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**Protection of EU citizens abroad:
A legal assessment of the EU citizen's right to consular
and diplomatic protection**

by

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Abstract

The wide range of disasters that has recently hit third countries has shown that not even the Member States with the widest network of consular and diplomatic representation can ensure on their own the protection of their nationals located in the affected areas. The present paper addresses the question of whether the EU citizenship confers to the citizens of the Member States real benefits when they find themselves in distress outside of the Union's borders. It critically assesses the legal nature, content and effects in the domestic legal orders of the least developed right recognised to the EU citizen: the right to protection abroad (Art. 20(2)(c) TFEU). The paper will demonstrate that the EU citizen has a clear, individual and directly effective right to receive non-discriminatory protection in third countries abroad from any of the Member States that is represented in loco. Nevertheless, since for the moment, the right to protection abroad is limited to an application of the principle of non-discrimination based on nationality, the paper will show that in practice, the effectiveness of the EU citizen's right to protection abroad is hindered by the divergent regulatory frameworks of the Member States on consular and diplomatic protection of nationals, frameworks which have not, so far, been harmonised by a EU measure. The paper concludes by describing the new roles acquired by the Union after the Lisbon Treaty in the field of consular and diplomatic protection of citizens abroad and how this change influences the role of the Member States in a traditional State-like activity.

Key-words:

EU law – public international law – Lisbon Treaty – consular and diplomatic protection – EU citizenship – EEAS



'There are fifty-four cities on the island, all spacious and magnificent, identical in language, customs, institutions, and laws.'

Sir Thomas More, *Utopia* (1516)

1. Introduction

The recent and devastating natural and man-made disasters which so far have affected all the regions of the world, from countries of North Africa to the Persian Gulf (Tunisia, Egypt, Libya and Barhein) and Japan^I, have brought back to public attention the issue of aid that a EU citizen who is in difficulties in a country outside the EU can expect to receive when his home Member State is not represented in that non-EU country.

In these situations of emergency and extreme difficulty, any Union citizen who finds himself unrepresented^{II} by his home Member State in a third country would obviously like to know whether his 'additional'^{III} and 'fundamental'^{IV} status of EU citizen may give him any additional benefits to those flowing from national citizenship while outside of the Union's borders. Or do the rights and freedoms resulting from the EU citizenship stop at the borders of the Union's internal market?

For instance, when Haiti was hit by a tsunami in 2010, less than half of the Member States had a consular or diplomatic mission *in loco* to which their nationals could resort to for help. When the democratic revolution shook Libya in the spring of 2011, only 8 Member States were represented, while a total of 6000 EU citizens were in need of protection.^V The aforementioned crises are not isolated events, but they are part of a phenomenon which has developed in the last decade. More and more EU citizens travel outside of the Union,^{VI} while increasingly, certain of them establish themselves in third countries and thus need protection abroad on a regular basis.^{VII} While the number of EU citizens in need of protection abroad increases, the number of consular and diplomatic representations of the Member States decreases, mainly due to the financial crises that have recently affected each of them.^{VIII} The result is that a number, higher than even before, of EU citizens cannot obtain protection in third countries from their home Member States.



In light of the fact that more and more EU citizens find themselves without protection from their home Member State, the questions that this paper seeks to answer are: firstly, whether the nationals of the unrepresented Member States have a right to protection while in third countries under the EU law, and secondly, from whom should they ask for this kind of help. Should the EU's delegations be responsible for the EU citizens abroad^{IX}, or should the latter turn to the consular or diplomatic representations of the other Member States that are represented in third countries, because the European Union as an international organisation is not entitled under public international law to exercise a State reserved competence such as consular and diplomatic protection of nationals?^X

The paradox is that even if the Union's citizens travel now more frequent outside of the Union, they are not more aware of the rights the foundational Treaties of the EU confer them while located in third countries. From the very beginning of the concept of EU citizenship, the citizens have been endowed with a Treaty based right which reads as follows

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State'.^{XI}

Notwithstanding, 2006 and 2008 Eurobarometer surveys^{XII} revealed that the majority of EU citizens do not know they have this right, and, even if they know of its existence, they do not know what exactly are they entitled to receive under this right.^{XIII} When the EU citizens were asked what kind of assistance would they expect to receive from the Member State they turn to for help, the majority of them responded that they expect to receive the same kind of help, regardless of which of the Member States they approach (Flash Eurobarometer no. 294 'EU citizenship' of March 2010).

This paper will show (section two) that, for the moment, despite the wish of the majority of EU citizens, EU law does not confer them a right to uniform protection abroad, because the Treaty provides for a mere prohibition of discrimination based on nationality, and does not require the Member States to harmonise their national laws on consular and diplomatic protection of nationals. Section two will discuss the exact rights a EU citizen can claim under the Treaty based right of protection by the consular and



diplomatic authorities of the Member States while outside of the Union's borders and assesses the legal effects of these rights within the Member States' domestic legal orders.

After looking at the material scope of the EU citizen's right to protection in third countries, the paper continues by addressing the question of the actors competent to ensure the EU's model of consular and diplomatic protection of the EU citizens. Under public international law, the question has long received a clear answer (Vattel, 1758; Amerasingh, 2008), which has remained mostly un-changed^{XIV} for the last decades - it is only the State of nationality that has competence to exercise consular and diplomatic protection of its own nationals.^{XV} However, under EU law, the State of nationality is no longer the sole actor entitled to exercise consular and diplomatic protection of its own citizens. First, the Maastricht Treaty entitled other Member States than the Member State of nationality to exercise consular and diplomatic protection for the EU citizens, and, now, the Lisbon Treaty has expressly conferred a role for the European Union, an international organisation, in the exercise of protection abroad of the EU citizens.^{XVI} Section three of this paper assesses the way in which the Lisbon Treaty has changed the exercise of consular and diplomatic protection of the Union's citizens in third countries and the division of roles between the EU and the Member States in this field.

2. The rights of the EU citizen in distress in third countries under the EU law framework

18 years have passed since the Maastricht Treaty conferred on the EU citizen a right to protection in third countries when he is not represented *in loco* by his home Member State. Despite the long existence of this right and the fact that its material scope has remained unchanged by the several Treaty amendments,^{XVII} EU citizens have still barely exercised this right.^{XVIII} A recent analysis of Art. 23(1) TFEU identified as the main cause for the low level of claims by the EU citizens the different standards of protection abroad of nationals existing between the Member States (Faro & Moraru, 2011). It will be shown in the following paragraphs that the EU Treaties have provided for a mere prohibition of discrimination based on nationality, which does not necessarily require harmonisation of the national practice and legislation.^{XIX} Thus, the EU legal framework is



made up of 27 different forms of protection abroad of the EU citizens by their home Member States.

In light of the discrepant national regulatory frameworks on consular and diplomatic protection of citizens,^{xx} it is no surprise that the EU citizen is not aware or is confused about the rights he enjoys while he is in distress in third countries. Ironically, even if the Union's citizen is aware of what the EU law confers on him, this paper argues that the effectiveness of the right is hindered because of the following elements: 1) the fact that the principle of non-discrimination based on nationality provided in Art. 23(1) TFEU has a very limited standardization force, thus leaving the content of the EU citizen's right to protection abroad at the level of only the minimum denominator of what the Member States confer on their own nationals; since there is a large discrepancy between the domestic standards of protection abroad of nationals, the content of the EU right to protection abroad is close to nothing; 2) absence of domestic legal remedies available to the EU citizens in certain of the national judiciatures against acts or refusal to provide consular and diplomatic protection; and 3) currently, limited legal remedies existing at the Union level.^{xxi}

In light of the problems raised above, this paper plans to shed light on the material scope of the EU Treaties' Articles, as amended by the Lisbon Treaty, on consular and diplomatic protection of the EU citizens abroad. The paper will argue that the still persistent confusion surrounding the area is the inevitable result of accommodating divergent domestic frameworks on consular and diplomatic protection of nationals under the EU law umbrella: ranging from matter reserved to the executive's control to a fundamental right to protection abroad of the national enshrined in the Constitution. In light of the numerous and wide discrepancies existent between the national frameworks on conferral of protection abroad on nationals^{xxii}, the confusion surrounding the material and personal scope of the EU citizen's right to protection abroad will decrease only if the national practices are harmonised.^{xxiii}

The paper will seek to identify the material scope of the EU citizen's right to protection while outside the Union's borders by analysing: 1) the legal status of the EU citizen's protection in the world; 2) whether Art. 20(2)(c) TFEU confers a right or only a prohibition of discrimination based on nationality; 3) whether the equal treatment principle is applicable only to consular protection requests or also to diplomatic protection requests



of EU citizens; and finally whether the EU citizen's right to consular and diplomatic protection is directly effective within the domestic legal orders.

2.1. The legal status of the EU citizen's protection abroad by the consular and diplomatic officials of the Member States - right or entitlement to legitimate expectations?

The legal status of the EU citizen's protection in third countries – whether a right or entitlement – is not entirely clear^{xxiv} for either academics^{xxv} or practitioners, be they from the Member States,^{xxvi} or from the EU's Institutions.^{xxvii}

The difference between 'right' and 'entitlement to legitimate expectation' as legal status of the protection the EU citizen can enjoy in third countries is of utmost importance for what the citizens can claim in practice. The doctrine of 'legitimate expectations' applies to areas perceived as matters reserved to the executive power, where the latter enjoys discretionary powers to define the content of the policy. If the protection of the EU citizen in the world is considered an entitlement to legitimate expectations, then the EU citizen will be entitled only to having his claim properly taken into account by the administrative power while the latter considers his individual case.^{xxviii} The EU citizen will not have a right to receive, in practice, consular assistance. On the other hand, if the protection of the EU citizen in third countries is interpreted as a 'right', then the margin of discretion left to the State is significantly limited, as the citizen has the right, and the State a corresponding obligation to provide consular protection. In short, the difference between 'right' and 'legitimate expectations' is to be found in the starting premise of the citizen's claim. While in the case of legitimate expectations, the premise is that the citizen is not entitled to receive consular protection, and it is the citizen who bears the burden of proving otherwise, in the case of a 'right', the premise is that the citizen is entitled to receive consular protection, and the burden of proving otherwise is with the administrative authorities.

Let us now turn to the wording of Art. 20(2)(c) TFEU in order to establish whether EU law provides or not for an individual right of the EU citizen to protection abroad by



the represented Member States, or only an entitlement to legitimate expectations to receive this kind of protection, as argued by certain of the Member States.^{XXIX}

Under the EC Treaty framework, the unclear wording of the provision on protection of the EU citizens in third countries has left room for interpretation. For instance, the following could be seen as arguments in favour of the entitlement argument: 1) the use of the expression 'shall be *entitled to*' in Art. 20 EC Treaty, instead of 'shall have *the right to*' which was the expression used for all other rights of the EU citizens provided in Part two on citizenship; 2) the fact that Art. 17(2) EC Treaty, even if providing in mandatory terms that the EU citizens 'shall enjoy the rights conferred by this Treaty', did not include a list of these rights; 3) the fact that Art. 46 of the EU Charter, which has the same wording as Art. 20 EC Treaty, even if clearly entitled '*right to consular and diplomatic protection*' thus indicating that Art. 20 EC Treaty established *a right* for the EU citizens, *and not an entitlement*, was not legally binding^{XXX}, thus did not have the legal force necessary to clarify the contention '*right*' v '*entitlement*' of the protection abroad of EU citizens.

Pre-Lisbon, the EU law framework on consular and diplomatic protection of EU citizens was drafted in ambiguous terms subject to opposing interpretation, with an obligation for the Member States more clearly identifiable in soft law documents (Guidelines on Protection of EU citizens of 2006) and international agreements (Preamble, Art.2 of Decision 95/553/EC) than in the founding Treaties.

One of the innovations brought by the Lisbon Treaty clarifying what are the exact rights of the EU citizens under EU law is the re-structuring of former Art. 17 of the EC Treaty in the form of a non-exhaustive list of rights clearly stated as being the rights of the EU citizens. Instead of having the rights spread out in different Articles, as it was under the EC Treaty, Art. 20 TFEU starts by putting forward the list of rights that the citizens enjoy:

'Citizens of the Union shall enjoy *the rights* and be subject to the duties provided for in the Treaties. They *shall have* [...] *the right* to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State.' (emphases added)



It should be noted that current Art. 20 TFEU does not use the word ‘entitlement’ in relation to the protection abroad of EU citizens, nor does it make a distinction between the protection by the consular and diplomatic authorities of the Member States in third countries and the other EU citizen’s rights. Consequently the FEU Treaty clarifies the previous debate on whether the EU citizen has or has not a right to protection while in third countries. This conclusion is supported also by the now legally binding EU Charter on Fundamental Rights and Freedoms. Art. 46 of the EU Charter is entitled ‘*the right to consular and diplomatic protection*’ and is part of the EU primary law (Art. 6 TEU) that binds the Member States in their conduct towards the Union's citizens. Since there is no legal hierarchy between the EU Charter and the EU Treaties, and the wording of Art. 46 of the EU Charter is identical with the wording of Art. 23 (1) TFEU, then, by way of consequence, the headline of Art. 46 – *right to consular and diplomatic protection* – indicates that Art. 20(2)(c) TFEU enshrines an *individual* right to consular and diplomatic protection conferred upon the unrepresented EU citizen.^{XXXI}

2.2. Legal content of the right to consular and diplomatic protection – is it something more than the principle of equal treatment based on nationality?

It was mentioned in the introduction that according to a recent survey, the majority of the EU citizens expect to receive the same kind of help they will be given by their Member State of origin from the consular and diplomatic representations of any of the other Member States under Art. 20(2)(c) TFEU (Eurobarometer no.294, 2010). For the moment it is rather a utopian desire than the reality. Such a common framework for the exercise of consular protection for the benefit of the EU citizens presupposes either the existence of a Union law that establishes this binding common framework which, with the help of the EU Courts, will be applied and interpreted uniformly across the Union's territory, or that the 27 national legal frameworks on the exercise of consular and diplomatic protection of nationals are almost identical. Unfortunately, neither of these scenarios applies.



At the moment of writing, the EU law framework governing the topic of protection abroad of EU citizens does not establish a common set of rights and procedures for the consular and diplomatic protection of the unrepresented Union citizens. The relevant EU law is made of first, general provisions found in Union primary law (the founding Treaties^{xxxii} and the EU Charter), secondly, of two international agreements implementing former Art. 20 EC Treaty, which substantially restrict the EU primary law scope (two Decisions of the Representatives of the Member States meeting within the Council^{xxxiii}), though without harmonising the relevant national legislation and practice, and lastly, of an impressive range of soft law: Council Conclusions and Guidelines^{xxxiv}, and numerous papers issued by the Commission.^{xxxv} There is no space here to engage in a detailed discussion of these provisions and reasons of the existent EU legal framework^{xxxvi}, suffice it to say, at this point, that these measures do not establish, either separately or in combination, a uniform framework for the exercise of consular and diplomatic protection of EU citizens in the world, but they rather preserve the existing different national standards of protection of EU citizens.

As to the scenario that the 27 Member States might have a similar regulatory framework on consular and diplomatic protection of nationals, it has been pointed out at the beginning of this section that there are extensive discrepancies between the Member States' national law and practice on protection abroad of nationals. The divergence between the domestic frameworks is, in fact, a natural result of the different national foreign policy interests, historical ties developed by each of the Member States with different regions of the world, different ambitions and seize of population. Thus it would have been almost impossible to develop a shared model of consular protection of nationals. The resistance of the Member States to the adoption of a common harmonised EU model of consular and diplomatic protection of EU citizens results from their understanding of consular and diplomatic protection of their nationals as one of the ultimate attributes of a sovereign State. The loss of the State's discretionary power to contour the model of protection abroad of nationals is thus equated with loss of an important part of the State's sovereignty. In light of the Member States' approach to consular and diplomatic protection of nationals as a traditionally reserved State activity, the EU design of protection abroad of the EU citizens as a right uniformly exercised irrespective of the requested Member States is for the near future a merely utopian aim.



Having established what Art. 20(2)(c) TFEU does not confer to the EU citizens, we now turn to the question of what the provision does confer on the Union's citizens in distress abroad.

The wording of the EU citizen's right to consular and diplomatic protection abroad has remained almost the same from its very first inception as Art. 8c of the Maastricht Treaty until now:

'Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.'^{xxxvii}

From the use of the 'on the same conditions' expression, we can legitimately conclude that the Article provides for the application of the principle of non-discrimination based on nationality in the specific field of consular and diplomatic protection of EU citizens in the world. Certain academics (Condinanzi et al., 2009) argued that the right to consular and diplomatic protection as framed by the founding Treaty is not innovative as to its content, since it is a mere reiteration of the explicit general EU law principle of non-discrimination based on nationality laid down in Art. 18 TFEU (former Art. 12 EC Treaty) applying it to the specific situation of protection of the EU citizens abroad. Interestingly, it has to be noted that at the moment of introducing the concept of EU citizenship, the scope of other citizenship rights of EU citizens was also interpreted as mainly an application of the principle of non-discrimination based on nationality, even though this was still seen as a major step in the European integration process (Duff, 2009).

In the meantime, the scope of the EU citizen's rights, especially of the freedom to reside and move, has been developed by the Court so as to include also mere prohibition of serious inconvenience without actual discrimination based on nationality.^{xxxviii}

A similar evolution can be identified, though to a lesser degree, in regard to another EU citizenship right which shares similarities with the right to consular and diplomatic protection, since it is framed in the language of equal treatment, and applies also in the sensitive area of high politics of the Member States: the right to vote for the European Parliament elections enshrined in Art. 22 TFEU.^{xxxix} Despite the explicit equal treatment



wording and the high sensitiveness of the ‘political rights’ field, the Court of Justice in the *Aruba* case^{XLI} held that EU citizens have a right to vote for the European Parliament’s elections as ‘a normal incident of Union citizenship’ (Shaw, 2008).

We can thus notice a trend in the jurisprudence of the Court of Justice of the EU (CJEU) whereby certain rights of the EU citizens as recognised by Art. 20 TFEU have developed a scope going beyond the application of the principle of non-discrimination based on nationality.^{XLI} The question is: can we identify a similar jurisprudential thread also in regard to the EU citizen’s right to consular and diplomatic protection? In other words, has the Union citizen’s right to consular and diplomatic protection developed into something more than the principle of non-discrimination, so that the EU citizen enjoys wider protection abroad than equal treatment solely based on the fundamental status of Union citizenship, as happened for example in regard to the right to reside and move?

For the moment, a similar jurisprudential evolution cannot be traced in regard to the right to consular and diplomatic protection, simply because the EU Courts have not so far specifically dealt with the EU citizens’ right to protection abroad.^{XLII} The majority of the national case law that has reached the EU Courts does not concern the right to consular protection, but other consular affairs matters, such as: issuing of visas,^{XLIII} financial obligations arisen for the Member States as a result of signing a memorandum of understanding between the Commission and the Member States on setting up a common diplomatic mission in Abuja (Nigeria),^{XLIV} establishing a hierarchy between the methods of sending judicial documents by post or by consular or diplomatic agents under Union law,^{XLV} and the duty of diplomatic protection of the Union in regard to vessels (not individuals) of the Member States.^{XLVI}

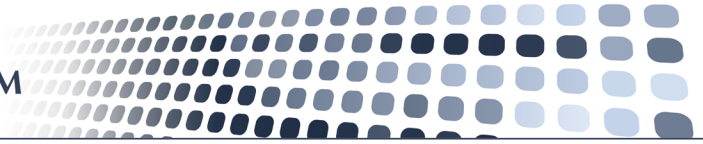
The fact that for the moment the legal content of the EU citizen’s right to consular and diplomatic protection is an expression of the principle of non-discrimination based on nationality does not mean that Art. 20(2)(c) TFEU in its initial form as Art. 8c of the Maastricht Treaty was not innovative, that the right will remain indefinitely at the level of the principle of non-discrimination based on nationality; or that the Member States can deny the right to consular protection to un-represented EU citizens simply because they do not confer a right to consular protection to their own citizens either. It what follows I will explain each of these foregoing conclusions.



If the founding Treaties had not provided for the right to consular and diplomatic protection, the mere existence of the general principle of non-discrimination based on nationality laid down at the start of the citizenship part of the Treaty^{XLVII} would not have been of much help to the EU citizens located outside of the Union's borders. The general principle of non-discrimination based on nationality applies, as Art. 18 TFEU (former Art. 12 EC Treaty) clearly says, *within the scope of EU law*. It is already settled norm that the general principle of non-discrimination based on nationality, and more generally the entire category of general principles of EU law do not operate in a self-standing fashion or in the abstract.^{XLVIII} The Member States are bound to respect the general principles only when they act within the scope of EU law^{XLIX}. The concept of 'scope of EU law' is an autonomous concept whose substance has been increasingly expanded based on the EU's Institutions exercise of powers and expansive interpretation of EU law by the CJEU. Currently, 'the scope of EU law' in relation to the Member States actions includes in general three main situations: 1) when Member States implement EU law;^L 2) Member States derogating, when permitted, from EU law;^{LI} 3) when Member States adopt measures touching upon a matter which has already been the subject of a specific substantive rule of EU law.^{LII}

Pre-Lisbon, the protection abroad of EU citizens was stipulated by only two Treaty articles: the substantive norm - Art. 20 EC Treaty enshrined the right to protection abroad ensured by the consular and diplomatic authorities of the Member States; and the procedural norm – Art. 20 EU Treaty which was a specific application of the principle of sincere cooperation between the Member States and EU Institutions in this field. In the absence of these Treaty provisions, or express Treaty objective of protection abroad of the EU citizens by the Member States which could justify the use of the flexibility clause in this area, the scope of EU law as described in the foregoing general situations could not have included the area of protection abroad of EU citizens. Consequently, the Member States' actions on consular and diplomatic protection of EU citizens would not be covered by the scope of EU law and thus the general principle of non-discrimination based on nationality will not be applicable to the Member States' actions in the field of protection abroad of EU citizens.

The innovative element brought by inserting Art. 8c in the EC Treaty sits thus in 'creating' *the scope of EU law*, in the absence of which the individuals would not have



benefited of the application of the general principle of non-discrimination based on nationality.^{LIII}

The right to consular and diplomatic protection of the Union's citizens has so far remained underdeveloped in comparison with the other EU citizenship rights and has not been the subject of the EU Courts' jurisprudence. However, the legal content of the Union citizen's right to consular and diplomatic protection does not necessarily have to remain at its current status of a simple expression of the equal treatment principle. The Council, depending of the content of the future directives it may adopt,^{LIV} and the EU Courts, which may apply their purposive interpretation^{LV} to Arts. 20(2)(c) and 23(1) TFEU and to the future Council Directives, may lead the way to an evolution of the EU citizen's right to protection abroad similar to that recently experienced by other EU citizenship rights (e.g. freedom to move and reside and the right to vote for the European Parliament).

The current understanding of the right to consular and diplomatic protection as a manifestation of the equal treatment principle does not though justify a rejection of consular protection by a Member State simply on the basis that it does not confer such assistance to its nationals under its national law.^{LVI} Consular and diplomatic protection in third countries is a fundamental right of the EU's citizens (Art. 46 part of Title V - Citizen's rights of the EU Charter.), rejection of this right by the Member States is justified only if the conditions provided by Art. 52 of the EU Charter are observed.^{LVII} An outright denial of protection by one of the Member States will empty the fundamental right of the EU citizen of any meaningful effect, thus raising serious concerns about the respect of the essence and proportionality requirement under Art. 52 EU Charter. Consequently, even if the founding Treaties frame the right to protection abroad as a principle of equal treatment, Art. 46 in conjunction with Art. 52 EU Charter do not legitimise the conduct of Member States that question whether to respond or not to EU citizens' requests for protection while in third countries, such a questioning which is tantamount to an outright denial of the fundamental right to consular and diplomatic protection.

Let us now look at how the principle of non-discrimination based on nationality might work in the specific situation of evacuating the EU citizens from crisis situations, which recently have greatly challenged both the Union and the Member States.^{LVIII} Art. 23(1) TFEU does not require a different conduct from the Member States in cases of crises than in day-to-day situations. In both circumstances, only the EU citizens that do not have



an accessible consular or diplomatic representation of their Member State are entitled to receive protection from another Member State. In crises, however, the Member States have not followed such a strict approach, but they aimed to ensure the evacuation of all EU citizens, being guided by the motto of ‘no citizen will be left behind’, irrespective of whether they were or not represented in the third country hit by crises.^{LIX} Despite their good intentions, the Member States operated on the basis of an *ad-hoc* type of cooperation, and not on a pre-established contingency plan.^{LX} This practice has to be reconsidered in light of the EU general principles and Treaty rights, so as to eliminate arbitrariness from the application of the fundamental right to protection abroad of the EU citizens. In addition to the respect of the EU citizen’s right to consular and diplomatic protection, the Member States will have to think how to ensure the respect of the EU citizen’s right to family life when planning the evacuation of the third country nationals who are family members of the EU citizen. Even if the right to consular and diplomatic protection is only a right of the Union’s citizen not extended to non-EU family members, the inclusion of the right to family life in Art. 7 of the EU Charter, and the future accession of the EU to the European Convention on Human Rights (Art. 8 ECHR being of specific concern in these circumstances) require the Member States to take all steps possible to ensure that in emergency evacuation, the non-EU family members will not be separated from EU citizens.^{LXI}

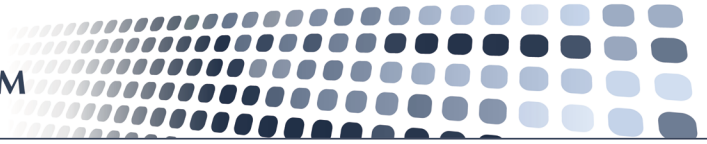
2.3. Does diplomatic protection fall under the scope of the EU citizen’s right to protection abroad?

In the previous section it was shown that the content of the EU citizen’s right enshrined in Art. 20 (2)(c) TFEU is the principle of non-discrimination based on nationality. In this section it will be shown that the issue whether the Article confers independent rights beyond the equal treatment right is not the only unclear aspect of the legal content of this right. The harshest critique visited by both academics (Stein, 2002; Vermeer-Künzli, 2006; Vigni, 2011; Closa, 1995) and Member States^{LXII} on the FEU Treaty provisions on protection abroad of the EU citizen concerns the lack of clarity of the material scope of this right. In other words, it is argued that the founding Treaties do not



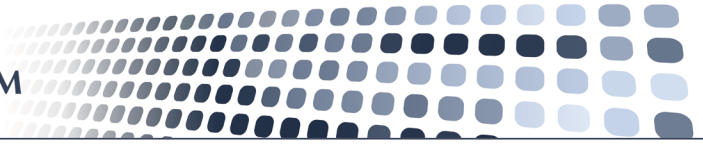
clarify what type of protection the individuals are entitled to request in third countries - consular *or/and* diplomatic protection-, and what is the exact scope of each of these mechanisms. It has been pointed out that Art. 20(2)(c) TFEU does not use the settled public international law concepts of ‘consular protection’ and ‘diplomatic protection’, but a new concept which is not an established legal concept under the public international law norms – ‘protection by the consular and diplomatic authorities of the Member States’ and consequently should not be understood as encompassing the consular and diplomatic protection mechanisms existing under public international law (Vigni, 2011). Once again it seems that the EU legal order establishes its own autonomous legal concept, similar to concepts already existing under public international law, but unclear in their precise meaning.^{LXIII} The present section will tackle the question whether, under the EU model of protection of the EU citizens abroad, the latter are entitled to receive both consular and diplomatic protection or only one of them, and whether these types of protection should be understood as having the same meaning as those already existing under public international law.

A brief retrospective of the Maastricht inter-governmental debate on the citizenship provisions might help to understand the wish of the Member States. At the time of drafting the Maastricht Treaty, Spain made a proposal for an Article on the protection of the unrepresented EU citizens while outside of the Union. The article was drafted in clear terms, expressly providing for ‘consular and diplomatic assistance and protection’^{LXIV} of the citizens of the European Union from any of the Member States.^{LXV} However, not all of the Member States agreed with Spain’s proposal to refer precisely to consular and diplomatic protection of unrepresented EU citizens. The compromise they managed to reach was a broader concept which permits both interpretations – with/without diplomatic protection. This kind of ‘enigmatic’ legislative drafting is followed by the Member States when they do not agree on the exact scope of a future Treaty provision. The result is that they leave it framed in broad terms that can be subject to different interpretation, which, depending on the evolution of the Member States’ view of the topic, can be interpreted in different ways leading to different legal consequences.^{LXVI} The Member States maintained this ambiguous attitude during the elaboration of the Decision 95/553/EC on the implementation of the EU citizen’s right to protection abroad. Several delegations of the Member States opposed Arts. 11-18 of the original draft of the *ad-hoc* group which expressly referred to diplomatic



protection (Stein, 2002). Since the aforementioned Decision is an international agreement which could have been adopted only by unanimous consent, those Articles and consequently diplomatic protection did not made their way into the final Decision. The Member States decided instead to focus on the mechanism that was the most requested by the EU citizens and at the same raised less problematic legal questions – consular protection.^{LXVII}

In the previous paragraphs we attempted to find out what rights precisely the Member States intended to confer on EU citizens in the relevant texts and concluded that their conduct during the Treaty negotiations and during the elaboration of the EC Decision strongly suggested indecision and divided opinions. However, so far we have looked only at the English official version of the Treaties. In Polish, Finish or Czech, the texts read differently for Art. 20(2)(c) and 23(1) TFEU, since the official versions of these Articles in the aforementioned languages use the clear concept of consular *and* diplomatic protection. In case of different language versions of a text of EU law, the ECJ has decided that uniform interpretation must be given to the text and hence, ‘in the case of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.’^{LXVIII} In our case, the purpose of Art. 20(2)(c) TFEU has to be seen in light of the newly introduced Union objective of ‘protection of the Union citizens in the world’ (Art. 3(5) TEU). The objective seems to refer to a general protection of the Union’s citizens in third countries, without distinction or limitations. In the same way, neither Art. 20(2)(c), nor Art. 23(2) TFEU make a distinction or exclude diplomatic protection from their scope, even if the Member States had multiple occasions during several Treaty amendments to introduce such a limitation. This interpretation whereby diplomatic protection is included in the content of the EU citizen’s right to protection abroad seems to be supported also by Art. 46 EU Charter, which is now part of the EU primary law. As previously mentioned, the wording of Art. 46 EU Charter is identical with Arts. 20(2)(c) and 23(1) TFEU, while Art. 46 EU Charter is conclusively entitled ‘right to consular and diplomatic protection’. It can be argued that the EU Courts may sustain a similar interpretation of the scope of Art. 20(2)(c) TFEU, since in cases concerning EU citizenship rights, or fundamental human rights, the Court has usually had in mind the effectiveness of these rights, sometimes even to the detriment of the Member States’ interests.^{LXIX}



In *Ayadi*^{LXX} and *Hassan*^{LXXI}, the General Court of the EU has recognised an obligation on the part of the Member States to exercise diplomatic protection for foreign citizens who reside within the Union's territory. If the Court was willing to go as far as recognising an obligation for the Member States in regard to third country nationals, it can be argued that, it will also do so for the benefit of the EU citizens.

Despite the temptation to make an analogy between the obligation to provide diplomatic protection established in the foregoing cases for the benefit of non-EU citizens and the right of the EU citizen to diplomatic protection, we have to recall that the foregoing judgments were decided in a specific context^{LXXII} which weighed heavily in the Courts' decision-making process. These specific and limited circumstances do not suffice to make a general statement that the Court will regard diplomatic protection as part of the Union citizen's right to protection abroad. Nevertheless, they may play an influencing role on the Court in its decision whether to stick to a limited interpretation of the material scope of protection abroad of the EU citizen or decide to make history in the public international law field by recognising a right to diplomatic protection to the individual from a non-nationality Member State.

So far we looked at the EU law framework to find out whether the right to protection abroad of the Union's citizens can be interpreted as encompassing also diplomatic protection. It has been pointed out that EU law favours such an interpretation. However, public international law academics (Dugard, 2006; Vermeer-Künzli, 2006) have argued that the EU model of protection abroad cannot be interpreted as encompassing diplomatic protection since such an interpretation is unlawful under public international law norms for the following reasons: firstly, the nationality condition required under public international law is not fulfilled, and secondly, the previous consent of third countries to the EU model has not been obtained.^{LXXIII}

This paper argues that even if the general norm under public international law is still one that permits only the State of nationality to exercise diplomatic protection for its own nationals, there are recent developments which indicate a shift from this traditional approach. Draft Art. 8 of the ILC Draft Articles on Diplomatic Protection, whereby refugees and stateless persons lawfully resident in a country can receive also diplomatic protection, signals that the traditional understanding of the nationality as a *ius sanguinis* or *ius soli* is no longer the sole type of link which can legitimize the exercise of diplomatic



protection for an individual. It seems that the ILC suggests that there can be a genuine link between an individual and the State on a basis other than that of nationality, as long as the relation between the individual and the State is solid. The issue of whether currently there is such a solid link between the Union's citizens and all other Member States as to justify the EU model of protection abroad of the Union's citizens is a complex one. Due to limited space, it cannot be discussed here.^{LXXIV}

The main argument of this paper in favor of the legitimacy of the EU model of consular and diplomatic protection of the EU citizens is not based on the 'solid link' argument, but on the fact that the ILC Draft Articles on diplomatic protection establish minimum standards under public international law which permit the States to go beyond these rules as long as they respect the condition of obtaining the express and unanimous consent of all the States involved in the new model (i.e. the State of nationality, the State exercising the protection and the receiving third country).^{LXXV} Consequently, from a public international law perspective, the problem of the EU model consists not in the fact that public international law generally excludes diplomatic protection of the kind envisaged by the EU law, as exceptions are possible, but rather whether there is, on the one hand, an express unanimous consent of the Member States for the EU model to include diplomatic protection, and on the other hand, whether there is the consent of the third countries for the exercise of consular and diplomatic protection by non-nationality Member States.

In regard to the unanimous consent of the Member States, it was pointed out above that the Member States have divided opinions on the issue of the legal content of the right, and for the moment it cannot be said that they have a unanimous view on whether to include or not the diplomatic protection within the scope of the EU citizen's right to protection abroad.^{LXXVI} As to the consent of the third countries in regard to the exercise of diplomatic protection by a non-nationality Member States, according to Art. 6 of the VCDR there is no need of express consent for the exercise of diplomatic protection, it can be inferred also from the absence of opposition by third countries, although, in case of absence of a signed agreement, third countries can, at any moment and without any explanation, change their previous position and object to this exercise of diplomatic protection. In spite of the express Treaty obligation of the Member States to start international negotiations with third countries^{LXXVII} so as to ensure the consent of the latter to the EU model of exercise of protection abroad of citizens, the majority of the EU



countries have never started such formal negotiations, with only two exceptions.^{IXXVIII} It can be argued that so far the lack of opposition from third countries to the exercise of diplomatic and consular protection of EU citizens by non-nationality Member States signals recognition of the EU citizen's right as encompassing both consular and diplomatic protection. However, the absence of a written binding agreement substantiating the consent of non-EU countries to the EU model of protection abroad of EU citizens which is atypical from the model of protection abroad of nationals traditionally accepted under public international law is prone to question the acceptance by non-EU countries of the EU citizen's right to diplomatic protection and thus also endanger the effectiveness of the right.

One might question why the public international law perspective is relevant, since the EU is an autonomous legal order with an established practice of autonomous legal concepts whose questionable legitimacy under the public international law norms has not impeded their application under the EU legal order.^{IXXIX} The present topic, diplomatic protection of unrepresented EU citizens in third countries, is a mechanism that does not operate within the EU territory, as the previous EU autonomous concepts, but entirely outside the Union's borders. Consequently, the pact between the EU countries is a *res inter alios acta* for the third countries, which enjoy sovereign powers on whether to prohibit or not a procedure carried out entirely within their sovereign territory. In future, if diplomatic protection will be recognized under the EU law framework for the benefit of the Union's citizens, the formal consent of third countries has to be ensured so as to prevent the prospect of discretionary rejection.

2.4. Questioning the direct effect of the EU citizen's right to protection abroad

In light of the different positions currently taken by the Member States on whether the EU citizen has or not a right to protection abroad and on the material scope of this right, it is highly possible that situations where the EU citizens will be refused assistance will arise in the future. The question that this section plans to assess is whether the EU



citizen can invoke his Treaty based right before the national courts in order to find redress against such refusals.

It is settled case law of the EU courts that rights derived from the EU law may be invoked directly before the national courts if they satisfy the conditions of clear, precise and unconditional wording.^{LXXX} As Bruno de Witte notes, the Court has, over time, changed its strict *Van Gend en Loos* understanding of these conditions so that currently the direct effect test boils down to one single condition: ‘is the norm sufficiently operational in itself to be applied by a court?’^{LXXXI}

The main arguments raised by academics (Closa, 1995; Kadelbach, 2003; Puissechet, 2003) against the direct effect of the right to consular and diplomatic protection are first that the right is not clear in what it confers on the EU citizens (see the above mentioned debate on whether diplomatic protection is or not included),^{LXXXII} second that the right needs further implementing measures to be adopted by the Member States in order to be effective according to the requirement laid down in Art. 23(1) TFEU, and third, that the exercise of the right by the Member States depends upon the consent of the receiving third country which, for the moment, none of the Member States, with few exceptions, has formally acquired.^{LXXXIII} We will continue by addressing in turn each of these three critiques.

Concerning the questioned clarity of the EU citizen’s right to protection abroad, it was previously shown that, for the moment, the right is at a status of a specific application of prohibition of discrimination based on nationality in the field of consular and diplomatic protection of the unrepresented EU citizens. It should be noted that in *Reyners*,^{LXXXIV} the CJEU recognised direct effect to former Art. 52 EEC Treaty on freedom of establishment based on the interpretation of this Article as a prohibition of discrimination (Craig, 1992). Nowadays it can be argued with certainty that the principle of non-discrimination based on nationality enjoys direct effect.^{LXXXV}

As to the contention that the right is not unconditional since it requires the Member States to adopt implementing measures, it has to be noticed that the Lisbon Treaty brought a change in the wording of Art. 23(1) TFEU. Former Art. 20 EC Treaty stipulated that ‘the Member States *shall establish the necessary rules among themselves* [...] required to secure this protection.’ while current Art. 23(1) TFEU reads as follows: ‘The Member States *shall adopt the necessary provisions* [...] required to secure this protection.’ (emphases



added) Art. 23 TFEU continues in paragraph two with an express conferral of legislative competence to the Council which can act in the field of consular and diplomatic protection of the EU citizens by way of adopting directives. There are two important changes in the wording of the right: first is the replacement of ‘establish rules’ with ‘adopt provisions’ and second, the word which might have indicated the purely inter-governmental character of the field, ‘among themselves’, was eliminated. As noted by another author (Saliceti, 2011), the change of wording may indicate that the measures under reference are those that the Member States have to adopt so as to implement the Council directives, since the expression ‘adopt provisions’ is commonly used in the field of implementation of directives by the Member States.^{LXXXVI} On the other hand, the previous expression ‘establish rules’ conveyed the idea of new norms to be adopted for the purpose of detailing the content of the Union citizen’s right. Whether this is or not the intention of the Member States, the CJEU has constantly ruled that the need for further implementing measures to be adopted by the Member States is not *per se* capable of denying direct effect to a Treaty based provision. There are numerous examples pointing in this direction, most of them to be found in the field of fundamental freedoms,^{LXXXVII} however the most relevant example for the present topic is the EU citizen’s right to reside and move which the Court has recognised as directly effective^{LXXXVIII}, despite the conditional language of the Treaty provision.

Former Art. 18(1) EC Treaty was firstly conditioned by limits which the Member States could impose and secondly by measures which the Member States themselves could adopt ‘to give effect to the right’. The latter condition is similar to the one enshrined in Art. 23(1) TFEU. Contrary to the Member States, the Court of Justice of the EU, in the *Baumbast* judgment, held that the need of further implementing measures by the Member States does not prejudice the direct effect character of the right to reside and move, as the margin of discretion left to the Member States is subject to strict judicial review by the national and EU courts. Consequently, even if rejecting the interpretation of the new wording of Art. 23(1) TFEU as a reiteration of the Member States’ duty to adopt national measures implementing the relevant EU law, in light of the Court’s reasoning in *Baumbast*, the direct effect of the right to consular and diplomatic protection in national judicatures still cannot be rejected because the limitations that the Member States can adopt under the Treaty are subject to the full jurisdiction of the EU and the national courts.^{LXXXIX}



In the foregoing paragraphs, the *Reyners* and *Defrenne* cases were invoked as examples of cases where the direct effect was recognised by the CJEU to unclear and legally incomplete Treaty Articles.^{XC} The reason why the CJEU, despite expressly recognising the conditionality of these Articles, held in favour of direct effect was to ensure the objective of these Articles when the Member States failed to fulfil their obligations to adopt implementing legislation within the provided transitional period. In light of this reasoning, the Member States' persistent failure to start international obligations with non-EU countries for the last 18 years, despite the initial time limit provided in Art. 8c of the Maastricht Treaty,^{XCI} and the clear obligation mentioned in Art. 23(1) TFEU, might influence the Court's decision in favour of recognising direct effect to the EU citizen's right to consular and diplomatic protection.

3. What role for the Union in the protection of the EU citizens abroad – a unique model of protection of individuals abroad

'The EU remains the only organisation that can call on a full panoply of instruments and resources [to] complement the traditional foreign policy tools of its member states.'^{XCII}

The above statement made by Solana one month before the entry into force of the Lisbon Treaty in regard to the role of the EU as an international actor perfectly reflects the *status quo* of the relation between the Union and the Member States in the area of consular and diplomatic protection of the EU citizens. Currently, the EU's role in the field of protection abroad of EU citizens is to complement the Member States, when the latter so request^{XCIII}, in their efforts to ensure protection abroad of the EU citizens.^{XCIV} For the moment the EU plays only a supporting role for the Member States but, as it will be shown in this section, it has the potential to develop into something more revolutionary. For the moment this merely 'supporting' role played by the EU already represents a unique role in the arena of international organisations^{XCIV} as there is no other international organisation enjoying a similar state like function. The supporting role conferred by the Lisbon Treaty to the EU has definitely not been an overnight conquest, but the culmination of a long evolution and fervent debate between the Member States and between the Commission



and the Council.^{xcvi} It remains to be seen whether this sort of master - apprentice relation between the Member States and the EU will evolve in the future into an equal sharing of tasks relation. The creation of the EEAS, the increased number of training courses for the EEAS personnel including also the specific task of the protection of EU citizens^{xcvii}, the newly attributed legislative competence to the Council in the field of consular and diplomatic protection of EU citizens and the EU's expansionist approach to its external competences indicate that maybe the EU's role in protection abroad of the EU citizens will not stagnate at a mere supporting role but has the potential to evolve into something more grandiose.

When the Maastricht Treaty introduced for the first time a Union citizen's right to protection outside the Union's borders, the only role envisaged for the Union in this regard was limited to one sentence in the EU Treaty, whereby the consular and diplomatic representations of the Member States and the Community delegations were obliged to cooperate so as 'to contribute to the implementation' of the EU citizen's right to protection in third countries (Former Art. 20(2) TEU). In contrast with other EU citizen's rights, the drafters of the Treaty did not endow the Council with legislative powers to ensure that the Union citizen's right would be effectively applied and developed. As in other sensitive foreign policy areas, the EU model of consular and diplomatic protection of the EU citizens was kept out of the reach of the Union's legislative procedures and left to the control of the Member States' executives. The only instruments that the Union could have adopted to implement the EU citizen's right were political acts, such : CFSP measures adopted by unanimous consent,^{xcviii} though, in practice, they have never been adopted, or non-binding Council Guidelines^{xcix} adopted in Council's specific Working Group (COCON)^c which have been popular with the Member States due to their non-constraining effects. The latter remained the masters of the field due to their exclusive competence to adopt acts implementing the EU citizen's right to consular and diplomatic protection (see former Art. 20 EC Treaty). And they did so, by way of using a hybrid type of acts - Decisions of the Representatives of the Governments of the Member States adopted within the Council, which so far have been the only legally binding acts adopted in this field. This type of Decisions was not designed to affect the rights of the individuals, but they were usually adopted for making political statements, or, even if producing binding legal effects, they were limited to the Member States with no direct impact on the



rights and obligation of individuals.^{CI} Therefore, in light of their limited legal effects, the limited judicial guarantees which they offered to individuals due to the Decision's hybrid nature^{CI} did not create problems for the protection of the fundamental human rights of EU citizens. The two Decisions adopted in the field of protection abroad of EU citizens are, though, exceptions from this rule as they directly affect the EU citizens' right to consular and diplomatic protection by restricting the material scope of the fundamental right without conferring on EU citizens legal remedies to complain at the EU level.^{CIII} The main effective judicial remedy which the EU legal order conferred on the individuals is the direct action of annulment, which in the case of the Decisions on consular and diplomatic protection of the EU citizens is not available to the injured EU citizens.^{CIIV}

So far when the Community did not have the competence to act, but action was necessary in order to obtain a Community or, in exceptional circumstances even a Union objective closely linked with a Community objective,^{CV} the Member States decided to use the flexibility clause so as to justify the adoption of Community measures. Former Art. 308 EC Treaty has been used by the Member States as a legal basis for the adoption of a Community Decision aiming to extend a Community Mechanism also to consular assistance provided to EU citizens in urgent need of help in third countries (see Council Decision 2007/779/EC). Arguably, the same Article could have been used^{CVI}, if unanimously agreed by the Member States, for the purpose of adopting Community measures on the protection abroad of EU citizens, instead of *sui-generis* measures which do not confer the same judicial guarantees on the individuals as do Community measures. The regulation of the protection abroad of EU citizens by way of Community measures was seen by some of the Member States as a too dangerous step for their sovereignty, since a traditional prerogative of the State (Vattel, 1758) would have been given to the EU. The Member States which had a long-standing tradition of wide consular and diplomatic representation felt most the danger of delegating competence to the Union in this field.^{CVII} Since Art. 308 EC Treaty required unanimous consent, the persistent opposition of certain Member States did not allow the use of the flexibility clause for the purpose of establishing a uniform standard of protection abroad of EU citizens which could have been achieved only by way of Community measures.

The Lisbon Treaty has brought a salient change to the legal framework of consular and diplomatic protection by abandoning the previous logic of inter-governmental *sui-*



generis decision making, and instead involving the EU with its legislative procedure and the newly created EEAS in a field historically dominated by States. In view of achieving its newly inserted objective of protecting EU citizens in the world (Art. 3(5) TEU), the Council has been endowed with express legislative power to adopt Directives ‘establishing the coordination and cooperation measures necessary to facilitate’ the aforementioned protection (Art. 23(2) TFEU). After consulting the European Parliament, the Council acts by qualified majority (Art. 16(3) TEU). The involvement of the European Parliament and the replacement of unanimous decision-making with qualified majority voting limit the long defended sovereignty of the Member States. On the other hand, it has to be noticed that Art. 23(2) TFEU maintained part of the inter-governmental language, as the directives the Council is entitled to adopt are limited to ‘cooperation and coordination’ measures, recalling the pre-Lisbon framework of cooperation and coordination among the Member States that had previously governed the field. The ‘coordination and cooperation’ language of Art. 23(2) TFEU gives us an indication that the directive to be adopted might not be used for harmonising the national law and practice on the legal nature, force, material and personal scope of consular and diplomatic protection of citizens: the Council might be entitled only to establish a common model for operational actions in cases of assisting the EU citizens in distress. The ambit of the directive under Art. 23(2) TFEU is similar to the ambit of the *sui generis* measures that the Member States could have adopted under the previous pillar structure. The difference that comes with the Lisbon Treaty is however significant in terms of judicial guarantees, since the change of legal nature of the measures that regulate the field of protection abroad of the EU citizens brings with it increased judicial guarantees for the individuals both at the Union and national level.

Additional consequences for the sovereignty of the Member States in this field may result from the fact that they are now sharing their external competence with the Union (Arts. 2(2), 4(2) TFEU). In light of the fact that the Member States have not started negotiations with third countries for the purpose of obtaining the latter’s consent to the EU model of exercise of consular and diplomatic protection of EU citizens, the Commission has proposed to include such a consent clause in mixed agreements that will be concluded/amended with third countries. According to a Commission Communication of March 2011, ‘the negotiations are on-going’, but the Commission omitted to mention in the Communication which kind of negotiating framework will be chosen: the Open Skies



method (Cremona, 2011) whereby the Member States continue to negotiate and conclude international agreements but under the strict supervision of the Commission, or delegate power to the Union to conduct the negotiations.

The newly created European External Service (EEAS) has also been endowed with competence to act for the protection of the Union citizens, *via* the Union delegations in third countries (Art. 5(10) Council Decision on EEAS and Art. 221 TFEU). The EEAS role is for the moment only that of supporting the Member States' representations in third countries, but has the potential to evolve according to Art. 13(2) of the EEAS Council Decision:

‘The High Representative shall submit a report to the European Parliament, the Council and the Commission on the functioning of the EEAS by the end of 2011. That report shall, in particular, cover the implementation of Article 5(3) and (10) and Article 9.’

The Report which will be drafted on the EEAS activity may reveal that, in the field of consular and diplomatic protection of the EU citizens abroad, there will be a need to adopt further actions to respond to problems that have occurred in practice. If the EEAS role in this area was insignificant and not open to further development then there would have been no need to include this subject matter in the Report on the EEAS' activities.^{CVIII} Consequently, it may be that in the future, depending on the facts of the Report, the EEAS might acquire a more prominent role in the protection abroad of EU citizens with further consequent loss of the long defended sovereignty for the Member States.

4. Conclusion

This paper has discussed one of the modalities to ensure protection of the EU citizens in the world, namely consular and diplomatic protection of unrepresented Union citizens. The mechanism was presented and evaluated as a right of the EU citizen.^{CIX} The right to consular and diplomatic protection of the Union's citizens, which was introduced with the Maastricht Treaty in 1992, has so far remained under-developed in comparison with the other rights of the EU citizens.



The argument of this paper is that, after the Lisbon Treaty, the EU citizen has a fundamental right to consular and diplomatic protection in non-EU countries which he can request from any of the Member States that is represented *in loco*, when his home Member States does not have an accessible consular or diplomatic representation. The holder of the obligation to protection is not the Member State of nationality, but any of the Member States that has a consular or diplomatic representation in the place from the third country where the citizen is located. The term ‘in the place’ has to be differentiated from ‘in the third country’ since it confers the right on the EU citizen to ask for protection from any of the Member States that has a consular or diplomatic representation in a place nearer to where he is located instead of having to travel hundreds of kilometres to reach the consular or diplomatic representation of his own Member State within the same third country. The right can be invoked directly by the individual before the domestic courts of the Member States when he considers himself to have been injured by acts of the consular or diplomatic agents. If certain Member States do not provide national legal remedies for their own citizens to complain against such acts, Art. 19(1) TEU now requires the Member States to make available such legal remedies, at least, for non-national EU citizens.

It has been mentioned that, despite the recently concluded work of the ILC, public international law norms do not recognise the individual a right to consular and diplomatic protection, but stipulates rather that the State is still the one to enjoy a right to exercise protection abroad for the citizen. With the express provision of a fundamental right to consular and diplomatic protection abroad in the EU Charter (Art. 46), the EU develops an autonomous legal concept in public international law by departing from the long established status of consular and diplomatic protection as a right of the State, and updating it to the status of a fundamental right of the individual. However, in the case of the EU law the right is not recognised to the individual in his relation to his State of nationality. It must be kept in mind that, under the EU legal order, the holder of the right is the EU citizen who does not have an accessible consular representation of its own Member State or another State representing it on a permanent basis.

The recent revolutions in the Mediterranean region and Middle East have shown the importance of the EU citizen’s right to consular and diplomatic protection and that consular assistance poses a growing challenge to the Member States and the Union. Not even the Member States benefiting of the widest external representation network can cope



alone with these catastrophes. These events have proved that only if both the EU and the Member States cooperate on a constant basis, will it be possible to effectively evacuate EU citizens from areas in distress. If, in the situations of collective evacuation, the civil protection mechanism^{CX} plays an important role and ensures what seems to be an effective *modus vivendi* between the Union's institutional setting and the Member States, in cases of individual consular protection, there still is much work to be done in order to ensure that the existing discrepancies between the 27 national regulatory frameworks on consular and diplomatic protection of citizens do not deprive the EU citizen of his now fundamental right to protection abroad.

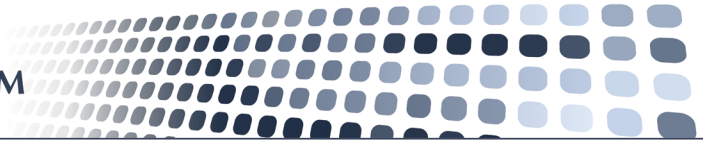
* PhD candidate at the European University Institute, Florence, Italy. The present paper is based on a previous EUI Working paper, see M Moraru, Protection of EU Citizens in the World: A Legal Assessment of the EU Citizen's Right to Protection Abroad in *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty* J Larik & M Moraru (eds), EUI Working Paper 2011/10, 107-129.

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

^{II} According to a 2007 survey there is a high percentage of Union citizens that may find themselves in this situation, since only in Beijing, Moscow and Washington all 27 Member States have at least one embassy (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009, COM (2007) 767 of 5 December 2007). In regard to the recent international crisis: in Libya only 8 Member States were represented, while in Bahrain only 4, see Communication from the Commission to the European Parliament and the Council - *Consular protection for EU citizens in third countries: State of play and way forward*, doc. COM (2011) 149/2 of 23 March 2011).

^{III} After the Lisbon amendment, there is a noteworthy turn of phrase in the key provisions on Union citizenship. Art. 9 TEU (placed in the very first Title of the TEU on Common fundamental provisions on the EU) and Art. 20 TFEU (the specific Treaty Article on citizenship) stipulates that the citizenship of the Union shall be 'additional to' instead of 'complementary to' the national citizenship. According to Shaw and de Waele, the difference in terminology is not a mere cosmetic change, but signals that the Union citizenship should now be seen as a self-standing, independent status from national citizenship, see more in J Shaw, 'The Treaty of Lisbon and Citizenship', *The Federal Trust European Policy Brief*, June 2008; and H de Waele, 'European Union Citizenship: Revisiting its Meaning, Place and Potential' (2010) 12 *European Journal of Migration and Law* 319-336.

^{IV} This pronouncement of Union citizenship which 'is destined to be the fundamental status' of the nationals of the EU countries has been repeated in a long line of case-law. See, for instance, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para. 31; Case C-224/98 *D'Hoop v. Office national de l'emploi* [2002] ECR I-6191, para. 28; Case C-103/08 *Gottwald*, Judgment of 1 October 2009, nyr, para. 23; Case C-544/07 *Rüffler*, Judgment of 23 April 2009, nyr, para. 62; Case C-135/08 *Rottmann* [2010] ECR I-0000, para. 43; Case C-34/09 *Zambrano*,



Judgment of 8 March 2011, para. 41. In the last two cases there has been a change of terminology, the European Court of Justice has no longer described the Union citizenship in terms of a future achievement ('is destined to be'), but already as a present result ('is intended to') which the citizens of the Member States can thus currently benefit of.

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

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

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

^{VIII} According to a comparative research, all of the Member States have had to close to a bigger or lesser extent certain of their consular or diplomatic representations abroad. See www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf

^{IX} According to the declaration of F Frattini, Director of the DG Justice in 2007, 17% of the interviewed Union citizens believed that they could seek protection from the EU's Commission delegations. See Public hearing: Diplomatic and consular protection (Centre Borschette) Brussels of 29 May 2007.

^X Public international law recognises a right to exercise diplomatic protection to an international organisation only in regard to its agents, generally described as 'functional protection'. A mechanism which the International Law Commission (ILC) has described as a different mechanism than the diplomatic and consular protection of nationals which only States can exercise. See Draft Articles on Diplomatic Protection with commentaries, text adopted by the ILC at its fifty-eighth session, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, 2006 (A/61/10).

^{XI} Former Art. 8c TEC became after the Amsterdam amendment Art. 20 TEC and after the Lisbon amendment, Art. 23(1) TFEU. In addition, the EU Charter of Fundamental Rights stipulates the same right in Art. 46.

^{XII} Eurobarometer No. 188 of July 2006 and Flash Eurobarometer No. 213 of February 2008. On the same line, see also the more recent Flash Eurobarometer no. 294 'EU citizenship' of March 2010.

^{XIII} This is confirmed by the Commission's Report to the European Parliament, the Council and the European Economic and Social Committee on progress towards effective EU Citizenship 2007-2010 (doc. COM (2010) 602 of 27 October 2010), Section 2.7.

^{XIV} Despite the work of the International Law Commission (ILC) on codification of the law on diplomatic protection finished in 2006, the Vattelian legal fiction whereby diplomatic protection is a right of the State of nationality and not of the individual, has been maintained by the ILC Draft Articles on diplomatic protection. See Arts. 1 and 2 of the Draft Articles on the Diplomatic Protection. Text adopted by the International Law Commission at its fifty-eighth session, (A/61/10). Available online at: untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf

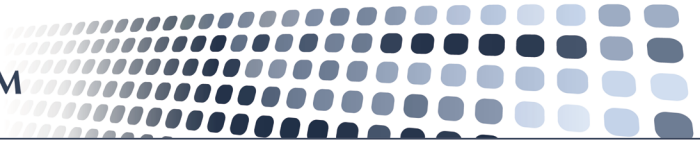
^{XV} More details on the international law perspective on consular and diplomatic protection of individuals and whether the European construction of consular and diplomatic protection is in conformity with public international law norms, see P Vigni 'The Protection of EU Citizens: The Perspective of International law' in J Larik and M Moraru (eds.) *Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty*, EUI Working Paper 2011/10 91-107; as well as P Vigni, 'Diplomatic and consular protection: Misleading Combination or Creative Solution?', *EUI Law Working Paper 2010/11*.

^{XVI} See Art. 3(5) TEU, Arts. 23(2), 221 TFEU and Art. 5(10) of Council Decision establishing the organisation and functioning of the European External Action Service 11665/1/10 REV 1 Brussels, 20 July 2010.

^{XVII} Including the latest amendment by the Lisbon Treaty, which has kept unchanged the material scope of the right of the EU citizen to protection abroad.

^{XVIII} Between 2007- 2009 approximately 600 unrepresented Union citizens were provided consular protection under Art. 20 (2)(c) TFEU. See Section 3 of Chapter three of the CARE Final Report.

^{XIX} Art. 23 (1) TFEU reads as follows: 'Every citizen of the Union shall, in the territory of a third country in



which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.’ Paragraph two of the same article confers legislative competence to the Council, however, the directives the Council is entitled to adopt aim only at facilitating the protection under this provision, ‘[...] establishing the coordination and cooperation measures necessary to facilitate such protection.’ Thus harmonisation seems to be excluded from the ambit of the Council competence. Based on this interpretation of the Union’s legislative competence, the Union will not have the power to provide in the future directive, without the unanimous consent of the Member States, the right of the EU citizen to repatriation, since certain of the Member States do not provide internally this right. Measures that can be included in the directive are based on cooperation and coordination among the Member States domestic procedures rather than on the harmonization of their national legislation and practices.

^{XX} For instance: different legal status and effects of the consular and diplomatic protection of citizens (certain Member States recognise a fundamental right to their nationals, others only a right, while others have an approach whereby consular and diplomatic protection is a matter of policy under the executive’s control); consular and diplomatic protection has different material and personal scope depending on the specific approach adopted by the Member States; certain of the Member States still have in force international agreements concluded with other Member States before their accession to the EU, whose compatibility with the relevant EU law is questionable. For more details, see the CARE Report, section 7 of Chapter 3.

^{XXI} The limited legal remedies available under the current EU law are the cause of the hybrid legal nature of the Decisions on consular protection (Decision 95/553/EC and Decision 96/409/CFSP), which, on the one hand, are international agreements and not EU acts, because they are not concluded by the EU institutions but only within the institutional framework of the EU Council, while, on the other hand, despite their public international law nature, they also form an integral part of EU law due to their legal basis – Art. 23(1) TFEU. Despite being part of the EU law, the legal nature of international agreements of these Decisions restricts the available EU legal remedies to infringements procedures. The possibility of actions of annulment brought by individuals and preliminary references addressed by national courts is debatable. On the legal status, effects and judicial remedies against Decisions of the Representatives of the Governments of the Member States concluded within the Council, in general, see RH Lauwaars, ‘Institutional Structure’ (Chapter IV) in PJG Kapteyn, AM McDonnell, KJM Moterlmans, CWA Timmermans (eds), *The Law of the European Union and the European Communities*, fourth edition (Alphen aan den Rijn: Kluwer Law International 2008) 221; and B de Witte, ‘Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements’ in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU law* (Antwerpen: Intersentia 2001) 261-62.

^{XXII} For a full description of the discrepancies existing between the Member States on consular and diplomatic protection of nationals, see Chapter seven of CARE Report, available online at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>

^{XXIII} After the entry into force of the Lisbon Treaty, the Council has legislative power to adopt by qualified majority voting directives for the purpose of facilitating the protection abroad of the EU citizens (Art. 23(2) TFEU). The Council has thus the power to adopt EU measures harmonising to a certain extent the domestic frameworks as long as there is no other appropriate measure that could ensure facilitating protection abroad of the EU citizens.

^{XXIV} The situation was more convoluted in the pre-Lisbon era, due to a more vague language used in the relevant Treaty provisions.

^{XXV} There are certain academic opinions which portrayed former Art. 20 TEC as an illustration of the Common Foreign and Security Policy (CFSP), a requirement for joint action between the Member States rather than as an individual right like the EU citizen’s right to move and reside within the EU. See S Kadelbach, ‘Union Citizenship’, *Jean Monnet Working Paper*, 2003, 30 and Siofra O’Leary, *EU Citizenship – The Options for Reform*, IPPR, 1996, 63.

^{XXVI} For e.g., Ireland and UK Ministries of Foreign Affairs. However, UK has argued different opinions. In mid-2005, during hearings before the ECJ, the UK acting as a defendant in a case brought before the Court by Spain, argued that consular and diplomatic protection is a right of the individual and not a policy (Case C-145/04 *Spain v UK* [2006] ECR I-17917, para. 54). During the same year, as a response to the Commission Green Paper, the UK argued that the same Treaty based provision did not provide for a ‘right’ to the Union citizens (!).



^{XXVII} See for the different opinions of the MEPs. European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Resolution of 11 December 2007 P6_TA(2007)0592, available at <http://www.careproject.eu/database/schedaEU.php?eulex=EUEPreport&lang=6>.

^{XXVIII} See, for example, de Smith, *Judicial Review*, fifth edition, 1995, at 574-5, citing *Re Findlay* [1985] AC 318, 388, per Lord Scarman. For an application of the doctrine of legitimate expectations to the specific case of diplomatic protection of citizens, see *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs* and another [2002] EWCA Civ 1598; and *R (on the application of Al-Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWCA Civ 1279, both cases are available in the CARE Database (http://www.careproject.eu/database/browse_euc.php#).

^{XXIX} For instance, UK and Ireland. See the UK position: ‘the United Kingdom will not engage in publicity campaigns to inform EU citizens of Art. 23 TFEU until its definition and meaning has been legally clarified. The language of ‘consular and diplomatic protection’ and ‘entitlement’ hold a stronger guarantee than is actually available to EU citizens and could create a potentially confusing state of affairs for EU citizens.’ Statement made by Jim Murphy, Minister of Europe at the Foreign and Commonwealth Office, European Standing Committee, ‘Diplomatic and Consular Protection’, session 2007-08, 23 June 2008, at col. 5, available in the CARE Database. So far, this position has not changed, according to the Report on the UK regulatory framework on consular protection to be found in the CARE Report.

^{XXX} Until 1st December 2009, the EU Charter had only an interpretative role in the application of EU law. See more on this in B de Witte, ‘The Use of the ECHR and Convention Case Law by the European Court of Justice’ in P Popelier, Catherine van de Heyning and P van Nuffel (eds) *Human Rights Protection in the European Legal Order: the Interaction between the European and the National Courts*, Cambridge: Intersentia, 2011, 17-35.

^{XXXI} It is important to distinguish between the EU citizen and the unrepresented EU citizen as holder of the right. The Treaties and the EU Charter do not confer a right to consular and diplomatic protection on all EU citizens, but only to a restricted category, namely, as expressly mentioned by the Treaties, to the ‘unrepresented EU citizens’. The notion of ‘unrepresented’ as a condition that a Union citizen has to fulfil in order to enjoy the right to consular protection is exhaustively defined in Art. 1 of Decision 95/553/EC: ‘Every citizen of the European Union is entitled to the consular protection of any Member State’s diplomatic or consular representation if, in the place in which he is located, his own Member State or another State representing it on a permanent basis has no: - accessible permanent representation, or - accessible Honorary Consul competent for such matters.’

^{XXXII} Art. 20(2)(c) and 23 TFEU and 35 TEU.

^{XXXIII} More details on the content and legal nature and effects of Decision 95/553/EC and Decision 96/409/CFSP can be found in the CARE Report.

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

^{XXXV} Green Paper - Diplomatic and consular protection of Union citizens in third countries (COM/2006/712 final), 28/11/2006; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Communication from the Commission, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Summary of the Impact Assessment (SEC/2007/1601) - Commission staff working document, 05/12/2007; Accompanying document to the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - Effective consular



protection in third countries: the contribution of the European Union - Action Plan 2007-2009 - Impact Assessment (SEC/2007/1600) - Commission staff working document, 05/12/2007; European Commission, EU citizenship Report 2010 - Dismantling the obstacles to EU citizens' rights – 27/10/2010; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TFEU On progress towards effective EU Citizenship 2007-2010 – 27/10/2010.

^{xxxvi} These issues are addressed in a PhD thesis currently undertaken at the EUJ by the author.

^{xxxvii} Art. 8c Maastricht Treaty made express the obligation for the EU countries to start, within a short deadline (*before 31 December 1993*), negotiations with third countries in order to ensure effective application of the right. This deadline was deleted from the subsequent Treaty provisions. The present EU Treaties dedicate two separate provisions to this right: Arts. 20(2)(c) TFEU and 23 TFEU. There is only one difference between the wordings of Art. 20(2)(c) and 23(1) TFEU: if Art 20(2)(c) TFEU provides that consular **and** diplomatic authorities of the Member States will confer protection, Art. 23(1) TFEU provides that national consular **or** diplomatic authorities will confer protection. This paper argues that the use of 'or' is rather intended to clarify the situation when a Member State has both diplomatic and consular representations in a third country. In this case, the Union citizen should seek protection only from one of these authorities representing the Member State, and not take advantage of help from both of representations. However, in light of the perfect match of the rest of the wording of Art. 20(2)(c) TFEU with Art. 23(1) TFEU, the change of 'and' with 'or' is regrettable and should have been avoided by the Treaty drafters.

^{xxxviii} Case C-391/09 *Runevič-Vardyn and Wardyn*, Judgment of 12 May 2011, nyr.

^{xxxix} On the basis of Art. 22 TFEU, citizens of the Member States resident in other Member States have the right to vote in European Parliament's elections *under the same conditions* as nationals.

^{xl} Case C-300/04 *Eman and Sevinger v. College vanburgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

^{xli} Case C-135/08 *Rottmann*, judgment of 2 March 2010, nyp; Case C-34/09 *Zambrano*, Judgment of 8 March 2011, nyp.

^{xlii} The landmark cases of the ECJ in the field of the EU citizenship have so far created either economic or social rights for the Union citizens within the borders of the internal market. For economic rights see the pronouncements of the ECJ in: Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-258/04 *Ioannidis* [2005] ECR I-8275; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; Case C-362/88 *GB-INNO* [1990] ECR I-667. For social rights, see the pronouncements of the Court of Justice in Case C-148/02 *Garcia Avello v Belgium* [2003] ECR I-11613; Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case [ECJ] C-413/99 *Baumbast* [2002] ECR I-7091; Case C-200/02 *Chen* [2004] ECR I-9925; Case C-158/07 *Förster* [2008] ECR I-8507; Case 186/87 *Cowan* [1989] ECR 195; Case C-57/96 *Meints* [1997] ECR I-6689.

^{xliiii} Case T-372/02 *Internationaler Hilfsfonds v Commission* [2003] ECR II-438; Case C-327/02 *Panayotova* [2004] ECR I-11055; Case C-139/08 *Kqiku* [2009] ECR I--2887; C-219/08 *Commission v Belgium* [2009] ECR I-9213; Case C-228/06 *Soysal* [2009] ECR I-1031; Case C-244/04 *Commission of the European Communities v Federal Republic of Germany* [2006] ECR I-885; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgium* [2002] ECR I-6591; Case C-257/99 *Barkoci and Marcel Malik* [2001] ECR I- 6557.

^{xliiv} Case C-203/07 P *Greece v Commission* [2008] ECR I-0000.

^{xli v} See Case C-473/04 *Plumex v Young Sports NV* [2006] ECR I-1579 – the Union law that was interpreted in this case was the Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, p. 37).

^{xli vi} This duty arose however only as a result of an express contractual obligation on the part of the Union, Case T-572/93 *Odigitria AAE v Council of the European Union and Commission of the European Communities* [1995] ECR 11-2025.

^{xli vii} To be noticed that the provision of the general principle of non-discrimination based on nationality is located within the chapter on Citizenship only since the Lisbon amendment. In the EC Treaty, it was located in a different part (Part One on Principles) separated from Part two on Citizenship.

^{xli viii} Op AG Sharpston in Case 427/06 Bartsch, para. 69. See further T. Tridimas, *The General Principles of EU Law* (2nd ed., 2006), 36 to 42; and J. Temple Lang, 'The Sphere in which Member States are Obligated to Comply with the General Principles of Law and Community Fundamental Rights Principles', *Legal Issues of European Integration* 1991, 23 to 35; S Prechal, S de vries & H van Eijken, 'The Principle of Attributed power and the Scope fo EU Law' in L Besselink, F Pennings, S Prechal (eds.) *The eclipse of the Legality Principle in the European Union*, Kluwer Law International, 2011, 216.



^{XLIX} It is settled case law of the CJEU that the general principles of EU law apply to the Member States actions only when they act within the scope of EU law: Case 149/77 *Defrenne III* [1978] ECR 1365, paras. 27 and 30, and Case C-299/95 *Kremzow* [1997] ECR I-2629, para. 15, Case C-442/00 *Caballero* [2002] ECR I-11915, paras 30 and 32, Case C-13/05 [2006] ECR I-6467, Case C-144/04 [2005] ECR I-9981 para. 75; Op AG Sharpston in Case 427/06 Bartsch [2008] ECR I-7245 para. 66.

^L Such as Directives, Decisions, operationalization of Regulations, C - 345/06 *Heinrich*, [2009] *ECR* I-1659 interpretation of national legislation in light of what used to be Framework Decisions (see Angelidaki, Pupino). Additionally, see, for example, Case 230/78 *Eridania* [1979] ECR 2749, para. 31; Case 77/81 *Zuckerfabrik Franken* [1982] ECR 681, paras 22 to 28; Joined Cases 201/85 and 202/85 *Klensch* [1986] ECR 3477, paras 10 and 11; Case 5/88 *Wachauf* [1989] ECR 2609, paras 17 to 22; and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paras 88 to 93.

^{LI} Case C-260/89 *ERT* [1991] ECR I-2925, paras. 41 to 45; and Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 24.

^{LII} See, for example, Case C-71/02 *Karner* [2004] ECR I-3025, paras 48 to 53 (potential impediment to intra-Community trade); instances of Member States acting as trustees of the Union's interests, see *inter alia* Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paras 23 to 30 (Member States acting as trustees of the Community in an area of exclusive Community competence) and Case C 246/07 *Commission v Sweden* (PFOS) judgment of 20 April 2010, nyr; Joined Cases C-286/94, C-340/95, C-401/95 and C-47/96 *Molenbeide and Others* [1997] ECR I-7281, paras. 45 to 48 (measures adopted by a Member State in the exercise of its competences relating to VAT).; Case C-402/09 *Tatu*, judgment of 7 April 2011 not yet reported, (Member States adopting pollution tax for second-hand imported cars).

^{LIII} As happened with the other Treaty based rights of the EU citizen which developed from a mere application of the principle of non-discrimination based on nationality into self-standing rights which the EU citizens can invoke solely based on their nationality (Case C-34/09 *Zambrano*, Judgment of 8 March 2011, para. 41).

^{LIV} Based on Art. 23(2) TFEU. To be noticed that this Article does not require the Council to adopt implementing legislation, but it only gives it this possibility.

^{LV} The purpose of the Treaty Articles, especially those on Union citizen's rights and fundamental freedoms has played a significant role in the European Court of Justice's interpretation of these Articles, whether in cases assessing direct effect, or breach of these rights and freedoms. See more in B de Witte, 'Chapter 12 – Direct Effect, Primacy, and the Nature of the Legal Order' in Craig and de Burca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press 2011).

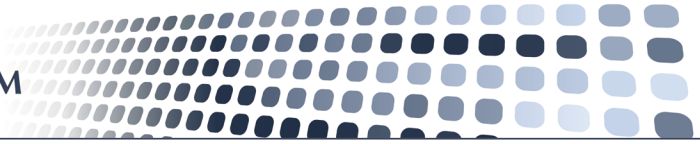
^{LVI} As certain Member States have argued, see, for example, the position of the Member States having an approach of the consular and diplomatic protection of nationals as a matter of the executive's policy in the CARE Final Report, available at <http://www.careproject.eu/images/stories/ConsularAndDiplomaticProtection.pdf>

^{LVII} According to Art. 52(1) of the EU Charter, limitations and restrictions of the Charter's fundamental rights are possible as long as the following conditions are fulfilled: the limitation must be provided by law; respect the essence of the fundamental rights; respects the principle of proportionality; it is necessary for the purpose of genuinely meeting objectives of general interest as recognised by the Union or there is a need to protect rights and freedoms of others.

^{LVIII} See, *inter alia*, the recent democratic revolutions in Egypt, Libya, the tsunami that affected Japan.

^{LIX} According to the information gather by the author during interviews with Commission and Member States representatives in the period of March – July 2011.

^{LX} One author argues that the Member States will respect the principle of non-discrimination based on nationality only if an equal number of places is given to each of the Member States in the transport means made available by another Member State (A Ianniello-Saliceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services' (2011) 17 *European Public Law* 91, 97). This paper, on the other hand, argues that Art. 23 TFEU would not require the aforementioned method of division of places, as the Article entitles only the unrepresented EU citizens to equal treatment. According to Art. 1 of the Decision 95/553/EC, unrepresented Union citizens are those that do not have an accessible consular or diplomatic mission of their State in the third country where they are located. Thus, in practice, a strict application of the Treaty Article would require a division of places by the number of the unrepresented Member States plus one (the Member State providing the transport means). However, in practice, the Member States are not that formalistic, as proved by the recent evacuation procedure of the EU citizens from



Egypt and Libya.

^{LXI} For the moment, the Member States have not yet recognised a right to protection abroad of the non-EU family member joining the EU citizen, not even in the limited circumstances of emergency evacuation. The situation is handled on a case by case basis. See more on this in M Moraru and S Faro, 'La Questione dell'Effettività del Diritto dei Cittadini Europei alla Protezione Diplomatica e Consolare nei Paesi Terzi. I Risultati del Progetto CARE', *Riv. Ital. Dir. Pubbl. Comunitario*, forthcoming issue (3/4), 2011 and Section 4.1.1 of Chapter three of the CARE Report.

^{LXII} See the national Reports on France, Ireland, Poland, UK in the CARE Report, available at www.careproject.eu/database/browse_eu.php.

^{LXIII} For instance, see the EU specific legal definition of 'goods', 'worker', 'primacy', 'subsidiarity', 'proportionality', 'alien', 'national security', 'court and tribunal', 'genuine link' – in EU citizenship case law the meaning of 'genuine link' is different in comparison to the public international law concept of 'genuine link'. The following examples show that the EU Courts have not limited their interpretation to mere transposition of the international law concepts, but adapted them to the EU legal order specificity.

^{LXIV} It can be noticed that the Spanish proposal referred to both 'protection' and 'assistance' since under Spanish national law the two concepts are legally different. The Spanish legal literature distinguishes between protection, which involves formal complaints before public authorities, while assistance refers rather to provision of food, clothes, and medicines. See E Vilarino Pintos, *Curso de Derecho Diplomático y Consular. Parte general y textos codificadores* (Tecnos: Madrid 1987) 102-103; A Maresca, *Las relaciones consulares* (Piernas:Madrid 1974) 215-219.

^{LXV} See Documentation de la RIE, col 18 1991, 333-338 and 405-409.

^{LXVI} A similar example of divided opinions between the Member States leading to a broad definition of a legal concept is the well known broad, encompassing all, definition of the CFSP, see R Gosalbo Bono, 'Some Reflections on the CFSP Legal Order' (2006) 34 *Common Market Law Review* 358–9.

^{LXVII} The Commission seems to have the same interpretation, diplomatic protection is not *per se* excluded from the legal content of the Union citizen's right, but for the moment, attention is given to the most problematic aspect of the right – consular protection for Union citizens found in distress in third countries. See Accompanying document to the Commission Action Plan 2007-2009 - Impact Assessment, doc. SEC (2007) 1600 of 5 December 2007 and the European Commission's EU citizenship Report 2010 - *Dismantling the obstacles to EU citizens' rights*, doc. COM (2010) 603 of 27 October 2010.

^{LXVIII} Case C-341/01 *PlatoPlastik Robert Frank* [2004] ECR I-4883, para. 64; Case C 340-08 *M and others*, (Fourth Chamber) judgement of 29 April 2010, nyr, para. 44. In the latter case there was discrepancy between on one hand, the different official language version of the EU law at issue (Council Regulation no 881/2002) and, on the other hand, between the official translation of the relevant EU law and the United Nations Security Council Resolution 1390 implemented by the foregoing Council Regulation. Since it could not take a decision solely based on literary interpretation, the ECJ interpreted the provision on the basis of the aim of both the Regulation and Resolution.

^{LXIX} See for example, C-200/02 *Chen* [2004] ECR I-9925; Case C-135/08 *Rottmann* [2010] ECR I-0000; Case C-34/09 *Zambrano*, judgment of 8 March 2011; and the already famous Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351.

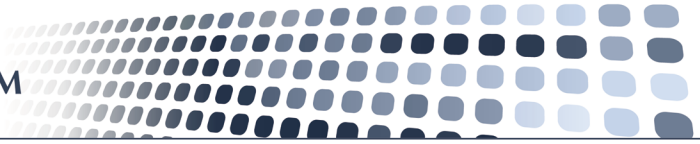
^{LXX} Case T-253/02 *Ayadi v Council and Commission* [2006] ECR II-2139, para. 149

^{LXXI} Case T-49/04 *Hassan v Council and Commission* [2006] ECR II-52, para. 119.

^{LXXII} There was no effective judicial remedy available for the injured individuals at either the national or international level. In regard to consular and diplomatic protection of the EU citizens in non-EU countries, certain of the Member States have domestic legal remedies available, as for those that do not, they are now required under Art. 19(1) TEU. It remains to be seen how the ECJ will interpret Arts. 20(2)(c) and 23 TFEU as well as Art. 46 EU Charter: in the Member States' or the EU citizen's benefit?

^{LXXIII} According to Art. 8 of the Vienna Convention on Consular Relations (VCCR) and Art. 6 of the Vienna Convention on Diplomatic Protection (VCDR), the receiving third country has discretionary power to oppose to the exercise of consular and diplomatic protection by another State than the State of nationality, as long as it has not formally consented to this type of protection of individuals.

^{LXXIV} To be noticed though that the Lisbon Treaty has brought a proliferation of references to 'peoples of Europe', 'Union peoples' which signals a strong desire to continue the creation of a sense of belonging between the citizens of the Member States and the Union, and not necessarily between the citizens of the Member States and the other Member States: preamble 13, TEU - Arts. 1(2), 3(1), 3(5), 9(1), 3(2), 10(4),



13(1), 14(2), 35(3); TFEU – Arts.15(3), 20(1), 21(1), 22, 23, 24, 170(1), 227(1), 228(1).

LXXXV Case *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy)[1989] ICJ Reports 1989, para. 50 of the judgment; Advisory Opinion - Reparation for Injuries Suffered in the Service of the UN, ICJ Reports 1949, p. 11: 'In the second place, even in inter-State relations, there are important exceptions to the rule, for there are cases in which protection may be exercised by a State on behalf of persons not having its nationality.'

LXXXVI The EU is bound to respect public international law (Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* [1992] ECR I-6019 para. 9). By way of consequence, it may be argued that it is bound to respect also the requirement of the three consents needed for a legitimate exercise of protection abroad of the EU citizens by other Member States than the State of nationality. However, the requirement of respecting public international law norms did not impede the CJEU from favouring EU instead of public international law norms in the *Kadi* case. It remains to be seen how the CJEU will interpret the requirement of unanimous consent under public international law in relation to the exercise of consular and diplomatic protection of EU citizens in non-EU countries.

LXXXVII The obligation was first included in Art. 8c Maastricht Treaty and remained in all subsequent versions of the Article including in the present Art. 23(1) TFEU.

LXXXVIII There are two exceptions: Italy signed several bilateral agreements after the entry into force of the Maastricht Treaty which include provisions protecting Union citizens working and/or living in third countries - namely the Conventions with Ukraine in 2003 (Art. 62), Republic of Moldova in 2000 (Art. 61), Georgia in 2002 (Art. 60), Great People's Libyan Arab Jamahiriya Socialist in 1998 (Art. 2) and Russian Federation in 2001 (Art. 37); the second exception is Portugal, namely the Consular Convention between Portugal and the Russian Federation (concluded in 2001). These agreements can be found online in the CARE database.

LXXXIX See the practice of disconnection clauses. For an extensive discussion on the regime of disconnection clauses in EU law see M Cremona, 'Disconnection Clauses in EC Law and Practice' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited - The EU and its Member States in the World* (Oxford: Hart Publishing 2010).

LXXX C-26/62 *Van Gend en Loos* [1963] ECR 1. TC Hartley, *The Foundations of European Union Law*, seventh edition (Oxford: Oxford University Press 2010) 110.

LXXXI The justiciability test as the author calls it. See de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' 331.

LXXXII In addition to this argument, certain Member States argue that the Treaty based Article needs further clarification whether it confers consular assistance and/or protection as in certain national legal orders the two legal concepts are distinct: Germany, Ireland, Romania, Spain, UK. See more on this topic in CARE Report, Chapter three, Section. 4.1.1.

LXXXIII Art. 23(1) TFEU second indent provides: 'Member States shall [...] start the international negotiations required to secure this protection.', recognising the public international law requirements: Art. 8 of the VCCR and Art. 6 of the VCDR.

LXXXIV Case C-2/74 *Reyners v Belgium* [1974] ECR 652, para. 30: 'After the expiry of the transitional period the directives provided for by the chapter on the right of establishment have become superfluous *with regard to implementing the rule on nationality, since this is henceforth sanctioned by the Treaty itself with direct effect.*' (emphasis added) See also Case 43/75 *Defrenne v SABENA* [1976] ECR 445.

LXXXV For a recent case on direct effect of the principle of non-discrimination based on nationality, see Case C-164/07 *Wood* [2008] ECR I-4143.

LXXXVI See for instance Art. 291(1) TFEU: 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts.'

LXXXVII For instance, Case C-13/68 *Salgoil* [1968] ECR 463. Hilson notes that the recognition of direct effect to the fundamental freedoms by the European Court of Justice surprised, as 'none of them sit particularly happily with the requirements as to clarity, precision and unconditionality.' See C Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) 29 *European Law Review* 636, 640.

LXXXVIII Case C-431/99 *Baumbast* [2002] ECR I-7091.

LXXXIX After the Lisbon amendment, the general rule is that the EU courts have general jurisdiction to review the application of the EU Treaties, thus including Arts. 20 and 23 TFEU, unless expressly excluded as is the case of the CFSP provisions (Art. 24 TEU).

^{XC} *Reyners* – former Art. 52 EC Treaty and *Defrenne* – former Art. 119 EC Treaty.



^{XCI} Art. 8C of the EC Treaty reads as follows: ‘*Before the 31 December 1993* the Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.’ (emphasis added)

^{XCII} Statement made by Javier Solana, ‘EU Makes Its Mark on the World Stage’, *The Guardian*, 11 October 2009.

^{XCIII} The area is not categorised among the TFEU list of competences, however, Art. 5(10) of the Council Decision establishing the EEAS is suggestive of the Union role in the area of consular and diplomatic protection, as well as Art. 35(3) TEU.

^{XCIV} So far EU Institutions that have plaid a role in consular and diplomatic protection of the Union citizens are: the Union Presidency, SITCEN, the President of the European Council, the High Representative of the Union for Foreign Affairs and Security Policy, and now also the EEAS (Art. 5(10) of Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service [2010] OJ L 201/30.

^{XCV} The only situation recognised under public international law when an international organisation can exercise diplomatic protection is when it exercises functional protection, namely when the injury is suffered by an agent of an international organisation. In the Reparation case, the ICJ limited the functional protection only to injuries arising from a breach of an obligation designed to help an agent in performing his duties (ICJ, Advisory Opinion of 11 July 1949, ‘Reparations for injuries suffered in the service of the United Nations’, 1949, ICJ Reports, 182).

^{XCVI} See the comments made during the public debate following the Commission Green Paper on the different views of the Commission, Council (especially of certain Member States) available at www.careproject.eu/database/browse_cu.php.

^{XCVII} See Josep M. Lloveras Soler, The New EU Diplomacy: Learning to Add Value, *EUI Working Paper RSCAS 2011/05*.

^{XCVIII} From all possible types of CFSP measures, a Joint Action would have probably been the most suited measure due to its specific operational character. In addition, CFSP Decisions could have also served the purpose of facilitating the protection abroad of EU citizens.

^{XCIX} See *inter alia*, Consular Guidelines on the protection of EU citizens in third countries adopted by the COCON and endorsed by the PSC 15613/10, of 5 November 2010.

^C The COCON is made up of representatives of the Member States’ Ministries of Foreign Affairs, usually working in the consular and diplomatic affairs unit.

^{CI} Decisions of Representatives of the Governments of the Member States were and are usually adopted pursuant to Art. 253 TFEU (ex-Art. 223 TEC), Art. 341 TFEU (ex-Art. 289 TEC).

^{CI} Decisions of Representatives of the Member States meeting within the Council are *international agreements* concluded by the executives of the Member States and not by the Council, thus they are not EU acts. However they form an integral part of the EU legal order. See H R Lauwaars, Chapter four - Institutional Structure, in Kapteyn, Mortelmans, Timmermans (eds.) *The Law of the European Union and the European Communities*, fourth edition revisited 2008, 219-221.

^{CIII} For instance, the possibility of the Union citizens to bring a direct action of annulment against the Decision 95/553/EC before the General Court of Justice is questionable, since the Decision is not a Union act.

^{CIV} Actions of annulment are available only against EU acts, Decisions of the Representatives of the Government of the Member States do not fall under this category. See Case 22/70 *Commission v Council* [1971] ECR para. 42; Joined Cases C 181/91 and C 248/91 *Parliament v Council and Commission* (‘Bangladesh’) [1993] ECR I 3685, paras. 12-14; Opinion Kokott of 26 March 2009 in Case C 13/07 *Commission v Council*, para. 40; Case C- 370/07 *Commission v Council*, judgment of 01/10/2009, para. 42.

^{CV} See the smart sanctions cases, where the inextricable link between the Union objective and the functioning of the internal market allowed the use of former Art. 308 EC Treaty for adopting a Community measures pursuing a Union objective. See, *inter alia*, Case T-306/01 *Yusuf* [2005] ECR II-3533, para. 164; Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-03649.

^{CVI} The strict positive and negative conditions for the exercise of the Community general competence were cumulatively fulfilled: absence of a Treaty provision conferring competence to the Community, necessity, subsidiary and the existence of a Community objective. The Council had the possibility to act by way of adopting Community measures under former Art. 308 EC Treaty. However, the Member States unanimously



agreed only to actions by way of Decisions of the Representatives of the Member States adopted within the Council.

^{CVII} See in this regard, the National Report of the UK in the CARE Report.

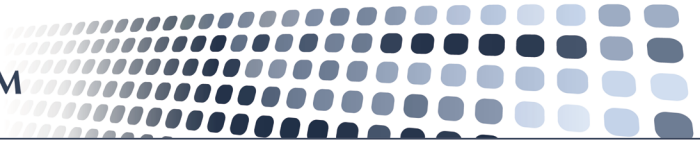
^{CVIII} More on this in the CARE Report, Section 7 of Chapter 3.

^{CIX} Consular and diplomatic protection as an external dimension of the Union citizenship is only one aspect of the protection abroad of the EU citizens. Consular protection can be conferred to the EU citizens in third countries hit by disasters also by ESDP missions. Interestingly, the first Decision adopted on the basis of former Art. 17 TEU concerned the evacuation of EU nationals whenever they are in danger in third countries. It was adopted as a *sui-generis* Decision that was not published in the Official Journal. Doc. 8386/96, Decision de Conseil du 27 juin 1996, relative aux opérations d'évacuations de ressortissants des Etats membres lorsque leur sécurité est en danger dans un pays tiers – see more in RA Wessel, *The European Union's foreign and security policy: a legal institutional perspective* (Dordrecht: Martinus Nijhoff Publishers 1999) 133.

^{CX} Council Decision 2001/792/EC, Euratom of 23 October 2001 establishing a Community Mechanism to facilitate reinforced cooperation in civil protection assistance OJ L 297, p.7. See also, Art. 2(10) and recital 18 of the preamble of Council Decision 2007/779/EC of 8 November 2007 which extended the Civil Protection Mechanism also to situation of consular assistance of the Union citizens in third countries.

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