

The External Dimension of EU Citizenship Arguing for Effective Protection of Citizens Abroad

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Introduction

Imagine you are spending a pleasant summer vacation at a beach resort on some Caribbean island and you suddenly realise that your passport, credit card and all your cash is gone. Whether it was stolen or lost does not matter, what does matter is that you need a travel document and the financial means to get back home.

Imagine you are conducting archaeological fieldwork somewhere in the Indian Ocean when a major natural disaster forces thousands to flee and evacuate to safer sites. As a foreign national in that state, you are unaware of whom to ask for help.

Imagine you are sent by your company to some rather unstable non-EU country to negotiate business. On the way to your hotel, you unexpectedly find yourself caught in the middle of a spontaneous demonstration organised by the political opposition in the capital's streets. Anti-riot police appear, violence erupts and large numbers of demonstrators are arrested. You are among those taken to the police station. After hours of questioning, you are detained, suspected of being a foreign supporter of the political opposition. Unable to make your objections understood, you urgently need someone who could inform your company and family of your circumstances, and negotiate your case with the local authorities.

Imagine that in all these cases, your home country does not have a diplomatic or consular representation that could provide you with the help you need.

At least in theory there should be no reason for despair as every EU citizen has the right to protection by the diplomatic and consular authorities of all the EU

member states. But how would you react if your request for help by another member states' embassy or consulate remained unanswered? How would you react if owing to this failure to help, your situation deteriorates and leads to personal damages or injuries, e.g. prolonged detention in police custody? How would you react when on your complaint, this member state declares that it considers the protection of its nationals abroad a matter of mere policy and not of law, and as such it is not obliged to assist its own nationals, nor is there anything that could make it assist other EU citizens. This member state would furthermore claim that any judicial proceedings would be in vain as the government's decision about whether to help is considered beyond the reach of the courts.

You might nevertheless want to pursue a case. The requested court – in doubt about the extent and impact of EU law in this matter – might stay the proceedings and ask the European Court of Justice (ECJ) for a preliminary ruling.

Predicting the ECJ's answer would be fairly difficult, as no case has yet been referred to Luxembourg in this matter. What is definite, however, is that the key legal provision would be Art. 20 of the Treaty establishing the European Community (TEC). This provision contains one of the rights connected with the concept of citizenship of the Union, as also foreseen in Arts. 17-22 TEC, and 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

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any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.¹

Although the case examples provided above might have been fictitious, the reported line of argumentation by the member state is rather real. It has been asserted for example by the UK, during the written and oral stages of a recent public hearing held in Brussels in the context of the European Commission's Green Paper on diplomatic and consular protection of Union citizens in third countries.² Whereas the Green Paper aims at strengthening the protection of Union citizens abroad, the UK responded with great reservation, stating

1.7 Thirdly, British nationals do not have a legal right to consular assistance overseas. The UK Government is under no general obligation under domestic or international law to provide consular assistance (or exercise diplomatic protection). Consular assistance is provided as a matter of policy, which is set out in the public guide, "*Support for British Nationals Abroad: A Guide*". Other Member States provide consular assistance on a range of bases, some of which recognise a right to consular assistance under national law, and some of which do not.

1.8 In relation to EU law, Article 20 TEC sets out an obligation of non-discrimination. It requires Member States to treat requests for consular assistance by unrepresented nationals of Member States on the same basis as requests by their own nationals. In compliance with this, the UK provides consular assistance to significant numbers of unrepresented Member States' nationals. But Article 20 TEC, does not create any right to assistance beyond this. Decisions 95/553/EC and 96/409/CFSP do not affect this position or broaden the basic legal principle set out in Article 20.³

During the hearing, the UK was not alone in showing considerable reluctance towards filling Art. 20 TEC with tangible substance and accepting enhanced EU involvement in consular assistance and diplomatic protection of EU citizens. The general notion among many of the delegations so far, namely France, Portugal and Ireland, is that everything is good as is, that member states can deal with the matter alone, and that the EU, in particular the Commission, would do best not to interfere with member states' consular and diplomatic practices. On the other hand, a number of smaller member states have shown much more enthusiasm towards the Commission's Green Paper. Although this comes as no major surprise comparing the means and possibilities of, for example, France's Corps Diplomatique to that of Latvia's, the contrasting responses by EU member states illustrate that protection abroad is not only a matter that directly affects the lives of Union citizens, but also one of solidarity and loyalty among the EU-27.

This Policy Brief is the edited and extended version of CEPS' contribution to the Commission's Green Paper consultation. While acknowledging that the Green Paper addresses a wide range of issues, this document focuses mainly on the following themes: 1) the material scope of Art. 20 TEC, 2) its legal character as regards individual entitlement and 3) its enforceability and justiciability. The last sections deal with the questions of harmonisation as well as a possible involvement of Commission delegations in the exercise of consular assistance and diplomatic protection.

I. Time to revise the *acquis* on Art. 20 TEC

Common rules specifying the rights and obligations contained in Art. 20 TEC are rather limited and outdated. Two major decisions taken by the "Representatives of the Governments of the Member States meeting within the Council" (not by the Council itself), i.e. Decision 95/553/EC⁴ and 96/409/CSFP,⁵ are more than 10 years old. Even a decade ago, the

¹ See the "Treaty establishing the European Community" ('EC Treaty'), consolidated version as amended by the Treaty of Nice, OJ C 321 E 29.12.2006.

² See European Commission, Green Paper, Diplomatic and consular protection of Union citizens in third countries, COM(2006) 712 final, Brussels, 28.11.2006(a). The public hearing took place on the 29th of May 2007.

³ See the UK's "Response to the Commission's Green Paper, Diplomatic and consular protection of Union citizens in third countries", March 2007 on the European Commission's website section entitled "Contributions on Diplomatic and consular protection of Union citizens in third countries" (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.06.2007). See also in the same place the critical contributions on this stance, e.g. by Fair Trials Abroad,

"Green Paper – Diplomatic and consular protection of Union citizens in third countries: Submission by Fair Trials Abroad" (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.06.2007).

⁴ See Decision 95/553/EC of 19 December 1995 of the Representatives of the Governments of the Member States meeting within the Council regarding protection for citizens of the European Union by diplomatic and consular representations, OJ L 314, 28.12.1995, pp. 73-76.

⁵ See Decision 96/409/CSFP of 25 June 1996 of the Representatives of the Governments of the Member States meeting within the Council on the establishment of an emergency travel document, OJ L 168, 6.7.1996, pp. 4-11.

European Parliament aired criticism that the “right to consular and diplomatic protection is still at a theoretical stage”.⁶ While nothing has substantially changed in this respect, the EU and the world at large have experienced major transformations and developments since then. Among many other implications, these developments have also directly affected the entitlement of every citizen of the Union to protection by the diplomatic and consular authorities of any member state in the territory of a third country in which his or her member state is not represented.

Recent global developments have made it more likely that an EU citizen will find him- or herself in a situation needing protection by diplomatic and consular staff, and these do not need to be explained in great length here. Empirical material, highlighting the situations after the tsunami in South-East Asia and the 2006 crisis in Lebanon is given in the Commission’s Green Paper. Terrorist activities along with unlawful counter-terrorism activities such as illegal detentions, extraordinary renditions or torture entail further threats to personal liberty, life and limb, and make the world more unsafe for Union citizens abroad.

From an intra-EU perspective, the 2004 and 2007 enlargements have further added to the necessity to assess Art. 20 TEC from a new perspective. The enlargement rounds have reshaped the geographical ratio underlying this provision, reducing the number of third countries where all 27 member states are represented to only three – the People’s Republic of China, the Russian Federation and the US.⁷ At the same time, the number of Union citizens who may be entitled to protection has increased considerably. With growing economic consolidation and the enhancement of personal financial means, this potential demand will steadily become a reality as more and more Union citizens travel abroad for business, tourism or in search of better employment opportunities.

Yet, it should be noted that numbers are not all that have changed in the last 10 years. Likewise, political integration has advanced considerably. The “union among the peoples of Europe” has in fact grown closer.⁸ This trend is illustrated by the various

⁶ See European Parliament, Resolution on the second Commission report on citizenship of the Union (COM(97)0230 C4-0291/97, OJ C 226, 20.7.1998, p. 61.

⁷ In 107 out of 167 third countries a maximum of 10 member states are represented. In some areas, the coverage is particularly thin: Central America and the Caribbean (Belize – 1 member state; Haiti – 3; El Salvador – 4; Bahamas – none), Central Asia (Tajikistan – 1 member state; Turkmenistan – 3), Central and West Africa (Liberia and Sao Tome – 1 member state; Mali and Congo-Brazzaville – 3). All data derived from European Commission (2006a), op. cit., p. 4.

⁸ See “Determined to lay the foundations of an ever closer union among the peoples of Europe”, Preamble of the EC Treaty (consolidated version as amended by the

modifications to the treaties brought about by the Amsterdam and Nice revisions as well as the participatory and – in relation to previous revisions – highly democratic procedures in drawing up the Fundamental Rights Charter and the Constitutional Treaty. Seen from the perspective of the individual, the impact of the concept of citizenship of the Union cannot be underestimated. While some observers in the early years of the Maastricht Treaty might have considered this new concept a mere political statement, citizenship of the Union in fact entails much more: apart from a strong political signal – and that is important – it involves a clear and unambiguous legal element. In a consistent line of case law, the ECJ has elaborated different aspects and consequences inherent to these treaty provisions, emphasising that “citizenship of the Union is destined to be the fundamental status of nationals of the member states”.⁹ The Court has thus played a laudable role in protecting and enforcing the individual’s legal status against over-restrictive interpretations by some member states.

In light of all these developments, recent efforts within the Council to strengthen the EU citizens’ entitlement to protection by consular and diplomatic authorities, such as the revised *Guidelines on consular protection of EU citizens in third countries*¹⁰ or the measures agreed in the Council document *Reinforcing the European Union’s emergency and crisis response capacities*¹¹ and the various efforts by the Commission in this context are positive steps. Nevertheless, with regard to the rather internal and informal character of all these measures, we consider it necessary not only to raise awareness of the right foreseen in Art. 20 TEC but also to strengthen and modernise the surrounding legal framework.

II. Informing citizens and living up to legitimate expectations

A good part of the Commission’s Green Paper is dedicated to actions to better inform EU citizens about their right to protection by diplomatic and consular authorities. We consider these actions valuable and

Treaty of Nice, op. cit.).

⁹ See inter alia ECJ, Case C-413/99, *Baumbast* [2002] ECR I-7091, para. 82; for a recent assessment see Attorney General Colomer, opinion in Cases C-11/06 and 12/06, *Morgan and Bucher*, 20.3.2007.

¹⁰ See Council of the European Union, *Guidelines on consular protection of EU citizens in third countries*, Council Doc. 10109/06, 2.6.2006(a), as adopted by the General Affairs Council during its 2736th Council meeting in Luxembourg, 12.6.2006.

¹¹ See Council of the European Union, *Reinforcing the European Union’s emergency and crisis response capacities*, Council Doc. 10551/06, Brussels, 15.6.2006(b); see also M. Barnier, *For a European civil protection force: Europe aid*, European Commission, Brussels, May 2006.

welcome, particularly the suggestion to keep and update a centralised list of contact details of embassies and consulates in third countries. Very often it is merely practical obstacles that prevent distressed citizens abroad from seeking protection. In addition, the idea of using passports as a means of information by printing the wording of Art. 20 TEC on the document deserves positive consideration.

Still, informing citizens about their rights makes it more likely that they will turn up and act on these rights. This prospect in turn requires adequate and reliable ‘reactions’ by the relevant authorities, as nothing is more disillusioning than a right that only exists on paper, a right that does not materialise when it is needed most.

To live up to the legitimate expectations of Union citizens and to guarantee an effective protection no matter which member state an EU citizen requesting protection is from, a common EU-wide understanding of Art. 20 TEC is necessary. When examining various official and academic statements, however, it appears that we are still a long way from this, with too many crucial questions remaining unclear. Ambiguity, for example, exists towards the very scope of protection abroad. Far more important, the question of whether Art. 20 TEC provides an individual right of protection does not appear to be settled, nor does whether this individual right corresponds to a public obligation to act, or finally, whether the public decision to act or to refuse protection is subject to judicial review.

The following sections deal with these different questions. Concerning the scope of Art. 20 TEC, we suggest a clarification as to whether this norm actually covers – as we think it does – both consular assistance and diplomatic protection. With regard to the second set of questions, we consider Art. 20 TEC to be an individual entitlement subject to judicial review.

1. Clarifying the substantive scope of Art. 20 TEC

The original rules governing diplomatic protection and consular assistance are rooted in public international law, both customary and treaty law.¹² Art. 20 TEC therefore stands in close proximity to this area of law and it is not surprising that the international legal community has been keenly following developments related to this provision. One of the prominent issues frequently under discussion at the international level is whether member states are actually entitled to render both consular assistance *as well as* diplomatic protection.

Diplomatic protection is understood as remedial interstate intervention that occurs when an individual

is injured by an internationally wrongful act committed by another state, and the individual has exhausted all available local remedies. The intervention may take the form of judicial proceedings but may additionally comprise any other diplomatic action or other means of peaceful settlement. The exercise of diplomatic protection does not depend on the individual’s request. *Consular assistance*, in contrast, is preventive in nature and is rendered on request to individuals who find themselves in difficulties in a foreign state.¹³ These difficulties may be the result of criminal charges or detention in the foreign state, a serious accident or illness, natural disasters or similar incidents.

The crucial difference with regard to Art. 20 TEC is that only consular assistance can be easily rendered to nationals in third countries by states other than their state of nationality.¹⁴ With respect to diplomatic protection, John Dugard, the UN International Law Commission’s Special Rapporteur on diplomatic protection, thus stated that the

European Union treaty provisions purporting to confer the right to diplomatic protection on all European Union citizens by all member states of the European Union is therefore flawed – unless it is interpreted as applicable to consular assistance only.¹⁵

While the acts specifying Art. 20 TEC¹⁶ quite obviously only cover consular assistance, in contrast the Commission’s Green Paper indiscriminately refers to both diplomatic and consular protection. A detailed legal assessment on this question was

¹³ For both definitions see J. Dugard, *Seventh report on diplomatic protection*, United Nations General Assembly, A/CN.4/567, United Nations, New York, 7.3.2006, p. 10.

¹⁴ All it takes is a notification according to Art. 8 of the Vienna Convention on Consular Relations. Silent consent may also be sufficient in the absence of formal notification, see Positionspapier der Bundesregierung zum Grünbuch der Kommission “Der diplomatische und konsularische Schutz der Unionsbürger in Drittländern”, 31.1.2007 on the European Commission’s website section entitled “Contributions on Diplomatic and consular protection of Union citizens in third countries” (retrieved from [http://ec.europa.eu/justice_home/news/events_en.htm](http://ec.europa.eu/justice_home/news/events/news_events_en.htm) on 18.6.2007).

¹⁵ See J. Dugard (2006), *op. cit.*, p. 10. A. Vermeer-Künzli puts strong emphasis on this sense in “Comments on the Green Paper on diplomatic and consular protection of Union citizens in third countries”, Leiden University, the Netherlands, on the European Commission’s website section entitled “Contributions on Diplomatic and consular protection of Union citizens in third countries”, (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.6.2007).

¹⁶ See Decision 95/553/EC (1995, *op. cit.*), pp. 73-76 and Decision 96/409/CSFP (1996, *op. cit.*), pp. 4-11 of the Representatives of the Governments of the Member States meeting within the Council.

¹² See the Vienna Convention on Consular Relations of 1963, United Nations, Treaty Series, Vol. 596, p. 261; see also Vienna Convention on Diplomatic Relations of 1961, United Nations, Treaty Series, Vol. 500, p. 95.

presented by Torsten Stein at the International Law Association New Delhi Conference in 2002, suggesting that a limitation to consular assistance in essence might not be what Art. 20 TEC intends.¹⁷ And while according to conventional understanding of international law, states are under no obligation to accept the exercise of diplomatic protection by a state other than that of the individual's state of nationality, there is no provision that would prevent these states from agreeing to it. Even Arts. 45(b) and (c), and Art. 46 of the Vienna Convention on Diplomatic Relations provide that one state may entrust the diplomatic protection of its interests and nationals to a third state, provided, however, that the receiving state accepts this operation. Therefore, granting diplomatic protection to Union citizens through Art. 20 TEC does not as such constitute a violation of international public law. Nevertheless, the exercise of this protection would either require respective negotiations to obtain the consent of third states (as explicitly foreseen in Art. 20, para. 2, TEC)¹⁸ or an understanding of Union citizenship as some form of nationality that would justify the exercise of diplomatic protection by any EU member state in favour of any EU citizen.¹⁹

Furthermore, what makes assessing the scope of Art. 20 TEC particularly difficult is that the very same provision carries a different wording depending on the official language in which it is read. While a majority of the Treaty versions are comparable with the English one, referring to "protection by the diplomatic or consular authorities", the German version as well as the Polish and Czech versions²⁰ actually provide for "diplomatic and consular protection". In fact, protection by diplomatic authorities does not necessarily have to be diplomatic protection,²¹ which is why many argue that the German, Polish and Czech versions are ultimately mere accidental slips. But the argument that Art. 20 TEC shall thus only cover consular assistance is not really convincing. First, in the majority of the different language versions, there is

¹⁷ See T. Stein, "Interim Report on 'Diplomatic Protection under the European Union Treaty'", presented at the International Law Association New Delhi Conference, 2002; in this sense see also R. Bieber, A. Epiney and M. Haag, *Die Europäische Union*, 7th ed., Baden-Baden: Nomos, 2006, § 2 para. 39; and also the European Commission's website section entitled "Contributions on Diplomatic and consular protection of Union citizens in third countries", Università degli Studi di Milano – Prof. Bruno Nascimbene, "Remarks" (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.6.2007).

¹⁸ See also European Commission (2006a), op. cit., pp. 11-12.

¹⁹ See with further references Stein (2002), op. cit.

²⁰ See Nascimbene's (2007, op. cit.) written contribution on the Commission's Green Paper.

²¹ See Art. 3 of the Vienna Convention on Consular Relations.

nothing that would hint at a limitation on consular assistance. Instead, the provision quite openly provides for "protection" in the broadest possible sense. Second, if the German, Polish and Czech versions had indeed been accidental slips, the question arises as to why the authors of the draft Treaty establishing a Constitution for Europe as agreed by the Intergovernmental Conference on 18 June 2004 would have made this 'mistake' again and transferred it over, even to other language versions? While Arts. I-10 (2)(c) and II-106 of the English version of the Constitutional Treaty basically repeat the wording of Art. 20 TEC, the headline of Art. II-106 and the material legal text of Art. III-127 explicitly use the term "diplomatic and consular protection". This same review exercise, giving identical results, can be carried out for the other language versions, which until then had not used equivalent wording to "consular and diplomatic protection".

In light of this evidence and the fact that granting diplomatic protection to EU citizens as such is not in contradiction with international public law, there is good reason to believe that the current *acquis* on Art. 20 TEC together with its limited understanding in some member states,²² falls short of what has been agreed on several occasions in the history of EU integration. The Green Paper and its succeeding actions therefore provide a timely occasion to recall the actual scope of Art. 20 TEC.

2. Conceiving Art. 20 TEC as an individual entitlement subject to judicial review

Another aspect that requires consideration and clarification is whether Art. 20 TEC provides – with direct effect – an individual right that corresponds to a member state's obligation to act, which is hence subject to judicial review.

While acknowledging that – owing to foreign policy implications – member states enjoy a wide margin of discretion in this matter, we do believe that the provision grants an individual right that limits a member state's discretion. Although it is self-evident in this context that an individual cannot be empowered to force a member state to act in a particular way, we

²² See e.g. the UK's "Response to the Commission's Green Paper on diplomatic and consular protection of Union citizens in third countries" (2007, op. cit.); see also on the European Commission's website section entitled "Contributions on Diplomatic and consular protection of Union citizens in third countries" the "Polish reply to the Commission's Green Paper on diplomatic and consular protection of Union citizens in third countries – Contribution to the public consultation", April 2007 (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.6.2007); in the same place see also the response by Greece (undated) (retrieved from http://ec.europa.eu/justice_home/news/events/news_events_en.htm on 18.6.2007).

nevertheless think that a member state at least has to duly consider a request for protection and that its decision is subject to judicial review. These findings are supported by the following considerations.

a) The humanisation of international law

With regard to the Vienna Convention on Consular Relations, the International Court of Justice (ICJ) has ruled in the *LaGrand*²³ and *Avena*²⁴ cases that rights related to consular assistance are not merely rights of states in interstate relations but are also individual rights. In a fairly recent decision, the German Federal Constitutional Court explicitly took up these decisions overturning lower criminal law judgments that had not paid due attention to the consequences that derive from the ICJ's rulings on the individual character of consular protection.²⁵ Another example, going even beyond these two authorities is the advisory opinion OC-16/99 of the Inter-American Court of Human Rights, stating that the right to information on consular assistance as enshrined in Art. 36(1)(b) of the Vienna Convention on Consular Relations is in fact part of the corpus of *human rights*.²⁶ All these examples illustrate that the humanisation of public international law is taking place at all levels.

While the ICJ has only ruled on consular assistance, there are a number of voices that have suggested that the exercise of diplomatic protection is not linked to the realm of unlimited governmental discretion either and that instead there should be an *obligation* to provide diplomatic protection, at least in cases of serious violations of human rights.²⁷ With regard to the

UN financial sanction system against terrorist suspects, the ECJ (Court of First Instance) has – as Nascimbene (2007) observed²⁸ – stated that because individuals are not entitled to be heard in person by the UN Sanctions Committee, when claiming that they have been wrongfully put on the list, they are essentially dependent on the diplomatic protection afforded by the states to their nationals. The Court continued by stating that therefore “Member States are *required* to act promptly to ensure that such person's cases are presented without delay and fairly and impartially to the Committee with a view to their re-examination”²⁹ (emphasis added).

These developments and discussions show that an understanding that considers the protection of citizens abroad as just interstate business, in which the individual – at best – might be an object but never an independent bearer of rights, can no longer be valid. Yet, if such an understanding can no longer be valid at the level of international public law, how much less can it be valid in European law? Here a provision on consular and diplomatic protection has been written into the EU's first pillar, subject to the Community method and explicitly not anchored within the intergovernmental foreign policy pillar.³⁰

b) Art. 20 TEC as an individual entitlement

The wording of Art. 20 TEC is precise, clear and unconditional. When read together with the related Treaty provisions and its specifying acts there is enough evidence to suggest that the question of whether or not to grant protection is no longer a question of governmental policy but rather one of law. Already Art. 17(2) TEC provides that “citizens of the Union shall enjoy the rights

²³ See the *LaGrand Case (Germany v. United States of America)*, ICJ Reports (2001) p. 466.

²⁴ See the *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports (2002) p. 12; see also J. Dugard (2006), op. cit., p. 10; and also C.J. Tams, “Consular assistance and rights and remedies: Comments on the ICJ's judgment in the *LaGrand Case*”, *European Journal of International Law*, Vol. 13, No. 5, 2002, pp. 1257-61; and M. Ferial Tinta, “Due process and the right to life in the context of the Vienna Convention on Consular Relations: Arguing the *LaGrand case*”, *European Journal of International Law*, Vol. 12, No. 2, 2001, pp. 363-67.

²⁵ See Bundesverfassungsgericht, judgment of 19.9.2006, 2 BvR 2115/01 and others.

²⁶ See the Inter-American Court of Human Rights, Advisory Opinion C-16/99, 1.10.1999, Inter-Am. Ct. H.R. (Ser A) No. 16 (1999); see also A.A. Cançado Trindade, “The humanization of consular law: The impact of advisory opinion no. 16 (1999) of the Inter-American Court of Human Rights on international case law and practice”, *Chinese Journal of International Law*, Vol. 6, No. 1, 2007, pp. 1-16.

²⁷ See J. Dugard, *First report on diplomatic protection*,

United Nations General Assembly, A/CN.4/506, United Nations, New York, 7.3.2000, p. 27 seq.; see also A. Vermeer-Künzli, “Restricting discretion: Judicial review of diplomatic protection”, *Nordic Journal of International Law*, Vol. 75, No. 2, June 2006, pp. 279-307; and also T. Meron, *The Humanization of International Law*, Leiden: Brill Academic Publishers, 2006, p. 302; and E. Milano, “Diplomatic protection and human rights before the International Court of Justice: Re-fashioned tradition?”, *Netherlands Yearbook of International Law*, 2004, pp. 85-142.

²⁸ See Nascimbene's (2007, op. cit.) written contribution on the Commission's Green Paper.

²⁹ See the Court of First Instance (CFI), Case T-94/04, *Hassan*, 12.7.2006, para. 119.

³⁰ And yet, during the public hearing on the 29th of May, the Council Working Group dealing with consular protection, COCON, was initially introduced and described as a second-pillar Working Group. This gives rise to the question of why a second-pillar group (conceived in intergovernmentalism) negotiates on a communitarised first-pillar issue.

conferred by this Treaty and shall be subject to the duties imposed thereby”. Art. 20 TEC uses the words “shall be entitled”. Decision 95/553/EC refers in its preamble to “the obligation laid down in Article 8c” (now Art. 20 TEC). Art. 2 of this Decision hence states that the diplomatic and consular representation in the third state “shall respond” to a request for protection. A similar formulation can be found in the 2006 *Guidelines on consular protection* mentioned above. Para. 1 of these guidelines further conceives Art. 20 TEC as an “obligation”. Numerous scholars have argued (although this is disputed) that Art. 20 TEC entails direct effect,³¹ and moreover contains a “civil right”.³² Such an understanding seems even more supported when taking the ECJ’s understanding of Union citizenship into account. Although cited above, it is worth mentioning again that EU citizenship – which comprises the right guaranteed in Art. 20 TEC – is destined to be the fundamental status of nationals of the member states. To interpret an entitlement that makes up part of this “fundamental status” as a mere means of a member state’s public policy is hardly convincing.

In this respect it is worth noting – as did Nascimbene (2007)³³ – that even the UK government, which so carefully avoided using words such as ‘right’ or ‘entitlement’ in its written submission to the Commission’s Green Paper, only some months earlier argued in front of the ECJ that “some *rights* which under the Treaty are conferred only on citizens can be extended by Member States to such persons [i.e. persons without citizenship of a member state] such as the

right to the protection of the diplomatic or consular authorities”³⁴ (emphasis added).

And finally, although the Charter of Fundamental Rights of the EU is not (yet)³⁵ endowed with directly binding legal force, it is crucial to recognise that it has transformed EU citizens’ entitlement to diplomatic and consular protection into a clearly specified *fundamental right*, provided for in Art. 46 of the Charter. But an unenforceable fundamental right subject to unlimited governmental discretion seems a contradiction in itself.

c) The question of judicial review

Addressing the question of judicial review, the positioning of Art. 20 TEC in the first pillar entails that the ECJ has unrestricted jurisdiction over any issue that might arise in the context of this provision. There is nothing that would limit the Court’s powers to give a preliminary ruling according to Art. 234 TEC or to decide on infringement procedures brought by the Commission or another member state according to Arts. 226 and 227 TEC.³⁶ With regard to the latter provision it might therefore be a possible, albeit more theoretical scenario that member state A instigates judicial proceedings against member state B for failure to provide effective protection to one of A’s nationals in breach of Art. 20 TEC.

Concerning judicial review by national courts, there is no provision in the treaties that would suggest that national courts would be barred from applying Art. 20 TEC as they (have to) do with any other provision of Community law. In addition, notice should be taken that similar to the development of the gradual humanisation of international law, the idea of governmental ‘legal black holes’ is more and more on the retreat. Military activity is no longer free from judicial oversight,³⁷ nor for example is the naturalisation of foreigners, which in some member states had been similar to a state’s act of mercy excluding any interference by judges. According to a modern conception of law, the right to judicial review of governmental acts is understood as a fundamental right, which is not only explicitly mentioned in the constitutions of several member states but also in

³¹ See U. Everling, “Auf dem Weg zu einem europäischen Bürger? Aspekte aus rechtswissenschaftlicher Sicht”, in R. Hrbek (ed.), *Bürger und Europa*, Baden-Baden: Nomos, 1994, p. 49; see also M. Ruffert, “Diplomatischer und konsularischer Schutz zwischen Völker- und Europarecht”, *Archiv des Völkerrechts*, Vol. 35, 1997, p. 459; and also P. Szczekalla, *Die Pflicht der Gemeinschaft und der Mitgliedstaaten zum diplomatischen und konsularischen Schutz*, Europarecht, 1999, p. 325; and C. Storost, *Diplomatischer Schutz durch EG und EU?*, Berlin: Dunker & Humblot, 2005. For a contrasting view, see e.g. S. Kadelbach, *Union Citizenship*, Jean Monnet Working Paper 9/03, Jean Monnet International Centre for Regional Economic Law & Justice, New York University School of Law, 2003, p. 30; and S. Staeglich, “Rechte und Pflichten aus der Unionsbürgerschaft”, *Zeitschrift für Europarechtliche Studien (ZEuS)*, 2003, p. 485. For a more reserved stance, see also, K. Lenaerts, P. Van Nuffel and R. Bray (eds), *Constitutional Law of the European Union*, 2nd edition, London: Sweet & Maxwell, 2005, para. 12-011, p. 552.

³² See Stein (2002), op. cit.

³³ See Nascimbene’s (2007, op. cit.) written contribution on the Commission’s Green Paper.

³⁴ See ECJ, Case C-145/04 *Spain v. U.K.*, 12.9.2006, para. 54.

³⁵ Nevertheless, see Council of the European Union, Presidency Conclusions of the Brussels European Council of 21-22 June, 11177/07, 23.6.2007, p. 17 – a cross reference in the new TEU will give legally binding force to the Charter.

³⁶ See Stein (2002), op. cit.

³⁷ See the article, “Lords to look at legality of Iraq war”, *Guardian*, 18.6.2007 (retrieved from www.politics.guardian.co.uk on 18.6.2007).

Art. 47 of the Charter of Fundamental Rights of the European Union and is furthermore reflected in Arts. 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Especially with regard to Art. 47 of the Charter of Fundamental Rights, due attention must be paid to the circumstance in which this provision grants the right to an effective remedy for any violation of the “rights and freedoms guaranteed by the law of the Union”; by no means is this limited to the rights and freedoms guaranteed by the Charter itself.³⁸ Accordingly, it further covers the right contained in Art. 20 TEC. In addition, it is settled case law of the ECJ that the requirement of judicial review reflects a general principle of Community law and that this general principle binds both EU institutions and member states when they are implementing EU law.³⁹

It is in line with this general trend that, for example, the German Federal Constitutional Court and the UK Court of Appeal have refused to surrender to governmental insinuations that the judiciary should actually have no say in the context of exercising diplomatic protection or consular assistance.⁴⁰ While German law recognises a wide margin of discretion in matters of foreign policy, administrative courts are nevertheless entitled to exercise judicial control over the decisions taken or omitted. With regard to UK law, the Court of Appeal has come to a very similar conclusion, stating that while there is very wide discretion on the side of the government whether and how to protect British citizens abroad, there is no reason why the government’s decision or inaction should not be reviewable if it can be shown the same were irrational or contrary to legitimate expectations.⁴¹

³⁸ See K. Pabel, “The right to an effective remedy pursuant to article II-107, paragraph 1 of the Constitutional Treaty”, *German Law Journal*, Vol. 6, No. 11, 2005, pp. 1602–16.

³⁹ See e.g. ECJ, Case C-97/91, *Oleificio Borelli*, ECR [1992], p. I-6313; and also ECJ, Case C-354/04 P, *Gestoras pro Amnistía*, 27.2.2007, para. 51.

⁴⁰ See for example Bundeversfassungsgericht, judgment of 16.8.1980, 2 BvR 419/80, BVerfGE 55, 349; see also Court of Appeal (Civil Division), *R (on the application of Abbasi & Anor.) v. Secretary of Foreign and Commonwealth Affairs & Secretary of State for the Home Department* [2002] EWCA Civ 1598 CA, 6.11.2002.

⁴¹ See the speech by Lord Justice Richards, “The international dimension of judicial review”, delivered at the 2006 Gray’s Inn Reading at Barnard’s Inn, Gresham College, 7.6.2006; see also K. Reece Thomas, “The changing status of international law in English domestic law”, *Netherlands International Law Review*, Vol. 35, 2006, pp. 371-98; and also C. Storost, “Der Fall Abbasi:

III. Agreeing on common minimum standards

Taking account of the wording of Art. 20 TEC entitling Union citizens to protection by the diplomatic or consular authorities of any member state “on the same conditions as the nationals of that State”, the Commission’s Green Paper acknowledges that the protection “is not uniform” and suggests considering the possibilities of offering citizens similar protection irrespective of their member state nationality. This eventually entails setting up common minimum standards.

We support the idea of agreeing on a common set of minimum standards. This would

- a) provide legal certainty for citizens in need of protection,
- b) prevent member states from undercutting a binding set of common rules, and
- c) avert the danger of a downward spiral that might in the long run lead to an erosion of Art. 20 TEC.

In particular, the latter aspect requires further attention. Without common standards, we fear that member states might be inclined to conceive Art. 20 TEC as a mere non-discrimination clause, as in fact does the UK, which would allow denying Union citizens any right to protection provided these member states treat their nationals in the same manner. Such an understanding, however, would be systematically flawed, as Art. 20 TEC would not have any genuine meaning next to the general non-discrimination clause of Art. 12 TEC. In addition, conceiving Art. 20 TEC in this way might clash with the principle of loyalty (Art. 10 TEC), i.e. member states that grant no right of protection to their nationals shift the burden onto those member states that are required by their constitutions or by national law to provide protection to their own nationals.⁴² Finally, allowing individual member states to evade their treaty obligation in such a way entails the apparent danger of a downward spiral: other member states might feel inclined to deny protection to their nationals in order to avoid granting any protection to other Union citizens. This downward spiral might eventually lead to a situation in which no member state is rendering any protection at all, entirely emptying Art. 20 TEC of meaning.⁴³

Wegbereiter eines gemeineuropäischen Anspruchs auf diplomatischen Schutz?”, *Archiv des Völkerrechts*, Vol. 42, No. 4, 2004, pp. 411-24; and International Law Association, *Final Report*, Toronto Conference 2006, Diplomatic protection of persons and property, ILA, London, 2006, paras. 168 and 169.

⁴² Protection abroad as a constitutional right is enshrined for example in Estonia, Latvia, Lithuania, Hungary and Poland.

⁴³ See also REDRESS, “REDRESS’ Comments on the European Commission’s Green Paper on Diplomatic and

It is in light of these considerations that we make the case for common minimum standards. Having regard to Decision 95/553/EC in which member states have already found common ground inter alia on the scope of consular protection, we can see no reason that would prevent member states from building on this decision and developing it further. This move would furthermore be in line with earlier suggestions of some member states – surprisingly including the UK, which has shown its support for minimum standards on consular assistance in the context of procedural safeguards in criminal matters.⁴⁴

For the time being, however, the legal base for ‘real’ EU legislation⁴⁵ with the aim of strengthening the right to consular and diplomatic protection of Union citizens abroad appears to be Art. 22 TEC. This step, however requires ratification procedures in all member states, a most cumbersome and lengthy undertaking. The solution formulated in the 2004 Constitutional Treaty would have allowed for much faster and more efficient procedures. Although the compromise reached in the meantime during the June 2007 European Council does not entirely live up to what was drafted in 2004, it nevertheless represents an improvement compared with the status quo. Once the Reform Treaty is in force, directives will be at the disposal of EU institutions to develop genuine secondary legislation on diplomatic and consular protection.

In the immediate future, at least a common understanding among member states should be ensured that conceives the non-discrimination element of Art. 20 TEC as only referring to the *scope* of protection and does not question whether to provide any protection at all.

IV. Structures and resources: Making good use of Commission delegations

Finally, concerning the Green Paper’s proposals relating to “structures and resources” we particularly welcome the idea of setting up common offices and involving the Commission delegations in an enforced way.

Member states’ cooperation and collaboration in third countries (involving Commission representatives) is already a reality in a number of policy areas. Apart from the example mentioned in the Commission’s

Consular Protection”, REDRESS, London, April 2007, p. 8 (retrieved from <http://www.redress.org/reports.html> on 18.6.2007).

⁴⁴ See the UK’s reply to the European Commission’s Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU (available at http://ec.europa.eu/justice_home/fsj/criminal/procedural/fsj_criminal_responses_en.htm).

⁴⁵ This is in contrast to acts being adopted by the Representatives of the Governments of the Member States meeting within the Council.

Green Paper, i.e. the issuing of visas, such cooperation, for example, is also foreseen in the field of irregular migration. Council Regulation 377/2004⁴⁶ established a network of immigration liaison officers with the aim of contributing to the EU’s policy of ‘managing’ borders and migration flows. These examples show that member states are willing and capable of working together abroad when it comes to borders and observing the movements of third-country nationals; even fewer obstacles should therefore exist when an effective collaboration for the protection of their citizens is at stake.

With regard to the Commission delegations’ participation in the protection of Union citizens abroad, we particularly would like to highlight that the delegations are already considered actors in the 2006 *Guidelines on consular protection*. In fact, cooperation between member states’ consular/diplomatic missions and Commission delegations in order to contribute to the protection of Union citizens is explicitly foreseen in Art. 20, para. 2, TEU.⁴⁷ There is furthermore nothing extraneous for international law about international organisations directly providing assistance to individuals. Examples are inter alia the International Committee of the Red Cross or the UN. In fact, as Stein (2002) has put forward, Community practice shows that the Commission frequently contacts the governments of third states in order to protect certain rights of EU citizens.⁴⁸ A recent example is the Commission’s efforts to assist the Bulgarian medical workers arrested in Libya (the so-called Benghazi case).⁴⁹

In addition, to the extent that member states have provided the Community with exclusive competences, e.g. in foreign trade or fisheries, one might argue whether the Commission delegations’ involvement

⁴⁶ See European Council, Regulation (EC) 377/2004 of 19 February 2004 on the creation of an immigration liaison network, OJ L 64, 2.3.2004, pp. 1-4.

⁴⁷ Art. 20 TEU reads

The diplomatic and consular missions of the Member States and the Commission delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented.

They shall step up cooperation by exchanging information, carrying out joint assessments and contributing to the implementation of the provisions referred to in Article 20 of the Treaty establishing the European Community.

⁴⁸ See Stein (2002), op. cit.

⁴⁹ See European Commission, “Commissioner Ferrero-Waldner calls for humanitarian resolution of the Benghazi case”, RAPID Press Release, IP/06/1907, 18.12.2006(b).

might not in fact be a necessary component. In these fields, member states can no longer use these policies as a means of exerting influence or pressure in their external relations.⁵⁰ At least the European Court of First Instance has acknowledged a Commission delegation's duty (!) to provide diplomatic protection.⁵¹

Finally, from the perspective of a Union citizen in need, it would be highly appreciable if Commission delegations would render assistance. In this respect, we fully agree with Stein (2002), who stated,

Since the network of the delegations of the Commission has become very dense, it would be intolerable not to make use of this network for the benefit of the protection of Union citizens. As a European institution exercising jurisdiction, the Commission is bound by the human rights which are protected in the Union which comprise also rights of protection. The mere representation can therefore not be the task of these delegations.

V. Conclusions and recommendations

The findings and recommendations developed in this paper can be summed up as follows:

- 1) There is a need to invigorate and strengthen the legal framework of Art. 20 TEC.
- 2) Clarification as to the precise scope of Art. 20 TEC, covering both diplomatic protection and consular assistance, is required.
- 3) Art. 20 TEC does provide individual entitlement to Union citizens. Granting protection to Union citizens abroad is not a question of mere public policy but a legal obligation that arises from the EC Treaty. The way in which member states live up to this obligation is subject to judicial review by national courts and the ECJ.
- 4) Binding minimum standards giving effect to the entitlement of Art. 20 TEC should be adopted.
- 5) Member states' embassies and consulates as well as Commission delegations should work closer together to guarantee that Union citizens abroad enjoy effective protection.
- 6) The European Parliament should pay particular attention to the external dimension of EU citizenship, when scrutinising the Commission's fifth report on citizenship of the Union due in 2007. Given that it is a core element of Union citizenship, the European Parliament should strive to develop the EU *acquis* on diplomatic and

consular protection out of its "theoretical stage",⁵² if need be by making use of its powers of supervision, e.g. written and oral questions to the Council.⁵³

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⁵⁰ See also C. Storost (2005), op. cit.

⁵¹ See the Court of First Instance (CFI), Case T-572/93 *Odigitria AAE* [1995] ECR II-2025; see also C. Storost (2005), op. cit.

⁵² See the European Parliament's Resolution (COM(97)0230 C4-0291/97, (1998, op. cit.), p. 61.

⁵³ A strong European Parliament determination to give real substance to Art. 20 TEC can be traced in the deliberations on the Commission's Green Paper – see European Parliament, LIBE Committee, *Working Document on diplomatic and consular protection for citizens of the Union in third countries*, Rapporteur: Ioannis Varvitsiotis, PE390.634v01-00, 13.6.2007.

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