

# THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: *A COMMENTARY*

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PUBLISHED BY:

JusGov/ UMinho Law School | Escola de Direito da Universidade do Minho

ISBN:

978-989-35054-8-9

Braga (Portugal), July 2024

This book is financed by national funds through the National Agency for Science and Technology, FCT (Fundação para a Ciência e a Tecnologia - FCT I.P.), under the project Ref. UID/05749/2020



## ARTICLE 46

### *Diplomatic and consular protection*

*Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she 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 Member State.*

1. The right to diplomatic and consular protection is based upon Article 46 of the CFREU, and Articles 20 (2)(c) and 23 of the Treaty on the Functioning of the TFEU. It constitutes one of the citizenship rights included in the Maastricht Treaty, alongside the right to free movement and residence in Member States [Articles 20(2) (a) and 21 TFEU], the right to vote and be elected in the European Parliament elections and in the local elections of the Member States of residence [Article 20(2)(b) and 22 TFEU], and the right to (i) address petitions to the European Parliament, (ii) make a complaint to the European Ombudsman, and (iii) write to the institutions of the Union in one of the languages of the Treaties and receive an answer in the same language [Articles 20(2)(d), 24 TFEU, 11 TEU and 41(4) CFREU].

The inclusion of an external dimension to EU citizenship serves a triple purpose: (i) to foster the worldwide free movement of EU citizens by securing consular support in situations of political and humanitarian crisis in third States; (ii) to enhance consular cooperation between Member States and the EU delegations outside the EU; (iii) to strengthen the identity of the Union as perceived by third States.

The diplomatic and consular protection provided to unrepresented EU citizens includes support provided in situations of need, such as when they are arrested or detained, suffer serious accidents, serious illnesses or die, need relief and repatriation or the issuance of documents. Since it is virtually impossible to exhaust local legal remedies in a short time span, the EU citizenship right does not include diplomatic protection in a strict sense, that is, the “*invocation by a State, through diplomatic action or other peaceful means, of the responsibility of another State for an injury caused by an international 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.*”<sup>1</sup>

2. The right to diplomatic and consular protection does not entitle the unrepresented EU citizens to the assistance that would be given in a similar situation by the diplomatic or consular missions of their Member State of origin. They are solely entitled to the support available to nationals of the Member State from whom they seek protection in the third State.

Under international law, States have the sovereign right to grant diplomatic and consular protection to their own citizens. This is not, however, an obligation, but merely a discretionary power that may be exercised “*by considerations of a political or other nature, unrelated to the particular case.*”<sup>2</sup>

<sup>1</sup> Article 6 of the draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006 (UN doc. A/CN.4/L 684).

<sup>2</sup> Judgment International Court of Justice (ICJ) *Barcelona Traction, Light and Power Company, Limited*

In the absence of harmonised EU rules, diplomatic and consular protection provided to unrepresented EU citizens varies according to the laws and practices adopted in each Member State. The phenomenon of “consular shopping” or “protection shopping” by which unrepresented EU citizens pick and choose Member States’ diplomatic and consular missions that offer a more generous treatment to their nationals may emerge and put a strain on the capacity of those missions to deliver adequate relief in times of crisis.

Diplomatic and consular missions of Member States enjoy a wide degree of discretion in deciding whether to provide assistance to unrepresented EU citizens on a given case.<sup>3</sup> EU citizens without representation that seek support in these missions may well find their request for diplomatic and consular protection denied. Since such a denial restricts a citizenship right protected by the Charter, it must meet objectives of general interest recognised by the Union, be necessary to attain a legitimate objective, respect the essence of the right to diplomatic and consular protection, as well as the principle of proportionality (Article 52 CFREU). When examining such requests, Member States’ missions must take into account the consequences that the denial of diplomatic and consular protection entails for the person(s) concerned.<sup>4</sup> Those consequences relate to the protection of other fundamental rights enshrined in the Charter, such as the rights to life, physical integrity, property, liberty and human dignity.<sup>5</sup>

The right to diplomatic and consular protection enjoys direct effect and is subjected to judicial review. Unrepresented EU citizens may seek compensation for any harm caused by the decision of the diplomatic or consular mission of the represented Member State.<sup>6</sup>

3. The reciprocal diplomatic and consular protection between Member States established in the Charter is also limited by the fact that in international law, “*in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.*”<sup>7</sup> Article 3(1) of the draft Articles on Diplomatic Protection (2006) is also clear in this respect: “*The State entitled to exercise diplomatic protection is the State of nationality.*”

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(*Belgium v. Spain*), 24 July 1964, *I.C.J. Reports 1970* 3, para. 79.

<sup>3</sup> Eva-Maria Poptcheva, *Multilevel Citizenship: the right to consular protection of EU citizens abroad* (Peter Lang, 2014), 192, found ten Member States that provide diplomatic and consular protection as a matter of policy: Austria, Belgium, Cyprus, the Czech Republic, France, Ireland, Luxembourg, Malta, the Netherlands, and the United Kingdom. Based on the national responses contained in the CARE Project Report Consular and Diplomatic Protection legal framework in the Member States, Eileen Denza, “Article 46”, in *The EU Charter of Fundamental Rights: a commentary*, ed. Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (Hart Publishing, 2014), 1186, also includes in this list Germany, Greece, and Spain.

<sup>4</sup> Judgment CJEU *Rottman*, 2 March 2010, Case C-135/08, ECLI:EU:C:2010:104, para. 56. This case concerned a situation in which national law granted national administrative authorities the discretionary power to withdraw the nationality of a naturalised citizen.

<sup>5</sup> Eva-Maria Poptcheva, *Multilevel Citizenship: the right to consular protection of EU citizens abroad*, 199, considers that “*the obligation imposed on the Member States as counterpart to the subjective right to claim consular protection is thus the obligation to secure those underlying fundamental rights.*” Poptcheva identifies the right to consular protection as an “umbrella right” that secures the effectiveness of other fundamental rights (199-200).

<sup>6</sup> Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, COM(2011)149/2, 4.

<sup>7</sup> Judgment Permanent Court of International Justice *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, 1938 P.C.I.J. (ser. A/B) no. 75 (Order of June 30), 16.

States have no right to protect nationals from other States against the will of the receiving State.<sup>8</sup> Article 8 of the Vienna Convention on Consular Relations (1963) authorises the extension of consular protection to nationals from other Member States, but at least tacit consent is required from the receiving State. Consent may follow the unilateral notification of the Member State whose protection was sought, or, alternatively, result from the application of “consent clauses” included in bilateral agreements that foresee the possibility of the third country accepting that the authorities of a Member State may provide protection to nationals of other Member States not represented on the same conditions offered to its own citizens.<sup>9</sup>

Article 23(1) TFEU mandates Member States to initiate international negotiations required to secure the effectiveness of the right to diplomatic and consular protection of unrepresented EU citizens. Although this obligation is not being complied with by Member States, in the absence of any reported denial from third states to protective functions exercised by Member States under Article 23 TFEU, the case could be made “for asserting that there has developed a customary law exception to the restricted right to protection deriving from the special nature of the relations between Member States of the Union.”<sup>10</sup>

4. Article 23(2) TFEU states that the Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

On 20 April 2015 the Council adopted Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries.<sup>11</sup>

The directive establishes that citizens of the Union enjoy protection from the diplomatic and consular missions of other Member States on the same terms as the nationals of those Member States, if in the territory of the third country where the EU citizen’s Member State of origin has no embassy or consulate established on a permanent basis, or if it has no embassy, consulate or honorary consul which is effectively in a position to provide him with consular protection (Articles 1 and 6). Protection for unrepresented citizens may include assistance in a number of typical situations in which Member States provides consular support to their own nationals, such as in cases of arrest or detention, serious accident or serious illness and death, as well as with regard to providing relief and repatriation in cases of distress, or the issuance of emergency documents (Article 9). The consular protection includes third-country family members accompanying the applicant to the same extent and on the same conditions as it would be provided to third-country family members of the citizens of the assisting Member State, in accordance with its national law or practice

<sup>8</sup> Eileen Denza, “Article 46”, 1182.

<sup>9</sup> The European Commission has also encouraged the inclusion of “consent clauses” in “mixed agreements”. These are international agreements adopted between the EU and its Member-States with third countries that focus on matters partially included within the sphere of competences of the EU and the Member-States. See Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, 8.

<sup>10</sup> Eileen Denza, “Article 46”, 1191.

<sup>11</sup> This Directive establishes a transposition deadline until 1 May 2018 (Article 17). On this date the intergovernmental legal framework that governed the implementation of the right to diplomatic and consular protection (Decision 95/553/EC) was repealed.

(Article 5).<sup>12</sup> Unrepresented citizens can only be required to undertake to repay costs of consular protection that would have had to be borne by nationals of the assisting Member State in the same circumstances [Article 14(1)].

In the event of a crisis, the coordination of the support provided for unrepresented citizens is performed by the “Lead State”. This role is given to one Member State represented in the third country. Member States not represented are obliged to provide the Lead State with all relevant information regarding their citizens [Article 13(2)].

5. The EU was granted legal personality by the Treaty of Lisbon (Article 47 TFEU) but that was not enough to overcome the “functional” limitation of its right as a federal Union of States to deliver diplomatic and consular protection solely to its staff.<sup>13</sup>

The possibility that the EU could provide diplomatic and consular protection directly to EU citizens was probably eschewed because it would invade areas of sovereignty that the Treaties still reserve almost exclusively to the Member States. However, that would be the best solution to reinforce the EU’s identity as perceived by third countries and, above all, to solve the limitations of a diplomatic and consular protection of unrepresented EU citizens based on a reciprocal cooperation between Member States.<sup>14</sup>

The need to strengthen the Union’s efforts in the field of diplomatic and consular protection was not ignored by the Treaty of Lisbon: (i) Article 3(5) TEU declares that “*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens*”; (ii) Article 35(3) states that the diplomatic and consular missions of the Member States and the Union delegations in third countries “*shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries.*”

The Union’s delegations, upon request by Member States, support the Member States in their diplomatic relations and in their role of providing consular protection to citizens of the Union in third countries on a resource-neutral basis [Article 5 (10) of the Council Decision 2010/427/EU].

In the event of crisis in third countries, the EU’s civil protection mechanism can also be called upon to provide consular support to EU citizens when requested

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<sup>12</sup> The Directive does not preclude that during the consultations which should take place before assistance is provided to third-country nationals, the assisting Member State and the unrepresented citizen’s Member State of nationality, whenever appropriate, agree on the possibility to extend assistance to third-country family members of the unrepresented Union citizen beyond what is required by the law of the assisting Member State or what is dictated by its practice, taking into account as much as possible requests from the unrepresented citizen’s Member State of nationality, and in so far as what is agreed does not fall short of what is required by Union law (Recital 9).

<sup>13</sup> In the opinion *Reparation for Injuries Suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, 184, the International Court of Justice stated the following regarding the case of the United Nations: “*upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.*”

<sup>14</sup> Marta Cartabia, “Art. 46 Tutela diplomática e consolare”, in *L’Europa Dei Diritti, Commento alla Carta dei diritti fondamentali dell’Unione Europea*, ed. Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (Bologna: il Mulino, 2001), 317, and “Article 46 – Diplomatic and Consular Protection”, in *Human Rights in Europe*, ed. William B. T. Mock and Gianmario Demuro (Durham: Carolina Academic Press, 2010), 286, which adds that this proposal was presented by the Commission and by the Spanish government at a European Council held in Rome.

by the consular authorities of the Member States.<sup>15</sup> The operational centre for this mechanism – the European Commission’s Monitoring and Information Centre – facilitates a rapid mobilisation of financial and logistical resources in crises, as well as the exchange of information of great importance to the consular authorities of the Member States.

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<sup>15</sup> Article 2(10) of the Council Decision 2007/779/EC. The EU Civil Protection Mechanism was used to provide evacuation of Europeans after the terrorist attacks in Mumbai in 2008 and the beginning of the civil war in Libya in 2011. See Communication from the Commission to the European Parliament and the Council, Consular protection for EU citizens in third countries: State of play and way forward, 8.