ARTICLES

THE ENTITLEMENT OF THE EUROPEAN UNION TO EXERCISE DIPLOMATIC PROTECTION: AN INTERNATIONAL CUSTOMARY LAW PERSPECTIVE

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ABSTRACT: Recent international practice of the European Union features a certain attention to the need to protect European citizens whose interests have been affected by a breach of international law by a third State. Strikingly, this practice seems to find a more solid basis in international law than in EU law. This *Article* explores the actions performed by the European Union through the lens of customary international law on diplomatic protection. It aims at ascertaining whether these actions prompted a development of international law which entails that, in force of the European citizenship, the Union is entitled to protect its citizens.

KEYWORDS: diplomatic protection – international customary law – EU citizenship – international practice of the EU – external action – international organisations.

I. INTRODUCTION: RECENT TRENDS IN THE PRACTICE OF THE EUROPEAN UNION CONCERNING THE PROTECTION OF EUROPEAN CITIZENS *VIS-À-VIS* A THIRD STATE

Not more than a few weeks after the withdrawal of the United Kingdom from the European Union, a number of EU citizens attempting to enter the UK territory without a visa

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discovered to be irregular migrants and, to their dismay, were treated as such. Some of them, indeed, had been picked up at the airport, deprived of their mobile phones, brought in centres for irregular migrants and detained for a number of days.[1]

The reaction of the Union was prompt and firm. The European Council "call[ed] on the UK to respect the principle of non-discrimination among Member States" and "invite[d] the Commission to continue its efforts to ensure full implementation of the Agreements [between the EU and the UK], including in the areas of EU citizens' rights, […] making full use of the instruments under the Agreements".[2] The Commission highlighted that "[m]edia reports of European citizens being put in detention cells or being fingerprinted just because they wanted to visit the United Kingdom" could damage the relationship between the Union and the United Kingdom and, consequently, invited the UK to "calm down […] and focus on the future".[3] Moreover, once pointed out that "the treatment of EU citizens at the UK border has [its] full attention", and while admitting that "[t]he UK authorities announced several measures to address EU concerns, including clarification of guidance for border guards to prefer immigration bail", the Commission made clear that it "will not hesitate to take action to address problems".[4]

Interestingly, the EU reaction, far from being unrehearsed, was solicited and supported by a number of members of the European Parliament, who asked the Commission to determine "[w]hat action it will take to ensure that the rights of EU citizens are protected by the United Kingdom should such situations ever arise again", to clarify "[h]ow does [it] intend to respond in order to defend EU citizens in the UK […]?" and "[h]ow does [it] intend to prevent similar cases from happening again in the future and to ensure that there are no restrictions on individual freedoms for EU citizens traveling

[1] See C Gallardo, 'EU Citizens Detained by UK after Landing Without Work Visas' (6 May 2021) Politico www.politico.eu; C Gallardo, 'More than 600 EU Nationals Held Under UK Immigration Powers in Three Months' (27 May 2021) Politico www.politico.eu. See also G Tremlett and L O'Carroll, 'EU Citizens Arriving in UK Being Locked up and Expelled' (13 May 2021) The Guardian www.theguardian.com; G Tremlett and L O'Carroll, 'Hostile UK Border Regime Traumatises Visitors from EU' (14 May 2021) The Guardian www.theguardian.com; G Tremlett and L O'Carroll, 'Number of EU Citizens Refused Entry to UK Soars Despite Covid Crisis' (28 May 2021) The Guardian www.theguardian.com. Moreover, see C Da Silva, 'Thousands of EU Citizens Refused UK Entry in Three Months Since Brexit Took Effect" (28 May 2021) EuroNews www.euronews.com; R De Miguel, 'The Dark Side of Brexit: European Citizens Being Detained in Migrant Holding Centers in UK' (17 may 2021) El Pais english.elpais.com; Al Jazeera and News Agencies, 'UK Refusing EU Citizens Entry at Much Higher Rate Despite COVID' (28 May 2021) Al Jazeera www.aljazeera.com.

[2] European Council Conclusions of 24-25 May 2021 paras 17-18. See C Gallardo and K Oroschakoff, 'EU Leaders Set to Urge UK to Respect Citizens' Rights After Detentions Row: European Council Weighs in after EU Nationals Without Visas Were Detained' (18 May 2021) Politico www.politico.eu; Reuters, 'Brussels to Chide UK over Handling of EU Citizens at Borders' (19 May 2021) Reuters www.reuters.com.

[3] See M De La Baume, 'Šefčovič Warns UK over "Unilateral Actions" Like Detention of EU Citizens' (30 May 2021) Politico www.politico.eu and BBC, 'Edwin Poots and Maroš Šefčovič on NI Protocol' (30 May 2021) BBC www.bbc.co.uk.

[4] Answer P-002650/2021 given by Vice-President Šefčovič on behalf of the European Commission of 16 July 2021 www.europarl.europa.eu.

to the UK?".[5] The Commission was even asked to intervene against the UK to protect EU citizens having the nationality of a particular Member State. Noting that in the first three months of 2021 more than two thousand Romanian nationals "were stopped at the British border", it was requested to clarify what they were "planning to do to make sure the British authorities provide additional information on the situation of Romanians refused entry to the United Kingdom and justify the repeated refusals to allow them to enter the United Kingdom?".[6]

II. The quest for competence: arts 20 and 23 TFEU

This EU action against the UK does not have an explicit legal basis in EU law.

Although arts 20(2)(c) and 23 TFEU provide EU citizens with the right to be protected within the territory of third States, they do not assign that competence to the European Union: quite the contrary, arts 20(2)(c) and 23 assign it to the exclusive competence of the Member States. Art. 23 TFEU expressly states that EU citizens who are "in the territory of a third country in which the Member State of which they are nationals is not represented" are entitled to enjoy "the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State". Nor is this exclusive competence inlaid by art. 35 TEU, which only confers to the "Union delegation" the task to "contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in [arts 20(2)(c) and 23 TFEU]".[7] In other words, art. 35 only confers to the Union the power to facilitate the in-

[5] European Parliament, Priority question for written answer P-002650/2021 to the Commission of 17 May 2021 www.europarl.europa.eu; European Parliament, Question for written answer E-002787/2021 to the Commission of 26 May 2021 www.europarl.europa.eu.

[6] European Parliament, Question for written answer E-002966/2021 to the Commission of 3 June 2021 www.europarl.europa.eu. The Council was instead asked whether it was "aware" of the reports "in the European press of European citizens of various nationalities being detained upon arrival in the United Kingdom" and whether it was "[willing] to demand that the UK comply with the principle of non-discrimination between Member States and the rights of European citizens?" (European Parliament, Question for written answer E-002812/2021 to the Council of 27 May 2021 www.europarl.europa.eu). On the external powers of the Parliament, see R Passos, 'The External Powers of the European Parliament' in P Eeckhout and M López-Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart 2016) 85.

[7] For an analysis of arts 20(2)(c) and 23 TFEU and, more generally, of the role of the Union in the protection of EU citizens abroad see M Moraru, 'An Analysis of the Consular Protection Directive: Are EU Citizens Now Better Protected in the World?' (2019) CMLRev 417; P Vigni, 'The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries?' in D Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge University Press 2017) 584; R La Rosa, 'La protezione diplomatica nell'Unione europea: un esempio di evoluzione delle norme internazionali in materia' (2009) Studi sull'integrazione europea 133.

ter-State mechanism of delegation of representation that is widely known in international law and used by arts 20(2)(c) and 23(3) TFEU.[8]

But even if arts 20(2)(c) and 23 TFEU were interpreted as attributing the power to the Union to intervene on an equal footing with the Member States, in the case of the EU citizens detained in the UK irregular migrants centres these provisions would not apply. As noted, the mechanism set up in the Treaties is conditional upon the fact that in the territory of third States, which have allegedly committed a wrongful act against an EU citizen, his home State is not represented: notoriously, all the Member States of the European Union are represented in the United Kingdom.[9]

[8] On the inter-State mechanism of delegation of the power to represent the citizens of a State, see: art. 46 of the 1961 Vienna Convention on Diplomatic Relations ("A sending State may with the prior consent of a receiving State, and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals"); art. 8 of the 1963 Vienna Convention on Consular Relations ("Exercise of consular functions on behalf of a third State. Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State"). Furthermore, see International Law Commission, Fifth Report on Diplomatic Protection by Mr. John Dugard, Special Rapporteur of 4 March 2004, UN Doc. A/CN.4/538 www.legal.un.org, para. 8: "A State may delegate by means of an international agreement the right to protect its nationals abroad to another State. Such an agreement may be entered into when a State has no diplomatic representation in a foreign country where many of its nationals reside[.] The best known example of such a delegation of the right of diplomatic protection today is to be found in article 8c of the Treaty on European Union (Treaty of Maastricht)". However, the Special Rapporteur noted that "[i]t is not clear whether this provision, or indeed other arrangements of this kind, contemplates diplomatic protection as this term is understood in the present draft articles, that is, action taken by a State in its own right arising from an injury to a national caused by the internationally wrongful act of another State – or only consular action, that is, immediate assistance to a national in distress" (*ibid.*). An example of implementation of arts 20 and 23 TFEU and 35 TEU is the case of the Polish journalist arrested in Myanmar while documenting the *coup d'Ètat* that took place there. The EU followed the affair, but it was managed by the diplomatic and consular authorities of the Member State which, in the absence of a Polish representation in Myanmar, assists Polish citizens. In particular, the Commission explained that "[t]he EU followed [...] the case of Robert Bociaga, who was detained by security forces on 12 March 2021, in close cooperation with the German Embassy who provides consular assistance to Polish citizens" (Answer P-001487/2021 given by High Representative/Vice-President Borrell on behalf of the European Commission of 1 June 2021 www.europarl.europa.eu). For other examples of application of arts 20 and 23 TFEU and 35 TEU see European Union External Action, *Good Stories on Consular Support for EU Citizens Stranded Abroad* (7 June 2020) eeas.europa.eu; European Union External Action, *EU-coordinated Repatriation of EU Citizens from Vietnam* (6 April 2020) eeas.europa.eu; European Union External Action, *Information Note to EU Member States Citizens (and from Iceland and Norway) in Liberia* (8 November 2018) eeas.europa.eu.

[9] See the list of foreign countries represented in the United Kingdom at UK Government, *Foreign Embassies in the UK* www.gov.uk.

III. The quest for competence: the EU-UK agreements

Before concluding that the reaction of the European Union was deprived of a legal basis, it is necessary to verify whether it can be grounded in international law and, notably, on the agreements concluded by the EU with the United Kingdom.[10]

If the UK had contracted in an agreement with the EU the obligation to grant European citizens the right to freely access its territory, namely to enter without a visa, the EU action could be qualified as a request to a non-compliant party to abide by the obligations flowing from the treaty. Under the doctrine of implied powers, an international organisation "must be deemed to have those powers which, though not expressly provided in the [founding treaties], are conferred upon it by necessary implication as being essential to the performance of its duties".[11] Consequently, if the Union had concluded an agreement with the UK establishing the treatment of the EU citizens, and, more specifically, if the agreement determined that EU citizens had the right to enter the UK territory without a visa, the Union could claim to possess the international powers and prerogatives necessary to implement it.[12]

This, however, was not the case. While replying to the questions of the Members of the European Parliament, the Commission excluded the possibility to ground its intervention against the United Kingdom on an agreement in force among them. It expressly recognised that "[t]he majority of reported cases of detention [falls] outside the scope of the [...] EU-UK agreements": neither the Withdrawal Agreement nor the Trade and Cooperation Agreement actually provide for a general right of the European citizens to enter the UK territory.[13] On the contrary, as the United Kingdom is a "third country", the Commission admitted that "its national immigration law applies to all travellers, including EU citizens".[14]

[10] For an updated list of the international agreements between the European Union and the United Kingdom see European Commission, *Relations with the United Kingdom* ec.europa.eu.

[11] ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [11 April 1949] para. 12.

[12] In this sense, *ex multis*, E Cannizzaro, 'The Scope of EU Foreign Power: Is the EC Competent to Include Human Rights Clauses in Agreements Concluded with Third States?' in E Cannizzaro (ed.), *The European Union as an Actor in International Relations* (Kluwer 2002) 297, 311 ff.

[13] Answer given by Vice-President Šefčovič on behalf of the European Commission cit.

[14] *Ibid.* In the same sense, the Commission's website specifies that "[e]ntry rules to the UK for [...] EU citizens [...] who have not resided in the UK at the end of the transition period [...] fall outside the scope of the Withdrawal Agreement", then "[w]hether or not will [EU citizen] need an entry visa after the end of the transition period will depend on the future rules that will be put in place in the UK" (European Commission, *Questions and Answers – the Rights of EU and UK Citizens, as Outlined in the Withdrawal Agreement* (26 November 2018) ec.europa.eu); that the Trade and Cooperation Agreement "does not cover the right to enter (with or without visa), work, reside or stay of EU citizens in the UK or of UK nationals in the EU" (European Commission, *Questions and Answers - EU-UK Trade and Cooperation Agreement* (24 December 2020) ec.europa.eu).

IV. The quest for competence: customary law on diplomatic protection

This latter statement, together with the emphasis constantly placed by the EU on the status of "EU citizens" possessed by the individuals damaged by the UK conduct, definitively clarifies that the European Union intended to act precisely in diplomatic protection. Under this customary rule the State of nationality of individuals injured by a breach of international law by another State is empowered to intervene using its prerogatives under international law to secure protection to those individuals and to obtain reparation from the wrongdoer. More precisely, this power materialised in bringing a claim *vis-à-vis* the UK to comply with its obligations under the customary international rules on the treatment of aliens: obligations traditionally owed to any foreign State by virtue of the link of nationality with its citizens. Then, the issue to be determined is whether the European Union is entitled, under international law, to exercise diplomatic protection in favour of European citizens.[15]

V. Legal entitlement to exercise diplomatic protection under international law

V.1. A functional interpretation of international law on diplomatic protection

Art. 1 of the Draft Articles on Diplomatic Protection defines diplomatic protection as "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 a responsibility".[16] In *Diallo*, the International Court of Justice (ICJ) qualified this provision as corresponding to customary international law.[17]

At first sight, the wording of this definition excludes the EU from the set of entities entitled to exercise diplomatic protection: art. 1 only mentions States, and the EU is not

[15] In this *Article*, the terms "citizenship" and "nationality" will be used interchangeably: for the purposes of the present analysis, both indicate the existence of a link between an individual and an international entity. However, under international law, a slight difference between these two terms seemingly exists: "nationality" denotes "the legal status of the individual", while "citizenship" indicates "the consequences of that status, ie the rights and duties under national law" (O Dörr, 'Nationality' (August 2019) Max Planck Encyclopedia of Public International Law opil-ouplaw-com.

[16] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries in Report of the International Law Commission on the Work of Its Fifty-eighth Session, UN Doc. A/61/10 (2006) Yearbook of the International Law Commission 26.

[17] ICJ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Preliminary Objections) [24 May 2007] para. 39.

a State. Coherently with such an assumption, art. 3 of the Draft Articles on Diplomatic Protection, dealing with the identification of the entities entitled to exercise diplomatic protection, states that "[t]he State entitled to exercise diplomatic protection is the State of nationality [of the individual concerned]".

However, the textual reading of these provisions is not conclusive. Several elements indicate the necessity to use other means of interpretation and, in particular, the necessity to adopt a functional approach. Both the case law of the ICJ and the Draft Articles on Diplomatic Protection point in this direction.

In *Nottebohm* the ICJ set out that the formal link of nationality is not sufficient, for a State, to exercise diplomatic protection. In particular, in *Nottebohm* the Court declined to apply a formal notion of citizenship and instead decided for a substantial notion: on the basis of this approach, the Court found that a State lacking substantial connection with an individual is not entitled to act in diplomatic protection.[18] A careful analysis of the practice led the ICJ to argue that, in the context of diplomatic protection, the term "nationality" should not be interpreted in a formal sense but on the basis of its function, namely to protect individuals having a genuine connection with their home State.[19] Consistently, the Court made it clear that a mere formal relationship between an individual and a State could not bestow upon the State the right to exercise diplomatic protection in his favour. The right to exercise diplomatic protection was only entailed by the "translation into juridical terms of the [substantial] individual's connection with the State which has made him its national".[20]

In *Reparation for Injuries* the ICJ seems to have accepted the idea that the formal link of nationality is not even necessary to legitimately act in diplomatic protection. In that case, notoriously, the ICJ adopted a functional approach with regard to the legal status of the entity allegedly entitled to bring a claim to protect an individual injured by a State and, on that basis, found that the United Nations have the power "to protect" their agents when acting on their behalf. As specified in the advisory opinion, diplomatic protection actually "rests on two bases[: t]he first is that the defendant State has broken an

[18] ICJ *Nottebohm (Liechtenstein v Guatemala)* (Merits) [6 April 1955] 21 ff.

[19] *Ibid.* 23.

[20] *Ibid.* Interestingly, the genuine link doctrine has been upheld by the Commission in October 2020, when it started an infringement procedure against Cyprus and Malta. More precisely, "[t]he Commission considers that the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship" (European Commission, *Investor Citizenship Schemes: European Commission Opens Infringements Against Cyprus and Malta for "Selling" EU Citizenship* (press release of 20 October 2020 ec.europa.eu). Furthermore, the findings of *Nottebohm* have been referred to as an element capable to untie some controversial knots in the mysterious notion of European citizenship. See, *inter alia*, case C-482/18 *Google Ireland* ECLI:EU:C:2019:728, opinion of AG Kokott, para. 44; case C-298/14 *Brouillard* ECLI:EU:C:2015:408, opinion of AG Sharpston, para. 35 and case-law cited therein; case C-507/13 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:2394, opinion of AG Jääskinen, para. 40.

obligation towards the national State in respect of its nationals[; t]he second is that only the party to whom an international obligation is due can bring a claim in respect of its breach".[21] Well, "[t]his is precisely what happens when [an international o]rganization, in bringing a claim for [a] damage suffered by [one of] its agent [because of the unlawful conduct of a State], does so by invoking the breach of an obligation towards itself".[22] In other words, "the principle underlying [the rule on diplomatic protection] leads to the recognition of this capacity as belonging to the [o]rganization, when [it] invokes, as the ground of its claim, a breach of an obligation towards itself".[23] The connection between the individual-agent and the organization may even take precedence over the link with his home State: in order to guarantee the independent action of the organization, indeed, "it is essential that in performing his duties [the agent] need not have to rely on any other protection than that of the [o]rganization [...]. In particular, he should not have to rely on the protection of his own State".[24]

Years later, the International Law Commission (ILC) endorsed the functional approach advocated by the ICJ. Commenting on art. 1 of the Draft Articles on Diplomatic Protection the ILC clarified that, during its entire process, it has considered diplomatic protection exclusively from the point of view of its ultimate purpose: "it views diplomatic protection through the prism of international responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an international wrongful act".[25]

[21] *Reparation for Injuries Suffered in the Service of the United Nations* cit. paras 11-12.

[22] *Ibid.* 12.

[23] *Ibid.*

[24] *Ibid.* 13.

[25] Draft Articles on Diplomatic Protection with Commentaries cit. 27. Ironically, the functional approach to diplomatic protection has been adopted by the ILC also to explain the reasons why it departed from the test of "genuine nationality" established in *Nottebohm*: in the modern international scenario, characterized by an ever greater mobility of individuals between States, "genuine nationality" would limit the effectiveness of the discipline of diplomatic protection. Therefore, it would hamper its capacity to achieve the goal of securing the responsibility of States. For these reasons, it proved necessary to prefer a different reading, capable of offering guarantees to many individuals as possible. In the First Report on Diplomatic Protection, by Mr. John R Dugard, Special Rapporteur, it is specified that "[t]he genuine link requirement proposed by *Nottebohm* seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. In today's world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection. Even supporters of *Nottebohm*, like Brownlie and van Panhuys, accept the need for a liberal application of *Nottebohm*" (UN Doc. A/CN.4/506 and Add. 1, 2000, para. 117 legal.un.org). Cf. the same point in Draft Articles on Diplomatic Protection with Commentaries cit. 30. Dougard came back to this issue in J Dougard, 'Diplomatic Protection' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2018) 1051, 1053 ff.

This approach has two consequences. First, from a methodological perspective, it directs to interpret arts 1 and 3 of the Draft Articles on Diplomatic Protection in the light of their purpose. Second, although the scope of the Draft Articles is limited to diplomatic protection claimed by States, by no way do they preclude the entitlement of other entities, such as international organizations, under special treaties or under general international law, to act in diplomatic protection.

V.2. A FUNCTIONAL NOTION OF "NATIONALITY"

In its commentary on art. 3 of the Draft Articles on Diplomatic Protection, the ILC specified that the "emphasis [...] on the bond of nationality between State and national" is due to the fact that it is precisely this link that "entitles the State to exercise diplomatic protection".[26]

There is nothing innovative in this wording. Even the Permanent Court of International Justice (PCIJ) stated, in the first decades of XX century, that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".[27] However, from a functional point of view, the clarification of the ILC seems to imply that, as it is the status of citizen that directly entails the right to act in diplomatic protection, States have a role (simply) because they are the entities which, traditionally, confer citizenship to individuals. Consequently, it would not be illogical to assume that every entity which is able, on the basis of its domestic law, to grant individuals that status, may fall within the notion of "State of nationality". If this assumption is correct, it is crucial to determine, once again from a functional perspective, what "nationality" really means in the discipline of diplomatic protection.

A useful indication comes from the commentary to the Draft Articles on Diplomatic Protection, where the ILC explained that "[as] the individual had no place, no rights in the international legal order [,] if a national injured abroad was to be protected, this could be done only by means of a fiction", and the *fictio iuris* was precisely "that an injury to the national was an injury to the State itself".[28] Diplomatic protection is thus grounded on a logical expedient which allows States to invoke the responsibility of other States for international wrongful acts which damaged their citizens. In this scheme, nationality is the notion which bridges the damage materially related to an individual to the State legally injured. The bond of allegiance between the individual and the State,

[26] Draft Articles on Diplomatic Protection with Commentaries cit. 29.

[27] PCIJ *The Panevezys-Saldutiskis Railway Case* (Merits) [28 February 1939] 16. In the same sense, see PCIJ *Mavrommatis Palestine Concessions* (Objection to the Jurisdiction of the Court) [30 August 1924] 12: "[i]t is an elementary principle of international law that *a State is entitled to protect its subjects*, when injured by acts contrary to international law committed by another State" (emphasis added).

[28] Draft Articles on Diplomatic Protection with Commentaries cit. 27. For an in-depth analysis of the history of diplomatic protection see, *ex multis*, CF Amerasinghe, *Diplomatic Protection* (Oxford University Press 2008) 8 ff.

proven by nationality, then produces a transfer-effect that is enforceable *erga omnes*, namely against every other State of the international community.[29]

This approach proves to be perfectly coherent with the broader legal framework of State responsibility. Indeed, in the system of State responsibility codified by the Draft Articles on Responsibility of States for Internationally Wrongful Act, only the injured State can invoke the responsibility for a wrongful act of another State.[30] From this perspective, diplomatic protection would be one of the procedures the injured State may recur to bring an international claim.[31]

So far, the reasoning seems to point out that, in the field of diplomatic protection, the notion of State of nationality should be considered as embracing the entities endowed with international legal personality which unilaterally establish a bond of allegiance with individuals that is suitable to produce some particular effects. More precisely, this bond of allegiance between the entity and the individual must be enforceable against the international community and entail the transfer, from the individual to the entity, of the injuries suffered by the individual because of an international wrongful act of a State.

There is no doubt that, usually, these entities correspond to States, and the bond of allegiance they establish with the individuals is named nationality. However, from a very functional perspective, it can not be excluded that entities other than States may be entitled to exercise diplomatic protection in presence of bonds of allegiance bearing a different name. In other words, in the light of what has been seen above, international law does not prevent entities other than States to act in diplomatic protection in favour of

[29] As specified by the ILC, by transferring the injury suffered by an individual to his national State, nationality also prevents the impunity of the wrongdoing State. In this sense, see Draft Articles on Diplomatic Protection with Commentaries cit. 27: "diplomatic protection [...] is a procedure for securing the responsibility of the State for injury to the national flowing from an international wrongful act".

[30] See the Draft Articles on Diplomatic Protection with Commentaries cit. 27: "[d]iplomatic protection is the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted. The present draft articles are concerned only with the rules governing the circumstances in which diplomatic protection may be exercised and the conditions that must be met before it may be exercised. They do not seek to define or describe the internationally wrongful acts that give rise to the responsibility of the State for injury to an alien. The draft articles, like those on the responsibility of States for internationally wrongful acts, maintain the distinction between primary and secondary rules and deal only with the latter".

[31] In this sense, see arts 30, 31 and 36 of Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 117 99. With regard to compensation, the commentary to art. 36 explicitly refers to diplomatic protection. It states that this provision "is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act. The scope of this obligation is [limited to] 'any financially assessable damage'. Financially assessable damage encompasses [...] damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection" (Draft Articles on Responsibility of States for Internationally Wrongful Acts cit. 99).

the individuals with whom they had established a bond of allegiance bearing analogies with nationality, if endowed with the necessary powers under their domestic laws.

VI. The EU citizenship and the bond of allegiance

The next step in this analysis is to determine whether European citizenship possesses, under international law, all the features examined above and, therefore, can discharge the functions performed by nationality in inter-States relations.

VI.1. The founding Treaties

As largely known, art. 20 TFEU grants certain individuals the status of EU citizen: in particular, "[e]very person holding the nationality of a Member State shall be a citizen of the Union". In order to determine whether the European citizenship is sufficient to bestow upon the EU the right to exercise diplomatic protection, it is necessary to ascertain, beyond the *nomen iuris*, whether the EU citizenship fulfills the conditions referred to in the preceding section: namely whether it is the expression of a bond of allegiance between the Union and the individuals; whether it can be opposed to the members of the international community; whether it transfers the injuries produced to the EU, by a wrongful conduct of a third State, on the European citizens.

If the analysis were conducted exclusively in the light of the provisions of the EU founding Treaties, the answer could only be negative. The Treaties seem to conceive of EU citizenship as a sort of a *minoris generis* citizenship. It is additional and complementary to the citizenship of a Member State.[32] It consists of a *numerus clausus* of rights which is not comparable with the many entitlements traditionally connected to national citizenships. Moreover, EU citizenship, even if formally granted by the European Union, is entirely predetermined by the Member States and cannot be amended by the sole Union. Under art. 25 TFEU, the rights deriving from EU citizenship can be increased through a procedure which requires not only the unanimity of the Member States acting within the EU Institutions, but also their "approval [...] in accordance with their respective constitutional requirements". Finally, but not less importantly, no provision of the Treaties confers to the Union the power to enforce the rights of the individuals *vis-à-vis* third States by virtue of the bond of allegiance incorporated in the EU citizenship. Consistently with its *minoris generis* character, the Treaties do not seem to conceive of EU citizenship as having "external relevance".[33]

[32] Art. 20(1) TFEU: "[c]itizenship of the Union shall be additional to and not replace national citizenship".

[33] The EU citizenship has been the subject of extensive literature. *Ex multis*, see: J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 608; D Kochenov, *Citizenship* (MIT Press 2019); D Kochenov, 'Pluralism Through Its Denial: the Success of EU Citizenship' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 179; D Kochenov, 'On Tiles

VI.2. The practice of the European Union

However, the provisions of the EU founding Treaties are not the sole elements to be taken into account. In particular, ascertaining the international relevance of the European citizenship from a functional perspective requires to strictly consider the international practice related to the EU citizenship.

In this regard, the obvious precedent is *Odigitria*.

In 1979 and 1980 the European Union concluded two distinct fishing agreements with Senegal and with Guinea-Bissau whereby each of these two States granted fishing rights in its respective territorial waters to licensed vessels flying the flag of a Member State. Unfortunately, the borders of the territorial waters of the two States were not clear-cut: in particular, there was an area subject to overlapping claims. Precisely in these disputed waters, the Guinean authorities seized a fishing vessel belonging to the Greek company Odigitria possessing a fishing license granted by the Senegalese authorities, confiscated its cargo and ordered the captain to pay a fine for fishing in territorial waters without a Guinean license.[34]

The Commission intervened in the dispute between Odigitria and Guinea-Bissau. It "had intensive consultations [with Guinea's authorities] in order to facilitate the vessel's release", "was present at the trial [of the captain and] made several approaches to the Government and President of the Republic of Bissau".[35] Its conduct was such that, called to review it, the General Court would have recognized that "there is no reason to doubt that the Commission Delegation in Guinea-Bissau fulfilled [...] *its duty to provide diplomatic protection* to the master and [Odigitria]".[36] This statement was confirmed by the Court of Justice which rejected Odigitria's appeal complaint according to which the Commission, despite of what previously established by the General Court, had violated its obligation to provide diplomatic protection.[37]

It would be a mistake to argue that in *Odigitria* the European Union simply requested Guinea-Bissau to fulfill its obligations under the 1980 agreement, namely to let the EU vessels fish in its own waters. Several elements point in another direction.

First, it must be considered that Guinea-Bissau did not violate the 1980 agreement. The agreement imposed on that State the obligation to allow EU vessels licenced by the Guinean authorities to fish in its waters. The disputed waters were, for Guinea-Bissau, a

and Pillars: EU Citizenship as a Federal Denominator' in D Kochenov (ed), *EU Citizenship and Federalism* cit. 3; D Kostakopoulou, *EU Citizenship Law and Policy* (Edward Elgar 2020); A Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart 2020); G Davies, 'European Union Citizenship and the Sorting of Europe' (2021) Journal of European integration 49; F Strumia, *La duplice metamorfosi della cittadinanza in Europa* (Jovene 2013).

[34] Case T-572/93 *Odigitria v Council and Commission* ECLI:EU:T:1995:131 para. 1 ff.

[35] *Ibid.* para. 76.

[36] *Ibid.* para. 77 (emphasis added).

[37] Case C-293/95 P *Odigitria v Council and Commission* ECLI:EU:C:1996:457 paras 10 and 43 ff.

part of its own territory. Then, as viewed by Guinea, it simply sanctioned a vessel which was fishing in its waters without the necessary license.[38] Moreover, the Commission did not request the Guinean authorities to compensate the damages they caused by seizing the vessel, or to pay the equivalent of the cargo they confiscated, nor did it ask them to revoke the fine imposed on the captain. As it specified, the Commission operated "in order to facilitate the vessel's release" and supervised the trial held against the commander.[39] Thus the "internationally wrongful act" against which the Union reacted "with a view to the implementation of [the international] responsibility" of Guinea-Bissau, to recall the expressions used in art. 1 of the Draft Articles on Diplomatic Protection, only consisted in the continuation of the seizure of the fishing vessel which, manifestly, increased the economic damage suffered by the Greek company day-by-day. All this is to say that the "internationally wrongful act" committed by the Guinea-Bissau, and contested by the European Union, did not consist in a breach of the bilateral treaty but rather in imposing an excessive penalty if compared with the gravity of the offense made by the Greek company under customary international law.

Therefore, the European Union fulfilled its "duty to provide diplomatic protection" in favour of Odigitria by arguing that Guinea-Bissau was violating the principle of proportionality, namely one of the general principles of international law applicable in the area of States' responsibility and, in particular, in determining the lawfulness of the injured State's response to the offense suffered.[40]

[38] Interestingly, the EU was aware that Guinea-Bissau considered the disputed waters to be subject to its sovereignty and that, consequently, it would have applied the agreement to that area. The EU accepted that this area was included both in the agreement with Senegal and in the one with Guinea-Bissau in order not to enter in the dispute between the two States. This choice was approved by the General Court: "[t]he Council and the Commission could not have asked for the zone in dispute to be excluded from those agreements without taking a position on matters forming part of the internal affairs of non-member States. If the Community opposed the claims of the States concerning the zones over which they claim to have jurisdiction or opposed the exercise of that jurisdiction when a dispute exists, those non-member countries would very probably refuse to conclude such agreements with the Community. Moreover, if the Community asked for zones to which other States lay claim to be excluded, that move would certainly be interpreted as interference by the Community in those disputes. The exclusion of such zones at the Community's request would also have the effect of weakening the claim of the non-member State in question to have the right to exercise such jurisdiction" (case T-572/93 *Odigitria v Council and Commission* cit. para. 38).

[39] *Ibid.* para. 76.

[40] Art. 51 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts cit., named precisely "Proportionality", states that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". It is to be noted that the expression "rights in question" refers "also [to] the rights of the responsible State" (cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries cit. 134-135). On the principle of proportionally cf. E Crawford, 'Proportionality' (May 2011) Max Planck Encyclopedia of Public International Law opil.ouplaw.com, who describes it at para. 1 as the general principle according to which "a State's acts must be a rational and reasonable exercise of means towards achieving a

Odigitria marks an important turn in the international practice of the European Union. The EU intervened against a third State, contesting its conduct in violation of a general principle of international law which caused a damage to a "European" company. *Odigitria* therefore highlights the conviction of the European Union – or its *opinio iuris*, as one might be tempted to say – of being entitled to exercise diplomatic protection.

The events are even more interesting if one considers that in 1990, when the fishing vessel was seized and the Commission intervened against Guinea-Bissau, EU citizenship had no legal basis in the Treaties. Then the Commission exercised diplomatic protection, not on the basis of the "formal" EU citizenship, but rather on the basis of the "material" allegiance between the individuals affected and the European Union, which is perfectly in line with the functional interpretation of customary law on diplomatic protection previously suggested.[41] Noteworthy, when the European judges enacted their rulings, the Treaties had already been amended and the European citizenship established. It does not seem implausible to suppose that the new constitutional setting has played a role in the decision of the judges to vest the European Institutions with prerogatives hitherto reserved to statehood, such as the "duty to provide diplomatic protection".[42]

Odigitria may help shed light on the vexed issue of the legal basis of the recent European Union's action aimed to protect European citizens *vis-à-vis* the United Kingdom.

The European Union did not question the imposition of a sanction on the EU citizens by that State. On the contrary the Commission, as said above, admitted that "[t]he UK is a third country and its national immigration law applies to all travellers, including EU citizens".[43] As in *Odigitria*, the EU did not claim that EU citizens had the right to enter in the territory of the third State concerned, nor did it contest the right of the third State to impose a sanction to their illegal entry. *Vis-à-vis* the United Kingdom, as well as *vis-à-vis* Guinea-Bissau, the EU has rather invoked the excessive severity of the sanction imposed, namely the compliance of the State's conduct with the general principle of proportionality in the treatment of aliens. Indeed, as previously noted, the EU intervention focused on the modality of the reactions of the United Kingdom to the illegal conduct of

permissible goal, without unduly encroaching on protected rights of either the individual or another State"; E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) EJIL 889; C Kress and R Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2021); TM Franck, 'Proportionality in International Law' (2010) Law & Ethics of Human Rights 230; J Crawford, J Peel and S Olleson, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) EJIL 963; JG Gardam, *Necessity, Proportionality, and the Use of Force by States* (Cambridge University Press 2004); DW Greig, 'Reciprocity, Proportionality and the Law of Treaties' (1994) Virginia Journal of International Law 295.

[41] Cf. *supra* section V.2.

[42] On the possibility to identify the *choses* before the *noms* in international law see PM Dupuy, 'Le jus cogens, les mots et les choses. Où en est le droit impératif devant la CIJ près d'un demi-siècle après sa proclamation?' in E Cannizzaro (ed.), *The Present and Future of Jus Cogens* (Gaetano Morelli Lectures Series 2015).

[43] Answer given by Vice-President Šefčovič on behalf of the European Commission cit.

the EU citizens and, in particular, on the gross disproportion between the offenses committed that the sanctions imposed.[44]

All these elements point to the conclusion that in both cases the EU conceived of and implemented its action as a form of diplomatic protection under international law and, in particular, as one based on the bond of allegiance between the Union and its citizens. The underlying premise of such an action was that EU citizenship had produced the effect of transferring the consequences of an international wrongful act from the citizen injured to the EU itself. By virtue of its status of injured entity, the European Union maintained to be entitled to exercise diplomatic protection and acted accordingly.

It is noteworthy that neither the EU Member States, nor the third States concerned, and even less other members of the international community contested the legality of the EU actions. Quite the contrary, in the case of the illegal entry of some European citizens in the UK territory, the EU Member States supported the action of the Union, so as the UK acquiesced to many claims of the EU and in no way contested the legality of its intervention for lack of statehood.

These positions seem to indicate a consistent *opinio iuris* of all the players at stake: in accordance with the ILC and the ICJ case law, indeed, "[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*)".[45] It does not seem unreasonable to maintain that the parties, through their consistent conduct, recognised the existence of an international law rule allowing the European Union to act in diplomatic protection or, alternatively, recognised that the scope *ratione personarum* of an existing international law discipline, namely the discipline of diplomatic protection, is broader than hitherto supposed, and includes the EU among the entities entitled to exercise the rights connected to it.

This assumption does not necessarily imply that a new rule of international law has already come into existence, or that customary law has already included the EU among

[44] See *supra* section II. The European Union welcomed the decision of the United Kingdom to "address EU concerns" and to direct the "border guards to prefer immigration bail" instead of detention measures (Answer given by Vice-President Šefčovič on behalf of the European Commission cit.). However, it took the view that detention, when even imposed, should have been "as short as possible and in full respect of all the rights of detainees" (*ibid.*). Furthermore, the Commission highlighted that it would have constantly monitored "the treatment of EU citizens at the UK border" and that it would have not "'hesitate to take action to address problems" (*ibid.*). Finally, it shall be noted that even the members of the European parliament who had urged the Commission to act stressed that the sanctions imposed by UK were "disproportionate", cf. European Parliament, Question for written answer E-002966/2021 to the Commission cit. ("the measures taken by the United Kingdom's authorities are disproportionate"); A Mituta, D Ciolos, D Pîslaru, V Gheorghe, V Botos, D Tudorache, R Strugariu and N Stefanuta, Letter of 12 May 2021 to President von der Leyen and Vice-President Šefčovič, available at www.twitter.com ("sending young EU nationals to immigration detention centres is grossly disproportionate").

[45] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018, UN Doc. A/73/10 122, Conclusion 10(3). In the same sense, cf. ICJ *Fisheries (United Kingdom v Norway)* (Merits) [18 December 1951] 27.

the entities entitled to act in diplomatic protection: more modestly, the analysis undoubtedly reveals that such evolution in international law is on-going.[46]

VII. The effects of the practice of the international organisations on customary law

The hypothesis just presented relies on the assumption that the EU can influence the contents of customary law. This assumption requires some clarification. The state of the law concerning the participation of international organizations to the processes of formation and development of customary law has evolved over time. If the traditional opinion suggested that only States' practice contributes to these processes, the opposite view is gaining more and more ground.

As largely known, when referring to customary rules, international courts and tribunals mainly look at practice and *opinio iuris* of States. In *Military and Paramilitary Activities in and against Nicaragua* the ICJ the ICJ said that it will "direct its attention to the practice and *opinio juris* of States", and in *Continental Shelf* the same Court noted that "it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States".[47] However, these contentions do not necessarily mean that the practice of international organizations does not count in the formation of customary law. They simply entail that their conduct is quantitatively less relevant than that of States in order to determine international law, which mainly concerns inter-State relations.

It must be considered that the international organizations' contribution to the formation and to the development of international law has been amply recognised.[48] In the Conclusion n. 4 of the Draft Conclusions on Identification of Customary International

[46] The scantiness of the relevant practice does not necessarily prevent the parties from considering that a new rule has emerged, or that a pre-existing customary rule enlarged its scope so as to include, besides States, another entity, namely the EU, as entitled to exercise the rights and duties flowing from it. In *North Sea Continental Shelf*, the ICJ clarified that there is no univocal rule governing the formation of customary law: in particular, in the presence of a clear and univocal consensus of the international community, a customary norm could also arise in a limited time frame and even in as a consequence of a very little practice (ICJ *North Sea Continental Shelf (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)* (Merits) [20 February 1969] para. 74 ff.). Some authors advocated a case for the sudden formation of a customary rule which corresponds to the changing needs of the international community and, albeit not having condensed in practice, collecting a very broad consensus. For an example, cf. the famous *Torrey Canyon* case (J Pfeil, 'Torrey Canyon' (December 2006) Max Planck Encyclopedia of Public International Law opil.ouplaw.com and literature referred to). In general, on instant customary law, cf. B Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) IJIL 23.

[47] ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [27 June 1986] para. 183 and ICJ *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Merits) [3 June 1985] para. 27.

[48] For an historical survey on this issue cf. K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201.

Law, endorsed by the General Assembly in resolution 73/203 of 20 December 2018, the ILC, while admitting at para. 1 that "[t]he requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States", at para. 2 indicates that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[49]

For our analysis, two elements need to be specified: what practice of the international organizations is to be considered is identifying customary law and when?

As for what practice, it is opportune to recall some observations of the Special Rapporteur. He underlined "the importance of the distinction between the practice of States within international organizations and that of the international organizations themselves": only the second one would be relevant for Conclusion 4(2).[50] Similarly he emphasized "the importance of distinguishing between the practice of the organization that related to the internal operation of the organization and the practice of the organization in its relations with States and others": again, only the second one would be relevant for Conclusion 4(2).[51]

As for the question of when the practice of international organizations has to be considered, the answer can be found in the comment on Conclusion n. 4. There the ILC clarified that the practice referred to in Conclusion 4(2) "arises most clearly where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States".[52] Significantly, the ILC found that "[t]his is the case, for example, for certain competences of the European Union".[53]

Summarizing the reasoning of the ILC, it could be assumed that "when [international organizations] exercise on the international plane exclusive competences or other powers conferred upon them", then "it is their own practice, in fulfilment of their mandates from

[49] Draft Conclusions on Identification of Customary International Law cit. 122, 130. For some notes on the relevant passages of the Draft Conclusions on Identification of Customary International Law see, *ex multis*, N Blokker, 'International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?' (2017) IOLR 1 and J Odermatt, 'The Development of Customary International Law by International Organizations' (2017) ICLQ 491.

[50] International Law Commission, Report on the Work of the Sixty-seventh Session, 2015, UN Doc. A/70/10, 38 ff., para. 71 legal.un.org. For a survey of the States' positions with respect to Conclusion 4(2) cf. International Law Commission, Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur of 14 March 2018, UN Doc. A/CN.4/717, para. 35 ff.

[51] Report on the Work of the Sixty-seventh Session (2015) cit. para. 71.

[52] Draft Conclusions on Identification of Customary International Law cit. 131.

[53] *Ibid.* See also M Wood, 'The UN International Law Commission and Customary International Law' (2020) Gaetano Morelli Lectures Series 65; P Palchetti, 'Unique, Special, or Simply a *Primus Inter Pares*? The European Union in International Law' (2018) EJIL 1049; K Daugirdas, 'International Organizations and the Creation of Customary International Law' cit. 201.

States, which could be of relevance".[54] Therefore, where customary law governing a specific issue has to be identified, in addition to collecting the practice and the *opinio iuris* of States, it is necessary to ascertain whether there are international organizations which, with respect to that given matter, act on the international plane instead of their Member States because of a transfer of competences. In that case, the practice and the *opinio iuris* of these organizations shall be considered, on an equal footing to that of States.

VIII. The effects of the practice of the European Union on customary law

In the light of the above, the assumption that the practice of the European Union may contribute to determine the customary regime of diplomatic protection, and that this practice aims at enlarging its scope *ratione personarum* so as to include the Union itself, appears more and more reasonable. What is still to be determined is whether the practice of the EU can influence customary law in the specific area of diplomatic protection.

In the Draft Conclusions on Identification of Customary International Law, the ILC established that the area of influence of the practice of an international organization on customary law corresponds to the area of the powers the organization may exercise, on the international level, instead of its member States. The "borders" of the competences transferred to the organization would therefore coincide with the borders of the scope of the effects its practice could produce on international law. Consequently, outside these borders, namely with regard to the matters in which the organization cannot act in the international sphere instead of its member States, its practice is irrelevant.

Applying these legal principles to the European Union, the potential scope of the effects the EU practice can produce on customary law, and therefore on the regime of diplomatic protection, corresponds to the matters falling within the international powers assigned to the European Union. These powers would not only be those explicitly conferred on the Union by the Member States. The potential scope of the effects of the EU practice on customary law would include the competences implicitly conferred to it.

In *Reparation for Injuries Suffered in the Service of the United Nations*, as partially anticipated, the ICJ found that "[w]hereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an [international organization] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice"[55]. Therefore, "[u]nder international law, [an international organization] must be deemed to have those powers which,

[54] Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur cit. para. 48.

[55] *Reparation for Injuries Suffered in the Service of the United Nations* cit. 10.

though not expressly provided in the [founding treaty], are conferred upon it by necessary implication, as being essential to the performance of its duties".[56]

Notoriously, the implied powers doctrine is one of the pillars that the system of the EU foreign power largely rests on. Building upon the provision of the Treaty which provides that "[t]he [Union] shall have legal personality", in *ERTA* the Court of Justice found that, "in its external relations", the EU "enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty".[57] In particular, "each time the [Union], with a view to implementing [an objective] envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules".[58] Actually in those cases "the [Union] alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system".[59]

IX. The actual scope of the effects of the practice of the European Union on customary law

Of course, neither the attribution to the European Union of the power to conclude agreements with third States, nor the actual conclusion of an agreement, does, *per se*, bestow upon the EU the power to exercise diplomatic protection. Arguably, the conclusion of an agreement implies that the Union is vested with the instrumental powers envisaged by international law to implement it on the international plane. But it is one thing to claim compliance with an agreement, it is another thing to exercise diplomatic protection under customary international law. To conclude that the Union possesses this power, a further analysis concerning the effect of EU practice on customary law is needed.

An example will clarify this difference. The existence of an exclusive competence of the Union on fisheries and conservation of marine biological resources can hardly bestow, *per se*, on the EU the power to exercise diplomatic protection in favour of European vessels and fishermen damaged by the illegal conduct of a third State. Nor is it sufficient, to this effect, the conclusion by the EU of an agreement with a third State, namely the exercise of the competence. The conclusion of an agreement certainly confers on

[56] *Ibid.*12.

[57] Case 22/70 *Commission v Council* ECLI:EU:C:1971:32 paras 13-14.

[58] *Ibid.* para. 17. On the application of the implied power doctrine to the EU cf. G Butler and RA Wessel, 'Happy Birthday ERTA! 50 Years of the Implied External Powers Doctrine in EU Law' (31 March 2021) European Law Blog europeanlawblog.eu; M Cremona, 'External Relations of the European Union: The Constitutional Framework for International Action' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 431.

[59] *Commission v Council* cit. para. 18.

the Union the power to claim the rights flowing from that agreement, but not yet the prerogatives flowing from customary international law related to the protection of its citizens. What is needed to this effect is that the EU effectively intervenes in defense of a European citizen who suffers a damage related indeed to his fishing activity, but not in consequence of a breach of the agreement. Such action, if recognised by third parties, could be part of the EU practice relevant for the identification of customary law on diplomatic protection, and ultimately bestows upon the EU the power to act in diplomatic protection for a breach of whatever rule of international law which has materially damaged an EU citizen (during his fishing activity, of course). [60]

This is precisely what happened in the *Estai* case. As known, in that case the EU reacted to the seizure of the (Spanish, then) European vessel Estai, caught by Canada while fishing Greenland halibut in international waters. The European Commissioner for Fisheries defined the conduct of Canada as an intentional act of piracy[61] and the European Union "protested and asserted that Canada had no right to arrest the 'Estai' on the high seas [...] under [...] the international law of the sea".[62] Then "extensive diplomatic negotiations between Canada and the European Union followed, which culminated in further agreements on the allocation of the Greenland halibut quotas".[63]

X. Concluding remarks: is there an individual right to diplomatic protection *vis-à-vis* the EU?

If the hypotheses proposed in this *Article* prove to be correct, and the European Union is vested with the powers and prerogatives commonly referred to under the formula of diplomatic protection, it must still be determined whether these powers and prerogatives also entail, for the Union, a duty to protect its citizens, albeit only within the scope of the European citizenship. If this were the case, since every duty entails a corresponding right, the legal sphere of the EU citizenship would be significantly enhanced.

This duty could be hardly grounded on international law. According to the prevailing view, the international law of diplomatic protection does not establish a duty upon the States of nationality. As pointed out in the Draft Articles on Diplomatic Protection,

[60] Cf. Draft Conclusions on Identification of Customary International Law cit. 134: "[p]ractice may take a wide range of forms. [...] Forms of State practice include [...] conduct in connection with treaties". In the commentary, the ILC pointed out that "[t]he words "conduct in connection with treaties" cover acts related to the negotiation and conclusion of treaties, as well as their implementation".

[61] See F Papitto, 'Una nave da guerra a difendere le sogliole' (11 March 1995) La Repubblica repubblica.it: the definition by the Commissioner was "un atto di pirateria premeditato".

[62] See Answer given by Ms Damanaki on behalf of the Commission E-4682/10EN of 6 September 2010 www.europarl.europa.eu.

[63] *Ibid.* and Statement by Mrs Emma Bonino, European Commissioner for Fisheries, on the Occasion of the Initialling of the Agreement Between the European Union and Canada on Fisheries (Greenland Halibut) of 16 April 1995, available at ec.europa.eu.

under international law the State of nationality "has the right to exercise diplomatic protection [but it] is under no duty or obligation to do so":[64] that State shall only "give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred".[65]

However, international law does not prevent the duty to exercise diplomatic protection from being established at the domestic level. As the ILC set out, "[t]he internal law of a State may oblige a State" to exercise diplomatic protection in favour of its citizens.[66]

Thus, the possible existence of a duty to exercise diplomatic protection upon the European Union shall be examined on the basis of EU law. Since there is no provision which expressly confers the power to act in diplomatic protection to the Union, *a fortiori*, the European legal order does not formulate an obligation in this regard. Nevertheless, such an obligation can not only stem from a written law provision, but also from an implied domestic rule. It seems then necessary to assess whether EU law would implicitly entail for the Union a duty to protect its citizens. A positive answer can be based on a number of arguments.

First, art. 3(5) TEU must be considered: in those fields in which the Union acquires the international prerogatives necessary for the exercise of the diplomatic protection, art. 3(5) may be construed as entailing a strong limitation to the discretion of the EU in deciding whether to act.

Art. 3(5) TEU states that, "[i]n its relations with the wider world", the European Union shall "contribute to the protection of its citizens". This passage of the provision does not establish, *per se*, a right of the European citizens to be protected by the Union: more modestly, it implies that the protection of the Union's citizens must be promoted by the EU. Nonetheless, this minor obligation can well produce consequences. Under a settled case of the of the Court of Justice, the Institutions of the European Union, in the exercise of their discretional powers, have "a duty [...] to examine carefully and impartially all the relevant aspects of the [specific] case": among other elements, they have thus to consider the objectives stated by art. 3 TEU.[67] Then art. 3(5) TEU would imply that the European Union, when acting at the international level, cannot ignore the objective of protecting EU citizens but, on the contrary, must take in due consideration the objective of "contribut[ing] to the protection of its citizens".

Moreover, attention shall be devoted to art. 21 TEU, as some of the objectives laid down in that provision point in the same direction of art. 3(5).

[64] Draft Articles on Diplomatic Protection with Commentaries cit. 28.

[65] Art. 19 of the Draft Articles on Diplomatic Protection cit.

[66] Draft Articles on Diplomatic Protection with Commentaries cit. 28.

[67] Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* ECLI: EU:C:1991:438 para. 14. In the same sense, case C-77/09 *Gowan Comércio Internacional e Serviços* ECLI:EU:C:2010:803 para. 57; cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240 para. 54; case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 225.

In paras (1) and (2)(b), art. 21 TEU requires the European Union to promote, by its "action on the international scene", "respect for [...] international law" and "the rule of law". On analogous terms as art. 3(5), art. 21 TEU does not grant the Union a competence to pursue the objectives it describes. In other words, Member States have not entrusted the Union with the task of attaining the objectives set out in art. 21 TEU. However, when the Union exercises at the international level one of the substantive competences conferred on it by the Member States, it must act by pursuing, *inter alia*, the objectives set out in art. 21.

It is difficult to imagine the objectives set out in art. 21 TEU being violated by the Union if it decides to exercise diplomatic protection. By its very nature, diplomatic protection is designed to remedy to a breach of international law and, unequivocally, tends to ensure respect for its rules. Admittedly, art. 21 TEU does not require the European Union to ensure that international law is complied with at all cost and in every circumstance. But, in principle, the conduct of the EU in the international area, composed of both actions or omission, must be assessed against the prism of the respect, and promotion of compliance with, international law. One can hardly hold that an unmotivated idleness against an unlawful conduct of a third State against its citizens, which would inescapably create a situation of impunity, is consistent with the imperative of "advanc[ing] in the wider world the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity" and, above all, the "respect for [...] international law" established by art. 21 TEU.

Thus, although EU law does not impose an obligation to exercise diplomatic protection, it would impose on the European Union a duty to decide whether to act in diplomatic protection on the basis of a balance of interests that takes into account the objectives set out in arts 3(5) and 21(1)(2) TEU. There would be no obligation of results, but there would be a strict obligation of means.

It cannot be excluded that compliance with this obligation may become the subject of judicial review. In *Air Transport Association of America*, the Court of Justice first specified that "[as] the European Union is to contribute to the strict observance and the development of international law", "when [...] adopts an act, it is bound to observe international law in its entirety, including customary international law".[68] Then, "[many] principles of customary international law [...] may be relied upon by an individual for the purpose of the Court's examination of the validity of an act of the European Union": in particular, it could happen "in so far as [...] the act in question is liable to affect rights which the individual derives from European Union law".[69] On closer inspection, the decision to

[68] Case C-366/10 *Air Transport Association of America and Others* ECLI:EU:C:2011:864 para. 101.
[69] *Ibid.* para. 107.

abstain from acting in diplomatic protection may well constitute an "act liable to affect rights which the individual derives from European Union law".[70]

In consequence thereof, the set of rights and prerogatives connected with the European citizenship would be significantly enhanced. It does not incorporate a right to diplomatic protection, but includes the right to have the Union assess the individual interests allegedly injured by a third State and, absent other preeminent interests connected to the objectives of the EU's external action, to be effectively protected. Such a right is certainly more indeterminate than the right to be protected, but it is not devoid of practical effect. It is one of the objectives which contributes to the set of interests which must be balanced with each other to determine the direction of the EU's external action. Significantly, it is a right which emerges from the combination between the European citizenship and the new international objectives of the EU, the two regimes which have innovated the legal order of European Union and which may innovate the international legal order.

[70] In the previous sections it was submitted that the EU may acquire the right to exercise diplomatic protection in the field of fisheries against a third State linked to it by a treaty on fishing. In such a situation, on the basis of the treaty on fishing, which "form an integral part" of EU law (case 181/73 *Haegemann v Belgian State* ECLI:EU:C:1974:41 para. 5), and by virtue of the capacity of international agreements' rules to produce direct effects (*ex multis*, see case C-12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400 para. 13 ff. and case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* ECLI:EU:C:1982:362 para. 26), European citizens may claim the right to fish in the waters of the third State concerned. Thus, if a European citizen suffers a damage as a result of a wrongful act of this State while fishing, and the European Union decides not to exercise diplomatic protection in his favour, that decision would be absolutely "liable to affect rights which the individual derives from European Union law" (*Air Transport Association of America and Others* cit. para. 107).