EXTERNAL REPRESENTATION AND THE EUROPEAN EXTERNAL ACTION SERVICE: SELECTED LEGAL CHALLENGES

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1. INTRODUCTION

The 2001 Laeken Declaration on the future of the European Union strongly asserted the need for the EU to be(come) a prominent global actor:[1] '*Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples?*' Via the meanderings of the Draft Constitution, the Lisbon Treaty translated this ambition into a number of external objectives (Articles 3 (5) and 21 TEU). In order to bring to fruition these ambitious objectives, the Treaty of Lisbon strengthened the institutional dimension of EU external representation, in particular through the establishment of the European External Action Service ('EEAS').[2]

This new body has been called 'the first structure of a common European diplomacy'.[3] However, the EU is not a state, although it is an active participant in the diplomatic network of states that is – primarily – regulated by the Vienna Convention on Diplomatic Relations of 1961 ('VCDR')[4] and the Vienna Convention on Consular Relations of 1963 ('VCCR').[5] Currently 138 Union delegations are active in states around the World, and at international organizations.[6] The EU's intensified global diplomatic ambitions in external representation trigger the question to which extent they are compatible with the European and international legal framework? Traditionally, diplomatic relations are established between states and the legal framework is strongly state-oriented. The EU is not a state but an international organization, albeit a very special one. It enjoys international legal personality, which allows it to enter into legal relations with

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[1] European Council, Laeken Declaration on the Future of the European Union, 14-15 December, 2001, subheading 'Expectations of Europe's citizens'.

[2] Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* 2010 L 201/30 ('EEAS Decision').

[3] 'Consular and Diplomatic Protection: Legal Framework in the EU Member States', Report of the *EU CARE project*, December 2010, at 31; available at <http://www.careproject.eu/images/stories/ConsularAndDiplomatic-Protection.pdf>.

[4] The VCDR was signed on 18 April 1961, entry into force 24 April 1964, *United Nations Treaty Series, vol. 500, 95, No. 301*. Currently 187 states are party to the VCDR. See <http://treaties.un.org/pages/ViewDetails. aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en>.

[5] The VCCR was adopted 24 April 1963, entered into force 19 March 1967, currently 172 states parties, *United Nations Treaty Series, vol. 596, 262*.

[6] Updates may be found at <http://eeas.europa.eu/delegations/web_en.htm>. See also the EEAS document 'EU Diplomatic Representation in third countries – First half of 2012', Council of the European Union, Doc. 18975/1/11, REV 1, 11 January 2012.

states and other international organizations.[7] At the same time, its external competences are limited by the principle of conferral,[8] and in many cases the EU is far from exclusively competent and shares its powers with the Member States. Indeed, the TEU mandates that 'essential state functions'[9] of the Member States are to be respected by the Union and it is in diplomatic relations in particular that one may come across these state functions.[10] Finally, within the Union the new diplomatic Service is by no means the sole competent institution for EU external relations.

With this EU-internal complexity in mind, the present paper will utilize the VCDR's description of 'diplomatic activities' in its Article 3, and on that basis, the article will explore the Union's 'diplomatic ambitions' through its newly established EEAS. Subsequently, this contribution will then confront these with the European and international legal reality. It will analyse to which extent the current legal framework is able to allow the EU to act alongside states at the global level in exercising a number of diplomatic functions. Thus, in this paper we shall focus on five distinct aspects of diplomatic relations by the Union first, establishing a formal EU presence through its delegations; second, representing the Union through the delivery of statements in multilateral fora; third, diplomatic relations through visits and missions by top EU officials at political level; fourth, the task of gathering information by the Delegations as 'EU embassies'; fifth and finally, the task of diplomatic protection of 'EU citizens'. In all these areas, we shall explore the extent to which EU and international law is supportive or obstructive to successfully completing these diplomatic tasks.

2. THE EEAS AS A CATALYST FOR THE EU'S DIPLOMATIC DEVELOPMENT

In the report of December 2011 evaluating the first year of the new Diplomatic Service, its foundation is viewed as a historic opportunity to rise above 'internal debates pertaining to institutional and constitutional reform', and instead to focus on 'delivering new substance to the EU's external action'.[11] There is certainly no lack of ambition in post-Lisbon EU external relations, prompting

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[7] See more extensively R. A. Wessel, 'Revisiting the International Legal Status of the EU', *European Foreign Affairs Review* (2000), at 507-537; R. A. Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations – Salient Features of a Changing Landscape,* Cambridge: Cambridge University Press, 2008, at 145-180.

[8] Art. 5 TEU.

[9] Cf. Art. 4(2) TEU.

[10] The EEAS Decision acknowledges this in Art. 5(9): 'The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States'. See also B. Van Vooren, 'A Legal-Institutional Perspective on the European External Actions Service', *CMLR* (2011), at 475-502, who points out that due to consistency obligations this should be read as a general obligation to cooperate between the EEAS and the national diplomatic services (at 497).

[11] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 2.

one commentator to observe that 'if there was an international award for "enthusiasm", the EU would stand good chances for winning it.'[12] Such enthusiasm indeed permeated the 2001 Laeken Declaration, as was clear from the quotation above.[13] The Lisbon Treaty is the result of that political ambition, and aims to create a more coherent, effective and visible foreign policy for the Union.[14] Two of the major innovations are the explicit mission statement for EU international relations embedded as a binding obligation in EU primary law; and the new diplomatic body (the EEAS) to bring them to fruition. In relation to the former innovation, the Lisbon Treaty has introduced in its constituting document strongly worded external values and objectives the EU 'shall' promote and pursue in the world. As regards values, in Article 3 (5) TEU we find a list which sketches the EU's cosmopolitan – if romantic[15] – view of a just global order. Additionally, Article 21 TEU now bundles into a single, strongly-worded provision all international objectives to be pursued across all EU internal and external policies. It would be incorrect to consider these Treaty articles as nothing more than empathic claims or ambitions with no legal substantive consequence for EU institutions and Member States.[16] They are legally binding in their nature as constitutional objectives of EU law, and Article 4 (3) TEU requires of the EU institutions and Member States 'sincere cooperation in carrying out tasks which flow from the Treaties'. That this duty of cooperation is judicially enforceable is well known,[17] but in a recent judgment of 22 December 2011 the Court also affirmed the binding nature of EU values stated in Article 3 (5) TEU, in that it imposes a substantive, legal obligation on the Union 'to contribute to the strict observance and the development of international law.'[18] In sum, when the EEAS is to deliver 'new diplomatic substance', the Treaties provide binding guidance on the method and substance of EU action in the world. How do these new legal obligations of effort – obviously not of result – translate into concrete diplomatic ambitions to be brought to fruition through the EEAS? So as to structure our reply to that question, we must briefly reflect on what we understand under the notion of 'diplomacy'.

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[12] J. Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law', *CLEER Working Papers 2011/5,* 2011, at 7.

[13] European Council, 'Declaration on the Future of the European Union', *Laeken* 14-15 December, 2001, subheading 'Expectations of Europe's citizens'.

[14] The European Convention, 'Final Report of Working Group VII on External Action', *CONV* 459/02, *Brussels*, 16 December 2002.

[15] Larik, *op.cit.*, 12 (who refers to the 'cosmopolitan romanticism' of that treaty article).

[16] See for a prominent example: Catherine Ashton, 'Statement by High Representative Catherine Ashton on Europe Day', Brussels, 7 May 2011, A 177/11.

[17] A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', *European Law Review* (2011).

[18] See Case C-366/10 *Air Transport Association of America (ATAA)*, of 21 December 2011, not yet reported, para. 101. Here the Court utilizes Article 3(5) TEU in its reasoning and indicates that this article implies a substantive obligation for the EU. On the legal binding nature of objectives listed in Article 21 TEU, see: B. Van Vooren, 'The Small Arms Judgment in an Age of Constitutional Turmoil', *European Foreign Affairs Review 14(1)* 2009, at 231-248.

Defining such a rather open-ended concept is outside the scope of this paper,[19] and hence we utilize the Vienna Convention on Diplomatic Relations (VCDR) to shed light on ambitions flowing from EU primary law. The VCDR does not exhaustively define diplomacy, but it does list in Article 3 that the functions to be carried out by a diplomatic mission are, *inter alia* to engage in the following five activities: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. The objective of this paper is to examine the legal specificity of the Union in light of its new diplomatic ambitions post-Lisbon. Utilizing article 3 VCDR and its description of what are the most common activities of external diplomatic representation, we view the following areas as potentially problematic for the Union to pursue them in a fashion similar to that of states:

(a) The formal status of Union Delegations and their staff in third countries and IO's;
(b) the legal existence of the EU as a single entity post-Lisbon, and its representation through demarches at multilateral fora where Member States are equally present;
(c) the conduct of diplomatic relations through visits and missions to third countries and international organizations by the EU's highest political representatives such as the European Council or Commission Presidents, as well as Commissioners and the HR/VP;
(d) the task of political reporting by EU delegations, in the complex inter-institutional and Member State landscape that characterizes the EU;
(e) and finally, the protection of 'European Union' citizens not merely as derived from Member State nationality but as an independent legal reality.

3. DIPLOMATIC REPRESENTATION BY THE EU AND THE REALITY OF EUROPEAN LAW

3.1. **The organization of Union Delegations**

The first indent of Article 3 (1) VCDR reads 'Represent the sending state in the receiving state'.[20] Several EU Treaty articles provide a solid basis for the Union to establish a formal and substantive presence as a single, fully matured dip-

[19] G. Berridge, 'Diplomacy: theory and practice' *Palgrave Macmillan*, 2010, at 282; K. Hamilton and R. Langhorne, *The practice of diplomacy: its evolution, theory and administration*, 2nd edition, London: Routledge, 2011, at 317.

[20] Art. 3(a) VCDR.

lomatic actor represented in third countries and international organisations (IOs).[21] As regards the physical presence through its delegations, EU activities are based on Article 221 (1) TFEU, which was newly inserted with the Lisbon Treaty: '*Union delegations in third countries and at international organisations shall represent the Union.*' The ambition flowing from this new provision in the TFEU should be quite clear: The Union no longer wishes to have an international presence through delegations of only one of its institutions (e.g. Commission delegations), or through the diplomats of the Member State holding the rotating Presidency.[22] The working group on external relations in the European Convention pointed out that too many spoke on behalf of the EU and that 'in diplomacy a lot depended on trust and personal relationships', which require a stable and coherent presence on the part of the Union.[23] The purpose of this new treaty provision was to have 'less Europeans and more EU',[24] e.g. a single diplomatic presence for the Union speaking on behalf of a single legal entity active globally. When Mrs Ashton took up her post in December 2009, she said that the EU delegations 'should be a network that is the pride of Europe and the envy of the rest of the world' and 'a trusted and reliable ally on European issues'.[25] Speaking on Europe Day 2011 she underlined this continued ambition, that the EEAS should be a 'single platform to protect European values and interests around the world', and 'a one stop shop for our partners.'[26] Implementing this ambition has meant that the former 'Commission Delegations' have been turned into 'Union delegations'[27] and that for all practical diplomatic purposes they are seen as EU 'embassies'.[28] In this respect, Heads of Delegations *de facto* act as 'EU Ambassadors',[29] with for example the letter of credentials presented to President Obama by Mr. Vale de Almeira opening with the words 'As I assume the role of the European Union's Ambassador and Head of Delegation to the United States [...]'[30] The EU Heads of delegations

[21] Art, 220 and 221 TFEU, *io* Article 3(5) and 21(1) TEU.

[22] But see the EEAS document 'EU Diplomatic Representation in third countries – First half of 2012', *Council of the European Union*, Doc. 18975/1/11, REV 1, 11 January 2012, which reveals that in some countries the EU is still represented by a Member State.

[23] 'The European Convention, Final report of Working Group VII on External Action', *CONV 459/02*, *Brussels*, 16 December 2002, at 321.

[24] A. Missiroli, 'The New EU Foreign Policy System After Lisbon: A Work in Progress', 25 (4) *European Foreign Affairs Review ,* (2010), at 427 – 452.

[25] High Representative Catherine Ashton, 'Quiet diplomacy will get our voice heard', *The Times*, 17 December 2009.

[26] High Representative Catherine Ashton, 'Statement by High Representative Catherine Ashton on Europe Day', Brussels, 7 May 2011, A 177/11.

[27] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 16 and see also F. Bergmüller, 'The EEAS: A Loss for the European Commission's External Relations Capacities?', in Paul Quinn (ed.), Making European Diplomacy Work: Can the EEAS Deliver?, *College of Europe, EU Diplomacy Paper*, 8/2011

[28] J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?' 7 *Hague Journal of Diplomacy* (2012) at 31-49.

[29] J. Wouters and S. Duquet, *op.cit.*, who point out that this is granted as a 'Courtesy title' by receiving states.

[30] See the introduction to the 'Letter of Credentials from Ambassador Vale de Almeira to President of the United States Barack Obama.' An extract of the letter is available through the Press

representing the Union in third states and at international organisations are thus conferred the authority to perform functions equivalent to those of national diplomats. In the reverse situation, the EU also continues the traditions of inter-state diplomacy: it is now President Van Rompuy who receives the letters of credentials of the Heads of Missions to the European Union of third countries, accompanied with the usual (e.g. state-like) protocol and official photograph.[31]

The transformation from Commission delegations into proper Embassies was not purely formal, but was in some cases accompanied by added powers to at least some of those representations abroad. While all 138 Commission delegations[32] were transformed into EU Delegations mere weeks after the entry into force of the Lisbon Treaty, 54 were immediately transformed into 'EU embassies' in all but name.[33] This meant that these 'super-missions' were not merely given the new name, but also new powers in the form of an authorization to speak for the entire Union (subject to approval from Brussels); as well as the role to co-ordinate the work of the member states' bilateral missions. Prominent exclusions among those 54 delegations were those to international bodies such as the UN in New York or the OSCE in Vienna, since the Union still had to work out how to handle EU representation in multilateral forums under Lisbon.[34] However, it is certainly the EU's ambition to 'progressively' expand these powers to other EU delegations as well.[35] This process can be followed in the regular reports on 'EU Diplomatic Representation in third countries' published by the Policy Coordination Division of the EEAS, and has been recently evaluated in the December 2011 report on one year of EEAS. The latter report states that EU delegations 'have progressively taken over the re-

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Release of the EU delegation to the United States 'New EU Ambassador presents his credentials', *EU/NR* 35/10, 10 August 2012. See also F. Fenton, 'EU Ambassadors: A New Creed?', in Paul Quinn (ed.), Making European Diplomacy Work: Can the EEAS Deliver?, *College of Europe, EU Diplomacy Paper*, 8/2011at 26-30.

[31] European Council, the President, 'Presentation of letters of credentials to President Van Rompuy', *EUCO* 9/12, Brussels, 18 January 2012. Here President Van Rompuy received the credentials of the Ambassadors of Saudi Arabia, Rwanda, FYROM, Malaysia, Colombia, Peru, Turkey and Afghanistan.

[32] This is the latest number including the two newly opened delegations in Libya and the South Sudan.

[33] Andrew Rettman, 'EU commission 'embassies' granted new powers', *EU Observer*, 21 January 2010.

[34] *Ibid*. Similarly, Andrew Rettman, 'Ashton designates six new 'strategic partners', quoting an EU official on the importance of the EEAS for the role of Mrs. Ashton in external representation: "Lady Ashton has de facto 136 ambassadors at her disposal", 16 September 2010.

[35] See for example: EEAS, 'EU diplomatic representation in third countries – second half of 2011', 11808/2/11 *REV 2,* Brussels, 25 November 2011, and EEAS, 'EU diplomatic representation in third countries – first half of 2012', 18975/11, Brussels, 22 December 2011. These documents always start with two paragraphs quoting Article 221 TFEU and an excerpt from the Swedish Presidency report on the EEAS of 23 October 2009, which set out the Member States' view on the scope of the EEAS in relation to the HR mandate. On that basis these reports continue by stating that the 'responsibility of representation and coordination on behalf of the EU has been performed by a number of Union delegations as of 1 January 2010, or later', and insofar as they have not taken over such functions, pre-Lisbon arrangements and the role of the Presidency continue to apply.

sponsibilities held by the rotating presidency for the co-ordination of EU positions and demarches'.[36] The report adds that this evolution has been a 'mixed success'. It argues that the transition 'has gone remarkably smoothly in bilateral delegations and has been welcomed by third countries', though other reports are cautious.[37] As regards EU representation at international organizations, the EEAS evaluation report states that 'the situation has in general been more challenging in multilateral delegations … given the greater complexity of legal and competence issues.'[38]

Indeed, the unified diplomatic presence for the EU in multilateral fora post-Lisbon has so far proven highly problematic, in spite of the TFEU's specific legal obligation in its Article 220 (1) TFEU. This provision requires that the EU 'shall establish all appropriate forms of cooperation' with various international organisations including, but not limited to (Article 220 (2) TFEU), the UN, the Council of Europe, the OSCE and the OECD. On the basis of this provision, the Union has already begun to implement its ambitions in terms of presence in multilateral fora.[39] The saga of speaking rights at the UN General Assembly and EU participation in the UN concluded in May 2011 is well known.[40] There is thus no need to dwell further on this example, and in this contribution we look at evolutions from the second half of 2011. In the following subsection 3.2 we shall look at the dispute concerning EU legal personality and formal presence in multilateral fora on the Member States' presence, with the International Civil Aviation Organization (ICAO) as a specific example.

3.2. **Delivery of EU demarches on behalf of the EU and/or its Member States**

With the EU wishing to establish its unified substantive diplomatic presence in multilateral fora, for some Member States – the UK notably – it has become problematic that the EU's legal personality is now explicitly recognised by the Treaty (Article 47 TEU) Indeed, with the Lisbon Treaty, the European Community (EC) has ceased to exist (Article 1 TFEU), and is now replaced by the

[36] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 6.

[37] *Ibid.* at 7. Kaczynski reports that there have been problems there too: in Washington, some national ambassadors apparently did not show up for local coordination meetings for months P. M. Kaczynski, 'Swimming in Murky Waters: Challenges in Developing the EU's External Representation', *FII Briefing Paper 88*, September 2011, at 9.

[38] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 8.

[39] As regards the Council of Europe, Art. 6(2) states that the Union shall accede to the European Convention on Human Rights, a negotiation process which was nearly completed at the time of writing, January 2012.

[40] The EU first sought to upgrade its observer status at the United Nations at the UNGA meeting in September 2010, but after a much publicised failure only managed to do so by May 2011. See Catherine Ashton, 'Statement by the High Representative following her call with UN Secretary-General Ban Ki-Moon', A 162/10, Brussels 18 August 2010, and Catherine Ashton, 'Statement by the High Representative on the adoption of the UN General Assembly Resolution on the EU's participation in the work of the UN', A 172/11, Brussels, 3 May 2011.

European Union which possesses legal personality. (See Article 1 io 47 TEU). While prior to the Lisbon Treaty the EU did already conclude many international agreements and could thus be argued to possess *implicit* legal personality,[41] the 'politically constructive ambiguity' of 'European Union' allowed this label to function as a political umbrella term referring to the EC and its 27 Member States. The fact that now Article 47 TEU explicitly gives legal personality to the EU, has prompted the UK to deploy the rather legal-formalistic argument that the terminology 'EU' can no longer be utilized to designate 'EC and its Member States' when delivering statements on behalf of the EU in multilateral fora.[42] The UK argues that because the Union's legal personality has explicitly been recognized, 'EU' has become a purely legal concept. Therefore, it allegedly can no longer serve to represent areas covered both by EU and Member States competences as that might lead to competence creep to the Union.

The Commission and several Member States strongly opposed this reasoning, which led to 'EU' representation in multilateral fora such as at the OSCE and UN to ground to a halt during the second half of 2011. During that time, several dozen EU statements and demarches were blocked over deep disagreement as to who delivers the statement: 'the European Union' or 'the European Union and its Member States'.[43] A temporary cease-fire, though not a permanent solution, was agreed on 24 October 2011 in the form of a document entitled 'general arrangements for EU statements'[44] Through this document the EU wishes to keep competence battles 'internal and consensual'[45] so that the EU achieve 'coherent, comprehensive and unified external representation' in multilateral organisations. However, the time and effort spent on minutiae in Council Conclusions no less – ('EU representation will be exercised from behind an EU nameplate'[46]) show how difficult to reach the ambition for the EU as a diplomatic actor exhibiting these three qualities still is. Notably, the arrangement expresses a rather rigid interpretation of 'international unity' focusing on form rather than substance. This because it requires that each statement made in a multilateral organisation requires tracing who is competent for which area, and to ensure that the internal division of competences is adequately reflected *externally*, namely on the statement's cover page and in the body of the text. It is beyond the scope of this paper to discuss the exact arrangements as to when a statement should say 'on behalf of EU', or 'on behalf of the EU and its Member States',[47] though it is truistic to state that such is hardly the core-business of multilateral diplomacy – the substance of the single message being of central importance. What is then notable in light of the single message is that even when there is agreement that the EU shall present a statement on

[41] See note 8.

[42] Discussion with senior official from a Member State, November 2011.

[43] See S. Blockmans, 'The European External Action Service One Year On: First signs of strengths and weaknesses', *CLEER Working Paper* 2012/2, at 33.

[44] Council of the European Union, 'General Arrangements for EU Statements in Multilateral Organisations', 16901/11, Brussels, 24 October 2011.

[45] *Ibid.* at 2.

[46] *Ibid*. at 3.

[47] *Ibid*. at 3.

its *own behalf*, according to the arrangement, still, '*Member States may complement statements made on behalf of the EU whilst respecting the principle of sincere cooperation.*'[48] This statement is rather troubling diplomatically and legally: diplomatically, the utility of a Member State also taking the microphone to repeat what the EU delegate has just said (since the duty of cooperation in Article 4 (3) TEU would not allow that Member State to say anything that contravenes it), seems rather futile. In international diplomacy one may certainly consider it useful that specific Member States with specific skills, knowledge, or historically good diplomatic relations 'back up' EU action, though this is not what is envisaged by this arrangement: it concretely implies that Member States should still be allowed to repeat the same message of the Union, largely for the visibility of their own foreign ministers. Legally too, the duty of cooperation entails from the Member States that they respect 'the EU institutional process' and accept that their interests be defended 'through the Union' as a consequence of their EU membership.[49] In fact, when the EU has decided to act internationally, in many cases this will actually entail a 'duty to remain silent' on the part of the Member States, even in the area of shared competences.[50] Thus, the arrangement rather goes against pre-existing legal interpretations of shared competence and the duty of cooperation, and seems hardly conducive to the unified diplomatic actor *in substance,* the Lisbon Treaty and EEAS sought to create.

One example may further illustrate the concrete impact of this rigid interpretation of Union competence and legal personality from the perspective of unified diplomatic representation. On 22 February 2012, the Council adopted a Decision concluding the 'Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto.'[51] The Commission had proposed the negotiation of this Memorandum in June 2009, and it was authorized to do so by the Transport Council in December 2009. The final document was initialled in September 2010. The purpose of this document is to ensure deep EU involvement in a multilateral organization of which it is not a member, but where it has significant competences. In essence it deals with the situation at issue in Opinion 2/91, where the CJEU has decided that due to absence of EU membership in the International Labour Organization, the Member States owed a close duty of cooperation to the Union so to ensure adequate representation of the common 'Union interest'.[52]

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[48] *Ibid*. at 3.

[49] Opinion of Advocate General Maduro, Case C-246/07, *Commission v Sweden Stockholm Convention on persistent organic pollutants (PFOS)* [2009] Judgment of 20 April 2010, not yet reported, paras. 49 and 56.

[50] A. Delgado Casteleiro and J. Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations', *European Law Review* (2011) 522-539.

[51] Council Decision on the conclusion of a memorandum of Cooperation between the European Union and the International Civil Aviation Organisation providing a framework for enhanced cooperation, and laying down procedural arrangements related thereto, DOC 5560/12, Brussels, 22 February 2012.

[52] R. Holdgaard, 'The European Community's Implied External Competence after the Open Skies cases', 8 *European Foreign Affairs Review* (2003), at 365-394; European Commission,

There should be no doubt that the Union has a strong legal and political interest to be represented in a singular fashion before the ICAO. Through the completion of the internal aviation market by the mid-nineties, as confirmed by the Open Skies judgments of 2002, many of the aspects on civil aviation covered by the 1944 Chicago Convention (safety, security, environment and air traffic management) fall within the scope of EU competence through the application of the ERTA doctrine.[53] In keeping with this reality, the EU-ICAO memorandum essentially sets out a regime of closer cooperation through the reciprocal participation in EU and ICAO consultative processes, joint mechanisms for regular dialogue, information sharing through databases, and so on. From the perspective of the EU Member States, supporting the EU in achieving its Treaty objectives through such a Memorandum in an organization of which it is not a member, is indubitably an expression of their duty of loyalty towards the Union embedded in Article 4 (3) TEU.[54] The response of the United Kingdom was the following:

> 'The UK will be abstaining on the Decision on Conclusion of a Memorandum of Cooperation between the European Union and the International Civil Aviation Organisation. The UK *recognises the benefits of the Memorandum of Cooperation, but attaches great importance to the principle of Member State sovereignty in international organisations*. The UK is *cautious* about *any measures* and processes which could eventually *lead to a change of the distribution of competences between the EU and Member States.* We would wish to convey these concerns by abstaining on this Decision."[55] (emphasis added)

The UK had previously mulled a negative vote, but then decided that abstention would suffice to make their point. In any case, since the legal basis of this Council Decision is Articles 100 (2) io. 218 (6) TFEU, the Council adopts this decision by qualified majority and the adoption of the Memorandum was not blocked. However, it points to a road in EU external representation post-Lisbon which ought not to be taken. A close look at the substance of the Memorandum of Cooperation shows that it is 'procedural' in nature, by establishing forms of closer cooperation between the EU and the ICAO in areas where it already possesses competence. It thus does not 'expand' EU competence in scope or substance, and one might query what would be the on-the-ground consequences of this 'abstention' – read together with the general arrangement on external representation? In application of QMV it is normal that certain Member States may be outvoted, but the explicit adoption of this statement cannot be permitted to have any further consequences. Indeed, the UK remains bound by the duty to cooperate loyalty embedded in Article 4 (3) TEU: 'The Member

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'Proposal for a Council Decision on the conclusion of a memorandum of Cooperation between the EU and the ICAO', Explanatory Memorandum, COM(2011) 107 final, Brussels, 10 March 2011, at 2.

[53] Holdgaard, *op. cit*

[54] Opinion 2/91, 'Convention No 170 ILO on the safety in the use of chemicals at work', [1993] *ECR* I-1061.

[55] Council Decision of 22 February 2012, *supra* n. 51 at 3.

States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.' Thus, in practice the UK must actively support EU activities in Montréal to implement this Memorandum of cooperation, and may not undertake any action that would hamper its implementation. Time must now tell whether that will be the case, but the blockage of EU presence in other multilateral fora in 2011 does not bode well.

3.3. **Diplomatic visits by top EU political representatives: separate roles of the EEAS, EU Delegations and the Commission**

The issue of competence as a challenge to the EU's effective, coherent and visible global representation is equally exemplified by the procedures relating to visits, missions and meetings of the Commissioners or the High Representative with third countries and international organisations – part and parcel of international diplomacy. The decision on the need for such visits, their preparation as well as their execution is rather complex within the Union, due to the co-existence of many 'high level political faces' of the Union. Post-Lisbon, additional complexity is created by the co-existence of the Commission and EEAS which each possess their own international relations responsibilities (Articles 17 and 27 *io.* 18 TEU). In January 2012 the EEAS and Commission therefore agreed a 'working arrangement' in implementation of Articles 3 (3) and 4 (5) of the EEAS Council Decision,[56] which duly illustrates the coordinative challenges of having two distinct actors with a significant and similar role in the single diplomatic task of external representation at the highest political levels. In legal terms, the procedures agreed in case of such visits are the expression of the duty of cooperation embedded in Articles 4 (3), 13 (2) and 24 TEU, as explicitly reiterated in Article 3 (2) of the EEAS Council Decision.[57] We briefly quote the latter article, as it is useful to examine to which extent the Working Arrangement implements or respects this article:

> 'The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.'[58]

The Working arrangement's rules on cooperation in the case of visits and missions are set out in four paragraphs, which respectively deal with:

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[56] European Commission, Secretariat General, Working Arrangements between Commission Services and the European External Action Service (EEAS) in relation to external relations issues, SEC (2012) 48, unpublished, on file with authors, at 4, hereafter: Working Arrangement.

[57] B. Van Vooren, 'A legal-institutional perspective on the European External Action Service', 48 *Common Market Law Review* (2011)*),* 475-502, at 496-498.

[58] Council Decision 2010/427/EU of 26 July 2010 establishing the organisation and functioning of the European External Action Service, *OJ* 2010 L 201/30.

1) Ensuring that relevant EEAS and Commission services are properly informed about planned visits and missions.
2) Establishing the role of EU Delegations in such visits.
3) Establishing the role of the EEAS and the Commission in visits of commissioners and the HR/VP's visits and missions.
4) Establishing competence boundaries for the EEAS and Commission officials in multilateral contexts during such visits.

The first point is that of intra-EU information about impending visits. Namely, when a Commissioner will visit a third country or international organization, the relevant Commission services 'shall inform' the EU delegation and the EEAS country desk of such a visit for which they are responsible.[59] This paragraph of the working arrangement does not contain reciprocity however, and thus the EEAS must not inform Commission services of visits by the HR/VP. This is no coincidental omission, as that same first paragraph does state that 'information about the HR/VP's and Commissioners' missions shall also be communicated to [the Secretariat General, Directorate F3 on relations with the EEAS] which is maintaining a strategic planning calendar of missions and meetings.' We may of course query whether reciprocity in this regard would even be necessary, given her CFSP focus? Taking the example of Palestine, in which the HR/VP has taken a great personal interest and which she visits regularly, the utility of reciprocal information to and from DG DEVCO is rather truistic.[60] Undoubtedly, in practice, Commission development staff would come to know about such visits through staff at relevant EU delegations, the internal calendar, or other day-to-day contacts, but the formal absence of reciprocity in the Working Arrangement is nevertheless telling of 'competence sensitivities'. *Ad hoc* cooperation may take place, but at the principled, written level, the Arrangement reflects that the EEAS' personnel, a structure set up on a legal basis within the TEU's articles on CFSP,[61] ought not inform Commission services of missions conducted by its top brass.

The second paragraph of the Working Arrangement focuses specifically on EU Delegations stating that they 'will provide all necessary support for the organisation of visits or missions to the countries or IO's for which they are responsible. They should be consulted in advance on the aim, content and timeliness of visits/and or demarches.' These consultations are indeed crucial, and in this case, silence is golden: the Working Arrangement does not state for whose visits they should be consulted upon – which is positive. On the basis of the EEAS' tasks as described in Article 2 of the EEAS Decision, we can thus assume that it concerns both Commissioners, the HR/VP, but also the President of the European Council. From the perspective of diplomatic ambitions, the working Arrangement is then laudable as it gives a rather broad

[59] Working Arrangement, at 4.

[60] See for example: Statement by High Representative Catherine Ashton following her meeting with the President of the Palestinian Authority, Mahboud Abbas, A 514/11, Brussels, 14 December 2011.

[61] Art. 27(3) TEU.

'embassy'-like role to the EU delegations. In national contexts too, an embassy will indeed be in close consultation with headquarters on the timeliness, form, level and content of a visit to the third country or IO in light of current and future diplomatic relations. As and when the visit takes place, that embassy will put much effort in meticulously preparing a visit by its foreign (or prime) minister through an hour-by-hour calendar of the meetings, discussions etc. by the high official.[62] The fact that this second paragraph is formulated 'in the abstract' is then arguably significant: no reference to specific competence-related limitations. EU delegations are quite simply expected to act as the proverbial one-stop-shop with important influence on visits and missions by EU representatives.

In paragraph 3, the Working Arrangement gets more complex (or at least, meticulous) when it comes to preparing the briefings of the visitor to the third country or IO. Here the Arrangement refers not to 'EU delegations' but rather to the more generic EEAS – which implies that this paragraph pertains to staff at headquarters based in Brussels, and again institutional competences and division do matter. Nonetheless, the notion of reciprocal cooperation of Article 3 (2) EEAS Council Decision does permeate this paragraph. The basic principle is that 'the EEAS will contribute to briefings for Commissioners' visits to third countries', and equally that 'Commission services will contribute to briefings for the HR/VP's visits' – with specific arrangements for briefings for candidate countries. Thus, the EEAS and Commission should together write the document the visiting official will read on the plane-ride to her or his destination. However, when it comes to meeting with the Commissioner or HR/VP, staff of 'the other' institution will not necessarily be present: 'Where appropriate, the relevant Commission service(s) and the EEAS will participate in preparatory meetings with the Commissioner(s). Where appropriate, the relevant Commission service(s) will participate in preparatory meetings with the HR/VP.'[63] Empirical research would be required what exactly 'where appropriate' means in this context, but past from experience in the field of EU external relations one might be suspicious of such phrases. In a sceptical reading, it may imply room for turf battles over the appropriateness of attending meetings with top politicians of the other institution, though in a more benevolent reading it may simply imply that when the EEAS has forwarded some documents to the Commission in preparing a visit by for example the Trade Commissioner, there is no need to attend the preparation meeting prior to the visit. Indeed, a Working Arrangement at this level must leave room for what EEAS Managing Director Christian Leffler rightly calls 'common sense'.[64] Only when it is useful should staff be present in the work of the other institution, and the Working Arrangement reflects the same sentiment when it comes to making the journey itself. Where appropriate, 'Commission staff may be asked to accompany the HR/

[62] These perhaps slightly generic observations are based on the time spent by one of the authors at the Belgian Permanent Representation to the United Nations, and the work of its staff preparing a visit of its foreign minister to New York.

[63] Working Arrangement, at 4.

[64] C. Leffler, in response to a question posed by one of the authors on EEAS diplomatic reporting obligations, at the conference 'Evaluating the Diplomatic System of the European Union', Brussels, 28 February 2012.

VP on visits. Similarly EEAS staff may be asked to accompany Commissioners on visits.'[65]

Finally, the Working Arrangement states that '[i]n accordance with Article 221 TFEU, EU Delegations in third countries and at international organisations represent the EU. Where the relevant Commissioner participates in meetings, conferences or negotiations related to international organisations, conventions and/or agreements, he/she will represent the EU position in non-CFSP matters. In meetings at official level, the non-CFSP EU position can be presented either by the EU Delegation or by Commission officials.'[66] That the High Representative speaks in CFSP matters and Commissioners in non-CFSP matters is no surprise,[67] but the sentence on meetings at 'official level' is perhaps more puzzling. This sentence concerns representation by the *EU institutions* in multilateral contexts such as the United Nations and the OSCE. Let us draw the parallel with national diplomatic activities: It is certainly not exceptional that diplomatic staff of a Member State to the United Nations would be joined by experts from national ministries (foreign ministry, agriculture, development, etc) on topical issues such as for example ECOSOC meetings. However, the working arrangement does not speak of EEAS officials from Brussels (EU equivalent of a national foreign ministry) and Commission officials (the 'other' ministries) presenting the non-CFSP EU position aside from the EU delegation, but only of the latter category. Here too, we can have two interpretations: the 'common sense'-interpretation implies that this simply replicates the situation of national experts joining their diplomats at the permanent representation in New York. However, the more 'suspicious' interpretation would be that this sentence is an extension of Article 17 (1) TEU, which is an article on which the Commission has been placing much emphasis in the post-Lisbon era. It reads: 'With the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation.' Thus, if this sentence in the Working Arrangement indeed means that the Commission shall ensure external representation alongside with, or instead of the EU delegations, this certainly detracts from the EU's ambition for them to be the "one stop shop" for EU diplomacy and external representation. This is especially so if it means that EU delegations are thus still associated with the task of representing the EU only on 'CFSP issues', something which Article 221 TFEU expressly seeks to avoid.

We may thus conclude that on the point of visits and missions by high officials the Working Arrangement leaves room for an optimistic reading and a more sceptical reading. On the one hand they do establish a set of rules which accord to "common sense" in the organization of diplomatic visits, but they do so in a charged environment where competence struggles are never far away, and which leave room for tension between the many 'high level' political representatives of the Union.

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[65] *Ibid*. at 4.
[66] *Ibid*. at 4.
[67] Art. 40 TEU.

3.4. Rules pertaining to the information-gathering and reporting tasks of the EU delegations

The fourth indent of Article 3 VCDR states as one of the diplomatic activities of a state: 'Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State'.[68] There should be no doubt that 'diplomatic reporting' is a core business for the EU delegations. In this subsection, we shall look specifically at the 'lines of diplomatic reporting to headquarters' by EU Delegations, headquarters being the EEAS and Commission services in Brussels. Related to that, given the structure of the Union as an international actor, we must also briefly reflect on information-sharing between the EU delegations and Member State Delegations on-the-ground. We have already seen that between the EEAS and the Commission the duty of cooperation exists in a reciprocal fashion; which is however not the case between EU delegations and the Member States. Article 5 (9) of the EEAS Council Decision states that 'The Union delegations shall work in close cooperation and share information with the diplomatic services of the Member States.' Notably, an early draft version of that article read 'on a reciprocal basis'. However, this was omitted during the negotiations on the Council Decision, which is indeed potentially problematic.[69]

Looking first at the EEAS-Commission relationship, we must again look at the Working Arrangement of January 2012. This document contains the following agreement on reporting back to 'headquarters': 'EU Delegations shall provide political reporting to the HR/VP, President Barroso and relevant Commissioner(s), the EEAS and Commission services … A two way flow of information is essential – from the political and trade/economic sections of EU Delegations to the EEAS and Commission services and in the opposite direction. The geographical desks in the EEAS shall be systematically copied on all reports and information relative to her/his respective country. Delegations shall provide relevant reporting to other Commission services outside the external relations "family". The Commission services shall keep EU Delegations informed about relevant developments, providing lines to take etc.'[70] Specifically as regards multilateral organisations, the Working Arrangement states that 'EU Delegations will report to both the EEAS and the relevant Commission DG(s)/services as appropriate. These Delegations may establish specific direct lines of reporting with the relevant Commission DG(s)/services in charge of the issues and policies dealt with (e.g. development, trade, economic issues, etc); systematically copying the EEAS. Reporting should, if relevant, also cover issues of a general nature concerning the international organisation in question.'[71]

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[68] Art. 3(c) and (d) VCDR.

[69] B. Van Vooren, 'A legal-institutional perspective on the European External Action Service', 48 *Common Market Law Review* (2011) 475-502, at 497. Here the author submits that although Article 5 (9) omits the reference to reciprocal EU-Member State cooperation, Article 4 (3) TEU still applies, and such a duty can be said to exist regardless of its absence in the EEAS Council Decision.

[70] *Ibid*. at 3.

[71] *Ibid*. at 4.

This seems to be a rather sensible arrangement, both as regards the bi-directionality of reporting and the lines of reporting via the EEAS or directly to the Commission. Asked about what these obligations mean in practice, EEAS Managing Director Leffler gave the example of discussions on the Rio+20 meeting in June 2012. Reporting there would go from the EU delegation in Brazil to DG CLIMA, DG ENV and DG TRADE in the Commission, to the 2 offices of the Commission and European Council Presidents, to the regional desk of the EEAS and to the local Member State representations. As in the previous subsection, the common sense (or optimistic) interpretation must be contrasted with the more sceptical perspective. One can indeed argue that setting up *ad hoc* lines of reporting, and a great degree of leeway must be accorded to individual EU delegations as regards reporting, as they must be able to take into account specific circumstances. However, since information is the bread and butter of coherent and effective policy-making, it is important to have a common, high standard of unified reporting between all relevant actors of EU diplomacy, and this is currently not yet the case. Indeed, it has been reported that policy reporting varied greatly in quality, and suffered from 'ad hoc-ism' depending on the Delegation at issue. Bicchi's extensive empirical research of the period up to Autumn 2011 shows that in the first year of the EEAS's existence 'there has been disparity between delegations in the way that reports are drafted and shared, as some delegations are more inclusive and/or descriptive than others.'[72] That is certainly undesirable in light of external delegations' prime role in swiftly and effectively collecting and disseminating information on-the-ground. However, this is not something which could be solved by further teasing out the text in the EEAS-Commission Working Arrangement. Rather, it is a matter of management by the Heads of Delegations who ensure that reporting is in line with the common agreement in Brussels. According to Leffler, the challenge of political reporting is less one between the institutions themselves, but rather one between the EU delegations and the Member States. According to him, at present (February 2012) the Member States are mainly on the receiving end of EU delegations' report, but share very little the other way. There is the hope and expectation that this will change, as Member States external representations come to trust and get used to their EU counterparts. One pilot project has been set up in Washington, to ensure greater cooperation in line with Article 5 (8) of the EEAS Council Decision: here political reports are uploaded through a shared intra-website, which can then be downloaded by the EU delegation and the local Member State representations.[73]

[72] F. Bicchi, 'The European External Action Service: A Pivotal Actor in EU Foreign Policy Communications', 7 *The Hague Journal of Diplomacy* (2012), at 90.

[73] C. Leffler, in response to a question posed by one of the authors on EEAS diplomatic reporting obligations, at the conference "Evaluating the Diplomatic System of the European Union", Brussels, 28 February 2012.

4. DIPLOMATIC PROTECTION AND CONSULAR ASSISTANCE FOR 'EU NATIONALS' AND THE REALITY OF INTERNATIONAL LAW

An important role for diplomatic missions abroad as described in Article 3 (1) VCDR is to 'Protect the interests of the sending state and its nationals in the receiving state – within the limits permitted by international law'.[74] There is a strong basis in the Treaties for EU ambitions on this front. Articles 3 (5) TEU and 23 TFEU together provide the basis for diplomatic protection and consular assistance to EU citizens. Article 3 (5) TEU obliges the EU to protect the interests of its citizens abroad, and persons holding the nationality of a Member State are citizens of the Union (Article 20 (1) TFEU). However, Member States are divided on how far the ambitions implementing these provisions would reach. In its most long-term version, if the Union were to achieve full diplomatic maturity, its most far-reaching implication *might* be that the EU provides such protection as if they were 'nationals of the EU' for the purposes of international law. While Article 3 (5) TEU could accommodate that interpretation, the role explicitly foreseen in the EEAS Decision for diplomatic protection and consular assistance by the EU does not, and is merely supplementary: 'The Union delegations shall, acting in accordance with the third paragraph of Article 35 TEU, and 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.'[75] While one may argue that consular assistance thus is not a competence of the EEAS or the Union delegations per se, a role of the delegations in this area seems obvious and was already foreseen by the Commission prior to the entry into force of the Lisbon Treaty.[76] At that point in time the Commission has been quite active in working together with the Member States in the protection of their citizens in crisis situations in third countries.[77] In March 2011, the Commission published a state-of-play on this issue, where it argued that 'the need of EU citizens for consular protection is expected to increase in the coming years.'[78] To support that argument the Commission first quoted Eurostat numbers which show a steep upwards trend in EU citizens travelling to third countries: from 80 million trips in 2005 to 90 million trips in 2008. The Commission also referred to major recent crises which affected a considerable number of EU citizens: Libya, Egypt and Bahrain after the uprisings in spring 2011, Japan after the earthquake in March 2011, or Iceland's volcanic ash cloud in spring 2010. In these circumstances, the Commission argued that 'it appears particularly relevant to further reinforce the effectiveness of the right of EU citizens to

[74] Art. 3(b) VCDR.

[75] Art. 5(10) of the EEAS Decision.

[76] See 'Effective consular protection in third countries: the contribution of the European Union', European Commission Action Plan 2007-2009, COM (2007) 767 final, at 10: "In the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations".

[77] See 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM-2011, 23 March 2011, 149 final, section 2.3.

[78] *Ibid*.

be assisted in third countries for their different needs (e.g. practical support, health or transport). With public budgets under pressure, the European Union and the Member States need to foster cooperation to optimise the effective use of resources.' [79] However, the EU Member States are deeply divided on how far EU ambitions reach in this area, and what is the end-point of 'optimisation of resources'? Some Member States have a strong interest for EU Delegations to develop a capacity for consular support for EU citizens, whereas others are clearly opposed to the EU taking such a role, since they see this as a purely national competence.[80] What is certain from the perspective of the EEAS is that if the Union wishes to pursue such a role for EU delegations abroad, significantly more financial and human resources will need to be allocated to the EU diplomatic service. The December 2011 EEAS evaluation report stated that 'it is difficult to see how this objective could reasonably be achieved "on a resource neutral basis" as required by the EEAS decision. It would certainly not be responsible to raise citizens' expectations about the services to be provided by EU delegations, beyond their capacity to deliver in such a sensitive area. And the existing expertise within the EEAS in this area is extremely limited. However, over the past year we have also seen that the EU Delegations can play an important role in the coordination of evacuations of citizens and that pragmatic solutions can be found on the ground.'

In keeping with the forward-looking nature of the article, we will examine the possibly most-far-reaching implications of EU citizenship. Namely, the ECJ has stated that this is a 'fundamental status' of nationals of the member states. We interpret that as meaning that for the purposes of diplomatic protection and/or consular assistance, EU citizens could be considered – if not now than in the medium or long term – as 'EU nationals'. On that basis we then investigate the extent to which international diplomatic law is currently capable of accommodating 'EU nationals', e.g. nationals of an IO rather than of a sovereign nation, in their diplomatic, or consular needs.

International law generally makes a distinction between consular assistance and diplomatic protection. Diplomatic protection 'consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.' (Art. 1 of the 2006 Draft Articles on Diplomatic Protection). It is often considered to involve judicial proceedings, but protection of citizens may take different shapes, including the forceful protection by military missions.[81] Interventions outside the judicial process on behalf of nationals (issuing passports, assisting in transnational marriages, etc.) are generally not regarded as constituting diplomatic

[79] *Ibid*.

[80] European External Action Service, 'Report by the High Representative to the European Parliament, the Council and the Commission', 22 December 2011, at 7-8.

[81] See for an example J. Larik, 'Operation Atalanta and the Protection of EU Citizens: *Civis Europaeus* Unheeded?', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-closer in the world? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10 107-124, at 129-144.

protection but as falling under consular assistance.[82] For EU citizens consular assistance is mostly what they seek whenever they are in a third country and in need of some administrative actions, both in peace time and in crisis situations.[83] Diplomatic protection may come up when they run into legal troubles and a governmental intervention is requested. Diplomatic asylum relates to situations in which third country nationals seek the protection of a foreign embassy. For the purpose of this paper it is not necessary to discuss the details of the distinction as we mainly aim to point to a general development, which indicates that the EU is increasingly involved in taking up these state functions.

We seem to be at the start of a new development, which calls for a reassessment of the applicability of existing rules. Is it at all possible for the EU to play a state-like role in these matters? With the entry into force of the Maastricht Treaty in 1993, a European Citizenship was created, and the European Court of Justice even hinted at the idea of European citizenship being the primary identity of the nationals of the Member States.[84] On the basis of Article 23 TFEU, EU citizens are entitled to protection by the diplomatic and consular authorities of all Member States, when his/her own country has no representation.[85] The experiences since 1993 are somewhat mixed. '[…] some States consider that very little has changed since the adoption of this provision, while others are more enthusiastic about it […]'"[86] This may be related to the somewhat ambiguous phrasing of Article 23, which regulates the protection of EU citizens by the diplomatic missions of other Member States. It has been noted that Article 23 merely reflects a non-discrimination clause as it basically states that protection is to be provided 'on the same conditions as the nationals of that state'. At the same time, the conclusion of international agreements is foreseen on the basis of which third states can accept protection and assistance by an EU Member State on behalf of nationals of another EU Member State. This practice has hardly been followed.[87] The fact is that, partly apart from the treaty provisions, the EU itself seems to be well on its way to further develop its capacities in the area of consular assistance. As an answer to the differences between the 27 national legal frameworks on consular and diplomatic protection, a common EU legal framework may be developed.[88] There

[82] See A. Künzli, 'Exercising Diplomatic Protection The Fine Line Between Litigation, Demarches and Consular Assistance', *ZaöRV* (2006) 321-350.

[83] M. Lindström, 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 109-126.

[84] Case 184/99, *Grzelczyk* [2001] *ECR* I-6193. See more generally on European citizenship: J. Shaw, *The Transformation of Citizenship in the European Union. Electoral Rights and the Restructuring of Political Space*, Cambridge: CUP, 2007.

[85] Art. 23 TFEU. Cf. also Art. 46 of the EU Charter.

[86] See A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', 60 *ICLQ* (2011) at 965-995.

[87] *Ibid*. at 269-270.

[88] The Commission hinted at new legislative measures in 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM(2011) 149 final, at 13, 23 March 2011. See also M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-

are good reasons to believe that this development may have consequences for the diplomatic services of the Member States and that traditional international law is being sidestepped.[89] In that sense, Article 23 itself already forms a good example of a deviation from general international law, as it provides for the right of EU citizens to diplomatic and consular protection of Member States other than the State of nationality in the territory of a third country.[90]

Indeed, one of the key problems is that the relevant international rules depart from the notion of 'nationality', defined as 'the status of belonging to a state for certain purposes of international law'[91] Indeed, 'the criterion of nationality helps to recognise the entity that is both competent and accountable to act in the name of individuals vis-à-vis third countries.'[92] Diplomatic protection is closely related to nationality as, in principle, states can only protect their own nationals. In a classic case in 1937, the Permanent Court of International Justice argued: "In taking up the case of one of its nationals […] a State is in reality exercising its own right […]. This right is necessarily limited to intervention on behalf of its own nationals because, 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".[93] While, this may be true for diplomatic protection, it may be easier for states to cooperate in consular matters, which are generally of a more administrative nature. In general, however, it is clear that – irrespective of the invention of a 'European Citizenship'– a 'bond of nationality' is by definition absent in the relationship between the EU and its citizens. European citizenship is granted to the nationals of the Member States (Article 20 TFEU).

In the academic debates on the scope of Article 23 TFEU the point is often made that this provision not only provides a right to EU citizens to consular protection, but also to diplomatic protection. Public international law academics would argue that it is in particular this dimension that cannot be established by the EU unilaterally, given the non-existence of the concept of 'European nationality'. In their view the essential 'solid link' between the intervening state and the protected citizen is missing. It has, however, been argued that the ILC Draft Articles on Diplomatic Protection establish minimum standards under public international law which permits the States to go beyond these rules as long as they respect the condition of obtaining the express unanimous consent

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Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10 107-124, at 118.

[89] Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', 60 *ICLQ* (2011 at. 965-995.

[90] P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10,, at 92 and 101-102.

[91] Cf. Art. 3 VCDR and Art. 5 VCCR.

[92] P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10.

[93] *Panevezys-Saldutiskis Railway Case*, PCIJ Rep Series A/B No 76, at 16 (1934). Also in the *Nottebohm Case* (Second Phase) International Court of Justice Rep 4,22 (1955).

of all the States involved in the new model (both EU Member States and (at least implicitly also by) third states).[94]

It is true that the general international rules apply 'in the absence of a special agreement' and obviously states can simply agree to allow for the protection by states of non-nationals. In any case, under international law, the consular protection of a citizen by another State requires the consent of the receiving State (Art. 8 VCCR: '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.') Allowing the *European Union* to protect the nationals of its Member States would thus be a new step. As third states are not bound by EU law they will have to recognise European citizenship to allow the EU to protect or assist its citizens abroad.[95] The EU does not yet have competences in this area, but the Commission has been quite clear on its ambitions: '[i]n the longer term, the Commission will also consider the possibility of obtaining the consent of third countries to allow the Union to exercise its protection through the Commission delegations'.[96] Article 23 TFEU, which now only allows Member States to protect EU citizens with the nationality of another Member States, would then be a first step in a development towards the recognition of a role of the EU itself.[97] The current EEAS legal regime does not yet include this option and, obviously, any transfer of powers will depend on the consent of the Member States as well, as they may have good reasons to continue a bilateral representation. After all, essential elements of a relationship between a Member State and a third state may not be covered by the EU's competences or a special relationship may exist between an EU state and a third country, either due to historical ties and/or geographic location.[98] Nevertheless, one medium-sized Member State already openly discussed the possible benefits of a transfer of certain consular tasks to Union delegations.[99]

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[94] See M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10 107-124, at 122.

[95] P. Vigni, 'Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10, at 92.

[96] See 'Effective Consular Protection in Third Countries: The Contribution of the European Union', Commission Action Plan 2007-2009, COM (2007) 767 final, 5 December 2007, at 10. Cf. also M. Lindström 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 112.

[97] A. Ianniello Salicceti, 'The Protection of EU Citizens Abroad: Accountability, Rule of Law, Role of Consular and Diplomatic Services', *European Public Law* (2011) 91.

[98] C. Cusens, 'The EEAS vs. the National Embassies of EU Member States?' in Paul Quinn (ed.), Making European Diplomacy Work: Can the EEAS Deliver?, *College of Europe, EU Diplomacy Paper,* 8/2011,at 12.

[99] See the report by the Netherlands Ministry for Foreign Affairs, 'Nota modernisering Nederlandse diplomatie' 8 April 2011, at 10 and 18; available at <http://www.rijksoverheid.nl/documenten-en-publicaties/notas/2011/04/08/nota-modernisering-nederlandse-diplomatie.html>.

It is difficult to come up with cases in which the EU itself would have a reason to protect EU citizens abroad. The Commission mentions the case in which EU citizens are not represented and may be in need of a 'portal' for further assistance.[100] Another situation may be when the protection of an EU citizen is required on the basis of an agreement that was concluded between the EU and a third state.[101] One may expect the Union delegations to play a role in these situations in the future, but the extent to which the delegations can actually take up diplomatic and consular tasks ultimately depends on agreements that are to be concluded with the third countries. It has been noted that Member States will most probably not be too eager to hand over powers in this area to the EEAS. Yet, the European integration process has its own dynamic and Member States are also known to be pragmatic; coordination by the Union delegations and a foreseen harmonisation of the diverging rules on the protection of nationals[102] may gradually lead to an increased role for the delegations in practice.

A final note concerns nationals of third states seeking diplomatic asylum by a Union delegation. Where diplomatic and consular protection is aimed at a state' own nationals, diplomatic asylum may be requested by third country nationals in need of immediate protection. With the coming of age of the EU delegations and their visible presence all around the world in crisis situations, the question of whether the EU is allowed to grant diplomatic asylum becomes more apparent.

5. CONCLUSION: REALISTIC AMBITIONS OR DIPLOMATIC DREAMS?

The main aim of this paper was to confront the diplomatic ambitions of the EEAS with the reality of EU and international law. Treaty provisions as well as policy documents and statements of EU officials reveal a development in the direction of a strengthened role for the EU itself as a diplomatic actor. The establishment of the EEAS is often mentioned as a new and crucial phase in this development and ever more frequently one comes across terms like 'EU Ambassador' or 'EU Embassy'. While Member States have a natural tendency to underline their sovereignty in international diplomatic relations, EU officials may point to necessary changes in the longer run. Thus, one Head of Delegation argued: 'In the long term, delegations should represent and in a way also substitute Member States' embassies. There would be greater efficiency, power, credibility and authoritativeness. We really come to the core of the Member States' sovereignty. There is strong opposition, which is normal. This is why

[100] *Ibid*. section 3.3.2.

[101] A case in point was Case C-293/95 *Odigitra AAE v Council and Commission* [1996] *ECR* I-06129.

[102] As was announced in 'Consular protection for EU citizens in third countries: State of play and way forward', Commission Communication, COM(2011) 149 final. See also M. Moraru, 'The Protection of Citizens in the World: A legal Assessment of the EU Citizen's Right to Protection Abroad', in Larik and Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10 107-124.

European foreign policy is fragmented, inefficient and weak: the EU is an economic giant and a political dwarf, but we can hope that things will evolve in a significant way even in this field.'[103]

Our findings underline a tension between the EU's diplomatic ambitions and EU and international law as it stands. In the first section we examined the EU's new structures from an internal perspective, and our conclusions are necessarily mixed. On the one hand, there is no doubt that in the new EU institutional landscape dividing lines remain firmly in place. Divisions within the wider 'RELEX family' in Brussels, as well divisions between the Member States and the Union itself, are visible in different echelons of EU external diplomacy. In our submission, the previous picture points that intra-EU structures are certainly not yet final, but that the working arrangements do point to 'holistic' thinking implying cooperation and reciprocity. Turf wars may exist intra-institutionally, but they seem minor in comparison to the deep schism between the EU and its Member States. Thus, as far as diplomatic ambitions and diplomatic dreams, we find that within the institutions, EU delegations as one-stop-shops for 'EU diplomacy' encompassing the EU institutions only is a dream on its way to be realized with the usual bumps and bruises. However, 'EU diplomacy"' as also encompassing the Member States, seems rather far off, as was illustrated by the UK stance in relation to the International Civil Aviation Organisation.

The next section focused rather on International diplomatic law, which regulates the diplomatic relations between states and international organizations simply do not fit into the existing legal regimes. Whereas in the area of diplomatic representation we have seen a pragmatic acceptance of a 'contracting in' strategy by the EU (allowing for instance for Heads of Delegations to be accepted alongside states Embassies), the diplomatic and consular protection of citizens is too much related to the notion of 'nationality'. As one author noted: '[…] EU citizenship has not yet acquired the status of nationality (or of a similarly solid link) at international level, so as to justify the intervention of any Member State for the protection of any EU citizen, regardless of his/her nationality. One cannot deny that, in recent years, there seems to be a development of the idea that a solid link may also exist between an EU citizen and his/her Member State of residence. However, international law does not seem to have recognized the legitimacy of these new developments occurring within the EU legal system.'[104]

The practical implication is that third states will have to accept that the EU acts on behalf of its citizens. At the same time, the EU Member States do not seem to be willing to give up their traditional competences in his area: 'consular protection is an area of Member State competence and Member State

[103] C. Carta, *op.cit.*, at 115.

[104] P. Vigni, 'The Protection of EU Citizens: The Perspective of International Law', in J. Larik and M. Moraru (eds.), 'Ever-Closer in Brussels – Ever-Closer in the World? EU External Action after the Lisbon Treaty', *EUI Working Paper* LAW 2011/10, at 102.

competence solely'.[105] As a consequence, '[r]ather than a zero-sum relationship, Member States and the EU as a collective foreign policy actor may operate along-side, across and in tandem with one another'.[106] While this may form a solution for the short term, the EU's ambitions seem to go beyond a mere coordinating role. International law does not *per se* block a further development of the EEAS (and its Delegations) in the area of diplomatic and consular protection, but further steps will not only have to be accepted by the EU Member States, but obviously also by third states (on the basis of bilateral agreements). We believe that in the years to come a pragmatic acceptance of a new role of the EU will have an impact on the interpretation and perhaps even on the nature of international diplomatic law as primarily inter-state law.

[105] M. Lindström, 'EU Consular Protection in Crisis Situations', in S. Olsson (ed.), *Crisis Management in the European Union: Cooperation in the Face of Emergencies*, Berlin/Heidelberg: Springer, 2009, at 122.

[106] J. Bátora and B. Hocking, 'Bilateral Diplomacy in the European Union: Towards 'post-modern' patterns?', *Discussion Papers in Diplomacy,* The Hague: Clingendael Institute 2008, at 6.