

PROTECTION OF EU CITIZEN ACCORDING TO ART. 23 TFEU: DIPLOMATIC PROTECTION AS DEFINED BY INTERNATIONAL LAW?

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Abstract: This paper analyses Art. 23 of the Treaty on the Functioning of the European Union, which establishes the right of an unrepresented EU citizen to protection by the diplomatic or consular authorities of any EU Member State in the territory of a third country. Particular attention is paid to well-established concepts of public international law, namely the diplomatic protection and consular assistance. Customary rules of international law governing these two concepts are briefly interpreted within the context of international law and, subsequently, they are confronted with relevant provisions of the Treaty on Functioning of the European Union with the aim to exclude the possibility of equating the regime introduced by Art. 23 with the concept of diplomatic protection.

Keywords: Diplomatic Protection, Consular Assistance, Treaty on Functioning of the European Union.

1 Introduction

According to Art. 23 of the Treaty on Functioning of the European Union (to be referred to as "TFEU"), "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"¹. Such subsidiary and extraordinary protection is often referred to as diplomatic and consular protection of EU citizens or (diplomatic and/or consular) protection of unrepresented EU citizens in third countries. But does the concept articulated by Art. 23 TFEU adhere to diplomatic protection as defined by international law? Or would it be rather correct to speak about consular assistance? Is the European approach still acting within the framework of customary legal rules, which reflect well-established inter-state practice in global context, or can we witness newly emerging concept of interstate relations in different quality? These are the crucial questions that have to be answered in this article.

2 International Law Focus on Diplomatic Protection

2.1 Diplomatic Protection as Defined by International Law

First of all, a comprehensive definition of diplomatic protection has to be provided in order to decide whether the "right" enacted by Art. 23 TFEU belongs to this concept. In this way, the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006 are very useful and instructive. Upon Commission's analysis of relevant state practice, it has been formulated a definition of diplomatic protection by virtue of enumeration of its elements which have to be fulfilled cumulatively. In this sense, "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility"². Thus, if a State intends to exercise diplomatic protection in favour of an injured person, it is necessary to meet three basic requirements³:

1. responsibility of a State under international law for injury to an alien caused by State's wrongful act or omission,⁴
2. a tie between the person injured and the State exercising such protection (so called "nationality of claim"),⁵

3. exhaustion of all local remedies.⁶

Upon meeting all of these preconditions, a State of national injured may politically intervene in favour of such person. This intervention may take various forms of diplomatic and other actions provided that these actions meet the criteria for "peaceful means of dispute settlement".⁷

The possible argument in favour of political intervention in a form of indirect protection of individual's rights and interests by the intervening State may be found in Art. 3(1)(b) of Vienna Convention on Diplomatic Relations, which provides that one of the functions of diplomatic mission in receiving State is a protection of interests of nationals of sending States within the limits permitted by international law. In accordance with Art. 2 of this Convention, the diplomatic relations between States (and consequently also their permanent diplomatic missions) are established by mutual consent of these Parties. Thus, the combination of consensual establishment of diplomatic relations (having primarily political nature, in contrast with consular relations of predominantly non-political, administrative nature⁸), implied consensus of States on protecting its nationals under jurisdiction of other States in accordance with afore-mentioned Art. 3 and reference to purposes and principles of the Charter of the United Nations⁹ creates a basic treaty framework for possible exercise of diplomatic protection.

It is worth noting that the exercise of diplomatic protection is a discretionary right of the State¹⁰ of nationality of injured person and this person is neither entitled to such protection, nor belongs (theoretically) to beneficiaries of this protection. However, the Draft Articles on Diplomatic Protection in its Art. 19 recommend the protecting States a practice of giving due consideration to the possibility of exercising diplomatic protection (especially) in cases of occurrence of significant injury, taking into account the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought, and transferring any compensation obtained from the responsible State to the injured person.¹¹

2.2 Diplomatic Protection, Consular Assistance - Overlapping Concepts?

Diplomatic protection and consular assistance are terms which are often used in a way that confuses both of these concepts. This is caused mainly due to the fact that the rules governing both concepts are mainly customary in their nature (and, thus, relatively unclear in some aspects of mutual delimitation of diplomatic protection and consular assistance) and that the subjects involved in this assistance or protection are rarely differentiated as to what kind of functions are they actually performing in certain situation.¹² It may be argued that the wording of Art. 23 TFEU expresses consular assistance as it

development of international law are emerging. In details, see Art. 3 to 8 of the Draft Articles on Diplomatic Protection.

⁶ According to conditions and limitations laid down by Art. 14 of the Draft Articles on Diplomatic Protection.

⁷ To the discussion about possible governmental actions that may be used by the exercise of diplomatic protection, see KÜNZLI, A.: Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance. In *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* [online]. 2006, vol. 66 [cit. 2012-01-29], pp. 323 - 331; and DUGARD, J.: *Seventh report on diplomatic protection (A/CN.4/567)* [online]. ILC, 2006 [cit. 2012-01-30], pp. 6 - 7.

⁸ MRÁZ, S., POREDOŠ, F., VRŠANSKÝ, P.: *Mezinárodní veřejné právo*. Bratislava: VO PF UK, 2003, p. 94.

⁹ See the Preamble of the Vienna Convention on Diplomatic Relations.

¹⁰ AMERASINGHE, C. F.: *Diplomatic Protection*. Oxford: Oxford University Press, 2008, pp. 79 - 90.

¹¹ Art. 19 of the Draft Articles on Diplomatic Protection.

¹² For example, Art. 70 of Vienna Convention on Consular Relations permits the diplomatic mission to exercise consular functions. This provision contributes to uncertainty in delimitation between diplomatic protection and consular assistance as diplomatic bodies may exercise not only diplomatic functions (political in their nature) but they are also entitled to operate as a consular body (vice versa does this principle not apply, i.e. the scope of activities of consular bodies is strictly limited to exercise of consular functions).

¹ Art. 23 of the Treaty on the Functioning of the European Union.

² Art. 1 of the Draft Articles on Diplomatic Protection.

³ These are implied or expressly included in the ILC's definition of diplomatic protection.

⁴ AMERASINGHE, C. F.: *Diplomatic Protection*. Oxford: Oxford University Press, 2008, p. 25.

⁵ This tie (link) has to be of certain quality. International law regards for sufficiently strong link solely the nationality link. However, some efforts in progressive

states the right to "protection by the diplomatic or consular authorities", thus covering the wide range of consular activities exercised by consulates and consular departments of diplomatic missions. On the other hand, diplomatic protection is not limited solely to the actions of diplomatic authorities and, what has to be highlighted, consular authorities should be excluded from the possibility of exercise of diplomatic protection due to their non-political status determining its non-interventional operation in mutual inter-state relations.

So what does the consular assistance stand for? This concept may be described as a form of assistance to the nationals presumed by international law, which is provided by the State of national in distress. In a broader sense, the consular assistance includes activities like facilitation of processing of administrative and judicial matters of nationals abroad, visas issuance or collective actions for citizens who find themselves in various emergency situations.¹³

As such casuistic definition could not render the difference between diplomatic protection and consular assistance, it is useful to compare these two concepts with respect to their characteristic features. In previous Chapter (see Chapter 2.1), basic requirements for exercise of diplomatic protection were identified. Above all, if the threshold laid down by these requirements is not reached, it is not possible to speak about diplomatic protection at all.

Moreover, Künzli argues that there are three substantial distinctions between diplomatic protection and consular assistance: greater legal limitations of consular activities comparing to diplomatic protection; different level of representation; and the legal nature of both concepts. Firstly, the possible scope of consular assistance is limited by the principle of non-intervention, whereas there is no such constraint on exercise of diplomatic protection.¹⁴ Secondly, in a case of diplomatic protection, it is required to represent the interest of a State rather than just the interest of an individual (which is typical for consular assistance). Finally, "consular assistance often has a preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred"¹⁵, whereas the diplomatic protection might be described as "remedial protection".¹⁶

Vigni adds two more differences between the two concepts in question with respect to the time and place in which they occur. Thus, consular assistance consists of providing support for a national abroad (so called *in situ* protection, i.e. assistance provided in the host State where the beneficiary of such assistance is physically located) either *ex ante* (before an injury to the citizen occurs) or *ex post* (in case of injury already suffered or in danger occurred). On the other hand, diplomatic protection does not require the presence of the injured individual in the territory of the wrongdoing State at the time of complaint of the State of nationality (diplomatic protection can be, thus, described as *ex situ* and *ex post* protection).¹⁷

Theoretically, a relatively clear line dividing diplomatic protection from consular assistance could be drawn. In practice, however, the line between these two concepts is much more unclear, in many situations rather confusing.¹⁸

¹³ KŘEPELKA, F.: Stručně o podpůrné konzulární ochraně občanů Evropské unie. In *Dny práva - 2010 - Days of Law* [CD-ROM]. Brno: Masaryk University, 2010, p. 2558.

¹⁴ Thus, if a State provides the consular assistance in favour of a non-national, it is usually accepted and relatively rarely disputed due to its non-interventional nature.

¹⁵ KÜNZLI, A.: Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance. In *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) [online]. 2006, vol. 66 [cit. 2012-01-29], p. 336.

¹⁶ *Ibid.*, pp. 331 - 337.

¹⁷ VIGNI, P.: Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution? In *EUI LAW Working Paper*, 2010, No. 11, pp. 25-26.

¹⁸ This aspect supports some scholars in finding some "transitive" forms of protection in situations, which does not meet the requirements for diplomatic protection but, at the same time, are of different nature comparing to consular assistance. Čepelka and Šturma, for example, write about "diplomatic representation" as a protection in form of assistance, intervention or protest done *in situ* by diplomatic or consular authorities

3 European Context

As it has already been outlined, the legal order of the European Union grants a special right to its citizens to ask for protection the consular or diplomatic authorities of other EU Member States if they occur in a situation where their State of nationality lacks its own consular or diplomatic representation in the territory of a third country. This provision raises many question of whether it deals rather with diplomatic protection, consular assistance or a *sui generis* regime created for satisfying the specific needs of this community of States, potentially built up on a series of agreements with third countries as one of its characteristic feature.¹⁹ Now, we will briefly analyze the status of the provision of Art. 23 TFEU as to find out whether it meets the legal requirements prescribed by law to be considered for diplomatic protection.

3.1 "Nationality of Claim" Interpretation in EU Context

First of all, the "nationality of claim" as one of the most controversial precondition should be examined. According to Art. 20 TFEU, EU citizenship is construed as an additional concept to national citizenship with no ambition to replace it. Thus, every person holding the nationality of any EU Member State is simultaneously an EU citizen. But does the EU citizenship reach the quality of EU Member State's nationality?

In practice, the terms nationality and citizenship are used interchangeably as synonyms. From the theoretical point of view, these notions have slightly different meaning. As Künzli points out, "since nationality is a necessary requirement for EU citizenship one could also conclude that nationality has a higher status than citizenship"²⁰. For nationality, in contrast to citizenship, the requirement of "ties of belonging and a sense of identity to the 'nation'"²¹ seems to be crucial, together with the fact that "the term 'citizenship' is confined mostly to domestic legal forums, while the term 'nationality' is connected to the international law forum"²². Such assumption argues in favour of domestic dimension of EU citizenship with little relevance from the international law point of view.

Though the European bodies argue that the concept of EU citizenship (through the provision of Art. 23 TFEU) is enriched by a specific external dimension, which is intended to strengthen the idea of European solidarity and the identity of the Union in third countries²³, the quality of the link between an EU citizen and EU bodies (and to even less extent to other EU Member States) does not reach the quality of the bond between the national and his State of nationality. The provision of the Draft Articles on Diplomatic Protection (reflecting customary legal rules of international law) grants the right to exercise diplomatic protection solely to the State of nationality of injured person.²⁴ This cannot be fulfilled if a person is linked to the protecting EU Member State only through internationally unrecognised EU

(or other relevant bodies) abroad in favour of their national in a case, when the bodies of the other State treat these nationals contrary to the expected treatment in accordance with domestic law or *comitas gentium*. For more details, see ČEPELKA, Č., ŠTURMA, P.: *Mezinárodní právo veřejné*. Praha: C. H. Beck, 2008, p. 345.

¹⁹ This is anticipated by Art. 23 TFEU, which in its second sentence states: "Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection."

²⁰ KÜNZLI, A.: Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance. In *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) [online]. 2006, vol. 66 [cit. 2012-01-29], p. 344.

²¹ *Ibid.*, p. 345-346.

²² RUBINSTEIN, K., ADLER, D.: International Citizenship: The Future of Nationality in a Globalized World. In *Indiana Journal of Global Legal Studies*, 2000, vol. 7, no. 2, p. 521.

²³ *Consular protection for EU citizens in third countries: State of play and way forward* (COM(2011) 149 final) [online]. European Commission, 2011 [cit. 2012-01-30], p. 2.

²⁴ See Art. 3(1) of the Draft Articles on Diplomatic Protection. The provision of Art. 3(2) of the Draft Articles, however, enables the exercise of diplomatic protection by a State in favour of stateless persons or refugees with qualitatively different link between these persons and the protecting State. In fact, this provision does not reflect current interstate practice and it may be considered for a progressive development of international law (as a potential rule *de lege ferenda*). In details, see PAVLOVIĆ, P.: Diplomatická ochrana osob bez státného občianstva a utečencov: Progressivny rozvoj medzinárodného práva ako brzda kodifikačného úsilia? In *COFOLA 2011 : The Conference Proceedings* [CD-ROM]. Brno: Masarykova univerzita, 2011, pp. 640 - 648.

citizenship (as the subject exercising diplomatic protection is not the Union, which is linked to the citizen in need at least by the bond of this citizenship, but solely an EU Member State as a different subject of international law with no relevant link to such person), thus making any claim presented in this way easily objectionable by third States.

In response to this conclusion, Moraru argues that the 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)"²⁵. In our opinion, the presented conclusion does not reflect the political reality and interests of various actors in their mutual relations. As there is usually missing substantial general consent on the merit of disputes setting up the exercise of diplomatic protection, it is hardly conceivable that the "defendant State" will expressly accept the claim of the "injured State" by defending its rights through diplomatic protection. Moreover, this trilateral consent is quite usual for providing consular assistance²⁶, without any evidence of such practice in case of diplomatic protection.

The European form of protection of unrepresented EU citizens in the territory of third States by diplomatic and consular authorities is also characterized by individual nature of this right. This feature is determined by express wording of Art. 20(2) TFEU stating that "citizens of the Union shall enjoy the rights and be subjects to the duties provided for in the Treaties". This provision is accompanied by exemplification introducing explicitly the right specified in Art. 23 TFEU. What is more, in favour of this argumentation speaks Art. 46 of the Charter of Fundamental Rights of the European Union, which enshrines (among other rights of individual nature granted to EU citizens) the right with the same wording as expressed in Art. 23 TFEU. Textual and contextual interpretation of Art. 20 TFEU and Art. 46 of the Charter allows us to argue in favour of individual nature of the right of protection of unrepresented EU citizens abroad. Since diplomatic protection is a discretionary right of the protecting State (which protects its own interests when "injured" by mistreating its national by third State), European solution cannot be interpreted in this way. Individual nature of EU citizen's right to protection provided by diplomatic or consular authorities of other EU Member States, thus, does not correspond with the substantial feature of diplomatic protection.

3.2 Specifications of Art. 23 TFEU in Other EU Documents

Art. 23 TFEU (together with afore-mentioned Art. 46 of the Charter of Fundamental Rights) cannot be regarded for single provision of EU law governing the content of this specific right stemming from EU citizenship. Except of this "constitutional" level, there are several documents and reports of various working groups on this topic specifying some aspects of general provision of Art. 23 TFEU.

The Decision 95/553/EC, for example, specifies that the protection provided by Art. 23 TFEU shall comprise following actions: assistance in cases of death, assistance in cases of serious accidents or serious illness, assistance in cases of arrest or detention, assistance to victims of violent crimes and the relief and repatriation of distressed EU citizens.²⁷ This list is not exhaustive; a citizen may also apply for protection in other circumstances, in which immediate assistance should be given to

a national in difficulties.²⁸ Enumerated spectrum of activities is typical agenda of consular authorities, especially if we consider the fact that in such situations does not usually occur violation of international law, requested assistance is provided *in situ* (as later, *ex situ*, the citizen is no more in need) and there are usually any local remedies at disposal at all. If we match these findings with general part of this article, which defines diplomatic protection in the framework of international law and deals with the most visible differences between this concept and consular assistance, there is every possibility to match the EU solution with specific form of consular protection.

Recently, a proposal for a Council Directive on Consular Protection for Citizens of the Union Abroad²⁹ has been presented. This document, objectively governing (*de lege ferenda*) the regime of practical application of the protective regime enshrined in Art. 23 TFEU, uses solely the term "consular assistance" when describing this concept. The shift from misleading or inaccurate term of "diplomatic and consular protection of EU citizens" to current usage of title "consular assistance" is quite obvious.

3 Conclusion

As presented in this article, we consider the right to protection of unrepresented EU citizens in third countries as stated in Art. 23 TFEU to be, in present state of legal regulation, a slightly specific form of consular assistance. At this time, the concept does not, and with respect to international law also cannot, fulfil the requirements to serve as diplomatic protection of EU citizens. However, the European integration is in permanent progress, so there is still a chance to deepen the integration to such extent that the EU citizenship will one day become comparable to the nationality of a federal state and diplomatic protection in terms of international law standards might become a real possibility for newly created European External Action Service. This hope is in part expressed in final report of CARE Project by following statement: "In light of the delicate foreign policy and diplomatic problems that the exercise of diplomatic protection entails, it is then understandable why the European Union, when developing the theme of European citizenship, placed emphasis on consular protection, leaving aside, at least for the moment, the development of diplomatic protection"³⁰.

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²⁵ MORARU, M. B.: Protection of EU citizens abroad: A legal assessment of the EU citizen's right to consular and diplomatic protection. In *Perspectives on Federalism*, 2011, Vol. 3, Issue 2, p.85.

²⁶ For examples of relevant state practice, see *Consular and Diplomatic Protection: Legal Framework in the EU Member States* [online]. ITTIG-CNR, 2010 [cit. 2012-01-31], pp. 17 - 21.

²⁷ Art. 5(1) of the Decision 95/553/EC: Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations, Official Journal L 314 of 28 December 1995, pp. 73 - 76.

²⁸ *Green Paper: Diplomatic and Consular Protection of Union Citizens in Third Countries (COM(2006)712 final)* [online]. Commission of the European Communities, 2006 [cit. 2012-01-29], p. 2.

²⁹ *Proposal for a Council Directive on consular protection for citizens of Union abroad (COM(2011) 881 final)* [online]. European Commission, 2011 [cit. 2012-01-29].

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