Chapter 9
The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection

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9.1 Consular Assistance and Diplomatic Protection: Jurisdiction vs Nationality

Consular assistance and diplomatic protection find their origins in the traditional dialectic between the legal principles of territoriality and personhood. This dialectic refers to the opposition between the territorial notion of "jurisdiction" that each state exercises over the population residing within its own borders, and the concept of "nationality" that connects each state with its own citizens.[1]

The territoriality of jurisdiction and the personhood of nationality enter into a relationship of mutual tension when citizens leave the territory of their own state and fall under the jurisdiction of a foreign public authority. When the place of residence of a person is transferred to the territory of a state other than that of their citizenship, then the authority that both states can claim to exercise in relation to that person is limited by the obligation to respect the sovereignty of the other state. The authority of the state of citizenship, based on personal ties, is limited by the duty to respect the territorial jurisdiction of the state of residence. Correspondingly, the authority of the state of residence, based on territorial jurisdiction, is limited by the duty to respect the political ties of belonging of the individual to the other state.

In its relations with foreigners living in its own territory, as in those with its own citizens living abroad, the sovereignty of each state is therefore limited by the potential conflict with the sovereignty of other states. This is the sphere of

[1]See on the topic Borchard (1913), p. 515. According to Borchard, "the principles of territorial jurisdiction and personal sovereignty are mutually corrective forces: an excessive application of the territorial principle is limited by the custom which grants foreign states certain rights over their citizens abroad".

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relationships that legal scholarship, in the early twentieth century, identified as the main subject of "international administrative law". Despite its perhaps misleading reference to the international legal dimension, this label referred to an area of domestic law. Unlike the current concepts of global administrative law or administrative international law (as law governing international civil service and applied by international administrative tribunals) that older label referred to a specific part of domestic administrative law, which – similarly to private international law – applies to cases having a connection with the legal systems of other states.[2]

This chapter deals with the impact of both Europeanization and globalization on some specific aspects of what was once called "international administrative law", namely consular assistance and diplomatic protection. It is structured as follows. First of all, the international conventions on consular assistance and diplomatic protection are briefly summarized, in order to clarify the commonalities as well as the differences between them (Sect. 9.2). Second, the impact of Europeanization is evaluated, taking into account both the horizontal (the right to consular and diplomatic protection from authorities of member states other than those of citizenship) and the vertical dimension (the right to consular and diplomatic protection from European authorities) (Sect. 9.3). Finally, the impact of globalization is considered (Sect. 9.4). It is argued in this respect that the changes observed in these specific sectors could exemplify some more general phenomena. On the one hand, globalization increases the international dimension of domestic administrative law, by widening the part of domestic administrative law that regulates situations having a link with foreign legal systems. On the other hand, globalization decreases the degree of specificity of that part of domestic law, submitting the exercise of "foreign affairs" administrative functions to the general requirements of the rule of law.

9.2 Overlapping, but Distinct Functions

In defining its own rules on diplomatic protection and consular assistance of citizens abroad, each state is generally bound by public international law, which is based on two international conventions: the Vienna Convention on Diplomatic Relations[3] and the Vienna Convention on Consular Relations.[4]

[2]See Borsi (1912); Neumeyer (1910, 1922, 1930, 1936). On "international administrative law" see Battini (2003), p. 30 ff. and, more recently Cossalter (2010). On the contribution of the Italian scholarship to the study of the subject matter, see also Mattarella (2005).

[3]Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations *Treaty Series*, vol. 500, p. 95.

[4]Done at Vienna on 24 April 1963. Entered into force on 19 March 1967. United Nations *Treaty Series*, vol. 596, p. 261.

These conventions overlap, but remain distinct. One's focus is primarily administrative and domestic. The other has political and international implications.[5] If someone loses his/her passport or travel documents while overseas, or finds himself/herself unexpectedly deprived of financial resources, or gets into an accident, or suffers a sickness, or is involved in a natural disaster, or is the victim of a terrorist attack, that person can turn to the consular authorities of the state of which he/she is a citizen, which will provide him/her with aid and assistance[6] in the situation of "distress".[7] The consular authorities therefore carry out administrative functions that are to be exercised in the interests of their own citizens, although in foreign territory. International law specifies certain of these functions, but the list is

[5]On the distinction between consular assistance and diplomatic protection, see, in particular, Kunzli (2006a). This work emphasizes in particular three differences. The first regards the stricter limits imposed by international law on the functions of consular assistance compared with diplomatic protection: "as a result of the obligation not to interfere in the domestic affairs of the receiving state as provided for in art. 55 of the VCCR, this cannot be interpreted to imply that the consul actually has the power to intervene in a judicial process to prevent a denial of justice... (...Consuls) have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime". The second difference concerns the degree of representation: "The Ambassador primarily represents the state and not its single individuals. Similarly, when Ministers of Foreign Affairs or even the Head of State are involved, one should properly speak of diplomatic protection and not of consular assistance. Since states (...) assert their own rights through the exercise of diplomatic protection it is connected to state sovereignty." The third difference, finally, regards the preventive and nonremedial nature of consular assistance: "Consular assistance often has a preventive nature and takes place before local remedies have been exhausted or before a violation of international law has occurred. This allows for consular assistance to be less formal and simultaneously more acceptable to the host state. (...) A diplomatic demarche on the other hand has the intention of bringing the matter to the international, or inter-state, level ultimately capable of resulting in international litigation".

[6]See Vienna Convention on Consular Relations, Art. 5, subsection e): (Consular functions consist in...) "e) helping and assisting nationals, both individuals and bodies corporate, of the sending State".

[7]See Vienna Convention on Consular Relations, Art. 5, subsection i): (Consular functions consist in...) "i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests". See also Art. 36, subsection c): "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action".

not exhaustive,[8] because it regards national law. The task of international law (namely, general public international law) is simply to facilitate the exercise of these administrative functions, in particular by imposing on the "receiving state" the obligation to consent on its own territory to the exercise of these consular functions by the authorities of the "sending state",[9] and on the latter, the obligation to respect the laws and regulations of the "receiving state", and to not interfere in its domestic affairs.[10] In this context, when exercising its consular functions, the state does not act on the plane of international relations, but carries out national administrative functions on foreign soil, according to international law.

However, when the situation of "distress" of the citizen abroad consists in a real "injury" due to an "internationally wrongful act or omission attributable to the receiving State", then various practices of diplomatic protection can supplement consular protection. In providing diplomatic protection, the sending state is not limited to merely furnishing assistance for its own citizen. In taking on her cause, it now does act on the plane of international relations, by means of various forms of action that can turn into an international controversy.

The political and international nature of diplomatic protection, as opposed to mere consular protection, helps explain an aspect that has long been considered essential: the state's absolute discretion over whether or not to exercise diplomatic protection, potentially committing an entire political community to engage in a controversy that regards at first sight only one of its members. Such discretion is traditionally recognized both in international law – as the International Court of Justice has always made clear – and in national administrative law (namely, the domestic international administrative law of each state), which has traditionally qualified the exercise of diplomatic protection as a prerogative of the executive power in matters of international relations, thus withdrawing it from the judicial branch, according to the English doctrine of "royal prerogative power over foreign affairs", or the French doctrine of "acte de gouvernment".[11]

[8]See the Vienna Convention on Consular Relations Art. 5, subsection. m): [Consular functions consist in . . .] "m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State".

[9]To this end, included in the Vienna Convention on Consular Relations are "facilities, privileges and immunities" that regard both the functioning of the consular offices (Chapter II, Section I, in particular v. Art. 28: "The receiving State shall accord full facilities for the performance of the functions of the consular post"), and the holders of such offices (Chapter II, Section II, v. in particular Art. 40: "The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity").

[10]See in particular the Vienna Convention on Consular Relations, Art. 55.1: "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the State".

[11]Cerulli Irelli (2009); Guicciardi (1937); Gaudemet (2001).

9.3 The Impact of EU Law

The body of law traditionally referred to as "international administrative law" – it has been observed – is strictly bound to the status of citizenship. On the one hand, legal relationships between the state and persons living outside its territorial jurisdiction can be ascribed to international administrative law as long as those persons are citizens. On the other hand, legal relationships between the state and persons living inside its borders can be assigned to international administrative law as long as those persons are not citizens (*recte*, they are citizens of another country).

On European soil, however, all this is complicated by the fact that there is a supranational citizenship as well as a national one.

Two consequences derive from that. The first one is the development of a European Union (EU) law conditioning the "international administrative law" of member states. The second consequence is the development of a separate "EU international administrative law". Each of these aspects is to be taken into account.

European citizenship has a double dimension, horizontal and vertical. The horizontal dimension regards the rights that citizens of one Member State may assert before other Member States, under the same conditions as the citizens of those states. This levelling of the playing field regards both the basic right of "internal" citizenship, namely the right to vote and to stand as candidate in elections, and the basic right of "external" citizenship, meaning the right to enjoy the protection of the diplomatic and consular authorities. In both cases, however, this levelling affects the administrative aspects of citizenship rights,[12] rather than those strictly political in nature.

Article 20 of the Treaty on the Functioning of the European Union (TFEU) gives citizens of the Union the right to vote and to stand as candidates in municipal elections in the Member State of residence, but not in general election. There are good arguments that maintain that Art. 20 TFEU also recognizes the right of citizens of the Union to enjoy consular assistance from the authorities of other Member States, which is the administrative aspect of the basic right related to the external dimension of citizenship. This right does not extend to diplomatic protection, since this necessarily assumes political membership in the specific Member State that exercises it.[13]

[12]On this point, see also Cassese (1997), in particular, p. 92, where a comparison is made between the right of European citizens to participate in local elections and their right to have access to public employment in other member States: in both cases, "the national public powers are cut off from their own base (the community), but only partially, in the case of public employment limited to the offices that do not bring with them the exercise of authority and care for the general interest; in the case of electoral rights limited only to minor offices". We could add: as to the protection by diplomatic and consular authorities, limited to consular assistance.

[13]See, for instance, Kunzli (2006a, b): "EU citizenship clearly is not sufficient to fulfill the requirement of nationality of claims for the purpose of diplomatic protection. Considering the fundamental nature of this requirement and its universal acceptance, one wonders then how the right to diplomatic protection was included in the various EU treaty provisions. It is submitted

126 EU legislation initially aimed in this direction in order to implement the consti-
127 tutional law noted above. The *acquis communautaire* is basically reflected in
128 Decision 95/553/EC which, clearly enough, refers only to consular assistance.[14]
129 But what is the content of the right to consular assistance that is recognized as
130 pertaining to European citizens in relation to the diplomatic and consular authorities
131 of the other Member States? Under a minimalist reading, the European right is
132 limited to a duty of nondiscrimination.[15] But this reading is not fully convincing,

that the drafters of these provisions either did not intend to include diplomatic protection but failed to use the proper language or confused – and continue to confuse – diplomatic protection and consular assistance. [. . .] The "right" accorded to citizens of the Union may include consular assistance but EU member states cannot be forced to exercise diplomatic protection". *Contra*, Geyer (2007): "granting diplomatic protection to Union citizens through Art. 20 TEC does not as such constitute a violation of international public law. Nevertheless, the exercise of this protection would either require respective negotiations to obtain the consent of third states (as explicitly foreseen in Art. 20, paragraph. 2, TEC) or an understanding of Union citizenship as some form of nationality that would justify the exercise of diplomatic protection by any EU member state in favour of any EU citizen".

[14]Kunzli (2006a, b): "In Decision 95/553/EC the actions for the purpose of diplomatic and consular protection to EU citizens are defined in Art. 5(1): (a) assistance in cases of death; (b) assistance in cases of serious accident or serious illness; (c) assistance in cases of arrest or detention; (d) assistance to victims of violent crime; (e) the relief and repatriation of distressed citizens of the Union. In a Factsheet on consular and diplomatic protection provided through the website of the European Institutions the conditions for protection and the kind of assistance that may be expected are further defined. In order to qualify for protection, an individual is required to: 1) possess the nationality of an EU member state; 2) be "in distress abroad . . . and require consular protection"; and 3) be in a non-EU state where his or her state of nationality is not represented through an embassy or consulate. While the conditions for protection mention the nationality of claims, they are silent on the exhaustion of local remedies and injury resulting from an internationally wrongful act. Prior to the fulfilment of these conditions, diplomatic protection cannot be exercised. What is envisaged here is clearly consular assistance, which does neither require exhaustion of local remedies nor the occurrence of an internationally wrongful act. Only the assistance mentioned under point (c) could under certain circumstances give rise to diplomatic protection. It is curious to note that the wording of the Decision is fairly precise and deviates in this respect from the text provided in the EC Treaty, the EU Charter and the Constitution. While it is stated in the preamble that the decisions concern "protection" without further qualification, Art. 1 provides that "[e]very citizen of the European Union is entitled to the consular protection of any Member State's diplomatic or consular representation" (emphasis added). In the light of the activities defined in Art. 5 of the Decision, cited above, this is correct. While even consular assistance is usually only exercised on behalf of a national, it is not impossible that a consular officer of one state may render assistance to a national of another state. Since consular assistance is not an exercise in the protection of the rights of a state nor an espousal of a claim, the nationality criteria are not required to be applied as strictly as in the case of diplomatic protection. There is no necessity for a legal interest through the bond of nationality".

[15]Such is the position expressed, for example, in response to the Green Paper issued by the European Commission, (*Diplomatic and Consular Protection of Union Citizens in Third Countries*, Brussels, 28-11-2006, COM (2006) 712 final) by the United Kingdom, which has in particular excluded the possibility that the European constitutional norm can create a "legal right" for the European citizen to assistance on the part of the diplomatic and consular authorities of the member States that do not recognize a similar right for their own citizens. The position of the

especially in light of more recent evolutions of European constitutional law, which seem to impose on the Member States something more than a simple obligation of equal treatment.

Consular assistance on the part of the authorities of the Member States, on a basis of equality with the citizens of these states, is today not only a legal right recognized by European constitutional law, but also a fundamental right, sanctioned by the Charter of Fundamental Rights of the European Union, that now has full constitutional and binding force.

That of course does not mean that the diplomatic and consular authorities of the Member States are legally obliged to satisfy all the requests for assistance from European citizens, without being able to exercise any margin of discretion. But it does mean at least that the decisions that they make in dealing with any such requests must be reviewable by national courts, in order to protect a right created by European law. The European citizen who asks for consular assistance from the authorities of another Member State, and receives a refusal that he/she considers discriminatory, must be able to appeal to a national judge capable of exercising judicial review of the contested administrative decision. Therefore, the logic of the "acte de gouvernement", which has long dominated in the sphere of the domestic international administrative law of the States, seems to be now incompatible with the European constitutional law regarding consular assistance.

But EU law can also be understood to harmonize, at least to some degree, the substance of the national laws regarding consular assistance, thus minimizing the differences between the respective "international administrative laws" of the various Member States.

The new EU constitutional law provides, in particular, the legal basis for a Europeanisation of the national laws regarding consular assistance, consisting essentially in a power to carry out actions to support, coordinate or supplement Member States. Through these actions, the EU will be able to both condition the national laws regarding consular assistance, and to ensure that "the diplomatic and consular missions of the Member States and the delegations of the Union in third countries [. . .] shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries" (Article 35 Treaty on the European Union). It naturally does not (yet) imply the full Europeanisation of the administrative functions of consular assistance, so long as the European law does

British government is referred to by Geyer (2007), p. 2: "British nationals do not have a legal right to consular assistance overseas. The UK Government is under no general obligation under domestic or international law to provide consular assistance (or exercise diplomatic protection). Consular assistance is provided as a matter of policy, which is set out in the public guide, "Support for British Nationals Abroad: A Guide". [. . .] In relation to EU law, Article 20 TEC sets out an obligation of nondiscrimination. It requires Member States to treat requests for consular assistance by unrepresented nationals of Member States on the same basis as requests by their own nationals. In compliance with this, the UK provides consular assistance to significant numbers of unrepresented Member States' nationals. But Article 20 TEC does not create any right to assistance beyond this".

not create any right to consular assistance from Commission delegations. Commission delegations, however, can become involved with the common exercise (by means of common offices) of an administrative function that remains the responsibility of the member States to carry out.

European citizenship, however, also displays a vertical dimension. European citizens cannot vote and stand as candidates in general elections of a different Member State. But they do have the right to vote and stand as candidates in European elections. Thus, further developing the comparison between rights based on the internal and the external dimension of citizenship, one could ask whether the European citizen has a right not only to enjoy the protection of diplomatic and consular authorities of a different Member State, but also to enjoy the protection of European diplomatic and consular authorities themselves.

The vertical dimension of the right to vote emerged when direct elections to the European Parliament were established. It thus emerged when the function of "internal" political representation of European citizens was assigned to a European institutional body. Analogously, the vertical dimension of the right to consular assistance and diplomatic protection is strictly connected to investing European bodies with the external political representation of European citizens, namely the foreign affairs function.

This function is partly emerging and, partly, has already emerged.

With regard to the former aspect, the Lisbon Treaty assigns such function to the High Representative of the Union for Foreign Affairs and Security Policy,[16] which concerns the implementation of the common foreign policy by means of a "European External Action Service". The action of this diplomatic body[17] could bring about an effective Europeanization of the administrative function of consular assistance, and even open the way to the exercise of the function of diplomatic protection of European citizens on the part of the Union authorities.

With regard to the latter aspect, we must not forget that there are sectors in which the functions of consular assistance and diplomatic protection are already fully Europeanized. I am referring in particular to the common trade policy, in the context of which the Commission is directly concerned with exercising, in favour of European firms present in overseas markets or that intend to penetrate these, a function of interlocutor with the overseas authorities that regulate these markets, which seems to lead to consular assistance, or, even, to diplomatic protection. For example, a European firm, injured by commercial barriers stemming from measures adopted by the authorities of third countries that conflict with the norms of the WTO or other trade agreements, may invoke the Trade Barriers Regulation (TBR),[18]

[16]See Art. 18 TUE.

[17]The diplomatic body has been established by Council Decision of 26 July 2010 (2010/427/EU).

[18]EC Council Regulation n. 3286/94 of 22 December 1994, laying down Community procedures in the field of the common commercial policy in order to censure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ L 349, 31.12.1994, p. 71, Amended by EC Council Regulation n.

which substantially defines due process requirements to be applied to European Union decisions to exercise diplomatic protection or not in favour of such a firm. The European Union has not a duty to give diplomatic protection: just consider that, even once it has ascertained the existence of a prejudice against the complainant caused by illicit means, it can still refuse to exercise protection if this seems to be in the "community interest". However, all decisions adopted by the Commission in applying the TBR must respect the duty to give reasons and are reviewable by courts in order to verify – as made clear by the Court of First Instance – "that the relevant procedural rules have been complied with, that the facts on which the choice is based have been accurately stated and that there has not been a manifest error of assessment of those facts or a misuse of powers".[19]

Just as it provides for national judicial review over Member States' decisions regarding consular assistance, European law also provides for European judicial review over European decisions concerning the exercise of the functions of consular assistance and diplomatic protection.

In this respect, European law reflects a more general tendency: the progressive subjection of overseas action by national authorities to (general) administrative law requirements. This is a tendency mainly due to globalization, whose impact is now time to address.

9.4 The Impact of Globalization

Globalization multiplies the situations in which the authority of the State is exerted over foreigners, or, seeing the same phenomenon from another perspective, the citizens' rights are exposed to foreign authorities. Thus, it enlarges the sphere of the body of law traditionally referred as "international administrative law".

First of all, due to phenomena related to globalization, such as the increase of tourism, ever more frequently cases arise in which the citizens of a State reside within the territory of another State. Moreover, globalization also multiplies the occasions in which citizens find themselves exposed to foreign regulation independently of their physical presence on foreign soil.

Economic and social integration brings domestic regulations, issued on the basis of territorial jurisdiction, an extraterritorial impact. It produces effects on foreign citizens that have made a financial investment in the territory of the State. Or it impacts foreign firms that sell products and lend services within that territory. So, it is not only the circulation of persons, but also and above all that of capital, of goods

356/95 and n. 125/2008. On this theme, see, among others: Mavroidis and Zdouc (1998); McNelis (1998); MacLean (1999a, b).

[19]Court of First Instance of the European Union, case T-317/02, *Fédération des industries condimentaires de France (FICF) and Others v Commission of the European Communities* [2004] ECR II-4325, para. 94.

and services that link each other national legal orders, in such a way that the authority exercised by each State over its own territory continually involves cases that present a transnational element.

This is no longer an exception, but is rather becoming the general rule. Not only when it issues rules, or makes decisions, that specifically regard foreigners present on its territory, but in almost all cases in which the State performs a legislative or administrative function within its own borders, it must consider the potential effects that its rules and decisions have on foreign citizens and firms. So the formerly specific area of the so-called "international administrative law" is now becoming general administrative law, because domestic administrative law as a whole gains an increasing transnational importance.

This obviously impacts consular assistance and diplomatic protection. On the one hand, the area of situations to which this kind of public functions apply tends to significantly widen. On the other hand, the exercise of diplomatic protection and consular assistance tends to be "reabsorbed" under the rule of (general administrative) law.

As to the first aspect, the more the exposure of citizens to foreign jurisdiction grows, the more important is their need for assistance and protection by their own State, at least in all those situations in which they cannot automatically make use of international remedies.[20] The "demand" for consular assistance and diplomatic protection is growing. And it is becoming more diversified. It does not only regard the more traditional area of assistance provided to the citizens overseas in a condition of distress, which still appears to be greater than in the past, but also the entire sphere of trade diplomacy. As economic interdependence progresses, so does the function of assistance and protection for national economic actors that encounter obstacles in accessing overseas markets or which investments, products or services are impacted by unfavourable rules or by the decisions of the foreign authorities that preside over those markets.

As to the second aspect, consular and diplomatic functions are increasingly subjected, and maybe should be definitely subjected, to the principles and requirements of general administrative law, which they had tended in the past to escape, precisely because of their "international" appearance. We have seen, in fact, that the decisions made in the course of exercising these functions at one time resided in the sphere of political actions, withdrawn from jurisdictional control as they were from the application of the requirements of due process and duty to give

[20]On the persistent relevance of the practice of diplomatic protection, notwithstanding the development of international regimes that, in particular in cases of protection of human rights, accord to the individual already the right to address them self autonomously to international tribunals against illicit acts committed by States against them, see in particular Dugard (2005): "Aliens are still in need of protection. Human rights instruments do not grant them effective remedies except in a minority of cases. [...] Diplomatic protection provides a potential remedy for the protection of millions of aliens who have no access to remedies before international bodies and a more effective remedy to those who have access to the often ineffectual remedies contained in international human rights instruments. It should therefore, be retained".

reasons. But the very idea of the suspension of the rule of law in the sphere of the foreign action of the State, withdrawn as such from the reach of the guarantees of administrative law, is increasingly coming into crisis. The more the exposure of the rights and the interests of citizens to foreign jurisdiction, and thus the more the demand grows for assistance and protection by one's own State for the defence of those rights and interests, the less is it acceptable that the state functions that respond to this demand for defence escape the principles of rights owed to citizens by the State.

In consequence, the complete freedom of action, traditionally recognized by States with respect to requests for consular assistance and diplomatic protection, has undergone a process of erosion. This process is due not only, and not mainly to the development of international law,[21] so much as and above all to the affirmation, in the national regulations of the States, of an international dimension of judicial review exercised by the courts.[22] There are in fact currently a number of decisions by courts of various countries,[23] which affirm the right of citizens to judicial review of the reasonableness and nonarbitrary nature of the decisions made by the executive regarding diplomatic protection and consular assistance.

These decisions, consequently, move from the area of governmental unreviewable acts to that of administrative discretionary acts. The functions and the powers of which they are expressions come under the rule of the general principles of administrative law and of the rights owed by the State to citizens. The exceptional character of international administrative law is reduced as it extends its own field of application.

It is often observed that, as a result of globalization, the domestic action of the State is more intensively regulated by international law. But there is another side of the same reality, which is rarely underlined. For the same reasons, in fact, the overseas action of the State is ever more intensively regulated by national administrative law, that is to say by the old international administrative law, which is increasingly losing its own special and exceptional character.

[21]Although the special advisor to the Commission on International Law had proposed an article that would have imposed on the States the obligation to exercise diplomatic protection for their own citizens, when these were subject to a gross violation of international norms of *jus cogens* that could be attributed to another State ("Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the state of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State") the Commission did not however, agree to this proposal. See Dugard (2005).

[22]Lord Justice Richards (2006).

[23]For a comparative analysis of this jurisprudence, see, among others, Kunzli (2006b); Forcese (2007); Attanasio et al. (2009).

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Author Queries

Chapter No.: 9

Query Refs.	Details Required	Author's response
AU1	The reference Kunzli (2006) has been changed as Kunzli (2006a, b). Please check if appropriate.	