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MISLEADING COMBINATION OR CREATIVE SOLUTION?

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Abstract

Article 23 of the Treaty on the Functioning of the European Union (TFEU) provides for the right of EU citizens to diplomatic and consular protection by Member States other than the State of nationality in the territory of a third country. But what are the concepts of diplomatic and consular protection embodied in that Article? Are those typical of public international law or rather novel concepts with autonomous meaning derived from EU law? This paper addresses this question and examines what are possible effects of Article 23 in terms of opposability of the concept of EU citizenship to third states as well as in terms of justiciability of the EU citizen's right to obtain protection from a non national Member State in a third country. The paper concludes that political and legal practice of the EU and of Member States has yet to provide clear answers to these questions

Keywords

EU citizenship; Diplomatic protection; Consular assistance; Individual rights; EU law; International law

I. Introduction

Art. 23 of the Treaty on the Functioning of the European Union (hereafter TFEU), which corresponds to ex-art. 20 of the EC Treaty (hereafter ECT), provides for the right of EU citizens to diplomatic and consular protection of Member States other than the State of nationality in the territory of a third country. This article states that, “[e]very 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”.

Art. 23 TFEU raises problems both of international and EU law. First, because the concepts of diplomatic and consular protection are mainly derived from international norms, which, at this stage, include, besides treaty law¹, provisions of customary origin binding for all States. Second, because it is not clear whether the EU intends to adopt the concepts of diplomatic and consular protection with their original meaning as generally recognised in international law or rather with an autonomous meaning and in accordance with EU law. In addition, whatever interpretation of these concepts the EU may choose to adopt, diplomatic and consular protection must be always exercised with respect to third countries, which, patently, are not bound by EU law. This makes it necessary to determine whether the protection that art. 23 TFEU intends to ensure to EU citizens also entails certain obligations of international law binding third States too.

The limited enforcement practice with respect to ex-art. 20 ECT, requires that we ascertain the scope and effectiveness of the right, provided for in this article, on the basis of some other available sources.

First of all, one must determine whether or not art. 23 TFEU establishes a true individual right to diplomatic and consular assistance to which an obligation of EU Member States corresponds. Such determination is important since much doubt exists as to whether a right of this kind can be afforded to individuals under general international law.

Secondly, since art. 23 is included in Part II of the Treaty on the Functioning of the EU that deals with the rights of EU citizens,² in order to understand whether the right to diplomatic and consular protection has the same effectiveness of other EU citizens’ rights, one must examine the scope of the concept of EU citizenship and its corresponding rights. In particular, since some rights of EU citizens, such as freedom of movement and residence and the right to vote, have been most frequently invoked before national and EU courts, it will be useful to analyse this case-law in order to understand whether some general principles, which have been highlighted by the European Court of Justice (hereafter ECJ) with regards to these rights, might be also helpful for the interpretation and application of the right established by art. 23 TFEU.

Thirdly, in order to ascertain whether the right to diplomatic and consular protection is also recognised at the international level, one must analyse the most recent developments of international law in this field. Although the EU has achieved a considerable influence and authority within the international community, one must admit that international law falls short of providing the specific obligations offered by the EU with respect to diplomatic and consular protection. Therefore, some EU provisions may not correspond to international obligations of either customary or treaty origin.

¹ 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations. See *infra* for a thorough analysis.

² Part II of the EC Treaty was entitled “Citizenship of the Union”. Part II of TFEU is entitled “Non-Discrimination and Citizenship of the Union”.

After this general analysis, we must finally examine the concrete practice of the EU and Member States in the exercise of diplomatic and consular functions with respect to EU citizens in order to determine whether some legal or practical developments have occurred in EU law as to the right that is established by art. 23 TFEU.

Against this general background this paper will examine the viability of some normative solutions, which have been suggested by EU organs - such as the possibility of any Member State and the EU itself to ensure the consular and diplomatic protection of EU citizens - and will try to assess whether these solutions have sufficient legal grounds both under EU and international law.

II. Consular and Diplomatic Protection in EU Law

a. Preliminary Remarks

To understand the extent to which consular and diplomatic protection is guaranteed by EU law, we must, first of all, ascertain whether such protection entails a perfect individual right of EU citizens comparable to generally recognized rights, such as freedom of movement or the right to vote. The recognition of this right would entail the obligation of EU Member States of guaranteeing diplomatic and consular assistance as well as the possibility for EU citizens to invoke a Member State responsibility for failure to provide such assistance in a given case.

Among the rights of EU citizens sanctioned in Part II of the TFEU, the right to diplomatic and consular protection is the only one that, so far, has never been invoked before national courts (and, by means of preliminary ruling, before the ECJ). Nevertheless, if we can concretely demonstrate that the right, sanctioned in art. 23 TFEU, has the same legal nature and effects for the purpose of its justiciability as other rights, which are provided for in Part II, the issue arises of what legal remedies are open before national and EU courts to a person who has been denied consular assistance.

In order to achieve such a result, we must, first of all, ascertain whether art. 23 TFEU is aimed at creating an individual right to diplomatic and consular protection. For this purpose, we have to take into account some relevant features of this article and the legal context to which it belongs.

Art. 23 TFEU states that, “[e]very citizen of the Union shall...be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State”. From a textual analysis of this norm, the wording of which is almost the same as that of ex-art. 20 ECT, it appears clear that the drafters of the EC Treaty intended unconditionally to guarantee this protection of EU citizens. In fact, they used the mandatory “shall” rather than the suggestive “should”. The latter expression usually entails a mere exhortation for States, while the former corresponds to an obligation.

Secondly, the text of art. 23 highlights an important feature of the right to consular and diplomatic assistance characterising all the individual rights that are recognised by EU law, which is the prohibition of any form of discrimination between foreign individuals and nationals in the enjoyment of such rights. Stating that diplomatic and consular assistance must be guaranteed by a Member State to EU citizens “on the same conditions as the nationals of that State”, art. 23 TFEU patently prohibits such discrimination. Not surprisingly, the Treaty on the Functioning of the European Union includes provisions concerning both EU citizenship and non-discrimination in its Part II³ with the purpose of highlighting the importance of ensuring the same rights, or at least the most similar treatment, of all

³ For the importance of the combination of the concepts of non-discrimination and EU citizenship in Part II of TFEU see also E. Crespo Navarro, La Jurisprudencia del TJCE en Materia de Ciudadanía de la Unión: una Interpretación Generosa basada en la Remisión al Derecho Nacional y en el Principio de No Discriminación por razón de la Nacionalidad, in *Revista de Derecho Comunitario Europeo*, 2007, p. 883-912, at. p. 910.

EU citizens. Thus, as to the non-discriminatory character, the right that is established by art. 23 TFEU does not seem to be different from other EU citizens' rights. A Member State may deny the individual right to consular and diplomatic assistance of non-nationals only if the right was not regulated in its national legal order. In this case, the EU Member State would not incur liability for a breach of the obligation of non-discrimination since it is actually not obliged to guarantee the consular and diplomatic protection to its nationals. At the same time, if the real intent of the drafters of the EC Treaty was to add a new right of EU citizens by means of art. 20 ECT, EU Member States, which do not provide for a similar right in their national legal orders, would be equally bound to ensure that right by virtue of their being parties to the EU treaties. Therefore, it appears necessary to determine the concrete effects of art. 23 TFEU in order to ascertain whether or not EU Member States have intended to subject themselves to the obligation of ensuring consular and diplomatic protection in respect of EU citizens.

Thirdly, taking into account the EU legal context, the right to consular and diplomatic protection is also included in art. 46 of the Charter of Fundamental Rights. The insertion of this right in the Charter seems to recognise its nature as an essential individual right.⁴ Although the Charter was not a binding legal instrument until the entry into force of the Lisbon Treaty⁵ and, thus, the rights that are sanctioned in it could not be similarly considered binding for EU Member States, one cannot deny that the Charter has always been an authoritative interpretative instrument that help us to support the opinion that the right, established both by arts. 23 TFEU and 46 of the Charter, is a proper individual right.⁶

Finally, if we analyse art. 23 TFEU in the legal context in which it is included, i.e. Part II of the Treaty on the Functioning of the EU, dealing with EU citizenship, we realize that it also provides for several EU citizens' rights the status of which, as individual rights, is unconditionally recognised. In order to ascertain the scope and effectiveness of these rights, one must, first of all, understand what legal status EU citizenship entails. Art. 20 of Part II of the TFEU, which duplicates ex-art. 17 ECT, states that "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship". Thus, if the only way to be an EU citizen is first to be the citizen of a Member State, such States clearly have the power to determine whether or not an individual can enjoy the rights that EU treaties provide for in respect of EU citizens. However, the ECJ has established several common principles in order to ensure, at least, the same rights of the individuals that undeniably enjoy the citizenship of a Member State.⁷ For

⁴ See A. Rey Aneiros, *Hacia el Reforzamiento de la Dimensión Exterior de la Ciudadanía Europea*, in *Revista de Derecho Comunitario*, 2007, p. 9-43, at p. 16.

⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, in O.J., C 306, 17 December 2007, p. 1 ff. .The Charter has just become binding with the entry into force of the new EU Treaty that, at art. 6, states: "[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

⁶ For the use of the Charter as interpretative instrument see the ECJ decision in the *Jégo-Quérelé* case, C-263/02, in ECJ Reports, 2004, p. I-03425. Most recently, see the *Kadi* case, C-402/05, *ibidem*, 2008, p. I-06351.

⁷ One must recall the leading role of the *Micheletti* judgment, in which the Court pointed out that, although Member States are free to choose their rules for the attribution of citizenship, nevertheless, such rules must be consistent with EU law and, in particular, with its fundamental principles. See the *Micheletti* case, C-369/90, in ECJ Reports, 1992, p. I-04239. This case concerned an Argentine-Italian citizen that intended to use his Italian citizenship to reside in Spain. Spanish law stated that, in cases of dual nationality, where neither nationality was Spanish, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain should have taken precedence; in this specific case, Argentine citizenship. Thus, Mr *Micheletti* could not be considered an Italian citizen and, thus, did not have the right to reside in Spain. The ECJ established that the provisions of Community law concerning freedom of establishment precluded a Member State from denying a national of another Member State who possessed at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deemed him to be a national of the non-member country. In short, the conclusions of the Court reaffirmed States' freedom of

example, dealing with the requirements for the recognition of citizenship, Member States must take into account general rules, such as the principles of non-discrimination and legality. Some of the rights of EU citizens, which are provided for in Part II of the TFEU,⁸ have been repeatedly declared by the ECJ as fundamental individual rights, such as the right to free movement and residence in the EU territory and the right to vote at municipal and European Parliamentary elections.⁹

In light of the above, it would seem illogical to argue that the right provided for in art. 23 TFEU is of a different nature than the other rights sanctioned in the same part of the TFEU. In addition, the Lisbon Treaty has slightly modified Part II by adding an article which expressly lists EU citizens' rights, including the right to consular and diplomatic assistance.¹⁰ Thus, the right established by art. 23 TFEU seems now assimilated to the other EU citizens' rights (even from the formalistic point of view).

(Contd.)

attributing their citizenship. Nevertheless, the *obiter dictum* stating the duty of States of compliance with principles of EU law opened the possibility, for the EU itself, of fixing some uniform requirements for the attribution of citizenship. Moreover, recent ECJ's case-law has considered, as contrary to EU law, national norms that, although non-discriminatory, limit EU citizens' rights in a disproportionate or unjustified manner. For instance, in the Morgan case, the ECJ stated that national law sanctioning that State grants for studies can be only used to study in territory of the granting State entailed an unjustified restriction of the freedom of movement of EU citizens. C-11/06, ECJ Reports, 2007, p. 09161. For an overview see Editorial Comment, Two-Speed Citizenship? Can the Lisbon Treaty Help Close the Gap? From non-discrimination to unjustified restriction, in CMLR, 2008, p. 1-11, at p. 2. Similarly, the ECJ has attempted to restrict cases of reverse discrimination, which might allow Member States to ensure EU citizens' rights with respects to the nationals of other EU countries only, but not in favour of their own citizens. For this reason, the ECJ has provided a restrictive interpretation of the concept of internal situation that notoriously falls outside the scope of EU law. See the Sevinger case, C-300/04, in ECJ Reports, 2006, p. I-8055. Mr Sevinger was a Dutch citizen born and resident in Aruba, a Dutch extra-Community territory. Under Dutch law, Aruba residents could not take part in the European elections unless they had resided in the Netherlands for 10 years. The Court affirmed that since the case concerned the enjoyment of a fundamental right of EU citizens, this case could not be considered an internal situation. Moreover, the ECJ believed that, although States are free to exclude some of their citizens from voting, nevertheless, such exclusion must be justified on the basis of objective reasons. Residence could not be considered an objective reason why to exclude individuals from enjoying a fundamental right, such as the right to vote, in particular because such exclusion allowed the Netherlands to discriminate between its nationals residing in a third country, who actually could take part in the elections, and nationals residing in extra-Community territories, such as Mr Sevinger. For this view see Editorial Comment, Two-Speed Citizenship?, cit., p. 3. See also T. Yeneva, Borderlines of Union Citizenship, in Legal Issues of Economic Integration, 2007, p. 407-418, at 411.

⁸ These rights are sanctioned by arts. 21 TFEU (right to move and reside in EU territory), 22 (right to vote and stand as candidate at the municipal and European elections in Member States other than that of origin), 23 (right to diplomatic and consular protection in third countries), and 24 (right to petition EU organs and apply the Ombudsman). Title V of the 2000 Charter of Fundamental Rights of the European Union (hereafter the Charter), which specifically lists the rights of EU citizens, also adds the rights to good administration (art. 41) and access to documents (art. 42), although, as we can infer from the exact wording of these articles, these two rights belong to all individuals that carry out relevant activities within and for the EU, regardless of their nationality. See M. Vink, Limits of European Citizenship, Palgrave MacMillan, Houdmills, 2005, p. 55.

⁹ The ECJ has repeatedly affirmed the nature of fundamental individual rights of such freedoms. For the character of fundamental right of the right to vote, sanctioned by ex-art. 19 ECT, see the Sevinger case, para 29, cit.. Although the case did not concern art. 19 specifically, since this article is applicable to EU citizens when they must vote in Member States other than the one of nationality, nevertheless, the right to vote is declared by ECJ as one of the fundamental rights of EU citizens. Moreover, in its decisions, the Court has attempted to extend the scope of EU citizens' rights by obliging Member States to comply with the fundamental principles of EU law both with respect to the citizens that live in other EU States and with regard to the relationship between Member States and their nationals. For the inclusion of the enjoyment of economic benefits, granted by the States both of residence and nationality, in the scope of the freedom of movement of EU citizens see the Bidar case, C-209/03, in ECJ Reports, 2005, p. I-2119 and the Nerkowska case, C-499/06, in ECJ Reports, 2008, p. I-3993. For the recognition of the right to a double family name see the Garcia Avello case, C-148/02, in ECJ Reports, 2003, p. I-11613. For the view that EU citizenship is strictly linked to the protection of the fundamental rights of individuals see also F. Dell'Olio, The Europeanization of Citizenship. Between the Ideology of Nationality, Immigration and European Identity, Ashgate Publishing, Aldershot, 2005, p. 56.

¹⁰ See para 2 of art. 20 TFEU.

The recognition of the status of individual right to consular and diplomatic protection of EU citizens does not exclude the possibility that the right can have different effects to the other rights sanctioned in Part II of TFEU. This difference can depend on the self-executing or non self-executing nature of the right to consular and diplomatic assistance or the imprecise and unclear content of art. 23 TFEU. Similarly, the fact that the latter article establishes a fundamental right of EU citizens does not help us to clarify its scope. In particular, it is not clear whether the simultaneous use of the adjectives “consular” and “diplomatic” relating to the protection that must be ensured for EU citizens corresponds to a deliberate choice of ECT drafters of bringing together two functions and activities that remain distinct and subject to different rules under international law.

b. The Effectiveness of Art. 23 TFEU and Other Norms Establishing EU Citizens’ Rights

The relevance of EU citizen’s rights stems from the possibility that individuals have to invoke these rights before a court and in particular within the Member States’ legal orders. In order to determine the effectiveness of the freedoms regulated by arts. 20-24 TFEU (ex-arts. 18-21 ECT), one must first understand whether such rights can be directly invoked by individuals or if, in order to be effective, they need to be implemented at the national level: in short, we must know whether or not EU citizens’ rights are self-executing, using the language of international law, and with direct effect, following EU law’s wording. Secondly, in order to evaluate how effective EU citizens’ rights are, one must also identify which remedies State and EU norms provide to make such rights justiciable.

The ECJ’s case-law,¹¹ affirming that such rights can be legitimately invoked before national courts, seems to have already answered the question relating to the justiciability of EU citizens’ rights. Although States have repeatedly disputed the possibility of individuals of claiming the violation of the rights that are now established in Part II of the Treaty on the Functioning of the EU (ex-Part II of the EC Treaty), the ECJ has always stressed that such rights¹² can be autonomously invoked whether or not their violation is related to other rights sanctioned by the EC Treaty, such as the right to non-discrimination.¹³

¹¹ See *supra* footnotes 7, 8, and 9.

¹² So far, the only EU citizens’ right that has never been invoked before national courts (and, by means of preliminary ruling, before the ECJ) is the right to consular and diplomatic protection, which is sanctioned by ex-art. 20 ECT. This fact is not surprising if one takes into account the considerable political implications that the granting of such right entails.

¹³ In the *Bidar* case the ECJ affirmed that, in order to invoke the violation of the principle of non-discrimination, sanctioned by ex-art. 12 ECT, it was not necessary to find any legal basis other than the breach of the freedom of movement of EU citizens, established by ex-art. 18 ECT. In short, the right, provided for by ex-art. 18, consists in an autonomous obligation that the UK violated by maintaining discriminatory behaviour with respect Mr *Bidar*. See paras 32-33 of the judgment, *cit.*. Similarly, in the *Sevinger* case, the ECJ stated that “*persons who possess the nationality of a Member State...may rely on the rights conferred on citizens of the Union in Part Two of the Treaty*”, para 29 of the judgment. As affirmed above, the latter case is particularly important because it recognises the possibility of individuals of invoking EU citizens’ rights even with respect to their State of nationality.

Excepting art. 24 TFEU,¹⁴ all the other articles of Part II allow Member States to adopt Community acts, aimed at facilitating the exercise of such rights.¹⁵ Moreover, art. 25 TFEU, the final clause of Part II, provides that the Council “*may adopt provisions to strengthen or to add to the rights listed in Article 20(2). These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements*”. The question arises whether such reference to the adoption of further legal acts can prove the absence of direct effect of EU citizens’ rights. As to art. 25, although it allows the EU organs to adopt measures relating to all the provisions of Part II, it clearly appears to be aimed at developing the future regulation of EU citizens’ rights by eventually extending the scope of arts. 21-24 rather than at implementing existing norms.¹⁶

Conversely, the expressions that we find in other articles, such as art. 22 TFEU, dealing with the right to vote in an EU country other than the State of nationality, and which contemplates the adoption of specific measures of implementation, seem to highlight that some rights cannot be considered effective absent implementation by means of EU and State legislation. This is certainly so with regard to art. 22. In fact, the right to vote became effective only when Member States implemented Council Directives 93/109 and 94/80 laying down, respectively, arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament and municipal elections for citizens of the Union residing in a Member State of which they are not nationals.¹⁷

The same conclusion cannot be reached with regard to some EU measures that were adopted in relation to art. 23 TFEU. The right to free movement and residence entails the clear, precise and unconditional obligation of Member States not to hinder such movement and residence, as the ECJ’s case-law has repeatedly recognized. Thus, art. 23 is self-executing and has direct effect.¹⁸ EU legislation that was adopted on the basis of this article cannot be deemed to be an implementing instrument, but rather a set of legal acts, aimed at clarifying the scope of some concepts, such as, for example, the notions of residence and family’s members. Actually, such clarification has been mainly fulfilled by codifying the principles that the ECJ’s case-law has sanctioned. For example, 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 States¹⁹ does not implement, but it simply clarifies the rights of EU citizens.²⁰

¹⁴ The rights to petition and apply the Ombudsman actually cannot be invoked against Member States, but vis-à-vis EU organs. These rights can be deemed political instruments that EU citizens can use when they do not have the possibility of bringing a legal action against EU institutions before the Court of First Instance.

¹⁵ Paragraph 2 of art. 21 TFEU (ex-art. 18 ECT) states that “[i]f action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council... may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1”. Similarly, art. 22 TFEU (ex-art. 19 ECT) affirms that the right to vote at municipal and EU Parliament elections “*shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously...and after consulting the European Parliament...*”.

¹⁶ See N. Hyland-C. Loftus-A. Whelan, *Citizenship of the European Union*, Occasional Paper 6, Institute of European Affairs, Dublin, 1995, p. 41.

¹⁷ Council Directive 93/109/EC, in O.J., L 329, 30.12.1993, p. 34-38 and Council Directive 94/80/EC, in O.J., L 368, 31-12-1994, p. 38-47.

¹⁸ For this view see Crespo Navarro, cit., p. 905.

¹⁹ 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, in O.J., L 158, 30-4-2004, p. 77-123.

²⁰ For the view that Directive 2004/38 enhances the rights of EU citizens by associating such rights to the obligation of non-discrimination see Crespo Navarro, cit., p. 910. For the role of Directive 2004/38 as instrument to favour the union of EU citizen’s families see D. Kostakopoulou, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623-646, at p. 639.

In order to ascertain if the same conclusions can be reached with respect to the right to consular and diplomatic protection, a specific analysis of the content and effects of art. 23 TFEU is required. At first sight, the scope of this right seems to be quite clear, precise and unconditional, at least as to its basic conception, which is the right of EU citizens to invoke the assistance of diplomatic and consular agents of Member States other than the State of nationality when these individuals happen to be in a third country where diplomatic or consular organs of their national state are not present.

However, some other parts of the text of art. 23 seem to imply that Member States did not intend to make this right immediately effective at the time of its introduction in the EC Treaty.²¹ Art. 23 states that “*Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection*”. Thus, two different types of implementing measures would appear to be required.

On the one hand, despite the clear scope of the right to diplomatic and consular protection, Member States should establish rules among themselves. So, one might argue that in the absence of such rules, no EU State would be allowed to intervene in order to protect an EU citizen that is not one of its nationals. But this conclusion is not inescapable. First of all, the legal and practical means, through which a State exercises diplomatic and consular protection, already exist since such means are the same that are used to ensure such protection *vis-à-vis* the nationals of this State: diplomatic and consular agents. This situation differs from the case relating to the right to vote in another country, established by art. 22 TFEU, which requires the adoption of specific instruments, such as the lists of voting and eligible people. Besides, EU organs have adopted some legal acts relating to ex-art. 20 ECT (now art. 23 TFEU) since its introduction in the EC Treaty.²² Further, the Lisbon Treaty added a new paragraph to art. 23 TFEU, which states that “[t]he Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection”. Some author believes that the attribution of this new legislative competence to the EU would make the right, established by art. 23, effective.²³ In the present author’s view, this paragraph mainly helps to find common solutions and provide most uniform treatment of EU citizens. However, it certainly shows that, in the view of Member States, the protection, provided for in ex-art. 20 ECT, already had a precise scope that only needed to be facilitated. Therefore, art. 23 TFEU seems to reaffirm, rather than to establish for the first time, the effectiveness of the right to consular assistance of EU citizens.

Moreover, from a practical point of view, one must take into account that individuals usually ask for consular assistance in critical situations. So, it does not seem acceptable that the State of nationality can hamper other States, if they are willing, from assisting its citizens in particular when the fundamental rights of these individuals are at risk of violation in a third country.

As some author have highlighted,²⁴ ex-art. 20 ECT did not establish a completely new right, but rather it incorporated the provisions of some existing international instruments, which already allowed consular authorities to provide assistance *vis-à-vis* non-nationals.²⁵ Thus, if States already accepted a

²¹ For the view that ex-art. 20 ECT did not have direct effect see S. Kadelbach, *Union Citizenship*, Jean Monnet Working Paper 9/03, in *European Integration: the new German School*, Max Planck Institute for Comparative Public and International Law, Heidelberg, 2003, in <http://www.jeanmonnetprogram.org/papers/03/030901-04.pdf> (visited on 31st August 2009), p. 1-56, at p. 30.

²² See for example Decision 95/553/EC. See *infra* for a thorough analysis.

²³ Rey Aneiros, *cit.*, p. 37.

²⁴ See S. O’Leary, *Nationality Law and Community Citizenship: a Tale of Two Uneasy Bedfellows*, in *Yearbook of European Law*, 1992, p. 353-384, at note 108.

²⁵ Art. 2(3) of the European Convention on Consular Functions already provides for the intervention of another State’ consular office for the protection of a foreign individual. Council of Europe, *European Convention on Consular*

similar obligation in other international instruments, we do not see why they should have not endorsed the same obligation in a context, like the EU, where States' relations are informed by more intense solidarity and brought to a more advanced level of cooperation than in any other international regime.

Finally, one must observe that art. 23 TFEU codifies the existing practice of EU States that has taken place for several years. One need only mention some recent cases, such as the disaster, provoked by the 2004 Tsunami, or the emergency arising from the 2006 Lebanon War, during which the Member States' consular authorities that were present in such territories provided urgent assistance to all EU citizens, irrespective of their nationality.²⁶

In conclusion, the right that is established by art. 23 TFEU seems to be sufficiently clear, precise and unconditional to entail direct effect. Moreover, its vital importance for the preservation of the fundamental interests of EU citizens appears to compel Member States to eliminate rather than to create obstacles for the enjoyment of such right. The reluctant behaviour of EU States might result in the breach of even most essential rights of individuals. States' practice demonstrates their intention to ensure as extensive protection as possible of any EU citizens, including other Member States' nationals.

On the other hand, as to the second type of implementing measures of art. 23 TFEU, the text of this article requires the adoption of some legal acts, the existence of which should allow the exercise of the right to consular assistance in third countries. Such legal acts are the agreements that Member States should negotiate with countries where consular assistance for EU citizens may be needed. Apparently, the negotiation of these international agreements is a precondition to make effective the right, established by art. 23.²⁷ The TFEU and, consequently, art. 23 is only binding *vis-à-vis* contracting States. Thus, third countries should express their consent to the exercise of diplomatic and consular protection in its territory by a State's organs *vis-à-vis* non-nationals. Since third countries are not bound by EU law, their consent is necessary to allow the exercise of consular and diplomatic protection as long as international law requires it. As we will see below, third States have only the right to object to the legitimacy of State intervention for the diplomatic protection of an individual when there is an insufficiently solid link between the individual him/herself and the intervening State. Nationality is traditionally the most solid link, and as such it is recognised by international law. Thus, the protection provided for in art. 23 TFEU, i.e. the intervention of a Member State other than the State of nationality could be challenged *prima facie* as inadmissible under international law. Nevertheless, such intervention might be legally justified as a sort of indirect action of the State of nationality, which, in the absence of its diplomatic agents, acts through the organs of another Member State. Accordingly, the third country involved could not dispute the legitimacy of the intervention of a "non national" EU Member State under international law because that Member State does not act in its own interest, but as "an agent" of the State of nationality. Thus, nationality link would still apply, although in an indirect manner. In addition, although EU citizenship does not yet seem to have acquired the status of nationality under international law, so as to allow the intervention of any Member State for the protection of non-nationals, one cannot exclude that, in the future, the status of EU citizen might become opposable *vis-à-vis* third countries so as to allow the exercise of the diplomatic protection of EU citizens of both Member States other than the State of nationality and, maybe, the EU itself.

What happens if the third country, in which an EU citizen has suffered injuries, has not expressed its consent for the intervention of a Member State other than the State of nationality for the protection of the citizen? The lack of such consent does not remove the obligation of the Member State concerned to grant or, at least, to attempt to grant such protection. In fact, while a third country can object to the

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Functions, done in Paris on 11 December 1967, ETS 61, in <http://www.unhcr.org/refworld/docid/3ae6b38d14.html> (visited on 25th August 2009).

²⁶ For this view see Hyland, cit., p. 41.

²⁷ For this view see E. Horváth, *Mandating Identity: citizenship, kinship laws and plural nationality in the European Union*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 90.

legitimacy, under international law, of the intervention of the diplomatic agents of a Member State other than the State of nationality on grounds of lack of a genuine link between the individual and the intervening Member State, the diplomatic organs of Member States cannot deny their protection of EU citizens invoking international law. Member States are mainly bound by art. 23 TFEU, which is *lex specialis* with respect to international law, at least in their relationships with EU citizens. In short, the diplomatic agents of an EU Member State cannot *a priori* deny the consular assistance, established by art. 23 TFEU, in respect of a non-national EU citizen because of the absence of the consent of a third country of allowing their intervention. In practice, this consent might be unnecessary under international law or it may result from *ex post* acquiescence. The lack of this consent can only *a posteriori* justify the non-compliance of that Member State with the duty to provide diplomatic and consular assistance in respect of an EU citizen, if the Member State concerned demonstrates that the third country concretely prevented its diplomatic agents from providing this protection. Thus, the diplomatic agents of Member States are always under the duty to make, at least, a good faith attempt to protect a non national EU citizen regardless of the behaviour of third countries.

Once the scope of the right to diplomatic and consular protection is so defined, EU citizens cannot be prevented from enjoying the right by reason of the lack of direct effect of art. 23 TFEU. The legal instruments, pertaining both to the EU and international legal context, the adoption of which is required by the article, do not appear to be indispensable for allowing EU citizens to enjoy the protection of consular organs of Member States other than the State of nationality. State practice concerning diplomatic and consular protection and the ECJ's jurisprudence relating to other rights of EU citizens seem to confirm that the right, established by art. 23, like all the rights of EU citizens, rests on a fundamental principle of EU law and, thus, can be only limited or denied for objective reasons. In fact, the lack of EU States' acts facilitating coordination or the absence of the consent of the third country against which consular protection should be exercised, can only be considered objective reasons for denying the right, established by art. 23 TFEU, when diplomatic organs of Member States provide evidence of having taken all possible measures to safeguard the right. Ultimately, the right to consular and diplomatic protection is just a further means for ensuring the equal treatment of EU citizens, which was the *raison d'être* for EU citizenship.

c. The Scope of the Concept of Diplomatic and Consular Protection in EU Law

1. Preliminary remarks

Art. 23 TFEU states that, “[e]very citizen of the Union shall...be entitled to protection by the diplomatic or consular authorities of any Member State...”. The content of this norm is duplicated by the text of art. 46 of the Charter of Fundamental Rights.²⁸ Art. 23 uses the adjectives “diplomatic” and “consular”, apparently, as synonyms. Under international law, however, diplomatic protection and consular protection, or rather, consular assistance, are two completely different legal concepts. 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*”, as stated by art. 1 of the Draft Articles on Diplomatic

²⁸ Such correspondence is not a casualty. In fact, the explanations relating to art. 46, which were prepared under the authority of the Presidium of the Convention that produced the text of the Charter, specify that the right at issue is the same as guaranteed by the EC Treaty in accordance with art. 52(2) of the Charter. The latter article, in fact, affirms that “[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties”. Thus, not only the text of arts. 46 of the Charter and 23 TFEU, but also the scope of the right guaranteed is the same. The Charter's explanations do not have legal force, but they are an instrument of authentic interpretation of the Charter itself. For the Charter's explanations see 2007/C 303/02.

Protection (hereafter Draft Articles) adopted by the International Law Commission (hereafter ILC) in 2006.²⁹ By contrast, consular assistance usually entails the support that national consular organs offer to individuals when they are dealing with their personal affairs in the territory of another country. We must admit that the use of the word “diplomatic”, in the definition of diplomatic protection, is certainly the main reason for misunderstanding. In fact, this word seems to associate diplomatic protection with the functions of diplomatic agents. Nevertheless, neither diplomatic nor consular organs usually have the competence to exercise diplomatic protection.

In order to clarify the difference between these legal issues and to understand whether or not art. 23 TFEU intends to make reference to such concepts as defined by international law, one must first of all examine international norms concerning diplomatic protection and diplomatic and consular relations. Then, art. 23 has to be read in the light of the above-mentioned international norms.

2. Diplomatic protection and consular assistance under international law

In order to better understand how diplomatic protection works, it is essential to clarify who, and on the basis of which criteria, can exercise such protection, whose interest is actually protected, and by which means diplomatic protection is performed.

As to the “actor” that can carry out diplomatic protection, art. 3.1 of the Draft Articles specifies that “[t]he State entitled to exercise diplomatic protection is the State of nationality”. Therefore, in order to determine the actual State that can exercise diplomatic protection in a specific case, one must ascertain the nationality of the injured person.³⁰ International law leaves States free to choose the rules for the attribution of their nationality. Nevertheless, the International Court of Justice (hereafter ICJ), in the *Nottebohm* case,³¹ required, in cases of multiple or controversial nationality, the presence of a genuine link between the injured individual and the State that intended to exercise diplomatic protection in respect of him/her. Although the ILC has not considered the “genuine link” doctrine as a principle of customary international law that should be applicable to any case of ascertainment of nationality, nevertheless, it admits that the doctrine can be of some help for avoiding that, in cases of multiple nationality, solid and tenuous ties between an individual and different States are equated.³² Moreover, in art. 4 of the Draft Articles, the ILC affirms that State law that attributes nationality must not be “inconsistent with international law”. The freedom of States to acknowledge nationality, therefore, encounters limits in international norms, such as those prohibiting any form of racial or gender discrimination.³³

²⁹ Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

³⁰ For the view that nationality is the necessary link between a State and an individual in order to allow the former to exercise diplomatic protection in favour of the latter see C.F. Amerasinghe, *Diplomatic Protection*, Oxford University Press, Oxford, 2008, p. 66. See also the Commentaries to the Draft Articles on Diplomatic Protection, in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, p. 30-31. For recent case-law reaffirming the relevance of nationality as criterion to recognise the right to exercise diplomatic protection see *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007, in <http://www.icj-cij.org/docket/files/103/13856.pdf> (visited on 18th August 2009), para 41. For an overview see G. Ballardore Pallieri, *La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica*, *Scritti di diritto internazionale in onore di Tomaso Perassi*, Giuffrè, Milan, 1957, p. 111-132.

³¹ ICJ Reports, 1955, p. 23.

³² See Commentary to Draft art. 4, cit., para 5. Moreover, in cases of dual nationality, Draft art. 6 does not allow the State of nationality that does not have genuine link to exercise diplomatic protection against the other State of nationality that by contrast has such link. For an overview, see C. Forcese, *The Capacity to Protect: Diplomatic Protection of Dual Nationals in the “War on Terror”*, in *European Journal of International Law*, 2006, p. 369-394, at p. 389.

³³ See for example some treaty provisions, mentioned by ILC in its Commentaries: art. 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women, UNTS, vol. 1249, p. 13. See also article 20 of the 1969 American Convention on Human Rights, UNTS, vol. 1144, p. 123; article 5 (d) (iii) of the 1965 International Convention

As to the diplomatic protection of legal persons and, in particular, a corporation, art. 9 of the Draft Articles affirms that “*the State of nationality means the State under whose law the corporation was incorporated*”. This formal criterion of attribution of nationality with respect to corporations is generally recognised by international law, as the Barcelona Traction case demonstrates.³⁴ Such criterion allows easily identifying the relevant State. However, art. 9 also deals with the question whether diplomatic protection can be exercised by the State of nationality of shareholders instead of the State where the corporation was established.³⁵ The ILC, in its commentaries, specifies that this second solution is ancillary with respect to the criterion of incorporation.³⁶ More favourable criteria on the basis of specific treaty law applicable between the disputing Parties and allowing the diplomatic protection of shareholders were established by the ICJ in ELSI case.³⁷ In this case, the ICJ considered the interests of shareholders as worthy of protection since the injured corporation no longer existed.³⁸ Finally, in the Diallo case, a most recent judgment of the ICJ, the Court affirmed that, when a direct and personal right of the shareholder is at stake, such as the economic rights arising from the status of shareholder, diplomatic protection of the State of nationality of the shareholder is admitted.³⁹

One of the most innovative provisions of the Draft Articles is certainly art. 8 that provides for the possibility for a State to exercise diplomatic protection in respect of Stateless persons and refugees who are lawfully and habitually resident in its territory. This proviso seems to express a rule of customary international law that, in these very specific cases, departs from the general principle under which diplomatic protection can be only exercised by the State of nationality.⁴⁰ The proactive character of this article might encourage States to exercise diplomatic protection also in respect of people with whom they have solid ties other than nationality even in those cases that do not concern Stateless persons or refugees, such as, for instance, the relationship between any Member State and EU citizens. However, diplomatic protection, which is exercised on grounds other than nationality, has not yet been recognised by customary international law. Therefore, in order to make this exercise lawful, an agreement between the intervening State, the State of nationality of the injured person, if any, and the State, against which the protection is invoked, seem to be required.⁴¹

Under art. 23 TFEU, the protection of EU citizens must be exercised by diplomatic and consular organs of Member States other than the State of nationality. To the extent that such protection amounts to diplomatic protection, we should conclude that EU law provides for an exceptional case of diplomatic protection that is based on grounds other than nationality. As seen above, an argument can be made that as long as there is a solid link between the intervening State and the individual seeking protection, the State against which diplomatic protection is invoked cannot object to the right of the intervening State to exercise diplomatic protection. In the case of art. 23 TFEU, the relevant link is not nationality, but EU citizenship. Therefore, if one can demonstrate that EU citizenship is generally

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on the Elimination of All Forms of Racial Discrimination, UNTS, vol. 660, p. 195. For the view that nationality attributed with fraud or negligence cannot be internationally accepted see Amerasinghe, *cit.*, p. 95.

³⁴ ICJ Reports, 1970, para 70.

³⁵ Art. 9 states that “*when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality*”.

³⁶ See the Commentary of art. 9 of Draft Articles, para 5. For an overview, see F. Francioni, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale*, Giuffrè, Milan, 1979.

³⁷ ICJ Reports, 1989, p. 15.

³⁸ See para 118, *ibidem*.

³⁹ Case concerning Ahmadou Sadio Diallo, *cit.*, para 66.

⁴⁰ See A. Künzli, *Exercising Diplomatic Protection. The Fine Line between Litigation, Demarches, and Consular Assistance*, in Zaörv, 2006, p. 321-350, at p. 343.

⁴¹ For the view that the absolute impossibility of third States of exercising diplomatic protection with respect to non-nationals see C. Forcese, *cit.*, at p. 389.

recognised by international law as a sufficient link between a State and an individual for the purpose of the exercise of diplomatic protection, non-EU countries should acknowledge the right of any Member State to exercise diplomatic protection *vis-à-vis* any EU citizen, regardless his/her nationality. However, EU citizenship does not seem to have so far reached such recognition under international law. On the contrary, even under EU law diplomatic protection of EU citizens that is based on different grounds than nationality requires an agreement between the State of nationality, the intervening State and the non-EU country against which diplomatic protection should be exercised. As already observed in the previous section, the need for such agreement is required by art. 23 TFEU itself. Nevertheless, as already pointed out, the necessity of such an agreement can be circumvented by construing the intervention of the non national Member State in terms of agency, i.e. as a representative of the State of nationality of the EU citizen that asks for protection. In this case, the formal title for the exercise of diplomatic protection would still belong to the State of nationality that would, in substance, perform it by means of the diplomatic and consular agents of another Member State. Thus, such agents would act as indirect organs of the State of nationality.

Finally, as to the persons that are entitled to exercise diplomatic protection under international law, one must mention the special case of international organisations. In its commentaries, the ILC specifies that it does not intend to deal with this issue in the Draft Articles.⁴² So far, international law only admits the possibility, for an international organisation, to bring an action against a State, which has caused damage with respect to the agents of the organisation itself.⁴³ This type of protection is more similar to the intervention of States in case of injuries of their organs than diplomatic protection of private individuals. The intervention of the international organisation is in fact aimed at safeguarding the functioning and dignity of the organisation that has been indirectly injured by means of the offences, which were perpetrated against its agents. For this reason, the intervention of the international organisation can be performed without the consent of the State of nationality of the injured agent since such intervention does not affect the interests of the individual as such, but as organ by means of which the organisation exercises its powers.⁴⁴ For the same reason, the action of an international organisation for the protection of one of its agents should be also brought against the State of nationality of the agent him/herself since, in this specific case, the relevant relationship for international law is not the nationality link, but rather the functional link.⁴⁵

Although no EU or international norms recognise the right of the EU to exercise diplomatic protection *vis-à-vis* EU citizens, one could assume that the status of EU citizen would present a sufficiently solid link between the citizen and the Organization so as to allow the latter to intervene in diplomatic protection. We perfectly know that the EU so far lacks of the necessary competences to intervene in any international situation involving the nationals of Member States. Moreover, as affirmed above, EU citizenship does not seem to be internationally accepted so as to allow either a Member State or the EU to exercise diplomatic protection solely on the grounds of such link.

⁴² See paragraph 3 of the Introduction of the Commentaries to the Draft Articles.

⁴³ See the ICJ's Advisory Opinion in the case of Reparation for Injuries suffered in the Service of the United Nations, ICJ Reports, 1949, p. 174 ff.

⁴⁴ For this view, see *ibidem* at p. 185-186. See also Amerasinghe, cit., p. 151-152.

⁴⁵ See the ICJ's Advisory opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, ICJ Reports, 1999, p. 62. This case did not concern diplomatic protection, but the immunity of UN experts. In fact, Mr Cumaraswamy, a Malaysian jurist, was prosecuted in Malaysia for the views that he expressed as a UN agent during an interview. Nevertheless, ICJ's wording is worth mentioning when the Court states that the immunity of a UN officer can be also invoked against the State of nationality of such 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, p. 177.

Notwithstanding the effort of the legal doctrine to extend the number of persons that can exercise diplomatic protection on the basis of criteria different from nationality, customary international law only recognises the admissibility of diplomatic protection for the state of nationality.

A further fundamental issue concerning diplomatic protection is the question whether the injured person has an individual right to be protected by his/her State of nationality. If such right existed, the State's intervention would be just an instrument for the protection of the right of the individual. Most importantly, the State of nationality would be compelled to exercise diplomatic protection and its failure to act would consist in a breach of international law. By contrast, if no individual right to diplomatic protection were deemed to exist under international law, the exercise of such protection would be aimed not at safeguarding the rights of the individual, but rather the interest of the State of nationality in having its citizens respected when they are abroad. Thus, the holder of the right to complain and achieve satisfaction would be no longer the individual, but his/her State of origin.

Although the ILC had discussed this issue for a long time, its members did not reach an agreement on the existence, under international law, of a duty to exercise diplomatic protection.⁴⁶ In fact, in its commentary to art. 2 of the Draft Articles, the ILC comments that the State of nationality has the right, but not the obligation to exercise diplomatic protection. Similarly, recent State case-law has denied the existence of a duty incumbent on the State of nationality to exercise diplomatic protection.⁴⁷ Nevertheless, in art. 19 of Draft Articles, the ILC at least suggests that States consider diplomatic protection as a feasible way of safeguarding individual rights.

To sum up, the exercise of diplomatic protection is subject to the discretion of the State of nationality. Therefore, the effectiveness of such protection as instrument for the safeguarding of individual prerogatives is to be doubted.

As to the right that is recognised by art. 23 TFEU, although no national or EU court has so far given its opinion relating to the nature of the individual right of the right to diplomatic and consular protection, we have inferred it from the textual and contextual analysis of art. 23. Therefore, if we acknowledged that art. 23 provides for a form of diplomatic protection of EU citizens, we should conclude that EU law provides for an individual right to diplomatic protection thus departing in this respect from general international law. We will see below whether or not art. 23 TFEU intends to deal with a similar right to diplomatic protection.

Finally, in order better to distinguish between diplomatic protection on the one hand, and diplomatic and consular assistance on the other hand, one must ascertain what typical requirements and features characterise diplomatic protection.

⁴⁶ Some countries recognise the existence of an individual right to diplomatic protection. See the judgments of the German Constitutional Court and British Court of Appeal respectively in the Rudolph Hess and Abbasi cases, as quoted by Künzli, cit., p. 329. For an overview see A. Bassu, *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica: sviluppi recenti*, Giuffrè, Milan, 2008.

⁴⁷ For an example of this case-law see the decision of the Supreme Court of Appeal of South Africa in *Van Zyl v Government of RSA* [2007] SCA 109 (RSA), in http://www.justice.gov.za/sca/judgments/sca_2007/sca07-109.pdf (visited on 29th December 2009). The applicants claimed that the South African Government did not comply with its duty to exercise diplomatic protection in their respect against Lesotho. The Court of Appeal affirmed that citizens have the right to request the government to consider the possibility of exercising diplomatic protection in respect to them. Nevertheless, both under South African and international law, the government is free to decide whether and through which means it intends to protect its citizens. See paras 51 and 52 of the judgement. See also the 2004 judgment of the South Africa's Constitutional Court where the issue of the existence of a duty to exercise diplomatic protection was analysed both under international and State law in *Kaunda and Others v President of the RSA* 2004 (10) BCLR 1009 (CC), 2005 (4) SA 235 (CC), in <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/Cey2GG5dyr/MAIN/0/57/518/0/J-CCT23-04> (visited on 30th December 2009).

One of the fundamental requirements for the exercise of diplomatic protection is the prior exhaustion of domestic remedies of the person invoking protection.⁴⁸ As stated by art. 14 of the ILC Draft Articles, domestic remedies are “*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*”. For the purposes of the present analysis, it is important to clarify that, if an individual is somehow assisted by his/her national organs during the exhaustion of local remedies, that form of assistance cannot be considered diplomatic protection since the exhaustion of local remedies is a precondition for the exercise of diplomatic protection. Therefore, diplomatic protection cannot simultaneously take place while the individual is exhausting local remedies.

Moreover, one must ascertain what type of activities diplomatic protection comprises. Some authors believe that diplomatic protection only takes place when the State of nationality raises a complaint before an international court or tribunal. In the absence of such judicial complaint, the action of the State would only entail consular assistance.⁴⁹ Other authors maintain that diplomatic protection can be exercised by any means, including diplomatic instruments of dispute settlement.⁵⁰ In the present author’s view, in order to characterise State action as diplomatic protection, one must consider neither the organs nor the activities that are used or performed by a State, but rather the purpose with which the State’s organs carry out certain activities.⁵¹ In the case of diplomatic protection, State organs do not intend to assist injured individuals, but rather they act autonomously, bringing the issue at the inter-state level, through legal or political means.

Apparently in contradiction of this view, in the LaGrand and Avena cases,⁵² the ICJ recognised the diplomatic protection rights of Germany and Mexico in order to bring a complaint against the US as to the violation of the individual right of their citizens to consular assistance. Most specifically, the individual right at issue was provided for by an international treaty, that is the 1963 Vienna Convention on Consular Relations, the Optional Protocol to which establishes that the ICJ has jurisdiction over the disputes arising from the application and interpretation of the convention itself. In this regard, the US sustained that the jurisdictional clause of the Optional Protocol was only applicable to inter-state disputes. By contrast, the complaint concerning the violation of the individual right, that is established by the 1963 Convention, could be only brought before the ICJ by means of diplomatic protection, which is an instrument of customary international law. Thus, in the US view, the ICJ did not have jurisdiction over the complaints concerning individual rights since its jurisdiction could not be based on the Convention on Consular Relations. Nevertheless, the ICJ disagreed with the US view and, in the LaGrand case, affirmed that diplomatic protection being a concept of customary law “*does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty*”.⁵³ Despite this statement, the ICJ still considered the exercise of diplomatic protection and the judicial action arising from such protection as inter-state acts. In fact, both in the LaGrand and Avena cases, after having acknowledged that the US had violated the individual right of German and Mexican citizens to consular assistance, the ICJ

⁴⁸ See arts. 14 and 15 of the Draft Articles. For an overview of the issue of the exhaustion of local remedies see R. Pisillo Mazzeschi, *Esaurimento dei ricorsi interni e diritti umani*, Giappichelli, Turin, 2004.

⁴⁹ For this view see C. Warbrick-D. McGoldrick, *Diplomatic Representation and Diplomatic Protection*, ICLQ, 2002, p. 723-744.

⁵⁰ E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1919 (reprint 2003), p. 436, as quoted by Künzli, *cit.*, p. 324.

⁵¹ For an overview see L. Condorelli, *L’evoluzione del campo d’applicazione della protezione diplomatica*, in J.F. Flauss (ed.), *La protezione diplomatica: mutazioni contemporanee e pratiche nazionali: actes de la journée d’études du 30 mars 2001 organisée à la mémoire de Georges Perrin*, Bruylant, Bruxelles, 2003, p. 3-28.

⁵² LaGrand and Avena cases, in ICJ Reports, respectively, 2001, p. 466 ff. and 2004, p. 12 ff.. For an overview of these cases see *infra*.

⁵³ See the LaGrand and Avena cases, *ibidem*, respectively, paras 42 and 40.

recognised the right of the applicant-State (not of the citizens of that State) to reparation both for the violation of its own right and the individual right of its citizens.⁵⁴ Thus, notwithstanding the fact that, in some circumstances, national States exercise diplomatic protection to claim the violation of the interests of their citizens, diplomatic protection is still deemed a State action, which can only indirectly result in the protection of individual rights.⁵⁵

While diplomatic protection is a legal and political action of a State exercised in exceptional circumstances, diplomatic relations involve several ordinary activities, which the State performs through specific organs: diplomatic agents. The typical functions of diplomatic agents are listed in art. 3 of the 1961 Vienna Convention on Diplomatic Relations,⁵⁶ such as representing and protecting the interests of the sending State, promoting relations with the host State.⁵⁷ In short, diplomatic organs represent the sending State in the host State and maintain relationships with the latter State in the name of the former.⁵⁸ Art. 3(b) explains that diplomatic functions consist in “[p]rotecting in the receiving State the interests...of...nationals, within the limits permitted by international law”. The wording of this paragraph seems to imply a type of “*in situ*” assistance, guaranteed within the territory of the host State, rather than diplomatic protection, as intended by international law. These activities ought not be confused with those declarations that, in some circumstances, States make, through their diplomatic agents, to express their formal complaint to the host State, as the initial act of the proceedings of diplomatic protection. In this case, diplomatic organs do not protect citizens, but, rather, they exercise their function of “*representing the sending State in the receiving State*”.⁵⁹ Thus, their action is a form of “*ex situ*” protection since it comes from outside the host State notwithstanding that the complaint concerned a violation occurring within the territory of the latter State.

The function of safeguarding the interests of citizens in the territory of a third country is also described in art. 5 of the 1963 Vienna Convention on Consular Relations.⁶⁰ In fact, in this field, the competences of diplomatic and consular authorities are almost the same. Art. 5 of the 1963 Convention is quite

⁵⁴ See the LaGrand and Avena cases, *ibidem*, respectively paras 126 and 115.

⁵⁵ For this view see B. Conforti, *Diritto Internazionale*, Editoriale Scientifica, Naples, 2006, 215-216. For the view that other instruments, such as the mixed tribunals of ICSID and 1981 Alger Iran-US Agreement, have replaced diplomatic protection, see Amerasinghe, *cit.*, p. 154.

⁵⁶ Done in Vienna on 18 April 1961, in UNTS, vol. 500, p. 95.

⁵⁷ Art. 3 states: “*The functions of a diplomatic mission consist, inter alia, in:*

(a) *Representing the sending State in the receiving State;*

(b) *Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;*

(c) *Negotiating with the Government of the receiving State;*

(d) *Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;*

(e) *Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations”.*

⁵⁸ For an overview on this subject-matter see G.R. Berridge, *Diplomacy: Theory & Practice*, Palgrave, Basingstoke, 2005; E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford University Press, Oxford, 1998; Société Française de Droit International, *Aspects récents du droit des relations diplomatiques*, Pedone, Paris, 1994; SIOI, *Convenzione di Vienna sulle relazioni diplomatiche*, CEDAM, Padua, 1984.

⁵⁹ This is particularly frequent in cases in which the injured person is still in the territory of the foreign responsible State. In this case, the individual will likely present his/her petition to the national diplomatic organs that are present in such territory, in order to achieve diplomatic protection. Such organs can be used by the State of nationality to raise its formal complaint against the responsible State. However, although such complaint comes from organs that are within the territory of the foreign State, we cannot consider this intervention as a form of “*in situ*” protection that usually characterises diplomatic and consular assistance.

⁶⁰ Done in Vienna on 24 April 1963, UNTS, vol. 596, p. 262.

detailed in the description of the typical administrative functions of consular posts.⁶¹ In particular, paragraphs a) and e) provide for the general obligations of, respectively, protecting the interests of and helping the nationals of the sending State.⁶² Such paragraphs must be read together with art. 36 of the 1963 Convention in order to define the concept of consular assistance that must necessarily be compared with the notion of diplomatic protection. Although art. 36 seems to regulate the rights of consular organs rather than those of individuals, since it is included in Section 1 of Chapter 2 of the 1963 Vienna Convention, which deals with facilities, privileges and immunities relating to a consular post, nevertheless, its paragraph 1 specifies that its purpose is “*facilitating the exercise of consular functions relating to nationals of the sending State*”, which are the functions, described in the above-mentioned paragraphs a) and e) of art. 5. Art. 36, establishes the right, both of consular organs and individuals, to communicate in case of need of the latter.⁶³ In addition, art. 36(b) provides for the right of consular agents to be informed of the arrest and detention of one of the citizens of their sending State. Most importantly, paragraph b) subjects this right to the request of the individual.⁶⁴ In recent years, art. 36(b) has been the object of extensive litigation before judicial bodies and discussion of legal doctrine. In particular, in the *LaGrand* case,⁶⁵ the ICJ recognised the existence of two separate rights. On the one hand, the ICJ affirmed the right of a State to be informed of the arrest and detention of one of its citizen in a third country in order to ensure him/her legal or practical assistance. On the other hand, the ICJ recognised that art. 36 provides for the right of the individual to be informed of the possibility of being assisted by his/her national consular organs. The ICJ’s decision is particularly important because it points out the clear difference between diplomatic protection and consular assistance. The latter is a right of the individual, as sanctioned by art. 36 of the 1963 Vienna Convention.⁶⁶ The ICJ reaffirmed the same conclusions in the *Avena* case, which concerned some Mexican citizens whose right to consular assistance had been disregarded in the course of criminal proceedings before United States courts.⁶⁷ Interestingly enough, this view of the ICJ was also espoused

⁶¹ For an overview on this issue see L.T. Lee, *Consular Law and Practice*, Oxford, 1991, G.E. Do Nascimento e Silva, *Diplomatic and Consular Relations*, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Dordrecht, 1991, p. 437-447, at p. 444-447, C.P. Economidès, *Consular Relations*, in *Encyclopedia of Public International Law*, vol. 9, Amsterdam, 1986, p. 35-37 e S. Lanza, *La Convenzione di Vienna del 1963 sulle relazioni consolari*, Milan, 1975, p. 9-13.

⁶² The content of paras a) and e) of art. 5 of the Convention on Consular Relations is quite similar to the wording of art. 3 of the Convention on Diplomatic Relations. For this view see also Künzli, *cit.*, p. 322.

⁶³ Paragraph (a) of art. 36 states that “*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*”.

⁶⁴ Art. 36 (b) affirms that “*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*”.

⁶⁵ See *supra* footnote 52.

⁶⁶ The ICJ affirmed that art. 36 “*provides that, at the request of the detained person, the receiving State must inform the consular post of the sending State of the individual’s detention “without delay”. It provides further that “any communication by the detained person addressed to the consular post of the sending State must be forwarded to it by authorities of the receiving State “without delay””. Significantly, this subparagraph ends with the following language: “The said authorities shall inform the person concerned without delay of his rights under this subparagraph” ... Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights*”. *Ibidem*, para 77. This view has been successively embraced by some other international body, such as the Inter-American Court on Human Rights. For the view of the latter organ, see Advisory Opinion OC-16/99 on “The right to information on consular assistance in the framework of the guarantees of the due process of law”.

⁶⁷ These Mexican nationals were sentenced to death by US courts without having being informed of the possibility of being assisted by the national consular organs of their State of nationality during the judicial proceedings, as art. 36 of the 1963 Vienna Convention states. After the unsuccessful exhaustion of domestic remedies of these Mexican citizens, Mexico brought an action against the US before the ICJ claiming the violation of art. 36 both with respect to Mexico itself and its

by the European Union in an official document that was addressed to the US Supreme Court as *amici curiae* brief in a case that concerned the domestic legal effects of the judgment of the ICJ on art. 36.⁶⁸

By contrast, the 1961 Diplomatic Relations Convention does not provide for the right of the injured person, but the right of the State of nationality to complain against the violations of the rights of its citizens. For this reason, in the LaGrand and Avena cases, the ICJ admitted both the direct action of the State (Germany and Mexico) against the violation of its own right to be informed of the detention of its citizens, as sanctioned by art. 36 of the 1963 Vienna Convention, and the indirect action, corresponding to the exercise of diplomatic protection, against the breach of the right of its citizens to be informed of the possibility of enjoying consular assistance, as established by art. 36(b).⁶⁹ Therefore, the differences between diplomatic protection and consular assistance are evident.

As is well known, the only requirements for the exercise of diplomatic protection are the breach of an international norm that provides for the right of an individual; the nationality of the individual concerned, which determines the State entitlement to intervene; and the prior exhaustion of local remedies. By contrast, consular protection can be ensured by consular organs even in the absence of any violation of international law. In addition, such organs must carry out their functions in accordance with the host State's law, as provided by art. 36 paragraph 2 of the 1963 Vienna Convention.⁷⁰

Moreover, one must recall that, while the right to consular assistance is expressly recognised by the ICJ as an individual right, diplomatic protection is still considered an exclusive prerogative of the State of nationality, which does not have any duty to exercise such protection *vis-à-vis* its nationals.

Finally, consular assistance and diplomatic protection also differ with respect to the time and place in which they occur. In respect of chronology, consular assistance consists of providing support for a citizen abroad either *ex ante*, that is before an injury to the citizen occurs, or *ex post*, when the citizen is already in danger or injured. However, in both these cases, consular assistance is aimed at supporting the action undertaken by the citizen. Thus, such assistance never entails an autonomous action of the State of nationality. As to the place, consular assistance can be defined as "*in situ*" protection, i.e., protection given in the host State where the beneficiary of the assistance is physically located. By contrast, diplomatic protection corresponds to the complaint of a State against a violation of the rights of one of its nationals by another State. This complaint can be only made when the violation of the rights of the individual and the exhaustion of domestic remedies already took place. In addition, the presence of the individual in the territory of the foreign country at the time of the complaint of the State of nationality is not necessary for the exercise of diplomatic protection. Thus, diplomatic protection is an action that brings the dispute at the international level, outside of the

(Contd.) _____

citizens. The ICJ recognised the US responsibility for both the violations and invited the latter State to review and reconsider the decisions with which US courts had sentenced Mexican citizens. See *supra* footnote 52.

⁶⁸ Brief of Amici Curiae, The European Union and Members of the International Community in support of petitioner, José Ernesto Medellín v. State of Texas, on Writ of Certiorari to the Court of Criminal Appeals of Texas, n. 06-984, 26th June 2007. In this brief, the EU recognises the nature of fundamental human right of the right to consular assistance, as sanctioned by art. 36 of the 1963 Vienna Convention. Mr Medellín was one of the Mexican citizens that led to the ICJ's decision in the Avena case. Notwithstanding the ICJ's verdict, US courts did not grant revision. In addition, some courts even denied the nature of individual right of the right to consular assistance. See *State v. Gegia*, 157 Ohio App. 3rd 112, 3004 Ohio 2124, 809 N.E. 2d 673 (9th Dist. Summit County 2004). For an overview of US case-law see B. Simma-K. Hoppe, From LaGrand and Avena to Medellín-A Rocky Road toward Implementation, in *Tulane Journal International and Comparative Law*, 2005, p. 31 ff. The EU Brief was aimed at supporting Mr Medellín application in his last chance to avoid execution that actually took place in July 2008.

⁶⁹ *Ibidem*, para 42. On this point see Künzli, cit., p. 338.

⁷⁰ Paragraph 2 of art. 36 affirms: "[t]he rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State...".

territory both of the responsible State and the State of nationality. In short, diplomatic protection can be classified as “*ex situ*” protection.

To sum up, diplomatic protection and consular assistance cannot be equated under international law. If the EU or its Member States, intend to establish new rules, which recognise the right to exercise one of these forms of protection interchangeably and by organs different to those which have such competence under international law, they ought to clarify their intention explicitly by the adoption of specific norms.

3. The scope of Art. 23 TFEU

The clear distinction between the concepts of consular assistance and diplomatic protection in international law, compels us to ascertain whether or not EU Member States intended to embrace such a conceptual distinction when they drafted ex-art. 20 ECT, which, as one must recall, is the only EU provision that mentions diplomatic and consular protection. Moreover, we will analyse if the EU has intended to extend the scope of these concepts so as to include forms of protection other than traditional diplomatic protection and consular assistance.

The textual construction of art. 23 TFEU (ex-art. 20 ECT) illustrates that three main features characterise the consular and diplomatic protection of EU citizens. First of all, such protection must be guaranteed to EU citizens who are “*in the territory of a third country*”. It means that the physical presence of EU citizens in the third country’s territory is essential for their enjoyment of the right to consular and diplomatic protection. We have already highlighted that, while for the exercise of consular protection, international law always requires the presence of the person needing assistance in the territory of the foreign State where consular or diplomatic agents exercise their functions, the same is not indispensable with respect to diplomatic protection. From the above, one can infer that the type of protection, which art. 23 TFEU aims to guarantee, is only the immediate and “*in situ*” protection corresponding to consular assistance. By contrast, if an EU citizen, who has suffered injuries in a foreign country and exhausted local judicial remedies without any success, seeks the protection of an EU Member State other than the national state, art. 23 TFEU will be of no help in securing the intervention of consular and diplomatic organs of that Member State. At that moment, there is no purpose for the claimant also to invoke the “*in situ*” assistance of the diplomatic agents of the national State. Rather he/she can only seek the “*ex situ*” intervention of the national political organs asking for diplomatic protection. Thus, the “territorial” prerequisite, sanctioned by art. 23 TFEU, seems to exclude diplomatic protection from the scope of this norm.

The second fundamental feature characterising the right established by art. 23, is this: an EU citizen can only ask other Member States’ organs for consular or diplomatic protection when his/her State of nationality “*is not represented*” in a third country.⁷¹ This requirement has several explanations. First of all, EU Members intend to avoid reciprocal interference in the relationship between each Member State and its own nationals and between a Member State and third countries. In short, the TFEU seems to recognise the priority of the intervention of the State of nationality for any form of protection of its citizens.

Secondly, the requirement of the absence of the diplomatic authorities of the State of nationality in a third country reveals the concern of some Member States for the financial implications that the guarantee of the right to consular assistance of EU citizens might have on their budget. EU States that have a wide number of diplomatic missions in third countries and, thus, the greatest faculty to ensure protection to EU citizens other than their nationals, only accept to be bound by the obligation to guarantee such protection in cases in which no alternative solutions are feasible.

⁷¹ For the view that this requirement makes the diplomatic and consular protection, provided on the basis of art. 23 TFEU, subsidiary with respect to the protection of the State of nationality, see Rey Aneiros, cit, p. 19.

Finally, one must observe that the requirement of the absence of national representatives in the territory of a third country is strictly linked to the above-mentioned condition of the presence of the injured individual in such territory. These two requirements, taken together, confirm that the type of protection, which the drafters of the EC Treaty intended to regulate with 20 ECT (now art. 23 TFEU), entails the immediate and “*in situ*” intervention of diplomatic authorities, so as to satisfy the urgent need of an EU citizen: in short, consular assistance.

While the two above-mentioned requirements define the scope of consular and diplomatic protection, as sanctioned by art. 23 TFEU, the third fundamental feature that can be inferred from the text of this article helps us to understand who is entitled to exercise such protection: i.e. the “*diplomatic or consular authorities*” of Member States. Since the EU does not have diplomatic missions that possess the same status and competences of States’ missions in third countries, in order to ensure the best protection of EU citizens, the 1992 drafters of ex-art. 20 ECT decided to attribute such competence to States’ organs. Nevertheless, Union delegations that nowadays are quite widespread in third countries⁷² are somehow involved in the fulfilment of diplomatic and consular protection of EU citizens. Art. 35(3) of the new EU Treaty (hereafter EUT), in fact, provides that these delegations must “*contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries cooperate with States’ diplomatic authorities*”. Nevertheless, “contribution” is not “direct intervention”. Since the content of art. 23 TFEU makes reference to diplomatic authorities of Member States only, the contribution of Union delegations in the protection of EU citizens may be presumably ancillary and supportive with respect to the intervention of Member States’ diplomatic organs.⁷³

In short, the wording of art. 23 TFEU allows us to affirm that it only deals with a form of protection, which implies the assistance of the diplomatic or consular authorities of other Member States in respect to EU citizens when they are in third countries and cannot rely upon their national consular or diplomatic organs because such organs are not present.⁷⁴ This protection can be categorised as consular assistance. As observed above, the right to consular assistance has been declared an individual right by the ICJ and other international bodies. Thus, art. 23 TFEU does not seem to create new rights for EU citizens. The article excludes from its scope diplomatic protection which, both under EU and international law, is not a right of individuals but only a prerogative of the State of nationality.

The only difference, between EU and international law, relating to the right to consular assistance affects the actors that can ensure such assistance. While, under international law, consular assistance can be only given by the State of nationality, EU law recognises the power to intervene of the consular organs of other Member States as well. This difference could encourage the third country, in the territory of which such assistance should be guaranteed, to deny the legitimacy of the other EU Member’s intervention under international law. Nevertheless, as affirmed above, the intervention of a Member State other than the State of nationality can be also justified under international law since the consular agents of the intervening Member State can be considered indirect organs of the State of nationality acting as substitutes of the organs of the State of nationality not present in the territory of the third country involved.

⁷² Union Delegations are over 130. See http://ec.europa.eu/external_relations/delegations/web_en.htm (visited on 11th August 2009).

⁷³ The Lisbon Treaty has also added a new norm, art. 221 of the Treaty on the Functioning of the EU, that sanctions the “*close cooperation*” of Union delegations “*with Member States’ diplomatic and consular missions*” with regard to any foreign policy issue.

⁷⁴ For this view see also Kadelbach, cit., p. 29.

Thus in the present author's view, no inconsistencies appear to exist between art. 23 TFEU and international law.

4. Legislative developments in the implementation of ex-art. 20 ECT

Although the text of ex-art. 20 ECT is almost duplicated in the Treaty on the Functioning of the European Union, at least with regard to the scope of the concept of diplomatic and consular protection, the follow-up of the legal and political discussions concerning this issue, which took place after 1992, has led us to question whether Member States (or maybe the EU) intend to extend the scope of such concept so as to entail both consular assistance and diplomatic protection.

One of the main legal instruments that has given rise to legal and political discussions is Decision 553, adopted by the Council in 1995 in order to render effective the right established by ex-art. 20 ECT.⁷⁵ This decision does not seem to extend the scope of the right at issue. In fact, its art. 1 reproduces the content of ex-art. 20 ECT. In addition, art. 5 of the Decision lists examples of situations in which protection must be ensured. The list includes cases of death, arrest, and repatriation of EU citizens, which typically entail consular assistance rather than diplomatic protection.

Moreover, art. 1 of the Decision also points out, in strong terms, that the obligation of Member States' organs of protecting EU citizens of another Member State only exists if no diplomatic authorities of the State of nationality of the injured person are present in a third country's territory. This further specification of a requirement that is already sanctioned by art. 23 TFEU seems to stress the point that this article must regulate protection which is "*in situ*" and urgent.⁷⁶

Although Decision 95/553 does not extend the scope of art. 23, it provides for some practical and legal instruments that have enhanced the protection of EU citizens when they are outside the EU. On the one hand, art. 6, establishing some mechanisms for the reimbursement of the expenses that Member States might incur in the exercise of consular assistance in favour of non-nationals, has encouraged EU States to intervene most enthusiastically and, thus, made the right to consular and diplomatic protection effective. On the other hand, art. 7 of Decision 553, fixing the time-limit of five years from the entry into force of the decision for its revision, has left open the door for new developments in this field.

In order to help Member States with the revision, the EU Commission submitted a Green Paper on this matter at the end of 2006.⁷⁷ This document mainly refers to the urgent and "*in situ*" protection, regulated both by arts. 23 TFEU and 5 of Decision 553. The Green Paper suggests some practical mechanisms for informing EU citizens and Member States' missions of the existence of the right to consular assistance.

Nevertheless, the most innovative proposals of the Commission are included in paragraph 5 of the Green Paper. In this paragraph, the Commission posits the transfer of the competence of diplomatic and consular assistance from States' authorities to the EU or, most precisely, to Commission (now Union) delegations. In order to achieve this result easily, the Commission suggests introducing, in future EU "mixed" agreements, a clause that might acknowledge this competence. The need for specifying this competence in the text of an international agreement and, not only in an EU act, is due to the fact that the Commission considers that the third States' consent is necessary to make this new EU power binding at the international level. Certainly, the Commission's proposal would enhance the role of EU in international relations and ensure a more uniform treatment of EU citizens than Member States do now. In fact, each State exercises consular and diplomatic protection on the basis of its

⁷⁵ Decision 95/553/EC, in OJ, L 314, 28-12-1995, p. 73 ff.. Actually, this instrument was not a proper decision, but rather a sort of international treaty that in fact entered into force only in May 2002 after the ratification of all Member States.

⁷⁶ For this view, see A. Künzli, cit., p. 347.

⁷⁷ Green paper, Diplomatic and consular protection of Union citizens in third countries, COM(2006) 712, in O.J., 2007, C 30, 10-2-2007, p. 8-13.

domestic law, which usually differs from that of other EU countries. However, one must observe that this type of clause cannot be deemed a general solution to the problem of diplomatic and consular protection of EU citizens. In fact, such clauses could be introduced only in those treaties dealing with issues that fall within the competence of the EU. So, if this solution was adopted, different organs (State or Union delegations) should exercise consular assistance in the cases that, despite their similarity, deal with subjects-matters that pertain to the diverse competences of the EU and Member States. For this reason, the suggestion of the European Economic and Social Committee, which commented the Green Paper, is noteworthy. The Committee believes that the creation of common diplomatic offices in third countries where diplomatic agents of all Member States would work side-by-side, would be advisable in order to ensure the protection of EU citizens.⁷⁸ The positive result of such a solution would be that consular assistance might be guaranteed in a uniform manner because the diplomatic agents of Member States, working together, could ensure the same type of protection. Moreover, since EU citizens would be assisted by the diplomatic agents of their State of nationality, there would be no problems of competence relating to international relations, which, by contrast, arise when EU organs intervene. The negative aspects of the solution that has been proposed by the Committee, mainly concern the fact that States might be reluctant to let their agents work side-by-side with the agents of other Member States due to concerns over confidentiality and security. Moreover, the creation of such common offices would be considered costly by parsimonious executives.

Another tricky issue that arises from the text of paragraph 5 of the Green Paper concerns the fact that the Commission also seems to envisage the possibility of allowing Union delegations to exercise diplomatic protection *vis-à-vis* EU citizens. In fact, the Green Paper mentions some fishing agreements that were concluded between the EU and some third countries and which, under the Commission's view, allow the EU to exercise "diplomatic protection" *vis-à-vis* EU vessels instead of EU flag States.⁷⁹ This issue will be examined below in detail. Here it is sufficient to observe that the norms of the fishing agreements to which the Commission makes reference in paragraph 5 of the Green Paper do not always deal with cases of diplomatic protection, but, in certain circumstances, they concern some forms of consular assistance. In fact, such norms regulate the supporting activities of Union delegations in cases of seizure and detention of an EU vessel,⁸⁰ which is a typical function of consular assistance, as provided for by art. 5 of the Vienna Convention on Consular Relations.

Notwithstanding this clear misunderstanding of the scope of ex-art. 20 ECT in the Commission's interpretation,⁸¹ the comments of legal experts that followed the adoption of the Green Paper revealed different views on this matter. While Nascimbene stressed the point that diplomatic protection is included in the scope of ex-art. 20 ECT, since the definition is expressly mentioned together with

⁷⁸ See para 4.4. of the Opinion of the European Economic and Social Committee on the Green Paper on diplomatic and consular protection of Union citizens in third countries, 2007/C 161/21, in O.J. 2007, C 161, 13-7-2007, p. 75-79, at p. 79.

⁷⁹ Actually, the expression of "diplomatic protection" was used by the Court of First Instance in its decision of the *Odigitria* case that we will analyse in depth in the following section.

⁸⁰ Article L of the Annex on Conditions for the exercise of fishing activities by Community vessels in the Côte d'Ivoire fishing zone to the Agreement between the European Economic Community and the Republic of Côte d'Ivoire on fishing off the coast of Côte d'Ivoire, in O.J., L 379, 31-12-1990, p. 3-13. Article L state: "*The seizure or detention, under the terms of the applicable Côte d'Ivoire legislation, of a fishing vessel flying the flag of a Member State of the Community shall be notified to the Delegation of the Commission of the European Communities in Côte d'Ivoire within 72 hours and simultaneously to the consular agent of the Member State whose flag the vessel flies.*

The circumstances and reasons which led to the seizure or detention shall be brought to the attention of the Delegation of the Commission of the European Communities in Côte d'Ivoire".

⁸¹ For the view in favour of a misunderstanding of the Commission see Künzli, cit., p. 340.

consular protection,⁸² Vermeer-Künzli, by contrast, denied the possibility of interpreting ex-art. 20 ECT as dealing with diplomatic protection due to the nature of the activities that are described in this article, Decision 95/553, and the Green Paper itself.⁸³

No legal documents were adopted after the Green Paper on this subject. Following some of its suggestions, the Commission only introduced in its website a fact-sheet that provides EU citizens useful information as to the protection that they can expect to achieve by dint of their EU citizenship when they are outside of the EU. The fact-sheet defines such protection by repeating the list of distress cases that are already mentioned in art. 5 of Decision 95/553, such as death, arrest, or repatriation.⁸⁴ However, in paragraph 6.2 of the fact-sheet, the Commission seems to suggest the possibility of exercising diplomatic protection on the basis of art. 23 TFEU. The text of this paragraph appears to be quite ambiguous when it states that in cases of arrest or detention, the embassy or consulate of any EU Member State must

“ensure that the treatment offered [to the detained EU citizens] is not worse than the treatment accorded to nationals of the country where [they] have been arrested or detained, and, in any case, does not fall below minimum accepted international standards – for example United Nation standards of 1955. In the event that such standards are not respected, [the embassy or consulate] will inform the foreign ministry of the country of origin [of the detained person] and, in consultation with them, take action with the local authorities”.

In particular, the second sentence of this statement causes ambiguity. On the one hand, the meaning of this sentence might be that Member States’ diplomatic agents accomplish their task by simply assisting EU citizens before national courts of a third country, which is a typical example of consular assistance. On the other hand, paragraph 6.2 of the fact-sheet might imply that the coordinate intervention of the EU Member State’s diplomatic mission and Foreign Affairs Ministry of the State of nationality of the detained person results in the formal complaint, against a third country, of the violation of the rights of this person. Such complaint would raise this issue at the inter-state level and, thus, could be considered diplomatic protection.⁸⁵ No other reference to this issue can be found in the text of the fact-sheet so as to help us in the interpretation of this statement. Nevertheless, if one takes into account all other paragraphs, one can observe that they just mention forms of consular assistance rather than diplomatic protection. Most importantly, in paragraph 6.2 itself, the Commission seems to acknowledge that, when the violation of a fundamental right of an EU citizen is at stake, other Member States’ diplomatic agents must seek the intervention of the State of nationality of the detained person. Thus, regardless of who informs the State of nationality of the violation, whether it be the citizen or other Member States’ agents, it is only the State of origin that can exercise diplomatic protection, pursuant to international law. In short, the action of other EU States’ agents only seems to respond to the general obligation of cooperation between Member States, keeping other States informed of the conditions in which their nationals are, rather than to the intention of exercising diplomatic protection in the interest of the sending State or the EU.

⁸² See para. 3 of the Remarks of Professor Bruno Nascimbene to the Green Paper, in http://ec.europa.eu/justice_home/news/consulting_public/consular_protection/contributions/contribution_academics_nascimbene_en.pdf (visited on 17th August 2009). For this view see also Rey Aneiros, cit., p. 26. Similarly, Professor Pietro Adonnino, in his comment to the Green Paper, affirms that EU citizens have right, under ex-art. 20 ECT, to assistance both of diplomatic and consular organs. Nevertheless, this statement does not completely resolve the issue under debate because, as affirmed above, in international law, the intervention of diplomatic organs can sometimes entail consular protection and, thus, may not correspond to diplomatic protection. See page 2 of Professor Adonnino comment in http://ec.europa.eu/justice_home/news/consulting_public/consular_protection/contributions/contribution_adonnino_it.pdf (visited on 20th December 2008).

⁸³ See para. 14 of the Comments of Dr. Annemarieke Vermeer-Künzli on Green Paper on Diplomatic and Consular Protection of Union citizens in third countries, in http://ec.europa.eu/justice_home/news/consulting_public/consular_protection/contributions/contribution_academics_leiden_en.pdf (visited on 17th August 2009).

⁸⁴ In http://ec.europa.eu/youreurope/nav/it/citizens/citizenship/outside-eu-protection/index_en.html (visited on 6th August 2009).

⁸⁵ This ambiguity is also highlighted by A. Künzli, cit., p. 348.

To sum up, the construction of ex-art. 20 ECT and the development of legal instruments and doctrine that has followed its adoption do not seem to resolve the problem of the scope of this article. In the present author's view, existing EU norms do not seem to allow including diplomatic protection in the meaning of the phrase "*protection by the diplomatic or consular authorities*" of another Member State that is contained in art. 23 TFEU. In particular, Decision 95/553 highlights that the main concern of Member States is to regulate the cases in which prompt and effective assistance is needed by EU citizens. The right to such assistance is one of the fundamental rights of EU citizens and must be ensured on the same conditions as the other rights of European citizens, which are guaranteed by the EU treaties.

III. EU Practice Relating to Consular and Diplomatic Protection

Although the textual interpretation of ex-art. 20 ECT and the normative instruments that have derived there from only seem to admit that it deals with the right of the EU citizen to consular assistance of Member States other than the State of nationality, one must ascertain whether the practice of EU organs and States has developed so as to guarantee the diplomatic protection of EU citizens, as well. Moreover, as already observed, the Commission, with the support of some scholars, has suggested interpreting ex-art. 20 ECT extensively so as to include, in its scope, the possibility of Union delegations of exercising both consular and diplomatic protection with respect to EU citizens in the third countries, to which the EU is bound by specific international agreements.

We will analyse these two different issues of extensive interpretation separately by taking into account both political and legal practice of the EU and Member States.

As to existing States' practice, we already mentioned the emergency situations arising from the 2004 Tsunami and the 2006 Lebanon War.⁸⁶ In these cases, France undertook the task of repatriating all EU citizens since its diplomatic offices in South-Eastern Asia and Lebanon were more numerous and larger than those of other EU countries. Moreover, the relationship between France and the relevant third States was closer for historical reasons and, thus more likely to avoid bureaucratic delays.⁸⁷ However, one must note that, in such emergencies, neither France nor other Member States made reference to ex-art. 20 ECT and the obligation of a Member State to provide assistance. Thus, the decision to allowing French intervention appears to be inspired more by political expediency than by legal considerations. In addition and most importantly, the activities that French diplomatic agents carried out during these emergencies appear to entail a form of consular assistance rather than diplomatic protection, as intended by international law. Therefore, such cases cannot be used as a justification of an interpretation of art. 23 TFEU to include diplomatic protection in its scope.

Another example of an attempt of coordinated intervention between some EU States is the case relating to an Italian priest, father Sandro De Pretis, who was arrested in Djibouti in October 2007.⁸⁸ Both Italy and France suspected that, in order to protect a non-governmental organisation, which a French judge was investigating, some members of the Djibouti government allowed the murder of the French judge and the illegal arrest of the Italian priest.⁸⁹ Therefore, at the beginning of 2008, the Italian and French governments initiated a coordinated diplomatic action in favour of father De Pretis

⁸⁶ As to a notorious precedent of these crises one can mention the first Gulf War in 1990 when Iraq invaded Kuwait. Some EU States did not have diplomatic representatives in Kuwait and, thus, asked for the assistance of other EU Members diplomatic organs in favour of their nationals. For a comment see C. Closa, *The Concept of Citizenship in the Treaty on European Union*, in CMLR, 1992, p. 1137-1169, at p. 1151.

⁸⁷ For an overall analysis of these cases see Hyland, *cit.*, p. 41.

⁸⁸ See <http://allafrica.com/stories/200712140857.html> (visited on 31st August 2009).

⁸⁹ Father De Pretis had demonstrated to have reservations about the good faith of such non-governmental organisation and, thus, was attacked both by the organisation and Djibouti government.

with respect to Djibouti.⁹⁰ As to the character of the French-Italian action, one can observe that it actually entailed a case of diplomatic protection by Italy with the support of France. However, no reference to EU norms and to the EU was made. Therefore, both States clearly acted in their own capacity without invoking their status of EU Members. In short, this case, as well, does not seem a relevant example of State practice relating to the enforcement of the art. 23 TFEU right.

We must admit that State practice cannot help us to understand what the real attitude of EU Member States is with regard to the right to consular and diplomatic protection, provided for in art. 23 TFEU.

However, EU legislative practice seems to demonstrate the positive intention of States of allowing other EU Members to exercise consular functions in their name. In particular, in 2003, the Council, amending 1999 Schengen Common Consular Instructions,⁹¹ added the possibility, for an EU State, of delegating other EU Members to issue the uniform visa in respect of third countries' citizens even when the diplomatic representatives of the delegating State are present in the territory of the third country.⁹² So, this decision sets aside the fundamental requirement, established by art. 23 TFEU, under which the consular authorities of a Member State can intervene instead of the organs of another EU State only when such organs are not present in the territory of a third country. In short, EU States seem to be ready to accept the idea that they can exercise several consular functions in a coordinated manner, in particular, when such functions only have administrative and operative character.

Another legal instrument that shows that EU Member States intend to develop EU law so as progressively to exclude the relevance of State nationality in favour of the recognition of an EU identity is Council Decision 2005/667 concerning criminal offences arising from ship-source pollution.⁹³ This decision was annulled because of the lack of competence of the Council.⁹⁴ However, Decision 2005/667 is relevant to us because its art. 11 contemplates that, in the future, the provisions of this decision should be applied by Member States so as to consider the vessels, flying the flag of any EU states as non-foreign ships.⁹⁵ Although this "uniform nationality" of EU vessels could be only applicable in the territorial sea and economic zone of Member States and the decision did not deal with

⁹⁰ See <http://www.villaggiomondiale.it/donsandrodeporetis.htm> (visited on 31st August 2009). This coordinated action just led to the partial liberation of father De Pretis in March 2008 that was sentenced to domiciliary arrest. Nevertheless, father De Pretis was definitively convicted in March 2009. For the latest news about this case see <http://www.mrd.djibouti.org/LireArticle.aspx?N=972> (visited on 31st August 2009). As to the reason of the intervention of the French government, one must recall that in 2006 Djibouti brought an action against France before the ICJ claiming the lack of cooperation in providing evidence and witnesses in the case of the murder of the French judge. This case only led to the conviction of France for having refused to execute a letter rogatory. Case concerning certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment of 4 June 2008, in <http://www.icj-cij.org/docket/files/136/14550.pdf> (visited on 31st August 2009). This judgment demonstrates that public opinion was not particularly in favour of Djibouti.

⁹¹ The Schengen acquis - Decision of the Executive Committee of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13), O.J., L 239, 22- 9-2000, p. 317-404.

⁹² Council Decision 2004/15/EC, in O.J., L 5, 9-1-2004, p. 76-77. For a comment to this decision see Rey Aneiros, *cit.*, p. 19.

⁹³ Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, O.J., L 255, 30-9-2005, p. 164-167.

⁹⁴ Decision 2005/667 was adopted under Title VI of the EU Treaty (Justice and Home Affairs) in order to fix criminal penalties for offences relating to marine pollution. However, the ECJ accepted the argument of the Commission and the Parliament, which affirmed that this decision mainly concerned maritime transport and environmental issues. Both these subjects notoriously fall in the EU competence. See C-440/05, *Commission v. Council*, ECJ Reports, 2007, p. I-09097.

⁹⁵ Art. 11.3 of the Decision stated that "By 12 January 2012, the Commission shall... make any proposals it deems appropriate which may include proposals to the effect that Member States shall, concerning offences committed in their territorial sea or in their exclusive economic zone or equivalent zone, consider a ship flying the flag of another Member State not to be a foreign ship within the meaning of Article 230 of the 1982 United Nations Convention on the Law of the Sea".

consular assistance, it proves to the contrary that Member States intend to regulate some issues adopting some “most European” solutions that may differ from general international law.

To sum up, one cannot deny that EU legal practice stresses the increasing importance of a coordinated action of Member States with the purpose of affirming EU identity. Nevertheless, as long as these legal provisions are not enforced, it will be difficult to ascertain to what extent EU States intend to set aside the principle of nationality and let other EU Members exercise public functions on behalf of them. In particular, the exercise of diplomatic protection is a too sensitive issue to induce one to believe that EU States are ready to delegate it to other Members.

The limited practice relating to the Commission’s suggestion of enhancing the role of the EU in diplomatic relations proves that the delicate nature of this matter has led the EU to refrain from intervening in situations that Member States prefer to resolve alone. Very recently, the EU Council made a declaration relating to the crisis affecting the follow-up of the elections in Iran. In particular, the Swedish Presidency of the Council expressed its concern over the ongoing trial in Tehran against an EU citizen, Clotilde Reiss, who is a French national.⁹⁶ Most importantly, the Presidency affirmed that “*actions against one EU country - citizen or embassy staff - is considered an action against all of EU, and will be treated accordingly. The EU will closely follow the trial and demand that the persons will be released promptly*”.⁹⁷ This declaration of the Council seems to be a real intervention in diplomatic protection of an EU citizen, or at least, the initial claim that usually leads to the exercise of diplomatic protection. Nevertheless, when action was needed, in particular, with regard to the payment of the bond that would have allowed Ms. Reiss to leave the prison, France autonomously intervened as State of nationality. So, the declaration of the Council appears to be very important from the political point of view because it expresses the opinion of the entire EU at the international level. Nevertheless, in legal and practical terms, the declaration is far from providing evidence that the EU has the unquestionable competence to deal with international relations in the name of Member States.

Similarly, in the above-mentioned De Pretis case, a member of the EU Parliament presented a parliamentary question addressed to the Council in order to ascertain what measures would have been adopted by the EU against the behaviour of Djibouti in this specific case.⁹⁸ The Council answered that the EU would have requested Djibouti to comply with Cotonou Agreement, which expressly subjects economic benefits to the respect of human rights within its territory.⁹⁹ Such answer seems to imply that the Council wanted to keep its relationship with Djibouti in the field of economic and development cooperation rather than to extend its competence to issues of mainly political nature, but at the same time it raises the question whether an economic development agreement constitutes the proper legal framework in which the EU may assert the human rights conditionality in relation to a specific case of diplomatic protection.

Although EU political practice does not help us to interpret art. 23 TFEU so extensively as to recognise the right of the EU to exercise diplomatic and consular protection, legal practice provides some forms of delegation of powers of Member States to the EU even with regard to international relations.

⁹⁶ Ms Reiss is accused to be a spy against the Iranian government. She is currently in the condition of domiciliary arrest. See <http://fr.euronews.net/2009/08/10/affaire-reiss-montee-des-tensions-entre-l-iran-et-l-occident/> (visited on 12th August 2009).

⁹⁷ See http://www.se2009.eu/en/meetings_news/2009/8/8/presidency_statement_on_the_post-election_trial_in_tehran (visited on 13th August 2009).

⁹⁸ Parliamentary question E-0829/08, 21st February 2008, in <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2008-0829+0+DOC+XML+V0//EN&language=EN> (visited on 1st September 2009).

⁹⁹ Council Reply E-08029/08, 16th April 2008, in <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-0829&language=EN> (visited on 1st September 2009).

First of all, we already mentioned the conclusion of some fishing agreements between the EU and third countries in which some form of diplomatic and consular intervention of the EU in favour of EU vessels is anticipated. In particular, the *Odigitria* case raised this issue.¹⁰⁰ This case concerned the complaint of Odigitria, a Greek fishing company, against the Commission due to the consequences of the arrest of an Odigitria's vessel in maritime waters, the sovereignty of which was contended between Senegal and Guinea Bissau. The Greek vessel was arrested by Guinea-Bissau authorities and sentenced to a monetary penalty for fishing without licence. In the action for extra-contractual liability of the EC, Odigitria specifically claimed that the Commission did not comply with its duties to provide diplomatic protection and to fix a bank fee for the prompt release of the Greek vessel. Such duties can be inferred from art. J of the Annex to the 1990 Protocol establishing the fishing rights and financial compensation¹⁰¹ to the 1980 Agreement between the European Economic Community and the Government of the Republic of Guinea-Bissau on fishing off the coast of Guinea-Bissau.¹⁰² Art. J states that,

“...[b]efore any judicial procedure, an attempt shall be made to resolve the presumed infringement through an administrative procedure...If the case cannot be settled by administrative procedure and has to be brought before a competent judicial body, the competent authority shall fix a bank security”.

Although the Court of First Instance did not find any violation of art. J, it nevertheless recognised that such article provides for a form of diplomatic protection by the EU with respect to vessels that fly the flag of a Member State. Such protection consists in the performance of negotiations between Guinea-Bissau and the EU, which acts on behalf of EU private operators. Similarly, as to the obligation of fixing a bank security, the Court established that the action of the EU is subsidiary to the intervention of the owner of the vessel.¹⁰³ In both these interventions, no legal role of the flag State is provided for. This case is certainly an example of the transfer of powers from Member States to the EU.¹⁰⁴ Nevertheless, we must recall that fishing is a subject that falls in the exclusive competence of the EU. It would be difficult to extend the same power to the EU with regard to the exercise of diplomatic and consular protection *vis-à-vis* EU citizens in matters that fall outside of the EU competence and especially in matters that affect the political sphere of States.¹⁰⁵ For this reason, the above-mentioned Green Paper of the Commission that invites Member States to conclude international agreements with third countries in which a clause specifies that diplomatic and consular protection of the citizens of a Member State should be provided by the EU, seems to disregard the fact that EU organs will be able to exercise such protection in any event only when EU competences are extended to all the fields of international relations.

Moreover, the Commission has proposed that the conclusion of commercial agreements between the EU and third countries should be conditional on some guarantees, such as the protection of the interests and rights of EU citizens in the territory of the third countries. This solution seems to entail a form of preventive protection rather than diplomatic and consular assistance. It appears to be aimed at imposing EU political views on third countries rather than at providing protection of EU citizens.¹⁰⁶

¹⁰⁰ Case T-572/93, Court of First Instance, in ECJ Reports, 1995, p. II-02025.

¹⁰¹ O.J., L 309, 11-11-1991, p. 8.

¹⁰² O.J., L 226, 29-8-1980, p. 34-42.

¹⁰³ T-572/93, cit., paras 83 and 85.

¹⁰⁴ See para 5 of the Green Paper, cit. *supra*.

¹⁰⁵ For this view see also Künzli, Comments on the Green Paper, cit. *supra*.

¹⁰⁶ For this view see also G. Harpaz, Enhanced Relations between the European Union and the State of Israel under the European Neighbourhood Policy: some legal and economic implications, in *Legal Issues of Economic Interpretation*, 2004, p. 257-273, at. 272.

In short, neither the political nor the legal practice of the EU and Member States appears to recognise the power of EU organs to exercise diplomatic and consular protection. Thus, if Member States wish to establish a similar power for the EU in the future, the adoption of new specific EU norms will be necessary. The same is not true as to the exercise of consular protection of Member States *vis-à-vis* EU citizens that are not their nationals. In this case, the lack of practice cannot cancel the existence of art. 23 TFEU that establishes the right of EU citizen to enjoy such protection. However, it is our view that, as long as no further implementation of the article is carried out, it will be difficult to extend the scope of this norm so as to include diplomatic protection, as dealt with by international law.

IV. Conclusions

The definition of the right to diplomatic and consular protection, established by art. 23 TFEU, still leaves several issues concerning both its scope and effectiveness unresolved.

Although no norms or judicial decisions expressly recognise the right to consular and diplomatic protection as a right *per se*, in the present author's view, such status can be inferred from the wording of art. 23 TFEU and the legal and treaty context to which the article belongs. The right to diplomatic and consular protection is one of the fundamental rights of EU citizens that Member States must guarantee by any means. We admit that in some circumstances implementing measures are necessary. However, we must stress the point that the need for implementation of the right to consular protection must be ascertained on the same bases on which the implementation of other EU citizens' rights has been rested by the ECJ. In the *Sevinger* case and other ECJ decisions,¹⁰⁷ the Court has highlighted that, since EU citizens' rights are fundamental rights of individuals, they cannot be denied on the basis of discrimination and unreasonableness. Both the State of nationality and any other Member State can only hinder the enjoyment of one of these rights for objective reasons. Due to the fact that consular assistance is mainly needed in very urgent situations, in which the violation of other fundamental rights of individuals can occur, such objective reasons must be really serious in order to justify the denial of assistance to an EU citizen. Thus, the right established by art. 23 TFEU, seems at least to entail the obligation of all Member States of making any attempt to guarantee diplomatic and consular protection.

Art. 23 TFEU makes this obligation effective under EU law. Nevertheless, Member States must ensure the right to diplomatic and consular protection of EU citizens in the territory of third countries. Therefore, it is also necessary to ascertain whether the right to consular and diplomatic protection is effective under international customary and treaty norms that bind third countries. As several EU provisions demonstrate, the current interpretation of the expression "diplomatic and consular protection" implies that Member States must provide consular assistance to EU citizens irrespective of nationality. Similarly, the right to consular assistance has been declared an individual right by several international bodies and, in particular, the ICJ. Therefore, no discrepancy seems to exist between EU and international law as to the scope of this right. Nevertheless, international law still considers nationality the most substantial link between an individual and the State intending to ensure consular assistance. By contrast, art. 23 TFEU also extends this power to EU Members other than the State of nationality. Nevertheless, in our view, when Member States afford consular assistance to non-nationals, they act as the representatives of the State of nationality, the consular organs of which are not present in the territory of a third country. Thus, no third country seems to be entitled, under international law as well, to deny the right to consular assistance of an individual whose State of nationality uses organs other than traditional bodies for the performance of such assistance. Any State is free to choose the means by which it guarantees consular assistance to its nationals.

¹⁰⁷ See *supra* footnote 9.

As to the scope of the right to diplomatic and consular protection, dealt with by art. 23 TFEU, we observed that Member States are only willing to transfer administrative and operative functions to other EU countries, such as, for example, consular assistance. When sensitive issues such as political relationships with their nationals or third countries, are at stake Member States still wish exclusively to govern such relationships. This intention is particularly clear as to the issue of the recognition of the right to exercise diplomatic protection of entities other than the States of nationality. Thus far, neither EU nor international law has made great steps forward.

The extension of the scope of art. 23 TFEU requires Member States to modify EU law relating to the attribution of competences to the EU with regard to international relations. As to commercial policy, we already noted some developments in the attribution of specific competences of the EU and in the recognition of powers of Member States other than the State of nationality in some cases such as those relating to the consular and diplomatic protection of fishing vessels that fly Member States' flag. By contrast, as long as Member States keep on considering foreign policy as a matter of their exclusive competence, it will be difficult to move them to transfer the powers concerning said policy to another State or to the EU itself.

Some recent EU legislative developments demonstrate that Member States have been increasingly accepting the idea that they can act in a coordinated manner in order to deal with some aspects of international relations. The above-mentioned amendment to the 1999 Schengen Common Consular Instructions and the enhanced role of Union delegations that is provided for in art. 35 EUT, as modified by the Lisbon Treaty, make us to believe that Member States have realised that actions, taken at the EU level, can be most effective for the protection of individuals, in particular when third countries are involved.

To sum up, answering to our original question whether art. 23 TFEU deals with diplomatic or/and consular protection of EU citizens, one must conclude that the article entails both a misleading use of the word "diplomatic" and a proactive approach aimed at strengthening the perception of an European identity. In fact, on the one hand, it is evident from its exact words that art. 23 only provides for the exercise of consular assistance of Member States other than the State of nationality *vis-à-vis* EU citizens. Thus, the exercise of diplomatic protection of EU Member States other than the State of nationality and the possibility of an autonomous diplomatic intervention of the EU in respect of EU citizens are absolutely out of the scope of art. 23 TFEU. On the other hand, the creative proposals of the Commission, relating to the wide interpretation of the concept of diplomatic and consular protection, which is sanctioned in art. 23, and to the attribution of some powers to the Union delegations in the field of foreign policy, might find some legal grounds in the legislative developments that have so far enhanced the cooperation between Member States and between Member States and the EU. We cannot exclude that this cooperation may lead Member States, in the future, to adopt new provisions that ensure a multi-level diplomatic and consular protection *vis-à-vis* EU citizens who have suffered injuries in a non-EU country. For example, such protection might initially consist in the intervention of the State of nationality and, in case of the ineffectiveness of such intervention, entail the exercise of some form of protection of other Member States or the EU itself.

In the end, an evolution of the current regime of consular and diplomatic protection, established by art. 23 TFEU, seems to be necessary. In fact, the limited scope and residual character of this regime has so far prevented the status of EU citizen from being consolidated in a legal position, recognized both in the EU and international legal order, and, thus, has impeded individuals in their enjoyment of the effective protection of their rights as EU citizens within the territory of the EU as well in third States.

