case, stating that ‘the case-law of the Courts of the European Union has not given rise to any clear criteria for the determination of whether and to what extent a principle of customary international law can serve as a benchmark against which the validity of EU legislation can be reviewed’, Case C-366/10 *ATAA*, Opinion AG J. Kokott, 28.10.2011, para. 109.

¹⁰⁸⁰ C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011] ECR I-00000.

¹⁰⁸¹ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community published in [2009] OJ L 8/3 of 13.1.2009 (‘ETS Directive’).

¹⁰⁸² See *ATAA*, para. 103.

Similarly to the *Racke* case, the Court established in *ATAA* two restrictive conditions to the application of an international legal custom as legal basis for the judicial review of EU secondary provisions. The first condition is, however, differently phrased from *Racke*, eliminating one of the conditions that the international customary norm had to fulfil. Customary international legal norms ‘*are capable of calling into question the competence of the EU to adopt the [challenged] act*’,¹⁰⁸³ while in *Racke* the Court added that the nature of customary international law needed to be ‘fundamental’. The second condition is identical to the condition first framed in *Racke*, and is determined by the same rationale of the imprecise wording of the international custom compared to the provisions of international agreements. Due to this particular characteristic of international customary law, ‘*judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying those principles.*’¹⁰⁸⁴

After having established that the three principles of customary international law could, in principle, be used as a standard for judicial review of EU secondary legislation, the Court passed to establish whether, *in casu*, there was a conflict between the international customary international norms and the norms established by the challenged EU Directive. The Court found that, by adopting the Directive, the EU institutions did not trespass on the limits of ‘*a manifest error of assessment*’, and thus the Court did not have to use its usual conflict resolution methods of conform interpretation,¹⁰⁸⁵ or balancing the autonomous character of the EU legal order with the respect of international law,¹⁰⁸⁶ in order to solve the alleged conflict between customary international law and the invoked EU Directive. The *ATAA* judgment added value to the legal effects recognised to customary international law within the EU legal order consists in, first, extending the scope of customary international norms that can act as legal basis for the legality review of EU provisions. Second, the judgment finally clarifies that customary international law can act as a benchmark for directly challenging EU secondary provisions, instead of finding an EU principle similar in content to the customary international

¹⁰⁸³ *Ibid.*, para. 107.

¹⁰⁸⁴ *Ibid.*, para. 107.

¹⁰⁸⁵ C-53/96 *Hermès International v FHT Marketing Choice BV* [1998] ECR I-3603, para 28; C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52 (‘International Dairy Arrangement’). See also AG Op *ATAA*, para. 107 ff.

¹⁰⁸⁶ *Kadi*, op.cit..

legal norm, through which the customary international law is internalised and can then act as legal basis for the legality review of EU law.¹⁰⁸⁷

In the *Hungary v Slovakia* case,¹⁰⁸⁸ the Court had the occasion to go further in the exploration of the relationship between customary international law and EU law. This case, similarly to the *Micheletti* case,¹⁰⁸⁹ is one of the rare cases where international law played an important role in shaping the scope of EU citizenship. The case raised the question of whether the special status of Mr Sólyom as President of Hungary, and thus as a high ranking diplomat, takes precedence over his fundamental status of EU citizen, and would thus justify restrictions to the EU primary provisions (Article 21 TFEU) and secondary provisions (EU Citizenship Directive 2004/38) based on the international customary legal norms governing diplomatic relations.

The Court had thus to balance customary international legal norms with EU primary law provisions establishing the fundamental EU citizenship rights, and it ended up giving precedence to customary international legal provisions.¹⁰⁹⁰ In a highly political decision it decided to give priority to customary international law even though what was at issue was not only EU secondary law provisions enshrined in the Citizenship Directive, but also EU primary law provisions which, according to the established jurisprudence of the CJEU, are hierarchically superior to customary international legal norms, and can be set aside only if the Treaty provisions in dispute are amended.¹⁰⁹¹ The apparent change in the CJEU approach is not easily noticeable due to the precedence of the customary international legal norms being formulated as a limitation to the exercise of the citizenship right of free movement, in addition to limitations such as public security, public policy or public health, which, unlike the customary international norms, are expressly provided by the EU Citizenship Directive.¹⁰⁹² The judgment added value to the relationship between customary international law and EU law consists, first, in the recognition of a hierarchically superior place to customary international law on the basis of the *lex specialis derogat lex generalis* principle, which, unlike previous cases, this time works in favour of the international rather than the EU norms. Second, it can be observed that, unlike the *ATAA* judgment, the Court did initially find a

¹⁰⁸⁷ As in the *Racke* case.

¹⁰⁸⁸ Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012, nyr.

¹⁰⁸⁹ Case C-369/90 *Micheletti v Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

¹⁰⁹⁰ For a critique on the lack of precision as to the exact customary international legal norms governing the special status of the President of Hungary in this case, see Lucia S. Rossi, 'EU Citizenship and the Free Movement of Heads of State: Hungary v. Slovak Republic', (2013) CMLRev, 1451.

¹⁰⁹¹ See Case C-179/97 *Kingdom of Spain v Commission* [1999] ECR I-1251.

¹⁰⁹² See *Hungary v Slovakia*, para. 51.

normative conflict. The Court was placed in the difficult position of having to find a midway between the two opposing solutions suggested by Hungary and Slovakia, and solve a very delicate political issue. It did not choose to find the facts as falling outside the scope of EU law, as suggested by the defendant States, nor did it decide to make a strict application of the EU citizenship provisions as suggested by the applicant State. Instead the Court reiterated the Union obligation to respect international customary law, and the obligation of conform interpretation of EU law, which is binding on the Union institutions. By making an innovative use of conform interpretation, the Court found an additional limitation to the application of the Union citizenship provisions, which has its source outside the EU primary or secondary provisions, namely in the *lex specialis* customary international legal provisions on diplomatic relations. Once again the Court found an innovative way of satisfying conflicting interests, i.e. those sought by the international customary norms and the EU citizenship provisions, by way of an inventive, even if legally erred reasoning,¹⁰⁹³ of using the conform interpretation conflict resolution tool.

From the perspective of international law, the main resolution tool of normative conflicts is the interpretation in ‘good faith’ provided by Article 31 VCLT which was initially meant to address conflicts between international treaty norms, rather than normative conflicts stemming from the fragmentation of the general international legal framework. There are precise requirements to be followed in fulfilling the obligation of conform interpretation: interpretation should be exercised in ‘good faith’, taking into account not only the wording of the international norm of reference but also the context and purpose of the norm and also the ‘*relevant rules of international law applicable to the parties.*’¹⁰⁹⁴ Based on Article 31 VCLT requirements of interpretation, Ziegler deduced that currently Article 31 VCLT serves also ‘*to avoid conflicts and to preserve unity with other areas of international law, or at least respect and reflect comity towards it.*’¹⁰⁹⁵ It seems thus that the EU obligation of ‘*conform interpretation*’ and the international tool of interpretation in ‘*good faith*’ are very similar, and pursue similar objectives, i.e. of preserving the unity of legal orders and respect of other areas of law.

¹⁰⁹³ See Lucia S. Rossi, ‘EU Citizenship and the Free Movement of Heads of State: Hungary v. Slovak Republic’, (2013) Common Market Law Review, 1451; M. Filippin, ‘A Change for future intra-European diplomatic relations? Case C-364/10 *Hungary v Slovakia*, Judgment of 16 October 2012’, (2013) MJ, 120.

¹⁰⁹⁴ According to Art. 31(1) and (3) lit c) VCLT.

¹⁰⁹⁵ Katja S. Ziegler, ‘The Relationship between EU law and International Law’, *University of Leicester School of Law Research Paper No. 13-17/2013*, 23.

It has to be mentioned that the EU devised two other mechanisms of conflict avoidance, which commonly apply in cases when Member States are faced with conflicting international and EU obligations: Article 351 TFEU which obliges the Union to respect the Member States' international obligations acquired prior to the accession or creation of the Union, and disconnection clauses which create a safe haven for the EU obligations diverging from the general international legal provisions.¹⁰⁹⁶

In evaluating the relationship between international and EU law, one has to take into account also the very rich legal literature on this topic.¹⁰⁹⁷ The main scholarly approaches to this normative relationship can be included under one of the following categories: 'legal pluralism' or 'legal constitutionalism', as opposite doctrines; while post-*Kadi*¹⁰⁹⁸, scholars militate for a middle-way doctrine where the international, regional (including the Union), and domestic legal orders are all equally legitimate without a clear hierarchical organisation, except in relation to *jus cogens* norms, or the EU constitutional principles, which sit at the apex of this plurality of legal orders and norms.¹⁰⁹⁹ All legal scholars, regardless of whether internationalist or European, generally agree that the traditional monist/dualist doctrines governing the relationship between international and national legal orders cannot adequately describe the different aspects of the relationship between the international legal order and the EU legal order. Post-*Kadi*,¹¹⁰⁰ it seems that one of the main academic concerns regarding the relation between international and EU law, is that the EU will feel free to deviate from international law as it suits the EU institutions, or even worse its own 'judicial vanity', thus disrespecting the Union obligation to ensure respect of international law.¹¹⁰¹

¹⁰⁹⁶ M. Cremona, 'Disconnection Clauses in EC Law and Practice', C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World*, Hart Publishing (2010).

¹⁰⁹⁷ See, e.g.: J. Wouters, A. Nollkaemper and E. De Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, Asser Press (2008); Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press (2009); E. Cannizzaro, P. Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff (2011); Gráinne de Búrca and J. H. H. Weiler, *The Worlds of European Constitutionalism*, Cambridge University Press (2012); Dmitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order*, Cambridge University Press (2013); Malcolm D. Evans and P. Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives*, Hart Publishing (2013).

¹⁰⁹⁸ Ramses A. Wessel (eds), *International Law as Law of the European Union*, Martinus Nijhoff (2011); Gráinne de Búrca and J. H. H. Weiler, *The Worlds of European Constitutionalism*, *op.cit.*.

¹⁰⁹⁹ G. de Burca, See also Katja S. Ziegler, 'International Law and EU law: Between Asymmetric Constitutionalisation and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011).

¹¹⁰⁰ Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdull Kadi & Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

¹¹⁰¹ G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', (2013) *Maastricht JECL* 168, 183; N Petersen, 'The Reception of International Law by Constitutional Courts through the Prism of Legitimacy', (2012) *ZaöRV*, 223, 248; C. Eckes, 'International Law

In conclusion, it seems that the Lisbon Treaty shows greater respect towards (customary) international law, which can contribute to the EU's increasingly active global role on the international sphere, and respect of international norms within the EU legal order. In spite of the aforementioned critiques, the CJEU has taken seriously the conventional EU's obligation to respect customary international law by accepting international customs as a direct legal basis for challenging the legal validity of EU secondary norms (ATAA). The *Hungary v Slovakia* judgment seems to have raised even further the status previously recognised to customary international law within the hierarchy of EU norms, by seemingly conferring to it an equal footing to EU primary law provisions, at least in certain specific circumstances. For the first time, the Lisbon Treaty ascertains the responsibility of the Union in contributing to the formation of customary international law. The Union, as a coordinated 28 States practice, definitely has an important word to say in the creation of international customs, and could effectively impose its own view.¹¹⁰² The Lisbon Treaty amendments and the recent jurisprudence of the CJEU on the application of customary international law indicates that the Union is distancing itself from the conflicting paradigm that has at times governed its relation with international law. Furthermore the EU model of protection of EU citizens abroad has become a model for other regional legal orders, importing the Union intergovernmental model of protecting citizens abroad.¹¹⁰³ It remains to be seen whether the relation between customary international law and EU law will continue to develop along a two-way fertilisation course.¹¹⁰⁴ However, in certain concrete cases, avoiding conflict might

as Law of the EU: The Role of the ECJ', in E. Cannizzaro, P. Palchetti & Ramses A. Wessel (eds), *International Law as Law of the European Union* (2011).

¹¹⁰² See F. Hoffmeister, 'The Contribution of EU Practice under International Law', in M. Cremona and M. Marcesceau (eds), *Developments in EU External Relations Law*, Oxford University Press (2008), 37-127.

¹¹⁰³ Recently, regional consular sharing agreements in cases of disasters have been agreed in the framework of other regional international organisations, such as the ASEAN (see the Guidelines for the Provision of Emergency Assistance by ASEAN Missions in Third Countries to Nationals of ASEAN Member Countries in Crisis Situation, Manila, Philippines, 29-30 July 2007) and Andean countries (according to Decision 548, the Andean Cooperation Mechanism on Consular Assistance and Protection and Migratory Matters was adopted in 2003. 'This instrument stipulates that any national of an Andean Community Member Country who is within the territory of a third State where his/her country of origin has no Diplomatic or Consular Representation, may avail him or herself of the protection of the diplomatic or consular officials of any other Member Country.', Decision 548/2003 has not yet been implemented). None of these provisions is so far a legal binding provision, since the ASEAN includes the partnership in a soft law instrument, while within the Andean framework, the Decision is not yet in force. These provisions do not enshrine an individual right similar to the EU citizenship right to equal protection abroad recognised within the EU legal order, but rather keep partnership in consular sharing as an inter-governmental framework of cooperation, similar to Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, [1995] OJ, L 314/73 and Decision 96/409/CFSP, on the establishment of an emergency travel document, [1996] OJ L 168/11.

¹¹⁰⁴ The idea of presenting the Union and international law in a mutually beneficial and friendly relationship was inspired by Katja S. Ziegler's progressive papers: Katja S. Ziegler, *The Relationship between EU law and International Law*, University of Leicester School of Law Research Paper No. 13-17/2013; Katja S. Ziegler,

be impossible. Once the conflict between international and EU law has occurred, the aforementioned conflict resolution tools might not always be helpful, and thus a choice would ultimately need to be made between the two legal norms.¹¹⁰⁵ These situations are those that ultimately test the level of respect the Union institutions show to international law.¹¹⁰⁶

III. The EU supranational model of protecting EU citizens abroad and the reality of public international law governing the protection of individuals

The protection of citizens abroad has traditionally been considered to involve consular and diplomatic protection of citizens. The appearance of new non-State actors with different forms of governance and action has meant that the concept of protection abroad of citizens has taken other forms than the aforementioned institutions of international law. For example, several of the European Union's institutions,¹¹⁰⁷ bodies¹¹⁰⁸ and missions¹¹⁰⁹ can provide consular assistance and protection to EU citizens in distress abroad and thus complement the Member States in the provision of the traditional consular and diplomatic protection of private individuals.¹¹¹⁰ This is the supranational model of protecting EU citizens abroad, which is part of the overall EU legal framework on protecting Union citizens in third countries. Before assessing the specifics of the EU model of protecting citizens abroad in light of the current public international law, it is important to establish what the legal nature of the EU is, and in light of its nature, to clarify the international rules binding on this legal entity.

The legal nature of the European Union is one of the oldest debated EU law related topics, due to the continuous ambiguity preserved by the founding Treaties on this topic and the fast developing practice of the EU that is placing the EU in between different legal

'International Law and EU law: Between Asymmetric Constitutionalisms and Fragmentation' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*, Edward Elgar (2011).

¹¹⁰⁵ As in *Kadi* case, see M. Avbelj, 'The case of Mr. Kadi and the Modern Concept of Law in Kadi on Trial: The Multifaceted Analysis of the Kadi Trial', in M. Avbelj, F. Fontanelli, G. Martinico (eds.), *Routledge Research in EU law* (2014), 49-63, 55.

¹¹⁰⁶ See, for instance, the *Kadi* case compared to *Hungary v Slovakia* case.

¹¹⁰⁷ The European Commission, within the framework of the Union Civil Protection Mechanism, see Decision Council Decision 1313/2013 of the European Parliament and Council on a Union Civil Protection Mechanism, [2013] OJ L 347/924 of 17.12.2013.

¹¹⁰⁸ EEAS and Union delegations, see Bart Van Vooren, 'A Legal Institutional Perspective on the European External Action Service', (2011) *Common Market Law Review*, 475.

¹¹⁰⁹ Under the European Union's ESDP missions, protection of citizens may take the form of forceful protection by military missions, see J. Larik, 'Operation Atalanta and the Protection of EU Citizens: Civis Europaeus Unheeded?', in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EU Working Paper LAW 2011/10*, 129-144.

¹¹¹⁰ See more details on the role of the Union in securing protection of Union citizens abroad in Chapter 4.

categories. The current EU founding Treaties have maintained the previous silence on the legal nature of the EU,¹¹¹¹ leaving open the question of what the legal nature of the EU is: a *sui-generis* entity whose autonomy from the international and national legal orders has been carefully constructed by the European jurisprudence,¹¹¹² or an international organisation, albeit a *sui generis*¹¹¹³ one, which is still an international organisation from the perspective of third parties.¹¹¹⁴ The increasing expansion of the Union competences in areas that used to fall under the State's exclusive competences, and expanding across all aspects of the individual's life, have driven more and more scholars to refer to the Union as a sort of *Rechtsstaat*, or to compare the Union with a federation, or confederation of States.¹¹¹⁵ Other scholars depart from analogies with State-like types of political organisations, and argue that the Union resembles new political and legal forms,¹¹¹⁶ or a neo-feudal puzzle of multiple sovereignties.¹¹¹⁷ It seems that the current standard scholarly opinion is that the EU is still an international organisation, albeit a *sui generis* or special one,¹¹¹⁸ which the current State-like

¹¹¹¹ Art. 1 TEU refers only to the replacement of the old pillar structure: 'By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer competences to attain objectives they have in common.'

¹¹¹² See the CJEU jurisprudence, starting with *Van Gend en Loos*, the Community is 'a new legal order of international law' (Case 26/62, *Van Gend & Loos*, [1963] ECR 1); *COSTA v Enel*, 'the EEC Treaty has created its own legal system' (Case 6/64, *Costa v. ENEL*, [1964] ECR 585) until the recent judgment in Op 2/13: 'The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation', para. 158. By 'autonomous legal order' is meant a 'self-referential order' that is a circular order that generates, validates and sustains itself', and thus establishes by itself the rules regarding the interactions with national and international legal orders, see, N. Tsagourias, 'Conceptualising the Autonomy of the EU: An Idea of Autonomy' in R. Collins and N. White (eds.), *International Organisations: An Idea of Autonomy*, Oxford University Press (2014), 340. See also, J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons', (2012) *The Hague Journal of Diplomacy*, 31, 33.

¹¹¹³ R. Schütze argues that the EU is no longer *sui generis*, but that, similar to any other federation, it has a 'dual government, dual sovereignty, and also dual citizenship', see R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford University Press (2009), 29.

¹¹¹⁴ See, *inter alia*, Andrés D. Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?', (2012) *EFARev*, 491.

¹¹¹⁵ J. Habermas, 'Why Europe needs a Constitution', in *New Left Review* 11, September-October 2001, http://newleftreview.org/A2343#_ednref22, R. Schütze, *From Dual to Cooperative Federalism*, Oxford University Press (2009); Hartley, *The Foundations of European Union Law*, Oxford University Press (1996), 109.

¹¹¹⁶ L. Siedetop, *Democracy in Europe*, London, Penguin (2000); N. Tsagourias, 'Conceptualizing the Autonomy of the European Union', in R. Collins and N.D. White (eds.), *International Organizations and the Idea of Autonomy: Institutional in the International Legal Order*, Routledge (2011), 339-352.

¹¹¹⁷ D. Ragazzoni, 'Identity vs. representation: what makes 'the people'? Rethinking democratic citizenship through (and beyond) Carl Schmitt and Hans Kelsen', (2011) *Perspectives on Federalism*, 1, 4-5.

¹¹¹⁸ The 'sui-generis' nature being given by the numerous constitutional, supranational features, and expansions of State-like competences and symbols. For the *sui-generis* nature of the European Union legal order, see, for example, J. H. Weiler and U. R. Haltern, 'The Autonomy of the Community Legal Order—Through the Looking Glass' (1996) *Harv.Int'l L.J.*, 411; for the federalist nature of the Union, see R. Schütze, *From Dual to Cooperative Federalism*, *op.cit.*; the 'international organization' versus 'state' legal debate is well summarized by Katja S. Ziegler, 'The Relationship between EU law and International Law', *op.cit.*

features have not yet altered it into a federation, co-federation, or other invented legal form.¹¹¹⁹ There are other scholars who emphasise that, in spite of the Union's expansion of power and of the consequential loss of the Member States' exclusive powers, the Union is and will remain primarily an international organisation, albeit *sui generis*¹¹²⁰, since the EU rules governing the amendment and exit from the founding Treaties are still the classical public international legal norms requiring the unanimous consent of the Member States.¹¹²¹

The legal nature of the Union remains a source of continuous debate, with different legal qualifications being put forward.¹¹²² The overall conclusion following the scholarly opinions is that the Union does not fit squarely within any of the traditional classifications: federation, co-federation, pluralist legal regime,¹¹²³ or international organisation.¹¹²⁴ While inventing new names and metaphors might solve the classification dilemma,¹¹²⁵ it will not

¹¹¹⁹ It has to be noticed that the EU is still governed by the structural principle of conferred powers, which can be seen as a version of the principle of speciality or attributed powers, which govern the functioning of international organisations (see ICJ Case of the *SS Lotus* and J. Klabbers, *An Introduction to International Institutional Law*, Oxford University Press (2008), 64) and differentiate them from States. For scholarly opinions supporting the EU's status of a special international organisation, see J. Alarez, *International Organisations as Law-Makers*, Oxford University Press (2005); J. Klabbers, D. Curtin, R. Wessel, Bruno de Witte, J. Bengoetxea, 'The EU as (More Than) an International Organization', in J. Klabbers and Å. Wallendahl, *Research Handbook on the Law of International Organizations*, Cheltenham/ Edward Elgar Publishing (2011), 448-465, 449.

¹¹²⁰ The *sui generis* type has so far materialised in titles such as Regional Economic Integration Organisations (REIOs), and lately regional international organisations. The Convention on the Rights of Persons with Disabilities has a RIO (Regional Integration Organisation) clause, which it has been argued to have been included for the purpose of covering the large scope of activities of the EU (see Art. 44: '*Regional integration organisation shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.*'); R. Wessel, 'Can the EU replace the Member States?....', *op.cit.*, 131. On the previous title of Regional Economic Integration Organisation, see E. Paasivirta and P. J. Kuijper, 'Does one size fit all?: The European Community and the Responsibility of International Organizations', (2005) *Netherlands Yearbook of International Law*, 169, 205.

¹¹²¹ J. Alarez, J. Klabbers, D. Curtin, R. Wessel, Bruno de Witte, J. Bengoetxea, 'The EU as (More Than) an International Organization', in J. Klabbers and Å. Wallendahl, *Research Handbook on the Law of International Organizations*, *op.cit.*

¹¹²² For a more exhaustive overview of some of the legal qualifications of the Union's legal order, see N. Walker and S. Tierney, 'Introduction: A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism' in N. Walker, M. Shaw and S. Tierney (eds.), *Europe's Constitutional Mosaic*, Hart (2011), 7-8; G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, *op.cit.*

¹¹²³ R. Wessel in E. Cannizzaro, *op.cit.*, 17

¹¹²⁴ C. Barnard, referred to the legal nature of the Union as being '*more than an international organization (as reflected by the judicially recognized doctrines of supremacy, direct effect, etc.) but less than a federal state (no welfare state no sufficient resources, no army etc.)*' in 'Introduction: The Constitutional Treaty, the Constitutional Debate and the Constitutional Process' in C. Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007) 1, 3. While Larik refers to the nature of the Union as still '*in a state of limbo between classic international organization and sovereign State.*' in J. Larik, 'From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) *International and Comparative Law Quarterly*, 935, 957.

¹¹²⁵ J. Bengoetxea, 'The EU as (More Than) an International Organization', in J. Klabbers and Å. Wallendahl, *Research Handbook on the Law of International Organizations*, Cheltenham/Northampton: Edward Elgar Publishing (2011), 448-465.

change the foundational basis of the Union and the EU Treaties system as embedded in general international law,¹¹²⁶ and the view of third countries.¹¹²⁷

Regardless of which scholarly opinion we choose to embrace in regard to the legal nature of the European Union, we cannot deny that the EU is not a State,¹¹²⁸ and that in the eyes of third countries and of the Court of Justice of the EU, the European Union is still only an international organisation, even if establishing a new kind of legal order, of a peculiar nature, with *'its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation'*.¹¹²⁹ The European Union now enjoys an express international legal personality, which permits it to enter into legal relations with other international actors, and to acquire international rights and obligations. However its external competences are limited by the principle of conferral,¹¹³⁰ which is a reformulation of the international legal principle of speciality¹¹³¹ within the EU legal order. The European Union exists and operates within the broader international legal system, where it needs to respect the principles of international law,¹¹³² which bind, primarily, international organisations, but also more generally all international actors.¹¹³³

In spite of non-State actors actively participating in international diplomacy, the EU and UN being some of the most prominent of them,¹¹³⁴ the international norms governing the exercise of consular and diplomatic protection of natural persons¹¹³⁵ are still of a purely inter-

¹¹²⁶ Katja S. Ziegler, 'The Relationship between EU law and International Law', University of Leicester School of Law Research Paper No. 13-17, 20.

¹¹²⁷ For third countries the EU is still an international organisation, though a special one, which requires insertion of specific clauses in international agreements to clarify the division of competences and representations tasks between the Union institutions and the Member States, see Andrés D. Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?', (2012) *European Foreign Affairs Review*, 491; R. Ambast and V. Tyagi, 'Ambassadors of Europe: An Insight into the Evolution of the European Union and International Diplomatic Law', (2008) *Studia Diplomatica*, available online at http://www.ies.be/files/repo/conference2008/EUinIA_VIII_1_AmbastTyagi.pdf

¹¹²⁸ See the CJEU in Opinion 2/13, Judgment of 18 December 2014, para. 156: *'[...] the EU is, under international law, precluded by its very nature from being considered a State.'*

¹¹²⁹ Opinion 2/13, para. 158.

¹¹³⁰ Art. 5 TEU.

¹¹³¹ In addition to the *Reparation of Injuries* case, see also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Rep 1996 (July 8) at 66, para. 25.

¹¹³² See Arts. 3(5) and 21 TEU.

¹¹³³ As in regard to the *jus cogens* norms.

¹¹³⁴ J. Wouters and S. Duquet, 'The Vienna Conventions on Diplomatic and Consular Relations' in A.F. Cooper, J. Heine and R. Thakur (eds.), *The Oxford Handbook of Modern Diplomacy* (2013); C. Jönsson and M. Hall, 'Communication: An Essential Aspect of Diplomacy', in C. Jönsson and R. Langhorne (eds.), *Diplomacy*, Sage Publications (2013), 398; A.F. Cooper, 'The changing nature of diplomacy', in A.F. Cooper, J. Heine and R. Thakur (eds.), *The Oxford Handbook of Modern Diplomacy* Oxford University Press (2013); K. Mahbubani, 'Multilateral diplomacy', in *The Oxford Handbook of Modern Diplomacy* (2013), 248-262.

¹¹³⁵ See Chapter 3.

States nature.¹¹³⁶ Therefore, it could be argued that the relevant international norms do not apply to the EU, which is still an international organisation, even if not a classical one.¹¹³⁷ The only relevant rule on the capacity of an international organisation to exercise protection of individuals abroad is to be found in the Advisory Opinion of the ICJ delivered in 1948, in the *Reparation of Injuries* case.¹¹³⁸ The Court established that the UN, as an international organisation, has the capacity to maintain its rights by bringing international claims on behalf of its agents while exercising functions attributed by the UN. Although similar to the exercise of diplomatic protection of individuals by States, the ICJ clearly differentiated this protective function, entitled ‘functional protection’ recognised to the UN, as an international organisation, from the classical diplomatic protection. The emphasis in this judgment was on whether the principle of speciality, which determines the limits of international organisations’ competences, prohibited the UN to exercise functional protection of its agents injured abroad. It is settled law that international organisations are conceived of as derivative subjects of international law, possessing only a limited set of powers, namely those established by their constitutive charters, in contrast to States, which are the original and complete subjects of international law.¹¹³⁹

The treaty and customary international law norms on the exercise of consular and diplomatic protection of individuals are relative norms from which States can derogate on the basis of mutual consent and provided they do not breach *jus cogens* norms. The *Barcelona Traction* judgment serves as an indication that the international norms are *de minimis* rules

¹¹³⁶ The Vienna Conventions on Consular and Diplomatic Relations, which provide many of the rules of the consular and diplomatic law, are still open only to States. See Art. 48 of the VCDR “*shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention [...]*”. Additionally, Art. 50 of the VCDR provides that the Vienna Convention remains “*open for accession by any State belonging to any of the four categories*” mentioned in Art. 48. Similar provisions exist in the VCCR, see Articles 74 and 76.

¹¹³⁷ The customary international law governing the exercise of consular and diplomatic protection of EU citizens is still an exclusive inter-States system, see the 2006 ILC Articles on Diplomatic Protection. The still preponderant inter-States relations nature of the international legal order is a more general problem which the EU has to confront in many areas of activity. See for instance H. Bruyninckx, J. Wouters, S. Basu and S. Schunz (eds.), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Palgrave Macmillan (2012); J. Wouters, Anna-Luise Chané, ‘Brussels meets Westphalia: The European Union and the United Nations’, WP No. 144/August 2014, available online at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp141-150/wp144-wouters-chane.pdf

¹¹³⁸ International Court of Justice, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174–220.

¹¹³⁹ J. Larik, ‘From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union’, (2014) *International and Comparative Law Quarterly*, 935, 957; L. Condorelli and A. Cassese, ‘Is Leviathan Still Holding Sway over International Dealings’ in A. Cassese (ed) *Realizing Utopia: the Future of International Law*, Oxford University Press (2012).

from which the States can derogate, either internally or regionally.¹¹⁴⁰ The EU-based arrangement of the Member States, although not domestic, and not touching directly on the State's right to exercise diplomatic protection to its own citizens, cannot not be contrary to rules that have been held to establish minimum rules of international law. This conclusion is also supported by Article 8 of the VCCR and the numerous bilateral and regional treaties on consular and diplomatic sharing concluded among States on the basis of Article 8 VCCR,¹¹⁴¹ which have functioned without the opposition of third countries for decades.

In regard to diplomatic protection, none of the norms governing this institution is absolute. The *Panevezys* judgment¹¹⁴² confirmed that the nationality of claims requirement can be derogated from on the basis of mutual consent among the involved States. Therefore, States can derogate from these norms by way of consenting to delegate certain of the functions of consular and diplomatic protection of private individuals to an international organisation for the purpose of helping them to safeguard their nationals in consular distress abroad. As long as this delegated competence is enshrined in the constitutional charter of the international organisation, then, from the perspective of general public international law, the principle of speciality is respected, and the international organisation can exercise protective functions of individuals, in addition to the functional protection of the organisation's agents.

Chapter 1 emphasised that one of the Lisbon Treaty innovations in the field of ensuring protection of EU citizens abroad, was to clarify the legislative,¹¹⁴³ institutional,¹¹⁴⁴ and functional¹¹⁴⁵ competence of the EU to act in this field. It could thus be concluded that in the absence of specific public international norms governing the exercise of consular and diplomatic protection of private individuals by international organisations, the European Union respected the general principle of speciality, which could have been the only one to prevent the EU from exercising such functions, and not the inter-States public international norms governing the exercise of consular and diplomatic protection of individuals which

¹¹⁴⁰ See the *Barcelona Traction* judgment, ICJ, *op.cit.*, paras. 71, 78-9.

¹¹⁴¹ See Chapter 2, Section IV.3 State practice, and Section V.2.b State practice.

¹¹⁴² *Panevezys-Saldutiskis Railway Case*, (1939) PCIJ Series A/B, No. 76 16, 17; *Mavrommatis Palestine Concessions Case* (1924), PCIJ Series A No. 2, at 16: 'This right [to resort to 'diplomatic action or international judicial proceedings'] is necessarily limited to intervention on behalf [of the state's] own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.'

¹¹⁴³ See Art. 23(2) TFEU, the competence of the Council to adopt Directives to ensure the effective implementation of the EU citizenship to equal protection abroad.

¹¹⁴⁴ See, in particular, Arts. 35 TEU, 221 TFEU, and Art. 5(10) of the EEAS Decision, the 2013 Union Civil Protection Mechanism Decision clarify the EU institutions and bodies with competence to provide consular protection of unrepresented Union citizens abroad.

¹¹⁴⁵ On the type of services the EU institutions can provide, see more details in Chapter 4, Section VI.1.b.

apply purely to the Member States' exercise of consular and diplomatic protection of citizens abroad.

IV. Exploring the relation between the EU specific legal regime on protection of EU citizens abroad with the general international legal framework

It is well known that the European Union legal order has placed the individual at the centre of its interests.¹¹⁴⁶ With the view of bringing the Union closer to its people, the Maastricht Treaty replaced the previous scattered regional forms of consular and diplomatic cooperation among the Member States based on Article 8 VCCR, with a single regional legal regime that would ensure equal protection abroad to all Union citizens.¹¹⁴⁷ Being part of the Union legal order, its specific legal characteristics are applying also to its provisions on the protection of EU citizens abroad, which together with the institutional and legal innovations are constructing an innovative, different model from the general international model of protection of citizens abroad.

Although the EU citizenship is not an independent source of consular and diplomatic protection rights, but rather of extending duties owed to a State's own citizens to nationals of other Member States, the legal nature and effects recognised to this equal treatment right have no equivalent under general customary international law. Traditional customary international law defined consular and diplomatic protection of individuals as discretionary rights of the State, from which States could have derogated from within their domestic legal orders or in their bilateral, regional or multilateral relations based on Articles 8 VCR and 46 VCDR. The 2006 ILC Articles on Diplomatic Protection have preserved the legal nature of a State right for diplomatic protection, following the clear rejection of Rapporteur Dugard's proposal to include a State obligation to exercise diplomatic protection for individuals in cases of

¹¹⁴⁶ See the Preamble of founding Treaties, Art. 1(2) TEU: 'in which decisions are taken as openly as possible and as closely as possible to the citizen.' A phrase that has been included in all the different versions of the founding Treaties; Opinion 1/91, First EEA Case, [1991] ECR; for the metamorphosis of the individual within the Union legal order, gradually gaining increasing direct rights (economic, social and then political), see D. Kochenov, R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', (2012) E.L. Rev., 369.

I-6079, para. 21

¹¹⁴⁷ For this argument see more in Madalina B. Moraru, 'Securing Consular Protection of the EU Citizens Abroad: What Role for the EU?', *op.cit.*, and 'Practical and Legal Consequences of Absence of EU and Member States' External Representations for the Protection of EU Citizens in Third Countries', *op.cit.*

violations of *jus cogens* norms.¹¹⁴⁸ Since then, the States' practice of recognising a State duty to exercise diplomatic protection on behalf of nationals subjected abroad to grave violations of fundamental rights has slowly grown. The Union legal order, Article 20(2)(c) TFEU confers a Union citizenship right to equal protection of EU citizens in third countries, while Article 46 EU Charter confers a fundamental status to this right to equal consular and diplomatic protection to all unrepresented Union citizens.

The foundation of the equal treatment right to protection abroad is the citizenship of a supranational entity, which has been strongly criticised by certain international legal scholars.¹¹⁴⁹ The EU citizenship has been argued not to conform to the 'nationality of claims' prerequisite for the exercise of consular and diplomatic protection of individuals. According to the generally accepted international view of consular and diplomatic protection, an individual must have the nationality of the assisting State (consular protection) or of the State claiming injury at the time at which the injury is inflicted (diplomatic protection) in order to legitimise the exercise of consular assistance or to establish an actual right of the State to exercise diplomatic protection.¹¹⁵⁰ On the other hand, the Union legal regime establishing a fundamental right to equal consular and diplomatic protection is premised on the Union citizenship, a concept which has various different legal definitions depending on the different views shared by legal scholars.¹¹⁵¹ Although there is no positive definition of the Union citizenship that is unanimously accepted by academics, there is some agreement on what the legal concept is *not*, namely a State-like citizenship within its traditional public international legal meaning. The Union citizenship has been criticised for not reflecting a 'full citizen status',¹¹⁵² and lacking an equally genuine and solid link between the Union citizens and all the Member States.¹¹⁵³ Therefore, the Union citizenship was found not to be fulfilling the requirements of nationality of claims for the purpose of diplomatic and consular protection.¹¹⁵⁴

¹¹⁴⁸ Special Rapporteur John Dugard proposed a provision for the Draft Articles on Diplomatic Protection designed to create an obligation to exercise protection in certain, limited, situations. This proposal was rejected. For the proposed article see J. Dugard, *First Report on Diplomatic Protection*, 52nd session, A/CN.4/506 (2000), para. 74

¹¹⁴⁹ A. Vermeer-Künzli, 'Nationality and EU citizenship' in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis, 2007, and 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union'; J. Dugard, *Seventh Report*, *op.cit.*

¹¹⁵⁰ See F. Amerasinghe, 'The Relevance of Nationality', in *op.cit.*

¹¹⁵¹ D. Thym, 'Towards 'Real' Citizenship? The Judicial Construction of Union Citizenship and its Limits' in M. Adams, Henri de Waele, J. Meeusen, G. Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice*, Hart (2014).

¹¹⁵² S. Kadelbach, 'Union citizenship', NYU *Jean Monnet Working Paper* 9/03.

¹¹⁵³ See A. Vermeer-Künzli, 'Nationality and EU citizenship' in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis; L. Azoulai, 'The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law', *EUI Working Paper LAW* 2014/14; A. Vermeer-Künzli, 'Where the Law becomes

Third, the implementation of the EU specific provisions by way of horizontal cooperation among the Member States (Article 23(1) TFEU), or by way of vertical cooperation among the Member States and the Union bodies or institutions¹¹⁵⁵ without the express consent of the receiving non-EU countries is considered by international legal scholars as a stark violation of the most fundamental general principles of international law: equal state sovereignty and non-intervention in the domestic affairs of States.¹¹⁵⁶ Last, but not least, the EU primary provisions are criticised for introducing a terminological confusion as they do not clarify precisely what is the substantive scope of the EU citizenship right to equal protection abroad (Article 20(2)(c) TFEU). Instead, it leaves room for confusing the label Article 46 EU – Diplomatic and consular protection)¹¹⁵⁷ with the legal content (protection by the consular and diplomatic authorities)¹¹⁵⁸, while public international law establishes a clear division between the institution of consular protection and that of diplomatic protection.¹¹⁵⁹ Insofar as diplomatic protection is considered as included within the material scope of the EU citizenship right to equal protection abroad, the Union fundamental right is argued to amplify the divergence between the Union and international legal regimes.¹¹⁶⁰

Irrelevant: Consular Assistance and the European Union', (2011) *International and Comparative Law Quarterly*, 965-995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance', (2008) *ZaöRV*, 339-340; T. Stein, Interim Report on 'Diplomatic Protection Under the European Union Treaty', in *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, 'The Protection of EU Citizens: The Perspective of International law' in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper 2011/10*, 91-107.

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ Art. 35(3) TEU reads as follows: '*The [The diplomatic and consular missions of the Member States and the Union delegations in third countries] shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in Article 20(2)(c) of the Treaty on the Functioning of the European Union and of the measures adopted pursuant to Article 23 of that Treaty.*' While consular assistance types of services can be provided by the European Commission or Union civilian and military mission within the framework of other Union policies, such as humanitarian aid, or CSDP missions. Additional competences are conferred upon the Union delegations by the EEAS Decisions, see more on the Union role in providing help to Union citizens abroad in Chapter 4.

¹¹⁵⁶ See A. Vermeer-Künzli, *The Protection of Individuals by means of Diplomatic Protection*, *op.cit.*, 10 and 25; P. Vigni, *op.cit.*

¹¹⁵⁷ See the title of Art. 46 EU Charter.

¹¹⁵⁸ Except for the title of Art. 46 EU Charter, the legal concepts of 'consular protection' and 'diplomatic protection' are not expressly used by the EU primary provisions; the EU secondary provisions have so far referred only to consular protection. The concept of 'protection by the diplomatic and consular authorities' is different from the public international law concepts of 'consular protection' and 'diplomatic protection'.

¹¹⁵⁹ S. Touzé, 'Aspects récents (et choisis) de la protection consulaire des citoyens de l'Union européenne', in R.A.E. – L.E.A. 2011/I, 79. See also J. Dugard, *Seventh Report*, *op.cit.*, para 19: '*by providing for both consular assistance and diplomatic protection, the provision disregards the fundamental differences between these two mechanisms.*'

¹¹⁶⁰ See, in particular, J. Dugard, *Seventh Report*, A. Vermeer-Künzli, *op.cit.*; and S. Kadelbach, *op.cit.*

The aforementioned specific legal nature, foundation and implementation of the EU model of ensuring protection of EU citizens abroad have determined international legal scholars to challenge the legitimacy of the specific Union legal provisions in light of the existent international legal regime, and point out the high probability of future difficulties in the adequate implementation of the relevant EU Treaties provisions.¹¹⁶¹

It was shown in the previous two sections that the specific characteristics of the Union, in particular, its autonomy from the international legal order, cannot exonerate it from the obligation to respect the international treaties it concludes, and other treaty provisions to which it is not party to, as long as they codify similar existing customary international legal norms. In the case of a conflict between customary international law and EU legal norms, the Union and the Member States have an obligation of interpreting the Union provisions or the national legislation implementing the relevant Union provisions in conformity with the customary international legal norms. If the conflict cannot be solved by way of conform interpretation, then the Union institutions or the individuals whose interests have been violated can ask the Court to pronounce the invalidity of the EU secondary norms directly based on customary international law¹¹⁶², insofar as the three conditions established in the *ATAA* judgment are met. First, the customary international law invoked is calling into question the competence of the EU to adopt the challenged act. Second, this EU secondary act is *'liable to affect rights which the individual derives from EU law or to create obligations under EU law in this regard.'* Third, the EU committed *'a manifest error of assessment concerning the conditions for applying those principles.'* Before pronouncing the fundamental incompatibility of the EU legal regime with the relevant public international legal norms, there are certain legal nuances which will be discussed in the following section, and which might present the alleged normative conflict in a different light.

First of all, it was shown in the previous chapter that the current public international legal regime governing consular and diplomatic protection of individuals has evolved from the traditional *Barcelona Traction* form under the impact of international human rights law. Evidence of such evolution was found, first, in the States' recent practice of exercising consular and/or diplomatic protection as a sort of obligation for ensuring the protection of individuals in cases of violation of fundamental human rights, or of extreme distress. Second, a growing domestic jurisprudence was identified, whereby domestic courts accept their jurisdiction to review individuals' complaints against the passiveness, or insufficient,

¹¹⁶¹ *Ibid.*

¹¹⁶² See inter alia, *Hungary v Slovakia*.

inadequate action of the executive to help nationals in such cases. This practice of the domestic executives and judiciaries was argued to be capable of nuancing the traditional portrayal of these legal instruments as discretionary State's rights. The 2006 ILC Articles on Diplomatic Protection have already introduced progressive developments to the traditional diplomatic protection institution as regards its definition and foundation, while further legal advancements have impacted on both consular and diplomatic protection institutions post-2006. Additionally, the fact that the Member States' exercise of their Union obligation to protect the Union citizens abroad has not so far been opposed by third countries could be interpreted as substantially contributing to the formation of an international custom recognising an individual right to consular protection, and secondly to the creation of an international custom recognising the Union specific regime as legitimate within the general international legal framework.

In the following paragraphs each of the specific aspects of the Union legal regime governing the protection of Union citizens abroad (i.e. the legal nature of the equal protection treatment, the non-nationality premise of the protection treatment, and the lack of express consent on the part of third countries) will be assessed from the perspective of their conformity with the current international legal framework.

The first section will argue that the slow but steady formation of a customary international norm recognising a limited duty of States to exercise consular and diplomatic protection of individuals, as demonstrated in the previous chapter, brings the public international legal institutions closer to the specific Union meaning of these mechanisms. Furthermore, the international and Union legal regime are not in a passive relationship, but they are in a mutually normative influencing relationship, where the international legal provisions inform the Union-specific provisions, while the latter contribute to the formation of a customary international norm, by supporting the idea of a limited State duty to exercise equal protection of individuals abroad. The objective of ensuring protection of individuals abroad, and in particular human rights, which drives both international¹¹⁶³ and Union mechanisms, shortens the gap between the specific norms of the two legal orders.

The second section tackles the issue of whether the European Union citizenship fulfils the 'nationality of claims' requirement under the international legal framework. In particular, it will address the main critiques brought to the Union citizenship as a legal concept upholding the edifice of the specific Union exercise of equal consular and diplomatic

¹¹⁶³ See J. Dugard, *First Report on Diplomatic Protection*, *op.cit.*.

protection of Union citizens. Namely, is the Union citizenship an autonomous legal concept from the Member State nationality, or does it have a purely dependent status vis-à-vis the domestic citizenship?; is the Union citizenship creating direct links between the Union citizen and all the Member States, and between the Union citizen and the Union?

The section will also address one of the fiercest criticisms of the Union citizenship as the premise of the Union regime of ensuring protection of Union citizens abroad, that is: its 'genuineness' and 'effectiveness' as required by the *Nottebohm* doctrine. In answering the latter question, this thesis relies on the conclusions reached in Chapter 2, namely, that the current international law has discarded the *Nottebohm* genuine link requirement for single or dual citizenship cases. It will be pointed out that the absolute requirement of nationality for diplomatic and consular protection claims under international law is slowly being replaced with other links considered as better reflecting the close connection between an injured individual and a State that could offer protection. For instance, residence can reflect the individual's integration into a national society and could thus be considered a social link legitimating the exercise of consular and diplomatic protection. As pointed out in Chapter 2, 'residence' is increasingly recognised as a legitimate premise for a State's exercise of consular and diplomatic protection functions. The 'Union citizenship' link could be interpreted as falling under this developing international trend which has recently recognised as legitimate foundation for the exercise of consular and diplomatic protection other connecting links than nationality.

This section will conclude by addressing the issue of third countries' consent to the exercise of the EU model of protecting Union citizens abroad. It will be argued that, in spite of the Member States and the Union's failure of obtaining the express consent of third countries to its inter-governmental and supranational model of securing protection of Union citizens abroad, there is a geographically widespread and longstanding practice confirming the international legitimacy of the EU specific model which could be argued to pre-empt third countries from opposing, in the future, the exercise of the EU model based on their lack of consent.

1. The legal nature of consular and diplomatic protection of individuals under the EU legal order and contemporary international law

Chapter 2 presented the evolution of consular and diplomatic protection within the public international legal framework, from their incipient forms in antiquity, taking clear shape during the formation of the nation-State as exclusive rights of the State, being formally recognised as institutions of public international law in the 19th century, and then starting to experience a revolutionary transformation post-World War II under the impact of the changing public international relations and law, and the development of international human rights. It is currently evident that the traditional definition of diplomatic protection as stated by the ICJ in *Mavrommatis*¹¹⁶⁴ and *Barcelona Traction*¹¹⁶⁵ judgments is outdated and has been replaced by a more modern definition provided in 2006 by the ILC¹¹⁶⁶ and confirmed by the ICJ, in 2007,¹¹⁶⁷ as reflecting current general customary international law. The changes brought to the legal definition of diplomatic protection are not spectacular, but they constitute a salient step in the evolution of this international institution, which for centuries has denied any role to the individual in its exercise.¹¹⁶⁸ The contemporary definition of diplomatic protection emphasises its procedural remedial nature and the role of the State as the means to invoke the international responsibility of a foreign State for the injuries inflicted upon the nationals of the Applicant State.¹¹⁶⁹ The role of the individual rights and interests are thus expressly recognised within the definition of the international legal mechanism of diplomatic protection. The individual rights are recognised as the premise of the mechanism.

However, the legal nature of consular and diplomatic protection has not drastically changed. It is still defined as a right of the State of nationality, which has however lost its complete discretionary power, since domestic judiciaries increasingly accept jurisdiction to review the executive's decision-making procedure in terms of arbitrariness, discrimination,

¹¹⁶⁴ *Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgments, P.C.I.J. Reports 1924, Series A, No 2.

¹¹⁶⁵ *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment, I.C.J. Reports 1970, p. 3.

¹¹⁶⁶ See Art.1.

¹¹⁶⁷ In the *Diallo* case, the ICJ completely endorsed the ILC Art. 1 on Diplomatic protection as it had been finally adopted by the ILC in 2006: 'The Court will recall that under customary international law, as reflected in Article 1 of the draft Articles on Diplomatic Protection of the International Law Commission (hereinafter the "ILC"), "diplomatic protection consists of 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 of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (Article 1 of the draft Articles on Diplomatic Protection adopted by the ILC at its Fifty-eighth Session (2006), ILC Report, doc. A/61/10, p. 24).' ICJ Judgment on Preliminary Objections of 24 May 2007, para. 39.

¹¹⁶⁸ See more details on this issue in Chapter 2.

¹¹⁶⁹ See Art. 1 of the 2006 ILC Articles on Diplomatic Protection.

good faith and soundness.¹¹⁷⁰ Second, Chapter 2 also gathered considerable practice of the executives and judiciaries around the globe contributing to the formation of a custom whereby States accept certain obligations to exercise diplomatic protection for their nationals abroad. The executive has to live up to the legitimate expectations of the nationals in terms of receiving a similar consular and diplomatic protection response as other nationals have received in similar situations. Practice also seems to support a State obligation to take diplomatic protection action in cases of grave violation of fundamental rights of the individual by foreign countries. It is only a matter of time until a customary norm will be recognised along the lines presented by Rapporteur Dugard in his initial proposal for Article 4 ILC Articles on Diplomatic protection as enshrining a State duty to exercise diplomatic protection in cases of violation of *jus cogens* norms. Third, it was pointed out in Chapter 2 that new actors are increasingly accepted on the international sphere in addition to the State of nationality, to exercise consular and diplomatic protection of individuals in third countries. Based on the numerous bilateral and multilateral consular and diplomatic cooperation agreements,¹¹⁷¹ States have agreed to share the responsibility of ensuring protection of their nationals abroad, signalling thus that the international community is more readily accepting non-nationality States exercising what used to be a function exclusively exercised, some decades ago, by the State of nationality.

The recognition of the individual's rights within the legal definition of the international institution of diplomatic protection, and of the *statu nascendi* State duty to exercise diplomatic protection of nationals conceptually bring the contemporary international mechanism of diplomatic protection closer to the Union fundamental right to equal protection abroad of the unrepresented EU citizens. Both the EU and the international legal order accept the limitation of the State's discretion to exercise protective measures of the individual. While the trends are fuelled by a similar objective safeguarding the life and rights of individuals, the

¹¹⁷⁰ See more details in Chapter 2, Section V.2.b – National jurisprudence.

¹¹⁷¹ See, for instance, the Accord entre la Bolivie, la Colombie, l'Equateur, le Pérou et le Venezuela relative aux attributions des consuls respectifs dans chacune des Républiques contractantes of July 1911. Consular services for Libyans were provided by different States in different parts of the world, for instance: Jordan in Spain, by Lebanon in France and Ghana, by Iraq in Iran and Pakistan, and by the UK in other countries. The UK may provide consular services for citizens of some Commonwealth countries: Ghanaians, Canadians and Sri Lankans in the absence of consulates of those States in third countries. Australia began issuing visas for New Zealanders in Argentina in 1984, and providing services for Papua New Guineans in 1975. *inter alia*, the Helsinki Convention on Nordic Co-operation (hereinafter the Helsinki Treaty), concluded on 23th of March 1962 between the Scandinavian countries (Denmark, Sweden, Finland, Iceland and Norway), or the Agreement on Consular Assistance and Cooperation signed between the three Baltic States of Estonia, Latvia and Lithuania, before they acceded to the EU on 5 February 1999. For the entire list of bilateral and regional agreements between the European countries on consular cooperation, see Chapter Three, Section 2.1.2 of the *CARE Report*. See also Lee & Quigley, *Consular Law and Practice*, *op.cit.* 62ff.

content and actors of the ‘duty to protect’ trend are different in the EU legal order from public international law. The EU inter-governmental model of protection does not take into consideration, for the moment, the duty to exercise consular and diplomatic protection as such, but it imposes a duty to exercise equal protection treatment to all unrepresented Union citizens, irrespective of their nationality and restricted to six situations. The public international law is now experiencing the development of a ‘humanization’ trend of consular and diplomatic protection whereby the State of nationality has a duty to exercise consular and diplomatic protection in cases of grave violations of human rights abroad. Due to the differences in content and actors, we cannot speak of a ‘conflict’, ‘divergence’, or ‘fundamental inconsistency’ in relation to the legal nature of the protection of individuals abroad recognised under the international, general and EU, regional legal orders.¹¹⁷²

2. The relation between the ‘Union citizenship’ and the ‘nationality of claims’ requirements for the exercise of consular and diplomatic protection of individuals

The international and EU legal mechanisms of protecting natural persons abroad rely on different premises: ‘State nationality’ versus ‘European Union citizenship’. The fact that the EU citizenship is not the citizenship of a nation State, but a supra-national type of citizenship, conferred by an international organisation, has spurred fervent critiques against the EU provisions for creating a legal regime based on a premise that is clearly incompatible with the ‘nationality of claims’ requirement mandatory for the international admissibility of consular and diplomatic protection of individuals.¹¹⁷³

¹¹⁷² For the ‘conflict’, ‘divergence’, or ‘fundamental inconsistency’ critiques, see, in particular, A. Vermeer-Künzli, *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis, 86-98; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339-340; S. Kadelbach, ‘Union citizenship’, *NYU Jean Monnet Working Paper* 9/03.

¹¹⁷³ A. Vermeer-Künzli, ‘Nationality and EU citizenship’ in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339-340; T. Stein, Interim Report on ‘Diplomatic Protection Under the European Union Treaty’, in *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, ‘The Protection of EU Citizens: The Perspective of

International legal scholars have levelled three main criticisms against the Union citizenship as a foundation of the Union regime governing the protection of Union citizens abroad: first, the Union citizenship is not a State citizenship; second, the derivative nature of Union citizenship affects both the acquisition and essence of the Union citizenship, and thus requires that a solid, ‘genuine’ and ‘effective’ social link exists between the citizens of the Member States and all the other non-nationality Member States; and, third, that these social links are not currently established within the EU.¹¹⁷⁴ These aspects are said to place the Union regime in conflict with the traditional international legal norms establishing the ‘nationality of claims’ requirement as a mandatory prerequisite, especially for the exercise of diplomatic protection of individuals. The current public international legal norms are seen as continuing to uphold the traditional conception of State citizenship as the legitimate premise of the consular and diplomatic protection of individuals, and requiring its ‘genuineness’ and ‘effectiveness’, especially in relation to the exercise of diplomatic protection, so as to be held admissible on the international plane.¹¹⁷⁵ The nature of the EU citizenship, its relationship with the citizenship of the Member States and the connection it creates between the EU citizens and the Member States will be examined for the purpose of understanding whether it can be viewed as a legitimate bond justifying – from the perspective of international law – the inter-governmental model of securing protection of EU citizens abroad.

First, the nature of the Union citizenship will be explored for the purpose of establishing its relation with the Member States’ nationalities and the extent to which the modality of acquiring Union citizenship affects its essence. The section will assess the extent

International law’ in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

¹¹⁷⁴ S. Kadelbach, ‘Union citizenship’, Jean Monnet Working Paper 9/03; L. Azoulai, *The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law*, *EUI Working Paper LAW* 2014/14; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965-995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339-340; T. Stein, ‘Interim Report on Diplomatic Protection Under the European Union Treaty’, in *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, ‘The Protection of EU Citizens: The Perspective of International law’ in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

¹¹⁷⁵ S. Kadelbach, ‘Union citizenship’, Jean Monnet Working Paper 9/03; L. Azoulai, *The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law*, *EUI Working Paper LAW* 2014/14; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965-995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339-340; T. Stein, ‘Interim Report on Diplomatic Protection Under the European Union Treaty’, in *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7.

of the Union citizenship's autonomy from the Member State nationality, which will dictate whether the content of Union citizenship brings it closer to the Member States' citizenship or to a kind of supra-national cosmopolitan citizenship that is completely detached from any similarity with the State citizenship. The clarification of the content and links created by the EU citizenship will determine the extent of the so-called 'derogation'¹¹⁷⁶ of the EU inter-governmental model of protection of EU citizens from the 'nationality of claims' international requirement for the exercise of consular and diplomatic protection of individuals. The section will conclude by pointing out that the EU citizenship has not reached that level of being completely detached from the nationality of the Member State(s), and the fact that the content of the EU inter-governmental model of protection is actually an equal treatment right, make the derivative nature of the EU citizenship a supporting element of this model. Under the EU inter-governmental model of protection, one Member State assumes, through EU primary law, an obligation to assist a national of another Member State. Therefore the right to equal protection abroad is earned by an EU citizen through their possession of another Member State nationality. The EU citizenship works only as an umbrella framework multiplying the bonds existing between all EU citizens and all the Member States.

The issue that has for a long period of time troubled the public international legal literature is whether the nationality of claims has to pass the test of the *Nottebohm* 'genuine' and 'effective' link between the individual and the State exercising protection. The EU citizenship was argued to not have created a 'genuine' and 'effective' link between all EU citizens and all the Member States.¹¹⁷⁷ In Chapter 2, it was pointed out that the *Nottebohm* principle of 'genuine' and 'effective' nationality link was discarded by current principles of customary international law in the case of single nationality and replaced with other principles in the case of dual nationality. It is thus important to establish first whether the EU citizen still needs to fulfil the international requirement of a 'genuine' and 'effective' social link, and if not, whether, in light of the legal content of the EU citizenship right to equal protection abroad, EU citizenship needs to reflect certain social links that are capable of creating a bond between all the EU citizens and all the Member States, thus justifying the protection of an EU citizen by a non-nationality Member State.

The section will conclude by showing that the increased autonomy and effectiveness of EU citizenship rights and recognition of EU citizens' civic participation has recently

¹¹⁷⁶ *Ibid.*.

¹¹⁷⁷ See A. Vermeer-Künzli, 'Nationality and EU citizenship' in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis, *op.cit.*

contributed to a more pronounced sense of social solidarity among the EU citizens, and a connection between all EU citizens and the EU countries. Notwithstanding the conceptualisation of EU citizenship as both a functional equivalent plurality of Member States nationalities and supra-national citizenship, and the elimination of the *Nottebohm* requirement of genuine nationality, the reality is that the exercise of diplomatic protection is still premised on State nationality, which the EU citizenship is not, and it is arguable whether the EU integration process has reached such a level whereby the EU citizenship confers a social bond between all EU citizens and all EU countries justified under public international law. The last part of this section assesses the conduct of third countries towards the EU's exercise of the inter-governmental model of protection of EU citizens. It will demonstrate that the international legal academic objection to the EU model failing to obtain the consent of third countries to the EU's 'derogation' from the traditional State of nationality international model of exercising of consular and diplomatic protection of individuals is no longer an issue.

**a. The relation between Union citizenship and Member State(s) citizenship(s)
– derivative or autonomous Union citizenship?**

Professor Dugard contended in his Final Report on Diplomatic Protection submitted to the ILC that the derivative nature of the EU citizenship and the fact that the Union does not have any power over the Member States' nationalities confirms that the Union citizenship does not fulfil the 'nationality of claims' international requirement for the exercise of consular and diplomatic protection, and consequently the Union legal regime is incompatible with the current international legal framework.¹¹⁷⁸

What exactly Union citizenship is, as a legal status of the individual, is a complex question, which, thus far, has given rise to numerous scholarly writings without arriving at a final single answer generally accepted by the legal and political literature.¹¹⁷⁹ Some scholars have concentrated on the empty content of the Union citizenship, labelling it as a '*pie in the sky*' or a '*cynical exercise in public relations on the part of the High Contracting Parties*'.¹¹⁸⁰ In order to understand the extent of the derivative nature of the Union citizenship, the Treaty provisions will first be assessed, followed by their interpretation by the CJEU. In particular, it

¹¹⁷⁸ See J. Dugard, *Seventh Report, op.cit.*, para. 19, p.9.

¹¹⁷⁹ See D. Kochenov, R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text', (2012) *ELRev.*, 369.

¹¹⁸⁰ J. Shaw, *op.cit.*; J. Weiler, *The Constitution of Europe*, Cambridge University Press, 1999, 344; J. Weiler, 'The Selling of Europe: The Discourse of European Citizenship in the IGC 1996', NYU Jean Monnet Working Paper 1/1996.

will be explored whether the derivative nature is limited to the criteria of acquisition of the Union citizenship, or does it go further and affect also the substance of the Union citizenship? Does Union citizenship create links between all its citizens and all of its Member States?

Since the establishment of the Union citizenship in 1993, the criteria of acquiring this ‘supranational’ citizenship has been the citizenship of any of the EU’s States. Therefore, unlike State nationality, which is commonly acquired based on domestic criteria such as *jus soli*, *jus sanguinis*, or succession factors¹¹⁸¹, *ius tractum*¹¹⁸² has since been the criteria recognised by the Union legal order for the acquisition of Union citizenship. The relevant Treaty provisions¹¹⁸³ do not make the rights forming an integral part of the Union citizenship substantive scope dependent on the Member State’s citizenship. State citizenship functions only as a factor triggering the Union citizenship, after this moment, it no longer has the power to prohibit, limit, or alter the Union citizenship rights. On the contrary, Article 18 TFEU expressly prohibits discrimination based on nationality, and thereby the Member States are prohibited from altering the substance of Union citizenship by way of State nationality related rules.

Article 20 TFEU provides a list of rights that are automatically conferred to all Union citizens, and are argued to have no equivalent correspondent in the national laws.¹¹⁸⁴ For instance, EU citizens enjoy the right of residence¹¹⁸⁵ and free movement around the Union, which gives access to numerous other EU rights, such as: access to work, establishment of a business, and residence all over the territory of the EU, while having the right to be accompanied by family members – irrespective of their nationalities. In addition to residential and economic rights, the EU citizenship confers also political rights, such as the right to vote for the European Parliament and local elections all over the Union, no matter where they reside, as well as the right to submit candidature for the European Parliament elections. EU citizens also have ‘*the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language*’.¹¹⁸⁶ They also benefit from the ‘*protection by the diplomatic and consular authorities of any Member State on the same*

¹¹⁸¹ See also J. Dugard, Commentary to Art. 4 on State nationality of a natural person.

¹¹⁸² See D. Kochenov, ‘Ius Tractum of Many Faces’, (2009) Columbia J.E.L., 169.

¹¹⁸³ In particular Arts. 19-24 TFEU.

¹¹⁸⁴ D. Kochenov and A. Dimitrovs, ‘EU Citizenship for Latvian “Non-Citizens”: A Concrete Proposal’, *NYU Jean Monnet Working Paper* 14/13.

¹¹⁸⁵ Art. 21(1) TFEU; Council Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State 2004 O.J. (L 158) 77.

¹¹⁸⁶ See more in Art. 20(2)(d) and Kochenov, ‘Ius Tractum of Many Faces’, *op.cit.*

*conditions as the nationals of that state*¹¹⁸⁷ in the States around the world where their own Member State of nationality is not represented.

In order to enjoy some of these rights, the Court has developed certain conditions, which are not related to the Member State nationality, but to movement within the Union or another cross-border element¹¹⁸⁸, and a certain degree of integration into the Member State of residence.¹¹⁸⁹ This extensive list of rights is part of the Union citizenship legal concept. Whether one chooses to look at the Union citizenship as a plurality of citizenships¹¹⁹⁰, multi-layered citizenship,¹¹⁹¹ federal citizenship,¹¹⁹² a ‘transnational status’,¹¹⁹³ a ‘new form of membership that transcends the boundaries of the nation-state’,¹¹⁹⁴ a political concept independent of the concept of nationality¹¹⁹⁵, this extensive list of rights still forms an integral part of the Union citizenship automatically conferred upon all Union citizens. As rightly pointed out by Kochenov,¹¹⁹⁶ the precise factor established as criteria for acquisition of Union citizenship as an individual’s legal status should not be construed as impairing the very substance of this legal status.

Regardless of the legal definition of Union citizenship that we choose to adopt,¹¹⁹⁷ there is one aspect that is common to all of them, namely: the EU citizenship was never

¹¹⁸⁷ See Arts. 20(2)(c) and 23 TFEU.

¹¹⁸⁸ ¹¹⁸⁸ See Arts. 20(2)(c) and 23 TFEU.

¹¹⁸⁸ The CJEU has so far been rather generous in finding a cross-border element either in the activity itself that is carried out across borders or from the residence in different countries, see C-158/96 *Kohl v Union des Caisses de Malade* [1998] ECR I-1931; K. Lenaerts, “‘Civis europaeus sum’: from the cross-border link to the status of citizen of the Union”, Online Journal on free movement of workers within the European Union, 2011/3.

¹¹⁸⁹ The integration is given by a certain period of residence and financial resources resulting from employment or self-employment that will guarantee the EU citizen will not become a burden on the social services of the Member State of residence. Following fulfilment of the conditions, access to welfare services is recognised. See N. Reich, *Understanding EU law*, Intersentia Antwerpen Oxford (2005), 109-112.

¹¹⁹⁰ Gareth T. Davies, ‘The entirely conventional supremacy of Union citizenship and rights’ in J. Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* *EUI RSCAS 2011/62* and AG Cruz Villalon Opinion in Case C-247/08 *Notary Profession* [2009] ECR I-9225.

¹¹⁹¹ R. Baubock, ‘The Three Levels of Citizenship within the European Union’ Special Issue EU Citizenship: Twenty Years On of the (2014) German Law Journal, 751.

¹¹⁹² D. Kochenov, ‘Ius Tractum...’, *op.cit.*, R. Scutze, *op.cit.*

¹¹⁹³ Y. Soysal, ‘Towards a Postnational Model of Membership’ in G. Shafir, *The Citizenship Debates*, Minneapolis, University of Minnesota Press (1998), 189, 189 and 198.

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ See AG Maduro Opinion in *Rottmann*, *op.cit.*, para. 35; Matthew J. Elsmore and P. Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, (2007) Ybk. Eur. L., 57; Francis G. Jacobs, ‘Citizenship of the European Union – A Legal Analysis’, (2007) Eur. L.J., 591.

¹¹⁹⁶ D. Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, (2009) Colum. J. Eur. L., 169, 188.

¹¹⁹⁷ The citizenship of the European Union is a legal concept that has been under constant legal debate and an ever-changing area of EU law, see M. Dougan, Niamh Nic Shuibhne and E. Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Hart Publishing (2012); D. Kochenov and R. Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’, (2012) Eur. L. Rev., 369.

intended to replicate the traditional concept of State citizenship.¹¹⁹⁸ Just as the European Union is a legal entity different to any of the classical legal concepts of ‘State’ and ‘international organisation’, also its legal products, such as the European Union citizenship, are different from the similar legal products of these classical legal concepts, such as the traditional conception of State citizenship. Therefore, even if the Union citizenship uses the concept of ‘citizenship’, its modes of acquisition are different from the criteria of acquisition of State nationality. Namely, birth, residence, succession do not apply to the Union citizenship, which requires specific criteria of acquisition – the citizenship of any of the EU’s Member States (Article 20 TFEU).¹¹⁹⁹

The extent of the derivative nature of the Union citizenship is expressly limited by the Treaty provisions by way of describing the Union citizenship as ‘additional to’, instead of ‘dependent on’ the Member State’s citizenship.¹²⁰⁰ Article 20 TFEU has replaced the previous ‘complementary’ status of EU citizenship in its relationship with the Member State’s nationality with ‘additional’, which determined several established academics to support an idea of an increased autonomy of EU citizenship from the national one.¹²⁰¹ Secondly, the derivative nature of the EU citizenship is further limited by the CJEU which describes the Union citizenship as ‘the fundamental status of nationals of the member states’,¹²⁰² destined to become the primary identity of the Union citizen.¹²⁰³ Furthermore, the enjoyment of EU

¹¹⁹⁸ E. Olsen, ‘The Origins of European Citizenship in the First Two Decades of European Integration’, (2008) J. Eur. Public Policy, 40; D. Kochenov, ‘The Present and the Future of EU Citizenship: A Bird’s Eye View on the Legal Debate’, *NYU Jean Monnet Working Paper* 02/12.

¹¹⁹⁹ See more on the intricacies of the Union citizenship acquisition and its autonomous status from the Member States nationalities in D. Kochenov, ‘Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, *op.cit.*.

¹²⁰⁰ See, *inter alia*, G. Martinico and R. Castaldi, Rethinking (EU) citizenship, Special issue of Perspectives on Federalism, Vol. 3, issue 2, 2011; A. Schrauwen, ‘European Citizenship in the Treaty of Lisbon: Any Change at all’ (2008) *Maastricht Journal of European and Comparative Law*, 55, 59-60; J. Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, *EUI RSCAS Working Paper* 2011/62.

¹²⁰¹ After the Lisbon amendment, there is a noteworthy turn of phrase in the key provisions on Union citizenship. Art. 9 TEU (placed in the very first Title of the TEU on Common fundamental provisions on the EU) and Art. 20 TFEU (the specific Treaty Article on citizenship) stipulates that the citizenship of the Union shall be ‘additional to’ instead of ‘complementary to’ the national citizenship. According to Shaw and de Waele, the difference in terminology is not a mere cosmetic change, but signals that the Union citizenship should now be seen as a self-standing, independent status from national citizenship, see more in J. Shaw, ‘The Treaty of Lisbon and Citizenship’, *The Federal Trust European Policy Brief*, June 2008; and H de Waele, ‘European Union Citizenship: Revisiting its Meaning, Place and Potential’ (2010) *European Journal of Migration and Law*, 319.

¹²⁰² See Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-209/03 *Bidar* [2005] ECR I-2119; Case C-135/08 *Rottmann* [2010] ECR I-0000, para. 43; Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41.

¹²⁰³ This pronouncement of Union citizenship which ‘is destined to be the fundamental status’ of the nationals of the EU countries has been repeated in a long line of case-law. See, for instance, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-224/98 *D’Hoop v. Office national de l’emploi* [2002] ECR I-6191, para. 28; Case C-103/08 *Gottwald*, Judgment of 1 October 2009, nyr, para. 23; Case C-544/07 *Rüffler*, Judgment of 23 April

citizenship rights is established in EU primary and secondary legislative measures autonomously interpreted by the CJEU, while the Member States' prerogatives regarding acquisition¹²⁰⁴ and loss of nationality have been recently limited by the CJEU.¹²⁰⁵

The CJEU has recently advanced the autonomous character of the EU citizenship by replacing the condition of moving into another national community in order to establish the scope of EU law and thus assess the conformity of national legislation with EU citizenship related norms.¹²⁰⁶ The Court has framed the Union citizenship as a rights based paradigm, where the substance of the Union citizenship rights is so important for the individual that in certain conditions it needs to be completely detached from cross-border and economically active requirements. The *Rottmann*¹²⁰⁷ and *Zambrano*¹²⁰⁸ judgments, and to a certain extent also *Dereci*¹²⁰⁹ and *McCarthy*,¹²¹⁰ are fundamental stepping-stones for the creation of a truly autonomous status of the Union citizenship.¹²¹¹ Since then, the conceptual paradigm reflecting the gist of the Union citizenship is '*the genuine enjoyment of Union citizenship rights*'.¹²¹² This precise paradigm as construed in the *Zambrano* judgment excludes any hierarchical relationship between the Union citizenship and Member States' citizenship, instead, these should be seen as two different legal statuses closely inter-linked but at the same time also substantially independent. One might even go as far as to argue that the *Rottmann* judgment actually makes Member States citizenship dependent on the Union citizenship since *via* the

2009, nyr, para. 62; Case C-135/08 *Rottmann* [2010] ECR I-0000, para. 43; Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41. In the last two cases there has been a change of terminology, the Court of Justice has no longer described the Union citizenship in terms of a future achievement ('is destined to be'), but already as a present result ('is intended to') which the citizens of the Member States can thus currently benefit of.

¹²⁰⁴ See C. Jacqueson, 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship', (2002) EUR. L. REV. 260, 262.

¹²⁰⁵ Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000.

¹²⁰⁶ See, *inter alia*, Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

¹²⁰⁷ Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000.

¹²⁰⁸ Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

¹²⁰⁹ Case C-256/11 *Murat Dereçi, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké & Dragica Stević v. Bundesminister für Inneres* [2011] ECR I-0000.

¹²¹⁰ Case C-434/09 *McCarthy* [2011] ECR I-0000.

¹²¹¹ The recent judgment of the CJEU in the *Dano* case (C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, Judgment of 11 November 2014) is a step backward from this case law affirming the autonomous nature of EU citizenship, since there the Court of Justice held that the (non-economically active) EU citizen's rights had to be derived from the secondary legislation on free movement, and not simply from Art. 18 TFEU. The judgment permitted Member States to limit enjoyment of social benefits for economically inactive EU citizens so that they do not become an unreasonable burden on their social assistance system. However this judgment has to be understood in the specific circumstances of the case, where Ms Dano did not enter Germany in order to look for work, nor was she actively seeking work in that country. It is unclear if the judgment would have remained the same if Ms Dano had at least tried to find work.

¹²¹² Case C-34/09 *Ruiz Zambrano*, para. 42: 'the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'; Lenaerts characterised the *Zambrano* judgment as 'emancipating EU citizenship from the constraints inherent in its free movement origins', see K. Lenaerts, "'Civis europaeus sum': From the Cross-border Link to the Status of Citizen of the Union", (2011) F.M.W. 6, 7.

latter's legal status an individual can retain their Member State nationality. Furthermore, the Union increased its say in the acquisition of Union citizenship by increasing its power over nationality matters reserved to the Member States. In spite of the CJEU recognising the Member States' exclusive competence over the acquisition and loss of nationality matters, it also required the Member States to have due regard to EU law, even when exercising these exclusive powers.¹²¹³ The derivative nature of the EU citizenship was furthermore diminished when the CJEU permitted the Union citizens to use this legal concept against one's own Member State of nationality with the purpose of eliminating obstacles to free movement of persons¹²¹⁴, even non-discriminatory ones.¹²¹⁵

In spite of the revolutionary steps¹²¹⁶ made by the CJEU in constructing the autonomous character of the EU citizenship, each one of these steps seems to have been followed by prudent restrictions preventing the extension of the unconditional standing of the Union citizenship beyond extreme circumstances.¹²¹⁷ Access to social benefits still requires proof of a real link with the Member State of residence, while economically active citizens are more readily given access to their Union citizenship rights.¹²¹⁸

The relationship between the EU citizenship and the nationality of the Member States cannot currently be portrayed as a one-way dependent relationship of the supranational citizenship on the Member States' citizenships. The EU legal order, through its different legal products such as the principle of non-discrimination, European Union citizenship, protection of fundamental rights, and fundamental freedoms, has gradually limited the Member States' discretionary powers over nationality-related matters by way of limiting their discretionary

¹²¹³ See *Rottmann*, para. 41.

¹²¹⁴ Case C-192/05 *K. Tas-Hagen en R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451; Case C-224/98 *Marie-Nathalie D'Hoop v. Office national d'emploi* [2002] ECR I-1691; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639.

¹²¹⁵ Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639. The CJEU's judgments, such as *Martinez Sala* (Case C-85/96 *Martínez Sala v. Bayern* [1998] ECR I-2691), *Garcia Avello* (Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613) and *Grunkin* (Case C-353/06 *Paul and Grunkin* [2008] ECR I-7639), holding national laws of both the States of residence and nationality as discriminatory, have further contributed to creating equality between the different links the individual has with the Member States, of both nationality and (actual or future) residence.

¹²¹⁶ Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193; Case C-135/08 *Rottmann* [2010] ECR I-144; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

¹²¹⁷ The CJEU judgments of *Dano*, *Dereci* and *McCarthy* seem to prove that in spite of the *Micheletti*, *Rottmann* and *Zambrano* cases, the cross-border and 'economically-oriented' approach of the Court has never disappeared from the EU legal landscape. See also the commentary of the *Dano* case by D. Thym, 'EU Free Movement as a Legal Construction not as a Social Imagination', available at <http://eutopialaw.com/2014/11/13/eu-free-movement-as-a-legal-construction-not-as-social-imagination/>

¹²¹⁸ See Joined Cases C-523/11 and C-585/11 *Laurence Prinz v Region Hannover and Philipp Seeberger v Studentenwerk Heidelberg*, Judgment of 18 July 2013, and C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, Judgment of 11 November 2014.

decision-making on: withdrawal of citizenship;¹²¹⁹ conferring privileged rights to their citizens, while excluding non-national EU citizens;¹²²⁰ restricting¹²²¹ and banishing non-national EU citizens from their territory;¹²²² and even the Member States' powers to impose duties on their citizens, since they have to provide compelling reasons and pass a strict proportionality test justifying these duties that hinder the EU citizenship rights.¹²²³ To sum up, the derivative nature of the Union citizenship seems to be limited to a single moment in the existence of the EU legal concept, namely its acquisition by the citizens of the Member States. Furthermore, the EU has over time enlarged its influence over the Member States' power to regulate citizenship matters. The relationship between the Member State's and Union citizenship is one of 'additionality' whereby the former helps to acquire the latter, while the latter exists in parallel to the former and adds a list of economic, political and social rights to the list of domestic citizenship rights.¹²²⁴

In addition to emphasising the autonomous status of the EU citizenship from the Member States' citizenship, legal commentators and Advocates General have also portrayed EU citizenship as 'plurality of national citizenships', which creates equal bonds between the individual and the societies of all the Member States.¹²²⁵ Consequently, the concept of Union citizenship is a fortunate mix of trans-national and supra-national links and features which permit an interpretation of EU citizenship close to the public international 'nationality of claims' requirement, while also preserving its autonomous feature from the State nationality.

In addition to this transnational conception of the EU citizenship, there is also a supra-national conception whereby a direct sense of belonging of the EU citizen towards the European Union has been promoted. Many scholars have strongly criticised the EU

¹²¹⁹ See the *Rottmann* case.

¹²²⁰ See for the non-discrimination based on nationality case law, and for more details, D. Kochenov, 'Rounding Up to the Circle: The Mutation of the member States' Nationalities under Pressure from EU Citizenship', in *EUI RSCAS* 2010/23, available at http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3

¹²²¹ According to the *Jipa* case (Case C-33/07 *Jipa* [2008] ECR I-5157) the Member States have to follow strict conditions when imposing restrictions on access to their territory to non-national EU citizens: the conduct of the non-national EU citizen needs to constitute 'a genuine, present and sufficiently serious threat to one of the fundamental interests of society' and the restrictive measure envisaged is proportionate.

¹²²² Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11.

¹²²³ D. Kochenov, 'Rounding Up to the Circle: The Mutation of the member States' Nationalities under Pressure from EU Citizenship', *op.cit.*

¹²²⁴ There is also a scholarly opinion that EU citizenship could in the future supersede State citizenship; for commentary and critiques see, R. Bellamy, 'Evaluating Union citizenship: belonging, rights and participation within the EU', (2008) *Citizenship Studies*, 597.

¹²²⁵ G. Davies, 'The entirely conventional supremacy of Union citizenship and rights' in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law? EUI RSCAS Working Paper* 2011/62; Opinion of AG Villalón in the *Notaries* case, (Case C-47/08 *Commission v Belgium* [2011] ECR I-4105); Opinion of Póiaras Maduro, AG in Case C-135/08 *Rottmann* [2010] ECR I-0000; Opinion of AG Jacobs in Case C-168/91 *Kostantinidis* [1993] ECR I-1191.

citizenship for failing to reflect this sense of ‘Europeanness’,¹²²⁶ or for creating a truly direct link between the citizens and the Union as a community of values, which exists and transcends the Member States territory.¹²²⁷ Although Article 20(2)(c) TFEU establishes the non-nationality Member States as bearing primary responsibility to protect EU citizens, the EU institutions themselves have been also conferred direct roles. The exercise of consular protection of EU citizens by the Commission within the civil protection mechanisms outside the EU territory, or by the EU delegations on the basis of Article 35(3) TEU and Articles. 5(9) and (10) EEAS Decision, or by the Commission together with the EU delegations within the humanitarian aid mechanisms, were argued to require, from the perspective of public international law, that the Union citizenship reflects a direct solidarity link between the citizen and the Union.¹²²⁸

It is precisely this direct link between the Union and the citizen, rather than between the Member States and the Union citizens, which is more problematic to prove.¹²²⁹ The conditionality of the enjoyment of European citizenship rights on the existence of a ‘cross-

¹²²⁶ R. Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’, *op.cit.*

¹²²⁷ L. Azoulai, ‘The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law’, *EUI Working Paper LAW 2014/14*. The question of whether there is or is not a direct genuine link between the EU and the citizens of all the Member States or between the national and any of the other Member States falls under the prolific industry of the interdisciplinary topics of Europeanisation, and European identity. These topics have concerned political scientists, sociologists, geographers (e.g. M. Keith and S. Pile, *Place and the Politics of Identity*, Routledge (1993)), anthropologists (e.g. M. MacDonald, *Towards an Anthropology of the European Union*, European Commission (1993)) and historians (e.g. H. Mikkeli, *Europe as an idea and an identity*, Houndmills (1998)) and least but not last also legal scholars, see more in A. Favell, E. Recchi, T. Kuhn, Janne S. Jensen and J. Klein, ‘The Europeanisation of Everyday Life: Cross-Border Practices and Transnational Identifications Among EU and Third-Country Citizens’, State of the Art, EUCROSS Working Paper no.1/2011, available online at

http://www.eucross.eu/cms/index.php?option=com_docman&task=cat_view&gid=7&Itemid=157

¹²²⁸ A. Vermeer-Künzli, ‘Nationality and EU citizenship’ in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339-340; T. Stein, Interim Report on ‘Diplomatic Protection Under the European Union Treaty’, in *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, ‘The Protection of EU Citizens: The Perspective of International law’ in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper 2011/10*, 91-107; S. Kadelbach, ‘Union citizenship’, *NYU Jean Monnet Working Paper* 9/03.

¹²²⁹ Following the conclusions of *Section III – The EU supranational model of protecting EU citizens abroad and the reality of public international law governing the protection of individuals*, the general public international legal norms on consular and diplomatic protection of individuals cannot be extrapolated to the exercise of protective measures by the Union to its citizens abroad, since the international norms are purely inter-States norms, while the Union is an international organisation. However a certain link between the Union and the citizen needs to be proven, otherwise it could be argued that the Member States are using the veil of the Union to violated traditional and foundational principles of international law such as equally state sovereignty and non-interference in the domestic affairs of other States, and committing also an abuse of their State rights. The direct link between the Union and the citizen does not though need to fulfil the precise *Nottebohm* standards applied to the relation between an individual and a State.

border' element and 'economic activeness' of the citizen, and the diversity of national identities existing within the Union which have to be protected have been argued to hinder the creation of a truly direct social link between the Union citizen and the Union.¹²³⁰ In order to create this direct link, it was argued that the autonomous character of the Union citizenship needs to grow independently of the proof of the cross-border and/or economically active elements¹²³¹ that condition the application of many of the EU citizenship rights.¹²³² In other words Union citizenship needs to develop into something more than transnational integration¹²³³ in order to be considered as something more than a plurality of Member States nationalities.¹²³⁴ For the moment, the *Micheletti*,¹²³⁵ *Chen*¹²³⁶ and *Garcia Avello*¹²³⁷ judgments of the CJEU are viewed as promoting a conception of EU citizenship as a perfect functional equivalence of the Member States' nationalities.¹²³⁸ Furthermore the principle of non-discrimination based on nationality has significantly contributed to limit the derivative nature of the EU citizenship by limiting the Member States' powers in nationality matters, and strengthening the social ties between an EU citizen and other non-nationality States. For instance, the permanent banishment of an EU citizen from a particular Member State is prohibited.¹²³⁹ Furthermore, once residence in a new Member State is established, non-discrimination on the basis of nationality applies to EU citizens, sometimes, even in cases where they objectively fail to meet the minimal requirements set by EU secondary law necessary to establish residence at the moment of the dispute.¹²⁴⁰

¹²³⁰ See, *inter alia*, F. Strumia, *Supranational Citizenship and the Challenge of Diversity, Immigrant, Citizens and Member States in the EU*, Martinus Nijhoff Publishers (2013).

¹²³¹ On the criteria of being 'economically active' or 'self-sufficient' see Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. As to the cross-border requirement, see Case C-34/09 *Zambrano* [2011] ECR I-01177, para. 69.

¹²³² See L. Azoulay, *op.cit.*

¹²³³ L. Azoulay, 'La citoyenneté européenne, un statut d'intégration sociale' in Gérard Cohen-Jonathan (ed.), *Chemins d'Europe. Mélanges en l'honneur de Jean-Paul Jacqué*, Paris, Dalloz (2010).

¹²³⁴ G. Davies, 'The entirely conventional supremacy of Union citizenship and rights' in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* EUI RSCAS Working Paper 2011/62.

¹²³⁵ It has to be noted that the *Micheletti* judgment was delivered in 1992, parallel to the adoption of the Maastricht Treaty.

¹²³⁶ Case C-200/02 *Chen v. Sec'y of State for the Home Dep't* [2004] ECR I-9925.

¹²³⁷ Case C-148/02 *Garcia Avello v. Belgium* [2003] ECR I-11613.

¹²³⁸ See P. Magnoste, 'How Can One be European? Reflections on the Pillars of European Civic Identity', (2007) ELJ, 664, 671; Ulrich K. Preuss, 'Problems of a Concept of European Citizenship', (2007) ELJ, 280; Opinion of AG Maduro in the *Rottmann* case; and G. Davies, 'The entirely conventional supremacy of Union citizenship and rights', *op.cit.*

¹²³⁹ Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11

¹²⁴⁰ Case C-456/02 *Trojani v. CPAS* [2004] ECR I-7573. See also D. Kochenov, 'Rounding Up to the Circle: The Mutation of the member States' Nationalities under Pressure from EU Citizenship', *RSCAS 2010/23*, 15, available at http://cadmus.eui.eu/bitstream/handle/1814/13634/RSCAS_2010_23.corr.pdf?sequence=3

However, these scholarly criticisms against the Union citizenship for failing to deliver the objective of creating a true citizenship of the Union, and remaining at the level of a bundle of citizenships of the EU Member States,¹²⁴¹ can be turned into an argument in favour of the international legitimacy of the EU inter-governmental model of protecting EU citizens abroad.¹²⁴² For the moment the EU regime of protecting EU citizens abroad consists mostly of a non-discriminatory conferral of consular and diplomatic protection by Member State(s) represented *in situ*. The common current legal understanding of EU citizenship as a set of links between the individual and the EU Member States¹²⁴³ brings the Union citizenship closer to the international requirement of a State nationality premise for the consular and diplomatic protection.

It is thus evident that, from the perspective of public international law, the derivative origin of the EU citizenship is not actually problematic, but rather it can serve as a justification for the exercise of equal protective treatment of EU citizens abroad, since it is based on the Member State nationality and on the extension of ‘nationality’ like bonds to all EU Member States. The substantive scope of EU citizenship is independent of State nationality, while Member States have lost their powers to condition the enjoyment of EU citizenship rights based on domestic norms, and have seen their prerogatives over the acquisition and loss of nationality matters restricted for the purpose of ensuring the ‘genuine enjoyment of the substance of the rights conferred by virtue of Union citizenship.’ As rightly pointed out by Advocate General Maduro, ‘[Member State citizenship and Union citizenship] are two concepts which are both inextricably linked and independent. Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality.’¹²⁴⁴ The EU citizenship is premised on a certain State nationality rationale that, through the EU citizenship, is multiplied to a system of functionally equivalent links between all EU citizens and all the EU Member States. Therefore, not only does the derivative nature of EU citizenship not discard it as a separate legal status of the individual,

¹²⁴¹ See G. Davies, J Heymann, ‘De la citoyennete de l’Union comme revelateur de la nature de l’Union europeenne’ (2010) *Europe*, No. Juin 2010, 8.

¹²⁴² The EU inter-governmental model of protecting EU citizens abroad is the model based on the implementation of Art. 20(2)(c) TFEU right to equal protection abroad of unrepresented Union citizens, which falls under the primary responsibility of the non-nationality Member States.

¹²⁴³ Even the AG Maduro in the *Rottmann* case, who has been one of the great supporters of the autonomous character of the Union citizenship, described Union citizenship first and foremost as the ties between the citizens and the EU: ‘That is the miracle of Union citizenship: it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond our States).’ (para. 23); G. Davies, and M. Benlolo Carabot, *Les fondements juridiques de la citoyennete europeenne*, Bruxelles, Bruylant (2007), 350.

¹²⁴⁴ Opinion of AG Maduro in the *Rottmann* case, para. 23.

but it can also actually help to bring EU citizenship closer to the conception of the international premise of consular and diplomatic protection of natural persons. The fact that EU citizenship is established on the basis of the nationality of an EU country and that it reflects functional equivalent links between the EU citizens and all the Member States is conceptualising the premise of the EU legal regime in terms similar to the State nationality premise of the international consular and diplomatic protection mechanisms.

The EU citizenship provisions have given the EU citizens the right to choose their civic, professional and social residences in any of the Member States of the Union. Recent social studies show that these legal provisions have given more than choices of lifestyle to the EU citizens. According to recent social studies, *‘living, working and engaging with the world go beyond the individualised consumption of “choices”, goods and services. In this sense, the added value of EU citizenship is not confined to creating a new institutional reality which is superimposed on national citizenships. Instead, European Union citizenship contributes to making more enriched life horizons possible.’*¹²⁴⁵ The intensification of economic, cultural, social and political exchanges among EU citizens and among EU citizens and Member States, under the impact of the European integration, can and has brought the European people closer together and *‘enable[d] them to act as co-citizens.’*¹²⁴⁶ There are genuine ties that have developed between the EU citizens and all the EU countries, which could justify the exercise of EU-based protection of unrepresented Union citizens by non-nationality Member States in third countries from the perspective of public international law. The level of social connection between the EU citizens and all the Member States is not perfectly equivalent with the *Nottebohm* genuine link, however this thesis argues that there is no need to establish such a perfect equivalence¹²⁴⁷, since the current public international law no longer requires the fulfilment of the *Nottebohm* criteria by the nationality test.¹²⁴⁸

¹²⁴⁵ See European Commission, Directorate-General for Research and Innovation Socio-economic Sciences and Humanities, *Policy Review – Co-creating the European Union Citizenship*, available at http://ec.europa.eu/research/social-sciences/pdf/co-creating_eu_citizenship.pdf

¹²⁴⁶ *Ibid.*

¹²⁴⁷ A. Vermeer-Künzli and J. Dugard seem to argue that the requirement of genuine link is still necessary and that the EU citizenship has not reached that level of development whereby it established genuine and effective links between all EU citizens and all EU countries, which would need to exist in order to legitimise the EU inter-governmental model of protection of EU citizens abroad, in particular the exercise of diplomatic protection. See A. Vermeer-Künzli, ‘Where the Law Becomes Irrelevant: Consular Assistance and the European Union’, (2011) ICLQ, 96; A. Vermeer-Künzli, ‘Nationality and EU citizenship’ in *The Protection of Individuals by means of Diplomatic Protection*, PhD Thesis (2007); J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, 10.

¹²⁴⁸ For more details, see the following section.

In parallel to the concept of EU citizenship as a bundle of functional equivalent links, the CJEU has infused autonomous features into the EU citizenship, which coupled with other political and social elements contribute to create a second conception of EU citizenship as a sort of supranational citizenship, creating links between the EU citizens and the Union. The autonomous features of the EU citizenship reflected by the ‘fundamental’ and ‘primary’ status which EU citizenship is destined to become¹²⁴⁹ have not and will probably never lead to EU citizenship superseding State nationality,¹²⁵⁰ since the foundational rationale of EU citizenship, as in fact of the entire European integration process, is that of mutual recognition (*in casu* mutual recognition of citizenship conferral¹²⁵¹).

It is currently still being debated whether these jurisprudentially developed autonomous features are sufficient to reflect a true European citizenship. Even if the EU citizenship would be so conceptualised, it is uncertain whether it could fulfil the *Nottebohm* ‘genuine’ and ‘effective’ nationality standards. Since the general public international legal norms on consular and diplomatic protection of individuals are inter-States norms, they cannot be extrapolated to the exercise of protective measures by the Union to its citizens abroad, since the Union is an international organisation. Therefore, the Union citizenship does not need to fulfil the strict *Nottebohm* standards, since they are applied exclusively to the relation between an individual and a State. A certain solidarity connection between the Union and the citizens would however need to exist in order to avoid allegations that Member States are abusing their internationally conferred rights to exercise consular and diplomatic protection of their nationals, and violating foundational principles of international law, such as equality between sovereign States and non-interference in the domestic affairs of other States.¹²⁵²

The reality is that the public international legal framework still recognises as a legitimate premise for the exercise of consular and diplomatic protection only State nationality, while non-nationality States are exceptionally recognised the right to exercise

¹²⁴⁹ See the judgment of the CJEU in the *Rottmann* case and the Opinion of the AG Maduro in the same case.

¹²⁵⁰ C. Shore, *Building Europe*, Routledge (2000); R. Bellamy, ‘Evaluating Union citizenship: belonging, rights and participation within the EU’, (2008) *Citizenship Studies*, 597.

¹²⁵¹ See F. Strumia, ‘Supranational Citizenship as Mutual Recognition of Belonging’, in *Supranational Citizenship and the Challenge of Diversity, Immigrant, Citizens and Member States in the EU*, Martinus Nijhoff Publishers (2013). See also the *Michelleti* judgment ‘[...] it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for the recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.’ (para. 10)

¹²⁵² For a more detailed explanation of this argument, please see the following sub-section.

consular and diplomatic protection of individuals¹²⁵³, and, in relation to international organisations there is no international legal framework allowing or prohibiting the exercise of such mechanisms for private individuals.¹²⁵⁴ According to the *Reparation of Injuries* Advisory Opinion of the ICJ, it seems that the general international principle of speciality is the foundational principle, which establishes the limits of an international organisation's actions. The inter-States consular and diplomatic laws which govern the exercise of consular and diplomatic protection of individuals cannot be extrapolated to international organisations, which is why, contrary to academic opinions, we cannot speak of a derogation from the public international law in regard to the EU supranational model of protecting EU citizens abroad.¹²⁵⁵

b. Does the Union citizenship need to pass the international 'genuine nationality' test?

A second critique raised against the EU citizenship as premise of the EU legal regime of protecting EU citizens abroad referred to the absence of the *Nottebohm* 'genuine link' between the EU citizen and the non-nationality Member States.¹²⁵⁶ The derivative and dependent nature of Union citizenship on the Member State citizenship, as well as the absence of a solid 'genuine' and 'effective' link between the EU citizens and all the Member States and the Union have been invoked as essential evidence revealing that the EU citizenship is

¹²⁵³ See more on this issue in the last Section of this chapter.

¹²⁵⁴ For the moment, the public international law has expressly recognised only the functional protection competence of international organisations. Under this doctrine, the EU, as an international organisation, would be entitled to exercise a functional type of diplomatic protection to the extent of safeguarding its own interests, as, for instance, in the case of the conduct of third countries resulting in injury to EU officials. See P. Pescatore, 'Les relations extérieures des Communautés européennes: Contribution à la doctrine de la personnalité des organisations internationales', RC (1961) II 218; See the Advisory opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Judgment of 12 October 1998, ICJ Reports (1999), 62. The ICJ stated that the immunity of a UN officer can also be invoked against the State of nationality of such an officer when this expert acts in the name of the organisation. The same conclusions had been reached by the ICJ some years before in the Advisory Opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, dealing with the case of Mr Mazilu, the Romanian member of the UN Commission on Human Rights, who was hindered by Romania from leaving the territory of the State in order to exercise his function at the UN*, ICJ Reports (1989) 177.

¹²⁵⁵ See Section III – The EU supranational model of protecting EU citizens abroad and the reality of public international law governing the protection of individuals.

¹²⁵⁶ For a detailed account of the criticism of the EU mechanism on account of the absence of the 'genuine' link test, see A. Vermeer-Künzli, 'When Law becomes irrelevant: Consular assistance and the European Union', *op. cit.*; J. Dugard, 2006, *op. cit.*, 10; A. Vermeer-Künzli, 'Comments on the Green Paper on diplomatic and consular protection of Union citizens in third countries', Leiden University, the Netherlands, on the European Commission's website section entitled 'Contributions on Diplomatic and consular protection of Union citizens in third countries', available at: <http://ec.europa.eu/justice_home/news_events/news_events_en.htm> (accessed 18 June 2007). See also R. Wessel and B. van Vooren, 'The EEAS' Diplomatic Dreams', in P. Quinn (ed.), *Making European Diplomacy Work: Can the EEAS Deliver?*, *EU Diplomacy Papers* 8/2011; J. Wouters and S. Duquet, speak also of the possible tension between the EU legal framework and general international norms on diplomatic protection of individuals, see 'The EU and International Diplomatic Law: New Horizons?', (2012) *The Hague Journal of Diplomacy*, 31.

not fulfilling the prerequisites imposed by public international law for the exercise of consular and diplomatic protection of individuals mechanisms. This section plans to assess whether the legal concept of Union citizenship needs to reflect a ‘genuine’ and ‘effective link’ between the EU citizens and all the EU countries, according to the *Nottebohm* international legal doctrine.

Chapter 2 demonstrated that current public international law still bases consular and diplomatic protection, in particular the latter, on the nationality link shared between the injured individual and the State exercising protection. Public international law recognises to States the discretion to establish who is to qualify for their nationality and the criteria for acquisition and loss of nationality. The 2006 ILC Articles on Diplomatic Protection have codified the current international practice on nationality matters related to the exercise of diplomatic protection, and have maintained the traditional autonomy of States in matters concerning nationality, such as: who qualifies to be a national and reasons for loss and withdrawal of nationality. Based on the current common States practice, Article 4 of the ILC Articles on Diplomatic Protection provides a non-exhaustive list of acquisition of nationality criteria: *ius sanguinis*, *solus*, naturalisation and succession of States. The Article ends with a provision requiring that acquisition of nationality must be consistent with international law. Over time, public international law has developed certain limitations to the State’s prerogatives based on prohibition of fraud, negligence or serious error,¹²⁵⁷ abuse of power,¹²⁵⁸ and discriminatory rules based on sex, religion, race, colour or national or ethnic origin.¹²⁵⁹ Based on the customary international law duty to avoid and reduce statelessness,¹²⁶⁰ and the ICJ’s relevant jurisprudence,¹²⁶¹ Rapporteur Dugard recommends, in his commentary to

¹²⁵⁷ See Flegenheimer claim (1958) 25 I.L.R. p.112, 153; I. Brownlie, *Principles of Public International Law*, 5th edition Oxford University Press (1998), 422.

¹²⁵⁸ Such as arbitrary deprivation of nationality, see the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws League of Nations, Treaty Series, vol. 179, p. 89, No. 4137.

¹²⁵⁹ Art. 5(1) of the European Convention on Nationality. Art. 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UN Treaty Series, 13. For the view that nationality attributed or gained by fraud or negligence cannot be internationally accepted see, Amerasinghe, *Diplomatic Protection*, op.cit., 95. See also P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels—Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91, 93 and 94.

¹²⁶⁰ See the 1961 Convention on the Reduction of Statelessness UN Treaty Series, vol. 989, 175; third Special Protocol concerning Statelessness to the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws League of Nations; Committee of Ministers’ Recommendation No. R (99) 18 on the avoidance and the reduction of statelessness; Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 15 March 2006, CETS 200, available at: <http://www.refworld.org/docid/4444c8584.html>

¹²⁶¹ ICJ Advisory Opinion in *The Legal Consequences for States of the continued presence of South Africa in Namibia, notwithstanding the Security Council Resolution 276 (1970)*, ICJ Report (1971), 4.

Article 4, that a State's conferral of nationality contrary to international law '*should not affect [individual rights]*'.¹²⁶²

In a 1955 judgment, the ICJ added a new criterion to the list of public international law requirements that needed to be fulfilled by the nationality requirement of diplomatic protection claims, also known as the *Nottebohm* 'genuine' nationality link requirement.¹²⁶³ The Court established that nationality, as the premise of the exercise of diplomatic protection, should be the legal expression of a social fact which reflects a connection between the individual and the State exercising diplomatic protection closer than with any other State and based on '[...] *his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future*'¹²⁶⁴

The 2006 ILC Articles on Diplomatic Protection have discarded the *Nottebohm* 'genuine' and 'effective' link requirement.¹²⁶⁵ Therefore the current criteria that the 'nationality of claims' need to fulfil according to international law, so as to legitimise an exercise of consular and diplomatic protection, currently include only: the acquisition of nationality following the domestic law to be respected by the individual; and several norms to be respected by State – prohibition of arbitrary deprivation of nationality, prohibition of discriminatory rules and reduction of statelessness.¹²⁶⁶ These minimal international rules do not create, in principle, any problems for the Union legal order since, although the nationality issues fall under the exclusive competence of the Member States, these international standards are directly binding on the Member States when establishing their domestic rules on nationality related aspects, first, in their quality of independent international actors, and second, *via* the primary effect of EU law which incorporates these customary international norms. Additionally, Union law prohibits the Member States from arbitrarily depriving their citizens of nationality, or creating stateless situations, while the foundational EU general principle of prohibiting discrimination based on nationality is binding on the Member States even when exercising exclusive competences.¹²⁶⁷ Consequently, the extended reach of the

¹²⁶² *Ibid.*, 35.

¹²⁶³ *Nottebohm* case (second phase), *Liechtenstein v Guatemala*, ICJ Reports (1955), 4, 24 and 26.

¹²⁶⁴ *Ibid.*, 24.

¹²⁶⁵ See more details in Chapter 3, section IV.2.b Does the Union citizenship need to pass the international 'genuine nationality' test?

¹²⁶⁶ Johannes M. M. Chan, 'The Right to a Nationality as a Human Right: The Current Trend towards Recognition', (1991) *Hum. Rts. L.J.*, 1.

¹²⁶⁷ A. Wiesbrock and A. Gajda, 'Maintaining Ethnic Ties in the Process of EU Enlargement: The Relationship between Kin-Minority Laws, EU Anti-Discrimination Law and the Schengen Acquis', (2012) *International Journal on Minority and Group Rights*, 399.

Union law and the double legal basis¹²⁶⁸ of the Member States' obligations to respect the relevant international customary norms are potentially preventing conflicts of norms between the EU and international legal regimes on the acquisition of nationality.

The 'genuine' nationality link has been abandoned by the current international norms in cases of both single and multiple nationalities. Even in cases of consular or diplomatic protection claims raised between States of nationality, the *Nottebohm* 'effective' and 'genuine' nationality link was replaced with the 'predominant' nationality link.¹²⁶⁹ However, the predominant link would not necessarily need to be fulfilled in the case of an exercise of Article 20(2)(c) obligation by a Member State, as the latter is a non-nationality Member State. Therefore the 'predominant nationality' would need to be proved only in cases where the Member State of nationality of the injured individual would exercise diplomatic protection measures against a third country whose nationality is also possessed by the Union citizen.

In light of the abandonment of the *Nottebohm* 'genuine' and 'effective' nationality link criteria for the admissibility of diplomatic protection claims by current customary international law, the Union citizenship and the Member State nationality no longer need to conform to this particular requirement. Even if the 'nationality', as premise of consular and diplomatic protection of natural persons, is no longer required to fulfil the 'genuine' link requirement, it cannot be a purely fictive and abstract concept, since customary international law prohibits abuses of State's rights in the field of conferral and withdrawal of nationality.¹²⁷⁰ Therefore, EU citizenship needs to reflect a true sense of social connection between the Union citizens and the actors providing protection abroad: primarily, the non-nationality Member States and the EU, when requested by the Member States.

The qualification of the Union citizenship as a 'pie in the sky', void of substance concept, has long been discarded as no longer reflecting the current reality.¹²⁷¹ Certain legal

¹²⁶⁸ Namely, on the basis of customary international legal principles and the EU general principle of respecting customary international law. See Section II - The Relation between International Customary Law and EU law – assessing the EU's obligation to respect public international law.

¹²⁶⁹ See Art. 8 2006 ILC Articles on Diplomatic Protection. For more details, see Chapter 2 (Section – Eliminating the non-responsibility rule in dual and multiple nationalities cases).

¹²⁷⁰ See the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Merits, Judgment of 5 February 1970, ICJ Reports (1970), 4, 23; see also the dissenting opinion of Judge Read in the *Nottebohm* case, arguing that instead of developing the *Nottebohm* 'genuine' link requirement, the ICJ could have relied on the abuse of the right doctrine; K. Hailbronner, 'Nationality in Public International Law and European Law', R. Bauböck and others (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries*, Amsterdam University Press (2006), 35-104.

¹²⁷¹ See D. Kochenov and R. Plender, *op.cit.*

and jurisprudential developments in the field of EU-based rights¹²⁷² have strengthened the sense of belonging and social links both horizontally, across the national communities, and vertically, towards the EU. There is an extensive list of rights conferred to the EU citizens, of a citizenship nature, fundamental rights, resulting from other primary (e.g. non-discrimination related) or secondary EU legal provisions which they can exercise in any of the national societies of the EU countries. Furthermore, this list of social, economic, and political rights is in a state of continuous evolution under the influence of the EU legislator, the Court of Justice, and whose efficient and effective application is closely supervised by the Commission.¹²⁷³ Inevitably the exercise of these EU-based individual rights, and in particular, the free movement rights have increased social and cultural interactions between the EU citizens and all the Member States, and have created closer bonds between Europeans. In addition, they proved able to generate ‘*mutual economic benefits for businesses and citizens, including those who remain at home, as the EU steadily removes internal obstacles.*’¹²⁷⁴ Due to the effective exercise of this extensive list of transnational rights, the EU citizens are thus no longer to be considered as foreigners in any of the EU Member States, but their links with the Member State of residence is said to be equal with that of the State of nationality.¹²⁷⁵ EU citizenship creates ties between the individual and the Member States not just on the basis of the right to take up residence and move around the EU territory, but due to the fact of possessing the citizenship of an entity whose laws, policies and symbols have pervaded all aspects of a citizen life. The legal literature seems to agree that Union citizenship as a jurisprudentially developed legal concept is mainly an ‘interstates’ or ‘transnational’ status of ‘social integration’, creating or encouraging bonds equally connecting the individual with his or her home Member State and the societies of other Member States of residence.¹²⁷⁶ The Member States’ reciprocal recognition of rights based on the EU citizenship has also led to

¹²⁷² Such as, *inter alia*, the entry into force of the EU Charter, the CJEU novel doctrine of ‘*genuine enjoyment of substance of the rights of European citizenship*’, and increasing mediatisation of the EU citizenship rights and direct access of the individual to dispute settlement mechanisms.

¹²⁷³ The European Commission produces a yearly action plan aiming to eliminate obstacles to the effective enjoyment of their Union rights by EU citizens.

¹²⁷⁴ See the European Commission, *2013 Report on EU Citizenship*, Brussels, of 8 May 2013, COM(2013) 269 final.

¹²⁷⁵ See F. Strumia, *op.cit.*, Chapter 4.

¹²⁷⁶ See Opinion of AG Villalón in the *Notaries* case, para. 137; and Anastasia I. Penot, ‘The transnational character of Union citizenship’ in M. Dougan, Niamh N. Shuibhne, E. Spaventa (eds), *Empowerment and Disempowerment of the Union citizen* Hart (2012).

the creation of a civic community among the European countries,¹²⁷⁷ and of a direct bond between the citizen and the Union.¹²⁷⁸

Some of the Lisbon Treaty's legal innovations increased the civic engagement, which has thus contributed to enhancing the social connection between the European citizens, and between them and the Member States of the EU. The Lisbon Treaty also increased the role conferred to the democratic delegated authority of the EU, the European Parliament, as co-legislator over almost all the EU affairs, and it conferred a direct legislative role to EU citizens. The citizens' legislative initiative¹²⁷⁹ confers directly to the Union citizens the right to make legislative proposals to the European Commission which, if the initiative is found to fulfil the necessary requirements, will have to put forward this legislative proposal to the European Parliament and the Council. This legislative mechanism has been characterised as '*bringing Europe closer to its citizens, [...] and thus contribute[s] [...] to the development of a real European public space.*'¹²⁸⁰ In the first 10 months following the adoption of the Regulation implementing Article 11 TEU, 27 requests for such legislative initiatives were already registered, on issues ranging from unconditional basic income, high-quality education and media pluralism.¹²⁸¹ These legislative developments have led to an increasing sense of belonging of the EU citizens towards the Member States and the EU.¹²⁸²

The economic, social, and political rights that EU citizens equally enjoy, in their different qualities and roles¹²⁸³, across the Member States based directly on their EU citizenship status, do not only have the potential of creating horizontal but also a and vertical sense of belonging. As proved by recent Eurobarometer surveys¹²⁸⁴, there is an increasing number of EU citizens feeling 'Europeans', knowing their rights and believing their voice is heard by the EU, which proves the these EU-based rights are gradually reaching their full

¹²⁷⁷ F. Strumia, *op.cit.*, 289.

¹²⁷⁸ AG Opinion Case C-47/08: '*the concept of loyalty as an expression of commitment to and solidarity with the political community cannot be regarded in itself as a distinctive, exclusive and preclusive characteristic of the Member States, such that it inevitably requires the bond of nationality. On the contrary, a European citizen is not as such unable to make a commitment of loyalty to the Union... The notary thus operates within a framework in which loyalty extends both to the State conferring authority and to the Union assuming it, as well as to the other Member States.*'

¹²⁷⁹ See Art. 11 TEU as implemented by Regulation (EU) No. 211/2011 of 16 February 2011 on the citizens' initiative, [2011] OJ L 65/1.

¹²⁸⁰ According to the Vice President for Inter-Institutional Relations and Administration statement, IP/10/1720, Brussels, 15 December 2010.

¹²⁸¹ See the European Commission report on progress towards effective EU citizenship 2011 – 2013, available online at http://ec.europa.eu/justice/citizen/files/com_2013_270_en.pdf

¹²⁸² See *Standard Eurobarometer* No. 82/2014.

¹²⁸³ As self-employed, worker, tax-payer, family member, consumer, criminal, etc.

¹²⁸⁴ See *Standard Eurobarometer* nos. 80, 81 and 82/2014.

potential.¹²⁸⁵ There are numerous political and sociological studies, which have found sound empirical evidence for the fact that the nationals of the Member States have become ‘Europeans’ in the context of a wide range of aspects of their everyday life. This effect is considered to be a direct consequence of the fact that almost every aspect of the day-to-day life of EU citizens has been regulated or touched upon by EU policies, ranging from the wide variety of certificates attesting the civil status of citizens (birth, marriage, divorce, death), health, participation in adjudicatory proceedings (e.g. recognition of civil and criminal judgments), shopping¹²⁸⁶, acquisition of property, travel, retirement, to sensitive national issues such as taxation, currency, and acquisition and loss of national citizenship¹²⁸⁷, and respect of the EU citizens fundamental rights even in areas said to still pertain to the Member States reserved competence.¹²⁸⁸ The EU has created its own growing regulatory system that has pervaded most of the common aspects of the EU citizens’ daily lives, and has woven together all the Member States.

In a nutshell, it can be argued that, based on the growing sense of belonging between the EU citizens and the Member States (particularly those of residence) and the EU, the Union citizenship could be considered a legitimate premise for the EU model of protecting EU citizens abroad, in terms of not being simply a sham behind which the Member States could avoid to conform with the international legal principles of non-intervention in the domestic affairs and sovereign equality of States.¹²⁸⁹

¹²⁸⁵ This practice seems to confirm Habermas’s rights based doctrine, whereby the exercise of the EU extensive list of rights contributes to creating a sense of belonging as the source of social solidarity within the EU (see J. Habermas, *Between facts and norms*, Cambridge: Polity Press (1996)). This thesis has been criticised by Bellamy as inadequate to ensure the sense of belonging necessary to create an EU-wide demos. (see R. Bellamy, *op.cit.*, 601) However Bellamy put forward his critique in 2008, before the entry into force of the Lisbon Treaty, and therefore it might not be current anymore; moreover, the present thesis does not argue that the EU rights have contributed to a fully-fledged EU demos, or European citizenship as a direct link between the EU citizen and the EU, but to the rising horizontal and vertical sense of belonging.

¹²⁸⁶ Even the number of digits that IBAN and BIC codes should have in the EU countries is regulated at the EU level, see <http://www.presseurop.eu/en/content/article/570181-leviathan-here-brussels>.

¹²⁸⁷ Case C-369/90 *Micheletti and Others* [1992] ECR I 4239, para. 10; Case C-179/98 *Mesbah* [1999] ECR-I 7955, para. 29; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para. 39; and Case C-135/08 *Rottmann* [2010] ECR I-1449, paras. 39 and 41; Opinion of AG Sharpston in Joined Cases C-7/10 and C-9/10 *Staatssecretaris van Justitie v Tayfun Kahveci and Osman Inan*; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000; and Case C-434/09 *McCarthy* [2011] ECR I-0000.

¹²⁸⁸ Such as counter-terrorism measures and foreign affairs related fields. D. Kostakopoulou, ‘The ECJ, Member State Autonomy and European Citizenship: Conjunctions and Disjunctions’, in H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, Hart (2012).

¹²⁸⁹ For example, the Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of Witwatersrand. For more details see, J. Dugard, First Report on diplomatic protection, presented to the International Law Commission during its 52th session, UN Doc. A/CN.4/506, 7 March 2000, 5-6, para. 14

c. Concluding remarks on the international legitimacy of the EU citizenship as a premise of the EU model of protecting Union citizens abroad

The nationality bond between the individual and the state has considerably weakened its position within public international law due to the changing trends pervading the international society. For instance, the phenomena of migration and acquisition of dual or multiple nationalities, and of the ‘humanization’ of the public international law which progressively recognises procedural and substantive international rights to individuals, and access to legal remedies has led to the reconsideration of the classical role of the nationality link in public international law, and, in particular, within the institutions of consular and diplomatic protection.¹²⁹⁰

The principles of equal sovereignty of States and non-intervention in the domestic affairs of States have been the foundational principles of the entire international community since the formation of the nation State. Due to their salient role in international relations, very few restrictions have been permitted – among which the exercise of consular and diplomatic protection of nationals in a foreign country. It is precisely the bond of nationality that justifies the limitation of these principles of international law and permits the extension of the territorial jurisdiction of the State of nationality. As a direct consequence, the nationality requirement of consular and diplomatic protection claims is of a strict interpretation and application.¹²⁹¹ Under the traditional doctrine, the nationality requirement had to be established at both the moment of the injury, at the moment the State exercises assistance or lodges the international complaint, and also continuously between these two moments. The classical international norms governing the ‘nationality of [diplomatic protection] claims’ requirement crystallised in a time when an individual had ties with one single state, and they were absolutely exclusive.¹²⁹² The growing exodus of persons taking residence in a country other than that of their nationality, and the growing trend of individuals acquiring more than one nationality by way of naturalization or marriage,¹²⁹³ has led to a development of cases

¹²⁹⁰ See Chapter 2, the section ‘Reconsidering the conditions for the exercise of consular and diplomatic protection under the international legal order’; A. Vermeer-Kunzli, ‘Nationality and diplomatic protection A reappraisal’, *op.cit.*, 76.

¹²⁹¹ See *Panevezys-Saldutiskis Railway Judgment* of 1939, p.16; *Barcelona Traction Judgment*, p.33, para. 36: the bond of nationality between the State and the individual is the primary legal source ‘*which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.*’

¹²⁹² N. Bar-Yaacov, *Dual Nationality*, London: Stevens and Sons (1961).

¹²⁹³ R. Hansen, and P. Weil, (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books (2002).

where the individuals asked for consular and diplomatic protection from a State other than the State of nationality, namely the long-term residence state with which the individual had established a stronger connection.¹²⁹⁴ Globalisation and the growing international movement of people have led to an increasing number of individuals living in a State other than their State of nationality, creating effective links with the State of residence rather than the State of nationality, as also portrayed by the oft-cited *Nottebohm* case. Holding the citizenship of more than one country has currently become more common. National policies discouraging dual citizenship by requiring renunciation or establishing automatic loss of nationality are becoming less frequent or not as strictly enforceable.¹²⁹⁵ The idea of ‘belonging to a state’ is gradually connected with residence, and it is no longer, as in the romantic period of international law, exclusively tied with the State of nationality.¹²⁹⁶ It is commonly accepted that the individual develops multiple connecting links with several States of nationality or residence. Therefore the existence of multiples ties, which is said to be a characteristic consequence of the Union citizenship and of the European Union project, is not a singular regional phenomenon, but is an event occurring around the globe.

In light of the changing notions of statehood and citizenship¹²⁹⁷, residence and social integration seem to turn into the real links reflecting the belonging of the individual to a certain society, community, and legitimising access to rights under both the international and European level.

The classical absolute requirement of the nationality of claims necessary to legitimise an exercise of consular and diplomatic protection has been updated by the ILC in light of the contemporary international law. Several ground-breaking limitations were introduced to the ‘nationality of claims’ premise for an exercise of diplomatic protection of individuals. Art. 8 of the ILC Articles on Diplomatic Protection prescribes the lawful and habitual residence as the legitimate link in relation to certain vulnerable people, such as: stateless individuals and

¹²⁹⁴ As signalled by the *Nottebohm* case, see also E. Schweighofer, ‘European citizenship and consular protection’, in S. Faro, Mario P. Chiti, E. Schweighofer (eds.), *European Citizenship and Consular Protection New Trends in European Law and National Law*, Editoriale Stientifica (2012).

¹²⁹⁵ For instance, Colombia, the Dominican Republic, Ecuador, Italy, Mexico, Turkey have changed their policies to allow dual citizenship. Countries that used to have only *jus loci* policy have adopted also the *jus sanguinis* policy allowing ethnic descendants to acquire their citizenship. See Segolene B. de Places, ‘Nationalite des Etats membres et citoyennete de l’Union dans la jurisprudence communautaire: La consecration d’une nationalite sans frontieres’ in R.A.E. – L.E.A. 2011/1, 29, 36.

¹²⁹⁶ Peter H. Schuck, *Citizens, Strangers, and In-betweens: Essays on Immigration and Citizenship*, New York: Westview Press (2000); S. Maillard, *L’émergence de la citoyenneté sociale européenne*, Aix-en-Provence: Presses universitaires d’Aix-Marseille (2008); D. Kochenov, ‘Rounding up the Circle: The Mutation of the Member States’ Nationalities under Pressure from EU citizenship’, *EUI RSCAS WP 2010/23*.

¹²⁹⁷ R. Bauböck, ‘Multilevel citizenship and territorial borders in the EU polity’ *IWE Working Papers series* 37/2003.

individuals with refugee and subsidiary status. Within the EU legal framework a similar trend has developed. It is argued that the very concept of nationality has become redundant, and what is said to have become more meaningful is the concept of ‘residence’.¹²⁹⁸

There is an increasing number of EU citizens travelling and living abroad for different purposes, whether for education, work, health care, family or other reasons,¹²⁹⁹ which has led in practice to the intensification of socio-cultural ties among the European citizens. Taking up residence in another Member State reflects the connection with another member State which would feel entitled to undertake to exercise consular and diplomatic protection in third countries, when the Member State of nationality is not represented, not just on the basis of the EU primary law obligation, but on the connection that has been formed directly with the EU citizen.

Furthermore, the right to take up residence in any of the Member States recognised to all EU citizens is not only an element that has helped in creating the social links between the citizen and the Member States, and between the EU citizens and the EU, but it has the potential of giving additional international legitimacy to EU citizenship as the premise for Art. 20(2)(c) types of consular and diplomatic protection. The 2006 ILC Articles on Diplomatic Protection have recognised several exceptions to the State of nationality premise for diplomatic protection, among which includes residence – based on the fact that in more and more cases it better reflects the tie between an individual and a State, than nationality.¹³⁰⁰

In spite of the evidence signalling a growing social and political link between the EU citizens and the Member States,¹³⁰¹ of the elimination of the *Nottebohm* ‘genuine’ link requirement and of the development of an alternative to citizenship as a premise for consular and diplomatic protection, the EU citizenship does not fulfil the primary condition, under current international law, to be the nationality of the protecting State. The EU provisions require the non-nationality State to secure protection of EU citizens abroad, and can request the entities of an international organisation, the EU, to help them in securing this protection of private individuals. Public international law permits, under certain precise conditions, that

¹²⁹⁸ G. Davies, ‘Any Place I Hang My Hat? Or Residence is the New Nationality’, (2005) ELJ, 55; and Segolene B de Places, ‘Nationalite des Etats membres et citoyennete de l’Union dans la jurisprudence communautaire: La consecration d’une nationalite sans frontieres’ in R.A.E. – L.E.A. 2011/1, 29, 41.

¹²⁹⁹ According to Eurobarometer Special Number No. 346, April 2011, ‘New Europeans’: ‘*More than one-third of Europeans regularly eat food typical of another country, follow news, cultural life or sports from another country, are fluent in at least one foreign language or regularly spend holidays or weekends abroad contributes to creating genuine social ties between the EU citizens across the EU territory.*’

¹³⁰⁰ See more details in Chapter 2, section – Increasing exceptions to the exclusive nationality link requirement).

¹³⁰¹ European Commission, *Special Eurobarometer 73.3*, 2011 Report ‘New Europeans’, available online at http://ec.europa.eu/public_opinion/archives/ebs/ebs_346_en.pdf

non-nationality States can exercise consular and diplomatic protection. The main condition required is the consent of third countries towards the exercise of protection by the non-nationality State. The following section will explore the precise conditions required by public international law for the exercise of consular and diplomatic protection of individuals by non-nationality States, and in particular the issue of third countries' consent towards the exercise of the Union model of protecting EU citizens abroad.

3. Assessing the third countries' consent to the Union model of protecting EU citizens abroad

It was shown that the elimination of the genuine link requirement and increasing role of 'residence' as an alternative premise to 'nationality' have not eliminated the strict understanding of 'nationality of claims' requirement as a State nationality, for the exercise of consular and diplomatic protection. It was pointed out that by way of unanimous consent, the Member States decided in 1993 to extend the protection treatment they would confer to their own citizens abroad also to other EU citizens who are not represented abroad. The recognition of this equal protection treatment to all unrepresented Union citizens was argued to create a significant deviation from the customary international law, which, in spite of certain legal innovations, still allocates consular and diplomatic protection of private individuals primarily to the State of nationality. The EU has endowed the non-nationality Member State and its institutions and bodies with the power to exercise consular and diplomatic protection of private individuals¹³⁰², thus challenging the international requirement of 'nationality of claims', which is mandatory, especially in the case of diplomatic protection. Therefore the EU model conferring consular and diplomatic protection functions to non-nationality Member States seems to not be conforming, at first glance, to the general international legal framework. The specific EU model of inter-governmental protection provided by the EU legal regime could, in principle, find a justification under the derogations prescribed by international treaty law and jurisprudence, since the international rules imposing the 'nationality of claims' requirement are not of an absolute nature, instead, both the international jurisprudence and the Vienna Conventions on Consular and Diplomatic Protection have recognised the possibility to derogate under certain conditions. The

¹³⁰² As opposed to the Union officials, a type of diplomatic protection which international organisations are entitled to exercise under the title of 'functional protection'. See the ICJ Case of Reparation for Injuries, *op.cit.*

international treaty law and jurisprudence of the ICJ have recognised a certain margin of discretion to States, which can deviate from this international norm by way of mutual consent.

In relation to consular protection, Article 8 of the VCCR¹³⁰³ recognises the possibility that a non-nationality State exercises the protection of the interests of another State and its nationals in third countries ‘*upon appropriate notification to the receiving State.*’ Therefore third countries can refuse the exercise of consular protection by non-nationality Member States to unrepresented Union citizens.

In regard to diplomatic protection, the PCIJ held, in the *Panevezys* case, that ‘*[...] in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.*’¹³⁰⁴ Therefore the ICJ recognised the right of the States to derogate from the nationality of claims requirement insofar as the new premise is established by unanimous written consent. In addition to customary international law, there is also Article 46 of the VCDR¹³⁰⁵, which enshrines a similar derogation as that provided by Article 8 of the VCCR, however this time, the consent of the receiving State is required prior to the exercise of protection by diplomatic officials. In international relations such situations arise when a State does not have a representation in a third country, or it has broken off consular or diplomatic relations with a State.¹³⁰⁶

The EU would have to fulfil the precise requirement of obtaining the consent of third countries to its EU model of securing protection of its citizens abroad, which it is argued it has not yet fulfilled.¹³⁰⁷

¹³⁰³ Article 8 of the VCCR, entitled – Exercise of consular functions on behalf of a third State, reads as follows: ‘*Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.*’

¹³⁰⁴ ICJ *Panevezys* judgment, *op.cit.*, p.17. Another judgment of the PCIJ strengthening the conclusion that States can derogate from the nationality of claims requirement is the 1923 judgment delivered in the *Decrets de nationalite promulges en Tunis* case, where it was held that, although States enjoy discretionary competence over matters of nationality, these competences can be limited by international law on the basis of conventional obligations entered into by the involved States.

¹³⁰⁵ Art. 46 of the VCDR reads as follows: ‘*A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.*’

¹³⁰⁶ B. Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd ed, Martinus Nijhoff Publishers (1998), 267.

¹³⁰⁷ See A. Vermeer- Künzli, ‘The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance’ in S. Faro, Mario P. Chiti and E. Schweighofer (eds), *European Citizenship and Consular Protection New Trends in European Law and National law*, Editura Scientifica Napoli (2012), 101-111; by the same author, ‘Where the law becomes irrelevant: Consular assistance and the European Union’, *op.cit.*; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, 10; P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels—Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper 2011/10*, 91–107.

All the Member States are parties to both the VCCR and VCDR, however since these treaties allow only States to be party to them, the Union is not thus directly bound to respect these treaties' rules. However, due to the high number of States that have ratified the Conventions, it has been argued that they have gained the status of customary norms¹³⁰⁸, which means that the EU is thus bound to respect the conditions established by international customary law when derogating from the nationality of claims requirement.¹³⁰⁹

The Member States were aware of the possible challenges that the establishment of the specific EU regime might pose to the international legal regime already during the adoption of the Maastricht Treaty. In order to ensure the required consent of third countries, the founding Treaties provided since the establishment of the EU citizenship, an obligation for the Member States '*to start the international negotiations required to secure this protection.*'¹³¹⁰ The initial proposal for this provision, made during the elaboration of the Maastricht Treaty by the Spanish representative, was more strictly phrased.¹³¹¹ Namely it was proposed that ex-Article 8C includes an obligation of the Member States to obtain the necessary consent of third States as required by the VCCR, instead of just starting 'international negotiations'. This proposal did not made its way into the Treaty but the more lenient obligation 'to start international negotiations'.¹³¹²

Apart from a few exceptions,¹³¹³ neither the Member States, nor the Union have concluded international agreements with all the countries around the world securing an explicit acceptance of the EU exceptional mechanism.¹³¹⁴ The common practice seems to have been that notification of the EU provision by way of practice, with few exceptions whereby certain Member States did formally inform certain third countries of the EU special agreement.¹³¹⁵ Certain Member States justified their lack of notification and start of

¹³⁰⁸ See E. Denza, *op.cit.*, 1, 44-45, and Michael J. Garcia, 'Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements', available online at <http://www.fas.org/sgp/crs/row/RL32390.pdf>

¹³⁰⁹ See the *Racke* case.

¹³¹⁰ The obligation was first included in Art. 8c Maastricht Treaty and remained unchanged throughout the different legal amendments of the founding Treaties, including in the present Art. 23(1) TFEU.

¹³¹¹ See more in see Documentation de la RIE, (1991), 333-338 and 405-409

¹³¹² See Art. 8c of the Maastricht Treaty and current Art. 23 TFEU.

¹³¹³ These Treaties were concluded by Italy: the bilateral agreements signed by Italy after the entry into force of the Maastricht Treaty are: the Conventions with Ukraine in 2003 (Article 62), Republic of Moldova in 2000 (Article 61), Georgia in 2002 (Article 60), Great People's Libyan Arab Jamahiriya Socialist in 1998 (Article 2) and Russian Federation in 2001 (Article 37); and Portugal: the Consular Convention between Portugal and the Russian Federation 2001, (Article 36(5)). See *CARE Report*, Chapter 3, Section 2.1.2.

¹³¹⁴ See Madalina B. Moraru, 'Securing consular protection of the EU citizens abroad: what role for the EU?' *op.cit.*

¹³¹⁵ According to the *CARE Report*, these countries were Belgium, France and Lithuania. '*Belgium has advised its consular network to inform third countries' authorities about the practice of extending consular and*

international negotiations based on the fact that the EU Presidency had already notified third countries of the new special agreement between the Member States in 1993.¹³¹⁶

The procedure prescribed by Article 23(2) TFEU, whereby the Member States would need to separately start international negotiations with all the States of the world is definitely a cumbersome one, requiring significant administrative, human and financial resources of the foreign affairs departments of the Member States. Certain Member States have been opposed to such international negotiations, arguing that obtaining such formal consent from third countries is unnecessary and an overly ‘major task’ for the domestic executive.¹³¹⁷ In light of the Member States’ reluctance to secure the express consent of third countries to its derogatory regime, the Commission has considered, since 2006, the possibility of inserting consent clauses in mixed agreements, which it will negotiate with third countries.¹³¹⁸ Certain Member States, in particular the UK, have opposed the Commission’s proposal, on the basis that the EU, and thus the Commission, lacks competence ‘to negotiate consent clauses in its existing bi-lateral agreements with third countries for the provision of an ‘EU’ consular service’.¹³¹⁹ So far, there has been no public evidence of the Commission already implementing this negotiation strategy.

The EU’s regional agreement of delegating the consular protection function among the Member States has thus remained a *pacta terti* for third countries,¹³²⁰ which might pose

diplomatic protection to non-national Union citizens (Art. 8 Vienna Convention). In the same notification Belgium asked the authorities of third countries to inform their local authorities of the existence of this type of cooperation between the EU Member States.’ France notified Chad of its will be the State providing protection for the citizens of the other Member States *based on the EU Treaty provision* (see *Summary Report of Public Hearing on the Green Paper* of 29 May 2007, p. 11.) Lithuania informed Morocco, Tunisia, and Algeria that the Republic of Poland exercises consular functions in Rabat and Casablanca (Morocco), Tunisia and Algeria on behalf of the Republic of Lithuania, however not on the basis of the EU Treaty provision but, based on the Consular Convention between the Republic of Lithuania and the Russian Federation.

¹³¹⁶ The notification was said to have been made via a verbal note, see *Guidelines for the Protection of Unrepresented EC Nationals by EC Missions in Third Countries* which was adopted by the 241st Political Committee on 29 and 30 March 1993.

¹³¹⁷ See the UK Report in the *CARE Report*.

¹³¹⁸ The European Commission has proposed, on several occasions, that Member States include a ‘consent clause’ i.e. a clause providing for the agreement of a third State that the consular and diplomatic authorities of a represented Member State can provide protection to nationals of unrepresented Member States under the same conditions as to its own nationals, within mixed agreements that are to be concluded or amended with non-EU countries (see European Commission, Green Paper of 28 November 2006 on diplomatic and consular protection of Union citizens in third countries, [COM\(2006\) 712](#) final – Official Journal C 30 of 10.02.07). In 2011, in a Report of the European Commission it was mentioned that ‘the Commission – taking due account of the specificity of each negotiation – proposed to include a consent clause in mixed agreements with certain third countries. Negotiations are ongoing’. See European Commission, Green Paper on diplomatic and consular protection of EU citizens, COM(2006) 712 of 28 November 2006; Communication from the Commission to the European Parliament and the Council, *Consular protection for EU citizens in third countries: State of play and way forward*, Brussels, 23.3.2011 COM(2011) 149 final.

¹³¹⁹ See the UK Report in the *CARE Report*.

¹³²⁰ See Art. 34 of the VCLT and J. Dugard, Seventh Report, *op.cit.*, paras.19-20

problems also within the EU legal order, since the Member States have an obligation to exercise consular and diplomatic protection, and the opposition of third countries, preventing them from fulfilling their EU obligations, might result in an action of damages lodged by the injured individuals.¹³²¹ The requirement of acquiring the consent of third countries to the EU derogatory regime is though slightly different depending on whether the type of protection secured is consular or diplomatic. In the case of consular services (Article 8 VCCR) the consent of the third State is presumed if they do not oppose the notification of the delegation. While in the case of diplomatic protection, the need to obtain the consent of third countries is more stringent, as it is required prior to the actual exercise (Article 46 VCDR). The Member States' non-conformity with the general customary norms and the procedure provided for derogations is argued to have salient legal consequences. In the absence of such formal consent, the exercise of consular assistance, and particularly diplomatic protection, on behalf of non-nationals can lead to a violation of diplomatic and consular law and the principle of non-intervention in the domestic affairs of foreign States by the Member States, and thus engage their international responsibility.¹³²²

The 21-years long practice of the Member States and the Union exercising Article 23 TFEU based consular and diplomatic protection without opposition from third countries could be interpreted as a sufficiently long, constant and geographically spread practice indicating wide consent to the derogatory EU legal regime. During this period there has been no public evidence of objection by third States to the exercise of consular and diplomatic protection by the Lead State, non-nationality Member States or the Union institution or bodies alone or in collaboration with the Member States on grounds of lack of *locus standi*, or violations of the VCCR and VCDR provisions.¹³²³ This long and generalised practice of tacit acceptance, can be argued to have by now crystallised into a customary international norm that stops third countries from objecting to future exercises of the EU's model by a non-nationality Member State or the body or institution of the EU.¹³²⁴ Practitioners have argued that opening now negotiations, whether by the Member States or the Union, is not just unnecessary, but might even be counter-productive to the interests of the Union since third countries might refuse to

¹³²¹ Art. 340 TFEU.

¹³²² A. Vermeer-Künzli, 'Where the Law becomes irrelevant: Consular Assistance and the European Union', *op.cit.*, 965, 985.

¹³²³ See E. Denza, 'Commentary to Art. 46 EU Charter', *op.cit.*, see 46.46

¹³²⁴ On the idea that this long and generalised practice has led to the creation of a customary international norm, see Madalina B. Moraru, 'Securing....', *op.cit.*, 174-175; E. Denza, 'Commentary to Art. 46 EU Charter', *op.cit.*, see 46.46.

consent if given the option, or ask for special favours in return for their consent.¹³²⁵ Instead, continuing the practice, which has so far been positive towards the EU citizens, is argued to be a preferable and prudent approach.¹³²⁶

The fact that, so far, no opposition has been raised by third countries should not be interpreted as excluding future opposition. There can be situations where the receiving States might consider that the advantages of alleviating its burden to ensure protection of aliens in distress situations are not outweighed by the injuries caused by such an intervention of the EU and the Member States. Cases of consular protection provided by the CSDP police and military missions rescuing EU citizens, that lead to the violation of human rights such as the prohibition on torture or arbitrary deprivation of life towards nationals of the receiving State, or cases where within a particularly hostile relation between the receiving State and the EU, the protection of EU citizens is secured by police and military rescue mission intervention which is challenged by the receiving State as a violation of its territorial integrity, contrary to the prohibition on the use of force.¹³²⁷ Proving the existence of a customary rule preventing change of conduct on the part of third countries will be a cumbersome burden of proof, further complicated if the consent of the third country is interpreted as given in regard to a particular consular service and in a particular distress situation. The option of securing a written consent from third countries might alleviate the burden of proof and protect the EU Member States from international legal responsibility. It is, however, unclear what the best solution would be in terms of the method of securing the written consent of third countries, since it seems that centralising the negotiation at the EU level is not supported by all the Member States,¹³²⁸ while leaving it in the hands of the Member States is counter-productive for both the Member States and attaining the objective of unequivocal and unconditional third countries' consent.

¹³²⁵ E. Denza, *op.cit.*

¹³²⁶ *Ibid.*

¹³²⁷ A. Vermeer-Künzli mentions that opposition was raised against the EU's intervention in the rescue missions of the United Kingdom and the Netherlands in Libya in February 2011. '*Neither mission was limited to the nationals of the respective rescuing states and elicited protest from Libya. The Netherlands mission was unsuccessful: the individuals to be rescued and the rescuing crew were captured and the equipment confiscated by Col. Gaddafi's troops. Only after intense negotiations with Greece were the individuals released.*' In 'Where the Law becomes irrelevant...', *op.cit.*

¹³²⁸ A consent that would be needed since the area does not fall under the EU's exclusive competence.

Conclusion of Chapter 3

The European Union is bound to respect international customary law regardless of the growing autonomy of the Union legal order and of its imprecise legal nature.¹³²⁹ Even a complete disconnection and formal re-branding of the Union as a federation, co-federation or any other legal metaphor would not exonerate the Union from the obligation of respecting international customary law. Until the formal re-labelling of the Union in the founding Treaties, third countries are entitled to consider the Union as an international organisation¹³³⁰ which, due to its increasing State like features,¹³³¹ as reflected also within the area of consular and diplomatic protection, will have difficulties in accommodating its international organisation status, to an international environment which is still, in many areas, including consular and diplomatic relations, regulated primarily by inter-States law. The field of consular and diplomatic protection of private individuals is one of the most telling examples of this difficulty. The development of the Union's internal legal provisions recognising a growing role to the non-nationality Member States and the Union institutions in this field has raised numerous scholarly questions regarding the conformity of the EU model of protecting EU citizens abroad with the general international legal framework.

The international rules governing consular and diplomatic protection of individuals are of both conventional (VCCR and VCDR), and customary legal nature.¹³³² Consequently, the Union is bound to respect the general international legal norms on consular and diplomatic protection of individuals. In order to enhance the protection abroad of the Member States' citizens while at the same time not increasing their costs, and strengthening the role of the

¹³²⁹ See the CJEU, Case C-286/90 *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para. 9; Case C-405/92 *Etablissements Armand Mondiet SA v. Armement Islais SARL* [1993] ECR I-6133, paras. 13-15; Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998], ECR I-3655, paras. 45-46 and 51; Case C-308/06 *Intertanko* [2008] ECR I-4057, para. 51; Joined Cases C-402/05 P and C 415/05 P *Kadi and Al Barakat v. Council and Commission* [2008] ECR I-6351, para. 291. See also European Court of First Instance Case T-115/94 *Opel Austria GmbH v. Council* [1997] ECR II-39; C-366/10 *Air Transport Association of America v Secretary of State for Energy and Climate Change* [2011], para. 101 ('ATAA'). M. Cremona, 'External Relations and External Competence of the European Union: The Emergence of an Integrated Policy' in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, Oxford University Press (2011), 237; and Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2008), 204. See also, T. Konstantinides, 'When in Europe: Customary International Law and EU Competence in the Sphere of External Action', *op.cit.*; and J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', *op.cit.*, 31, 47

¹³³⁰ See R. Ambast and V. Tyagi, 'Ambassadors of Europe: An Insight into the Evolution of the European Union and International Diplomatic Law', (2008) *Studia Diplomatica*, 16.

¹³³¹ M. Smith, 'The European Union and International Order: European and Global Dimensions', (2007) *European Foreign Affairs Review*, 437, 452; T. Tiilikainen, 'To Be Or Not To Be?: An Analysis of the Legal and Political Elements of Statehood in the EU's External Identity', (2001) *European Foreign Affairs Review*, 223, 228.

¹³³² See the ILC Articles on Diplomatic Protection.

Union in securing an effective Union citizenship, the Member States took advantage of the derogations permitted by the general international legal framework from the exercise of consular and diplomatic protection of individuals, and provided for a specific Union common regime of protecting EU citizens abroad. The Union inter-governmental model has, to a certain extent, deviated from the legal nature and premise of the classical international legal mechanisms of consular and diplomatic protection of natural persons. Namely, it replaced the strict State nationality requirement for consular and diplomatic protection exercises with the EU citizenship, and it imposed a duty to equal protection treatment on the Member States,¹³³³ where, under the public international law, States enjoy an unfettered discretionary right to exercise consular and diplomatic protection.

The current international diplomatic law permits derogations from the ‘nationality requirement’ in the case of refugees, persons benefiting of subsidiary protection and stateless persons, where the nationality link is replaced with legal and habitual residence in a non-nationality State. However the EU legal regime does not fall under this exception.

A second derogation is recognised in the case of sharing of consular affairs among States, where a third country is delegated by the State of nationality to exercise consular protection (Article 8 VCCR) and/or diplomatic protection on his behalf (Article 45 VCDR). International treaty law subjects this exception to very strict conditions. Current treaty or customary law do not refer to situations where the institutions of an international organisation can exercise consular or diplomatic protection on behalf of private persons. The Union regime, which is based on a common sharing of consular and diplomatic protection functions among the Member States, and among the Member States and the Union, does not precisely follow the internationally prescribed derogations and thus raises grounded challenges regarding the conformity of the Union derogatory regime with the international legal framework.

According to the current state of play, it seems that the derivative origin of the Union citizenship, and the characterisation of Union citizenship as a bundle of equally functional links between the Union citizen and all the EU Member States,¹³³⁴ have the potential of bringing the EU legal regime closer to the international framework. The level of concrete connection between the EU citizens and the Member States is however argued to not be uniform. It has probably not reached that level of belonging to a community of values, a

¹³³³ See Arts. 20(2)(c) and 23 TFEU, Art. 46 EU Charter.

¹³³⁴ See the Opinion of AG Maduro in the *Rottmann* case, para. 23; L. Azoulai, ‘La citoyenneté européenne, un statu d’intégration sociale’, *op.cit.*

community of the peoples of Europe that is the same regardless of the territory of the Member State where the EU citizen decides to take residence.¹³³⁵

In conclusion, as long as the Union regime of protecting EU citizens abroad is primarily based on a partnership between the Member States and involvement of the EU institutions at the request of the Member States, then the Union model of ensuring protection of Union citizens abroad is not completely deviating from the models permitted under the general international legal framework. The way Union citizenship has been constructed so far, as a legal status empowering the Union citizens with equal rights across the Member States helps, to a certain extent, to justify the premise of the specific Union exercise of consular and diplomatic protection of Union citizens. The elimination of the *Nottebohm* ‘genuine’ and ‘effective’ link requirement which the nationality of claims had to fulfil under traditional international customary law is simplifying the conditions that the Union citizenship has to fulfil and is further accommodating of the Union-specific regional regime.

The growing social and political connection between the EU citizens and the Member States, on the one hand, and the EU citizens and the Union, on the other hand, do not discard the reality that the Union citizenship is not a State nationality. Consequently, the EU regime needs to fulfil a third requirement under international law in order to be legitimate, namely: to obtain the consent of third countries for the exercise of its specific regime of protecting EU citizens abroad. The consent of third countries is required by Article 8 VCCR for the exercise of consular protection, and by Article 45 VCDR for the exercise of diplomatic protection by the non-nationality States. In light of the *de minimis* nature of international law governing the field of consular and diplomatic protection of individuals, the non-nationality Member States could, in principle, exercise consular and diplomatic protection of private EU citizens if third States expressly consented to this. In spite of the expressly provided Union obligation of starting international negotiations, incumbent upon the Member States (Article 23(1)(2) TFEU), with few exceptions, the Member States have not so far started to implement this positive obligation. They have either expressly refused to fulfil the EU obligation,¹³³⁶

¹³³⁵ See L. Azoulai, ‘The (Mis)Construction of the European Individual Two Essays on Union Citizenship Law’, *EUI Working Paper 2014/14*. For a slightly different view, see AG Villalon’s Opinion in Cases 47-61/08, ‘*European Union citizen. In so far as it has a transnational dimension, European citizenship is founded on the existence of a community of States and individuals who share a scale of values, a high degree of mutual trust and a commitment to solidarity. Given that, on being awarded the nationality of a Member State, an individual is introduced into that community of values, trust and solidarity, it would be paradoxical if membership of that very community were to constitute the ground for preventing a European Union citizen from exercising the rights and freedoms guaranteed by the Treaty*’ (para. 138)

¹³³⁶ The UK.

considering that the Union institutions had already fulfilled it,¹³³⁷ or that the Union itself is better placed to fulfil it^{1338, 1339} The lack of agreement among the Member States on how best to proceed with obtaining the express consent of third countries seems to have led to a stalemate on the matter of securing conformity with the relevant international legal norms. The persistent lack of third countries' consent can thus lead to the international responsibility of the Member States and the EU for violating the principle of non-intervention in the domestic affairs when implementing their Union obligation to secure equal protection of EU citizens abroad.

The EU and the Member States might be saved from incurring international responsibility or facing prohibition of implementing their derogatory model in third countries on the basis of the principle of estoppel, which precludes third countries from changing their constant conduct of tacitly recognising, over a period of 21 years, the exercise of consular and diplomatic protection by the non-nationality Member States and the EU institutions and bodies. The principle of estoppel is based on a long established practice, which might have by now obtained the status of an international custom, thus works in favour of the Union and its Member States. However, the Union/Member States would have the cumbersome task of proving the established practice, and the task will be draconian, since the material scope of the consular assistance might have varied throughout the years. It is recommended that before a decision is taken in relation to obtaining the formal consent of third countries, one weighs the negative reaction and conditionality that third countries might impose in exchange for their consent against the likelihood of future situations where third countries' would actually oppose the exercise of the EU model, or invoke the international responsibility of the Member States and the Union.

It will not be an easy task to be successful in an international claim challenging the international legitimacy of the Union legal order. If the ICJ is chosen as the appropriate forum, the task will probably be more cumbersome on the part of the Member States, due to the high standards established by the ICJ for proving the existence of an international customary norm.¹³⁴⁰ While, if the CJEU is chosen as the appropriate dispute resolution forum, the applicant will have a more cumbersome task in light of the strict conditions for challenging the validity of EU law based on customary international law. Following the ATAA

¹³³⁷ Germany.

¹³³⁸ Smaller Member States.

¹³³⁹ See the *CARE Report*, Chapter 3, Section 3.

¹³⁴⁰ See Chapter 2 (Section – *The requirements for the formation of an international customary norm recognising a State duty to exercise diplomatic protection*).

judgment, three conditions must be met for an individual to claim the invalidity of an EU secondary provision based directly on a rule of customary international law. First the customary international law invoked is calling into question the competence of the EU to adopt the challenged act. Second, this EU secondary act is ‘*liable to affect rights which the individual derives from EU law or to create obligations under EU law in this regard.*’¹³⁴¹ Third, the EU committed ‘*a manifest error of assessment concerning the conditions for applying those principles.*’¹³⁴² To date, *Opel Austria* is the only case where an EU secondary act was held invalid based on a violation of the EU general principle of protection of legitimate expectations recognised by the CJEU as a corollary of the customary international law principle of good faith.¹³⁴³ In the case of consular and diplomatic protection of EU citizens, the last criteria is not fulfilled as regards the EU institutions, since the EU provisions have included an express obligation to start international negotiations whose non-fulfilment is incumbent upon the Member States, and not the Union institutions. In case an action of damage is brought against the Member States based on the inconsistency of the EU law with the relevant international legal norms, the CJEU might be more prone than the ICJ to recognise the formation of an international customary norm accepting the international legitimacy of the Union regime, or at least a principle of estoppel in relation to the particular consular conduct of the Member States.¹³⁴⁴ It is difficult to imagine that such a case would, in the first place, be admitted due to the limited active *locus standi* before the CJEU. Third states cannot submit claims before the CJEU, while it would be difficult to imagine why a third country national would wish to invoke the inconsistency of the EU legal regime.

In spite of the several inconsistencies between the international and EU legal orders on the exercise of consular and diplomatic protection of private individuals ascertained by legal scholars, the international and EU legal norms do not conflict in incompatible ways. Practice proves that the relationship between the international legal norms and the EU specific rules seems to be rather mutually beneficial than conflictual. The EU model of protecting citizens abroad can be interpreted as further contributing to the spread of the individual-centred and ‘humanization’ trends that have pervaded the international mechanisms of consular and

¹³⁴¹ See the CJEU judgment in the *ATAA* case, para. 107.

¹³⁴² *Ibid.*, para. 110.

¹³⁴³ AG Kokott, in her Opinion in the *ATAA* case, argued that the norm on the basis of which the EU Regulation was held invalid was ultimately the EEA Agreement rather than the general principle of EU law or the customary international law principle. See also T. Konstadinides, ‘When in Europe: Customary International Law and EU Competence in the Sphere of External Action’, *op.cit.*

¹³⁴⁴ Based on the CJEU previous jurisprudence, giving precedence to the EU law obligations, even when the international obligations were recognised as in principle taking precedence over EU law provisions, see *Case C-Portugal v Commission* [2000] ECR I-5171.

diplomatic protection of natural persons. The Union's practice of establishing an individual fundamental right to consular and diplomatic protection recognised to unrepresented Union citizens contributes to supporting the modern international trend whereby consular and diplomatic protection of individuals are no longer exclusive discretionary powers of the State of nationality but, slowly, also individual rights to some sort of consular and diplomatic protection entitlements are recognised. The Member States have taken full advantage of the exceptions permitted by the general international legal framework and created a Union specific regime that would serve their needs of efficiently responding to the growing consular demands of their citizens travelling abroad.

Despite the prevalent post-Lisbon Treaty objective of strict observance of international law, the EU does not limit to a mot-à-mot application of the international rules, but passes it through its constitutional and specific objectives lenses. Examples such as *Kadi*, *Micheletti* and *ATAA*, where EU law goes beyond a strict reproduction of the relevant international legal norms to ensure its own objectives and defend itself from international law, if needed,¹³⁴⁵ resemble to a certain extent the EU's model of protecting EU citizens abroad. The relationship between public international and EU law in the area of protection of citizens abroad has been mutually influencing. At times it has been fervently criticised for being conflictual, due to the EU's disregard of the relevant public international norms, argued to not accommodate the distinctive EU's features. However the EU's model of ensuring protection of EU citizens abroad is not *per se* incompatible with international law, nor is its implementation in practice, as proved by the lack of third countries opposition and model importation by certain regional organisations.¹³⁴⁶

¹³⁴⁵ See G. de Burca, 'Europe's raison d'être', in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge University Press (2014), 21-38.

¹³⁴⁶ See the regional consular sharing agreements in cases of disasters, which have been consented in the framework of other regional international organisation, such as the ASEAN (see the *Guidelines for the Provision of Emergency Assistance by ASEAN Missions in Third Countries to Nationals of ASEAN Member Countries in Crisis Situation*, Manila, Philippines, 29-30 July 2007) and Andean countries (according to *Decision 548, the Andean Cooperation Mechanism on Consular Assistance and Protection and Migratory Matters* was adopted in 2003. 'This instrument stipulates that any national of an Andean Community Member Country who is within the territory of a third State where his/her country of origin has no Diplomatic or Consular Representation, may avail him or herself of the protection of the diplomatic or consular officials of any other Member Country.', Decision 548/2003 has not yet been implemented). None of these provisions is so far a legal binding provision, since the ASEAN includes the partnership in a soft law instrument, while within the Andean framework, the Decision is not yet in force. These provisions do not enshrine an individual right similar to the EU citizenship right to equal protection abroad recognised within the EU legal order, but rather keep partnership in consular sharing as an inter-governmental framework of cooperation, similar to Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, OJ, 1995, L 314/73 and Decision 96/409/CFSP, on the establishment of an emergency travel document, OJ, 1996, L 168/11.

Practice has proved that the interplay between the EU and international legal orders has been normatively productive, and mutually encouraging the respect of each other's norms and beneficial to the individual and international relations. The EU's specific rules on the protection of EU citizens abroad have actively contributed to shaping international law.¹³⁴⁷

First of all, the EU requirement incumbent upon the Member States to start international negotiations had the potential of creating international norms ensuring the international legitimacy of the EU's model. In spite of the absence of express international norms recognising the legitimacy of the EU model of protecting citizens abroad, third countries have not opposed to the exercise of this model by the non-nationality Member States and Union. The geographically widespread and long-standing consent of third countries to the EU's model of protecting EU citizens abroad can probably be argued to have led to the formation of a customary international norm recognising the international legitimacy of the EU's model, and furthermore to the support of the future creation of an individual right to receive some sort of consular or diplomatic protection from States.

The EU has given rise to further normative productivity, by way of offering a model for handling the growing consular burden of securing protection to citizens abroad. The EU specific model of ensuring protection of EU citizens abroad has by now influenced other regional legal orders. The ASEAN and Andean organisations seem to have taken as inspiration the EU model, especially the inter-States model of sharing of the citizens' protection burden. Since 2007 and 2003 respectively, the ASEAN and Andean countries have recognised an individual right to receive protection abroad from any of the represented States when the States of nationality is not represented *in loco*.¹³⁴⁸ The EU's modern model departing from the classical interstate relations and vision of consular and diplomatic protection of individuals seems to be seen as an appealable evolution in the eyes of other international actors. Therefore, the EU specific model is no longer the sole exception from the international legal regime since other regional organisations have developed similar forms of protection of unrepresented citizens abroad, at least in regard to the intergovernmental forms of consular and diplomatic cooperation.

Secondly, the portrayal of the EU's legal regime as incompatible with the international legal order is not entirely accurate since the EU norms, as such, are not incompatible *per se*

¹³⁴⁷ On the EU's general objective of shaping the international legal order introduced by the Lisbon Treaty, see J. Larik, 'Shaping the international order as an EU objective' in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order*, Cambridge University Press, (2014), 62-87.

¹³⁴⁸ See the ASEAN Andean countries examples.

with international law. Article 20(2)(c) TFEU refers to protection by the consular and diplomatic authorities of the non-nationality Member States, which, as previously pointed out, is permitted by public international law with the condition of obtaining the consent of third countries. The requirement of obtaining this consent was expressly included in the Maastricht Treaty, in the form of an obligation incumbent upon the Member States to start the international negotiations. In the meantime the exercise of consular protection by non-nationality Member States has achieved wide consensus among third countries.

In regard to the exercise of protective functions by the Union institutions, it has to be emphasised that former Article 20 EU Treaty (current Article 35 TEU) did not provide a principal role in securing protection abroad of EU citizens to the Commission delegations, but only a complementary role which has translated in practice mostly in the form of operational help during repatriation or evacuation of citizens, rather than consular services in their classical Article 5 VCCR form. The post-Lisbon increased protection role of the EU is, first of all, a codification of its external practice already consented by third countries. Article 5(10) EEAS Decision builds upon Article 35 TEU and the practice of the EU – which followed the express requests of the Member States mostly in cases of consular crises. This practice has already been consented by third countries mostly due to the benefits it brings to them by taking away the burden of protecting aliens during crisis situations. The enhanced role of ensuring protection of EU citizens abroad recognised to the EU on the basis of the Lisbon Treaty seems to have created more opposition from the Member States rather than third countries. The exercise of legislative power directly by the Council in the form of Union measures has been fervently opposed by the certain Member States throughout the pre-Lisbon Treaty period, while currently the Council and the Commission have clear legislative powers for the implementation of the EU citizenship right to equal protection abroad. This role, *per se*, is not making the EU legal regime incompatible with international legal norms, since the EU's distinctiveness in terms of internal norms *vis-à-vis* the international legal order has already been accepted by the international community.¹³⁴⁹

In spite of the general development of international law accepting new non-State actors, the international norms governing the exercise of consular and diplomatic protection of natural persons,¹³⁵⁰ are still of a purely inter-States nature. Therefore, it could be argued that the relevant international norms do not apply to the EU, which is still an international

¹³⁴⁹ B. de Witte, 'The Emergence of a European System of Public International Law' in J. Wouters, A. Nollenkaemper and E. de Wet (eds.), *The Europeanisation of International Law*, TMC Asser Press (2008).

¹³⁵⁰ See Chapter 3.

organisation, even if not a classical one.¹³⁵¹ The only relevant rule on the capacity of an international organisation to exercise protection of individuals abroad is to be found in the Advisory Opinion of the ICJ delivered in 1948 in the *Reparation of Injuries* case¹³⁵², which does not prohibit the exercise of consular and diplomatic protection of individuals by an international organisation as long as this function is included within the international organisation constitutive charter. With the entry into force of the Lisbon Treaty, the European Union has a clear delimitation of its competence to exercise protection of EU citizens abroad,¹³⁵³ therefore it would be argued that the European Union respects the applicable international norms, namely the general principle of speciality.

The EU model of ensuring protection of EU citizens abroad reflects the changing conduct of international relations. In public international law, the times when European States used to abuse the use of force and other means of interference in the domestic affairs of other States, under the guise of diplomatic protection measures have long passed.¹³⁵⁴ The current EU legal regime of protecting EU citizens is not a veil concealing interventionist intentions. Its main objective is to secure the protection of EU citizens as proved by practice, which has beneficial consequences also for third countries in terms of alleviating their responsibility of taking care of aliens in distress. It is true that the protection of nationals was also put forward as the main objective during the aforementioned past times, and that this objective could at any times be again abused by States. However, if this practice recurs, third countries would better invoke the abuse of rights doctrine rather than their lack of express consent to the EU specific model of protecting Union citizens abroad.

¹³⁵¹ The customary international law governing the exercise of consular and diplomatic protection of EU citizens is still an exclusive inter-States system, see the 2006 ILC Articles on Diplomatic Protection. The still preponderant inter-States relations nature of the international legal order is a more general problem, which the EU has to confront in many areas of activity. See for instance H. Bruyninckx, J. Wouters, S. Basu and S. Schunz (eds.), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Palgrave Macmillan (2012); J. Wouters, Anna-Luise Chané, 'Brussels meets Westphalia: The European Union and the United Nations', WP No. 144/August 2014, available online at https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp141-150/wp144-wouters-chane.pdf

¹³⁵² International Court of Justice, Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), 174–220.

¹³⁵³ For more details, see the following chapter.

¹³⁵⁴ The Anglo-Boer war (1899-1902) was justified by Britain as an intervention to protect its nationals who owned the gold mines of Witwatersrand, and the United States' military interventions in the Dominican Republic in 1965, in Grenada in 1983 and in Panama in 1989 were carried out on the pretext of defending U.S. nationals, for more on this see J. Dugard, *First Report on Diplomatic Protection*, presented to the International Law Commission during its 52th session, UN Doc. A/CN.4/506, 7 March 2000, 5-6, para. 14. See also Amerasinghe, 'The Effect of the Calvo Clause', in *op.cit.*; J. Dugard, *Third Report on Diplomatic Protection*, Addendum, 16 April 2002, para. 1.

To conclude, the case of the EU model of ensuring protection abroad of EU citizens reflects an interdependence and mutual normative influence between the international and EU norms, rather than a conflictual relationship with the public international legal order. The exercise of the EU supranational model of protecting EU citizens abroad creates a precedent in international law, while the EU inter-governmental model is influencing international law by shaping existing international legal norms so as to correspond to the modern day needs of the international society.¹³⁵⁵

¹³⁵⁵ This effect is referred to by legal academics (see S. Touze, *op.cit.*, and K. Ziegler, *op.cit.*) as ‘normative permeability’ or ‘transversal effect of EU law’, and for a more detailed account, see D. Kochenov and F. Amtenbrink (eds), *The European Union’s Shaping of the International Legal Order*, Cambridge University Press (2014).

Chapter 4 - The Unique Role of the European Union in Securing the Protection of EU Citizens Abroad

I. Introduction

Since the introduction of an EU citizenship right to protection abroad, in 1993, the EU has overcome numerous legal and political obstacles before reaching the current day expressly recognised power to exercise consular and diplomatic protection functions directly to its EU citizens in third countries.

The exercise of consular and diplomatic protection on behalf of individuals has traditionally been connected with the State and perceived as falling under its sovereign power.¹³⁵⁶ As shown in Chapter 3, these mechanisms of protecting citizens abroad were developed in an era when only States were formally recognised as international actors. The Vienna Conventions on Consular and Diplomatic Relations as well as the current customary international law still recognise only the State of nationality, and exceptionally non-nationality States, as holders of a right to exercise consular and diplomatic protection on behalf of natural persons.¹³⁵⁷ Since the appearance of international organisations on the international sphere, international law has had to accommodate and permit participation of this new international actor. To a certain extent the accommodation was made by recognising rights and obligations similar to those of States, such as active and passive legation rights,¹³⁵⁸ right to conclude international agreements, functional protection of their officials,¹³⁵⁹ and immunity recognised to their high officials.

The entry into force of the Maastricht Treaty has introduced a new actor on the international sphere, which could exercise, to a certain extent, State-like consular and diplomatic protection functions on behalf of private individuals, who are its citizens. The

¹³⁵⁶ J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press (2012), 115ff.

¹³⁵⁷ See Art. 8 VCCR and 45 VCDR.

¹³⁵⁸ See Henry G. Schermers, Niels M. Blokker, *International Institutional Law: unity within Diversity*, 5th revised ed. Brill (2011), 1158-1160.

¹³⁵⁹ See the ICJ's Advisory opinion *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports (1999), 62. The ICJ stated that the immunity of a UN officer can also be invoked against the State of nationality of such an officer when this expert acts in the name of the organisation. The same conclusions had been reached by the ICJ some years before in the Advisory Opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, dealing with the case of Mr Mazilu, the Romanian member of the UN Commission on Human Rights, who was hindered by Romania from leaving the territory of the State in order to exercise his function at the UN*, ICJ Reports (1989), 177.

Lisbon Treaty has further strengthened the role of the Union in this field by introducing several institutional, procedural and substantive legal innovations. The most important institutional innovation is the replacement of the Commission delegations with Union delegations, which are currently representing the entire panoply of Union interests,¹³⁶⁰ and they can also ensure the protection of Union citizens in third countries.¹³⁶¹ Unlike any other international organisation, and, similar to the consular and diplomatic missions of States, the Union delegations can protect the interests of the sending State and of its nationals in the world. The recognition of legislative powers to the Union Institutions, which can adopt via the QMV Directives, represents a procedural amendment meant to ensure the efficiency of the EU citizenship right to equal protection abroad, and broadly, protection of the Union citizens in the world. The most salient substantive legal innovations with impact on the EU citizenship right to equal protection abroad were commented in the first Chapter.

The present Chapter will aim to offer a more integrated assessment of the impact of the Lisbon Treaty on all Union policies which are involved in securing protection of the Union citizens abroad. This chapter will first address the added value of the Lisbon Treaty to the EU's role of ensuring protection of unrepresented Union citizens abroad.¹³⁶² It will continue to analyse the legal status, nature and effects of the EU citizenship right to equal protection abroad.¹³⁶³ The question of the extent of consular and diplomatic functions entrusted to the EU will then be addressed.¹³⁶⁴ In order to understand the impact of the EU legal regime on the Member States' consular and diplomatic protection functions, the Member States' national systems on consular and diplomatic protection of their citizens will be mapped out.¹³⁶⁵ Finally, the chapter will conclude by discussing the future of the EU's role in the field of protecting unrepresented Union citizens in the future.¹³⁶⁶

¹³⁶⁰ Art. 221 TFEU.

¹³⁶¹ Art. 35 TEU and Art. 5(10) EEAS Decision.

¹³⁶² *Section II. The Added Value of the Lisbon Treaty - Strengthening the EU's Role to Ensure Protection of its Citizens in the World.*

¹³⁶³ *Section III. The legal status of equal protection abroad – (fundamental) EU citizenship right or entitlement to legitimate expectations?; Section IV. What's in the EU citizen's right to equal protection abroad? Challenges to establish the substantive content of the EU citizenship right; Section V. The legal effects of the Union citizenship right to equal protection abroad.*

¹³⁶⁴ *Section VI. The complex EU institutional architecture ensuring protection of EU citizens abroad.*

¹³⁶⁵ *Section VII. Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad.*

¹³⁶⁶ *Section VIII. Policy and institutional recommendations to increase the efficiency of protection of the EU citizens in the world.*

II. The Added Value of the Lisbon Treaty - Strengthening the EU's Role to Ensure Protection of its Citizens in the World

When the Maastricht Treaty introduced for the first time a Union citizenship right to protection outside the Union's borders, the only role envisaged for the Union was limited to one sentence in the former EU Treaty, whereby the consular and diplomatic missions of the Member States and the Community delegations were obliged to cooperate so as '*to contribute to the implementation of the Union citizen's right to protection in third countries*'.¹³⁶⁷ This particular obligation of cooperation would be put into practice on a common basis only after some 10 years from its introduction, following several consular crises affecting third countries, when the Member States realised they could not cope with the consular demands of the EU citizens through horizontal cooperation alone.¹³⁶⁸ These positive instances of vertical cooperation convinced the Member States of the added value of the vertical cooperation, and more cases of the Union's involvement followed.¹³⁶⁹

Unlike the case of other Union citizenship rights, the drafters of the Treaty did not endow the Council with specific legislative powers to ensure that the Union citizen's right to equal protection abroad would effectively be applied and developed. Similar to other areas touching on sensitive foreign policies, the EU model of consular and diplomatic protection of the Union citizens was kept out of the reach of the Union's legislative power and was left to the full control of the Member States' executives. The provision within Article 8c Maastricht Treaty whereby the '*Member States shall establish the necessary rules among themselves*' was interpreted as precluding implementation by way of Union legislative measures. The Member States did not act within the Community or Union pillar but outside the EU legal order, only taking advantage of the operational facilities of the Council. Until 2007, the instruments implementing the EU citizenship right to equal protection abroad were adopted only in the format of sui-generis international agreements concluded by the Member States and non-constraining soft law documents elaborated by Council's specific Working Group - COCON. The only legally binding implementing instruments was a hybrid form of act - Decisions of the Representatives of the Governments of the Member States adopted by the Member States acting in their capacity as representatives of the Member States within the

¹³⁶⁷ Former Art. 20(2) TEU

¹³⁶⁸ For instance, during the South East Asia tsunami of December 2004.

¹³⁶⁹ For instance in Libya (2010), Mumbai (2008) and Libya again in early 2011. During the Gaza crisis in January 2009, nearly 100 people were evacuated in armoured buses thanks to the EU Delegation's support. In most of these cases the Community Civil Protection Mechanism was triggered.

institutional framework of the Council. This type of act was usually adopted for making political statements or implementing organisational, administrative tasks, and was not designed to affect rights of the individuals.¹³⁷⁰ The possibility of using the fall-back competence (former Article 308 EC Treaty) as legal basis for a Community based act, as occurred for the extension of the Civil Protection Mechanism to cover the provision of consular protection of EU citizens in third countries,¹³⁷¹ had not been considered, and it is argued that, in light of the required unanimous consent, it would have never passed approval in the Council.¹³⁷²

The Lisbon Treaty brought important changes regarding the role of the Union in securing the protection of Union citizens abroad on several accounts,¹³⁷³ which have the potential of changing the previous logic of inter-governmental *sui generis* decision-making, into an area with strong supranational features. It could be argued that the Lisbon Treaty is a historical point in time for the purely inter-States international consular and diplomatic law, since it clearly establishes an international organisation alongside the States in an area that has been traditionally reserved to States.

A first significant substantive legal innovation, brought by the Lisbon Treaty, is the introduction within the Article setting out the Union's values and general objectives - Article 3(5) TEU - of a provision establishing that: '*In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.*' The separation of 'the protection of [Union] citizens' from the words 'values' and 'interests' in this phrase seems to indicate that its nature is distinct from the latter ones, and, thus seems to fall under the remaining legitimate category of the Union's 'objectives'. One might question whether this differentiation between 'interests', 'values', and 'objectives' is necessary or indeed useful. In principle, the main difference is between 'values' and 'interests', on the one hand, and 'objectives', on the other hand. The latter category is said to have normative force, due to its interpretative¹³⁷⁴, guiding and informing policy-making role,

¹³⁷⁰ E.g. Art. 253 TFEU (ex-Art. 223 TEC), Art. 341 TFEU (ex-Art. 289 TEC).

¹³⁷¹ Council Decision 2007/779/EC of 8 November 2007 establishing a Community Civil Protection Mechanism [2007] OJ L 314/9, 9-19.

¹³⁷² Council Decision 2007/779/EC of 8 November 2007 establishing a Community Civil Protection Mechanism [2007] OJ L 314/9, 9-19.

¹³⁷³ See, for instance: introducing the protection of EU citizens in the world as an express Union objective; introducing new external relations actors; enhancing the duty of vertical cooperation among the consular and diplomatic missions of the Member States and the external representations of the Union; recognising an express internal legislative role for the Council and the Commission, as well as an external action competence.

¹³⁷⁴ According to the CJEU, EU law or domestic law falling under the scope of EU law must be interpreted and applied in the light of the Treaty objectives; this is method of interpretation is known as the teleological method of interpretation, which the Court often uses (see Joined Cases 6 and 7/73 *Istituto Chemioterapico*

whether based on specific policy related provisions (Articles 23(2) TFEU), or within the general framework of the flexibility clause (Article 352 TFEU) or development of EU's external implied powers (Article 216(1) TFEU).¹³⁷⁵ Several legal scholars have incidentally referred to Article 3(5) TEU as establishing general Union objectives.¹³⁷⁶ It has to be noticed that Article 3(5) TEU starts with the words '*in its relations with the wider world*' thus signalling that it refers to external relations 'values', 'interests', and 'objectives'. The protection of Union citizens is not so general to be qualified as a 'value' and being mentioned separately from the latter and having a corresponding internal and external Union power detailing the protection of Union citizens abroad, one is lead to believe that we are in the presence of a Union's objective. Therefore, it can be argued that Article 3(5) TEU includes within the panoply of external relations objectives the 'protection of its citizens'. An express Union objective is now present in the founding Treaty to guide and inform the Union's policy-making and choices for their implementation outside the EU. In the context of the highly challenged consular and diplomatic protection functions recognised to the Union¹³⁷⁷, the objective of 'protection of [Union] citizens' can, for instance, orientate and also legitimate the Union's use of Article 35(3) TEU-based external competence.

A second important substantive legal innovation brought by the Lisbon Treaty to the protection of Union citizens abroad is the clarification of the legal nature of the EU citizen's right to equal protection abroad as being both an EU citizenship right,¹³⁷⁸ and a fundamental right of the EU citizen (Article 46 EU Charter¹³⁷⁹). If the Lisbon Treaty clarified the legal

Italiano S.p.A. and CommercialSolvents Corporation v Commission [1974] ECR 223, para. 32; see also Opinion 1/91; see also A. Kaczowska, *European Union Law*, Routledge (2013), 138-140; K. Lenaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *EUI Working Paper AEL* 2013/9; J. Larik, 'From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) *International and Comparative Law Quarterly*, 935, 953.

¹³⁷⁵ It has been argued that the objectives will not serve alone as legal basis for the extension of Union powers, they can lead to such a result but only within the limited circumstances codified by Arts. 216(1) TFEU and 352 TFEU. See J. Larik, 'From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) *International and Comparative Law Quarterly*, 935, 953; M. Cremona, 'A Reticent Court? Policy Objectives and the Court of Justice' in A. Thies and M. Cremona (eds.) *The European Court of Justice and External Relations Law - Constitutional Challenges*, Hart Publishing (2014).

¹³⁷⁶ J. Larik, 'From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) *International and Comparative Law Quarterly*, 935, see fn 4.

¹³⁷⁷ In particular the defensive attitude of certain Member States, in particular the UK, which has constantly been opposed to recognising consular and diplomatic like functions to the EU, and thus raised oppositions to the newly conferred external power of the Union to protection citizens abroad as enshrined in Art. 35(3) TEU and Art. 5(10) EEAS Decisions and future inclusion of such power in the proposal for a Directive on consular protection of Union citizens abroad.

¹³⁷⁸ The right to equal protection abroad is provided by Article 20(2)(c) TFEU, which is located among the other three EU citizenship rights and under the Chapter on Non-Discrimination and Citizenship.

¹³⁷⁹ Article 46 is entitled 'the right to consular and diplomatic protection'.

nature of the EU citizenship right to equal protection abroad, the same cannot be said about the substantive scope of application of this right. The Treaty of Lisbon did not change the wording of the EU citizenship right to equal protection abroad, thus maintaining the previous concept of ‘protection by the consular and diplomatic authorities of the Member States’ which has been criticised for confusing consular with diplomatic protection and for lacking clarity as regards the precise types of protection the EU citizenship provision refers to – consular and/or diplomatic protection.¹³⁸⁰ The added value of the Lisbon Treaty comes from the entry into force of the EU Charter and its Article 46. In addition to strengthening the legal status of the EU citizenship right to equal protection abroad by raising it to a ‘fundamental right’, Article 46 of the EU Charter could be interpreted as offering evidence on the substantive scope of application of this right. The Article is entitled ‘diplomatic and consular protection’ and has the same content as Articles 20(2)(c) and 23(1) TFEU, and same legal force as the Founding Treaties, indicating that the equal ‘protection by the consular and diplomatic authorities of the Member States’ could be interpreted as including both consular and diplomatic protection, contrary to the view of certain Member States¹³⁸¹ and the majority of the legal scholars, of both international and EU law formation,¹³⁸² that the EU citizenship right confers only equal consular protection.¹³⁸³

In terms of institutional innovations, the Lisbon Treaty introduced new actors within the Union’s institutional setting responsible for the conduct of its external representation,

¹³⁸⁰ See S. Kadelbach, ‘Union citizenship’, *NYU Jean Monnet Working Paper* 9/03; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965.

¹³⁸¹ See the UK’s position from a recent report in relation to the Commission’s proposal for a Directive on consular protection of unrepresented Union citizens: ‘The Government’s view — endorsed by both the Committee and its predecessor — has consistently been that: *consular services are the responsibility of Member States*; are, quite rightly, at the top of Ministers’ and officials’ agenda, at home and abroad; a good level of cooperation between Member States already exists, and work was underway to improve it further; missions staffed by EU officials could not provide a service of the same standard, with the level of immediate accountability that ensured that it remained thus; the *Government would resist the expansionist elements in these proposals with vigour and determination*’. (emphasis added). See the Thirty-third Report of Session 2012-13 of the Foreign and Commonwealth Office, available at: <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86-xxxiii/8615.htm>> (accessed June 2013).

¹³⁸² A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, *op. cit.*, pp. 965-995; P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, in J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels—Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91–107; E. Denza, ‘Commentary to Art. 46 of the EU Charter’, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing (2014); S. Kadelbach, ‘Union citizenship’, *NYU Jean Monnet Working Paper* 9/03; J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006.

¹³⁸³ For a detailed discussion of Art. 46 EU Charter and its relation with Arts. 20(2)(c) and 23 TFEU, see the section titled ‘Content of the EU citizenship right to equal protection abroad’, in this chapter.

which aimed to ensure consistency and coherence of the Union's foreign policy and enhance the image of the Union as an international actor in the eyes of third countries: for instance, the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy¹³⁸⁴, who have similar external representation functions,¹³⁸⁵ and the European External Action Service (EEAS).¹³⁸⁶ The Lisbon Treaty provided only for the possibility of establishing the EEAS, while its actual establishment, as '*a functionally autonomous body of the European Union, separate from the Commission and the General Secretariat of the Council*' was done in 2010 on the basis of a Council Decision,¹³⁸⁷ and officially launched on 1st of December 2010, following the adoption of a flanking Staff and Financial Regulation.¹³⁸⁸

The EEAS became functional in January 2011, after merging several departments from the Council¹³⁸⁹ and the Commission¹³⁹⁰ into the new EEAS.¹³⁹¹ The Commission Delegations were replaced with Union delegations, which were endowed with a wider external representation task,¹³⁹² now operating as diplomatic missions representing all Union's interests and policies.¹³⁹³ The Delegations are currently the face of the Union in third countries, and the Heads of the delegation have now wider powers to act for the purpose of ensuring the effective implementation of all the Union's interests and policies tasks, including wide administrative competences, such as concluding contracts and being a party to legal proceedings, similar to the powers of the ambassadors and consuls of the Member States.¹³⁹⁴ To the concern of certain Member States¹³⁹⁵, the Union delegations have taken over some of the international representations functions which the Member States had to fulfil under their Union obligations, such as replacing the coordination role of the consular and diplomatic missions of the Member States holding the Presidency in third countries.

¹³⁸⁴ Hereinafter HR, Art. 18 TEU.

¹³⁸⁵ Art. 15(6), 18 and 27 (2) TEU. The differences between the external representational tasks of the President and of the HR are not very clear. While the former represents the Union 'on issues of common foreign and security policy, **at this level and in that capacity**', the more general mission of HR is take the lead in the Union's common foreign and security policy and is assisted by the EEAS. See J. Wouters and S. Duquet, *The EU, EEAS and Union Delegations and International Diplomatic Law: New Horizons* (Leuven Centre For Global Governance Studies, 2011), 7.

¹³⁸⁶ Art. 27(3) TEU.

¹³⁸⁷ Article 1(2) of Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service (hereinafter EEAS Decision) [2010] OJ L 201/30.

¹³⁸⁸ 2011 EEAS Report.

¹³⁸⁹ The DG E, crisis management, was seconded to the EEAS.

¹³⁹⁰ DG RELEX, external service and part of DG DEV were seconded to the EEAS.

¹³⁹¹ Art. 4 EEAS Decision and Organisational Chart.

¹³⁹² Art. 221 TFEU.

¹³⁹³ *Ibid.*

¹³⁹⁴ See Art. 5(8) EEAS Decision.

¹³⁹⁵ Such as the UK and France.

The Lisbon Treaty brought several significant innovations capable of enhancing the procedural efficiency in the field of protection of EU citizens abroad. First of all, the Lisbon Treaty conferred express legislative powers to the Union Institutions, for the purpose of adopting Directives ‘establishing the coordination and cooperation measures necessary to facilitate’ the equal protection of EU citizens abroad.¹³⁹⁶ After consulting the European Parliament, the Council acts by qualified majority.¹³⁹⁷ The involvement of the European Parliament and the replacement of unanimous decision-making with qualified majority voting is a significant blow to the long defended sovereignty of the Member States. On the other hand, it should be noted that Article 23(2) TFEU maintained part of the inter-governmental language as the directives that the Council is entitled to adopt are limited to ‘coordination and cooperation’ measures, recalling the pre-Lisbon framework limited to cooperation and coordination among the Member States that governed the field. The ‘coordination and cooperation’ language of Article 23(2) TFEU gives an indication that the Directive to be adopted might not be used for harmonising the national law and practice on the legal nature, force, material and personal scope of consular and diplomatic protection of citizens. The Council might be entitled to establish only a common model for operational actions in cases of assisting EU citizens in distress. Thus, it could be argued that the ambit of the Directive mentioned in Article 23(2) TFEU is similar to the ambit of the *sui generis* measures that the Member States could have adopted under the previous pillar structure.¹³⁹⁸

Regardless of whether it is only a ‘coordination and cooperation’ or harmonising Directive, the change of the legal nature of the implementing measures brought about by the Lisbon Treaty is significant in terms of the judicial guarantees available to individuals. Unlike the *sui generis* Decisions of the Representatives which are not Union acts, Directives are subject to the full panoply of EU judicial remedies, thus increasing the effectiveness of the EU citizen’s fundamental right to consular and diplomatic protection at both EU and national levels.

In terms of the relevant external competence of the European Union, the Lisbon Treaty has clarified, to a certain extent the types of competence enjoyed by the Union,¹³⁹⁹ and thus the division of competences to act externally between the Union and the Member States. The

¹³⁹⁶ The Commission plays the role of legislative initiator, Art. 17 TEU, the European Parliament’s role is not as important as the Council, however it has to be consulted (Art. 16(3) TEU), while the Council adopts Directive(s) by QMV - Art. 23(2) TFEU.

¹³⁹⁷ Art. 16(3) TEU.

¹³⁹⁸ The so-called Decisions of the Representatives of the Governments of the Member States meeting within the Council.

¹³⁹⁹ There is an express list of categories of competences, Arts. 2-6 TFEU.

EU citizenship or the specific right to equal protection abroad is not mentioned by any of the specific categories of competences, whether exclusive (Article 3 TFEU), complementary (Article 5 TFEU) or supporting, coordinating or supplementing as provided by (Article 6 TFEU).¹⁴⁰⁰ In this situation, according to the fall-back competence Articles 4(1) and 216(1) TFEU, the EU would enjoy an internal and external competence of enhancing the protection of EU citizens abroad that is shared with the Member States.

Some of the Member States might prefer to have this competence qualified as supplementary under Article 6 TFEU, since this would pre-empt the Union's future acquisition of power to the detriment of the Member States, keeping the latter as primary actors. However, the only type of competence provided by Article 6 TFEU that might be interpreted as covering the equal protection of Union citizens abroad, namely administrative cooperation,¹⁴⁰¹ has a specific EU autonomous meaning, referring to cooperation among the national executives for the specific purpose of ensuring the effective transposition of EU law. It is arguable whether the specific meaning of Union action under Article 23 TFEU, which is after all part of the EU citizenship rights that have so far been subject to EU shared competence, could be interpreted as falling under the aforementioned meaning of 'administrative cooperation'. A legal scholar argued that the areas enshrined in Article 6 TFEU are not exhaustive,¹⁴⁰² however, the specific type of supplementary competence would have to be mentioned in some other Article within the Treaty on the Functioning of the European Union, which is not the case with the EU citizenship right.

A significant added value of the Lisbon Treaty in terms of further clarifying the EU external relations catalogue, is the introduction of an express legal basis for the complementary civil protection policy (Article 196 TFEU) and humanitarian aid policy (Article 218 TFEU), which can exceptionally be used for the purpose of ensuring consular protection of EU citizens in distress abroad. The fact that the Union and the Member States share their external competences in this field may entail certain unwelcome legal consequences for some of the Member States.¹⁴⁰³ It seems that the Member States are already experiencing the consequences, as, in light of the fact that the Member States have not started

¹⁴⁰⁰ Certain authors argued that consular and diplomatic protection of EU citizens abroad would fall under the ambit of administrative cooperation as provided by Art. 6 (g) TFEU (see S. Battini, 'The Impact of EU Law and Globalisation on Consular Assistance and Diplomatic Protection' in E. Chiti, Bernardo G. Mattarella (eds.), *Global Administrative Law and EU administrative Law, Relationships, Legal Issues and Comparison*, Springer (2011). However, this competence refers rather to the transposition of EU legislation and not the cooperation among the consular and diplomatic authorities of the Member States as part of the national administration.

¹⁴⁰¹ Art. 6(g) TFEU.

¹⁴⁰² P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford University Press (2012), 174.

¹⁴⁰³ Arts. 2(2), 4(2) TFEU.

negotiations with third countries with a view to obtain the latter's consent to the exercise of the EU's specific regime, the Commission proposed to include a consent clause in mixed agreements with third countries. According to a Commission Communication of March 2011, 'the negotiations are on-going', however, the Community does not mention which kind of negotiating framework will be chosen: the *Open Skies* method¹⁴⁰⁴ – whereby the Member States continue to negotiate and conclude international agreements but under the strict supervision of the Commission, or negotiations conducted directly by the Union after obtaining a delegation from the Member States to continue the negotiations.

Another salient procedural innovation was brought by the Lisbon Treaty to the obligation of systemic cooperation with the Member States' consular and diplomatic missions in third countries. In order to enhance the practical application of the equal protection of unrepresented EU citizens in third countries, the vertical diplomatic cooperation between the Union delegations and the Member States' consular and diplomatic missions was strengthened in the Lisbon Treaty. There are currently several different provisions in both EU primary and secondary law translating this obligation. A general diplomatic cooperation obligation is included in Article 32 TEU applicable within the CFSP ambit, and a correspondent obligation is placed within the TFEU in relation to non-CFSP areas (Article 221 TFEU). Additionally, Article 35(3) TEU provides for a specific vertical diplomatic cooperation within the specific area of implementation of the EU citizenship right to equal protection abroad. The duty of cooperation is further strengthened by Article 5(9) of the EEAS Decision, which provides a general duty of cooperation, while paragraph 10 of the same Article endows the Union delegations with the competence to support the Member States, upon their request, in their role of providing consular protection to citizens of the Union in third countries.

In addition to the obligation of vertical cooperation, the effective implementation of the EU citizen's right to equal protection abroad is also ensured by adding an obligation of horizontal cooperation among the consulates and embassies of the Member States.¹⁴⁰⁵

A retrospective insight to the Founding Treaty amendments, from Maastricht until the Lisbon Treaties, shows the incredible evolution experienced by the EU, in spite of certain Member States' persistent opposition. The EU significantly increased its role into an area that has been historically perceived as reserved to States. Ensuring protection of EU citizens

¹⁴⁰⁴ M Cremona, 'External Relations and External Competence of the EU: the Emergence of an Integrated Policy' in P. Craig and G. de Burca (eds.), *The Evolution of EU Law*, Oxford University Press (2011), 230-267.

¹⁴⁰⁵ See Art. 35(1) and (3) TEU.

abroad used to be governed by inter-governmental measures, and the Community, its delegations, and the Union, were gradually accepted as actors following recent consular crises from the early 2000s. The Treaty of Lisbon gave a concrete role to the EU in relation to the protection of EU citizens abroad. It can be noted that the EU is now legally obliged to respect in all its internal and external policies the *Union's* objective of protecting the interests of its citizens abroad (Article 3(5) TEU) and has a foreign service (the EEAS)¹⁴⁰⁶ empowered to attain this obligation (Article 221 TFEU), while the Member States are required, according to Article 4(3) TEU and Article 35 TEU, to cooperate sincerely with the EEAS for the purpose of ensuring the *Union's* objective of protecting the Union citizens in the world. Comparing the EU legal regime established by the Maastricht Treaty with the current framework established by the Lisbon Treaty, the EU's role is definitely clearer and bigger, and with a potential to increase depending on the evolving external security and internal financial circumstances, and the changing views of the Member States. Large-scale consular crises¹⁴⁰⁷ have revealed the gaps in the horizontal cooperation, and the necessity of vertical consular cooperation in order to promptly respond to the consular demands has certainly played a decisive role in the Member States' acceptance of the EU involvement to fill the gaps in practice.

¹⁴⁰⁶ The European External Action Service was formally launched on 1 December 2010 and became operational in January 2011. See European External Action Service established by Article 27(3) TEU and Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, [2010] OJ L 201/30.

¹⁴⁰⁷ See the case of the 2004 South East Asian tsunami, where difficulties in providing prompt relief to EU citizens were encountered, see for instance the case of Sweden, the *CARE Report*, Chapter III section 4.7. The European Commission 2006 Green Paper also mentioned that Member States were not well represented in the area: 17 Member States had a representation in Thailand, while only 6 had a representation in Sri Lanka. European Commission, 'Green Paper on Diplomatic and Consular Protection', 28 November 2006 (COM(2006)712 final) ('Green Paper').

III. The legal status of equal protection abroad – (fundamental) EU citizenship right or entitlement to legitimate expectations?

The fact that the EU citizenship to equal protection abroad is formulated differently than the other EU citizenship rights, namely, instead of providing a ‘right to equal protection abroad’ along the lines of the ‘right to move and reside’,¹⁴⁰⁸ ‘right to vote’¹⁴⁰⁹ and ‘right to petition’,¹⁴¹⁰ the EU legal provisions have always phrased the right in more abstract wording, such as ‘right to enjoy [...] the protection’¹⁴¹¹ and ‘entitlement to protection’¹⁴¹², which has been argued by certain Member States,¹⁴¹³ legal scholars¹⁴¹⁴ and EU Institutions’ representatives¹⁴¹⁵ as indicating a different legal nature and force of this EU citizenship right compared to the other EU citizenship rights.

The difference between ‘right’ and ‘entitlement’ seems to be that of a different legal force, whereby the latter legal concept can be subject to further limitations that do not need to follow the same strict conditions as a limitation imposed to a right.¹⁴¹⁶ In short, ‘entitlement’ would grant more leeway for Member States to act discretionally. The distinction between ‘right’ and ‘entitlement’ is not clear since legal dictionaries seem to define these terms in

¹⁴⁰⁸ Art. 21 TFEU.

¹⁴⁰⁹ Art. 22 TFEU.

¹⁴¹⁰ Art. 24 TFEU.

¹⁴¹¹ See Art. 20(2)(c) TFEU.

¹⁴¹² See Art. 46 EU Charter – ‘[...] be entitled to protection [...]’.

¹⁴¹³ For example, Ireland and the UK Ministries of Foreign Affairs. However, the UK has offered different opinions. In mid-2005, during hearings before the ECJ, the UK acting as a defendant in a case brought before the Court by Spain, argued that consular and diplomatic protection is a right of the individual and not a policy (Case C-145/04 *Spain v UK* [2006] ECR I-17917, para. 54). During the same year, as a response to the Commission Green Paper, the UK argued that the same Treaty based provision did not provide for a ‘right’ to the Union citizens (!).

¹⁴¹⁴ There are certain academic opinions that portrayed former Art. 20 TEC as an illustration of the Common Foreign and Security Policy (CFSP), a requirement for joint action between the Member States rather than as an individual right like the EU citizen’s right to move and reside within the EU. See S. Kadelbach, ‘Union citizenship’, NYU *Jean Monnet Working Paper* 9/03, 30 and Siofra O’Leary, *EU Citizenship – The Options for Reform*, IPPR, 1996, 63; or simply as an entitlement understood as something less than a right, in regard to which the State can retain some power of refusal, see Touzé, who emphasises that Art. 46 of the Charter does not use the term ‘right’ (‘droit’) but rather the term ‘entitled’ (‘bénéficie’), while other provisions of the Charter do confer ‘rights’, see S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, (2011) *Revue des affaires européennes*, 83-85 and J. Wouters, S. Duquet and K. Meuwissen, ‘The European Union and Consular Law’, *KU Leuven Working Paper* 107/2013.

¹⁴¹⁵ See for the different opinions of the MEPs. European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Resolution of 11 December 2007 P6_TA(2007)0592, available at <http://www.careproject.eu/database/schedaEU.php?eulex=EUEPreport&lang=6>.

¹⁴¹⁶ S. Kadelbach, ‘Union citizenship’, NYU *Jean Monnet Working Paper* 9/03; S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, (2011) *Revue des affaires européennes*, 83-85; J. Wouters, S. Duquet and K. Meuwissen, ‘The European Union and Consular Law’, *KU Leuven Working Paper* 107/2013, 6-7.

ways that makes them appear synonymous.¹⁴¹⁷ ‘Entitlement’ seems to be described as the fact or situation of having a right, and it is more commonly used in contract law or social law.

The opinion put forward by this thesis is that there is not enough legal evidence of a clear legal difference between ‘right’ and ‘entitlement’ and thus, contrary to certain legal scholarly views,¹⁴¹⁸ there is no need of making a choice between the two concepts in regard to the nature of the EU citizenship right to equal protection abroad.¹⁴¹⁹

This thesis argues that, even if we were to accept such a clear distinction between the concepts of ‘right’ and ‘entitlement’, whereby the latter concept imposes a less binding or forceful obligation upon the Member States, there is enough evidence in the founding Treaties that the EU citizenship right to equal protection is a ‘right’ with a similar legal nature and force as the other EU citizenship rights enshrined in Article 20 TFEU.

First, Article 8c of the Maastricht Treaty and all its later versions have used the word ‘shall’ in the wording of the EU citizenship right to equal protection abroad, which commonly reflects a legal obligation, and it would logically entail a corresponding right to the EU citizens.

Second, the Lisbon Treaty introduced a list of EU citizenship rights in addition to the separate legal provision dedicated to each of the four EU citizenship rights. Since all four rights were included within a common list, it would seem illogical to differentiate the EU citizenship right to equal protection abroad from the other rights as having a different, less forceful legal status.

Third, the now legally binding EU Charter on Fundamental Rights and Freedoms also supports its status as a ‘right’. Article 46 of the EU Charter is entitled ‘*the right to consular and diplomatic protection*’ and is part of the Union primary law¹⁴²⁰ that binds the Member States in their conduct towards the Union citizens. Since there is no legal hierarchy between the EU Charter and the EU Treaties, and the wording of Article 46 of the EU Charter is identical to the wording of Article 23 (1) TFEU, then, as a consequence, the title of Article 46 – *right to consular and diplomatic protection* – indicates that Article 20(2)(c) TFEU enshrines

¹⁴¹⁷ The *Oxford Dictionary*, the *Legal Dictionary*, the *Law Dictionary* (all accessed online)

¹⁴¹⁸ S. Kadelbach, ‘Union citizenship’, NYU *Jean Monnet Working Paper* 9/03; S. Touzé, ‘Aspects récents (et choisis) de la protection consulaire des citoyens de l’Union européenne’, (2011) *Revue des affaires européennes*, 83, 83-85.

¹⁴¹⁹ Established legal scholars, such as E. Denza, who is coming from a common law system, use interchangeably the concepts of ‘right’ and ‘entitlement’ without making a difference between the two. See E. Denza, Commentary to Art. 46 of the EU Charter, in *The EU Charter of Fundamental Rights: A Commentary*, by S. Peers, T. Hervey, J. Kenner, A. Ward, Hart Publishing (2014). See also of a similar opinion, P. Vigni, ‘Diplomatic and consular protection: Misleading Combination or Creative Solution’, *EUI Law Working Paper* 2010/11, 5.

¹⁴²⁰ See Art. 6 TEU.

an *individual* right to consular and diplomatic protection recognised to the unrepresented EU citizen.¹⁴²¹ The legal force of Article 46 EU Charter should however be interpreted with caution in light of Article 52(2) EU Charter, which provides that: ‘*Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.*’

In conclusion, in spite of some scholarly views and opinions of the Member States, there seems to be enough legal evidence that Articles 20(2)(c) and 23 TFEU confer a ‘right’ to equal protection abroad to the (unrepresented) EU citizens, which is no less of a ‘right’ than the other EU citizenship rights provided by the founding EU Treaties.

IV. What’s in the EU citizen’s right to equal protection abroad?

Challenges to establish the substantive content of the EU citizenship right

1. Introduction

One of the sharpest critiques raised against the EU citizenship right since its introduction by the Maastricht Treaty, which seems to continue also after the entry into force of the Lisbon Treaty, concerns the imprecise substantive content of this right.¹⁴²² Namely it is not clear whether the term ‘protection by the consular and diplomatic authorities of the Member States’ should be equated with the public international legal concepts of ‘consular protection’ and ‘diplomatic protection’. So far the thesis adopted a maximalist understanding of the substantive scope of the EU citizenship right to equal protection abroad, especially in Chapter

¹⁴²¹ It is important to distinguish between the EU citizen and the unrepresented EU citizen as holder of the right. The Treaties and the EU Charter do not confer a right to consular and diplomatic protection to all EU citizens, but only to a restricted category, namely, as expressly mentioned by the Treaties, to the ‘unrepresented EU citizens’. The notion of ‘unrepresented’ as a condition that a Union citizen has to fulfil in order to enjoy the right to consular protection is, currently, exhaustively defined in Art. 1 of Decision 95/553/EC: ‘*Every citizen of the European Union is entitled to the consular protection of any Member State’s diplomatic or consular representation if, in the place in which he is located, his own Member State or another State representing it on a permanent basis has no: - accessible permanent representation, or - accessible Honorary Consul competent for such matters.*’

¹⁴²² A. Vermeer-Künzli, ‘The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance’ in by S. Faro, Mario P. Chiti and E. Schweighofer (eds), *European Citizenship and Consular Protection New Trends in European Law and National law* edited, Editura scientifica Napoli (2012), 101-111; A. Vermeer-Künzli, ‘Where the Law becomes Irrelevant: Consular Assistance and the European Union’, (2011) *International and Comparative Law Quarterly*, 965; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance’, (2008) *ZaöRV*, 339; T. Stein, ‘Interim Report on “Diplomatic Protection Under the European Union Treaty”’, in: *ILA Committee on Diplomatic Protection of Persons and Property, Second Report*, New Delhi, 2002, 36-7; P. Vigni, ‘The Protection of EU Citizens: The Perspective of International law’ in: J. Larik and M. Moraru (eds.), *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, *EUI Working Paper* 2011/10, 91-107.

3 where, for the purpose of doing an exhaustive legal assessment of the conformity of the EU legal regime of protecting EU citizens with the public international legal framework, it was safer to take into consideration the EU citizenship right as including both equal consular and diplomatic protection. Arguments in both directions have been raised by legal scholars, and according to the Commission's latest policy paper on the EU citizenship right to equal protection abroad,¹⁴²³ the EU citizenship right does not exclude diplomatic protection, which might in the future, depending on the circumstances, also develop a diplomatic protection aspect. Therefore Chapter 3 chose to embrace the maximalist understanding to explore whether this development might pose problems in future from the perspective of the EU legal regime conformity with public international law.

As discussed in Chapter 3, public international law recognises two different traditional types of assistance that can be provided to natural persons abroad: diplomatic protection and consular assistance. Although presenting numerous similarities in terms of legal nature, conditions, and objectives, they are not identical and have different legal regimes governing their exercise.¹⁴²⁴

Consular and diplomatic protection resemble, in terms of their legal nature, since they are both traditionally defined as rights of the State of the nationality, over which the State enjoys extensive decision-making powers, which only recently have been made subject, to a certain extent, to limitations based on judicially established criteria.¹⁴²⁵ One of the important differences between these two mechanisms consists in the requirements necessary to be fulfilled by the State to legitimately exercise the protection on the international sphere. While consular protection, does not have precise requirements, except general ones such as nationality of claims,¹⁴²⁶ and respect of the local law of the receiving State,¹⁴²⁷ diplomatic protection, due to its more intrusive effects into the domestic affairs of the receiving States and legal consequences on the international plane,¹⁴²⁸ has been made subject to more stringent requirements clearly prescribed by customary international law.¹⁴²⁹

¹⁴²³ European Commission Staff Working Paper Impact Assessment Accompanying the document Proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizens, SEC(2011) 1556 final, Brussels, 14.12.2011.

¹⁴²⁴ For a more detailed commentary of the differences between consular and diplomatic protection under international law, please see Chapter 2 Section II.

¹⁴²⁵ See the section 'National jurisprudence' in Chapter 2.

¹⁴²⁶ Resulting from Art. 8 VCCR.

¹⁴²⁷ Arts. 5(m) and 55 of the VCCR.

¹⁴²⁸ That is raising the international responsibility of the receiving State.

¹⁴²⁹ See Art. 1 of the 2006 ILC Articles on Diplomatic Protection refers to three requirements: existence of an international wrongful act, 'nationality of claims', and exhaustion of local remedies.

In spite of the current public international law maintaining the legal differentiation between consular and diplomatic protection of individuals,¹⁴³⁰ the Lisbon Treaty has maintained the same convoluted wording of the Maastricht Treaty's EU citizenship right to equal protection by the consular and diplomatic authorities of the Member States.¹⁴³¹ The source of clarification of the substantive content of the EU citizenship right might come from beyond the founding Treaties, i.e. the EU Charter, which has an Article with the same wording as Article 20(2)(c) TFEU, but is entitled '*diplomatic and consular protection*', thus indicating that the content of the EU citizenship which is equivalent to the EU fundamental right might include both international mechanisms of 'consular protection' and 'diplomatic protection'.¹⁴³²

Several of the recent consular crisis have shown that consular protection and assistance is unequivocally falling under the scope of the EU citizenship right and that their understanding is similar to consular protection action as defined by public international law. So far, diplomatic protection actions, whether of an informal or formal nature, seem not to have been exercised by non-nationality Member States, but rather by the EU institutions for certain EU citizens abroad.¹⁴³³

The question of the legal content of the EU citizenship right to equal protection abroad seems to be of utmost relevance in light of the fact that more and more EU citizens find themselves outside the Union without protection from their Member State of nationality.¹⁴³⁴ In addition to the issue of whether diplomatic protection is also covered by the EU citizenship right, the precise list of protection services has been an issue in practice in light of the clash between the EU citizens' expectations of the right to receive the same kind of help regardless of which Member State they resort to,¹⁴³⁵ in spite of the various implementing practices of the 28 Member States. There are very few aspects of the consular and diplomatic protection of natural persons on which all the Member States converge, the main trait is that the legal nature, substantive, and personal scope of consular and diplomatic protection of individuals, and the recognised domestic legal remedies, are differently regulated by the 28 Member

¹⁴³⁰ See Chapter 2, section III - Differentiating consular assistance from diplomatic protection as State's mechanisms for protecting citizens abroad.

¹⁴³¹ Former Art. 20 EC Treaty is now Art. 23 TFEU, while the right is also stipulated in the list of EU citizenship rights (Art. 20(2)(c) TFEU).

¹⁴³² Whether Art. 46 EU Charter uses the public international law concepts of 'consular protection' and 'diplomatic protection' or autonomous EU concepts is not clarified.

¹⁴³³ See more details on this issue in this Chapter, section 1.b - Type of 'protective' services.

¹⁴³⁴ For instance, according to the European Commission, 'more than 30 million EU citizens are estimated to permanently live in a third country', while the Member States are all represented only in four third countries, see Annex 2. See C COM (2011) 149/2, 3.

¹⁴³⁵ *Flash Eurobarometer* No. 294 'EU citizenship' of March 2010.

States. The Member States have interpreted the EU citizenship right to equal protection abroad through the lens of their specific national models, without making adjustments or compromises, thus leading in practice to different models of the EU citizenship right, in terms of its legal nature, force and substance. This implementation framework has confused the EU citizens, who do not benefit of a publicly available list of the type of protection services they enjoy from each of the Member States under the EU citizenship right to equal protection abroad. The wording of former Article 20 EC Treaty and, now, Article 23(1) TFEU has also been one of the main sources of disagreement between Member States and, in particular, between the United Kingdom and the European Commission which adopt different and to a certain extent divergent views.¹⁴³⁶

This section will assess whether the EU citizenship right to equal protection abroad jointly with the EU fundamental right to diplomatic and consular protection confer to the EU citizens a right to a concrete list of consular and diplomatic services or only to non-discriminatory protection treatment, and whether of both consular and diplomatic protection type.

2. The EU citizenship right to equal protection abroad – extending the application of the principle of non-discrimination based on nationality outside the European Union

It was mentioned in the introduction that, according to a recent survey, the majority of the EU citizens expect to receive the same kind of help they would be given by their Member State of origin from the consular and diplomatic representations of any of the other Member States under Article 20(2)(c) TFEU.¹⁴³⁷ For the moment, this is a utopian ideal rather than the reality. Such a common framework for the exercise of protection of the EU citizens presupposes either the existence of a Union law that establishes this binding common framework which, with the help of the EU Courts, will be applied uniformly across the Union territory, or that the 28 national legal frameworks on the exercise of consular and diplomatic protection of nationals are almost identical. Unfortunately, neither of these scenarios applies.

At the moment of writing, the EU legal framework governing the topic of protection of the EU citizens abroad is made up of, first, Union primary legal provisions,¹⁴³⁸ second, three

¹⁴³⁶ See the UK Report in the *CARE Report*.

¹⁴³⁷ Eurobarometer from March 2010.

¹⁴³⁸ Arts. 20(2)(c) and 23 TFEU and 35 TEU and Art. 46 EU Charter.

sui-generis international agreements implementing former Article 20 EC Treaty,¹⁴³⁹ an impressive amount of soft law – Council Conclusions and Guidelines,¹⁴⁴⁰ and numerous papers issued by the Commission.¹⁴⁴¹

The Union primary law provisions essentially extend the EU principle of non-discrimination based on nationality to a new subject area: the protection which consular and diplomatic officials of the Member States normally confer to their citizens abroad, and territorially: outside the borders of the Union. The fundamental EU citizenship right to protection abroad confers to the un-represented EU citizen a right to receive the protection treatment which is provided by the represented Member State to its own citizens in third countries, and nothing more.

The only harmonisation comes from the implementing measures, and it is very limited. The three Decisions of the Representatives of the Governments of the Member States restrict the substantive ambit of the equal protection obligation to six mandatory consular related circumstances: death; serious accident or serious illness; arrest or detention; victims of violent crime; relief and repatriation of distressed citizens; and issue of the ETDs. Therefore the EU citizens are entitled to receive the equal protection treatment only in these situations. Some

¹⁴³⁹ Decisions: 95/553/EC, 11107/95, 96/409/CFSP.

¹⁴⁴⁰ During the 15 years of its existence, the COCON committee has adopted an impressive number of conclusions and guidelines in the field of consular protection, which however maintain a very broad language, sometimes simply reiterating the relevant Treaty provisions: see Guidelines approved by the Interim PSC on 6 October 2000, Cooperation between Missions of Member States and Commission Delegations in Third Countries and to International Organisations, 12094/00; Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5.11 2010; Guidelines on Protection of EU citizens in the event of a crisis in a Third Country adopted by the COCON on 26 June 2006 – 10109/2/06 REV 2; Lead State Concept in Consular Crises, Conclusions adopted by COCON, 10715/07, 12.07.2006; ‘Common Practices in Consular Assistance’ and ‘Crisis Coordination’ adopted by the COCON, 10698/10, 9.06.2010; Guidelines for further implementing a number of provisions under Decision 95/553/EC adopted by COCON, 11113/08, 24.06.2008. The initial work of the COCON was not disclosed to the public.

¹⁴⁴¹ Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Communication from the Commission, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Summary of the Impact Assessment (SEC/2007/1601) - Commission staff working document, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Impact Assessment (SEC/2007/1600) - Commission staff working document, 05/12/2007; European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens’ rights – 27/10/2010; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU On progress towards effective EU Citizenship 2007-2010 – 27/10/2010.

Member States committed to provide consular protection also in other consular related situations, but this is the exception rather than the norm.¹⁴⁴²

Decision 11107/95 provides details on the services and procedures that Member States can follow under each of the five mandatory circumstances enshrined in Decision 95/553. However the Decision is not drafted in mandatory wording, but rather in the form of a recommendation in case the Member State decides to offer a particular consular protection service. The Member States seem to have approached the Decision as a sort of guideline rather than a binding EU secondary legislative act.¹⁴⁴³ Therefore the EU legal binding provisions do not establish a common set of rights and procedures falling under the ambit of *‘protection by the consular and diplomatic officials of the Member States’*.

Since the EU legal provisions only prohibit discriminatory conduct on the part of the Member States, the possibility of a uniform or coherent legal regime of protection of EU citizens abroad might come from the fact that the Member States’ legal regimes and practice is similar. After all, the EU countries share common legal principles, values and, to a certain extent, legal systems. It has already been pointed out that the domestic legal frameworks vary to a great degree on the topic of consular and diplomatic protection of citizens abroad. The different national foreign policy interests, historical ties developed by each of the Member States with different regions of the world, different ambitions and size of population has probably led to the elaboration of different legal frameworks and practice, although they all consider the field of consular and diplomatic protection of nationals as a field of administrative law and part of the State’s foreign affairs.

The resistance of the Member States to the adoption of a common harmonised EU model of consular and diplomatic protection of EU citizens results from their understanding of consular and diplomatic protection of the nationals as one of the ultimate attributes of a sovereign State. The loss of the State’s discretionary power to contour the model of protection abroad of nationals is thus equated with loss of an important part of the State’s sovereignty, which for certain Member States is unacceptable. Currently there are no common consular services and procedures from which unrepresented Union citizens might benefit. There is a minimum of similar consular services that the Member States seem to provide in the

¹⁴⁴² See more on these Member States in the section in this chapter titled ‘Impact of the EU legal framework on consular and diplomatic protection of individuals on the Member States’.

¹⁴⁴³ See the *CARE Report* Chapter three.

mandatory situations, however this is based on a case-by-case approach.¹⁴⁴⁴ Therefore, according to the Member States' understanding, there is nothing to stop them from denying a certain consular service to an EU citizen, if they do not provide it either to their own citizens. In practice, in cases of consular crisis, the Member States have so far effectively provided consular help¹⁴⁴⁵ in the form of medical assistance, relief, and evacuation, although the latter situation has been more problematic in practice.¹⁴⁴⁶

In spite of the divergent legal framework which can deprive the EU citizenship right of its usefulness, the EU citizenship right to equal protection abroad has great potential in terms of offering concrete benefits to the EU citizens.

First of all, the fact that it is envisaged as a mere principle of non-discrimination based on nationality does not negate its added value.¹⁴⁴⁷ The EU general legal principle of non-discrimination based on nationality laid down at the start of the citizenship part of the Treaty¹⁴⁴⁸ would not have been of much help to the Union citizens located outside of the Union borders, if it was not included within a specific EU citizenship right. The general principle of equal treatment applies, as Article 18 TFEU (former Article 12 EC Treaty) provides, *within the scope of EU law*. In the absence of an express EU primary legal provision extending the substantive and territorial scope of the legal principle, or of conditions necessary to use the fall-back Community competence to enact relevant EU secondary provisions¹⁴⁴⁹, the general principle of equal treatment could not have been applied.¹⁴⁵⁰ The

¹⁴⁴⁴ Despite their good intentions, the Member States operate, mostly in consular crisis on the basis of an *ad hoc* type of cooperation, and not on a pre-established contingency plan. However efforts are made to adopt such plans by the consular and diplomatic missions of the Member States jointly with the EU delegations.

¹⁴⁴⁵ According to the information gathered by the author during interviews with Commission and Member States representatives in the period of March – July 2011.

¹⁴⁴⁶ For example, during the 2008 terrorist attacks in Mumbai, it was reported that the external missions of certain Member State rescued their own citizens while leaving EU citizens of other nationalities, who did not have any consular representation in the country, behind, and thus *de facto* denying their European citizenship right to equal protection abroad. Problems have also been encountered by EU citizens when trying to obtain European Travel Documents in situations that were not the result of disasters. Source - the *CARE Report*, fn 54 above, Chapter Three, Section Five.

¹⁴⁴⁷ M. Condinanzi and A. Lang arguing that the right is not innovative, see *Cittadinanza dell'Unione e libera circolazione delle persone*, Milan: Guiffre editore (2009), 49.

¹⁴⁴⁸ It should be noted that the provision of the general principle of non-discrimination based on nationality at the beginning of the Citizenship chapter has been introduced only since the Lisbon amendment. In the EC Treaty, it was located in a different part (Part One on Principles) separated from Part two on Citizenship.

¹⁴⁴⁹ Former Art. 308 EC Treaty required the express provision of a Community objective (to be distinguished from Union objective) as one of the positive conditions that had to be fulfilled so as to justify the use of the flexibility clause as legal basis for Community legislative measures. See more on the conditions for the use of Art. 308 EC Treaty as legal basis for Community acts in K. St. Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P. Craig and G. de Burca (eds), *The Evolution of EU Law* Oxford University Press (2011), 100. See also, Case T-306/01 *Yusuf* [2005] ECR II-3533, para. 164; Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649; Case C-436/03 *Parliament v Council (European cooperative society)* [2006] ECR I-3733; and Case C-217/04 *UK v Council and European Parliament*

innovative aspect of Article 8c in the EC Treaty consists precisely in creating the scope of EU law necessary for the EU general principle of equal treatment based on nationality to apply.¹⁴⁵¹

Second, the EU citizenship, as it is currently understood, has the potential of offering concrete benefits to the unrepresented Union citizens in third countries if the Member States make publicly available a list of their concrete consular services they provide to their own citizens abroad. In this case, the EU citizens would benefit from receiving protection in a fix number of situations¹⁴⁵² and would know the precise approach of the Member States in regard to offering consular protection services. The application of the principle of non-discrimination based on nationality in the field of consular protection of Union citizens abroad has been argued¹⁴⁵³ to require the Member States to follow ‘a quotas’ approach in cases of consular crisis where numerous EU citizens require help. On the basis of this strict application of the non-discrimination principle, each nationality represented *in situ* would receive an equal number of, for instance, seats on an aircraft. Practice shows that it would be too much to ask from the Member States to endorse such a righteous conduct. The Member States have usually first secured help for their own citizens and then on a first-come-first-served basis for the other nationalities.¹⁴⁵⁴

Looking at the evolution experienced by the other EU citizenship rights and the current consular challenges faced by the Member States, the disillusionment of what the EU citizenship right to equal protection abroad actually entails in practice might only be temporary.

It has to be noticed when the EU citizenship rights were first introduced, their scope of application was interpreted as limited to an application of the principle of non-discrimination based on nationality.¹⁴⁵⁵ In the meantime, the scope of the EU citizen’s rights, especially of

(European Network and Information Security Agency) [2006] ECR I-03771. Pre-Lisbon Treaty, the Council of the EU was not conferred internal legislative competence. It is the Lisbon Treaty which provided for the first time express internal legislative competence for the Council in the field of the Union citizen’s right to consular and diplomatic protection (Art. 23(2) TFEU).

¹⁴⁵⁰ The ECJ has constantly held that the principle of non-discrimination based on nationality applies only within the scope of EU law, see Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

¹⁴⁵¹ As happened with the other Treaty-based rights of the EU citizen which developed from a mere application of the principle of non-discrimination based on nationality into self-standing rights which the EU citizens can invoke solely based on their nationality (Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41)

¹⁴⁵² As currently provided by Decisions 95/553 and 96/409.

¹⁴⁵³ Alessandro I. Saliceti, ‘The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services’, *op.cit.*, 91, 97.

¹⁴⁵⁴ Based on evidence collected while working as a researcher for the Commission financed CARE Project.

¹⁴⁵⁵ A. Duff, *Saving the European Union – The Logic of the Lisbon Treaty*, London: Shoehorn (2009).

the freedom to reside and move, has been developed by the Court so as to include also prohibition of serious inconvenience without proof of actual discrimination based on nationality.¹⁴⁵⁶

A similar evolution can be identified, though to a lesser degree, also in regard to another EU citizenship right which, in a way, shares more similarities with the EU citizenship right to equal protection abroad, than the freedom to reside and move, since it is clearly framed in similar equal treatment language, and applies also in a sensitive area of high politics of the Member States: voting rights to the European Parliament elections.¹⁴⁵⁷ Despite the explicit equal treatment wording and the high sensitivity of the ‘political rights’ field, the Court of Justice in the *Aruba* case¹⁴⁵⁸ held that the EU citizens have a right to vote for the European Parliament’s elections as a normal consequence of the Union citizenship.¹⁴⁵⁹

A sort of a trend can be identified in the jurisprudence of the Court of Justice, whereby, the rights of the EU citizens as recognised by Article 20 TFEU, have a scope that goes beyond the application of the principle of non-discrimination based on nationality.¹⁴⁶⁰ However, this trend has not yet been established in relation to the EU citizenship right to equal protection abroad. For the moment, such a judicially developed evolution cannot be traced in regard to the right to equal protection abroad, simply because the EU Courts have never dealt with the EU citizenship right to protection abroad.¹⁴⁶¹ The majority of the national case law that have reached the EU Courts do not concern the right to equal protection abroad, but other consular affairs matters, such as: issuing of visas,¹⁴⁶² financial obligations arising for

¹⁴⁵⁶ Case C-391/09 *Runevič-Vardyn and Wardyn*, Judgment of 12 May 2011, nyr.

¹⁴⁵⁷ Whereby citizens of the Member States resident in other Member States have the right to vote in European Parliament’s elections *under the same conditions* as nationals.

¹⁴⁵⁸ Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

¹⁴⁵⁹ J. Shaw, ‘The Treaty of Lisbon and Citizenship’, *The Federal Trust European Policy Brief*, June 2008.

¹⁴⁶⁰ Case C-135/08 *Rottmann*, Judgment of 2 March 2010; Case C-34/09 *Zambrano*, Judgment of 8 March 2011.

¹⁴⁶¹ The landmark cases of the CJEU in the field of the EU citizenship have so far created either economic or social rights for the Union citizens within the borders of the internal market. For economic rights see the pronouncements of the CJEU in: Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-258/04 *Ioannidis* [2005] ECR I-8275; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; Case C-362/88 *GB-INNO* [1990] ECR I-667. For social rights, see the pronouncements of the Court of Justice in Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613; Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-158/07 *Förster* [2008] ECR I-8507; Case 186/87 *Cowan* [1989] ECR I-195; Case C-57/96 *Meints* [1997] ECR I-6689.

¹⁴⁶² Case T-372/02 *Internationaler Hilfsfonds v Commission* [2003] ECR II-438; Case C-327/02 *Panayotova* [2004] ECR I-11055; Case C-139/08 *Kqiku* [2009] ECR I-2887; C-219/08 *Commission v Belgium* [2009] ECR I-9213; Case C-228/06 *Soysal* [2009] ECR I-1031; Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885; Case C-459/99 *Mouvement contre le racisme, l’antisémitisme et la xénophobie ASBL (MRAX) v Belgium* [2002] ECR I-6591; Case C-257/99 *Barkoci and Marcel Malik* [2001] ECR I- 6557.

the Member States as a result of signing a memorandum of understanding between the Commission and the Member States on setting up a common diplomatic mission in Abuja (Nigeria),¹⁴⁶³ hierarchy between the methods of sending judicial documents by post or by consular or diplomatic agents under Union law,¹⁴⁶⁴ and the duty of diplomatic protection of the Union in regard to vessels (not individuals) of the Member States.¹⁴⁶⁵

The right to equal protection abroad of the Union citizens has so far remained quite underdeveloped in comparison with the other EU citizenship rights and has not been the subject of the EU Courts' jurisprudence. However, this particular EU citizenship right might develop in the future beyond the right to non-discriminatory protection on the basis of nationality. The EU legislature or the EU Courts might play a role in contributing to the legal development of this right in the future. The Council, depending on its choices of content of the future directives it may adopt,¹⁴⁶⁶ and the EU Courts use of purposive interpretation¹⁴⁶⁷ in relation to these future Council directives, may lead the way to an evolution of the Union citizen's right to equal protection abroad similar to the one experienced by the other Union citizenship rights.

Should the Member States finally agree to adopt common standards in the future, this change of attitude will most probably be motivated by the need to overcome the consular challenges characteristic of the 21st century, namely the high expectation among their citizens of quality consular services coupled with the financial cuts which makes it impossible to fulfil these increasing consular demands, rather than by the sense of increased solidarity among the Member States or the abstract objective of increasing efficiency of the EU citizenship right to equal protection abroad. A failure of the Member States' Ministries of Foreign Affairs in their performance of consular protection has been equated by the media and academia with the failure of the State, and it is perhaps this reaction, which Member States strive to avoid, that

¹⁴⁶³ Case C-203/07 P *Greece v Commission* [2008] ECR I-0000.

¹⁴⁶⁴ See Case C-473/04 *Plumex v Young Sports NV* [2006] ECR I-1579 – the Union law that was interpreted in this case was the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ([2000] OJ L 160/37).

¹⁴⁶⁵ However, this duty arose only as a result of an express contractual obligation on the part of the Union, Case T-572/93 *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1995] ECR I-2025.

¹⁴⁶⁶ Based on Art. 23(2) TFEU. It should be noted that the Article does not require the Council to adopt implementing legislation, but it only gives it the possibility to do so.

¹⁴⁶⁷ The purpose of the Treaty Articles, especially those on Union citizen's rights and fundamental freedoms has played a significant role in the Court of Justice's interpretation of these Articles, whether in cases assessing direct effect, or breach of these rights and freedoms. See more in B de Witte, 'Chapter 12 – Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Burca (eds), *The Evolution of EU Law*, Oxford University Press (2011).

will push them to advance clarity, common standards and concrete efficiency of the EU citizenship right to equal protection abroad.¹⁴⁶⁸

The current understanding of the EU citizenship right to protection abroad as an equal treatment right does not however justify an unreasonable rejection of consular protection by a Member State.¹⁴⁶⁹ Being a fundamental right of the EU citizen,¹⁴⁷⁰ a rejection of this right by the Member States needs to respect the requirements provided by Article 52 of the EU Charter.¹⁴⁷¹ An outright denial of protection by one of the Member States will empty the fundamental right of the Union citizen of any meaningful effect, thus raising serious concerns about the respect of the essence and proportionality requirements under Article 52 of the EU Charter. Consequently, even if the founding Treaties frame the right to protection abroad as an equal treatment right, Article 46 EU Charter in conjunction with Article 52 EU Charter would not legitimise a conduct of Member States that does not provide grounded reasons for their refusal to ensure protection of an unrepresented Union citizen abroad. The EU fundamental rights requirements would have an impact also on the personal scope of application of the EU citizenship right to equal protection abroad. The Member States will have to consider how to ensure the respect of the EU citizen's right to family life when planning the evacuation of the third country nationals who are family members of the EU citizen. Even if the right to consular and diplomatic protection is a right of the Union citizen as stated in the EU Treaties and the EU Charter, the inclusion of the right to family life in Article 7 of the EU Charter seems to require the Member States to take all steps possible to ensure that in emergency evacuation, the non-EU family members, especially vulnerable categories, will not be separated from the EU citizens.¹⁴⁷²

¹⁴⁶⁸ See the National Report on Sweden in the *CARE Report*, and M. Okano-Heijmans 'Changes In Consular Assistance And The Emergence Of Consular Diplomacy', in J. Melissen and A.M. Fernández (eds.), *Consular Affairs and Diplomacy*, Martinus Nijhoff Publishers (2011).

¹⁴⁶⁹ As certain Member States have argued. See, for example, the position of the Member States taking the approach of the consular and diplomatic protection of nationals as a matter of the executive's policy in the *CARE Report*, available at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>.

¹⁴⁷⁰ The right to consular and diplomatic protection is enshrined in Art. 46 EU Charter, which is part of Title V on Citizen's rights.

¹⁴⁷¹ According to Art. 52(1) of the EU Charter, limitations and restrictions of the Charter's fundamental rights are possible as long as the following conditions are fulfilled: the limitation must be provided by law; it respects the essence of the fundamental rights; it respects the principle of proportionality; it is necessary for the purpose of genuinely meeting objectives of general interest as recognised by the Union or there is a need to protect rights and freedoms of others.

¹⁴⁷² For the time being, the Member States have not yet recognised a right to protection abroad of the non-EU family member joining the EU citizen, not even in the limited circumstances of emergency evacuation. The situation is handled on a case-by-case basis. See more on this in M Moraru and S Faro, 'La Questione dell'Effettività del Diritto dei Cittadini Europei alla Protezione Diplomatica e Consolare nei Paesi Terzi. I Risultati del Progetto CARE', (2011) Riv. Ital. Dir. Pubbl. Comunitario, and Section 4.1.1 of Chapter three of the *CARE Report*.

3. Does diplomatic protection fall under the scope of the EU citizen's right to equal protection abroad?

The previous section showed that the content of the EU citizenship right to equal protection abroad is the principle of non-discrimination based on nationality. This section will attempt to clarify whether the prohibition of discrimination applies to both consular and diplomatic protection situations, and whether these concepts should be understood in their public international legal meaning.

As previously mentioned, one of the harshest critiques of the EU citizenship right to equal protection abroad, coming from both academics¹⁴⁷³ and Member States,¹⁴⁷⁴ refers to the lack of clarity regarding the substantive scope of this right. In other words, it is argued that the founding Treaties do not clarify what type of protection the individuals are entitled to request in third countries – consular *and/or* diplomatic protection, and what the exact meaning of these mechanisms is.

It has been pointed out that Article 20(2)(c) TFEU does not use the settled public international law concepts of ‘consular protection’ and ‘diplomatic protection’, but a new concept which is not an established legal concept under the public international law norms – ‘*protection by the consular and diplomatic authorities of the Member States*’,¹⁴⁷⁵ and consequently, the EU legal regime refers to protection mechanisms different from the ‘consular and diplomatic protection’ in their classic public international legal meaning.¹⁴⁷⁶ ‘*Protection by consular and diplomatic authorities*’ should not be automatically equated with ‘consular protection’ and ‘diplomatic protection’, since the definition of diplomatic protection under current customary international law requires additional conditions that are not mentioned in the EU legal provisions. It could thus be argued that the EU legal order might

¹⁴⁷³ T Stein, ‘Interim Report on “Diplomatic Protection Under the European Union Treaty”’ in: ILA Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi, 2002, 32-39; A. Vermeer-Künzli, ‘Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance’, *op.cit.* ; P. Vigni, ‘Diplomatic and consular protection: Misleading Combination or Creative Solution?’, *op.cit.*; C. Closa, ‘Citizenship of the Union and Nationality of the Member States’ (1995) CMLRev, 487.

¹⁴⁷⁴ See the national Reports on France, Ireland, Poland, and the UK in the *CARE Report*, available at www.careproject.eu/database/browse_eu.php

¹⁴⁷⁵ P. Vigni, ‘The Protection of EU Citizens: The Perspective of International Law’, *op.cit.* .

¹⁴⁷⁶ *Ibid.*, see also Art. 1 2006 ILC Articles on Diplomatic Protection and the analysis in Chapter 2 and 3.

use autonomous legal concepts, which even though similar to the ones existing under public international law, might not have the same meaning.¹⁴⁷⁷

The substantive content of the EU citizenship right is furthermore confused by the different translations of Article 20(2)(c) TFEU in the various official national languages. For instance, the Czech, Finish, German and Polish versions of Articles 20(2)(c) and 23(1) TFEU use instead of the concept of ‘consular *and* diplomatic protection’ instead of ‘protection by consular and diplomatic authorities’, which thus leave no doubt that the Member States’ obligation to offer equal treatment should cover also diplomatic protection. In case of different language versions of an EU legal provision, the CJEU has established a set of principles to follow in the process of establishing the true meaning of the legal provisions. First of all, the CJEU establishes equal legal force to all official language versions of an EU legal provision¹⁴⁷⁸ and requires that the divergence created by the different language versions is to be solved ‘by interpreting by reference to the purpose and general scheme of the rules of which it forms a part.’¹⁴⁷⁹

A contextual interpretation of current Article 20(2)(c) TFEU might shed light on the convoluted content of the EU citizenship right to equal protection abroad. At the time of drafting the Maastricht Treaty, Spain made a proposal for an Article on the protection of the unrepresented EU citizens while outside of the Union. The Article was drafted in clear terms, expressly providing for ‘consular and diplomatic assistance and protection’¹⁴⁸⁰ of the citizens

¹⁴⁷⁷ The Union legal order has, so far, developed specific Union definitions for many of the classical public international legal concepts, such as ‘citizenship’ (in particular EU citizenship as defined by Art. 20 TFEU. On the specificity of the notion of EU citizenship compared to State nationality, see the Opinion of AG Maduro in Case C-135/08 *Rottmann*, in particular para. 23; and G. Martinico and R. Castaldi, ‘Rethinking (EU) citizenship’, (2011) Special issue of Perspectives on Federalism, on the further infuse of specificity brought by the Lisbon Treaty to the Union citizenship), ‘internal armed conflict’ (C-129/14 *Diakite*, 30.01.2014, nyr), ‘*ne bis in idem*’ (C-129/14 PPU *Spasic*, Judgment of 18 July 2014, nyr), ‘*rebus sic standibus*’ (Case C-162/96 *Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655).

¹⁴⁷⁸ *CILFIT* case, para. 18.

¹⁴⁷⁹ Case C-100/84 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1984] ECR 01169, paras. 15 and 17; Case C-341/01 *PlatoPlastik Robert Frank* [2004] ECR I-4883, para. 64; C-1/02 *Privat-Molkerei Borgmann GmbH & Co. KG* [2004] ECR I-03219, para. 25; C- 63/06 *UAB Profisa v Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos* [2007] ECR I-03239, paras. 13 and 14; Case C-340/08 *M and others*, (Fourth Chamber) judgement of 29 April 2010, nyr, para. 44. In the latter case there were discrepancies between the different language versions of both the EU law at issue (Council Regulation no 881/2002) and the United Nations Security Council Resolution 1390 implemented by the foregoing Council Regulation. Since it could not base a decision solely on literary interpretation, the ECJ interpreted the provision on the basis of the aim of the Regulation and Resolution.

¹⁴⁸⁰ It can be noticed that the Spanish proposal referred to both ‘protection’ and ‘assistance’ since under Spanish national law the two concepts are legally different. In the Spanish legal literature, ‘protection’ involves formal complaints before public authorities, while ‘assistance’ refers to the provision of food, clothes, and medicines. See E Vilarino Pintos, *Curso de Derecho Diplomático y Consular. Parte general y textos codificadores*, Tecnos: Madrid (1987), 102-103; A Maresca, *Las relaciones consulares*, Piernas: Madrid (1974), 215-219.

of the European Union from any of the Member States.¹⁴⁸¹ However, not all of the Member States agreed with Spain's proposal to include both consular and diplomatic protection of the unrepresented Union citizens. The Member States reached a compromise by keeping the adjectives 'consular' and 'diplomatic' in relation to the officials securing protection, instead of the type of protection to be secured to the unrepresented Union citizens. Thus the emphasis was placed on ensuring 'a' protection rather than the types of protection. The idea was to ensure that unrepresented EU citizens are not left completely unprotected, especially in emergency situations.

It has to be noticed that the provision is similar to the Article 8 VCCR kinds of burden sharing agreements concluded among certain European countries before the creation of the EU or their accession to the EU. This kind of formulation leaves open the possibility of evolutive interpretation of the content of the EU citizenship right depending on the development of the European society's needs.¹⁴⁸² The Member States maintained this attitude also later on during the elaboration of the Decision 95/553/EC on the implementation of the EU citizen's right to equal protection abroad. Several delegations of the Member States opposed to the original versions of Articles 11-18 of the Decision, which expressly referred to diplomatic protection.¹⁴⁸³ Since the aforementioned Decision is an international agreement which could have been adopted only by unanimous consent, those Articles and consequently diplomatic protection did not make its way into the final Decision. The Member States decided instead to focus on the mechanism that was requested the most by the EU citizens and at the same raised less problematic legal questions, i.e. consular protection.¹⁴⁸⁴

The contextual interpretation of the Article seems to have revealed a certain division of opinions and approaches among the Member States on whether 'diplomatic protection' is also covered by the equal treatment right.

The purposive interpretation of the relevant Treaty Articles could offer additional supporting evidence for the minimalist or maximalist interpretation of the content of the EU

¹⁴⁸¹ See Documentation de la RIE, col 18 1991, 333-338 and 405-409.

¹⁴⁸² A similar example of divided opinions between the Member States leading to a broad definition of a legal concept is the well-known broad, all-encompassing definition of the CFSP, see G. Bono, 'Some Reflections on the CFSP Legal Order' (2006) CMLRev, 358, 358-9.

¹⁴⁸³ T. Stein, 'Interim Report on "Diplomatic Protection Under the European Union Treaty"', in: ILA Committee on Diplomatic Protection of Persons and Property, Second Report (New Delhi 2002), 36-7.

¹⁴⁸⁴ The Commission seems to follow the same interpretation, diplomatic protection is not *per se* excluded from the legal content of the Union citizen's right, but, for the moment, attention is given to the most problematic aspect of that right – i.e. consular protection for Union citizens in distress in third countries. See Accompanying document to the Commission Action Plan 2007-2009 - Impact Assessment, doc. SEC (2007) 1600 of 5 December 2007 and the European Commission's EU citizenship Report 2010 – *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010.

citizenship right to equal protection abroad. In our case, the purpose of Article 20(2)(c) TFEU has to be seen in light of the newly introduced Union objective of ensuring protection of the Union citizens in the world (Article 3(5) TEU). The objective seems to refer to a general protection of the Union citizens in third countries, without distinction or limitations. In the same way neither Article 20(2)(c), nor Article 23(2) TFEU make a distinction or exclude diplomatic protection from their scope, even if the Member States had multiple occasions during several Treaty amendments to introduce such a limitation.

The maximalist interpretation, whereby diplomatic protection is included in the content of the EU citizen's right to protection abroad, seems to be supported also by Article 46 EU Charter, which is now part of the EU primary law. As previously mentioned, the wording of Article 46 EU Charter is identical with Articles 20(2)(c) and 23(1) TFEU, while Article 46 EU Charter is conclusively entitled 'diplomatic and consular protection'. However Article 52(2) EU Charter limits the legal force of the EU Charter Articles whose content is similar to those of Treaty provisions, by giving priority to the founding Treaties legal provisions, which cannot be altered by the EU Charter. Therefore, Article 52(2) EU Charter seems to limit the interpretative force of Article 46 EU Charter, which cannot thus solve the issue of the confusing wording of the Treaty provisions.

Based on the previous jurisprudence of the CJEU, it could be argued that the EU Courts would favour a maximalist interpretation of the EU citizenship right to equal protection abroad, if it enhances protection of the other substantive rights of the EU citizen.¹⁴⁸⁵

In *Ayadi*¹⁴⁸⁶ and *Hassan*,¹⁴⁸⁷ the General Court of the EU has recognised an obligation on the part of the Member States to exercise diplomatic protection for foreign citizens who reside within the Union territory. If the Court was willing to go as far as recognising an obligation incumbent upon the Member States in regard to third country nationals, it can be argued that, furthermore it will do so when a violation of a fundamental right of the EU citizens is at stake.

¹⁴⁸⁵ Diplomatic protection is formally speaking only a procedural means whereby the individual's claims for violation of other substantive individual rights is brought forward to the perpetrator State. In cases concerning EU citizenship rights, or fundamental human rights, the Court has had in mind the effectiveness of these rights, sometimes even to the detriment of the Member States' interests. See for example, C-200/02 *Chen* [2004] ECR I-9925; Case C-135/08 *Rottmann* [2010] ECR I-0000; Case C-34/09 *Zambrano*, judgment of 8 March 2011; and the already famous Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

¹⁴⁸⁶ Case T-253/02 *Ayadi v Council and Commission* [2006] ECR II-2139, para. 149

¹⁴⁸⁷ Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-52, para. 119.

These specific and limited circumstances do not suffice to make a general statement that the Court will hold diplomatic protection as part of the Union citizen right to protection abroad. Nevertheless, these judgments can suggest that the Court will take into consideration not only the Member States' intentions when drafting the EU legal provision, or their interests, but also the objective of the EU citizenship right which is to ensure 'protection' of the unrepresented Union citizens. According to the public international legal definition of diplomatic protection, this form of protection encompasses different measures ranging from informal negotiations between high officials, to sending official letters, and submitting an international claim. What is important is the fulfilment of the three requirements: the existence of an international wrongful act, 'nationality of claims', and exhaustion of legal remedies.¹⁴⁸⁸

In practice it could be that an EU citizen held captive or arbitrarily arrested in a third country, who has exhausted all the local remedies, is still detained by public officials, or by private individuals without the local public authorities taking action. The represented Member States might consider taking action and informally negotiating with the local officials, in which case this might actually constitute a form of protection close to the public international law concept of diplomatic protection.¹⁴⁸⁹

The majority of legal academics¹⁴⁹⁰ argue that the EU citizenship right includes only consular protection and moreover that there is currently no need of interpreting the EU citizenship right to equal protection abroad as including also diplomatic protection situations, since the purpose of the Article is to secure protection *in situ*, rather than formal protection by the Government via diplomatic negotiations or international claims, which is specific of diplomatic protection.¹⁴⁹¹

¹⁴⁸⁸ See Art. 1 2006 ILC Articles on Diplomatic Protection and its commentary by the Rapporteur J. Dugard.

¹⁴⁸⁹ It has to be noted that the 'nationality of claims' would not be fulfilled in these circumstances, but as noted in Chapter 3, so far the international community seems to have accepted the EU specific exercise of protection of EU citizens abroad.

¹⁴⁹⁰ P. Vigni, *op.cit.*; Denza, *op.cit.*; S. Touzé, *op.cit.*

¹⁴⁹¹ See P. Vigni and E. Denza, *op.cit.*

V. The legal effects of the Union citizenship right to equal protection abroad

In light of the different positions currently taken by the Member States on the levels of protection to which the Union citizen is entitled under the EU provisions, it is highly possible that more situations where the Union citizens will be refused assistance will arise in the future.¹⁴⁹² The question that this section plans to assess is whether the Union citizen can invoke his Treaty-based right to equal protection abroad before the national courts in order to seek redress against such refusals.

It is settled case law of the EU courts that rights derived from EU law may be invoked directly before the national courts if they satisfy the conditions of clear, precise and unconditional wording.¹⁴⁹³ As Bruno de Witte notes, the Court has, over time, changed its strict *Van Gend en Loos* understanding of these conditions so that, currently, the direct effect test boils down to one single condition: ‘is the norm sufficiently operational in itself to be applied by a court?’¹⁴⁹⁴

The main arguments raised by academics¹⁴⁹⁵ against the direct effect of the EU citizenship right to equal protection are first, that the substantial content of the right is unclear (see the above-mentioned debate on whether diplomatic protection is or is not included),¹⁴⁹⁶ second, that the right needs further implementing measures to be adopted by the Member States in order to be effective,¹⁴⁹⁷ and third, that the exercise of the right by the Member

¹⁴⁹² So far there is few information on cases where EU citizens were denied assistance and protection in third countries. For instance, it was reported that during the 2008 terrorist attacks in Mumbai, certain external representations of the Member States rescued their own citizens while leaving EU citizens of other nationalities who did not have any consular representation in the country behind, and thus were *de facto* denied their European citizenship right to equal protection abroad. Problems have also been encountered by EU citizens when trying to obtain European Travel Documents in situations that were not the result of disasters. Source - the *CARE Report*, fn 54 above, Chapter Three, Section Five.

¹⁴⁹³ C-26/62 *Van Gend en Loos* [1963] ECR I. T.C. Hartley, *The Foundations of European Union Law*, seventh edition, Oxford University Press (2010), 110.

¹⁴⁹⁴ The ‘justiciability test’ as the author calls it. See Bruno de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’, Grainne de Burca and P. Craig (eds), *The Evolution of EU Law*, 2nd ed, Oxford University Press (2011), 331.

¹⁴⁹⁵ C Closa, ‘Citizenship of the Union and Nationality of the Member States’ (1995) 32 *Common Market Law Review* 502 and S. Kadelbach, ‘European Integration: The New German Scholarship’, NYU *Jean Monnet Working Paper* 9/03; J-P Puissechet, ‘La pratique française de la protection diplomatique’ in J-F Flauss (ed), *La Protection diplomatique- Mutations contemporaines et pratiques nationales*, Bruylant (2003), 119-120.

¹⁴⁹⁶ In addition to this argument, certain Member States argue that the Treaty-based Article needs further clarification whether it confers consular assistance and/or protection, as in certain national legal orders the two legal concepts are distinct – as, for instance, in: Germany, Ireland, Romania, Spain, and the UK. See more on this topic in *CARE Report*, Chapter three, Section 4.1.1.

¹⁴⁹⁷ Art. 23(1) TFEU second indent provides: ‘Member States shall adopt the necessary provisions [...] required to secure this protection.’

States depends upon the consent of the receiving third countries which, for the moment, very few of the Member States have expressly acquired.¹⁴⁹⁸

Concerning the questioned clarity of the EU citizen's right to equal protection abroad, it was previously shown that, for the moment, the content of the right is restricted to a prohibition of discrimination based on nationality in the field of consular and diplomatic protection of the unrepresented EU citizens. It should be noted that in *Reyners*,¹⁴⁹⁹ the CJEU recognised direct effect to former Article 52 EEC Treaty on freedom of establishment based on the interpretation of this Article as a prohibition of discrimination.¹⁵⁰⁰ Nowadays it can be argued with certainty that the principle of non-discrimination based on nationality enjoys direct effect.¹⁵⁰¹

As to the contention that the right is not unconditional since it requires the Member States to adopt implementing measures, it has to be noticed that the Lisbon Treaty brought a change in the wording of Article 23(1) TFEU. Former Article 20 EC Treaty stipulated that 'the Member States *shall establish the necessary rules among themselves* [...] required to secure this protection' while current Article 23(1) TFEU reads as follows: 'The Member States *shall adopt the necessary provisions* [...] required to secure this protection.' Article 23 TFEU continues in paragraph 2 with an express conferral of legislative competence for the Council which can enact directives for the purpose of '*facilitating* such protection'.

There are two important changes in the wording of the right: the first is the replacement of 'establish rules' with 'adopt provisions', and the second is that the term that indicated the purely inter-governmental character of the field, 'among themselves', was eliminated. As noted by another legal author,¹⁵⁰² the change of wording may indicate that the referred measures are those that the Member States have to adopt so as to implement the Council directives, since the expression 'adopt provisions' is commonly used in the field of transposition of directives by the Member States.¹⁵⁰³ On the contrary, the previous expression

¹⁴⁹⁸ Art. 23(1) TFEU second indent provides: 'Member States shall [...] start the international negotiations required to secure this protection.' Therefore it recognises the public international law requirements as enshrined in Art. 8 of the VCCR and Art. 6 of the VCDR.

¹⁴⁹⁹ Case C-2/74 *Reyners v Belgium* [1974] ECR 652, para. 30: 'After the expiry of the transitional period the directives provided for by the chapter on the right of establishment have become superfluous *with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.*' (emphasis added) See also Case C-43/75 *Defrenne v SABENA* [1976] ECR 445.

¹⁵⁰⁰ See also P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) Oxford Journal of Legal Studies, 464.

¹⁵⁰¹ See Case C-164/07 *Wood* [2008] ECR I-4143.

¹⁵⁰² Alessandro I. Saliceti, 'The Protection of EU Citizens Abroad', *op.cit.*, 91, 94-5..

¹⁵⁰³ See for instance Art. 291(1) TFEU: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.'

‘establish rules’ conveyed the idea of new norms to be adopted for the purpose of detailing the content of the Union citizen’s right. Whether this is or is not the intention of the Member States, the Court of Justice constantly rules that the need for further implementing measures to be adopted by the Member States is not *per se* capable of denying direct effect to a Treaty-based provision. There are numerous examples pointing in this direction, and most of them are to be found in the field of fundamental freedoms,¹⁵⁰⁴ however the most relevant example for the present topic is the Union citizen’s right to reside and move which the Court has recognised as directly effective¹⁵⁰⁵, despite the conditional language of the Treaty provision.

Former Article 18(1) EC Treaty was firstly conditioned by limits which the Member States could impose and secondly by measures which the Member States themselves could adopt ‘to give effect to the right’. The latter condition is similar to the one in Article 23(1) TFEU. Contrary to the Member States, the Court of Justice in the *Baumbast* judgment¹⁵⁰⁶ held that the need of further implementing measures by the Member States does not prejudice the direct effect character of the right to reside and move since the margin of discretion left to the Member States is subject to strict judicial review by the national and EU courts. Consequently, even if rejecting the interpretation of the new wording of Article 23(1) TFEU as a reiteration of the Member States’ duty to adopt national measures transposing the relevant EU secondary legislation, in light of the Court’s reasoning in *Baumbast*, the right to equal protection abroad cannot be rejected direct effect solely on the basis of the possible limitations the Member States can adopt within the framework of implementing EU secondary legislation, since first, these limitations will be subject to the full jurisdiction of the EU Courts and the national courts, second, the EU primary provision are operational in themselves, as proved by practice.¹⁵⁰⁷

Lastly, the provision of the Member States’ obligation to start international negotiations with third countries for the purpose of obtaining their consent to the exercise of the EU specific right to protection of EU citizens abroad cannot be invoked as argument against the direct effect of the EU citizenship to equal protection abroad. The CJEU has

¹⁵⁰⁴ For instance, Case C-13/68 *Salgoil* [1968] ECR 463. Hilson notes that the recognition of direct effect to the fundamental freedoms by the European Court of Justice was unexpected, as ‘none of them sit particularly happily with the requirements as to clarity, precision and unconditionality.’ See C Hilson, ‘What’s in a right? The relationship between Community, fundamental and citizenship rights in EU law’ (2004) *European Law Review*, 636, 640.

¹⁵⁰⁵ Case C-431/99 *Baumbast* [2002] ECR I-7091.

¹⁵⁰⁶ Case C-431/99 *Baumbast* [2002] ECR I-7091.

¹⁵⁰⁷ After the Lisbon amendment, the general rule is that the EU courts have general jurisdiction to review the application of the EU Treaties, thus including Arts. 20 and 23 TFEU, unless expressly excluded as is the case of the CFSP provisions (Art. 24 TEU).

previously recognised direct effect to EU based rights whose content was unclear and legally incomplete,¹⁵⁰⁸ due to the fact that the Member States failed to fulfil their obligations to adopt implementing legislation within the provided transitional period. In light of this reasoning, the persistent failure of most of the Member States to start international obligations for the last 20 years, despite the initial time limit provided in Article 8c of the Maastricht Treaty,¹⁵⁰⁹ and the clearly mentioned obligation in Article 23(1) TFEU, might influence the Court to recognise the direct effect to the EU citizen's right to equal protection abroad should it face such a case in the future.

¹⁵⁰⁸ *Reyners* – former Art. 52 EC Treaty and *Defrenne* – former Art. 119 EC Treaty.

¹⁵⁰⁹ Art. 8C of the EC Treaty reads as follows: '*Before the 31 December 1993* the Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.' (emphasis added)

VI. The complex EU institutional architecture ensuring protection of EU citizens abroad

Over recent years the EU has redesigned its institutions in an attempt to enhance its role as a global actor and increase its leadership on the international arena. The Lisbon Treaty introduced new actors with EU external relations functions and re-arranged the division of tasks among the existent ones. The creation of the High Representative of the Union for Foreign Affairs and Security Policy¹⁵¹⁰, the establishment of the European External Action Service (EEAS)¹⁵¹¹ and the transformation of the Commission delegations into Union delegations¹⁵¹² are among the most important institutional novelties introduced by the Lisbon Treaty. The division of tasks between the Union and the Member States in the ambit of external relations has also significantly changed, by increasing the Union's power of international representation and its external relations competences¹⁵¹³ and enhancing the role of coherency in external relations, but also across the Union's entire panoply of policies.

The EU policies involved in securing protection of (unrepresented) EU citizens abroad and adjacent institutional framework are recent topics in the law and politics of EU external relations. They have been mostly addressed from the perspective of the institutional framework of European diplomacy¹⁵¹⁴, the role, functions and impact of the EEAS creation¹⁵¹⁵, EU visas policy¹⁵¹⁶, and only recently, and very briefly, from the perspective of the EU consular functions vis-à-vis its citizens in third countries.¹⁵¹⁷ This section aims to

¹⁵¹⁰ Art. 18 TEU.

¹⁵¹¹ Art. 27(3) TEU.

¹⁵¹² Art. 221 TFEU.

¹⁵¹³ See, for instance, in the case of trade and investment. For a short account of the evolution of extension of the EU's competences in this area, see S. Woolcock, 'EU Trade and Investment Policymaking After the Lisbon Treaty', available at http://www.ceps.eu/system/files/article/2010/02/22-25-Woolcock_0.pdf. See more generally on all EU external relations competences, Geert De Baere, 'EU external action' in C. Barnard and S. Peers (eds), *European Union Law*, Oxford University Press (2014).

¹⁵¹⁴ C. Carta, *European Union Diplomatic Service: Ideas, Preferences and Identities*, London: Routledge (2012); Emerson and others, *Upgrading the EU's role as global actor: institutions, law and the restructuring of European diplomacy*, CEPS (2011);

¹⁵¹⁵ R. Balfour, and K. Raik, (eds), 'The European External Action Service and National Diplomacies', (2013) EPC Issue Paper, n°73; M. Gatti, *The European External Action Service and the Implementation of the Union Method in European Foreign Policy*, PhD Thesis, 2013; J. Bátorá, 'The 'Mitrailleuse Effect': The EEAS as an Interstitial Organization and the Dynamics of Innovation in Diplomacy', (2013) *Journal of Common Market Studies*, 598; R. Wessel, R. and Bart Van Vooren, 'The EEAS's diplomatic dreams and the reality of European and international law', (2013) *Journal of European Public Policy*, 1350.

¹⁵¹⁶ A. M. Fernandez, 'Consular affairs in the EU: Visa policy as a catalyst for integration?', (2008) *The Hague Journal of Diplomacy*, 21; by the same author, 'Local consular co-operation: Administering EU internal security overseas', (2009) *European Foreign Affairs Review*, 591; 'Consular affairs in an integrated Europe', in J. Melissen, and A.M. Fernández (eds), *Consular affairs and diplomacy*, Martinus Nijhoff Publishers, (2011).

¹⁵¹⁷ This topic has been addressed from either the EU's external relations topic (G. Porzio, 'Consular Assistance and Protection: An EU Perspective', (2008) *The Hague Journal of Diplomacy*, 21; K. Raik, 'Serving the citizens? Consular role of the EEAS grows in small steps', EPC Policy Brief, April 2013; J. Wouters, S. Duquet,

address the specific functions the EU possesses post-Lisbon Treaty for securing protection of EU citizens abroad, as they result from the various EU internal and external relations policies, while also briefly pointing out the post-Lisbon relation between these EU policies and the Member States' consular and diplomatic policies in theory and practice.¹⁵¹⁸ For this purpose the section will first identify the allocation of functions of the main EU institutions with a role in securing protection of EU citizens abroad; second, to establish the type of competence the EU enjoys in this field and the consular and diplomatic services it can provide to EU citizens in need of help in third countries. The section will conclude by outlining the strengths and weakness of the EU's role in securing protection of EU citizens abroad and will also consider the possible recommendations that could solve the current problems identified in this field.

1. The role of the EEAS and the Union Delegations in ensuring protection of EU citizens abroad

Following the entry into force of the Lisbon Treaty, the EU's triangular external representation system was maintained¹⁵¹⁹, while some of the old actors were replaced with newly instituted ones. Currently, the EU is represented externally by the President of the European Council (Article 9(b) TEU), the High Representative for Foreign Affairs (Article 13(2)(a) TEU), and the Commission (Article 17(1) TEU). In addition, the Member States preserve their external representation tasks in areas that do not fall under the scope of application of EU law.

The High Representative was specifically designed to bridge the CFSP and non-CFSP areas of action, to increase the inter-institutional dialogue between the Commission and the Council, as well as consistency and visibility of the EU policies.¹⁵²⁰ During the elaboration of the European Convention, the idea of an independent body that would help the High

and K. Meuwissen, 'The European Union and Consular Law', *Leuven Centre for Global Governance Studies Working Paper*, No.107/2013) or from a citizenship and fundamental rights perspective (Alessandro I. Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', (2011) *European Public Law*, 191; S. Touzé, 'Aspects récents (et choisis) de la protection consulaire des citoyens de l'Union européenne', (2011) *Revue des affaires européennes*, 79; E. Denza, 'Commentary to Art. 46 of the EU Charter', in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary*, by Hart Publishing (2014)).

¹⁵¹⁸ The specific issue of the EU law on protection of EU citizens abroad, as resulting from the provisions on the EU citizenship and EU external relations policies, impact on the Member States' legal framework and practices of consular and diplomatic protection of individuals will be assessed in a separate section in this Chapter.

¹⁵¹⁹ See S. Nuttall, 'Coherence and Consistency' in C. Hill and M. Smith (eds) *The European Union and International Relations*, Oxford University Press (2005), 93.

¹⁵²⁰ See more in C. Carta, *European Union Diplomatic Service: Ideas, Preferences and Identities*, *op.cit.*.

Representative in his tasks emerged. The Lisbon Treaty introduced thus a new external relations actor, an independent *sui generis* body, separated from both the Commission and the Council Secretariat, and entitled the European External Action Service (EEAS). The EEAS itself includes different departments from the Commission and the Council specialised in the conduct of external relations of the Union, and the Union delegations.¹⁵²¹

The entry into force of the Maastricht Treaty introduced a new actor (the European Union) on the international sphere that could exercise, to a certain extent, consular and diplomatic protection – State-like functions on behalf of private individuals, who were its citizens. The Treaty of Lisbon has made the EU directly responsible for the protection of EU citizens located outside the European Union.¹⁵²² It further strengthened the role of the Union in this field by replacing the Commission delegations with Union delegations which are now representing all of the Union interests¹⁵²³, and can also protect Union citizens in third countries¹⁵²⁴, unlike any other international organisation, and similar to the consular and diplomatic missions of States that can protect the interests of the sending State and of its nationals.¹⁵²⁵

The idea of ensuring external protection of Union citizens *via* the Union diplomatic delegations did not appear for the first time during the elaboration of the Treaty of Lisbon or the Constitutional Treaty. The possibility was put forward for consideration, as early as 1993, at the initiative of the Commission, which proposed that protection of the then Community citizens should be ensured directly by EC Missions.¹⁵²⁶ Starting in 2006, the Commission reconsidered the idea of making the EU delegations directly responsible for the protection of EU citizens.¹⁵²⁷ Furthermore EU vessels fishing in the maritime waters of third countries with which the EU had concluded fishing agreements benefited for many years from the diplomatic protection of the Union *via* the then Commission delegations.¹⁵²⁸ It thus seems that

¹⁵²¹ See Arts. 1 and 4 of the EEAS Decision.

¹⁵²² Art. 3(5) TEU.

¹⁵²³ Art. 221 TFEU.

¹⁵²⁴ Art. 35 TEU and Art. 5(10) EEAS Decision.

¹⁵²⁵ According to of Art. 5(a) VCCR and Art. 3(1)(b) VCDR.

¹⁵²⁶ Report from the Commission on the Citizenship of the Union, COM(93)702 final, Brussels, 21 December 1993, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1993:0702:FIN:EN:PDF>> (accessed March 2013). On the history of the Union delegations, see E. Drieskens, 'What's in a Name? Challenges to the Creation of EU Delegations', (2012) *The Hague Journal of Diplomacy*, 51.

¹⁵²⁷ See European Commission (2007) *Effective Consular Protection in Third Countries: The Contribution of the European Union*, Commission Action Plan 2007-2009, 5.12.2007, COM(2007) 767 final, at 10.

¹⁵²⁸ For example fishing agreements concluded between the EU and certain third countries include two provisions of relevance for the subject: '1) Seizure of fishing vessels flying the flag of a Member State shall be notified to the Delegation of the Commission of the EU and simultaneously to the consular agent of the Member State of the flag; 2) Before any judicial procedure is started, an attempt shall be made to resolve the presumed

under areas of exclusive Union competence, the Union had been recognised as having the right to exercise diplomatic protection directly to legal persons. However, it is difficult to imagine practical situations where private EU citizens, and not legal persons, could by way of their actions fall under the exclusive competence of the EU and thus benefit from a right to diplomatic protection from the EU before the Lisbon Treaty.

a. The EEAS and Union delegations' competence to protect EU citizens abroad

The newly created European External Service has been endowed with the competence to act for the protection of the Union citizens, mostly *via* the Union delegations in third countries.¹⁵²⁹ The Council Decision qualifies the role of the EEAS in this field as supporting the competences of the Member States' representations in third countries.

It has to be pointed out that the qualification of the EU delegations' competence in the field of protection of Union citizens abroad, according to Article 5(10) of the Council Decision, as 'supplementary' does not necessarily imply a qualification of the nature of this EU competence as supportive in the sense of one of the three main EU competences from the catalogue of competences introduced by the Treaty of Lisbon (Articles 3- 6 TFEU). The consular and diplomatic protection of EU citizens in the world is not among the list of supplementary competences of the EU enumerated under Article 6 TFEU, nor are they to be found under one of the other Articles stipulating the different types of EU competences.¹⁵³⁰ Therefore, according to the fall-back Article 4(1) TFEU, the EU's competence in the field of consular and diplomatic protection of EU citizens is shared with the Member States, without necessarily creating a hierarchy between the competences of the Member States and those of the EU to secure protection abroad for unrepresented EU citizens. However, the principles of subsidiarity¹⁵³¹ would require the EU to adopt policy measures only when necessary and better ensuring the objective of ensuring protection of EU citizens by way of actions taken at the EU level.

infringement through an administrative procedure.' The latter provision was interpreted by the then Court of First Instance in Case T-572/93, *Odigitria*, Judgment of the Court of First Instance of 6 July 1995. The Court interpreted this provision as a form of diplomatic protection by the EU with respect to vessels that fly the flag of a Member State. The Court held that the EU Delegation abroad had a 'duty to provide diplomatic protection' to the detained crew under the fisheries agreement that the European Commission negotiated bilaterally with the non-EU countries concerned. For a complete list of these fisheries agreements, see: <<http://ec.europa.eu/fisheries/cfp/international/agreements/>> (accessed March 2014).

¹⁵²⁹ Art. 5(10) Council Decision on EEAS and Art. 221 TFEU.

¹⁵³⁰ Art. 3 TFEU on exclusive EU competences, Arts. 4(2) or 5 TFEU on shared competences.

¹⁵³¹ Art. 5 TEU, and the Protocol No. 2 on the application of the principles of subsidiarity and proportionality.

Article 5(10) of the EEAS Council Decision should be seen more as an operational principle guiding the co-operation in practice between the EU delegations and the Member States' external representations in third countries, rather than placing an etiquette on the nature of the EU's overall competence in this field

b. Type of 'protective' services

The EU with all its institutions is subject to the principle of conferred powers and thus the EEAS can exercise only the competences that were granted by the founding treaties to the EU. Article 35(2) and (3) TEU expressly empower the EU delegations to contribute to the implementation of the EU citizen's right to equal protection abroad, however they do not detail the type of contribution. The involvement of the EU delegations directly ensuring the protection of EU citizens abroad is once again provided in Article 221 TFEU, in corroboration with Article 3(5) TEU. Additionally, as Article 46 of the EU Charter provides that the substantive scope of Article 23 TFEU is both equal consular *and* diplomatic protection, one may think that the EU, through its diplomatic service, can thus ensure directly consular and diplomatic protection of EU citizens in third countries. Article 5(10) of the Council Decision clearly empowers the EEAS with competence to exercise consular protection of EU citizens if the Member States so request.

It can thus be noted that the extent to which specific sub-categories of consular services might be handled by the EU delegations is not regulated in detail by either the founding Treaties, or the EEAS Decision. Both primary and secondary EU law only provide guiding principles for the responsibilities of the EEAS in the area of consular and diplomatic affairs, without detailing the exact consular or diplomatic services that the EU delegations are entitled to exercise in relation to EU citizens located outside the Union.¹⁵³² Article 221(1) TFEU entrusts the EU delegations with only a general external representation for all EU external relations competences, without specifying what precise consular and diplomatic functions the EU delegations possess. The EU provisions that relocate some of the Member States' external representations tasks to the HR and the EU delegations do not either give much detail on the type of consular and diplomatic services the EU delegations are entitled to

¹⁵³² The EEAS Chief Operating Officer David O'Sullivan pointed out that the gaps left by the Lisbon Treaty, which only provided the legal basis for the EEAS and the very basic provisions of the 2010 Council Decision establishing the EEAS, had to be filled by the EEAS itself. Speech by EEAS Chief operating Officer David O'Sullivan at the Institute of International and European Affairs in Dublin, 6 October 2011, available at: http://www.eeas.europa.eu/top_stories/2011/061011_en.htm, accessed 28 October 2011 (accessed January 2015).

provide to the EU citizens.¹⁵³³ The EU delegations are taking over the external representation tasks of the rotating presidency in third countries. This particular new function will mainly consist in CFSP related tasks: the local organisation of summits, ministerial meetings and other political dialogue and troika activities (former Article 18 TEU); the organisation and chairing of the local cooperation between the Member States diplomatic and consular missions (former Article 20 TEU); the coordination of the EU positions and demarches;¹⁵³⁴ agenda-setting; and as spokesperson in third countries,¹⁵³⁵ therefore they do not entail consular and diplomatic services provided directly by the EU delegations to the EU citizens.

The transfer of external representations tasks from the Rotating Council Presidency to the High Representative, Union delegations and the President of the European Council is a welcome step in the light of the past practice which proved that ensuring external representations functions by the Member States holding the Rotating Council Presidency in third countries was a cumbersome task not only for the small Member States, but also for those possessing one of the wider networks of external representations. It was pointed out that even during the German Presidency in the first half of 2007, the 27 local Presidencies were exercised by seven different Member States. The external representation of the EU becomes even more cumbersome for the Member States in those third countries where only a few of them are represented, since such Member States would have to exercise the local Presidency almost on a continuous basis, with all the financial and non-financial burdens which that requires from an embassy. The external representation of the EU in foreign affairs that fell within the competence of the Rotating Presidency posed serious problems not only in terms of its capacity to cover as many regions as possible, but also in terms of continuity. The changing every 6 months of the Member State holding the Rotating Presidency created confusion for third countries in terms of the face, name, telephone numbers, and all the bureaucratic administrative aspects of external relations.

The Union delegations have now taken over the coordination of Member States' embassies from the embassies of the Member States holding the Rotating Presidency,¹⁵³⁶

¹⁵³³ The Lisbon Treaty eliminated the external representation power of the Rotating Presidency, and instead provided for a general rule on EU representation contained in Arts. 17(1) and 18 TEU.

¹⁵³⁴ European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, p. 6.

¹⁵³⁵ See M. Gatti, *The European External Action Service and the Implementation of the Union Method in European Foreign Policy*, PhD Thesis, 2013, 39ff.

¹⁵³⁶ Several Reports on the EEAS activities mention the gradual taking over of the external representation and internal coordination role from the rotating Council Presidency in third countries and various multilateral fora by the EU delegations. See, for example: EEAS, *EU diplomatic representation in third countries – second half of 2011*, 11808/2/11 REV 2, Brussels, 25 November 2011, and EEAS, 'EU diplomatic representation in third

however the transfer of the coordination function was not smooth in all cases.¹⁵³⁷ This new function will also have an impact on the efficiency of the procedure to ensure protection of EU citizens abroad. The fact that the EU is present in more third countries than any of the Member States, and that a single entity will ensure coordination of the meetings where planning and management of protection is discussed could lead in practice to a more coherent and transparent protection procedure.

Although, so far, most of the protection secured by the EU to its citizens abroad has taken the shape of consular protection, usually provided during consular crisis situations, the EU has occasionally exercised, pre- and post-Lisbon Treaty, also diplomatic protection actions for the benefit of its citizens detained, or prohibited to return to the Union territory. For instance, in October 2007, the EU requested Djibouti to comply with the Cotonou Agreement, which expressly subjected economic benefits to the respect of human rights within its territory.¹⁵³⁸ The Council's statement comes in response to the arbitrarily arrest of an Italian citizen.¹⁵³⁹ Post-Lisbon Treaty, it seems the EU's diplomatic interventions on behalf of its citizens located in third countries has increased. For instance, in 2011, on behalf of a group of Czech citizens illegally detained in Zambia,¹⁵⁴⁰ and in 2013, in the famous cases of Ms Invernizzi, an Italian citizen, whose human rights to exit a country and return to her country of nationality and the right to fair trial were violated in Saudi Arabia, facing also the death penalty for adultery;¹⁵⁴¹ or of the Swedish journalist, Dawit Isaak, imprisoned in Eritrea for having exercised his freedom of expression.¹⁵⁴² The diplomatic intervention of the HR and the EU delegations, conducting negotiations for the repatriation of the citizens or for their

countries – first half of 2012', 18975/11, Brussels, 22 December 2011; N. Helwig, 'The New EU Foreign Policy Architecture: Reviewing the first two years of the EEAS', CEPS February 2013, available at: <http://www.ceps.be/ceps/dld/7711/pdf>.

¹⁵³⁷ For example, P. M. Kaczyński pointed out that in Washington some national ambassadors did not show up for local coordination meetings for months. See, P. M. Kaczynski, 'Swimming in Murky Waters: Challenges in Developing the EU's External Representation', *FII Briefing Paper* 88, September 2011, 9.

¹⁵³⁸ Council reply, E-0829/08 of 16 of April 2008, available at: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-0829&language=EN> (accessed February 2013).

¹⁵³⁹ Parliamentary question, E-0829/08 of 21 February 2008, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-0829+0+DOC+XML+V0//EN&language=EN> (accessed February 2013).

¹⁵⁴⁰ Written question P-011180/11 Jan Březina (PPE) to the Commission. VP/HR — Detention of Czech citizens in Zambia

¹⁵⁴¹ Question for written answer to the Commission (Vice-President/High Representative) submitted by MEP Oreste Rossi, under Rule 117, published in OJ C 308 E, 23/10/2013.

¹⁵⁴² Question for written answer E-008016/12 to the Commission (Vice-President / High Representative) submitted by MEP Olle Schmidt on 11 September 2012, published in OJ C 308E, 23/10/2013.

liberation with the local governments, or handing habeas corpus before the local courts constitute diplomatic protection actions.¹⁵⁴³

Comparing the catalogue of functions that Member States' embassies and consulates are empowered to exercise in third countries with the list of responsibilities of Union delegations, one arrives at the conclusion that there is a significant number of similar consular and diplomatic functions which both the Member States' external representations and the embassies of the European Union, an international organisation, can now exercise of behalf of the EU citizens in the world.

The consular functions which a consular mission of a Member State can exercise are specified in Article 5 of the VCCR, and they are thirteen in number. Of this list, only the visas and the notary related functions are not currently performed by the EU. As to the other consular functions, the EU has certain competence to exercise them, including: supervision of judicial proceedings in which EU citizens are involved;¹⁵⁴⁴ Article 5(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with regard to such persons;¹⁵⁴⁵ and Article 5(k) and (l) assistance to vessels and ships carrying the EU flag, but also those of the Member States, as long as they are carrying out actions which fall under the exclusive competence of the EU. For example, fishing agreements¹⁵⁴⁶ concluded between the EU and certain third countries include two provisions of relevance to the subject: 1) seizure of fishing vessels flying the flag of a Member State shall be notified to the Delegation of the Commission of the EU and simultaneously to the consular agent of the Member State of the flag; and 2) before

¹⁵⁴³ According to the commentary of Article 1 of the ILC Articles on Diplomatic Protection, "Diplomatic action" covers all the lawful procedures employed by a State to inform another State of its views and concerns, including protest, request for an inquiry or for negotiations aimed at the settlement of disputes. "Other means of peaceful settlement" embraces all forms of lawful dispute settlement, from negotiation, mediation and conciliation to arbitral and judicial dispute settlement.' See Yearbook of the International Law Commission, 2006, vol. II, Part Two, para. 8, p.26.

¹⁵⁴⁴ 'The EU has informed the Ministry of External Affairs of its intention to send representatives from its Delhi-based missions of Belgium, Denmark, Germany, France, Hungary, Sweden, the United Kingdom, and the EU, to attend the court hearing in the case of Human Rights Defender and National Vice-President of the People's Union for Civil Liberties, Dr. Binayak Sen, as observers. The hearing is scheduled to take place at the Chhattisgarh High Court in Bilaspur on Monday 24 January. This is in line with the EU's agreed policy on Human Rights Defenders. The EU has also expressed to the Indian authorities its concern about the conditions pertaining to the detention of Dr. Sen'. Available at: <http://eeas.europa.eu/delegations/india/press_corner/all_news/news/2011/20110121_en.htm> (accessed may 2013).

¹⁵⁴⁵ See the reply of the EEAS to the petition of an EU citizen whose child was abducted in Egypt, available at: <http://eeas.europa.eu/petitions/2012/20120820_rights_eucitizens_egypt_en.pdf> (accessed May 2013).

¹⁵⁴⁶ See *inter alia*, Article L of the Agreement between the European Economic Community and the Republic of Cote d'Ivoire on fishing off the coast of Cote d'Ivoire, [1990] OJ L 379/0003.

any judicial procedure is started an attempt shall be made to resolve the presumed infringement through an administrative procedure.¹⁵⁴⁷ Therefore, although the EEAS and EU delegations are mostly involved in protecting EU citizens in consular crisis, a certain involvement exists also in day-to-day situations and diplomatic protection related cases.

There is growing cooperation between the EU delegations and the Member States whereby the Union delegations have provided the Member States with significant logistic assistance on numerous occasions for the purpose of ensuring consular assistance for both represented and unrepresented EU citizens in third countries affected by disasters.¹⁵⁴⁸ The delegations have helped with the logistics, including: opening their premises to the EU citizens and the Member States' consular and diplomatic officials and helping with transportation, communications,¹⁵⁴⁹ and with wider coordination functions of the Member States' consular and diplomatic missions.¹⁵⁵⁰ Furthermore, according to a recent Commission study, unrepresented EU citizens perceive Union delegations as 'natural' contact points.¹⁵⁵¹

In short, the added value of the Treaty of Lisbon in terms of the protection of unrepresented EU citizens abroad primarily consists of enhancing the EU's role, by giving more powers and instruments to the EEAS in the field of consular protection of EU citizens, and ensuring more efficient horizontal co-operation and co-ordination among the external

¹⁵⁴⁷ This latter provision was interpreted by the General Court in the *Odigitria* case. The General Court interpreted this article as a form of diplomatic protection by the EU with respect to vessels that fly the flag of a Member State.

¹⁵⁴⁸ The most recent example was during the political upheaval in Syria when the EEAS was ready to help with the evacuation of around 25,000 EU nationals in Syria and with hosting the diplomatic officials of four Member States in the EU delegation in Damascus (A. Miozzo's statement of May 2012, available at: <http://www.europeanvoice.com/article/imported/eu-embassy-stays-open-as-expulsions-escalate/74455.aspx> accessed May 2013). Similar operations were carried out in Libya, Egypt, and Tunisia during the political upheaval that affected those countries in the spring of 2011.

¹⁵⁴⁹ On the general role of the EEAS in the field of consular protection of EU citizens, see the December 2011 EEAS evaluation report which stated that '[...] over the past year we have also seen that the EU Delegations can play an important role in the coordination of evacuations of citizens [...]', European External Action Service (2011a) 'Report by the High Representative to the European Parliament, the Council and the Commission' (22 December 2011). For an academic position on the role of the EEAS in the field of consular protection of EU citizens, see Bart van Vooren and R. Wessel, *op. cit.*, and European Parliament, AFET Committee Report on *The Role of the European External Action Service in Consular Protection and Services for EU citizens*, 2013, available at:

<<http://www.europarl.europa.eu/committees/de/studiesdownload.html?languageDocument=EN&file=85428>> (accessed May 2013).

¹⁵⁵⁰ As happened, for instance, in Japan, when the EU delegation spontaneously assumed the coordination of national capabilities responsibility during the 2011 nuclear disaster. See J. Wouters, S. Duquet and K. Meuwissen, 'The European Union and Consular Law', *KU Leuven Working Paper* 107/2013, 10.

¹⁵⁵¹ See Commission Staff Working Paper, Impact Assessment, accompanying the document, *Proposal for a Directive of the Council on co-ordination and co-operation measures regarding consular protection for unrepresented EU citizens*, SEC (2011) 1556 final, Brussels, 14.12.2011, at p. 28. A similar situation also existed before the entry into force of the Lisbon Treaty. According to the declaration of F. Frattini, Director of the DG Justice in 2007, 17% of Union citizens interviewed believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels of 29 May 2007.

representations of the Member States. The EU's involvement in Georgia, Egypt, and Libya and recently in Syria has demonstrated to the citizens of the EU and to the Member States the added value brought by the EU Institutions in this domain. In these emergency situations the EU has made use of all its disaster response tools,¹⁵⁵² making sure that help is given to the populations of the affected third countries¹⁵⁵³ but also to its EU populations caught in the midst of disasters.

In its four years of existence, the role of the EEAS in responding to crises around the world and coordinating crisis management missions and operations has grown considerably.¹⁵⁵⁴

Some of the Member States have fervently opposed the recognition of consular powers to the EEAS,¹⁵⁵⁵ since the ability to provide consular services to citizens and secure assistance in emergency situations has traditionally been defined under the international legal framework as a symbol of statehood.¹⁵⁵⁶ In spite of opposition from several Member States, it seems that there is a progressive recognition of the EU's role in exercising consular and diplomatic protection functions for the benefit of EU citizens. The difficult task of ensuring external representation of the Union by the Member State holding the Rotating Council Presidency as well as the need to present a more coherent external image of the Union¹⁵⁵⁷ might have influenced the Member States, including those vehemently opposed to the idea of the Union taking over more external representations functions, to accept, during the development of the

¹⁵⁵² For a detailed overview of the EU's panoply of disaster response tools, see F. Casolari, 'The External Dimension of the EU Disaster Response', in: A. de Guttry, M. Gestri and G. Venturini (eds.), *International Disaster Response Law*, Hague: Springer T.M.C Asser Press, 2012, pp. 129 – 155; and M. Cremona, 'The EU and Global Emergencies – Competence and Instruments', in: A. Antoniadis, R. Schütze and E. Spaventa (eds.), *The European Union and Global Emergencies: A Law and Policy Analysis*, Hart Publishing, 2011, pp.11-31.

¹⁵⁵³ Usually via the humanitarian assistance instrument. See for example, N. Keoning, 'The EU and the Libyan Crisis: In Quest of Coherence?', *IAI Working Paper* of July 2011.

¹⁵⁵⁴ According to David O'Sullivan, Chief Operating Officer, European External Action Service, the EEAS mobilized 'over 7000 EU military and civilian personnel with about thirty missions launched since 2003. Our strength lies in a comprehensive approach enabling us to combine diplomatic, political, military, trade, development and humanitarian actions.' See his Guest Editorial article 'The EU's External Action: Moving to the Frontline' in (2014) *EFRev*, 329, 329–334.

¹⁵⁵⁵ See, *inter alia*, Foreign and Commonwealth Office, Thirty-third Report of Session 2012-13, Draft Council Directive on consular protection for citizens of the Union abroad, available at: <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86-xxxiii/8615.htm>>; and the National Report on the UK legislation and practice on consular and diplomatic protection of citizens in the *CARE Report*, available at: <<http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>>

¹⁵⁵⁶ See the Montevideo Convention on Rights and Duties of States, Article 1. See also K. Raik, 'Serving the citizens?', op. cit. Consular role of the EEAS grows in small steps', *CEPS Policy Brief*, 30 April 2013, available at: <http://www.epc.eu/documents/uploads/pub_3488_consular_role_of_the_eeas.pdf> (accessed May 2013).

¹⁵⁵⁷ See J. Larik, 'The EU on the Global Stage after the Lisbon Treaty: External Action and the External Action Service', in S. Cassesse, B. Carotti, L. Cassini, E. Cavalieri and E. MacDonald (eds.), *Global Administrative Law: The Casebook*, IRPA–IILJ (2012), 16.

Treaty of Lisbon, to transfer more external representation tasks from the national to the EU diplomatic sphere.

However, in spite of the recent attainment of consular and diplomatic functions by the EU, the general norm, in both theory and practice, is that the Member State of nationality still maintains the primary responsibility for ensuring the protection of EU citizens abroad. In the event of the absence of the external representation of the Member State, the responsibility falls on the other Member States that are represented in the specific third countries, and, lastly, responsibility falls on the EU delegations, if requested by one of the Member States.

2. The role of the Commission, the European Parliament and the Council in ensuring protection of EU citizens abroad

Of these three EU institutions with legislative power, the Commission and the European Parliament have supported the development of a more ambitious role for the EU in securing protection of EU citizens in the world based on the EU's newly attributed competences, capacity to gather resources, and its more influential negotiation power. Since the development of the concept of an EU citizenship right to equal protection abroad, the Commission has militated for a stronger role of the EU in the field of ensuring protection of EU citizens abroad based on the Member States' inability to secure efficient consular and diplomatic protection of EU citizens abroad, and later on based on the Member States inability of ensuring an efficient implementation of the EU citizenship right.

Strengthening the EU citizenship right to equal protection abroad became a key priority for the Commission starting in 2006. The Green Paper prepared by the Commission was the first policy initiative aimed at finding the appropriate means to increasing the efficiency of the EU citizenship right in terms of vertical and horizontal cooperation, finding a common framework for the exercise of consular protection and increasing the awareness of EU citizens.¹⁵⁵⁸ The proposals envisaged by the Green Paper indicate the Commission's inclination for supranational forms of action. A consent clause to be negotiated by the Community with third countries, the establishment of a common rules framework for the exercise of the Member States' obligation to ensure protection abroad of EU citizens, and a role for the Commission delegations, are some of the supranational measures envisioned by the Commission for tackling the problems in practice. The Community action approach was

¹⁵⁵⁸ Council of the EU, 'Closer Consular Cooperation', doc. 16231/06, December 2006; Commission, 'Green Paper'.

not welcomed by certain Member States,¹⁵⁵⁹ which have stressed the lack of competence of the Community, Union, and thus the Commission to act, proposing instead to act by way of intergovernmental type of actions.¹⁵⁶⁰

Pre-Lisbon Treaty, the role of the Commission was limited, since it was considered to lack legislative power, and had thus adopted only soft law documents, such as: the Green Paper, Action Plan, and Impact Assessment. Even if the implementation of the unrepresented Union citizen's right to equal protection abroad was, in the pre-Lisbon period, carried out primarily by way of horizontal consular cooperation among the Member States due to the Member States' desire to preserve their full powers in the field of consular and diplomatic protection of citizens abroad, once the Member States started to feel overwhelmed by the magnitude and frequency of disasters affecting their citizens in third countries, forms of vertical consular cooperation started to appear. For instance, the Community Civil Protection Mechanism was amended in 2007 for the purposes of also covering consular protection of Union citizens in need of urgent help in third countries.¹⁵⁶¹ Therefore, within the framework of the Civil Protection Mechanism, the Commission acquired a small role via the Commission's Monitoring and Information centre ('MIC') established within this Mechanism.

To date, the EU's Civil Protection Mechanism has often been activated for the purposes of supporting the Member States in ensuring consular assistance to EU citizens in major emergencies in third countries. The Mechanism was activated in past crises such as: Libya (2010),¹⁵⁶² Mumbai (2008)¹⁵⁶³ and Libya again in early 2011.¹⁵⁶⁴ During the Gaza crisis

¹⁵⁵⁹ In particular the UK, which has been the most reticent of all the Member States in relation to the development of any supranational form of action and harmonisation in this field.

¹⁵⁶⁰ See the *CARE Report*, Chapter IV and J. Wouters, S. Duquet and K. Meuwissen, 'The European Union and Consular Law', *KU Leuven Working Paper* No. 107/2013.

¹⁵⁶¹ Preamble 18 of the Civil Protection Mechanism (Council Decision 2007/779/EC Euratom establishing the EU Civil Protection Mechanism (Recast), *OJ*, 2007, L 314/9 reads as follows: 'The Mechanism could also be used for supporting consular assistance to EU citizens in major emergencies in third countries, regarding civil protection activities, if requested by the consular authorities of the Member States'.

¹⁵⁶² In particular, two grants (with a value of €112,000) were awarded to two Member States that had evacuated about 150 EU citizens. See Commission Staff Working Paper, Impact Assessment, accompanying the document, *Proposal for a Directive of the Council on co-ordination and co-operation measures regarding consular protection for unrepresented EU citizens*, SEC (2011) 1556 final, Brussels, 14.12.2011, p. 18.

¹⁵⁶³ In Mumbai, the Mechanism was triggered by the French Presidency and activated in order to assist severely wounded EU citizens after the Mumbai attacks; this operation complemented bilateral operations undertaken by Member States to evacuate more than 100 non-wounded EU citizens to Europe. The costs of the evacuation were 50% co-funded by the Civil Protection Financial Instrument. See Commission Staff Working Paper, Impact Assessment, *ibid.*, p. 18.

¹⁵⁶⁴ See EU press release of 23.02.2011 available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/222&format=HTML&aged=0&language=EN&guiLanguage=en>

in January 2009, nearly 100 people were evacuated in armoured buses thanks to the EU Delegation's support.

As part of the Commission's efforts of increasing the effectiveness of EU citizenship, the problems faced in the implementation of the EU citizenship right to equal protection abroad were addressed in several of the Commission's policy papers. Supported in its endeavours by the European Council, which invited the Commission in 2009, within the framework of the Stockholm Programme, to 'consider appropriate measures establishing coordination and cooperation necessary to facilitate consular protection in accordance with Article 23 TFEU'¹⁵⁶⁵, the Commission undertook a comparative analysis of the extent and nature of discrepancies between the then 27 Member States' legal frameworks and practice on consular and diplomatic protection¹⁵⁶⁶ and an evaluation of the best policy options for an instrument that should replace¹⁵⁶⁷ the sui generis inter-governmental implementation framework of former Article 20 EC Treaty, consisting of the three Decisions of the Representatives of the Governments of the Member States (95/553, 96/409, 11107/95).

As part of its concern for ensuring an effective implementation of the EU citizenship right to equal protection abroad, and mindful of the Union's obligation to respect international law, the Commission has on numerous occasions emphasised the need to obtain the consent of the third countries either by way of 'a unilateral notification to the third countries' or a consent clause introduced in future bilateral agreements concluded by the Member States. The cumbersome procedure involved by these solutions has determined the Commission to put forward another proposal whereby a consent clause is inserted in mixed agreements with certain third countries.¹⁵⁶⁸ In spite of this proposal being put forward to the Member States as

¹⁵⁶⁵ The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Council document 170 24/09 of 2 December 2009, [2010] OJ C 115/01, p. 11.

¹⁵⁶⁶ See the CARE Project (Citizens' Consular Assistance Regulation in Europe), <http://www.careproject.eu/>. See in addition also the other studies launched by the Commission: a study (2009) on Member States' legislations and practices, carried out by the Instituto Europeo de Derecho. An external study (2010) by the consultancy GHK supported the Commission in its analysis of policy options and the related costs, focusing on crisis situations and financial reimbursement. A second external study (2011) undertaken by the consultancy Matrix Insight evaluated Decision 95/553/EC and examined scope for further improvement, see Commission Proposal for a Council Directive on Consular Protection for citizens of the Union abroad, COM(2011) 881 final 2011/0432 (CNS), Brussels, 14.12.2011, fn 19.

¹⁵⁶⁷ The consular related Decisions provided that they will have to be amended 5 years after they entry into force, that is in 2007. Since the Commission has the role of legislative initiator, it took this responsibility also in relation to the 'odd one out' EU citizenship right to equal protection abroad.

¹⁵⁶⁸ See Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, doc. COM (2011) 149/2 of 23 March 2011).

the preferred option from all possible solutions, so far the Member States have not all agreed with this particular supranational solution.¹⁵⁶⁹

Although the European Parliament has been quiet on the implementation of the EU citizenship right to equal protection abroad during most of this EU citizenship right's existence, its position has changed, particularly after the 2008 Mumbai conflict. Following the negative experience of certain MEPs who were left behind by the consular authorities of a Member State,¹⁵⁷⁰ based on the fact that they were not co-nationals of those consular officials, the European Parliament has gradually increased its voice and its proposals for a stronger role of the EU in securing protection of the EU citizens in the world. For instance, the European Parliament welcomed most of the Commission's proposals in this field, starting from the Green Paper's proposals¹⁵⁷¹ and continuing post-Lisbon Treaty in regard to the Commission's proposal for a Directive on consular protection of Union citizens in third countries.¹⁵⁷² Post-Lisbon Treaty, the European Parliament is calling, even more fervently than the European Commission, for a stronger consular role for the EEAS, based on the newly conferred protection powers of the Union. The Parliament seems to see in this new consular and diplomatic protection role of the EU a way to enhance EU citizenship,¹⁵⁷³ the connection of the public with the EU, and also the EU's international position.

On the other hand, the Council has been more reluctant towards the Commission's proposals, in light of the fact that certain Member States have acted as persistent objectors to any initiative that increases the role of the EU in this field. Pre-Lisbon Treaty, the Council served only as an institutional setting for the meetings of the Member States where they adopted the relevant *sui generis* Decisions implementing former Article 20 EC Treaty.

Compared to the Commission, the Council had a slightly more important role since one of its Working Groups was given the task of following the implementation of the EU citizenship right to equal protection abroad – the COCON Working Group.¹⁵⁷⁴ The Working Group was established immediately after the entry into force of the Maastricht Treaty and was

¹⁵⁶⁹ The UK has clearly rejected this proposal in 2006 when it was first put forward by the Commission (Green Paper 'Diplomatic and consular protection of Union citizens in third countries', COM 2006 712 final, 28.11.2006), and it seems it has not changed the position, see the UK Report in the *CARE Report*.

¹⁵⁷⁰ See the *CARE Report*, Chapter Conclusions, 665.

¹⁵⁷¹ See the Report on the Green Paper: Diplomatic and Consular Protection of Union citizens in third countries, European Parliament Committee on civil liberties, justice and home affairs, and G. Porzio, *op.cit.*, 97.

¹⁵⁷² See more details on this issue in this Chapter, section VIII - Future policy and institutional measures to increase efficiency of ensure an effective protection of EU citizens protection in the world abroad

¹⁵⁷³ See K. Raik, 'Serving the citizens? Consular role of the EEAS grows in small steps', *EPC Policy Brief* of 30 April 2013.

¹⁵⁷⁴ Council Working Group promoting European Consular Cooperation.

meant to be a forum of meeting and discussion among consular representatives of the Member States. The work of this ‘club of port and cigars’,¹⁵⁷⁵ as it has been called, has been criticised by academics for lacking a long-term vision of the European consular cooperation,¹⁵⁷⁶ and for keeping a Community policy – the EU citizenship right – intergovernmental.¹⁵⁷⁷

The Member States had and continue to have a divided position on the EU’s role in the field of ensuring protection of EU citizens abroad. While Eastern European and smaller countries such as Belgium and Netherlands have supported an increased consular role for the EU, other Member States have been reluctant to such a delegation of power. The latter group has invoked several objective reasons for their position, such as the EEAS lack of human resources and training and lack of EU and Member States’ funds to remedy this situation. However, the main reason of opposition is the perception of these former colonial powers of the field of citizens’ protection abroad as a core State power with important legal and political ramifications that should remain under the State’s exclusive control. It is thus highly likely that the Council will maintain the EU citizenship right as the ‘odd one out’ EU citizenship right, still attributed to the COCON Working Group that shared a primarily internationalist approach to the implementation of this right.

The final part of this section will assess the benefits of increasing the EEAS involvement for both EU citizens in need of assistance and for the Member States’ budgetary expenditures.

3. Institutional policy options for the future

The principal role of the EEAS, and of the Union delegations as part of the EEAS, is to serve the High Representative and the other EU institutions.¹⁵⁷⁸ Ensuring the protection of EU citizens abroad has become a very controversial issue due to the alleged limited competence of the EU in this field, but most importantly due to the challenges it poses on the Member States’ sovereignty.

The solution, so far, in cases of Member States facing difficulties in ensuring prompt consular assistance for all their nationals abroad has generally come from horizontal consular cooperation, whether initiated solely through intergovernmental cooperation mechanisms¹⁵⁷⁹

¹⁵⁷⁵ M. Okano-Heijmans ‘Changes In Consular Assistance And The Emergence Of Consular Diplomacy’, in J. Melissen and A.M. Fernández (eds.), *Consular Affairs and Diplomacy*, Martinus Nijhoff Publishers (2011), 36.

¹⁵⁷⁶ *Ibid.*

¹⁵⁷⁷ Alessandro I. Saliceti, *op.cit.*...

¹⁵⁷⁸ K. Raik, ‘Serving the citizens?’, *op.cit.*..

¹⁵⁷⁹ For example, under Decisions of the Representatives of the Governments of the Member States 95/553/EC and 96/409/CFSP, or Lead State arrangements or other burden sharing arrangements such as by creating co-

or through EU instruments.¹⁵⁸⁰ However with the financial crisis severely affecting all Member States' budgets, horizontal cooperation had already proved to be insufficient in the recent consular crisis affecting third countries, and will become increasingly insufficient in light of the growing number of unrepresented Union citizens, especially in third countries where no Member States are represented.¹⁵⁸¹

The solution to the on-going reduction of the external representation network of the Member States and their budget allocation for consular and diplomatic assistance services therefore has to come also from outside national capabilities. The Treaty of Lisbon has revolutionised the conduct of EU foreign affairs both substantially and institutionally.¹⁵⁸² Among the most relevant amendments with regard to ensuring the protection of EU citizens in the world, we should note the establishment of a diplomatic service for the EU¹⁵⁸³ which includes around 140 Union delegations operating globally and making the EU better represented externally than most of the Member States. Indeed, in several third countries¹⁵⁸⁴ only the EU has an 'embassy',¹⁵⁸⁵ while in certain key tourist destinations, such as Cape Verde, Fiji and Madagascar, there are only three other Member States that are represented in addition to the EU delegation. In this context, what becomes evident is the potential added value of the EU delegations for ensuring the protection of unrepresented EU citizens *in situ* by providing certain consular services or opening their premises to EU citizens. Article 5(10)

locations (concentration of two or more diplomatic and/or consular missions in one building/premises), Common Visa Application Centres (mutual accreditation of an external service provider at a joint visa application centre) or Common Administrative Centres (issuance of Schengen visa by several Member States in the same building or by one Schengen member in full representation of all Schengen partners in visa matters).

¹⁵⁸⁰ As for example, under the Civil Protection Mechanism, Council Decision 2007/779/EC Euratom establishing the EU Civil Protection Mechanism (Recast), [2007] OJ L 314/9.

¹⁵⁸¹ There are 26 countries outside the EU where no Member State is represented, while the EU has a delegation in 8 of these third countries, see more details in Annex 2.

¹⁵⁸² Spatial constraints do not allow an in-depth analysis here of all substantive and institutional amendments brought about by the Treaty of Lisbon in the field of the EU's external relations. For a complete assessment of the Treaty of Lisbon changes in EU external relations, please see M. Cremona, 'Defining Competence In EU External Relations: Lessons from the Treaty Reform Process', in: A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape*, Cambridge: Cambridge University Press, 2008, and by the same author, 'The Union's External Action: Constitutional Perspectives', in: G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution Européenne: Commentaire du traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Bruxelles: Bruylant (2007).

¹⁵⁸³ The European External Action Service established by Article 27(3) TEU and Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ*, 2010, L 201/30.

¹⁵⁸⁴ See Annex 1.

¹⁵⁸⁵ See Annex 1. Although the founding Treaties and the Council Decision establishing the EEAS refer formally to Union delegations, academics have also used the term Union 'embassy' when referring to Union delegations, unlike the Member States, notably, the UK, which have long fought for the Treaty of Lisbon to drop any reference to the terms 'embassy' or 'Minister for Foreign Affairs' used by the Constitutional Treaty. See J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', *op.cit.*.

of the EEAS Decision provides only a supporting role for the Union delegations and the EEAS, however this competence should not be understood as ‘supporting’ in the meaning of Art. 6 TFEU, since according to the TFEU, the Union competence in securing an efficient implementation of the EU citizenship right to equal protection abroad, and thus including consular protection seems to be a shared competence under the fall-back provisions of Article 4(2) TFEU.

According to Article 13(2) of the EEAS Council Decision, the role of the EEAS in the field of consular protection of the EU citizens in third countries might develop in the future:

‘The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.’

The Report on the EEAS activity in the field of consular and diplomatic assistance of Union citizens may reveal, in a similar way as the Commission Reports on Union citizenship did in regard to Union citizenship, the necessity to adopt further actions to respond to problems that occurred in practice. If the EEAS role in this area was insignificant, then there would have been no need to include this subject matter in the Report on the EEAS’ activities,¹⁵⁸⁶ therefore it can be inferred that the activity of the EEAS is open to future changes and amendments. There are three possible roles that the EEAS can develop in the area of consular protection of EU citizens: supportive, coordinator and ‘a more complete consular service function to be undertaken by the EEAS.’¹⁵⁸⁷

The EU Institutions and the Member States have different views on what the future role of the EEAS should be. Although in favour of a strong presence of the Union in the field of ensuring the effectiveness of the EU citizenship right to equal protection abroad, the Commission, in its proposal for a Directive on consular protection of EU citizens abroad, envisages a limited role for the EEAS – namely, limited to supporting the Member States, and occasionally coordination action *in situ*. The European Parliament has taken a consistent approach to supporting the EEAS to reach its full potential in regard to its wider role of external representation and in particular in regard to ensuring protection of EU citizens abroad. The European Parliament has argued for a strong coordination role and has suggested

¹⁵⁸⁶ More on this in the *CARE Report*, Section 7 of Chapter 3.

¹⁵⁸⁷ See the presentation of Pierre Vimont, Executive Secretary General of the European External Action Service, during a Workshop organised by the European Parliament, ‘The Role of the European External Action Service in Consular Protection and Services for EU Citizens’, EXPO/B/AFET/FWC/2009-01/Lot2/12/REV1, January 2013.

that the Commission considers the possibility of engaging the EEAS in other day-to-day consular services.

The Member States' reactions to the role of the EEAS in this field have diverged. While certain EU countries with limited resources and few consular missions support an increased role for the EEAS in the area of consular and diplomatic protection of Union citizens,¹⁵⁸⁸ other Member States are strongly opposed to such legal advancement.¹⁵⁸⁹ However, in light of the persistent economic crisis and the citizens' increased demands in receiving prompt and quality consular services,¹⁵⁹⁰ some of the Member States, which used to play the persistent objector role, have revisited their positions¹⁵⁹¹ and agreed to further the cooperation with the EEAS and the role of the Union delegation in consular matters. For instance, the UK agreed to conclude co-location agreements with the EU delegation¹⁵⁹² and considers the conclusion of further similar arrangements.¹⁵⁹³

Therefore, the potential role of the EEAS in the area of ensuring protection of Union citizens in third countries has not been exhausted, and it is currently only incipient and open to increasing power in the future. The future development of the EEAS role in the area of ensuring protection of EU citizens abroad should not be driven by the Member States' fears of losing their core sovereign powers, but rather by cost efficiency principles in ensuring the EU's objectives of ensuring an effective protection of (unrepresented) Union citizens abroad,¹⁵⁹⁴ which are binding on the Member States.

Research studies¹⁵⁹⁵ commissioned by the European Parliament on the role of the EEAS in the Union's external representation also militate for an increased role of the EEAS in consular affairs in light of the ensuing benefits for the financial resources of the Member

¹⁵⁸⁸ See, for instance, the National Report on Latvia and Estonia, in the *CARE Report*, which expressly recommends such a solution.

¹⁵⁸⁹ See the position of the UK and France, in the National Reports in the *CARE Report*.

¹⁵⁹⁰ See the National Report on Sweden in the *CARE Report*, and J. Melissen, and Ana M. Fernandez, *Consular Affairs and Diplomacy*; Martinus Nijhoff Publishers, (2011).

¹⁵⁹¹ See for instance Czech Republic, in J. Wouters, *op.cit.*; V. Pertusot, A. Möller and J. Rappold, E. Burke, L. van Schaik, P. Ivan, F. Landal, Maria J. Seabra, E. Viilup, I. Molina, A. Sorroza, S. Blockmans, 'Reviewing Member States' Commitment to the European External Action Service', *EPIN Working Paper* No. 34/2012.

¹⁵⁹² The UK has concluded co-location agreements with the EU and other Member States in Kazakhstan and Tanzania.

¹⁵⁹³ Igor Merheim-Eyre pointed out that following a 33% reduction in the budget of the UK Foreign and Commonwealth Office in 2010 alone, 'the FCO has further recognized **the need to build strong external partnerships to deliver on its strategy, including with the EEAS**', see Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387877/Consular_Evidence.pdf.

¹⁵⁹⁴ See Art. 3(5) TEU, Arts. 20(2)(c) and 23 TFEU.

¹⁵⁹⁵ See the Research Project launched by the European Parliament on the role of the EEAS: European Parliament's Committee on Foreign Affairs on the *Strengthening the EU's external representation: the role of the EEAS on the Union's external representation*.

States, but also for increasing coherence of external relations. The EU delegations might take on some of the services that are currently duplicated between the Member States.¹⁵⁹⁶

It has been argued¹⁵⁹⁷ that the role of the EEAS in the area of consular matters should not be restricted to the current role of the Union's institutions in crisis situations¹⁵⁹⁸ and it was definitely intended to be broader than what is currently provided in the Council Decision on the establishment of the EEAS, Article 5(10): '*to support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis*'. The role of the EEAS could be increased for the benefit of both the EU citizens, by way of enhancing the efficiency of the EU citizenship right to protection abroad, and the Member States, by rationalising their resources¹⁵⁹⁹, possibly recognising to it a higher role in day-to-day consular protection¹⁶⁰⁰ and higher participation in co-location agreements with the Member States.¹⁶⁰¹ While the latter can be more easily achieved, without for the moment a huge increase of budgetary expenditure for the EEAS, since it has the widest external representation network of all the Member States,¹⁶⁰² an increased consular role in the form of issuing ETDs and visas would require a higher financial commitment, and for the moment the EEAS exercises its role of providing consular

¹⁵⁹⁶ Emerson et al., *Upgrading the EU's role as global actor: institutions, law, and the restructuring of European diplomacy*, CEPS (2011), 10.

¹⁵⁹⁷ See Professor Whitman, Rapporteur of the Research Project launched by the European Parliament's Committee on Foreign Affairs on the *Strengthening the EU's external representation: the role of the EEAS on the Union's external representation*, http://www.europarl.europa.eu/RegData/etudes/note/join/2010/433821/EXPO-AFET_NT%282010%29433821_EN.pdf

¹⁵⁹⁸ On the role of the Union Institutions before the entry into force of the Lisbon Treaty, see M. Lindstrom, *EU Consular Cooperation in Crisis Situations* in S. Olsson, *Crisis Management in the European Union – Cooperation in the Face of Emergencies*, Springer (2009): '*Overall the EU institutions do not have any direct consular tasks but rather serve as facilitators supporting the Member States to assist their citizens, for example by providing help with logistics such as transportation and communications. Within the EU structure the Council Secretariats Joint Situation Centre (SitCen) plays the most prominent role in this regard assisting the Presidency or the designated Lead State with the management of communications, especially with Brussels and in the framework of the Crisis coordination arrangements (CCA).*'

¹⁵⁹⁹ It was noted that in 2012 the Spanish Foreign Ministry suffered a 54% budgetary cut, and as a consequence agreed to a co-location of diplomatic premises with the EU delegation in Yemen. As a result, a sum of 500,000 euros was saved in the first year. See Igor Merheim-Eyre, *Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387877/Consular_Evidence.pdf.

¹⁶⁰⁰ Such as issuing Emergency Travel Documents, which for the moment the non-nationality Member States can issue on the basis of Decision 96/409/CFSP; and short-term Schengen visas under the framework of the Common Visas Code.

¹⁶⁰¹ Currently, the EU has concluded co-location agreements with the Member States in the following third countries: Kazakhstan – Astana and Almaty (Germany, France, Italy and the UK); Nigeria – Abuja (Germany, Italy and Netherlands); and Tanzania – Dar es Salaam (Germany, Netherlands and the UK).

¹⁶⁰² See Annex 1.

protection to citizens of the Union in third countries on a resource-neutral basis.¹⁶⁰³ Therefore, until the EEAS has a higher budget that could include also the management of visas, the role of the EEAS cannot be more than it presently is.

In light of the national economies' problems and increasing challenges faced by national consular and diplomatic officials it has to be considered whether relying on horizontal cooperation among national capabilities is still a better option than the EEAS exercising more consular functions in both consular crises and day-to-day situations. In terms of ensuring an efficient EU citizenship right to protection abroad, entrusting the EU delegation with the primary responsibility of providing protection would be a beneficial step since the individual will not have to find out which Member State to approach for help, and thus can receive assistance sooner, while the Member States would not have to incur the costs of the EU citizens' consular shopping. As rightly pointed out by one legal commentator:

*'There is no reason at all why in ten years' time the Union representations in third countries, particularly small third countries geographically remote from Europe, should not carry out consular duties for all EU citizens in the countries to which they are accredited and in particular provide Schengen visas to citizens of these countries wishing to visit the EU. The emergence of a specialized corps of consular officials within the External Service would be an entirely logical development, demonstrable proof of the Union's ability to save the money of European tax-payers by common action.'*¹⁶⁰⁴

¹⁶⁰³ See Art. 5(10) EEAS Decision. Additionally, the EEAS Review of 2013 pointed out that 'the Delegations are currently neither adequately staffed nor its employees trained to provide complex consular protection on a daily basis.' See also Igor Merheim-Eyre, 'Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders', *op.cit.*.

¹⁶⁰⁴ See Rapporteur Whitman, *Strengthening the EU's external representation: the role of the EEAS on the Union's external representation*, 7
<http://tepsa.be/Whitman%20Strengthening%20the%20EU's%20external%20representation.pdf>

VII. Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad

The Member States' systems of consular and diplomatic protection of individuals¹⁶⁰⁵ have traditionally displayed a wide variation in legal rules, policies, actors and practices. Each national system evolved in a unique historical and cultural context, with certain similarities established among some of the European Member States located in the same geographical region. Each of them developed different legal and constitutional frameworks within specific legal systems,¹⁶⁰⁶ and administrative traditions. These social, legal and historical specificities have impacted on the content of the legal rules and policies and the role of public actors in securing protection of their citizens abroad. The Member States have therefore organised differently their efforts to protect citizens from threats while located outside their borders. This great variety among the Member States' systems of ensuring protection of their citizens in the world is not in itself a negative aspect, since the results of the comparative analysis of the national systems does not lead to a 'one best way' approach. However, from the perspective of ensuring the effectiveness of the Member States' common endeavour under the EU citizenship right to equal protection abroad, this great national variety and the resistance of certain Member States to change has created problems. It will be pointed out that the great variety across national systems of consular and diplomatic protection of citizens affects the effectiveness of the EU citizenship right to equal protection abroad and ultimately the security and safety of Union citizens in the world.

This section will present the results of a comparative analysis of the Member States' systems on ensuring protection of citizens abroad, concentrating on the commonalities and differences. In spite of the great diversity among the national systems, the EU legal framework has impacted on the national systems, leading to more or less significant changes in the traditional domestic legal frameworks, role of actors and operation of consular and diplomatic protection of citizens. This section will very briefly outline the possible reasons that may have determined the Member States to loosen their resistance to the top-down influence in a core area of State sovereignty. It will be shown that the reasons, although

¹⁶⁰⁵ The Member States' systems of consular and diplomatic protection of individuals is herein used as the overall framework including the relevant domestic legal rules, policies, actors and mechanisms that a Member State has in place to protect its own citizens in third countries from different types of threats or assist them in day-to-day or crisis situations.

¹⁶⁰⁶ Continental or common law legal systems.

mixed, relate primarily to purely national interests, rather than to a common European public good – EU citizens in general or the European integration project.

There is a ‘growing public expectation’¹⁶⁰⁷ from national consular and diplomatic officials to perform and rise up to the assertive claims of their co-nationals requesting equally formal consular protection and formal diplomatic protection.¹⁶⁰⁸ Responding effectively to these demands becomes more and more difficult in light of the increasing disasters, financial cuts and the consequential closing of external representations and capabilities.

Recent surveys¹⁶⁰⁹ have showed that several Member States had to reduce their external representation networks due to, *inter alia*: budgetary constraints, security issues, or as a sign of disapproval of the massive violations of human rights by certain national political regimes.¹⁶¹⁰ In the latter circumstance, the practice has been that either those Member States that maintained an external representation *in situ* secured consular protection for the unrepresented EU citizens based upon a Protecting Powers international agreement,¹⁶¹¹ or directly based upon the EU Treaty provisions on consular co-operation among the Member

¹⁶⁰⁷ Maaike O. Heijmans and J. Melissen, ‘Foreign Ministries and the Rising Challenge of Consular Affairs: Cinderella in the Limelight’; *Discussion Papers in Diplomacy*, Netherlands Institute of International Relations ‘Clingendael’, 2006.

¹⁶⁰⁸ See the claims for diplomatic protection submitted by the detainees of Guantanamo Bay and other suspects of terrorism subject to ill treatment – e.g. *Abbasi*, and *Al-Rawi*, who have been highly mediated.

¹⁶⁰⁹ Comparing the list of the *Member States’ external representations in third countries* from Annex 1 with the list of Member States’ external representations from the second half of 2010 drafted by the General Secretariat of the Council (see EU diplomatic representation in third countries, 17770/2/09 REV 2 PESC 1795 RELEX 1235 COCON 47), it resulted that in the last two years, Member States have reduced their external representation networks in third countries. It was found that, currently, there are more third countries with no Member States’ external representations, and also a further reduction of Member States’ external representations as compared to the second half of 2010. For more details on this trend in individual Member States, see Melanie Morisse-Schilbach, for France, in: B. Hocking and D. Spence (eds), *Foreign Ministries in the European Union: Integrating Diplomats*, Palgrave Macmillan (2005), 123; for Hungary, see <http://euobserver.com/economic/28315>. For the Netherlands, see the Ministry of Foreign Affairs’ ‘Nota moderniseren Nederlandse diplomatie’, 8 April 2011, 10 and 18.

¹⁶¹⁰ The UK closed its embassies in Tehran and Bamako, while France closed its embassies on 21 September 2012 in 22 third countries: Afghanistan, Bahrain, Bangladesh, Comoros, Egypt, India, Indonesia, Iraq, Iran, Kenya, Libya, Lebanon, Malaysia, Mali, Mauritania, Niger, Nigeria, Pakistan, Sudan, Chad, Tunisia, and Yemen. See <http://ec.europa.eu/consularprotection/index.action;jsessionid=9JqgRGTQGLq2GpjVLTRbjQGCh28L421gMblt6sbGb9cHT7WyB2dQ!-2096030516>.

¹⁶¹¹ The British embassy in Tehran has been closed since 15 July 2012. Since 1989, whenever the UK severed its diplomatic relations with Iran, Sweden has usually exercised the Protecting Power responsibilities on behalf of the UK in Iran, including limited consular assistance to British nationals, based upon an international agreement regarding the protection of UK interests in Iran. See UKTS no. 45 (1989) printed version and A.V. Lowe, C. Warbrick and Vaughan Lowe, ‘Diplomatic Law: Protecting Powers’, (1990) *International and Comparative Law Quarterly*, 471, 471-474.

States,¹⁶¹² or the EU delegation *in situ* themselves secured consular assistance for the unrepresented EU citizens.¹⁶¹³

Currently, all 27 Member States are represented in only four non-EU countries.¹⁶¹⁴ The consequences of absence of Member State's external representation in a third country for the EU citizens' protection abroad became clear in the aftermath of recent natural disasters¹⁶¹⁵ which affected several third countries.¹⁶¹⁶ The EU citizens realised that they did not have an external representation of their Member State of origin to resort to for help.¹⁶¹⁷

There are over 70 countries worldwide with between zero and five Member State embassies.¹⁶¹⁸ On the other hand, the EU has built up a diplomatic service¹⁶¹⁹, which has a network of at least 140 Union delegations operating globally¹⁶²⁰ and makes the EU better represented externally than most of the Member States. Thus, in many third countries, only the EU is represented.¹⁶²¹

As recent natural and man-made disasters have shown, not even the most committed national Foreign Affairs Ministry can effectively fulfil the demands for assistance.¹⁶²² As a

¹⁶¹² As laid down in Art. 23 TFEU.

¹⁶¹³ See the situation in the summer of 2012 in Syria, where the EU delegation hosted national diplomats of four Member States at its premise in Damascus and was prepared to secure the evacuation of the 25,000 EU citizens present in Syria, when 13 out of the 19 Member States that were represented had closed their external representations. See similar situations in Mali, Iran, Syria, and Libya, according to information available on the website of the European Commission, protection of EU citizens abroad, available at:

<http://ec.europa.eu/consularprotection/index.action> (last accessed in December 2013).

¹⁶¹⁴ The People's Republic of China, the Russian Federation, the United States of America, and Canada, see <http://ec.europa.eu/consularprotection/index.action> (last accessed in December 2013).

¹⁶¹⁵ The notion of disaster is used according to the definition given by the International Law Commission: 'A calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.' ILC, protection of persons in the event of disasters, Draft Articles 1-5, Document A/CN.4/629.

¹⁶¹⁶ Many regions of the world were affected by major natural or man-made disasters in the last five or six years, which caused a great number of deaths and injuries to the population. Examples include the democratic uprising in the Southern Neighbourhood in spring 2011, the earthquake and the tsunami that hit Haiti in January 2010, the Icelandic volcanic ash cloud of 2010, acts of local or international terrorism (Sharm el-Sheik 2005, the 11 September 2001 attacks on World Trade Centre in New York), and military conflicts (the Lebanon conflict of summer 2006, and the Georgian conflict of August 2008).

¹⁶¹⁷ See Madalina B. Moraru, 'Practical and Legal Consequences of Absence of EU and Member States' External Representations for the Protection of EU Citizens in Third Countries', in Jean T. Arrighi, R. Bauböck, M. Collyer, D. Hutcheson, M. Moraru, L. Khadar and J. Shaw (eds.), *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Citizens Residing in Third Countries*. Study of the European Parliament, Policy Department of Citizens' rights and Constitutional Affairs, 2013.

¹⁶¹⁸ See Annex 1: Member States' External Representations and EU Delegations in third countries.

¹⁶¹⁹ The European External Action Service established by Art. 27(3) TEU and Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, OJ 2010 L 201/30.

¹⁶²⁰ See EU External Service Directory, http://eeas.europa.eu/delegations/web_en.htm (last accessed in December 2013).

¹⁶²¹ See Annex 1: Member States' External Representations and EU Delegations in third countries.

¹⁶²² Many regions of the world have been hit by major natural or man-made disasters in the last five or six years which have caused a great number of deaths and injuries to the population. For instance, the democratic uprising

consequence, the Member States agreed, 20 years ago, to pool their consular and diplomatic resources, in an attempt to ensure a minimal consular protection to all those EU citizens who are not represented abroad.¹⁶²³ Although the current EU legal framework confers only a few protection services to unrepresented Union citizens¹⁶²⁴, in light of the diverse approaches Member States have towards consular and diplomatic protection of their citizens, it is remarkable that a common agreement between all the Member States was reached and it was included in the constitutional EU treaty and thus agreed to be part of the EU primary law, which benefits of specific principles that are not characteristic to the field of consular and diplomatic protection of individuals.

Certain Member States (in particular the larger ones and benefiting of an extended network of external representation) have traditionally approached consular and diplomatic protection of their citizens as a matter of policy falling under the exclusive and discretionary power of the executive, supporting the development of an Union framework only along the lines of an intergovernmental steered cooperation. While other Member States (in particular smaller ones, with a less extended external representation network, and the CEECs) have approached consular and diplomatic protection of individuals as a legal right of the citizen and supported the development of the Union legal framework in the direction of increasing the role of the Union in this field and of a Union steered cooperation.

This division of positions among the Member States coupled with the fact that the EU primary law confers only an EU citizenship right to equal protection abroad, instead of a right to consular and diplomatic protection as such, has imbued certain specific characteristics to the development of the EU legal framework and practice.

As a consequence, the implementation of the EU citizenship right has advanced, until recently, only by way of the common minimum denominator among the different Member States approaches, which due to the extreme differences existing among their domestic legal frameworks, includes only a short list of protection services. For almost 20 years, the implementation of the EU citizenship right to equal protection abroad was made exclusively

in the spring of 2011, in the Southern Neighbourhood; the earthquake and the tsunami that hit Haiti in January 2010; the Icelandic volcanic ash cloud of 2010; acts of local or international terrorism (Sharm el-Sheik 2005, 11 September 2001 Attacks on World Trade Centre in New York); military conflicts (Lebanon conflict of summer 2006, the Georgian conflict of August 2008). In regard to the recent international crisis: in Libya only 8 Member States were represented, while in Bahrain only 4, see Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, doc. COM (2011) 149/2 of 23 March 2011).

¹⁶²³ Art. 8 c of the Maastricht Treaty and currently Arts. 20(2)(c) and 23 TFEU.

¹⁶²⁴ It has to be remembered that the EU citizenship confers a right to equal consular and diplomatic protection, and not a right as such to consular and diplomatic protection from any of the EU countries.

via horizontal cooperation forms of action and measures;¹⁶²⁵ since 2007, vertical cooperation and the role of the Union has been gradually increasing.

10 years after the formation of the Union, the horizontal cooperation was advanced by being established within the framework of a Community instrument with very limited involvement from the Commission, mostly in the form of an alert centre coordinating the Member States' capabilities. Consular and diplomatic protection of citizens continues to be regarded as an important area of national sovereignty, which has led to the Member States' divergent positions regarding the delegation of national authority to the supranational level of the EU. The development of the Union framework on protection of EU citizens abroad is thus illustrative of the different national rationales, which has led to the development of the EU legal framework mostly as an inter-governmental framework.

Following the domestic financial cuts and widespread consular crisis in third countries, the involvement of the Commission delegations and, post-Lisbon Treaty, more intensively of the Union delegations, became necessary in consular crisis situations. The vertical cooperation, so far, has taken the form of coordination of actions, demarches, meetings, and sharing of diplomatic premises. The fact that vertical cooperation has not yet reached its full potential does not mean that the EU legal order has not had an impact on the national Ministries of Foreign Affairs. In the following paragraphs, the impact of the EU policies governing the protection of EU citizens abroad on the national legal frameworks and practice, and the impact of the introduction of new EU external relations actors with power to exercise protection of EU citizens abroad on the national consular and diplomatic missions will be sketched.

One of the most striking effects of the EU law on the national consular and diplomatic laws and practice is the fact that, since 1993, the consular and diplomatic officials of all the Member States have had an obligation derived from EU law to ensure protection of all EU citizens who do not have an accessible permanent representation or competent Honorary Consul of the Member State of nationality or of a representing State. This protection would

¹⁶²⁵ Soft law types of arrangements which sometimes took the name of the Lead State, but otherwise simply established the Member States responsible for ensuring consular protection to unrepresented EU citizens among all those Member States *in loco* (Art. 4 of Decision 95/553); and other burden-sharing agreements on diverse consular affairs aspects (Such as: creating co-locations (concentration of two or more diplomatic and/or consular missions in one building or facility), Common Visa Application Centres (mutual accreditation of an external service provider at a joint visa application centre) or Common Administrative Centres (issuance of Schengen visa by several Member States in the same building or by one Schengen member. Many of the Member States have concluded agreements with other Member States regarding the representation in visa application procedures, often as a result of the Schengen agreement (e.g. Denmark with Sweden, Finland, Germany, France, The Netherlands, Austria and Hungary). In some cases these arrangements are based on formal agreements, but in other cases only on an exchange of diplomatic notes.)

have to be provided on the same conditions as it would be provided to the co-nationals of the consular and diplomatic official. Therefore the consular and diplomatic officials of the Member States have seen their consular and diplomatic responsibilities in third countries increased due to the EU legal framework. In principle, the increase of consular functions is balanced by the decrease of consular activity in another third country, while citizens are still benefiting of protection from another Member State. However, the burden-sharing is not necessarily reciprocal, since some of the Member States have wider external representation networks than others,¹⁶²⁶ and thus inevitably the consular protection burden will be higher for the former category of Member States. This particular lack of reciprocity and the fact that the EU citizenship right provided only for a prohibition of discriminatory conduct has not led to salient changes in the national legal frameworks and practice of the Member States, which have preserved their previous models of ensuring consular and diplomatic protection of individuals and, in certain cases, have not even adopted specific legislative provisions whereby the EU citizenship right would be introduced to their nationals.

The EU countries have different approaches on several issues: the types of measures, if any, adopted for the implementation of Decisions 95/553/EC and 96/409/CFSP, whether consular protection is a right or not, the level of discretion left to the Member States in deciding when, to whom and to what degree of consular and diplomatic protection to provide, the legal force of the provision interpreted as conferring a right to consular protection, and the possibility of conferring financial assistance to citizens in distress.

Only a few Member States have adopted national provisions for the implementation of former Article 20 EC Treaty, because the Article was argued by almost all the Member States to be directly applicable in their national legal orders,¹⁶²⁷ and thus there was no need of further implementing norms. With regard to those Member States that have adopted such norms, it seems that the majority of the national norms refer only to consular protection.¹⁶²⁸

¹⁶²⁶ Such as the UK, France, Germany, and Italy compared to smaller Member States such as the Benelux and the Baltic countries.

¹⁶²⁷ Bulgaria, Italy, Poland, Slovakia, the Netherlands and the UK. The CARE national Reports mention that there is no specific act whatsoever, and that the Decision is considered to be directly applicable under their domestic legal orders based on the explanation that it is part of the EU law, which, in turn, is directly applicable in their domestic legal orders. According to the CARE national Report on the Netherlands, the EC Decision was published in the national Official Journal.

¹⁶²⁸ Only the Estonian and Latvian provisions may be interpreted as also including diplomatic protection. Section 53(1) of the 2009 Estonian Consular Act provides that: '*A representation of the Republic of Estonia protects the interests of a citizen of a Member State of the European Union if the Member State of the European Union where the person is a citizen does not have a representation in the receiving State and if the receiving State has no objections thereto.*' The Lithuanian Consular Statute, in section 11(2), provides that consular missions should assist and protect the personal, material and other rights and interests of those EU citizens who have no consular representative in a specific area.

The implementing measures are of a different ranking and transparency¹⁶²⁹ ranging from legislative, executive acts to mere guidelines.¹⁶³⁰ The Commission has highlighted on several occasions the need for adequate legislative implementation and respect of these Decisions by all of the EU countries, regardless of the fact that they are not Union acts, but parallel agreements concluded between the Member States.¹⁶³¹

In terms of the legal status of the consular and diplomatic protection recognised by the Member States to their own nationals, which on the basis of Article 20(2)(c) TFEU would need to be recognised also to the unrepresented Union citizens, less than half of the EU countries confer on their citizens a right to consular assistance,¹⁶³² certain Member States confer consular assistance only as a matter of policy,¹⁶³³ reserving a high margin of discretion with regard to the decision on who should receive such assistance and the exact services that are included under the consular assistance procedure.¹⁶³⁴ Even among the EU countries conferring a right to consular protection, there is discrepancy regarding the legal force of the internal norm providing the right. Thus, in certain EU countries the right is a fundamental right embodied in the Constitution,¹⁶³⁵ in others it results from a legislative provision adopted or amended by the national Parliament.¹⁶³⁶ Other EU countries have no specific legislative provision, however certain legal provisions are interpreted as conferring a similar right.¹⁶³⁷

¹⁶²⁹ Some of the national measures were not published in official journals; see, Austria, Belgium (partial transparency – the Decision has been published in the Official Journal but the further circulars and instructions adopted for implementing it were not available to the public), Bulgaria, Cyprus, Denmark, Germany, Ireland, and the UK. See more in the *CARE Report*, Chapter three.

¹⁶³⁰ It has to be pointed out that the duty of cooperation in good faith in relation to the implementation of former Art. 20 EC Treaty would have required the Member States to secure an adequate transposition also of the Decisions, which were international agreements, and thus the Member States were under a duty to exercise their international powers without detracting from EU law or from its effectiveness.

¹⁶³¹ See more on this in Alessandro I. Saliceti, ‘The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services’, *op.cit.*

¹⁶³² As a constitutional right (Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania); EU countries having a legislative provision that is interpreted by the national scholars as providing a right to consular protection (Denmark, Finland, Greece, Slovakia and Slovenia); EU countries having no specific legislative provision, which according to the national scholars, is interpreted as including a similar right (Italy, Sweden). See the *CARE Report*, Chapter three, section 4.1.

¹⁶³³ Austria, Belgium, Cyprus, Ireland, Malta, the Netherlands and the UK.

¹⁶³⁴ See, for instance, the UK: ‘The United Kingdom has the discretion to exercise consular assistance to British and non-British nationals (including EU citizens) on a case-by-case basis.’ The UK has been a fervent objector to this EU citizenship right, arguing that the obligation imposed on Member States by Article 23(1) TFEU is ‘to exercise their consular assistance policies in a non-discriminatory way as among EU citizens’. ‘The United Kingdom believes that this obligation requires Member States **to consider requests** for consular assistance by unrepresented EU citizens on the same basis as requests by their own nationals.’ Internally the UK does not confer a right to consular assistance to their citizens, however under the legitimate expectations doctrine the citizen has an entitlement to receive a similar treatment as the one received by another citizen in a similar situation. See more in the UK Report in the *CARE Report*, 522-525.

¹⁶³⁵ As a constitutional right: Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania.

¹⁶³⁶ Denmark, Finland, Greece, Slovakia and Slovenia.

¹⁶³⁷ See more on this in Section 4.1.

All Member States conformed to provide consular assistance in the six mandatory cases required by Decision 95/553 and Decision 96/409, namely, death, serious accident or serious illness, arrest or detention, victims of violent crime, relief and repatriation of distressed citizens (in the case of natural disasters, civil unrest, armed conflict or other crises) and issue of Emergency Travel Documents,¹⁶³⁸ in the particular event of the loss of travel documents. However, certain EU countries were willing to go beyond the list of consular functions laid down in Article 5(1) of Decision 95/553/EC and committed to confer assistance in other consular situations.¹⁶³⁹ Although positive derogation is welcomed, since the unrepresented EU citizens receive more help, in practice, it can lead to confusion if a precise list of consular services provided by each of the Member States is not publicly available. In addition, it seems that a majority of EU citizens would expect the same kind of help regardless of which Member State's embassy or consulate they turn to.¹⁶⁴⁰

Usually, long-term residents, stateless persons, refugees, asylum seekers and non-EU family members are not included in the personal ambit of national consular and diplomatic protection regimes, and they were not formally covered by the EU citizenship right. Unlike the EU citizenship right to free movement and residence, which confers benefits also to the third country national who is a family member of the EU citizen that exercises this EU

¹⁶³⁸ With the sole exception of Bulgaria. See the CARE national Report on Bulgaria, which mentions that the cases of destroyed and temporarily inaccessible travel documents are not stipulated by the Bulgarian law. So far no problems have occurred in practice; however, this is mainly due to the fact that there have not yet been many applications for issuance of ETDs from other EU citizens than Bulgarians.

¹⁶³⁹ The *Czech Republic* (according to Art. 4(2) of the Guidelines on consular assistance of EU citizens, 'Moreover, the mission can assist – in accordance with its competences – citizens of the European Union which have requested for it in other situations.'), *Estonia* (although section 53 of the 2009 Consular Act is not clear enough as to whether paragraph 2 should be interpreted as restricting the material scope of paragraph 1: 'Provision of consular assistance to citizens of Member States of European Union: (1) A representation of the Republic of Estonia protects the interests of a citizen of a Member State of the European Union if the Member State of the European Union where the person is a citizen does not have a representation in the receiving State and if the receiving State has no objections thereto. (2) At the request of a Member State of the European Union, consular assistance shall be provided if a citizen of the country is in an emergency, has been detained or is serving sentence, also in the event of death or other unforeseeable and extraordinary circumstances.' On the other hand it has to be noticed that Estonia has very few representations and it will probably be more in a situation of requesting consular assistance than providing it, which limits the relevance of the aforementioned question of interpreting the two paragraphs of section 53), *Latvia* (Art. 11(2) of the Consular Statute provides that consuls should assist and protect personal, material and other rights and interests of those EU citizens who have no consular representative in a specific area), *Lithuania*, *Spain* (See Circular Order n. 3.213), and *Sweden* (According to Regulation (UF 1996:9) regarding Assistance to Citizens in the European Union, Swedish embassies and consulates may assist Union citizens in other matters. See more on this in the national Report on Sweden. See also the Helsinki Treaty, the Baltic Treaty, the Convention on consular cooperation between the Grand-Duchy of Luxembourg and the Kingdom of Belgium of 30 September 1965, and the Agreement between the Federal Minister for Foreign Affairs of the Republic of Austria and the Foreign Minister of the Republic of Hungary entered into force on 20 December 2005 which provide for a wider list of consular functions than under Art. 5(1) of Decision 95/553/EC. This latter subject is detailed in the *CARE Report*, section 2.1.2).

¹⁶⁴⁰ Eurobarometer from March 2010. See Communication from the Commission to the European Parliament and the Council Consular protection for EU citizens in third countries: State of play and way forward COM(2011) 149/2 Brussels, 23/03/2011, 4.

citizenship right, the EU citizenship right to equal protection abroad has not yet been recognised by the EU institutions as conferring incidental benefits also to the third country national (TCN), family member of the EU citizen who is exercising this specific EU citizenship right. The reasons are first, the fact that the national legal regimes do not usually recognise such a domestic right to the TCN family member, and, second, that the EU citizenship right to equal protection or the implementing Decision do not recognise either such a right. However, in cases of emergency evacuations, the Member States have, in practice, accepted to evacuate the family of the EU citizen, even if the members were not EU citizens.¹⁶⁴¹ A few of the Member States confer consular assistance to the aforementioned categories of persons under the same conditions as for nationals/EU citizens but only as a matter of policy.¹⁶⁴² The legislation of the Member States is similarly varied in regard to the legal remedies recognised to the citizens against the executive conduct in cases of consular and diplomatic protection. There is a considerable number of Member States that do not confer or admit limited judicial remedies,¹⁶⁴³ usually due to the discretionary power of the executive over foreign affairs.

More and more Member States refuse to give financial advances to either nationals or EU citizens, due to lack of funds allocated for this purpose. This practice is understandable since, given the now scarce financial and human resources, consular and diplomatic services must concentrate on the best use of their budgets, e.g., encouraging citizens to pool all their available resources, including private resources, to help themselves.

In addition to the problems resulting from the diverging national legal regimes, the EU citizens encounter a second problem, namely of not being properly informed of these various domestic models of consular and diplomatic protection, due to the Member States' lack of a common approach on the appropriate means of informing the citizens about their EU citizenship right.¹⁶⁴⁴

On a local or regional level, the consular services of Member States seem to establish a working network of assistance that is barely known to citizens but according to certain

¹⁶⁴¹ See Chapter three of *CARE Report*.

¹⁶⁴² See, in particular, the cases of Cyprus, Ireland, UK, and the other EU countries approaching consular assistance as a matter of their internal policy in the *CARE Report*, Chapter three.

¹⁶⁴³ Austria, Belgium, and the Czech Republic – according to the CARE national Reports, these countries argue that there is no legal obligation to confer a judicial remedy on their own citizens or EU citizens, since they do not recognise a right to consular protection. Certain EU Member States allow for a mere administrative complaint, meaning before superior officials (Cyprus, France, and Italy). Finland and Estonia do not offer the possibility of making a judicial complaint against the refusal to provide financial assistance.

¹⁶⁴⁴ The national Report on Sweden points out that one of the reasons for lack of practice under Art. 23 TFEU is that citizens are not fully aware of this right.

national surveys seems to work effectively as ‘an invisible hand’ in the day-to-day handling of consular assistance to EU citizens.¹⁶⁴⁵ While in practice, serious problems have not occurred, the EU citizens are still unaware of the precise content of this right, since this would actually entail knowledge of each of the now 28 domestic legal frameworks; on top of which the case-by-case approach in practice of the Member States confuses the picture even further.

It seems that, in practice the Member States have not changed much of their legal frameworks on consular and diplomatic protection of individuals following the introduction of the EU citizenship right to equal protection abroad. Some of them have amended the existing legislation so as to include an obligation on the part of the consular and diplomatic officials to secure protection to unrepresented Union citizens abroad.¹⁶⁴⁶ However, they should operate certain changes, particularly increasing transparency and publicity of the right, and secondly to ensure effective legal remedies against violations of the EU primary law provisions and implementing *sui generis* acts.

The introduction of such a right does not mean that the diplomatic and consular authorities of the Member States are legally obliged to satisfy all the requests for assistance from unrepresented EU citizens, without being able to exercise any margin of discretion. But it does mean that the consular and diplomatic authorities have to justify the exercise of their discretion when limiting the EU citizenship right. Such limitation would need to comply with the EU proportionality test¹⁶⁴⁷: pursuing a legitimate aim, and the limitation has to be appropriate and necessary. Furthermore, the injured unrepresented Union citizen must have the possibility under national law to contest the administrative decision before a national court competent to judicially review the challenged administrative decision.¹⁶⁴⁸ The EU principles of equivalence¹⁶⁴⁹ and effectiveness¹⁶⁵⁰ would require the Member States to confer to the injured unrepresented EU citizen a similar legal remedy as recognised to the national in a

¹⁶⁴⁵ See the *CARE Report*, Chapter four.

¹⁶⁴⁶ See, for instance Estonia. The Consular Law Act of 2003 as amended in 2004 and the latest in 2009 includes a provision (53) on the provision of consular assistance services by the Estonian consuls to EU citizens.’ Para. 53. Provision of consular assistance to citizens of Member States of European Union (1) A representation of the Republic of Estonia protects the interests of a citizen of a Member State of the European Union if the Member State of the European Union where the person is a citizen does not have a representation in the receiving state and if the receiving state has no objections thereto. (2) At the request of a Member State of the European Union, consular assistance shall be provided if a citizen of the country is in an emergency, has been detained or is serving a sentence, also in the event of death or other unforeseeable and extraordinary circumstances.’ See the Estonian Report in the *CARE Report*.

¹⁶⁴⁷ Now on the basis of Art. 52 EU Charter.

¹⁶⁴⁸ Currently under Art. 41 EU Charter.

¹⁶⁴⁹ Case C-222/86 *Heylens*, judgment of 15 October 1987; Joined cases C-430/93 and C-431/93 *Jeroen van Schijndel*, later confirmed in joined cases C-222/05 and C-225/05 *J. Van der Weerd and others v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007] ECR I-4233, at paras. 19-22.

¹⁶⁵⁰ C-126/97 *Eco Swiss China Time v. Benetton* [1999] ECR I-3055.

similar situation, while current Article 47 EU Charter would require the conferral of a legal remedy in the absence of one under the domestic legal regime.

Therefore, in spite of the existent diversity of the domestic legal regimes on consular and diplomatic protection of individuals, the EU citizenship right, in conjunction with the EU Charter, has had an impact on the domestic legal frameworks. The most obvious is the prohibition of the act of State¹⁶⁵¹, or *acte du gouvernement*¹⁶⁵² approached in regard to the legal remedies and judicial review of claims submitted by the unrepresented Union citizens.

Therefore the EU law has to a certain extent harmonised the procedural domestic law regarding consular assistance. By introducing the EU principle of non-discrimination in consular protection of EU citizens, the differences between the diverse domestic administrative legal frameworks and practice of the Member States on consular assistance of individuals should diminish, however, until problems occur and they are raised before courts, the remaining framework still presents sufficiently numerous diverse aspects.

Despite these recent positive developments, the situation is unsatisfactory because of the uncertainty and unpredictability of the forms of protection. The Member States very often follow a *case-by-case approach* in practice, which can be problematic in terms of legal certainty regarding an EU primary law provision. A case-by-case approach is inspired by contingent circumstances and it makes it very difficult to adequately inform Union citizens about their rights to consular and diplomatic protection. More generally, the current limitations and ambiguities are a serious drawback for the establishment of a genuine European citizenship.

In terms of coordination of national capabilities for the purpose of ensuring protection of EU citizens abroad, the Lisbon Treaty has brought salient changes. If pre-Lisbon Treaty the coordination tasks were under the responsibility of the consular and diplomatic mission of the Member States holding the Rotating Presidency, the entry into force of the Lisbon Treaty has transferred this task to the Union delegations in third countries¹⁶⁵³, and liberated the consular and diplomatic missions of their EU derived task of external representation of some of the EU foreign affairs in third countries.¹⁶⁵⁴

¹⁶⁵¹ See *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888, 932 applied in the UK, but changed in the *Abbasi* judgment, see Chapter 2.

¹⁶⁵² Followed by French courts.

¹⁶⁵³ Art. 27 TEU. See also, L. Erkelens and S. Blockmans, 'Setting-Up the EEAS: An Institutional Act of Balance', *CLEER Working Paper* 2012/1.

¹⁶⁵⁴ On the shortcomings entailed by the Rotating Presidency's role in diplomatic coordination see D. Rijks, 'EU Diplomatic Representation in Third Countries', *Paper GARNET Conference 'the EU in International Affairs'* (2008).

Member States would also need to take into consideration the EU objectives and policies on protection of EU citizens abroad when concluding consular and diplomatic cooperation agreements with third countries or among themselves. Since the EU enjoys shared competence in this field and it is clear that discriminatory consular or diplomatic protection is prohibited, the Member States would need to first assess whether, by concluding such agreements, they will hinder the EU citizenship right to equal protection abroad and the relevant Union objectives. For instance, some of the EU countries concluded among themselves before the adoption of the Maastricht Treaty or their accession to the EU consular cooperation agreements which confer to their nationals' assistance in a wider category of consular circumstances than the one established by Decisions 95/553/EC and 96/409/CFSP.¹⁶⁵⁵ According to Article 20(2)(c) TFEU, the Member States are required to provide the same level of consular protection to all non-national EU citizens, as they provide to their own citizens, without conferring preferential treatment to some of the EU citizens possessing the nationality of the Contracting States compared to the other non-national EU citizens.¹⁶⁵⁶ The EU legal framework, as scattered and minimal as it is, has impacted on the Member States' way of traditionally exercising consular protection of their citizens abroad, due to the primacy and direct effect of the EU citizenship right to equal protection abroad which has required them to extend their consular protection of individuals mechanisms to all the other unrepresented Union citizens outside the Union, as well as requiring them to secure effective judicial guarantees for violations by the Member States' consular and diplomatic officials of the EU citizenship right to equal protection abroad.

¹⁶⁵⁵ See the *CARE Report*, Chapter three, Section 2.1.2.

¹⁶⁵⁶ In practice, it seems the broad language of these bilateral and regional consular cooperation agreements and the implementation legislations permits an interpretation of these agreements in conformity with the EU law, without the need to amend or terminate them. See previous footnote for additional sources.

VIII. Policy and institutional recommendations to increase the efficiency of protection of the EU citizens in the world

In light of the increasing frequency and size of disasters¹⁶⁵⁷ and transboundary threats, and of the budgetary pressures on the national foreign affairs ministries¹⁶⁵⁸, the demands on the EU's disaster response capacity are likely to increase. In this context, an efficient use of resources will thus require that in addition to the horizontal cooperation between the Member States, the latter will also need to increase their vertical cooperation with the EU institutions and bodies.

The EU citizenship right to equal protection abroad has been regarded by certain Member States¹⁶⁵⁹ as a threat to the core of their sovereignty by attempting to limit their consular and diplomatic protection rights, long perceived as discretionary under both international and domestic legal orders, and advancing the image of the EU as a State. Diplomatic and consular protection of individuals has been traditionally considered the expression of the State's sovereignty over persons, and '*an important component of the reciprocal relationship of protection and obedience which exists between citizens and the state according to classical political theory.*'¹⁶⁶⁰ This traditional conception of consular and diplomatic protection of individuals as core elements of the State sovereignty explains the very cautious approach of some of the Member States to the implementation of the EU citizenship right to equal protection abroad by means other than inter-governmental measures. The EU general principles of primacy, effectiveness,¹⁶⁶¹ transparency, and sincere cooperation would have required the Member States to assess whether acting by way of EU secondary legislative measures would have better ensured those principles than the sui generis inter-governmental measures they so far adopted.

The application of the EU citizenship right to equal protection abroad has been fraught with inconsistencies in its implementation, which have led in practice to its limited awareness,

¹⁶⁵⁷ See Report from the Commission to the European Parliament and the Council, 'Annual Report on the European Union's Humanitarian Aid and Civil Protection Policies and their Implementation in 2013', COM/2014/0537 final.

¹⁶⁵⁸ The recorded annual number of disasters worldwide has increased fivefold from 78 in 1975 to nearly 400 today. For more empirical evidence on the increasing disasters and threats, see the Communication from the European Commission to the European Parliament and the Council, *Towards a stronger European disaster response: The role of civil protection and humanitarian assistance*, COM(2010) 600 final, 26 October 2010.

¹⁶⁵⁹ In particular, the UK and France.

¹⁶⁶⁰ S. Kadelback, 'Union Citizenship', in Armin von Bogdandy and J. Bast, *Principles of European Constitutional Law*, Hart Publishing (2009), 448.

¹⁶⁶¹ On the importance of the principles of primacy and effectiveness of EU law, see CJEU Opinion 2/13 and Case C-399/11 *Melloni*, Judgment of 26 February 2013.

understanding and exercise by the EU citizens. The substantive and personal scope of the right are not easily identifiable by a normal EU citizen. The content of the EU citizenship right as a mere prohibition of discriminatory protection based on nationality coupled with the divergent domestic legal frameworks of the 28 Member States on consular and diplomatic protection of citizens have created a legal framework whereby the EU citizen enjoys different models of protection – ranging from a constitutional right to protection abroad endowed with judicial guarantees to no right whatsoever, except to legitimate expectations; receiving protection only in the limited six mandatory consular related situations to a more extended list of consular related situations, which is very difficult to pinpoint precisely; enjoying protection only in the person of the EU citizen, or extended also to his family members who are third country nationals. And the list of differences among the national legal frameworks and practice continues to various other aspects related to procedure of providing this type of protection of individuals.¹⁶⁶² Even the essence of the EU citizenship right to equal protection abroad, namely to choose the represented Member State to resort to for help, is affected in practice by the Member States which have established burden-sharing agreements among themselves allocating responsibility to protect to one particular Member States, without ensuring a wide publicity of the list with the Member States responsible for the different third countries. The entire process of horizontal cooperation and coordination among the Member States is characterised by an *ad-hoc* approach depending to a large extent on the persons involved.¹⁶⁶³

In addition the EU primary and secondary provisions increased the confusion surrounding this right, by introducing legal concepts that are not clearly defined. For instance, determining who is an ‘unrepresented’ Union citizen under Article 1 of Decision 95/553 entails determining first the ‘accessibility’ of the permanent representation of the Member State of nationality or of another representing State, or competent Honorary Consul. The Decision does not provide a definition of the concept it introduces ‘accessibility’.

Although new EU actors have been endowed with competence to contribute to the effective implementation of the EU citizenship right to equal protection abroad, i.e. the EEAS

¹⁶⁶² See the section on the Impact of the EU legal framework on protection of EU citizens abroad on the Member States, and Chapter three in the *CARE Report*.

¹⁶⁶³ See Commission staff working paper, Executive summary of the Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC (2011) 1555, 14.12.2011, 2.

and Union delegations, their role and allocation of tasks, especially in cases of crises, have not been clarified. In practice their potential has clearly not been fully exploited.¹⁶⁶⁴

In light of this divergent framework, it is no surprise that of the 300,000 cases of consular protection reported in 2009, only 16% had as the addressee an unrepresented Union citizen, although 79% of the respondent EU citizens declared that they are aware of their EU citizenship right to equal protection abroad.¹⁶⁶⁵

Following the entry into force of the Lisbon Treaty, the Commission has acquired the power to make legislative proposals for a Directive that will facilitate the equal protection abroad of unrepresented Union citizens. Therefore the Commission finally has the possibility of taking measures to remedy the current divergent framework of implementation of the EU citizenship right to equal protection abroad and the suboptimal use of capabilities of the relevant competent actors.¹⁶⁶⁶ Given the long-awaited opportunity¹⁶⁶⁷, and following sufficient collection of empirical data,¹⁶⁶⁸ the Commission embarked upon the preparation of a proposal for a Council Directive¹⁶⁶⁹ that would concentrate of enhancing efficiency of the type of protection services that is most solicited by the unrepresented EU citizens and aims to

¹⁶⁶⁴ See the Draft opinion for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a Council directive on consular protection for citizens of the Union abroad, PE 487.728v01-00, rapporteur: Tadeusz Zwiefka, 26.04.2012.

¹⁶⁶⁵ See Commission staff working paper, Executive summary of the Impact assessment accompanying the document proposal for a Directive of the Council on consular protection for citizens of the Union abroad, SEC (2011) 1555, 14.12.2011, 2.

¹⁶⁶⁶ See Art. 23(2) TFEU.

¹⁶⁶⁷ Since 2006 the Commission has searched for legal ways to eliminate discrepancies between the Member States' exercise of consular protection of unrepresented Union citizens. The most popular method has seemed to be by way of pushing forward the Unionization of the Member States' exercise of consular protection of EU citizens. See Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006. However, it seems that the Commission's proposal of 2011 lost its integrationist spur in favour of the horizontal cooperation framework, most favoured by the COCON Working Group, namely, the sharing of experiences between the diplomatic and consular representatives on their own unanimous accord so as to establish common practice. See Proposal for a Council Directive on consular protection for citizens of the Union abroad, Brussels, 14.12.2011 COM (2011) 881 final 2011/0432.

¹⁶⁶⁸ See the four studies carried out by different policy think tanks at the Commission call: 1) 'A study (2009) on Member States' legislations and practices, carried out by the Instituto Europeo de Derecho, examined laws and practices of Member States in the field of consular protection, including as regards the implementation of the Decision 95/553/EC on unrepresented EU citizens; 2) the CARE (Citizens Consular Assistance Regulation in Europe) project activities (2009-2011), realised with the financial support of the Fundamental Rights & Citizenship Programme of the European Commission, the legal framework of Member States on consular and diplomatic protection was comprehensively analysed. Special attention was given to Article 23 TFEU; 3) An external study (2010) by the consultancy GHK supported the Commission in its analysis of policy options and the related costs, focusing on crisis situations and financial reimbursement; 4) A second external study (2011) undertaken by the consultancy Matrix Insight provided further evidence, including via missions to third countries, evaluated Decision 95/553/EC and the current functioning of cooperation and coordination and examined how consular protection for unrepresented EU citizens could be further improved.' See Impact assessment accompanying the document proposal for a Directive of the Council on coordination and cooperation measures regarding consular protection for unrepresented EU citizen SEC (2011) 1556, 14.12.2011.

¹⁶⁶⁹ See Communication from the Commission to the European Parliament and the Council - Consular protection for EU citizens in third countries: State of play and way forward, COM (2011) 149/2, 23.3.2011.

address ‘life and death’ situations for the EU citizens in third countries, namely consular protection. In light of the deficient fragmented legal framework created by the Decisions of the Representatives of the Member States, it was clear that a Directive would be the most recommended legal form in terms of ensuring clear, legally binding norms and legal remedies for an EU citizenship right whose importance within the EU legal framework has been neglected for a long period.

In December 2011, the European Commission finalised the proposal for a Directive on the Consular Protection of Union citizens abroad¹⁶⁷⁰, which has been approved with amendments by the European Parliament¹⁶⁷¹ and is currently under negotiation within the Council. The main issues which the Commission Proposal endeavoured to resolve regard the essential aspects of the EU citizenship right: the definition of who is an unrepresented Union citizen; the clarification of the rules on allocation of responsibilities between the Member States present in a third country, and coordination with the Member States of nationality; the clarification of the role of the Union delegation; establishing fixed procedures for the management of exercising protection of unrepresented Union citizens in cases of consular crises; and establishing a standard reimbursement procedure.

Of the three main policy options that the Commission could have followed: maintaining the current loose horizontal cooperation framework, establishing a minimum common horizontal and vertical cooperation framework and tighter common rules, the second option was chosen as the best compromise for the time being. Financial reasons played an important role in choosing the best policy option, since the costs entailed by the third policy option would have entailed considerably higher costs at both national and EU level without bringing a considerably higher quality of protection services. In light of the still persistent financial crisis and the reticence of some of the big Member States to the EEAS,¹⁶⁷² it was unlikely that the third policy option would pass the necessary voting in the Council, therefore the second option seemed the only option left.

¹⁶⁷⁰ Proposal for a Council Directive on Consular protection for citizens of the Union abroad, COM (2011) 881, 14.12.2011 (hereinafter the Proposal).

¹⁶⁷¹ The amendments proposed by the European Parliament go beyond the inter-governmental type of advancement of the EU citizenship right to protection abroad, i.e. horizontal cooperation among the Member States and promoting the Lead State concept. Instead the European Parliament sees the EU's ability to provide consular assistance as a way to enhance the meaning of EU citizenship and bring the EEAS closer to the public by taking full advantage of the consular functions that the EU primary and secondary law has conferred upon the EEAS. See, European Parliament legislative resolution on the proposal for a Council Directive on consular protection for citizens of the Union abroad, Rapporteur: Edit BAUER (EPP/SK), 25 October 2012, A7-0288/2012 / P7_TA-PROV (2012) 0394.

¹⁶⁷² See the *CARE Report*, Chapter three, Summary, and Reviewing Member States' Commitment to the European External Action Service, EPIN WP 34/2012.

The Commission's Proposal starts in force, by re-stating the CJEU mantra that '*the EU citizenship is the fundamental status of the citizens of the Union*', and therefore, the EU citizens are not required to present their identity documents to prove their status – identity documents only have a declaratory value.¹⁶⁷³ The main reform consists, primarily, in a clearer definition of the unrepresented Union citizen, clarifying the limits of the personal scope of the EU citizenship right, bringing the concept of the Lead State within a legally binding EU act and establishing a standard reimbursement procedure. Article 3 of the Commission's Proposal defines an accessible external representation of the Member States based on the travelling-time which must be calculated at least on the basis of a same-day return to the place of departure, while in emergency situations the time period can be even shorter.¹⁶⁷⁴ It clarified that the principle of equal protection treatment applies also to the third country nationals who are family members of an EU citizen. Thus, in case a Member State would normally protect the third country national who is a family member of one of its citizens, it should confer an equal protection also to the third country national who is a family member of an unrepresented non-national Union citizen.¹⁶⁷⁵ The Proposal reinforces the right of the EU citizen to choose the Member States to resort to for help, permitting derogations insofar as clear, transparent, and effective treatment is ensured.¹⁶⁷⁶ The Lead State concept is maintained. However rules were introduced aiming to clarify its role in ensuring protection of unrepresented Union citizens abroad, including by requiring to expressly include the unrepresented Union citizens in the contingency plans which the Lead State would need to prepare together with the represented Member States and follow in cases of crises. A step forward was made also in regard to ensuring policy coherence with other relevant EU policies, such as the Civil Protection Mechanism by, *inter alia*, providing that a Lead State can seek additional support from the EU Civil Protection Mechanism and the crisis management structures of the EEAS.¹⁶⁷⁷ The Proposal introduced a reimbursement procedure with standard formats for requests and an easier system for tracking the reimbursement costs. This reimbursement procedure is meant to complement those available within the EU Civil Protection Mechanism.

¹⁶⁷³ See recital 12 of the Proposal.

¹⁶⁷⁴ See Art. 3(2) of the Commission's proposal.

¹⁶⁷⁵ See Art. 2.

¹⁶⁷⁶ Art. 4, namely '*Member States shall inform the European Commission of any such arrangement in view of publication on its dedicated internet site.*'

¹⁶⁷⁷ See the 1993 Guidelines for the Protection of Non-Represented EC Nationals by EC Missions in Third Countries, available in the CARE Database.

On a close reading of the Commission's Proposal, the horizontal character of the measures proposed is striking, while the role of the Union delegations is very limited, almost inexistent from the proposed Directive. It seems the Commission has changed its previous 'Unionist' approach in favour of a compromise that would reach approval in the Council and finally bring an advancement,¹⁶⁷⁸ even if more limited than its previous ambitions.¹⁶⁷⁹

On the other hand, the European Parliament amendments concentrated on conferring a greater role to the EEAS and Union delegations by either replacing horizontal cooperation measures with vertical cooperation or adding vertical cooperation measures within the Commission Proposal.¹⁶⁸⁰ First, the European Parliament introduces the Union delegations in the list of actors that can provide consular protection to unrepresented Union citizens and to which the latter can resort to for help.¹⁶⁸¹ It replaces the Lead State(s) with the Union delegations, which have the primary responsibility of coordination of the Member States' consular and diplomatic authorities in cases of crises, and in day-to-day situations, following thus the role which the Union delegations have taken over from the Rotating Presidency.¹⁶⁸² In order to fulfil these tasks, the European Parliament recommended that the necessary financial means should be provided to the EEAS.¹⁶⁸³ In addition, the proposed amendments introduced the principle of fairness in the distribution of burden-sharing agreements,¹⁶⁸⁴ new consular services that should be provided within the 6 mandatory situations,¹⁶⁸⁵ such as ensuring access to legal advice, especially in cases of detention,¹⁶⁸⁶ and the provision of interpreters or other necessary assistance in order to overcome language barriers.¹⁶⁸⁷

The European Parliament's amendments were for the most part clarifying the sometimes still convoluted or broadly phrased rules of the Commission, and seemed to be a welcome improvement of the text, which were welcomed by the Commission. Most of the proposed amendments were accepted by the Commission, with the exception of those

¹⁶⁷⁸ See the reviewing process of Decisions 95/553 and 96/409, which were supposed to be reviewed in 2007 but have never been in practice.

¹⁶⁷⁹ Compare with Decisions 95/553 and 96/409.

¹⁶⁸⁰ See European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the proposal for a Council directive on consular protection for citizens of the Union abroad, A7-0288/2012, 10.10.2012 (hereinafter EP Response).

¹⁶⁸¹ See Recital 7, 10 and Article 1.

¹⁶⁸² See Section VI.a. The EEAS and Union delegations' competence to protect EU citizens abroad.

¹⁶⁸³ See, *inter alia*, Amendments 14 and 56 of the EP Response.

¹⁶⁸⁴ Amendment 8 of the EP Response.

¹⁶⁸⁵ Namely, the situations mentioned by the Proposal: ' (a) arrest or detention; (b) being a victim of crime; (c) serious accident or serious illness; (d) death; (e) relief and repatriation in case of distress; (f) need of emergency travel documents.' – Art. 6(2). These have remained unchanged compared to the current legal framework established by Decision 95/553 and 96/409.

¹⁶⁸⁶ See Amendment 36 of the EP Response.

¹⁶⁸⁷ Amendment 12 of the EP Response.

concerning the primary role conferred to the Union delegations in cases of crises and other day-to-day consular situations.¹⁶⁸⁸

The reasons mentioned by the Commission for its rejection refer to the EEAS lacking the necessary human and financial resources and its doubt that the increased role will lead in practice to better protection. The Commission is more in favour of preserving the Member States' flexibility on the ground, which seems to be necessary, at least in the Commission's view, to achieved improved protection. While the lacking financial and human resources could be a solid ground, in light of the EEAS functioning on a neutral resource basis in this field, it is unclear why, first, the Member States' flexibility would be limited by vertical cooperation, and, second, how the EEAS with its extended capabilities could in any way harm or not improve the protection in practice, when, so far, the involvement of the Union delegations has only lead to positive results for both the Union citizens and the Member States.¹⁶⁸⁹ As a compromise solution, the Commission proposed to subject the EEAS related provisions to a review clause, which would allow the evolution of the Union delegations and the EEAS role in this field, in the future, depending on the specific circumstances.

Until the Council adopts the Directive, the current legal framework governing the application of the EU citizenship right to equal protection is governed by the divergent laws of the Member States' governing consular affairs, where the level of protection can vary depending on the Member State to which a Union citizen decides to resort to for help. These differences have already led to a complicated cooperation and coordination among consular and diplomatic authorities of the Member States. It remains to be seen whether the future Directive will clarify the scope of consular protection of unrepresented EU citizens and the conditions for its exercise as well as to simplify the procedures that consular authorities and diplomatic authorities apply between them.¹⁶⁹⁰

It seems the European integration process has slowly but surely pervaded most of the Member States' reserved areas, whether formally or informally¹⁶⁹¹, even in areas which

¹⁶⁸⁸ See Commission Communication on the action taken on opinions and resolutions adopted by Parliament at the October 2012 I and II part-sessions, SP(2012)767, 15.11.2012.

¹⁶⁸⁹ See, for instance, the 2012 financial savings of approximately 500,000 euros of the Spanish Foreign Ministry following the co-location of diplomatic premises with the EU delegation in Yemen (Igor Merheim-Eyre, Review of the Balance of Competences: Foreign & Commonwealth Office - Consular Services Evidence from Stakeholders, available online); see more in Section - 5.1 The role of the EEAS and the Union Delegations in ensuring protection of EU citizens abroad.

¹⁶⁹⁰ See Mario P. Chiti, S. Faro, Madalina B. Moraru, E. Schweighofer, 'Future developments: setting a minimum European standard' in Chapter four - Present and future of consular protection of EU citizens of the *CARE Report*.

¹⁶⁹¹ By informally, it is meant changes in the Member States' legislation or practice stirred by EU practices in other fields which impact also on the areas that are recognised by the Treaties as reserved to the Member States –

national politicians have done their best to shelter from European influence. A paradigmatic change has already informally occurred in the Member States' diplomacies and management of consular and diplomatic protection of individuals under the impact of the Union legislation and practice.

Due to perceiving consular and diplomatic protection as a core area of national sovereignty, some of the Member States are not willing to delegate policymaking autonomy to the EU level, insisting on preserving their national sovereignty and the principle of subsidiarity that gives priority to the national levels of authority.¹⁶⁹²

Despite the increasing horizontal cooperation and coordination among the Member States within the framework of different EU policies, i.e. in the implementation of the EU citizenship right to equal protection abroad, civil protection, humanitarian assistance, civil and military CSDP mission, disagreements between the Member States remain regarding the degree of supranationality needed in the field of protection of (unrepresented) Union citizens in the world. These differences of opinion result from the different approaches that the Member States adopt in the national models of consular and diplomatic protection of citizens and civil protection, and their need of the EU's help in ensuring protection of their citizens abroad. Though the Commission has recently made several legislative proposals on how to improve the EU's crisis response, only few have passed approval, while others are persistently blocked by certain Member States. The tension between the need for solidarity in the face of large-scale disasters and the reluctance of the Member States to delegate authority from the national to the supranational level is likely to continue to play a major role in the further development of European model of ensuring protection of EU citizens in the world. However, even the most reluctant of the Member States are re-considering their approaches in light of their increasing troubles to ensure an effective response to the demands of the citizens in need of protection in third countries.

Sooner or later the Commission's proposal for a Directive on Consular Protection of Union citizens abroad or another version will be seriously considered by the Council, whether due to the specific vision of the Member States holding the EU Presidency, supporting such an advancement, or due to an internal or external crisis that has so far commonly been the cause for opening policy changes. It may happen that in the future the Council may take

for instance, as in the case of naturalisation laws of the Member States under the influence of EU citizenship. See more details on this issue in D. Kochenov, 'Rounding Up the Circles', *op.cit.*

¹⁶⁹² See the 2014 UK Parliament Report on the proposal for a Directive on Consular Protection of Union citizens abroad, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-v/21910.htm>

advantage of this prerogative and agree with the Commission policy option, or choose a different policy model depending on the specific circumstances. Until that point, which may take considerable time in light of the sensitiveness of the topic,¹⁶⁹³ the main legal acts governing the field of consular protection of Union citizens in third countries, aside the Treaties' provision, are still the Decisions of the Representatives of the Governments of the Member States adopted within the Council.

Conclusion of Chapter 4

Over the years, the EU has developed a practice of protecting EU citizens, especially unrepresented ones, abroad. This practice was based on the EU citizenship provisions and other EU policies and instruments used to address global emergencies. For instance, the EU used the development cooperation legal basis for adopting humanitarian relief measures for civilians hit by a disaster outside the Union,¹⁶⁹⁴ the residual powers for adopting civil protection mechanisms which were initially designed to tackle crises outside and inside of the Union but were later used also for consular assistance of EU citizens abroad,¹⁶⁹⁵ and use of the ESDP military missions for implementing civilian types of crisis management schemes which were adopted under the EC Treaty instead of the CFSP/ESDP legal basis.¹⁶⁹⁶ Some of these EU instruments on disaster response were adjusted so as to answer not only the needs of the affected third countries and their populations, but also the needs of the EU citizens, which

¹⁶⁹³ There are several examples in the European integration process of sensitive areas where due to the Member States lack of agreement, it took a long time for the Council to act, to the extent that in certain cases the deadline provided by the founding Treaties for action to be taken was breached. See, for example, the fields of the principle of equal pay for men and women, the situation that arose in *Defrenne*, Case 43/75 *Defrenne v SABENA* [1976]; the area of freedom to provide service where the Council adopted the Services Directive only in 2006 (Directive 2006/123/EC of 12 December 2006 on services in the internal market); another sensitive field where it took around thirty years for the Member States to reach agreement on the European company status – see Council Regulation No 2157/2001 of 8 October 2001 on the Statute for a European company published in the OJ L no 294 of 10.11.2001, p. 0001 – 0021, and Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) published in the OJ L no 199 of 31.07.2007, p. 0040 – 0049.

¹⁶⁹⁴ Council Regulation (EC) 1257/96 of 20 June 1996 concerning humanitarian aid, [1996] OJ L 163/1, 02.07.1996.

¹⁶⁹⁵ In 2007, the Member States unanimously agreed in the JHA Council to extend the application of a Community instrument – the Civil Protection Mechanism (the ‘Mechanism’) – to international crises circumstances for the purpose of ensuring consular assistance to unrepresented Union nationals in the form of relief and repatriation. See Council Decision 2007/779/EC of 8 November 2007. The Civil Protection Mechanism has been used in the 2004 tsunami in South East Asia, the 2006 Lebanese military conflict, the Mumbai terrorist attack in November 2008, the 2010 tsunami in Haiti, the 2010 Israeli forest fires, and the 2011 earthquake/tsunami in Japan. A full register of the application of the Mechanism in international crises can be found on the Commission DG Humanitarian Aid and Civil Protection website, http://ec.europa.eu/echo/civil_protection/civil/index.htm

¹⁶⁹⁶ See the Council Regulation (EC) No 381/2001 of 26 February 2001 creating a rapid-reaction mechanism published in the Official Journal L 57 of 27.02.2001.

were present in those countries at the moment the crisis unfolded.¹⁶⁹⁷ Therefore the scope of these Community/Union measures enlarged so as to address in addition to the needs of third countries and their populations, the needs of EU citizens located in these countries and the problems EU countries faced in relation to their own citizens.

The reason behind this broad interpretation of some of the EU competences, which raised concerns about the appropriate legal basis for the EU secondary legislation,¹⁶⁹⁸ was the objective of ensuring an effective response to as many as possible disasters,¹⁶⁹⁹ and especially to take care of the EU citizens abroad. In spite of these good intentions, in certain circumstances, the Union clearly went beyond the conferred powers by making use of certain EU legal instruments in a field where there was not yet an EU legislative measure justifying the Union external action.¹⁷⁰⁰ It thus became evident that the expressly conferred competences became insufficient¹⁷⁰¹ for the EU's ambition to become an omnipresent actor capable of an efficient response to all of the complexities and negative effects resulting from crises affecting third countries.

The Lisbon Treaty, which was drafted with the aim of strengthening the external identity of the Union, codified the abovementioned EU's practice in the field of emergency response. One of the noteworthy changes brought by the Lisbon Treaty, which was absent from the Constitutional Treaty, is the provision of the Union's objective of ensuring protection of the Union citizens in the world (Article 3(5) TEU). This newly inserted

¹⁶⁹⁷ See more details in Chapter 1, section 2. The nexus between the EU citizenship right to equal protection abroad and EU external relations policies.

¹⁶⁹⁸ See Peter Van Elsuwege and J. Orbie, 'The EU's Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis', in I. Govaere and S. Poli, *EU Management of Global Emergencies Legal Framework for Combating Threats and Crises*, Brill Nijhoff (2014), 21-47.

¹⁶⁹⁹ The examples provided in this paragraph refer to the Union/Community adopting EU/Community measures in a field where the member states only were competent to act. However, conflicts between the Union Institutions and between the latter and the member states were fuelled also by the Community practice of adopting Community measures serving Union measures. See the debate surrounding the correct legal basis for smart sanctions.

¹⁷⁰⁰ Following the success of using the Civil Protection Mechanism during the evacuation procedures from 2004 in South East Asia (affected by the tsunami) and during the 2006 Lebanese conflict, in November 2007 the Member States codified the practice by adopting a Council Decision which expressly provides that the EU Civil Protection Mechanism can be used outside of the Union not only for relief of the affected third country and its population, but also for the specific purpose of supporting the consular assistance of the EU citizens. (See Article 2(10) and recital 18 of the preamble of Council Decision 2007/779/EC of 8 November 2007) Thus, the residual power (ex-Art. 308 EC Treaty) was used by the Council for enlarging the application of a Community measure in a field which during the pre-Lisbon period was reserved to the member states' actions instead of that of the Council (see ex-Art. 20 EC Treaty). During the pre-Lisbon period, protection abroad of EU citizens was not stated in the Treaties as a Community objective, nor was it connected to the operation of the internal market in order to justify the use of the residual power.

¹⁷⁰¹ The European Union, as an international organisation may conduct its international relations only within the limits of the powers conferred on it by the founding Treaties, and abstain from encroaching into the member states' own sovereign powers. See present Art. 5(1) TEU, former Art. 5 EC Treaty.

objective introduces the Union to third countries as being directly responsible for the protection of EU citizens located outside of the Union. The Union now has the competence and the necessary infrastructure to fulfil this external objective. Unlike former Article 20 EC Treaty, the new Article 23 TFEU has a new paragraph which expressly confers on the Union legislative competence to adopt measures in the field of protection abroad of EU citizens, while Article 35 TEU enables it to adopt Union measures focused on achieving efficient cooperation between the Union and the EU countries in this field. Starting in 2010, the EU also has the necessary EU diplomatic infrastructure that will work for the fulfilment of its aim to ensure protection abroad of EU citizens.¹⁷⁰² Thus, the post-Lisbon Union has great potential for developing a model of protection of EU citizens abroad more effective than the previous EU model, which was mostly an inter-governmental one, and surely more effective than the traditional international model of protecting citizens abroad.

Post-Lisbon, the EU has a bouquet of policies that can be used to ensure the protection of EU citizens in distress abroad, made of: Article 196 TFEU (civil protection measures), Article 214 TFEU (humanitarian aid) while the CSDP (former ESDP) continues to include humanitarian and rescue tasks (Article 43 TEU).

These additional powers conferred by the Lisbon Treaty to the EU in areas which the Member States have perceived as exclusive State competence¹⁷⁰³ are an indication of the fact that the countries of the EU, facing budgetary constraints, could no longer efficiently respond to the increasing number of crisis of global magnitude by acting independently, but need the added value of the EU institutional framework and its capabilities.

The Lisbon Treaty has clarified the legal nature and effects of the EU citizenship right to equal protection abroad as a fundamental EU citizenship right to be enjoyed by all the unrepresented Union citizens in third countries, which has direct effect within the domestic legal frameworks of the Member States. The substantive and personal scope of the right has, however, remained as convoluted as before the entry into force of the Lisbon Treaty since its wording has not been changed. Therefore the previous divergent application of the EU citizenship right created by the content of this right, which is restricted to a prohibition of discriminatory protection treatment by the consular and diplomatic officials of the Member

¹⁷⁰² Art. 221 TFEU, Art. 5(10) of the EEAS Decision.

¹⁷⁰³ See the UK, France and Germany Reports in the CARE Final Report, available at <http://www.careproject.eu/>. This idea was re-affirmed by consular representatives of the other EU countries during a Workshop organised by the European Commission in Brussels on 23 June 2011. See also M. Ekengren, N. Matzen, M. Rhinard, M. Svantesson, 'Solidarity or Sovereignty? EU Cooperation in Civil Protection', (2006) *European Integration*, 468; Ana Mar Fernández, *Consular Affairs in the EU: Visa Policy as a Catalyst for Integration?*, *op.cit.*.

States, coupled with the diverse national legal frameworks on the matter of consular and diplomatic protection of citizens abroad was not amended by the Lisbon Treaty. This framework has led in practice to increased unawareness among the EU citizens of the concrete benefits of this right and its limited exercise in practice. In practice, the EU citizens did not know what consular services they were entitled to from the different Member States, and thus delays and complaints have occasionally occurred. According to the CARE Report, *‘Austria has experienced problems when providing assistance to Union citizens, in particular, concerning support to family members and visa issues’*; Slovakia has experienced problems in providing assistance to Union citizens, in particular, concerning questions of visa and travel documents; according to the Estonian Report, *‘a representation of one Member State refused once to issue an emergency travel document to an Estonian citizen claiming that such assistance is provided to its own citizens only’*¹⁷⁰⁴. Furthermore during the 2008 attack in Mumbai, a team of MEPs and their assistants leading the EP’s trade delegation to Mumbai were left behind by a German consul who took with him only the German nationals. France failed to give *laissez-passer* documents to other delegation members while Germany asked the MEPs to go to its consulate to fill out forms despite the ongoing state of emergency.¹⁷⁰⁵

The difficulties encountered by the EU citizens and the Member States during the evacuation procedures, the unclear legal content of the EU citizenship right and the divergent implementation of this right have led the Commission to draft a proposal for a Directive that will potentially improve the effectiveness of the fundamental Union citizenship right to equal protection abroad. It remains to be seen how the content of the right and the divisions of tasks horizontally, between the Member States and vertically, between the Member States and the Union will look in the future. It seems the Commission, the European Parliament and the Council have different views on these issues. While the Commission has adopted a more moderate approach, attentive to preserving the flexibility of the horizontal cooperation, the European Parliament pushes for a greater role and use of the full potential of the EEAS and the Union delegations. The Council is, for the moment, in a stand-by, since no advancement has been made since 2013 on the text of the Commission proposal for a Directive on Consular Protection of the Union citizens in third countries. For the time being the main legislative norms are to be found still in the Decisions 95/553 and 96/409, which were supposed to have been amended in 2007.

¹⁷⁰⁴ CARE Report, Conclusions Chapter, 665.

¹⁷⁰⁵ See more details at <http://euobserver.com/22/27253>

Conclusion – The EU Model of Protecting EU Citizens abroad: Reality and Prospects

Since 1993, an EU model of ensuring protection of (unrepresented) Union citizens abroad has been developed, in addition to the traditional international model based on the State of nationality right to protect its own citizens in foreign States. In spite of the constant opposition of certain Member States to the development of this EU model and of the several institutional, procedural and policy related shortcomings, the EU model does confer concrete protection benefits to the EU citizens travelling or residing in third countries. The thesis started with a legal assessment of the establishment and evolution of the European Union's model of protecting the Union citizens in the world. It found that the EU model developed in three main stages.

The first stage began in 1993, when the Maastricht Treaty introduced the foundation of the Union model, constituted of the EU citizenship right to equal protection abroad, and continued during the following decade. Since 1993, all the citizens of the EU countries, located in a third country where their Member States of nationality did not have an external representation, have had a right conferred directly by the founding Treaties to receive protection from the consular and diplomatic authorities of any of the Member States represented in that particular third country on the same conditions as the nationals of those States.

This specific EU citizenship right, which is unlike the other EU citizenship rights, due to its application outside the Union market, closely followed previous bilateral and multilateral models of consular and diplomatic cooperation agreements concluded among some of the European countries before the creation of the European Union. The added value of the EU citizenship right to equal protection abroad introduced by the Maastricht Treaty consists, first, in the geographical extension of the previously scattered consular and diplomatic cooperation among some of the European countries to all the States of the European Union. Second, it ensured a stronger protection for the Union citizens, since the EU citizenship right enjoys primacy, direct effect and effective legal guarantees before national courts, features which lacked in regard to the international rights recognised by the Member States' arrangements concluded outside the Union's institutional framework. Although the

EU citizenship right is not innovative in terms of its substantive scope of application,¹⁷⁰⁶ the legal effects and guarantees with which it is endowed, under the EU legal framework, bring the pre-Union or pre-accession inter-States consular and diplomatic cooperation to a new (Union) level of cooperation and solidarity, which adds more stringent obligations on the Member States for the benefit of all EU citizens.

The EU citizenship right to equal protection abroad was meant to ensure a prompt and effective protection of all the unrepresented Union citizens abroad, strengthen the image of the EU on the international sphere, increase the solidarity among the EU countries, and bring the citizens of the Member States closer to both the Member States and the European Union. The promise of never being left unprotected when the EU citizen is in need of help outside the territory of the Union, and the other adjacent objectives, constituted great advancements of the EU integration process, which was seemingly gaining ground-breaking State-like features, unseen in other international organisations. The theory was not matched by practice.

The implementation of this EU citizenship right to equal protection abroad and its contribution to the advancement of the EU's international actorness were fraught with many difficulties which seriously diminished the effectiveness of this right and did not contribute to the strengthening of the Union's image, but rather to the visibility of the Member States' solidarity.

For a period of approximately 15 years, the EU legal framework governing the protection of EU citizens abroad was made entirely of *sui generis* international agreements concluded by the Member States for the purpose of implementing the EU citizenship right, and soft law documents adopted by the Commission and the Council's COCON Working Group. Unlike the other EU citizenship rights, which were implemented by way of Community secondary legislative measures, the EU citizenship right to equal protection abroad was implemented by international legal instruments, namely through simplified international agreements concluded by the representatives of the Member States within the Council's institutional setting. This choice of implementing legal instruments stripped the EU citizens of certain legal benefits derived from legal remedies which were commonly available in regard to the Community legal measures, such as: the infringement procedures that the Commission and a Member State could have started against the Member States for lack of, or

¹⁷⁰⁶ EU law currently requires Member States to ensure consular protection to unrepresented Union citizens in only six mandatory circumstances. See Article 5(1) of Decision 95/553/EC and Decision 96/409/CFSP, more details in the following Section.

inappropriate, transposition of the Community secondary legislation,¹⁷⁰⁷ direct action of annulment initiated by the EU citizens, preliminary references sent by national courts, action of damages instituted against the Member State before national courts, or against the EU institutions before the EU courts by the injured individuals.¹⁷⁰⁸ EU legal remedies were available only in regard to the implementation of the EU primary law provision enshrining the EU citizenship right to equal protection abroad, and not the *sui generis* Decisions. Given the fact that the relevant Decisions significantly limited the material and personal scope of application of the EU citizenship right, the lack of the EU common legal remedies against these Decision, while the implementing measures of the other EU citizenship rights benefited of the full panoply of EU legal guarantees, contributed to the limited effectiveness of this right, and confusion surrounding the practical application of this right. EU citizens were unaware of their rights, and the right did not attract academic interest – only being referred to when enumerating the EU citizenship rights introduced by the founding Treaties.

The reason for the exceptional implementing framework of the EU citizenship right compared to the other EU citizenship rights was due to the Member States' majoritarian view of consular and diplomatic protection of individuals as a core element of State sovereignty, which led the Member States to act by way of purely inter-governmental measures and allocating the topic to a Working Group within the Council composed of State consular and diplomatic officials.

In addition to the nature of the implementing instruments, lacking sufficient effective legal remedies and transparency at national, EU level and in third countries, the content of the EU citizenship right to an equal treatment based on nationality together with the different views and approaches of the Member States on the consular and diplomatic protection of individuals increased the confusion surrounding the benefits actually conferred by the EU

¹⁷⁰⁷ It has to be noticed that the transposition of Decisions 95/553/EC and 96/409/CFSP was very long, followed various procedures among the Member States, ranging from adoption of a legislative measure specifically meant to transpose the Decisions, amending existent consular legislation, adopting or amending administrative documents, or lacking any transposition act. See more details on this issue in Chapter 1, Section b. '*A critical assessment of the legal nature, effects and remedies of the implementing measures*', and Chapter 4, Section VII. '*Mapping the Member States' national systems of ensuring protection of citizens abroad and the top-down impact of the EU model of protecting Union citizens abroad*', and the *CARE Report*, Chapter 3, Section 2.3 Implementation of European law into national law.

¹⁷⁰⁸ Domestic courts can refer preliminary questions to the CJEU on the interpretation and application of these Decisions only insofar as their adoption constitutes a violation of the institutional balance of the EU legal framework and substantive allocation of competences between the Union and the Member States. See Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012. See also Case C-13/07 *Commission v Council*, case withdrawn, see the Opinion of the AG (concerning the legal basis of the Union's decision on the approval of Vietnam's accession to the WTO); Case 114/12 *Commission v Council*, Judgment of 4 September 2014.

citizenship right. Therefore, in practice, the EU model of protecting EU citizens abroad was constituted by various different national models – ranging from treating the protection of citizens abroad as a matter entirely reserved to the State of nationality's executive,¹⁷⁰⁹ to recognising a limited individual right,¹⁷¹⁰ or a constitutional citizenship right to protection abroad,¹⁷¹¹ which prevented the construction of a coherent and fully efficient Union model guaranteeing security and protection of Union citizens in third countries.

The different, almost divergent views of the Member States on the consular and diplomatic protection of citizens have thwarted the development of an effective comprehensive EU legal framework on ensuring protection of EU citizens abroad. The potential of the EU citizenship right to equal protection abroad has been restricted by international and ad-hoc agreements of the Member States to a minimum number of consular situations.

In spite of these shortcomings, the emergence of the inter-governmental model of protection of EU citizens abroad is a stunning accomplishment in light of the great variety of domestic systems of consular and diplomatic protection of nationals abroad, of the national security objectives and some of the Member States' persistent resilience towards any model other than the traditional model of protection of nationals abroad.

The second stage of the development of the EU model of ensuring protection of EU citizens abroad started in 2004 when massive international disasters affecting third countries, and the EU citizens located there, led the Member States to accept cooperation with EU institutions and external policy instruments for the purpose of complementing their capacity to secure the effective protection of their citizens abroad. The natural disasters gravely affecting South East Asia in 2004, the enlargement of the Union, the turmoil caused by the Arab Spring and the financial cuts suffered by the Member States all demonstrated to the Member States that protection of Union citizens abroad solely by way of horizontal cooperation among the Member States is no longer sufficient to guarantee security to the Union citizens in third countries. Slowly, the Member States accepted the help of the Union institutions and instruments in securing protection of Union citizens abroad. In 2007, the civil protection mechanism was formally extended to address also external natural and man-made disasters and to secure consular assistance and protection to the EU citizens located in the third countries. In parallel the humanitarian aid, development cooperation instruments, and

¹⁷⁰⁹ For instance, Austria, Belgium, Cyprus, Ireland, Malta, Netherlands and UK.

¹⁷¹⁰ For instance, Germany, Greece, Italy and Sweden.

¹⁷¹¹ Bulgaria, Estonia, Hungary, Latvia, Lithuania, Poland, Portugal and Romania.

the military and civilian capabilities of the ESDP missions were accepted as supporting instruments in cases the Member States required additional help to secure the prompt and effective consular protection of their citizens in the world.

In parallel to the increased frequency and magnitude of different sorts of disasters and threats affecting third countries, Member States started to close some of their external representations under the financial crisis pressure¹⁷¹² – leaving certain geographical areas with limited external representations and an increasing number of third countries in which none of the Member States are represented. At the same time, the expectations of the Member States' citizens for prompt and effective assistance from their national governments in cases of natural or man-made disaster affecting third countries where more and more EU citizens live or travel was increasing.¹⁷¹³ Consequently, the pressure on the Member States' executives to find ways of better responding to the needs of EU citizens for urgent protection has also increased. This was the context of the Lisbon Treaty elaboration.

The third stage in the EU model of ensuring protection of EU citizens abroad started with the entry into force of the Lisbon Treaty, which conferred an unprecedented power to an international organisation (the EU) to exercise State-like consular protection functions, and occasionally also diplomatic protection functions, directly with respect to the Union citizens in the world. The Treaty of Lisbon significantly changed the previous inter-governmental framework and endowed the Union with both internal and external legislative competence that it can use for the purposes of increasing the effectiveness of the protection of its citizens in the world. Finally the EU was endowed with the normative and institutional setting necessary to fulfil its promise of protecting its citizens in the world and of acting as a fully operational international actor.¹⁷¹⁴

In terms of the substantive legal innovations introduced by the Lisbon Treaty to the EU model of protecting EU citizens abroad, we can note, first, the provision of a Union

¹⁷¹² See, R. Balfour & K. Raik, 'The European External Action Service and National Diplomacies', *EPC Issue Paper* No. 73, March 2013; M. M. Schilbach, *op. cit.*, p. 123; for Hungary, see: <<http://euobserver.com/economic/28315>> (accessed April 2013). For Netherlands, see the Ministry of Foreign Affairs' 'Nota modernisering Nederlandse diplomatie', 8 April 2011, at p. 10 and p. 18; See Annex on *Member States' External Representations and EU Delegations in third countries* in the European Parliament Report on *Access to Electoral Rights: Citizenship, Residence and the Franchise in Local, Regional, National and European election*, Annex drafted by the M. Moraru.

¹⁷¹³ M. Okano-Heijmans, 'Changes In Consular Assistance And The Emergence Of Consular Diplomacy', in: J. Melissen and A. M. Fernández (eds.), *Consular Affairs and Diplomacy*, Martinus Nijhoff Publishers, 2011, pp. 21 -43; J. Melissen, 'Introduction: The Consular Dimension Of Diplomacy', in: Melissen and Fernández (eds.), *op. cit.*, pp. 1- 21.

¹⁷¹⁴ See J. Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law', *CLEER Working Papers* 2011/5, 2011, 7.

objective of ensuring protection of EU citizens abroad which has the legal force of informing and guiding EU policy making. Second, the EU citizenship right to equal protection abroad was expressly recognised a fundamental right status in the list of rights that EU citizens derive directly from EU law. Article 46 of the EU Charter is entitled ‘diplomatic and consular protection’ which can support the future development of EU policies on diplomatic protection in addition to the, so far, exclusive consular protection focused EU policy strategy. However, the substantive and personal scope of the EU citizenship right to equal protection abroad has remained as convoluted as before the entry into force of the Lisbon Treaty since its wording has not been changed. Therefore the previous divergent application of the EU citizenship right created by the content of this right restricted to a prohibition of discriminatory protection treatment by the consular and diplomatic officials of the Member States coupled with the diverse national legal frameworks on the matters of consular and diplomatic protection of citizens abroad were not amended by the Lisbon Treaty.

One of the institutional innovations introduced by the Lisbon Treaty with the potential to remedy the aforementioned divergent implementing framework of the EU citizenship right to equal protection abroad is the express conferral of legislative power to the Council to adopt directives implementing the EU citizenship right.¹⁷¹⁵ Since 2012, the Council is assessing a Commission’s proposal for a Directive on Consular Protection of unrepresented Union citizens abroad. The main issues which the Commission Proposal endeavours to resolve regard the essential aspects of the EU citizenship right: the definition of who is an unrepresented Union citizen; the clarification of the rules on allocation of responsibilities between the Member States present in a third country, and coordination with the Member States of nationality; the clarification of the role of the Union delegation; establishing fixed procedures for the management of exercising protection of unrepresented Union citizens in cases of consular crises; and establishing a standard reimbursement procedure.

The Commission, the European Parliament and the Council have different views on the scope of the Directive, which has led to the current stalemate of the negotiation procedure. However, the institutions are exploring possible legislative options, as well as alternatives, since the protection of EU citizens in the world is a topical objective of the Union in light of the increasing number of security challenges which the Member States have to face. The cause of the stalemate is mainly the opposition of certain Member States within the Council to any delegation of power to the EU, and their ongoing defensive attitude towards their foreign

¹⁷¹⁵ Art. 23(2) TFEU.

policy independence. Seeing the EEAS as a competitor of their national Ministries of Foreign Affairs and more importantly as a challenge to their statehood,¹⁷¹⁶ several Member States have tried to prevent the development of consular functions by the EU, and of the Union delegations in the field of consular assistance of Union citizens. On the other hand, the European Parliament strongly supports a directive that recognises a greater role to the EEAS and Union delegations by replacing some of the key horizontal cooperation concepts and instruments, such as the ‘Lead State’, with an enhanced role for the Union delegations, and introducing stronger human rights guarantees for the EU citizens. In light of these institutional policy roles, the European Commission has changed its previous supranational approach to a more accommodating position towards the diverse interests of the Member States, in order to ensure its proposal will see daylight as soon as possible. For the moment the directive is still under negotiations within the Council, being revised in light of the requests of the UK – which was not pleased with even the very few remaining supranational provisions.¹⁷¹⁷ Therefore, the current legal framework governing the application of the EU citizenship right to equal protection is still governed by the problematic pre-Lisbon Treaty implementing framework, where the levels of protection can vary depending on the Member State to which a Union citizen decides to resort to for help, without ensuring wide transparency among the EU citizens regarding the list of various domestic protection services they are entitled to benefit when located in third countries.

In terms of institutional innovations, one of the most salient innovations introduced by the Lisbon Treaty is the creation of the EEAS and the transformation of the Commission delegations into Union delegations, which have the potential of increasing the efficient consular, but also diplomatic protection of EU citizens in the world. Since its creation, the EEAS, of which the Union delegations are part, has already proved beneficial for ensuring protection of EU citizens in distress abroad, as demonstrated during the Arab revolutions that started in the spring of 2011. In light of the increased number of EU tools that the EEAS can use (9 more Situation Rooms, a Crisis Platform, and express Union civil protection mechanism),¹⁷¹⁸ and the demonstrated added value of EU delegations to the coordination of

¹⁷¹⁶ See R. Balfour and K. Raik, *op. cit.*, p. 17, available at: <http://www.fiia.fi/assets/news/The%20EEAS%20and%20National%20Diplomacies.pdf> (accessed March 2013).

¹⁷¹⁷ UK Parliament, European Scrutiny Committee, document of 2 July 2014, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmeuleg/219-v/21910.htm>

¹⁷¹⁸ According to A. Miozzo, the Managing Director for Crisis Response at the European External Action Service, in a speech given on March 2012 at the Institute of International and European Affairs, the EEAS now has 9 Situation Rooms with which to ensure accurate and updated information regarding political situations

the Member States' capabilities for securing protection of EU citizens in distress abroad, the recognition of the aforementioned consular coordination and supporting tasks of the EU delegations could be of considerable help to the Member States in view of securing protection of all EU citizens' abroad.

In addition to the criticism directed at the inefficient implementing framework of the EU model of protecting EU citizens abroad, academics have sharply criticised the EU legal architecture for disrespecting the public international rules governing the exercise of consular and diplomatic protection of natural persons. The EU model of protecting Union citizens abroad, although respecting the traditional conception of the State of nationality bearing the primary responsibility to protect its nationals abroad, adds new actors with new responsibilities to protect the Union citizens abroad. The non-nationality Member States have been, since 1993, the bearers of an EU primary law obligation to ensure equal protection abroad to unrepresented Union citizens, incidentally, the institutions and bodies of a supranational organisation – the European Union – were recognised direct powers to secure consular protection of Union citizens in cases of consular crisis.¹⁷¹⁹ Scholars have argued that, if the EU citizenship right to equal protection abroad is considered as including also diplomatic protection, then the EU legal framework is 'fundamentally inconsistent' with the general public international legal norms for two main reasons.¹⁷²⁰ First of all due to the violation of the principle of *pacta tertiis nec nocent prosunt*¹⁷²¹ by imposing on third countries the EU inter-governmental and supranational model of exercising consular and diplomatic

worldwide. Another co-ordination instrument entrusted to the EU is the Crisis Platform, which is a new instrument created within the framework of the EEAS which, to date, has efficiently ensured the pooling of the Member States and the EU's resources and capabilities for the purpose of assisting EU citizens in third countries affected by disasters. The Crisis Platform has now efficiently ensured the co-ordination tasks of the Member State taking the Rotating Presidency. There are also several new expressly provided EU competences after the entry into force of the Union which can be put in practice by also involving the EU delegations in third countries, such as: humanitarian aid (Article 214 TFEU) and civil protection (Article 222 TFEU).

¹⁷¹⁹ The EEAS and Union delegations according to current Art. 35 TEU (former Art. 20 TEU), the EEAS Decision and Instrument contributing to Stability and Peace (Regulation No 230/2014 Establishing an instrument contributing to stability and peace, 11 March 2014, OJ L 77/1, succeeding the Instrument for Stability), bodies established within the Commission under the Union Civil Protection Mechanism and the CSDP civilian and military missions.

¹⁷²⁰ A. M. Vermeer-Künzli, 'The Legal Framework of consular assistance: Some inconsistencies between EU law and international law on consular assistance' in S. Faro, Mario P. Chiti and E. Schweighofer, *European Citizenship and Consular Protection New Trends in European Law and National law*, Editura Scientifica Napoli (2012), 101-111; A. M. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', (2011) ICLQ, 965-995; See J. Dugard, *Seventh Report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7 March 2006, p. 10; A. M. Vermeer-Künzli, 'Exercising Diplomatic Protection, the fine line between litigation, demarches and consular assistance', (2008) ZaöRV, 339; T. Stein, 'Interim Report on "Diplomatic Protection Under the European Union Treaty"', in ILA Committee on Diplomatic Protection of Persons and Property, Second Report, New Delhi, 2002, 36-7; P. Vigni.

¹⁷²¹ The principle is enshrined in Art. 34 VCLT.

protection of EU citizens without having first obtained the consent of third countries¹⁷²², which in regard to diplomatic protection is mandatory.¹⁷²³ Second, due to the non-conformity of the EU citizenship with the mandatory requirement of ‘nationality of claims’ and *Nottebohm* requirement of ‘*genuine connection*’.¹⁷²⁴ The EU model does not fall under the few permitted exceptions by current customary international law from the nationality of diplomatic claims requirement, i.e. in the case of refugees, persons benefiting from subsidiary protection and stateless persons. Since the EU is an international organisation that is part of the international legal order, it is required obligated to respect the public international rules. In spite of the specificity of the EU model of protecting EU citizens abroad, whereby equal consular and diplomatic protection treatment can be provided by both non-nationality Member States and the EU institutions and bodies, and of the Member States’ lack of concluding agreements with third countries obtaining their consent to the exercise of the EU model, the EU legal framework is not in a ‘fundamental’ conflict with the general public international legal norms.

First of all, it has to be pointed out that the current international legal framework governing the exercise of consular and diplomatic protection of individuals has made significant advancements from the traditional State-centric model of consular and diplomatic protection of natural persons. According to the traditional Vattelien conception of diplomatic protection,¹⁷²⁵ States enjoyed discretionary rights of exercise protection of their citizens abroad without any corresponding duties towards the nationals. This traditional doctrine, applicable to both consular and diplomatic protection, no longer reflects an honest picture of the current institutions of consular and diplomatic protection of natural persons. The development and growing importance of international human rights and the increasing role of the individual in international relations have led to structural changes in the definition and exercise of the international mechanisms of consular and diplomatic protection of natural persons. According to the modern international conception of consular and diplomatic protection of individuals, the State has lost its near-sacrosanct discretion to exercise these functions, which now recognise and are guided by a complementary mix of the State’s and

¹⁷²² According to Rapporteur J. Dugard, in the *Seventh Report*, ‘*Third States are not bound to respect any of the provisions contained in treaties and conventions in force within the Union and are not obliged to—and with respect to diplomatic protection are unlikely to—accept protection by States that are not the State of nationality of an individual Union citizen.*’ (para. 20, p.9).

¹⁷²³ In relation to consular protection this can be presumed in the absence of opposition, however the third country could always decide to oppose if it had not expressly consented to the non-nationality Member States’ exercise of consular protection.

¹⁷²⁴ *Nottebohm*, para. 23, Künzli, *op.cit.*, 88.

¹⁷²⁵ Which also corresponded to consular protection.

individual's interests. At the same time States are showing an increased interest in efficiently securing protection of all their nationals abroad, and have more often recourse to delegation of consular and diplomatic representation functions to other States from their region or with whom they share historical or cultural ties. New actors are thus recognised on the international scene, in addition to the State of nationality, signalling that the nationality link is no longer an absolute mandatory requirement for the exercise of international consular and diplomatic protection of individuals abroad. Additionally, the current customary international law has discarded the *Nottebohm* test in relation to both cases of single and multiple nationalities. The test that the nationality of a diplomatic claim has to pass under current public international law is that the nationality has to be conferred in accordance with the domestic law of the sending State, these legal provisions have to respect the international norms prohibiting abuses of power and discrimination, and the nationality has to be continuous. The EU citizenship is not formally a State nationality, however it is widely accepted that it does establish links between all the EU citizens and the EU countries thus offering, to a certain extent, a justification for the inter-governmental EU model of protecting EU citizens abroad. In addition, the EU citizenship is recognised, more than ever before, for establishing the foundation for the creation of a solid link between the EU citizen and the Union itself. This conceptualisation of the EU citizenship justifies, to a certain extent, the provision of protection by the Union institutions and bodies themselves. It has to be noticed that, so far, the EU institutions have exercised primarily consular protection, which is a mechanism that is less strict in requiring the nationality of claims pre-requisite, while diplomatic protection was exercised in cases of gross violation of human rights of EU citizens by third countries. In regard to this latter situation, it has to be noticed that the international custom is starting to recognise a State duty to exercise diplomatic protection of nationals subject to such grave injuries. The rising importance of fundamental human rights on the international sphere seems to increasingly justify exercises of diplomatic protection measures by the international society, regardless of whether the initiator is the State of nationality, non-nationality States or other non-State actors recognised as international subjects of international law.

Even if one rejects the social developments stirred by the EU citizenship in bringing the EU citizens closer to the Member States and the Union, the fact is that the EU model cannot still be considered as fundamentally inconsistent with the public international law. The third countries have for more than 20 years tacitly consented to the exercise of the EU model

throughout its different stages of development, starting from the purely inter-governmental model and continuing until the current three-pronged model: State of nationality, non-national Member States and the EU institutions and the EEAS. In the end, it is in the third countries' interest to consent to a model that albeit not strictly following the precepts of public international law, has, so far, brought them only advantages, as third countries no longer have to deal with the protection of aliens, allowing them to concentrate on helping their own population in distress. Furthermore, the relation between public international law and EU law in this field cannot be couched in terms of being 'conflictual' or 'fundamentally inconsistent', since the specific public international legal norms establish minimum standards of conduct, from which the States can derogate by way of common accord.

When addressing the conformity of the EU model of protecting EU citizens abroad with the public international legal framework, one has to remember that the EU model also has a supranational aspect, which even if, currently, is not widely developed, exists nonetheless, and it cannot be governed by the international consular and diplomatic law as established by the Vienna Conventions on Consular and Diplomatic Relations and the ILC Articles on Diplomatic Protection, but by the general international principle of speciality. The EU Treaties' provisions on protection of Union citizens abroad do respect the principle of speciality, by providing clear and express norms establishing the competence of the Union to protect its citizens in the world.¹⁷²⁶ Therefore, from the perspective of public international law, the EU can continue to exercise and develop its three-pronged model of ensuring protection of EU citizens abroad.

The extent to which the Union delegations can actually take on more diplomatic and consular tasks ultimately depends upon the Member States' agreement which, for the moment, seems to be more difficult to obtain than that of third countries. The practice so far has proved that third countries tacitly approve of the EU's purely inter-governmental and supranational model of ensuring protection of its citizens abroad. Therefore, it is up to the Member States under their obligation of sincere cooperation with the EEAS,¹⁷²⁷ to turn the creation of the EU diplomatic service into an opportunity to ensure an effective fulfilment of the EU objective of effective protection of Union citizens in the world.

In conclusion, the norms, policies and mechanisms for ensuring protection of EU citizens abroad have gradually widened under the EU legal order from an inter-governmental cooperation framework to gradually include the Union institutions (EEAS, bodies under the

¹⁷²⁶ Arts. 3(5) and 35(3) TEU, Arts. 20(2)(c), 23, 221 TFEU.

¹⁷²⁷ See, in particular, Arts. 4(3) and 35(3) TEU.

Civil Protection Mechanism) and Union policies (civil protection and humanitarian aid). The EU legal framework on securing protection of EU citizens in the world is in development, with proposals from the European Parliament and certain Member States for the EEAS to take up more formal roles and possibly, in the future, also be allocated more financial resources to efficiently support the Member States in their consular and diplomatic protection functions. The field is in constant development due to the growing internal but also external pressures on the Member States to efficiently guarantee security of EU citizens in third countries. For the moment, the goal is to ensure protection for those unrepresented Union citizens, supporting the under-represented or over-stretched Member States' consular and diplomatic missions and giving concrete effect to the EU citizenship also outside the borders of the Union.

However, the EU architecture of protection of EU citizens abroad and its implementation still present several shortcomings and fall short of the ambitious goals stated in various EU official documents. The current framework can advance towards a truly coherent framework between the EU's internal and external relations policies, if Member States manage to reach consensus on the content of the Directive which should not translate into broadly couched language permitting arbitrary actions, lack of transparency, and even discrimination among the EU citizens, among the various third country nationals who are family members of the EU citizens, or between the EU citizens and their third country family members.

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Annex 1: Member States' External Representations and EU Delegations in third countries¹

| Third countries | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LV | LU | MT | NL | PL | PT | RO | SE | SI | SK | UK | MSS total | EU |
|----------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----------------|----|
| Afghanistan | | X | X | | X | X | X | X | | X | X | X | X | | X | | | | | X | X | | | X | | | X | 15 | X |
| South Africa | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | | | | | | X | X | X | X | | | X | 20 | X |
| Albania | X | | X | | X | X | X | | X | X | | X | X | | X | | | | | | X | | X | X | X | | X | 16 | X |
| Algeria | X | X | X | X | X | X | | | X | X | | X | X | | X | | | | | | X | X | X | X | | | X | 16 | X |
| Andorra | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Angola | | X | X | | | X | | | | X | | X | | | X | | | | | | X | X | X | | | | | 10 | X |
| Antigua and Barbuda | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X ² | |
| Saudi Arabia | X | X | | X | X | X | X | | X | X | X | X | X | X | X | | | | | X | X | X | X | X | | | X | 20 | X |
| Argentina | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | X | | | | | X | X | X | X | X | | X | 22 | X |
| Armenia | | | X | | X | X | | | X | | X | X | | | X | X | | | | | X | | X | | | | X | 9 | X |
| FYROM | X | | X | X | X | X | | | X | X | | X | X | | X | | | | | | X | | X | X | X | | X | 16 | X |
| Australia | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | X | 25 | X |
| Azerbaijan | X | X | X | X | X | X | | | X | | X | X | X | | X | X | | | | | X | | X | | | | X | 15 | X |
| Bahamas | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Bahrain | | | | | | X | | | | | | X | | | X | | | | | | | | | | | | X | 4 | |
| Bangladesh | | | | | | X | X | | | X | | | | | X | | | | | | X | | | X | | | X | 7 | X |
| Barbados | | | | | | | | | | | | | | | | | | | | | | | | | | | X | 1 | X |
| Belarus | | | | X | X | X | | X | | | | X | X | | X | X | X | X | | | X | | X | X | | X | X | 13 | X |
| Belize | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X |
| Benin | | | | | | X | X | | | | | X | | | | | | | | X | | | | | | | | 4 | X |
| Bhutan | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Bolivia | X | | | | | X | X | | | X | X | X | X | | X | | | | | X | X | | | | | | X | 10 | X |
| Bosnia & Herzegovina | X | X | X | | X | X | X | | X | X | | X | X | X | X | | | | | | X | X | X | X | X | | X | 20 | X |
| Botswana | | | | | | X | | | | | | X | | | | | | | | | | | | | | | | 3 | X |
| Brazil | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | | | | | X | X | X | X | X | | X | 23 | X |
| Brunei | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Darussalam | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Burkina Faso | | X | | | | | X | | | | | X | | | | | | | | | X | | | X | | | | 5 | X |
| Burundi | | X | | | | X | | | | | | X | | | | | | | | | | | | | | | X | 4 | X |
| Cambodia | | | X | | | X | X | | | X | | X | | | | | | | | | | | | X | | | X | 7 | X |

¹ Source: web site of European Commission, DG Justice – Consular Protection of EU citizens, which includes the external representations from the Member States for each third country (http://ec.europa.eu/consularprotection/en/content/home_en); web site of the EEAS, EU delegations in third countries directory (http://eeas.europa.eu/top_stories/2015/infographic_eu_delegation_en.htm); web sites of the Ministries of Foreign Affairs of the Member States. (last checked 03.06.2015).

² EU Delegation to Barbados and the Eastern Caribbean

| Third countries | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LV | LU | MT | NL | PL | PT | RO | SE | SI | SK | UK | MSs total | EU |
|----------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----------|----|
| Cameroon | | X | | | | X | | | | X | | X | | | X | | | | | | X | | | | | | X | 7 | X |
| Canada | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | 27 | X |
| Cape Verde | | | | | | | | | | | X | | X | | | | | | | | | X | | | | | 3 | X | |
| Central African Republic | | | | | | | | | | | | X | | | | | | | | | | | | | | | 1 | X | |
| Chad | | | | | | | | | | | | X | | | | | | | | | | | | | | | 1 | X | |
| Chile | X | X | X | | X | X | X | | X | X | X | X | | | X | | | | | | X | X | X | X | | X | X | 17 | X |
| China | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | 27 | X |
| Colombia | X | X | | | | X | | | | X | | X | | | X | | | | | | X | X | X | X | | X | X | 12 | X |
| Comoros | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Congo | | X | | | | | | | | | X | X | | | X | | | | | | | | | | | | 3 | X | |
| Democratic Republic of the Congo | | X | | | | X | | | X | X | | X | | | X | | | | | | X | | X | | | X | 10 | X | |
| Costa Rica | | X | | | X | X | | | | X | | X | | | X | | | | | X | | | | | | X | | 8 | X |
| Côte d'Ivoire | | X | | | | X | | | | X | | X | | | | | | | | | | | | | | | | 4 | |
| Cuba | X | X | X | X | X | X | | | X | X | | X | X | | X | X | | | | | X | X | X | X | X | X | X | 18 | X |
| Djibouti | | | | | | | | | | | | X | | | | | | | | | | | | | | | 1 | X | |
| Dominica | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Dominican Republic | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | X | | 6 | X |
| Egypt | X | X | X | | X | X | X | X | X | X | X | | X | | X | | X | | | X | X | X | X | X | X | X | X | 21 | X |
| El Salvador | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | | 4 | X |
| Ecuador | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | X | 6 | X |
| Eritrea | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | X | 5 | X |
| Ethiopia | X | X | | | X | X | X | | X | X | X | X | | X | X | | | | | | X | X | X | X | X | X | X | 18 | X |
| Fiji | | | | | | | | | | | | X | | | | | | | | | | | | | | X | 2 | X | |
| Gabon | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | | 4 | X |
| Gambia | | | | | | | | | | | | | | | | | | | | | | | | | | X | 1 | X | |
| Georgia | | | X | | X | X | | X | X | X | | X | X | | X | X | X | | | | X | | X | X | | X | X | 16 | X |
| Ghana | X | X | X | X | X | X | X | | | X | | X | | X | X | | | | | | X | | | | | X | X | 10 | X |
| Grenada | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Guatemala | | | | | | | X | | | X | X | X | X | | | X | | | | | X | | | | X | X | X | 9 | X |
| Guinea | | | | | | | X | | | X | X | | X | | | | | | | | | | | | | X | X | 4 | X |
| Guinea-Bissau | | | | | | | | | | | X | | X | | | | | | | | | X | | | | | | 3 | X |
| Equatorial Guinea | | | | | | | | | | X | | X | | | | | | | | | | | | | | | | 2 | |
| Guinea | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Guyana | | | | | | | | | | | | | | | | | | | | | | | | | | X | 1 | X | |
| Haiti | | | | | | | | | | X | | X | | | | | | | | | | | | | | | | 2 | X |
| Honduras | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | | 3 | X |

| Third countries | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LV | LU | MT | NL | PL | PT | RO | SE | SI | SK | UK | MSs total | EU | |
|-----------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----------|----|--|
| India | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | | | X | X | X | X | X | X | X | X | X | X | 25 | X | |
| Indonesia | X | X | X | | X | X | X | | X | X | X | X | | X | X | | | | | | X | X | X | X | X | X | X | 18 | X | |
| Iraq | | | | | | X | X | X | | X | X | | | | X | | | | | | X | | | X | X | X | X | 10 | X | |
| Iran | X | X | X | X | X | X | X | | X | X | X | | X | X | X | | | | | X | X | X | X | X | | | | 20 | | |
| Iceland | | | | | | X | X | | | | X | X | | | | | | | | | X | | X | X | | | X | 7 | X | |
| Israel | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | | X | X | X | X | X | X | X | X | 26 | X | |
| Jamaica | | X | | | | X | X | | | X | | X | | | | | | | | | | | | | | | X | 6 | X | |
| Japan | X | X | X | | X | X | X | X | X | X | X | X | X | X | X | | X | X | X | | X | X | X | X | X | X | X | 24 | X | |
| Jordan | X | X | X | X | X | X | X | | X | X | | X | X | X | X | | | | | | X | | X | X | | | X | 17 | X | |
| Kazakhstan | X | X | X | | X | X | X | | X | X | X | X | X | | X | X | X | | | X | X | X | X | X | X | X | X | 19 | X | |
| Kenya | X | X | | X | X | X | X | | X | X | X | | X | | X | X | | | | X | X | X | X | X | X | X | X | 18 | X | |
| Kyrgyzstan | | | | | | X | | | | | | X | | | | | | | | | | | | | | | 2 | X | | |
| Kiribati | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| North Korea | | | X | | X | X | | | | | | | | | | | | | | | X | | X | X | | X | X | 7 | | |
| South Korea | | X | X | | X | X | X | | X | | | X | X | X | X | | | | | | X | | X | X | X | | | 12 | X | |
| Kuwait | X | X | X | | X | X | | | X | X | | X | X | | X | | | | | X | X | | X | | | | X | 14 | X | |
| Laos | | | | | | X | | | | | | X | | | | | | | | | | | | | | | | 2 | X | |
| Lesotho | | | | | | X | | | | | | | | X | | | | | | | | | | | | | X | 3 | X | |
| Lebanon | X | X | X | X | X | X | X | | X | X | | X | X | | X | | | | | X | X | | X | | | | X | 16 | X | |
| Liberia | | | | | | | | | | | | X | | | | | | | | | | | X | | | | | 2 | X | |
| Libya | X | X | X | X | X | X | | | X | X | | | X | | X | X | | | | X | X | X | X | | X | X | X | 17 | X | |
| Liechtenstein | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Madagascar | | | | | | X | | | | | | X | | | | | | | | | | | | | | | | 2 | X | |
| Malawi | | | | | | X | | | | | | | | | | | | | | | | | | | | | X | 2 | X | |
| Malaysia | X | X | | X | X | X | X | | | X | X | | | X | X | | | | | | X | | X | X | X | X | X | 15 | X | |
| Maldives | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Mali | | | | | | X | X | | | X | | | | | | | | | | X | | | | | | | | 4 | X | |
| Morocco | X | X | X | | X | X | X | | X | X | X | X | X | | X | | | | | | X | X | X | X | | X | X | 18 | X | |
| Marshall Islands | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Mauritius | | | | | | | | | | | | X | | | | | | | | | | | | | | | X | 2 | X | |
| Mauritania | | | | | | X | | | | X | | | | | | | | | | | | | | | | | | 2 | X | |
| Mexico | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | | | | | X | X | X | X | X | X | X | X | 21 | X | |
| Micronesia Federated States | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Moldova | | | X | | X | X | | | | | | X | | | | | | | | | | | | | | | | | | |
| Monaco | | | | | | | | | | | | | | | | | | | | X | | | | | | | | 7 | X | |
| Mongolia | | | X | | | | | | | | | | | | | | | | | | | | | | | | | 0 | | |
| Montenegro | X | | X | | X | X | | | X | | | X | X | | X | | | | | | | | | | | X | X | 3 | X | |
| Mozambique | | | | | | | X | X | | | X | X | X | X | X | | | | | | | X | X | X | X | X | X | 11 | X | |

| Third countries | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LV | LU | MT | NL | PL | PT | RO | SE | SI | SK | UK | MSS total | EU |
|--------------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----------|----|
| Myanmar | | | | | | X | | | | | | X | | | | | | | | | | | | | | | X | 3 | X |
| Namibia | | | | | | X | | | | X | X | X | | | | | | | | | | | | | | | X | 5 | X |
| Nauru | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Nepal | | | | | | X | X | | | | X | X | | | | | | | | | | | | | | | X | 5 | X |
| Nicaragua | | | | | | X | | | | X | X | X | | | X | | | X | | | | | | | | | | 7 | X |
| Niger | | | | | | X | | | | X | | | | | | | | | | | | | | | | | | 2 | X |
| Nigeria | X | X | X | | X | X | | | X | X | X | | | X | X | | | | | | X | X | X | X | | | | 17 | X |
| Norway | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | | | | X | X | | X | | | | 23 | X |
| New Zealand | | | | | X | X | | | X | X | | X | | | X | X | | | | | X | | | | | | | 9 | X |
| Oman | X | | | | X | X | X | | X | X | | X | | X | X | | | | | | X | | | X | | | | 9 | |
| Pakistan | X | X | X | | X | X | X | | X | X | X | | X | | X | | | | | | X | X | X | X | | | | 17 | X |
| Palau | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Panama | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X |
| Papua New Guinea | | | | | | | | | | | | X | | | | | | | | | | | | | | | X | 2 | X |
| Paraguay | | | | | | X | | | | X | | X | | | X | | | | | | | | | | | | | 4 | X |
| Peru | X | X | | X | X | X | | | X | X | X | X | | | X | | | | | | X | X | X | | | | X | 14 | X |
| Philippines | X | X | | X | X | X | | | X | X | X | X | | X | X | | | | | X | | | X | X | | | X | 16 | X |
| Qatar | | X | X | X | X | X | | | X | X | X | X | X | X | X | | | | | | X | | X | | | | X | 12 | X |
| Russia | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | | X | 27 | X |
| Rwanda | | X | | | | X | | | | | | X | | | | | | | | | X | | | | | | X | 4 | X |
| St. Kitts-Nevis | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| San Marino | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Vatican City State | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| St. Vincent and the Grenadines | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Saint Lucia | | | | | | | | | | | | X | | | | | | | | | | | | | | | X | 2 | |
| Samoa | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X |
| São Tomé and Príncipe | | | | | | | | | | | | | | | | | | | | | | X | | | | | | 1 | |
| Senegal | X | X | | | | X | | | | X | | X | | | X | | | X | | | | X | X | X | | | X | 12 | X |
| Serbia | X | X | X | X | X | X | X | | X | X | X | X | X | | X | X | | | | | X | X | X | X | | | X | 5 | X |
| Seychelles | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Sierra Leone | | | | | | | | | | | | | | | | | | | | | | | | | | | X | 1 | X |
| Singapore | X | X | | | | X | X | | X | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | | | X | 22 | X |
| Solomon Islands | | | | | | X | | | | | | X | | | | | | | | | | | | X | | | X | 4 | X |
| Somalia | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X |
| Sudan | | | X | | | | | | | | | | | | X | | | | | X | | | X | X | | | | 5 | X |

| Third countries | AT | BE | BG | CY | CZ | DE | DK | EE | EL | ES | FI | FR | HU | IE | IT | LT | LV | LU | MT | NL | PL | PT | RO | SE | SI | SK | UK | MSs total | EU |
|--------------------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----------|----|
| Sri Lanka | | | | | | X | | | | | | X | | | X | | | | | | X | | X | | | | X | 6 | X |
| Switzerland | X | X | X | X | X | X | X | X | X | X | X | X | X | | X | X | X | X | X | X | X | | X | X | | X | X | 26 | X |
| Suriname | | | | | | | | | | | | X | | | | | | | | | | | | | | | | 2 | |
| Swaziland | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | X |
| Syria | | | | | | | | | | | | | | | | | | | | | | | | | | | | 1 | X |
| Tajikistan | | | | | | X | | | | | | | | | | | | | | | | | | | | X | 2 | X | |
| Tanzania | | X | | | | X | X | | | X | X | X | | X | | | | | | | X | | | | | | X | 10 | X |
| Thailand | X | X | X | | X | X | X | | X | X | X | X | X | | X | X | | X | X | | X | | X | X | | X | X | 7 | X |
| Timor-Leste | | | | | | | | | | | | | | | | X | | | | | | | | | | | | 1 | X |
| Togo | | | | | | X | | | | | | X | | | | | | | | 2 | | | | | | | | 2 | X |
| Tonga | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Trinidad Tobago | | | | | | X | | | | X | | X | | | | | | | | | X | | | | | X | 5 | X | |
| Tunisia | X | X | X | | X | X | | | X | X | | | X | | | | | X | | X | X | | X | | | | X | 15 | X |
| Turkmenistan | | | | | | X | | | | | | X | | | | | | | | | X | | | | | | X | 5 | |
| Turkey | X | X | X | | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | X | X | X | X | X | | X | X | 25 | X |
| Tuvalu | | | | | | | | | | | | | | | | | | | | | | | | | | | | 0 | |
| Uganda | X | X | | | | X | X | | | | | X | | X | X | | | | | | | | X | | | | X | 10 | X |
| Ukraine | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | | X | X | X | X | | X | X | 24 | X |
| United Arab Emirates | X | X | X | X | X | X | X | | X | X | | X | X | X | X | | | | | X | X | | X | X | | | X | 19 | X |
| United States of America | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | X | | X | X | 27 | X |
| Uruguay | | | | | | X | | | X | X | | X | | | X | | | | | | | X | | | | | X | 9 | X |
| Uzbekistan | | | X | | X | X | | | | | | X | | | X | | X | | | | X | | X | | | X | X | 10 | X |
| Vanuatu | | | | | | | | | | | | X | | | | | | | | | | | | | | | | 1 | X |
| Venezuela | X | X | X | | X | X | | | X | X | X | X | | | X | | | | | | X | X | X | | | | X | 15 | X |
| Vietnam | X | X | X | | X | X | X | | X | X | X | X | X | X | X | | | X | X | | X | | X | X | | X | X | 20 | X |
| Yemen | X | X | X | | X | X | | | X | X | | X | | | X | | | | | | X | | X | X | | | X | 13 | X |
| Zambia | | | | | | X | X | | | X | X | X | | X | X | | | | | | | | | X | | X | X | 9 | X |
| Zimbabwe | X | | X | | X | X | | | X | X | | X | | | X | | | | | | X | X | | | | | X | 12 | X |

The above table demonstrates that larger EU Member States have more representations in third countries than smaller EU Member States. For example, while France, Germany, the UK, Italy and Spain (combined population of 314,815,000) have external representations in more than 50% of all third countries, Luxembourg, Malta, Estonia, Latvia and Cyprus (combined population of 5,301,000) have representations in less than 10% of all third countries. As a consequence, based on the obligation of consular cooperation required under Art. 23(1) TFEU, it could be argued that these larger Member States are more likely to be “providers” of assistance to unrepresented EU citizens (the “supply” side), coming from smaller Member States (“demand” side).

There are 27 countries outside of the EU in which *no Member State is represented* (Andorra, Antigua and Barbuda, Bahamas, Belize, Bhutan, Brunei Darussalam, Comoros, Dominica, Grenada, Kiribati, Liechtenstein, Maldives, Marshall Islands, Micronesia Federal States, Monaco, Nauru, Palau, Panama, Saint Kitts and Nevis, Saint Vincent and Grenadines, Samoa, San Marino, Seychelles, Somalia, Swaziland, Tonga, and Tuvalu), while the EU has a delegation in Somalia and Swaziland, and covers the other countries by way of bilateral EU delegations located in nearby third countries 10 third countries where *only one Member State is represented* (Barbados, Central African Republic³, Chad, Djibouti, Gambia, Guyana, Sao Tome and Principe, Sierra Leone, Syria, Vanuatu), while *the EU has a delegation in all of these third countries, with the exception of Sao Tome and Principe*; and 13 countries in which *two Member States are represented* (Fiji, Haiti, Kyrgyzstan, Laos, Liberia, Malawi, Madagascar, Mauritius, Niger, Papua New Guinea, Saint Lucia, Suriname, Togo), while *the EU has a delegation in all of these third countries, except one – Saint Lucia*. The Member States' diplomatic and consular representations are especially limited in Central America and the Caribbean⁴, Central Asia⁵ and Central and West Africa.

It is estimated that 8,7% of the EU citizens travelling outside the EU go to third countries where their Member State does not have a consular or diplomatic representation.⁶ Based on the number of trips made annually by EU citizens to third countries, the estimated number of unrepresented EU citizens travelling abroad annually is at least 7 million. It is estimated around 2 million EU expatriates live in a third country where their Member State is not represented.⁷

In case of political distress, it may well happen that the EU delegation will remain the only connection for the EU citizens, as has happened during the summer of 2012 in Syria (with the exception of Romania, which was the only Member State having a limited number of consular personnel for cases of emergency).

³ France has one external representation, in addition to the EU delegation, however, from the Commission's web site it is unclear whether the external representation has an office or it has only a postal address and emergency telephone number.

⁴ No Member State is represented in the Bahamas, Belize, 1 Member State is represented in Barbados, 2 in Haiti, 4 in El Salvador and 6 in the Dominican Republic. According to information provided by <http://ec.europa.eu/consularprotection/index.action> (last checked on 9 January 2013).

⁵ 2 Member States are represented in Tajikistan and 5 in Turkmenistan. One Member State is represented in Kirghistan.

⁶ Commission Staff Working Document Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Effective consular protection in third countries: the contribution of the EU Action Plan 2007-2009, Brussels 5.12.2007 SEC(2007) 1600, at 26.

⁷ There are several estimates of the current total number of unrepresented EU citizens. According to the Commission Action Plan 2007-2009 (2 million European citizens reside in third countries where they are not represented), the GHK study (GHK (2011), Study for an Impact Assessment on Improving Financial Compensation of Consular Assistance in Crisis Situations), which however uses data from 2009, estimates the number to be 2.58 million, while a Matrix study (Matrix (2011), Study for an Impact Assessment on Coordination and Cooperation Measures to Facilitate the Right to Consular Protection for Unrepresented EU Citizens) which seems to use the most up-to-date data, found that the total figure for unrepresented EU citizens residing in third countries is 1.74 million, which in turn means that 5.6% of residents in third countries are unrepresented.

Annex 2 – Union instruments that can be used for protection of Union citizens in emergency situations outside the Union borders

| Name of policy | Humanitarian aid | Rapid Reaction Mechanism | Civil Protection | Consular protection | Military missions (ESDP missions) | Civilian missions |
|-------------------------|--|--|---|--|--|--|
| Pre-Lisbon legal basis | Art. 179 EC Treaty, Title XX | Art. 308 EC Treaty No specific objective/ensure coherence of Union external actions | Art. 308 EC Treaty/ specific objective – Art. 3(1)(u) EC Treaty | Art. 20 EC Treaty | Title V TEU, Arts. 14 and 17 TEU (humanitarian and rescue tasks) | Joint Declaration by the Council and the Commission on the use of the Community Civil Protection Mechanism in EU crisis management based on the Seville European Council Conclusions of June 2003 and the Presidency Feira European Council of 19 and 20 June 2000 (made possible the activation of civil protection in CFSP crisis management operations) and Arts. 14 and 17 TEU |
| Post-Lisbon legal basis | Art. 214 TFEU | | Art. 196 TFEU | Art. 20(2)(c) TFEU | Title V TEU, Arts. 43, 25 and 28 TEU | Title V TEU, Arts. 43, 25 and 28 TEU |
| Instrument | Council Regulation No. 1257/96 concerning humanitarian aid | Council Regulation No. 381/2001 creating a rapid-reaction mechanism | Council Decision 2001/792/EC, Euratom establishing a Community mechanism to | 95/553/EC: Decision of the Representatives of the Governments of the Member States meeting | Title V EU Joint Action | |

| | | | | | | |
|--|--|--|--|---|--|--|
| | | | facilitate reinforced cooperation in civil protection assistance interventions (last amended by Council Decision 2007/779/EC, Euratom establishing a Community Civil Protection Mechanism Decision Council Decision 1313/2013 of the European Parliament and Council on a Union Civil Protection Mechanism | within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations and 96/409/CSFP: Decision of the Representatives of the Governments of the Member States, meeting within the Council of 25 June 1996 on the establishment of an emergency travel document | | |
|--|--|--|--|---|--|--|

| Responsible Union Institution | Commission DG ECHO | Commission, Conflict Prevention Unit EEAS | Initially Commission DG Environment, currently DG Humanitarian Aid and Civil Protection together with Council PROCIV Working Group EEAS | Initially EPC until Maastricht Treaty, subsequently, DG RELEX and Council COCON Working Group, currently, DG Justice and COCON Working Group | PSC, EUMS | Initially Committee for Civilian Aspects of Crisis Management (CIVCOM); and Commission DG Environment Civil Protection Unit (for Civil Protection only), currently Commission DG Humanitarian Aid and Civil Protection and PSC |
|---|--------------------|---|---|--|---|--|
| Does it have a correspondent internal policy? | No | No | Yes/ Tool used for both internal and external security | No | Currently yes under Art. 222 TFEU solidarity clause | Yes under Art. 222 TFEU solidarity clause |