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# **Diplomatic Immunities Ratione Materiae under the Vienna Convention on Diplomatic Relations: Towards a Coherent Interpretation**

by  
Xinxiang Shi

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## Declaration

I declare that this thesis was composed by myself, that the work contained herein is my own except where explicitly stated otherwise in the text, and that this work has not been submitted for any other degree or professional qualification.

## Abstract

Rules of diplomatic immunity, which nowadays are enshrined in the Vienna Convention on Diplomatic Relations, play an important role in interstate diplomacy because they ensure the efficient performance of diplomatic functions.

This thesis investigates a particular form of diplomatic immunity — diplomatic immunity *ratione materiae*. Unlike diplomatic immunity *ratione personae*, which pertains to the personal status of a diplomatic agent, diplomatic immunity *ratione materiae* depends in essence on the official nature of a particular act

In practice, however, the determination of diplomatic immunity *ratione materiae* may meet with many conceptual and practical difficulties. For one, it is not always easy to distinguish the official acts of a diplomatic agent, who represents the sending State in the receiving State, from his or her private acts. In case of disagreement between the two States, questions may also arise as to who has the authority to make a final determination. The Vienna Convention does not offer much guidance on these issues; on the contrary, the Convention complicates them by employing, without adequate explanation, distinct formulas for different kinds of diplomatic immunity *ratione materiae*.

This thesis examines these formulas in detail. On a general level, it is submitted that diplomatic immunity *ratione materiae* for certain types of activity constitutes not only a procedural bar to court proceedings but also a substantive exemption of individual responsibility. More specifically, it is argued that each formula must be understood in the light of the rationale behind immunity, the type of immunity concerned, and the specific functions or duties performed. In case of controversy, weight should be given to the opinion of the sending State, although the authority to make a decision lies ultimately with the court of the receiving State.

## Lay Summary

A diplomatic mission is a State organ of the sending State which operates on the territory of the receiving State. Under international law, the receiving State has an obligation to grant diplomatic immunity to members of the foreign mission. This immunity means that a mission member may not be sued or prosecuted in local courts even when he or she has violated local laws. The purpose of this immunity is to ensure that diplomatic mission members can carry out their functions without harassment from local authority.

Rules of diplomatic immunity are set out in the Vienna Convention on Diplomatic Relations, which has been adopted by almost all States in the world. There are two types of diplomatic immunity under the Vienna Convention. The first one, personal diplomatic immunity, protects certain mission members irrespective of the nature of the act performed. The second one, diplomatic immunity *ratione materiae*, however, only protects official acts performed by a mission member.

This thesis explores the scope of diplomatic immunity *ratione materiae*. It is submitted that diplomatic immunity *ratione materiae* for certain official acts constitutes not only an exemption from local jurisdiction but also an exoneration of individual responsibility. In practice, this means that immunity for these acts cannot be waived by the sending State.

More specifically, it is argued that each type of diplomatic immunity *ratione materiae* under the Vienna Convention has its distinct scope. As a result, the determination of diplomatic immunity *ratione materiae* should be made in the light of the rationale behind immunity, the type of immunity concerned, and the specific functions or duties performed. In case of controversy, weight should be given to the opinion of the sending State, although the authority to make a decision lies ultimately with the court of the receiving State.

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## Introduction

On 23 November 1996, the serving ambassador of Zaire to France, Ramazani Baya, caused a traffic accident which resulted in the death of two teenagers on his way to meeting the Zairian President, Mobutu Sese Seko, who was then residing in France to receive health treatment.<sup>1</sup> The ambassador made the trip because Mobutu had suddenly decided to call a meeting at his villa. Upon receiving the phone call from the president, the ambassador, who was just across the border in Italy, scrambled into his car and raced towards the president's residence. The car was driven at more than three times the speed limit when the two teenagers were hit and killed.<sup>2</sup>

The ambassador was questioned by the police, but released shortly after his diplomatic status was confirmed. At the request of France, he was recalled by his government.<sup>3</sup> However, the public resentment towards the incident later turned out to be so strong that the French Government had to request Zaire to waive Baya's diplomatic immunity to enable a prosecution in France.<sup>4</sup> Zaire initially refused to waive immunity, stating that it would set 'a bad precedent'.<sup>5</sup> But after France directly exerted pressure on Mobutu, waiver was finally granted.<sup>6</sup> The former ambassador returned to France and was sentenced to two-year suspended imprisonment along with a fine of \$10000.<sup>7</sup>

If Baya's immunity had not been waived by Zaire, the French court would have had to consider whether Article 39(2) of the Vienna Convention on Diplomatic Relations (VCDR), which sets out immunity for acts performed by a former diplomat in the exercise of his or her functions as a member of the mission,<sup>8</sup> applied to the former ambassador. While it seems obvious that attending a meeting convoked by the president of the sending State is an official function of an ambassador, it may be questioned whether, and if so to what extent, violations of traffic

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<sup>1</sup> Anne Swardson, 'Grieving Town Finds Zaire Diplomatic', *The Washington Post*, 23 January 1997.

<sup>2</sup> Ibid.

<sup>3</sup> Ben Macintyre, 'Call for Car Crash Envoy to Face Trial', *The Times*, 3 December 1996.

<sup>4</sup> Supra note 1.

<sup>5</sup> 'Zaire Fires Ambassador Who Killed Two Boys in Car Accident', *The Associated Press*, 21 January 1997.

<sup>6</sup> Supra note 1.

<sup>7</sup> 'Zairian Envoy Sentenced in France Auto Deaths', *The NY Times*, 30 April 1997.

<sup>8</sup> Article 39(2) of the VCDR.

regulations committed by the ambassador during the journey could be regarded as ‘in the exercise of’ the official function.

In the general context of the VCDR, questions like this are only part of the overall inquiry of what constitutes an official act in diplomatic law. The answer to this overall inquiry is of particular relevance to those mission members who only enjoy diplomatic immunity *ratione materiae*. Unlike full diplomatic immunity, which pertains to the personal (diplomatic) status of a person, diplomatic immunity *ratione materiae* essentially hinges upon the official nature of an act. Yet in practice it is not always easy to draw a line between official and unofficial acts; and sometimes the disagreement between States has led to serious consequences.<sup>9</sup>

## 1. Scope of the thesis

In general, two types of diplomatic immunity exist under the VCDR:

The first one, diplomatic immunity *ratione personae* (personal diplomatic immunity), is based on the personal status of a mission member. According to Article 31(1) and Article 37(2) of the VCDR, incumbent diplomatic agents<sup>10</sup> and administrative and technical staff (ATS),<sup>11</sup> unless they possess the nationality or permanent residency of the receiving State, enjoy personal diplomatic immunity from criminal proceedings. Under Article 31(1), serving diplomatic agents not having the nationality or permanent residency of the receiving State also enjoy, save for the three exceptions listed in Article 31(1)(a), (b) and (c), personal diplomatic immunity from civil proceedings.<sup>12</sup> The official or private nature of an act has no bearing on this type of diplomatic immunity. Therefore, even if a person (enjoying personal diplomatic immunity) has committed an illegal act in a purely private capacity, he or she may not be sued or prosecuted in the receiving State unless the sending State has agreed to waive the

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<sup>9</sup> In *Ministère Public and Republic of Mali v. Keita*, a Belgian court ignored the opinion of the sending State (Mali) and ruled that a chauffeur of the embassy of Mali, who had killed the ambassador due to dissatisfaction with his working conditions, did not enjoy immunity because he had not acted ‘in the course of his duties’ pursuant to Article 37(3) of the VCDR. This judgment resulted in a strong protest by the whole ACP (African, Caribbean and Pacific Group of States) diplomatic corps in Brussels. See, *Revue Belge de Droit International*, 1977-1978, p. 607, case no. 1443.

<sup>10</sup> Article 31(1) of the VCDR.

<sup>11</sup> Article 37(2) of the VCDR.

<sup>12</sup> Article 31(1) of the VCDR.

immunity.<sup>13</sup> Personal diplomatic immunity is crucial to the overall operation of a diplomatic mission because it ensures that those who perform important functions/duties are free from harassment.

Diplomatic immunity *ratione materiae*, on the other hand, hinges upon the official nature of an act. Under the VCDR, the application of diplomatic immunity *ratione materiae* mainly takes three forms.

Firstly, for those who are protected by personal diplomatic immunity, diplomatic immunity *ratione materiae* applies primarily in a residual manner, viz. after personal diplomatic immunity expires. According to Article 39(2) of the VCDR, once the functions/duties of a person have come to an end, he or she is only protected by diplomatic immunity *ratione materiae* for acts performed 'in the exercise of his functions as a member of the mission'.<sup>14</sup> In practice, disputes concerning the application of Article 39(2) normally arise when a former diplomat or ATS member returns to the receiving State or stays in the receiving State after leaving office.

Secondly, in certain exceptional situations, diplomatic immunity *ratione materiae* is the only form of immunity enjoyed by a serving diplomatic agent not having the nationality or permanent residency of the receiving State. Article 31(1) of the VCDR provides that personal diplomatic immunity from civil proceedings is not available in disputes relating to private immovable property, succession, and professional or commercial activity.<sup>15</sup> However, if a diplomatic agent has performed these acts 'on behalf of the sending State'<sup>16</sup> or 'in the exercise of his official functions',<sup>17</sup> immunity would still follow. This in turn suggests that, for diplomatic agents who have performed these acts, their immunity from civil proceedings is in essence diplomatic immunity *ratione materiae*.

Thirdly, for certain categories of mission members, diplomatic immunity *ratione materiae* is the only form of immunity available under the VCDR. According to Article 27(5), a diplomatic courier is protected by the receiving State and enjoys personal inviolability 'in the performance

<sup>13</sup> Article 32(1) of the VCDR.

<sup>14</sup> Article 39(2) of the VCDR. See Chapter 2(3) and (4) below.

<sup>15</sup> Article 31(1) of the VCDR. See Chapter 4 below.

<sup>16</sup> Article 31(1)(a) and (b) of the VCDR.

<sup>17</sup> Article 31(1)(c) of the VCDR.

of his functions'.<sup>18</sup> Under Article 37(2), ATS members of a diplomatic mission enjoy diplomatic immunity *ratione materiae* from civil proceedings which does not extend to 'acts performed outside the course of their duties'.<sup>19</sup> Article 37(3) provides that service staff members of a diplomatic mission are protected by diplomatic immunity *ratione materiae* from both criminal and civil proceedings for acts performed 'in the course of their duties'.<sup>20</sup> Lastly, for diplomatic agents who possess the nationality or permanent residency of the receiving State, their immunity from jurisdiction and inviolability pertain, pursuant to Article 38(1) of the VCDR, only to 'official acts performed in the exercise of his functions'.<sup>21</sup>

This thesis aims at exploring the scope and application of these diplomatic immunities *ratione materiae* under the VCDR.

In literature, the topic of diplomatic immunity *ratione materiae* has been mainly approached in two ways:

Firstly, writers have tried to articulate the scope of diplomatic immunity *ratione materiae* by listing specific examples. Denza, for example, holds that driving offence should be protected by 'in the course of duties' immunity under Article 37(2) and (3)<sup>22</sup> but not by 'in the exercise of functions' immunity under Article 38(1) and Article 39(2).<sup>23</sup> In a similar vein, the editors of *Satow's Diplomatic Practice* point out that renting a private residence in the receiving State should be regarded as an act performed 'in the course of duties' but not 'in the exercise of functions'.<sup>24</sup> More generally, it has been argued that, given the obligation to respect local laws under Article 41(1) of the VCDR,<sup>25</sup> illegal or criminal acts should never be considered as official in nature.<sup>26</sup>

<sup>18</sup> Article 27(5) of the VCDR. See Chapter 2(5) below.

<sup>19</sup> Article 37(2) of the VCDR. See Chapter 3 below.

<sup>20</sup> Article 37(3) of the VCDR. See Chapter 3 below.

<sup>21</sup> Article 38(1) of the VCDR. See Chapter 2(2) below.

<sup>22</sup> Denza, 3rd edition, p. 408

<sup>23</sup> Denza, 3rd edition, p. 416, 441. See also, Brown, p. 77; Lewis, 3rd edition, p. 145. For opposite opinions, see, Brownlie, 5th edition, p. 361; Salmon, p. 437; Dembinski, p. 185.

<sup>24</sup> *Satow's*, 6th edition, p. 165. See also, *Satow's*, 5th edition, p. 145.

<sup>25</sup> Article 41(1) of the VCDR provides that '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'.

<sup>26</sup> Cahier, p. 35. Similar arguments have also been presented with respect to consular immunity, see, for example, *Oppenheim's*, 9th edition, p. 1145; Milhaupt, p. 861; Lee, 2nd edition, p. 497. On the relevance of consular immunity, see *infra* Section 3.2.

On a more theoretic level, authors have sought to establish an abstract formula to help determine diplomatic immunity *ratione materiae*. Dinstein, for one, indicates that diplomatic immunity *ratione materiae* is available only when the act in question can be ‘imputed to the (sending) State and regarded as an act of State’.<sup>27</sup> Salmon takes this ‘act of State’ formula one step further by arguing that an act of State should be determined by rules of attribution of State responsibility.<sup>28</sup> Sen seems to understand diplomatic immunity *ratione materiae* as immunity for ‘acts performed in an official capacity’.<sup>29</sup> Hardy, for his part, presents three potential understandings of diplomatic immunity *ratione materiae* but admits that none of them is free from doubt.<sup>30</sup> Similar abstract formulas are also proposed with regard to the determination of Article 31 of the VCDR.<sup>31</sup>

Yet to date, a systematic study of diplomatic immunity *ratione materiae* under the VCDR is still lacking in the scholarship; and it is the purpose of this thesis to fill the gap. The majority of academic discussion on the topic exists in treatises dealing with diplomatic law as a whole, which means in-depth analysis of diplomatic immunity *ratione materiae* is often insufficient. On the other hand, authors dealing specifically with the issue have focused almost completely on ‘in the exercise of functions’ immunity,<sup>32</sup> and this in turn suggests that they fail to consider the interaction between different kinds of diplomatic immunity *ratione materiae*. This interaction is important because the interpretation of one immunity could potentially have ramifications in the interpretation of other immunities. As will be shown in the following chapters, sometimes an interpretation that seems appropriate to one particular kind of diplomatic immunity *ratione materiae* can be discarded because it would lead to absurd results with regard to other immunities.<sup>33</sup>

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<sup>27</sup> Dinstein, p. 82. See also, Denza, 3rd edition, p. 439.

<sup>28</sup> Salmon, p. 465.

<sup>29</sup> Sen, 3rd edition, p. 142.

<sup>30</sup> An official act protected by diplomatic immunity *ratione materiae* can be either ‘solely official acts in the strictest sense’, or ‘acts in close connection with’ official functions, or ‘acts which occur in the course of duties in a looser, temporal sense’, Hardy, p. 66.

<sup>31</sup> See, for example, the ‘bounds of proper activity’ formula proposed by Denza with regard to the functions of a diplomatic agent, Denza, 3rd edition, p. 306. See also, the standard of ‘motive’ proposed by Murty concerning the determination of ‘commercial activity’, Murty, pp. 356-357.

<sup>32</sup> See, in particular, Dinstein, *supra* note 27.

<sup>33</sup> See, in particular, the impact of a broad interpretation of ‘in the course of duties’ immunity of ATS on the immunity of service staff members, Chapter 3(2).

## 2. Structure of the thesis

This thesis consists of five chapters.

Chapter 1 examines the nature of diplomatic immunity *ratione materiae*. Full diplomatic immunity and State immunity have both been regarded as a procedural rule merely addressing the jurisdiction of a court.<sup>34</sup> With regard to diplomatic immunity *ratione materiae*, however, authors have argued that it represents not only a procedural bar but also a substantive exemption of individual liability.<sup>35</sup> Chapter 1 will examine the procedural/substantive nature of diplomatic immunity *ratione materiae* by comparing the immunity to full diplomatic immunity and State immunity. On a practical level, the conclusion of this chapter would have a direct bearing on the effect of waiver of diplomatic immunity *ratione materiae*.<sup>36</sup>

Chapter 2 looks at those diplomatic immunities *ratione materiae* that apply the formula of ‘in the exercise/performance of functions’.<sup>37</sup> The facts in the above mentioned Zairean Ambassador incident have illustrated the difficulty of determining whether an act falls inside the exercise of a diplomat’s functions.<sup>38</sup> Yet the problem can be even more complicated if reference is made to Article 38(1), the wording of which seems to imply that an official/private distinction exists within the formula of ‘in the exercise of functions’.<sup>39</sup> Further, Article 27(5) employs the same formula to denote the personal inviolability of a diplomatic courier;<sup>40</sup> but it must be questioned, considering the difference between inviolability and immunity from jurisdiction,<sup>41</sup> whether the former is capable of being assessed on the basis of the nature of a particular act. Chapter 2 will examine these questions in turn.

<sup>34</sup> See Chapter 1(2.1) and (2.2) respectively.

<sup>35</sup> For a review of academic opinions, see, Chapter 1(1).

<sup>36</sup> See Chapter 5(3.2).

<sup>37</sup> In the rest of this thesis, ‘in the exercise of functions’ immunity will be used to refer to immunities in Article 27(5), Article 38(1), and Article 39(2), unless difference between them is specifically mentioned.

<sup>38</sup> *Supra* note 1-7 and accompanying text.

<sup>39</sup> Article 38(1) of the VCDR provides that a diplomatic agent who is a national or permanent resident of the receiving State enjoys immunity only for ‘official acts performed in the exercise of his functions’.

<sup>40</sup> Article 27(5) of the VCDR.

<sup>41</sup> See Chapter 2(5.1).

Chapter 3 concerns the diplomatic immunity *ratione materiae* of subordinate members of a diplomatic mission. Article 37(2) and (3) of the VCDR use the formula of ‘in the course of duties’ to denote the immunity of this kind,<sup>42</sup> but the scope of this formula is by no means clear. The protest by the ACP diplomats in Belgium of the judgment of *Keith* has fully demonstrated the controversy among States over the application of this immunity.<sup>43</sup> This chapter will first examine whether ‘in the course of’ and ‘in the exercise of’ refer to the same range of activity – an issue upon which no consensus exists among authors.<sup>44</sup> Section 3 of this chapter will explore the ‘duties’ of a mission member. In particular, it will be discussed whether acts which fall outside the ordinary duties of a subordinate member but which are instructed by the head of mission could be protected by the immunity under Article 37. In addition, Chapter 3 will also examine whether the word ‘immunity’ in Article 37(3) necessarily encompasses personal inviolability during a service staff member’s course of duties. Lastly, it will be discussed whether, under Article 37(2), an ATS member enjoys immunity from execution for acts which do not attract diplomatic immunity *ratione materiae* from civil proceedings.

Chapter 4 deals with the three exceptions in Article 31(1). Two general questions which potentially inform other kinds of diplomatic immunity *ratione materiae* will be addressed at the beginning of this chapter: Firstly, it will be answered whether ‘on behalf of the sending State’, stipulated in Article 31(1)(a) and (b), has the same meaning with ‘inside a diplomat’s official functions’ in Article 31(c). The importance of this discussion lies in its potential impact on the nature of acts incidental to daily life. If the two formulas have the same meaning, these acts would then not be regarded as ‘inside a diplomat’s official functions’ because they are usually conducted by a diplomat in his or her private capacity and thus can hardly be said to constitute acts performed ‘on behalf of’ the sending State. Secondly, since Article 31(c) speaks of the functions of a diplomatic agent rather than a diplomatic mission,<sup>45</sup> and since the VCDR does not specifically provide for the functions of a diplomatic agent, it must be determined whether, and if so to what extent, these functions may be related to Article 3(1) of the VCDR.

<sup>42</sup> Article 37(2) and (3) of the VCDR.

<sup>43</sup> *Supra* note 9.

<sup>44</sup> See, Chapter 3(2).

<sup>45</sup> Cf. Article 43(1) and Article 5 of the Vienna Convention on Consular Relations (VCCR), both of which use the term ‘consular functions’.

With respect to individual exceptions in Article 31(1), this chapter will focus on three main problems which have proved particularly controversial in State practice. In the first place, it will be discussed whether principal residence of a diplomatic agent may be regarded as being held ‘on behalf of the sending State for the purposes of the mission’.<sup>46</sup> Secondly, it will be examined whether the term ‘real action’ necessarily encompasses any dispute concerning an immovable property over which the receiving State claims exclusive jurisdiction. Thirdly, this chapter seeks to provide a proper understanding of ‘commercial or professional activity’ under Article 31(1)(c).<sup>47</sup>

Chapter 5 addresses the procedural aspects of diplomatic immunity *ratione materiae*. Three main issues will be discussed in this chapter. First, it will be examined whether the court of the receiving State has to consider diplomatic immunity *ratione materiae ex proprio motu* in the absence of an invocation of immunity. The ICJ in *Mutual Assistance* seems to be of the view that functional immunity in general international law must be invoked by the official’s home State.<sup>48</sup> For the world court, France in this case did not violate the functional immunity of Djiboutian officials because Djibouti had not invoked immunity in the French court, thus making it impossible for the French court to verify the official nature of the acts.<sup>49</sup> Chapter 5 will first discuss, in the light of the drafting history of relevant provisions of the VCDR, as well as State practice after the adoption of the convention, whether the same obligation of invocation also exists with regard to diplomatic immunity *ratione materiae*. Second, the question of who has the authority to determine diplomatic immunity *ratione materiae* will be answered in Chapter 5. The determination of diplomatic immunity *ratione materiae* involves a balance between the interests of the sending State and the interests of the receiving State. On the one hand, the very purpose of immunity prevents the receiving State from investigating the details of the official acts of a foreign embassy. On the other hand, however, it is equally inappropriate to ask the court of the receiving State to defer to the opinions of the sending

<sup>46</sup> For example, the British Foreign Affairs Committee in its 1984 Report indicated that the application of Article 31(1)(a) to private residence of diplomatic agents ‘has caused great difficulties of interpretation’ in practice. Minutes of Evidence, p. 5.

<sup>47</sup> For example, in the 2017 British Supreme Court judgment of *Reyes*, the Lords held different views as to whether human trafficking could be regarded as a commercial activity. *Reyes v. Al-Malki and another*, [2017] UKSC 61.

<sup>48</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, at para. 196. For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see *infra* Section 3.2.

<sup>49</sup> *Ibid.*



State.<sup>50</sup> It is therefore the task of this chapter to figure out how diplomatic immunity *ratione materiae* is to be determined. Third, the problems with waiver of immunity will also be discussed in Chapter 5. Article 32 of the VCDR provides that immunity could be waived by the sending State, but it does not articulate how the sending State is to be represented in case of waiver. Under Chapter 5, it will be discussed whether a diplomat (including a head of mission), who represents the sending State in the receiving State, could waive his or her own immunity. Further, based on the specific nature of diplomatic immunity *ratione materiae*, the effect of waiver on different proceedings will also be explored in this chapter.

### 3. Methodology

In essence, this thesis seeks to interpret various provisions of diplomatic immunity *ratione materiae* in the VCDR. Rules of treaty interpretation are now mainly regulated by Article 31-33 of the Vienna Convention on the Law of Treaties (VCLT).<sup>51</sup> The VCLT was concluded after the VCDR; but rules concerning treaty interpretation merely represent a codification of existing customary international law<sup>52</sup> and thus may be applied retrospectively to the VCDR.<sup>53</sup>

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<sup>50</sup> The dilemma was aptly pointed out by Hardy: ‘Whilst it would be improper to require the sending State to go into court and demonstrate in detail how the act in question fell within the range of duties ascribed to the particular person concerned, on the other hand, there is no reason why the bare assertion of that State should be regarded as sufficient in itself to prevent the court from giving its ruling’. Hardy, p. 65.

<sup>51</sup> UN *Treaty Series*, vol. 1155, p. 331. For a discussion of the actual usefulness of rules of interpretation in practice, see, Hersch Lauterpacht (1949), pp. 49-55.

<sup>52</sup> Sinclair (1970), p. 65; Corten and Klein, p. 812; ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 13 April 2006, para. 427. The customary status of Article 31-33 of the VCLT has on various occasions been confirmed by the ICJ. See, for example, *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, at para. 99; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12, at para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports 2007*, p. 43, at para. 160.

<sup>53</sup> Article 4 of the VCLT. The ICJ upheld the customary status of Article 31 of the VCLT in *Sovereignty over Pulau Ligitan and Pulau Sipidan* case by applying the article to interpret a 1891 convention, even though Indonesia was then not a party to the VCLT. *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v. Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 625, at paras. 37-38; see also, *Kasikili/Sedud Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045, at paras. 18-20.

With respect to diplomatic immunity *ratione materiae* under the VCDR, the following matters merit some consideration.

### 3.1. Subsequent State practice

State practice after the adoption of the VCDR is important in two aspects. First, Article 31(3)(b) of the VCLT provides that subsequent practice between State parties concerning the application of a treaty might indicate the correct meaning of treaty provisions.<sup>54</sup> Second, Article 47(2)(a) of the VCDR,<sup>55</sup> which seems to permit a ‘restrictive application’ of the convention, renders the true meaning of treaty provisions even more reliant on the practice of States.<sup>56</sup>

The importance of subsequent State practice to treaty interpretation lies in its capacity to ‘reintroduce’ the parties’ intentions.<sup>57</sup> This is certainly true when a national court renders a binding decision on a dispute concerning diplomatic immunity *ratione materiae*, although in such case the decision itself must be evaluated in the light of practice of other State parties.<sup>58</sup>

However, there were also numerous cases which did not actually reach the court stage. In particular, for diplomats who are neither a national nor a permanent resident of the receiving State,<sup>59</sup> the normal reaction by the receiving State to their controversial acts, thanks to their full diplomatic immunity, is a declaration of *persona non grata*.<sup>60</sup>

Yet a declaration of *persona non grata* must be considered with caution. Article 9(1) of the VCDR does not require a receiving State to spell out the reason for an expulsion.<sup>61</sup> As Behrens observes, in practice negative measures may be taken by a receiving State for reasons

<sup>54</sup> Article 31(3)(b) of the VCLT.

<sup>55</sup> Article 47(2)(a) allows a receiving State to apply the VCDR restrictively if a prior restrictive application has been conducted by the sending State.

<sup>56</sup> For a similar view, see, Sen, 3rd edition, p. 104.

<sup>57</sup> Corten and Klein, p. 826; Aust (2000), p. 194. For the problems with the standard of parties’ intentions, see, Fitzmaurice (1951), pp. 3-5.

<sup>58</sup> For a broad approach to ‘subsequent State practice’ as encompassing unilateral acts and subsequent non-interpretative agreements, see, *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at para. 28.

<sup>59</sup> Article 38(1) of the VCDR.

<sup>60</sup> Article 9(1) of the VCDR.

<sup>61</sup> *Ibid.* For the discussion on this point within the ILC, see, Barker (1996), p. 102.

completely irrelevant to the underlying diplomatic conduct.<sup>62</sup> It is therefore essential to examine the motivation behind an expulsion: Whereas an official statement by the receiving State that the act in question should not be regarded as ‘in the exercise of functions’ clearly constitutes a valid practice of interpretation,<sup>63</sup> an expulsion that is clearly motivated by political consideration must be precluded from the remit of this thesis.<sup>64</sup> In borderland cases, the interpretative force of an expulsion can only be assessed in conjunction with the specific context of the case.<sup>65</sup>

### 3.2. Relevant rules of international law

Article 31(3)(c) of the VCLT provides that consideration should be made to ‘any relevant rules of international law applicable in the relations between the parties’.<sup>66</sup> The ‘relevant rules’ are not limited to those applicable at the time of the conclusion of a treaty; and they encompass not only customary international law and general principles, but also other conventional rules relevant to the interpretation of the treaty in question.<sup>67</sup>

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<sup>62</sup> Behrens (2016), p. 15.

<sup>63</sup> See, for example, the Abisinio incident, in which the US Department of State, in commenting on the withdrawal of the Papua New Guinea’s ambassador over a serious car accident in the US, pointed out that ‘under the circumstances [the ambassador was drunk-driving when the accident happened], Ambassador Abisinio’s driving at the time of the automobile accident may [not] be characterised as “an act performed ... in the exercise of his functions as a member of the mission”’. *Cumulative Digest*, pp. 997-999, at p. 999.

<sup>64</sup> See, for example, the expulsion of the US Ambassador to Venezuela, which was made in order to support Bolivia, an ally of Venezuela which expelled the US Ambassador in La Paz several days earlier. ‘Venezuela’s Chavez Expels US Ambassador’, *Reuters*, 12 September 2008.

<sup>65</sup> For factual indicia (and concomitant problems) that potentially bear on the relevance of a case, see, Behrens (2016), pp. 16-18.

<sup>66</sup> Article 31(3)(c) of the VCLT.

<sup>67</sup> Article 31(3)(c) in the ILC 1964 draft of the VCLT was part of draft Article 27(1) (now Article 31(1)) which read ‘A treaty shall be interpreted ... in the light of the general rules of international law in force at the time of its conclusion’. The ILC subsequently deleted the phrase ‘in force at the time of its conclusion’ and replaced the word ‘general’ with ‘any’ in order to make clear that any relevant rules of international law may be applied. See, Commentaries to draft Article 27, *Ybk ILC 1966*, vol. II, p. 222, para. 16. See also, Fragmentation of International Law, *supra* note 42, para. 426. The ICJ in *Oil Platforms* case applied rules on the use of force to interpret a 1955 treaty between the US and Iran, citing Article 31(3)(c) of the VCLT. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 161, para. 41.

Article 31(3)(c) reflects the ‘principle of systemic integration’, according to which any rule should be interpreted in the overall context of international law as a systematic whole.<sup>68</sup> With regard to diplomatic immunity *ratione materiae*, emphasis will be placed on rules concerning consular immunity, which also employs the formula of ‘in the exercise of functions’.<sup>69</sup> The VCCR is largely patterned on the VCDR; and the ILC made it clear that relevant provisions concerning consular immunity were directly transposed from articles on diplomatic immunity *ratione materiae* in the VCDR.<sup>70</sup> The connection between the two regimes has also been confirmed by State practice. In a recent judgment in the US, for example, a district court equated Article 39(2) of the VCDR with Article 43(1) of the VCCR and directly applied the case law concerning the former to a dispute concerning the latter.<sup>71</sup>

However, despite the similarities between the two immunities, it is worth pointing out that the functions of a consul are different from the functions of a diplomatic mission member. As a result, consular immunity and diplomatic immunity *ratione materiae* have the same scope only with regard to the contents of the formula ‘in the exercise of’, viz. whether an act that has happened during the performance of a particular function can be regarded as ‘in the exercise of’ that function. Further, since the VCDR uses several different wording to denote diplomatic immunity *ratione materiae*,<sup>72</sup> rules on consular immunity are applicable to diplomatic immunities *ratione materiae* other than Article 39(2) only when these immunities are proved to be the same with Article 39(2). These differences between consular immunity and diplomatic immunity *ratione materiae* will be taken into account when analogy is made in the following chapters.

In a similar vein, reference will also be made to rules concerning functional immunity of State officials in general international law, the reason being that, like diplomatic immunity *ratione*

<sup>68</sup> Fragmentation of International Law, *supra* note 52, para. 479.

<sup>69</sup> Article 43(1) of the VCCR.

<sup>70</sup> See, in particular, the ILC’s commentary on the different wording between Article 43(1) and Article 71(1) of the VCCR, Ybk ILC 1961, vol. II, p. 127. For more details, see Chapter 2(2).

<sup>71</sup> *Rana v. Islam et al.*, *Digest of United States in International Law* (2015), p. 431. See also, the Italian case of *Rubin v. Consul of the Republic of Panama* (1977), 77 ILR 593.

<sup>72</sup> *Supra* note 14-21 and accompanying text.

*materiae*<sup>73</sup> and consular immunity,<sup>74</sup> functional immunity in general international law is also based on the so-called ‘act of State’ rationale,<sup>75</sup> which means that immunity is recognised if the act in question could be regarded as the act of the official’s home State.<sup>76</sup> Indeed, it has been argued, by authors<sup>77</sup> and domestic courts alike,<sup>78</sup> that functional immunity in general international law is simply an extension of diplomatic immunity *ratione materiae* to State officials other than diplomats and consuls.<sup>79</sup>

Yet a preliminary caveat is still necessary in this respect. Despite the common rationale of ‘act of State’, the functions and duties of a diplomatic mission member are simply different from the functions of an ordinary State official, and this separates the current study from a study on functional immunity in general international law.<sup>80</sup> Further, the drafting history of the VCDR

<sup>73</sup> See, for example, the Chairman’s statement at the ILC 428th meeting, in which it was confirmed that the commission’s intention with regard to the immunity of former diplomats was to immunise acts which ‘were not really private acts at all but acts of the sending State’, Ybk ILC 1957, vol. I, p. 217, para. 22 [Chariman]. See also, Denza, 3rd edition, p. 439; Hardy, p. 83. It should be noted that not all diplomatic immunities *ratione materiae* are based on the ‘act of State’ rationale, see *infra* note 81

<sup>74</sup> See, in particular, the ILC commentaries to draft Article 43 of the VCCR (dealing with consular immunity): ‘This exemption [from jurisdiction] represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State’, Ybk ILC 1961, vol. II, p. 117.

<sup>75</sup> The term ‘act of State’ here refers solely to the rationale behind these immunities; it does not concern the ‘act of State’ doctrine in common law system. For an introduction of the doctrine in the US and the UK, see, Singer, pp. 283-324; Akehurst, pp. 240-257; Mann (1943), pp. 42-57, 155-171.

<sup>76</sup> Fox, 2nd edition, p. 667; De Smet, p. 319.

<sup>77</sup> Authors have related functional immunity of State officials in particular to Article 39(2) of the VCDR. See, Fox, 2nd edition, p. 709; Cassese (2002), p. 868; Van Panhuys, p. 1206; Preuss (1932), p. 180.

<sup>78</sup> See, in particular, the *Pinochet (No. 3)* case, in which the British House of Lords applied Article 39(2) of the VCDR to a former head of State. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, p. 202 [Lord Browne-Wilkinson]. The legislations of the UK and Australia extend diplomatic immunity, with ‘necessary modifications’, to heads of State; and this means that a former head of State enjoys diplomatic immunity *ratione materiae* under Article 39(2) of the VCDR. For the UK legislation, see, State Immunity Act (1978), Article 20(1), available at: <https://www.legislation.gov.uk/ukpga/1978/33>; for the Australian legislation, see, Foreign States Immunities Act (1985), Article 36(1), available at: <https://www.legislation.gov.au/Details/C2016C00947>.

<sup>79</sup> Others argue that diplomatic immunity *ratione materiae* is an extension of functional immunity in general international law to diplomatic law. See, for example, O’Keefe (2015), p. 453.

<sup>80</sup> The difference between the two immunities based on the different functions performed will be explored in detail in Chapter 4(2.2).

reveals that only certain kinds of diplomatic immunity *ratione materiae* are specifically based on the ‘act of State’ rationale.<sup>81</sup> For other immunities, therefore, analogy to functional immunity in general international law is only permissible if it is first proved that they also share the basis of ‘act of State’.

Lastly, State practice concerning the immunity of State representatives to the UN, who enjoy diplomatic immunity (including diplomatic immunity *ratione materiae*) according to the agreement between the US and the UN,<sup>82</sup> also sheds light on the scope of diplomatic immunity *ratione materiae* under the VCDR.<sup>83</sup>

Resort to these three regimes will be made primarily in Chapter 2 of this thesis.

### 3.3. Travaux préparatoires

Article 32 of the VCLT places preparatory work of a treaty in an inferior position to the ‘general rule’ contained in Article 31. According to Article 32, travaux préparatoires can only be used to *confirm* the meaning resulting from the application of Article 31,<sup>84</sup> or, more rarely in practice, *determine* the meaning of a treaty provision if the application of Article 31 leaves the meaning ambiguous or manifestly absurd.<sup>85</sup>

<sup>81</sup> There was no discussion of the rationale behind immunities under Article 37(2) and (3), Article 27(5) and Article 31(1)(c) either within the ILC or at the Vienna Conference.

<sup>82</sup> Agreement regarding the Headquarters of the United Nations, *UNTS* vol. 11, no. 147, p. 12, Section 15. For academic opinions, see, for example, Brandon, who points out that Section 18 of the UN Convention on the Privileges and Immunities of the United Nations (*UNTS*, vol. I, p. 15), which provides for functional immunity of UN officials, is the practical equivalent of Article 39(2) of the VCDR because they are both based on functional necessity theory. Brandon, pp. 360-361; see also, Binet, p. 85. For a comprehensive review of diplomatic immunities *ratione materiae* of officials of miscellaneous international organisations, see, Jenks, pp. 114-121.

<sup>83</sup> See, for example, *Baoanan v. Baja*, 627 F. Supp. 2d 155, in which the residual immunity of a former representative to the UN was decided on the basis of Article 39(2) of the VCDR. For a general discussion of the relationship between diplomatic immunity and immunity of international organisations, see, Duxbury, pp. 297-318. But see, Kartusch, who points out that in practice international organisations tend to be more receptive to requiring their staff to fully comply with local laws. Kartusch, p. 31.

<sup>84</sup> For application of this rule in practice, see, Corten, *supra* note 52, p. 847, footnote 32.

<sup>85</sup> *Ibid.*

The difference between Article 31 and Article 32 represents the convention's emphasis on the text of a treaty as the authentic expression of the parties' intentions.<sup>86</sup> But the impact of travaux préparatoires on an interpretative process should not be underestimated. As editors of the *Oppenheim's International Law* note:

Where a treaty has been negotiated with thorough preparation and full deliberation, and an efficient and complete record (at least so far as concerns the point at issue) has been kept, the value of the travaux préparatoires may be great.<sup>87</sup>

In his dissenting opinion to the ICJ judgement on the jurisdiction and admissibility of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judge Schwebel also pointed out that 'the travaux préparatoires are no less evidence of the intention of the parties when they contradict as when they confirm the allegedly clear meaning of the text or context of treaty provisions'.<sup>88</sup> Indeed, the ILC recognised in its 1966 commentary that the very fact that travaux préparatoires may 'confirm' the meaning of a treaty provision demonstrates that no rigid line could be drawn between Article 31 and Article 32.<sup>89</sup> In short, well-preserved travaux préparatoires are important to treaty interpretation because they reflect the parties' intentions.<sup>90</sup>

The ILC deliberately refrained from defining the 'preparatory work' in order to prevent the 'possible exclusion of relevant evidence'.<sup>91</sup> But the ICJ has on several occasions referred to comments of the ILC to interpret treaty provisions.<sup>92</sup> The inclusion of the ILC's work into the definition of travaux préparatoires is also supported by authors in the field.<sup>93</sup> With regard to the interpretation of the VCDR, a strong case can be made for consideration of the ILC's work because: first, like the official records of the 1961 Vienna Conference, the ILC's debate is relatively well-recorded and preserved, which in turn increases the value of these materials;<sup>94</sup>

<sup>86</sup> Commentaries to draft Article 27, Ybk ILC 1966, vol. II, p. 220.

<sup>87</sup> *Oppenheim's*, 9th edition, p. 1277.

<sup>88</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, at p. 39.

<sup>89</sup> Ybk ILC 1966, vol. II, p. 220, para. 10.

<sup>90</sup> For a more detailed discussion of the importance of travaux préparatoires to treaty interpretation, see, Hersch Lauterpacht (1935), pp. 549-591. For the problems with travaux préparatoires, see, Fitzmaurice (1951), pp. 15-17.

<sup>91</sup> *Supra* note 89, p. 223, para. 20.

<sup>92</sup> *Kasikili/Sedudu Island* case, *supra* note 53, para. 49; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment, I.C.J. Reports 2007*, p. 659, para. 280.

<sup>93</sup> See, for example, Aust (2000), p. 198; Linderfalk, p. 45; Corten, *supra* note 52, p. 854.

<sup>94</sup> Aust (2000), p. 198.

second, large part of the rules on diplomatic immunity *ratione materiae* is built upon the ILC 1958 Draft Articles, which were adopted by the commission upon consideration of States' comments;<sup>95</sup> third, many ILC members were in fact the representative of their respective States at the Vienna Conference. As will be shown in the following chapters, on numerous occasions the attitude of a State towards diplomatic immunity *ratione materiae* at the Vienna Conference was merely a repetition of the attitude of its representative in the ILC discussions.

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<sup>95</sup> Ybk ILC 1958, vol. II, pp. 89-105.



# Chapter 1: The Nature of Diplomatic Immunity Ratione Materiae: Immunity from Jurisdiction or Immunity from Liability?

## 1. Introduction

Diplomatic immunity *ratione materiae* differs from personal diplomatic immunity in that it excludes purely private acts from its protection. The ‘act of State’ rationale behind diplomatic immunity *ratione materiae* means that the sending State’s responsibility may arise with regard to an act protected by such immunity.<sup>1</sup> This raises the question whether the diplomatic agent, who has actually performed the act, may also be held personally responsible. If the answer to this question is in the negative, diplomatic immunity *ratione materiae* should then be more properly characterised as a substantive immunity from liability rather than a procedural bar to the jurisdiction of the receiving State.<sup>2</sup> This characterisation could have wide ramifications regarding the application of diplomatic immunity *ratione materiae* in practice. Notably, the concept of waiver must be reconsidered if a diplomatic agent is not personally liable for an act performed in the exercise of diplomatic functions.<sup>3</sup>

It is therefore the purpose of this chapter to explore the nature of diplomatic immunity *ratione materiae*.

Academic opinions on the issue are widely divided.

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<sup>1</sup> In *Mutual Assistance*, the ICJ indicated, with regard to the functional immunity of Djiboutian officials, that a State invoking functional immunity for its State organs ‘is assuming responsibility for any internationally wrongful act in issue committed by such organs’. See, *Mutual Assistance*, para. 196. For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see, Introduction (3.2).

<sup>2</sup> See Section 2 *infra* for a more detailed discussion of the procedural nature of immunity rules.

<sup>3</sup> See Chapter 5(3.2) for a more detailed discussion on waiver of diplomatic immunity *ratione materiae*.

Wilson points out that diplomatic immunity for official acts differs from diplomatic immunity for private acts because the former concerns, in addition to immunity from the jurisdiction of local courts, a substantive exemption from local law.<sup>4</sup> For the author, the distinction between the two immunities means that, whereas ‘legal liability may be imported for unofficial acts in cases of waiver’, official acts should never be tried in the receiving State.<sup>5</sup>

Unlike Wilson, Hardy does not believe that all official acts should be regarded as the same. For him, administrative acts of the sending State, such as refusal of a passport or dismissal of a mission member, are fundamentally distinct from acts such as a traffic offence committed during an official trip, although they may all be taken as acts performed in the exercise of diplomatic functions.<sup>6</sup> As a result, Hardy takes the view that diplomatic immunity *ratione materiae* for acts in the former category is substantive in nature, whereas acts in the latter category are merely protected by procedural diplomatic immunity *ratione materiae*.<sup>7</sup>

Alternatively, support for the substantive characterisation of diplomatic immunity *ratione materiae* is also expressed from the perspective of attribution of responsibility. Editors of *Oppenheim's International Law* indicate that, for acts performed by a diplomatic envoy at the command or with the authorisation of the sending State, the envoy cannot personally be blamed because responsibility lies solely with his or her home State.<sup>8</sup> Similarly, Dembinski

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<sup>4</sup> Wilson (1967), pp. 113-114; See also, Preuss (1932), p. 181. Bishop, p. 710. This is also the position taken by the Harvard Draft Convention on Diplomatic Privileges and Immunities, which provides in Article 18 (Non-liability for Official Acts) that ‘a receiving State shall not impose liability on a person for an act done by him in the performance of his functions as a member of a mission or as a member of the administrative personnel’. According to the commentaries, ‘immunity for official acts is an exemption from both the jurisdiction *and the law* of the receiving State’. Harvard Draft, p. 97 (Emphasis added). For a similar argument concerning consular immunity, see, Parry, p. 128.

<sup>5</sup> Ibid, p. 114.

<sup>6</sup> Hardy, pp. 66-67. This also seems to be the opinion of Brownlie, who argues that immunity *ratione materiae* for ‘non-justiciable’ matters is substantive immunity. See, Brownlie, 5th edition, p. 333; Watts, p. 59: immunity of a head of State for sovereign acts is not strictly ‘jurisdictional immunity’.

<sup>7</sup> Hardy, p. 65. At an earlier stage, Hardy also points out that diplomatic immunity (as a whole) is ‘primarily, though not exclusively, procedural in character’, *ibid*, p. 53. Salmon observes in a similar line that ‘where foreign State activity is governed by public law or administrative law, for example the conditions for the grant of a passport, the immunity enjoyed by the staff member is not limited to jurisdiction but also to the law itself’. Salmon, p. 462 [Translation].

<sup>8</sup> *Oppenheim's*, 8th edition, p. 359. Fiore's Draft Code seems to follow the same understanding. Section 465 of the Draft Code provides that ‘diplomatic agents must be held completely and absolutely immune so far as concerns their personal responsibility in the

points out that the distinction between official and private acts is important to ensure that a mission member ‘will never be held responsible for acts which are attributable exclusively to the State’.<sup>9</sup>

Others are more cautious. Denza, for example, expresses the view that an act performed in the exercise of diplomatic functions is one which is ‘imputable’ to the sending State.<sup>10</sup> The word ‘imputable’ leaves room for arguing that the same act could also be imputed to the person of the diplomat. Likewise, Salmon, despite holding the view that diplomatic immunity *ratione materiae* should be determined by reference to rules of attribution of State responsibility, argues nonetheless that this rule does not apply if international law specifically imposes individual (criminal) responsibility.<sup>11</sup>

On the other hand, authors have argued that diplomatic immunity *ratione materiae* is in fact State immunity,<sup>12</sup> which is procedural in nature.<sup>13</sup> Dinstein, in particular, criticises the argument that diplomatic immunity *ratione materiae* represents a substantive exemption from local law. For him, if there is no personal liability for a diplomat who has committed a crime

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performance of their functions as representative of a foreign State’. Fiore’s Draft Code, reprinted at Harvard Draft, p. 159. See also, Kunz, p. 838. For an early incident concerning the British Chargé d’Affaires to Venezuela, in which the British Government held the view that residual immunity for former diplomats constitutes a ‘substantive defence’, see, Jones (1948), pp. 269-271.

<sup>9</sup> Dembinski, p. 188; Cassese (2005), p. 115. For similar arguments regarding State officials in general, see, Alebeek (2008), p. 107; Zappala, p. 598; Gaeta, p. 976; Webb (2013), p. 86. This is also the argument of Djibouti in the *Mutual Assistance* and the opinion of the ICTY in *Prosecutor v. Tihomir Blaskic*. See, *Mutual Assistance*, para. 185 and Judgement of the Appeals Chamber of ICTY on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v. Tihomir Blaskic*, Judgement of 29 October 1997, para. 38 respectively.

<sup>10</sup> Denza, 3rd edition, p. 441. See also, Elihu Lauterpacht, who, in arguing that diplomatic immunity does not amount to an exemption from liability, adds a caveat of diplomatic immunity for official acts. Elihu Lauterpacht (1954), p. 75.

<sup>11</sup> Salmon, pp. 465-468.

<sup>12</sup> Lewis, 3rd edition, pp. 1-2; Aust (2010), p. 136; *Satow’s*, 6th edition, p. 139; Dinstein, p. 83; Silva (1972), p. 116. In *Mahe v. Agent Judiciaire du Trésor Français*, the Court of Appeal of Madagascar also held that diplomatic immunity *ratione materiae* under Article 31(1)(a) of the VCDR is State immunity for diplomatic premises. *Mahe v. Agent Judiciaire du Trésor Français* (1965), 40 ILR 80; see also, *Zoernsch v. Waldock*, [1964] 1 W.L.R. 675. For a similar understanding of functional immunity in general international law, see, for example, Jia, pp. 1304-1305.

<sup>13</sup> See Section 2.2 below.

in an official capacity, waiver of diplomatic immunity *ratione materiae* would be meaningless, as a criminal prosecution is only possible on the assumption that a crime has been committed.<sup>14</sup>

This chapter consists of two main sections.

Section 2 of this chapter will contest the procedural characterisation of diplomatic immunity *ratione materiae*. This will be done by comparing diplomatic immunity *ratione materiae* to personal diplomatic immunity and State immunity – both of which have been widely accepted as procedural in nature.<sup>15</sup> It will be examined in particular whether the reasons behind the procedural characterisation of these two immunities also stand with regard to diplomatic immunity *ratione materiae*.

Section 3, on the other hand, challenges the substantive nature of diplomatic immunity *ratione materiae*. Academic opinions supporting a substantive understanding of diplomatic immunity *ratione materiae* can be roughly summarised in two lines of thought: firstly, the ‘substantive exemption from local law’ approach, which suggests that diplomatic immunity *ratione materiae* is substantive in nature because official acts fall outside the law of the receiving State;<sup>16</sup> and secondly, the ‘attribution of responsibility’ approach, which upholds a substantive characterisation of diplomatic immunity *ratione materiae* because it is believed that a diplomatic agent is not personally liable for acts performed in the exercise of diplomatic functions.<sup>17</sup> These two approaches will be analysed in turn in Section 3.

## 2. Diplomatic immunity *ratione materiae* as a procedural rule

A procedural rule pertains to the ‘manner for carrying on a civil lawsuit or criminal prosecution’.<sup>18</sup> Yet it is not always easy to tell whether diplomatic immunity *ratione materiae* relates solely to the ‘manner’ of conducting a court proceeding. A diplomatic agent who has performed some personal wrongdoing in the exercise of diplomatic functions may enjoy

<sup>14</sup> *Supra* note 12, pp. 80-81. See also, Starke, p. 222.

<sup>15</sup> See Section 2.1 and 2.2 respectively.

<sup>16</sup> See, in particular, *supra* note 4 and 7.

<sup>17</sup> See, in particular, *supra* note 8 and 9.

<sup>18</sup> *Black’s Law Dictionary*, 9th edition, pp. 1323-1324.

diplomatic immunity *ratione materiae* in the receiving State but may still be punished in the sending State;<sup>19</sup> and in this respect diplomatic immunity *ratione materiae* may be said to concern only the manner of conducting a court proceeding. However, as will be shown below,<sup>20</sup> there are also cases in which a diplomat is simply not to be blamed for an official act, and this in turn suggests that diplomatic immunity *ratione materiae* for these acts constitutes a *de facto* exemption from personal liability, which is clearly not a mere procedural matter.

There appears to be no rule in international law which specifically addresses the procedural or substantive nature of immunity rules. However, courts and authors have presented several reasons to support the procedural characterisation of certain kinds of immunity.<sup>21</sup> Notably, there seems to be wide consensus that both personal diplomatic immunity<sup>22</sup> and State immunity<sup>23</sup> are procedural in nature, although the underlying reasons are not necessarily the same.<sup>24</sup> In this section, the procedural nature of diplomatic immunity *ratione materiae* will be tested against these reasons.

## 2.1. Diplomatic immunity *ratione materiae* as a procedural rule of personal diplomatic immunity

It is widely accepted that the immunity of a *servant* diplomatic agent is procedural in nature.<sup>25</sup> In *Arrest Warrant*, the ICJ indicated, with regard to the personal immunity from criminal proceedings of a Minister for Foreign Affairs,<sup>26</sup> that a procedural immunity merely constitutes

<sup>19</sup> The availability of diplomatic immunity *ratione materiae* for these acts essentially depends on whether the immunity only protects lawful acts. This will be discussed in detail in Chapter 2(4.3).

<sup>20</sup> See, in particular, the cases in *infra* note 36 and 93.

<sup>21</sup> See *infra* note 28 and 43.

<sup>22</sup> See Section 2.1

<sup>23</sup> See Section 2.2

<sup>24</sup> On the relationship between personal immunity in general international law, diplomatic immunity, and State immunity, see, Sucharitkul, pp. 97-98; Watts, pp. 35-36.

<sup>25</sup> Rosanne van Alebeek, 'Immunity, Diplomatic', *Max Planck Encyclopedia of Public International Law* (May 2009). See also, *Dickinson v. Del Solar*, in which the British court ruled that 'diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction'. *Dickinson v. Del Solar*, [1930] 1 KB 376, at p. 380.

<sup>26</sup> The case was decided on the basis of customary international law. But the court made specific reference to diplomatic immunity and justified the personal immunity of Ministers for Foreign Affairs on the basis of functional necessity. See, *Arrest Warrant*, paras. 52-53. See also, *Mutual Assistance*, para. 174, in which the ICJ proclaimed that rules concerning personal

a temporary bar to the jurisdiction of a foreign court, but does not exonerate the person from all criminal responsibility.<sup>27</sup> The court adduces four instances in which personal immunity does not lead to impunity: firstly, the person may be prosecuted by his or her home State; secondly, personal immunity may be waived; thirdly, the person may be prosecuted after he or she ceases to hold office; and fourthly, if an international tribunal is established, the person does not enjoy personal immunity in front of the tribunal.<sup>28</sup>

With the exception of the fourth one,<sup>29</sup> all these instances could be equally applied in diplomatic law to demonstrate the procedural nature of personal diplomatic immunity. Consequently, if a serving diplomatic agent kills a person in a street fight, or if he or she is sued in a divorce proceeding, personal diplomatic immunity may be said to be procedural in nature because: firstly, according to Article 39(2) of the VCDR, this immunity only lasts for as long as the diplomat is still holding office;<sup>30</sup> and secondly, there is a genuine possibility that the diplomat's civil/criminal responsibility may be realised elsewhere – he or she may be prosecuted or sued in the sending State,<sup>31</sup> or, alternatively, it is likely that the sending State would waive diplomatic immunity.<sup>32</sup>

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inviolability of diplomatic agents under the VCDR are 'necessarily applicable' to incumbent heads of State, who enjoy personal immunity to the same extent as serving ministers for foreign affairs. In a similar vein, Watts points out that, although the functions performed by a head of State are more extensive than that performed by an ambassador, the influence of diplomatic immunity on the personal immunity of heads of State is 'considerable and sometimes compelling'. Watts, pp. 39-40.

<sup>27</sup> *Arrest Warrant*, para. 60.

<sup>28</sup> *Ibid*, para. 61. In their joint separate opinion, Judge Higgins, Kooijmans, and Buergenthal point out that the possibility of any of the four situations being realised (in the case of an incumbent Minister for Foreign Affairs) is remote, Joint Separate Opinion, para. 78.

<sup>29</sup> The *Arrest Warrant* concerns allegation of war crimes and crimes against humanity, which in turn makes establishing an international tribunal a genuine possibility. This possibility simply does not exist with regard to ordinary crimes and civil disputes. For proposals of establishing a permanent international tribunal to deal with abuse of diplomatic immunity, see, Wright (1987), p. 185; Ross (1989), p. 195.

<sup>30</sup> Article 39(2) of the VCDR.

<sup>31</sup> Article 31(4) of the VCDR.

<sup>32</sup> Article 32(1) of the VCDR. In a 2012 case, for example, Mauritius waived the diplomatic immunity of its serving ambassador to the US who had failed to pay minimum wages to a domestic worker. The ambassador pleaded guilty in a US district court and paid a \$5000 fine. See, Martina E. Vandenberg, 'Diplomats Who Commit Domestic-Worker Crimes Shouldn't Get a Free Pass', *Washington post*, 1 January 2014.

The first reason is obviously not capable of justifying a procedural characterisation of diplomatic immunity *ratione materiae* – Article 39(2) of the VCDR clearly stipulates that immunity for former diplomats is permanent.<sup>33</sup>

The difficulty lies with the second reason. On paper, neither Article 31(4) nor Article 32(1) of the VCDR makes a distinction between personal diplomatic immunity and diplomatic immunity *ratione materiae*, and this suggests the existence of a ‘genuine possibility’ of realising responsibility. However, it should be noted that, unlike personal diplomatic immunity, which pertains to both private and official acts,<sup>34</sup> diplomatic immunity *ratione materiae* merely concerns official acts. While it is reasonable to expect that, when a diplomatic agent has committed a purely private wrongdoing, the sending State would waive diplomatic immunity or recall the diplomat and charge him/her in its own court,<sup>35</sup> it is questionable whether the same could be said regarding an act performed in the exercise of diplomatic functions.

An incident between Iran and Australia may be recalled to illustrate the point. In 1983, Iran expelled two Australian diplomats from Tehran because they had ‘insulted the Iranian Constitution by insisting that women be photographed for visas and passports without their traditional headdress’.<sup>36</sup> The Australian Government, holding that the policy on passports and visas was internationally recognised, expelled two Iranian diplomats in retaliation.<sup>37</sup>

If we presume that the acts of the Australian diplomats have been performed in the exercise of functions, it may be questioned whether diplomatic immunity *ratione materiae* for such acts is still procedural in nature. The reaction of Australia clearly indicates that waiver of immunity is not possible.<sup>38</sup> On the other hand, it is equally impossible that the diplomats, who had

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<sup>33</sup> Article 39(2) of the VCDR.

<sup>34</sup> For the argument that personal diplomatic immunity in fact applies only to private acts, see, Kunz, p. 838; Sucharitkul, pp. 98-99.

<sup>35</sup> See, for example, the case cited at supra note 32.

<sup>36</sup> *Australian Digest* (1981-1983), pp. 507-509.

<sup>37</sup> *Ibid*, p. 507.

<sup>38</sup> Cf. the McDonald incident, in which the diplomatic immunity of a passport officer of the Irish Embassy in London, who had illegally sold Irish passports to those who were not eligible according to *Irish* regulations, was waived by the Irish Government. The officer was extradited to the UK, where he was sentenced to 21-month imprisonment. David Hearst, ‘Irish Diplomat Fights Extradition Move’, *The Guardian (London)*, 6 August 1987; Michael Horsnell and

performed the function of issuing visas and passports in strict adherence to the law of the *sending* State, would be charged once they returned to Australia – indeed, they were likely to be thus charged if they had not performed what they did.

It then follows that a ‘genuine possibility’ of realising responsibility, if there is any, does not really exist in the case of the two Australian diplomats. This in turn calls into question the procedural characterisation of diplomatic immunity *ratione materiae*, for at least in this case upholding such immunity would be tantamount to recognising that the diplomats have no responsibility at all. Admittedly, not all acts performed in the exercise of diplomatic functions feature a fundamental difference between the law of the two States.<sup>39</sup> But this case does illustrate that, at least for certain official acts, diplomatic immunity *ratione materiae* is simply not a procedural rule in the same way as is personal diplomatic immunity.

## 2.2. Diplomatic immunity *ratione materiae* as a procedural rule of State immunity

A second way of proving the procedural nature of diplomatic immunity *ratione materiae* is to argue that this immunity is the equivalent of the immunity of States.<sup>40</sup> As pointed out by Akande and Shah, immunity *ratione materiae* of State officials (including diplomats and consuls) operates as a procedural bar of State immunity that prevents a court from indirectly exercising control over the sovereign acts of a foreign State through proceedings against the foreign official who has carried out the acts.<sup>41</sup> In a similar vein, Dinstein, having pointed out that diplomatic immunity *ratione materiae* is the immunity of State for its own acts, argues that this immunity is not immunity from law but merely immunity from judicial process.<sup>42</sup>

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Mark Souster, ‘Irish Embassy Official Jailed over Passport Racket’, *The Times (London)*, 26 September 1989.

<sup>39</sup> Although disputes concerning such acts are by no means infrequent in practice. For a similar case concerning consular immunity, see, *Re Rissmann*, *infra* note 93

<sup>40</sup> *Supra* note 12.

<sup>41</sup> Akande and Shah, p. 827. But note the authors also believe that immunity *ratione materiae* operates on a substantive level, *viz.* it diverts liability from the person of a State official to the State itself.

<sup>42</sup> Dinstein, pp. 79-81. See also, Wickremasinghe, p. 397.



State immunity is widely regarded as a procedural rule because it merely addresses the jurisdiction of a foreign State but does not absolve the acting State's responsibility.<sup>43</sup> Unlike personal diplomatic immunity, the 'procedural bar to a foreign jurisdiction' in the context of State immunity is largely explained by the nature of an act.<sup>44</sup> Under current international law, acts which constitute such a procedural bar are most commonly referred to as *acta jure imperii* (acts of sovereign nature).<sup>45</sup> For acts of a private nature (*acta jure gestionis*), on the other hand, there would be no State immunity.

Yet diplomatic immunity *ratione materiae* concerns acts which are performed 'in the exercise of diplomatic functions'.<sup>46</sup> If this immunity is to be regarded as a procedural bar in the same way as is State immunity, it must be proved that 'in the exercise of functions' in fact has the same scope as *acta jure imperii*.

This seems to be the understanding of the ILC in the United Nations Convention on Jurisdictional Immunities of States and Their Property (CJIS).<sup>47</sup> In its commentaries to Article 2(1)(b)(v) of the convention, the ILC holds that functional immunity for official acts<sup>48</sup> is the same as State immunity *ratione materiae*, which is based on the 'sovereign nature or official character' of an act.<sup>49</sup> At the drafting stage of the VCDR, certain members of the ILC also seemed to regard diplomatic immunity *ratione materiae* as State immunity for public/sovereign

<sup>43</sup> In *Jurisdictional Immunity*, the ICJ, in upholding the procedural nature of the immunity of Germany, pointed out in particular that lump-sum compensation to victims of WWII has been made by Germany on an interstate level. See, *Jurisdictional Immunities*, para. 58, 94. For academic opinions, see, for example, Fox, 2nd edition, p. 525; Sucharitkul, p. 121. On different opinions, see, Dissenting Opinion of Judge Cançado Trindade in the *Jurisdictional Immunity*, available at: <http://www.icj-cij.org/docket/files/143/16891.pdf>, para. 245; See also, Orakhelashvili (2008), p. 341; Trapp and Mills, pp. 159-163.

<sup>44</sup> Boas, p. 270; Barker (1998), p. 951.

<sup>45</sup> *Jurisdictional Immunity*, paras. 60-61; Fox, 2nd edition, pp. 502-503; Peter-Tobias Stoll, 'State Immunity', *Max Planck Encyclopaedia of Public International Law* (April 2011), para. 25; 'Sovereign Immunity', in Grant and Barker (2009). For a criticism of the distinction, see Brownlie, 5th edition, p. 336; Hersch Lauterpacht, pp. 222-227; Fitzmaurice (1933), p. 124.

<sup>46</sup> For similar problems concerning the relationship between personal immunity of heads of State and State immunity, see Watts, p. 55.

<sup>47</sup> UN Doc. A/59/508.

<sup>48</sup> For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see Introduction (3.2).

<sup>49</sup> Ybk ILC 1991, vol. II, Part Two, p. 18, para. 18. See also, O'Keefe and Tams, pp. 82-83. For a restrictive reading of the article as granting immunity *ratione materiae* only to acts of representation, see, Douglas, pp. 312-313.

acts.<sup>50</sup> In academia, authors supporting an equation between diplomatic immunity *ratione materiae* and State immunity likewise believe that no difference exists between ‘official acts’ and *acta jure imperii*.<sup>51</sup>

However, this is not supported by State practice.

In general, an important standard for domestic courts in their determination of *acta jure imperii* and *acta jure gestionis* is whether the act concerned may also be performed by a private person.<sup>52</sup> It is irrelevant whether an act has been performed with the purpose of furthering sovereign interests. Rather, the appearance of an act as one which could also be performed by ordinary people seems sufficient to deprive the State of its immunity. Thus, in *Republic of Argentina v. Weltover*, the US Supreme Court ruled, with regard to the *jure gestionis* nature of Argentina’s issuance of bonds as part of its currency stabilisation plan, that, even though the aim of the act is to fulfil sovereign objectives (currency stabilisation), the act is not entitled to State immunity because issuance of bonds is the ‘*type of action*’ which could be performed by any private party.<sup>53</sup> Underlying this standard seems to be the principle of *par in parem non habet imperium* (equals do not have authority over one another)<sup>54</sup> – if a sovereign State has performed an act which could be likewise performed by a private person, the State would be regarded as on an equal standing with the private person and therefore loses State immunity, and the act in question would accordingly be taken as an *act jure gestionis*.<sup>55</sup>

<sup>50</sup> See, for example, the comments made by Spiropoulos, Verdross, and Ago, with regard to the immunity of diplomats with the nationality of the receiving State. Ybk ILC 1957, vol. I, p. 100, para. 32 [Spiropoulos], p. 102, para. 53 [Verdross], pp. 124-125, para. 9 [Ago].

<sup>51</sup> *Oppenheim’s*, 9th edition, p. 1094, fn. 6; Salmon, p. 465, Van Panhuys, p. 1210. See also, with regard to consular immunity, Sen, 3rd edition, p. 290; Franey, p. 156. Cf. Bröhmer, who takes the view that the distinction between functional and non-functional conduct has nothing to do with the distinction between *acta jure imperii* and *acta jure gestionis*. Bröhmer, p. 368.

<sup>52</sup> Schreuer, p. 25.

<sup>53</sup> *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, at pp. 614-615 (Emphasis original). For similar cases in other jurisdictions, see, *Holubek v. The Government of the United States*, 40 ILR 73, in which the Supreme Court of Austria, in rejecting the immunity of the United States for a driving offence, indicated that ‘by operating a motorcar and using public roads, the defendant moves in spheres in which private individuals also move. In these spheres, the parties face one another on a basis of equality, and there can be no question here of any supremacy and subordination’. See also, the British *I Congreso del Partido* case, *Playa Larga (Owners of Cargo Lately Laden on Board) Appellants v. I Congreso del Partido (Owners Respondents)*, House of Lords, [1983] 1 A.C. 244, at p. 262 [Lord Wilberforce].

<sup>54</sup> Sen, 3rd edition, p. 433. *Oppenheim’s*, 8th edition, p. 264. For a historical review of the principle, see, Yang, pp. 51-55.

<sup>55</sup> Higgins (1982), p. 271; O’Keefe (2015), p. 428.

A critical assessment of this standard reveals, however, that it is not appropriate for the determination of diplomatic immunity *ratione materiae*. The main consideration for State immunity is whether a sovereign State stands on an equal footing with a private civil party. The primary purpose of diplomatic immunity *ratione materiae*, however, is to facilitate the performance of diplomatic functions.<sup>56</sup> In order to fulfil these functions, a diplomatic mission must be allowed to perform everyday business transactions which keep the mission running. Buying an embassy vehicle, employing a mission cook, concluding a contract for repairing mission premises, all concern the kind of activities which are wholly necessary for the operation of a diplomatic mission but which, according to the standard mentioned above, constitute *acta jure gestionis*. If acts performed in the exercise of diplomatic functions are perceived as acts which could only be performed by a sovereign State (*acta jure imperii*), diplomatic immunity *ratione materiae* would be available only when a diplomatic agent has performed diplomatic functions in the strictest sense (such as negotiating a treaty with the receiving State). It may indeed be questionable whether in situations like this immunity is still necessary at all.<sup>57</sup> In any event, as will be shown below,<sup>58</sup> this narrow understanding of diplomatic immunity *ratione materiae* is not supported in practice.

It may be argued, as some authors do, that the difference between ‘in the exercise of functions’ and *acta jure imperii* can be reconciled by taking a broad view of *acta jure imperii* as enclosing *acta jure gestionis* relating to a diplomatic mission.<sup>59</sup> In this way, an ordinary *act jure gestionis* would be characterised as an *act jure imperii* if it is performed by a diplomatic mission, and this characterisation renders ‘in the exercise of functions’ the equivalent of *acta jure imperii*.

Yet this broad definition of *acta jure imperii* is not supported in State practice. On the contrary, domestic courts seem quite willing to give diplomatic immunity *ratione materiae* a more extensive scope than State immunity. In the case of *Claims against the Empire of Iran*, for example, the Federal Constitutional Court of Germany rejected the State immunity of Iran in a dispute concerning a contract of repairs of Iranian embassy buildings which had been

<sup>56</sup> Preamble of the VCDR.

<sup>57</sup> On this point, see Chapter 2(2).

<sup>58</sup> See, for example, the cases in *infra* note 60 and 62.

<sup>59</sup> Van Panhuvs, p. 1210. Cf. Foakes, who holds the view that Article 39(2) of the VCDR protects a former diplomat even for acts that do not attract State immunity. Foakes, p. 9. See also, Whomersley, p. 852

concluded between the ambassador of Iran and a private firm.<sup>60</sup> For the court, the fact that the repairs were necessary for the orderly carrying out of embassy business did not alter the *jure gestionis* nature of the contract, as the same contract might well be concluded by a private person.<sup>61</sup>

However, in an earlier case which closely resembles the *Claims against the Empire of Iran*, diplomatic immunity *ratione materiae* was upheld.<sup>62</sup> In *Monnaie v. Caratheodorou Effendi*, a proceeding was brought against the former Ottoman Ambassador in Belgium for the payment of the costs of installing a heating system at the embassy.<sup>63</sup> The installation had been ordered by the ambassador when he was still holding office; but at the time of the proceeding his tenure had already finished. The Belgian court upheld the immunity of the former ambassador by holding that the ambassador was not personally responsible for an act performed in the exercise of his functions.<sup>64</sup>

Recent developments concerning the application of diplomatic immunity *ratione materiae* and State immunity to employment-related issues also highlight the asymmetry between ‘in the exercise of functions’ and *acta jure imperii*.

With regard to diplomatic immunity *ratione materiae*, domestic courts seem quite willing to recognise the immunity if a mission member has employed someone to work for the mission.

<sup>60</sup> *Claims against the Empire of Iran*, 45 ILR, p. 57.

<sup>61</sup> *Ibid.*, p. 80. For similar cases concerning the denial of State immunity for acts relating to a diplomatic mission, see, *S v. India*, 82 ILR 13; *Dralle v. Republic of Czechoslovakia*, 17 ILR (1950) 155, *Embassy of the Socialist Republic of Czechoslovakia v. Jens Nielsen Bygge*, 78 ILR 81; *La mercantile v. Reno de Grecia*, 22 ILR (1958), p. 240; *Hungarian Embassy Case*, 38 ILR 110. For a similar case concerning a consulate office building, see, *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018. See also, Schreuer, pp. 19-20. For the author, the denial of State immunity for acts relating to diplomatic and consular premises constitutes the most salient example of the application of ‘nature’ test, according to which immunity is determined by looking at the appearance of a transaction rather than the purpose behind it.

<sup>62</sup> *Monnaie v. Caratheodorou Effendi*, relevant parts reprinted at Alebeek (2012), p. 12. See also, Salmon, p. 412.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* In a comparable case concerning consular immunity, the plaintiff sued both Salvador and its Consul-General for breach of a lease of consulate premises which had been concluded between the plaintiff and the consul. The US court ruled that the act of the consul was an act *jure gestionis* but had been performed in the exercise of functions. See, *Berdakin v. Consulado de la Republica de El Salvador*, 912 F.Supp. 458 For the relationship between consular immunity and diplomatic immunity *ratione materiae*, see Introduction (3.2).

Thus, in *Swarna v. Al-Awadi*, the US court pointed out that entering into employment relationships with others who will work at the mission is part of a diplomatic agent's official functions and should therefore be protected by Article 39(2) of the VCDR.<sup>65</sup> In the British case of *Abusabib v. Taddese*, the court went even further when it held that Article 39(2) would protect a former diplomat from disputes concerning the employment of a private servant as long as the servant has been employed to help the diplomat with his or her official business.<sup>66</sup>

In contrast, however, a sending State itself does not necessarily enjoy State immunity for an employment of its mission staff.

In *Benkharbouche v. Embassy of the Republic of Sudan*, the UK Supreme Court held that Article 16(1)(a) of the UK State Immunity Act, which extends State immunity to all employment relationship concerning a foreign mission, violates Article 6 of the European Convention on Human Rights<sup>67</sup> because customary international law does not recognise State immunity for employment of those mission staff who only perform subordinate duties.<sup>68</sup> This decision is borne out by jurisprudence in other jurisdictions, which rejects State immunity when a sending State has employed a mission staff member who performs no sovereign/public task.<sup>69</sup>

<sup>65</sup> *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, at p. 518. This decision was confirmed by the Court of Appeals (622 F.3d 123) and later followed by *Baoanan v. Baja* (627 F. Supp. 2d 155).

<sup>66</sup> *Abusabib v. Taddesse*, [2013] I.C.R. 603, at p. 608, para. 23. Numerous domestic decisions on consular immunity also indicate that employing subordinate members for a consulate is an act performed in the exercise of functions and should thus be protected by Article 43(1) of the VCCR. See, for example, *Jimenez v. Delgado* (2013), 978 F.Supp.2d 726; *Ewald v. Royal Norwegian Embassy*, 2012 WL 245244.

<sup>67</sup> Article 6 of the convention provides for the right of access to justice, but the right is qualified by recognised rules of immunity in international law. See, Louise Doswald-Beck, 'Fair Trial, Right to, International Protection', *Max Planck Encyclopedia of Public International Law* (April 2013), para. 34. For a review of the jurisprudence of the European Court of Human Rights, see, Mullally and Murphy, pp. 699-707.

<sup>68</sup> *Benkharbouche v. Embassy of the Republic of Sudan*, [2017] UKSC 62. Cf. *Sengupta v. Republic of India*, in which State immunity was upheld for the employment of a foreign mission clerk. *Sengupta v. Republic of India* (1982), [1983] ICR 221. For a detailed discussion of State immunity over employment of diplomatic or consular mission staff, see, Garnett, pp. 785-813; Webb (2016), pp. 750-754

<sup>69</sup> Immunity has been denied in cases concerning the employment of embassy chauffeur (*Emilio B.M. v. Embassy of Equatorial Guinea* (1986), 86 ILR 508; *Abbott v. Republic of South Africa* (1992), 113 ILR 412; *Rousseau v. Republic of Upper Volta* (1983), 82 ILR 118), translator or interpreter (*Diana v. Republic of South Africa* (1986), 86 ILR 512; *Embassy Interpreter Dismissal Case* (1985), 77 ILR 485), assistant in one department of the embassy (*Coco v. State of Argentina* (1996), 113 ILR 491; *Manauta v. Embassy of Russian Federation*

Further evidence can be found by a reference to Article 31(1)(a) and (b) of the VCDR. Article 31(1)(a) of the VCDR provides that a diplomat enjoys immunity from a legal action relating to immovable property situated in the receiving State *when he or she holds the immovable property on behalf of the sending State for the purposes of the mission*.<sup>70</sup> According to Article 31(1)(b), a diplomatic agent is protected from a succession proceeding if he or she is *involved in the proceeding on behalf of the sending State*.<sup>71</sup>

Again, it is difficult to reconcile the argument that these immunities are in fact State immunity itself with the fact that no State immunity is recognised in international law in these proceedings. According to Article 13 of the CJIS,<sup>72</sup> State immunity is not available in a proceeding which relates to the determination of: (a) ‘any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum’;<sup>73</sup> (b) ‘any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*’.<sup>74</sup> In practice, domestic courts have found no difficulty in rejecting State immunity even for disputes concerning mission premises of a foreign State.<sup>75</sup> If a diplomatic agent enjoys diplomatic immunity *ratione materiae* for acts which do not attract State immunity, it would be difficult to argue that the two immunities are essentially the same.

The above analysis, taken as a whole, points to the conclusion that diplomatic immunity *ratione materiae* is simply different from State immunity. Acts performed in the exercise of

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(1994), 113 ILR 429; *Castanheira v Commercial Office of Portugal* (1980), 82 ILR 100; *Mauritius Tourism Promotion Authority v. Mrs M K Wong Min*, UKEAT/0185/08/LA, caretaker (*Saignie v. Embassy of Japan* (1997), 113 ILR 492), and medical secretary (*Barrandon v. United States of America* (1998), 116 ILR 622).

<sup>70</sup> Article 31(1)(a) of the VCDR.

<sup>71</sup> Article 31(1)(b) of the VCDR.

<sup>72</sup> For the customary status of Article 13, see, the ILC commentary to the article, at Ybk ILC 1991, vol. II, Part Two, p. 46.

<sup>73</sup> Article 13(a) of the CJIS. See also, O’Keefe and Tams, pp. 78-79, in which it is pointed out that the VCDR does not prohibit suing a sending State for disputes relating to mission premises.

<sup>74</sup> Article 13(b) of the CJIS.

<sup>75</sup> See, *Jurisdiction over Yugoslav Military Mission*, 38 ILR, p. 162 (concerning the land used by a foreign mission); *Her Majesty of the Queen in Right of Canada v. Edelson and Others*, 131 ILR, p. 279 (concerning the residence of an incumbent ambassador).

diplomatic functions are in fact broader in scope than *acta jure imperii*.<sup>76</sup> This in turn casts doubt on the procedural nature of diplomatic immunity *ratione materiae*, for if immunity merely constitutes a procedural bar due to the nature of an act (as opposed to the status of a person), it is difficult to explain why the scope of this procedural bar essentially depends on who is the named defendant (the diplomat or the State). Therefore, diplomatic immunity *ratione materiae* must be regarded as something more than the procedural rule of State immunity.

### 3. Diplomatic immunity *ratione materiae* as a substantive rule

The problems with the procedural characterisation of diplomatic immunity *ratione materiae* leave room for arguing that the immunity is in fact substantive in nature. As mentioned above, two lines of thought have been forwarded in this respect.<sup>77</sup> These arguments will be assessed in turn.

#### 3.1. Substantive exemption from local law

The upshot of this line of thought is that (some) acts performed in the exercise of functions fall outside the law of the receiving State.

The main problem with Wilson's argument that all acts protected by diplomatic immunity *ratione materiae* are exempt from local law<sup>78</sup> is that the argument fails to explain situations where State immunity is denied for acts which attract diplomatic immunity *ratione materiae*. Hiring a domestic worker for the embassy is an act covered by diplomatic immunity *ratione*

<sup>76</sup> Commenting on the *Pinochet* case, Barker points out that immunity *ratione materiae* is an 'individual immunity' distinct from State immunity itself. Barker (1998), p. 941. In a similar vein, Webb points out that functional immunity in general international law is different from State immunity as the former also protects *acta jure gestionis* performed in an official capacity. Webb (2013), p. 86.

<sup>77</sup> *Supra* note 16 and 17.

<sup>78</sup> *Supra* note 4. A similar argument finds support in the drafting stage of the VCDR, in the context of diplomatic interference. See, Ybk ILC 1957, vol. I, p. 149, para. 38 [Tunkin].

materiae;<sup>79</sup> but if this act falls outside the law of the receiving State, a claim against the sending State itself would also be unable to proceed. This is clearly not supported by State practice mentioned above.<sup>80</sup> Similarly, the very fact that a sending State is not immune from a dispute concerning mission premises<sup>81</sup> illustrates that diplomatic immunity *ratione materiae* in Article 31(1)(a) of the VCDR simply does not constitute a substantive exemption from local law.

Hardy's argument seems more pertinent in this regard, for it recognises that only certain 'administrative' acts performed in the exercise of functions constitute a substantive exemption from law.<sup>82</sup> Yet two questions remain to be answered before this argument can be justified: In the first place, it must be explained *why* administrative acts are substantively exempt from local law; secondly, it must be made clear whether *only* administrative acts are so exempted.

With respect to the first question, it should be noted that, although a diplomatic mission performs functions on a foreign territory, it is still a State organ of the *sending* State and operates according to the administrative laws of that State. The principle of sovereign equality of States<sup>83</sup> protects the internal organisation of a State.<sup>84</sup> Thus, if one State gives consent for another State to carry out diplomatic functions on its territory, it must be taken as having implicitly recognised that these functions may be performed, to the extent recognised by the principle, in the latter State's 'own way'. It is rather impossible to argue that, for instance, diplomats of a foreign mission should report to their ambassador in the manner regulated by the administrative law of the *receiving* State, or, alternatively, that the wages of a foreign diplomat must exceed local minimum standard.<sup>85</sup> These matters are completely internal to a diplomatic mission – the receiving State's law is simply inapplicable in this regard.<sup>86</sup>

<sup>79</sup> *Supra* note 65 and 66.

<sup>80</sup> *Supra* note 68 and 69.

<sup>81</sup> *Supra* note 73 and 75.

<sup>82</sup> *Supra* note 7.

<sup>83</sup> *Infra* note 90.

<sup>84</sup> See, for example, the ICTY Appeals Chamber in *Prosecutor v. Tihomir Blaskic*, *supra* note 9, para. 41. Cassese also justifies the protection on the principle of non-intervention in the internal affairs of another State. Cassese (2005), p. 53.

<sup>85</sup> According to Article 34, a diplomat's official emoluments are exempt from local taxation laws. Similarly, although a private servant does not enjoy any privilege or immunity, his or her emoluments from the employment are also exempt from local taxation laws. See, Article 34 and Article 37(4) respectively.

<sup>86</sup> Seyersted terms the exclusive jurisdiction of a State over its relationship with its organs and officials 'organic jurisdiction', which extends to all acts related to the employment. For the author, although in practice disputes concerning these acts are usually dismissed by reference



Consequently, if a diplomatic agent has performed diplomatic functions in accordance with the administrative rules of the sending State, the acts concerned, which clearly belong to 'acts performed in the exercise of functions', would be substantively exempt from local laws.

The act of the Australian diplomats in the Iran-Australia incident seems to fall into this category.<sup>87</sup> It is clear that underlying the dispute between the two States is the difference between the Iranian Constitution and the Australian visa regulations. The question is, however, whether Iran is justified to evaluate the Australian visa regulations according to the standard of its own constitution. The answer appears to be in the negative, for the issuance of Australian visa is a matter completely internal to Australia.<sup>88</sup> By permitting Australia to perform the function of issuing visas on its territory, Iran must be taken as having implicitly recognised the validity of Australian visa regulations, unless, of course, at the time of the permission, the two States agreed that certain parts of the visa regulations must be modified in order to comply with the Iranian Constitution. However, even in this latter scenario, it is *Australia* that amends the visa regulations, not the Iranian legislature. This implicit recognition is important, for otherwise the establishment of diplomatic relations would mean, in the dispute between Iran and Australia, that Australia must perform the function of issuing *Australian* visas in accordance with *Iranian* law. On its face this argument seems already rather untenable. Indeed, if this is the case, it is questionable, considering Australia's reaction after the expulsion, whether diplomatic relations between the two States could be established in the first place.

This does not mean that Iran's expulsion of the Australian diplomats is as a matter of law 'wrong' – according to Article 9 of the VCDR, Iran has the right to expel foreign diplomats for whatever reasons.<sup>89</sup> However, the invocation of the Iranian Constitution as the reason for the expulsion does not alter the fact that the acts of the Australian diplomats are simply not

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to immunities, the acts are in fact exempt from both the legislative and the judicial power of the forum State. Seyersted (1965), pp. 34-43. For similar arguments concerning the internal administration of international organisations, see, Brower, pp. 68-69.

<sup>87</sup> *Supra* note 36.

<sup>88</sup> Cf. the so-called Canadian Caper incident, in which the Canadian Embassy in Tehran issued forged Iranian exit visas to help six American captives flee Iran. Commenting on the incident, Green points out that, whereas the issuance of Canadian passports is a matter completely internal to the Canadian authority, the issuance of Iranian visas is an interference in the internal affairs of Iran but is justified by the failure of Iran to protect American mission staff. Green, pp. 147-148.

<sup>89</sup> Article 9(1) of the VCDR.

subject to Iranian laws. The principle of sovereign equality of States<sup>90</sup> determines that the legislations of the two States are on an equal footing. Therefore, any problem in this respect can only be solved on an interstate (as opposed to domestic) level.<sup>91</sup>

On the other hand, however, it should be noted that acts which feature a fundamental difference between the laws of two States do not always concern administrative acts. This in turn calls into question whether the term ‘administrative acts’ is sufficient to embrace all acts that fall outside the law of the receiving State.

An Italian case concerning consular immunity may be recalled in this respect.<sup>92</sup> In *Re Rissmann*, a German consul was prosecuted in the receiving State for assisting a minor, by issuing her with passports and other travel documents, to return to Germany to join her father.<sup>93</sup> According to German law, the minor was a German national and had been entrusted by a German court to the guardianship of her father. According to Italian law, however, she was an Italian national and had been entrusted by an Italian court to her mother, an Italian citizen resident in Genoa.<sup>94</sup> The German Government officially invoked the consul’s immunity under Article 43(1) of the VCCR. In particular, it was pointed out that any responsibility for the act lay solely with the German State because the act had been directly dictated by German law.<sup>95</sup> This position was accepted by the Italian court. For the court, since the consul had performed consular functions in accordance with the law of the sending State, consular immunity in this respect was ‘based on a principle of substantive law’ and therefore ‘not merely procedural’ in nature.<sup>96</sup>

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<sup>90</sup> Article 2(1) of the UN Charter; see also, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, A/RES/25/2625. Juliane Kokott, ‘States, Sovereign Equality’, *Max Planck Encyclopedia of Public International Law* (April 2011).

<sup>91</sup> See, on this point, Whomersley, p. 850; Kelson, p. 358. Cf. Barton, who argues that the functional immunity over discipline and internal administration of a visiting army derives from the consent of the territorial State to the presence of the foreign army. Barton, p. 412

<sup>92</sup> For the relationship between consular immunity and diplomatic immunity *ratione materiae*, see Introduction (3.2).

<sup>93</sup> *Re Rissmann*, 71 ILR, p. 577.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, p. 584.

<sup>96</sup> *Ibid.*, p. 581.

*Re Rissmann* concerns the difference between the two States' nationality laws, which do not strictly pertain to internal administrative regulations. Yet it seems clear that the two States in *Re Rissmann* have consensus that the consul's act falls outside the law of the receiving State. In light of the principle of sovereign equality of States,<sup>97</sup> there seems indeed no reason to make a distinction between administrative laws and other laws. After all, what really matters is that, when a diplomatic agent has performed *diplomatic functions*<sup>98</sup> in strict adherence to the law of the sending State, any dispute that arises therefrom falls outside the law of the receiving State and must be solved on an interstate level.

The main obstacle to the argument that certain acts performed in the exercise of functions fall outside the law of the receiving State is Article 41(1) of the VCDR, which imposes an obligation to respect local laws on all persons enjoying privileges and immunities.<sup>99</sup> However, a closer examination of the drafting history of Article 41(1) reveals that the article is not intended to subject all acts of a diplomatic mission under the law of the receiving State. Indeed, the very reason of replacing the word 'comply', which was used in the 1957 draft of Article 41(1), with 'respect' was to make clear that a diplomat merely needs to 'respect' those laws and regulations of the receiving State which do not apply to him/her.<sup>100</sup> As a result, the ILC's commentary to the 1958 draft of Article 41(1) states that the duty to respect local laws and regulations 'does not apply where the agent's privileges and immunities exempt him from it'.<sup>101</sup> In fact, considering that Article 41(1) requires even those who enjoy 'privileges' – viz. substantive exemption from laws and regulations such as those relating to taxation or social

<sup>97</sup> Supra note 90.

<sup>98</sup> It should be noted that the qualifying term 'diplomatic functions' is important to ensure that 'in the exercise of functions' is not interpreted as anything dictated by the sending State. For more details on this point, see Chapter 4(2.2).

<sup>99</sup> Article 41(1) of the VCDR. Commenting on the judgment of *Rissmann*, Condorelli points out that the obligation to respect the law of the receiving State means that the nationality of the child must be determined by Italian law, which in turn suggests that the German consul had not been performing his consular function of issuing travel documents to nationals of the sending State. Condorelli, pp. 340-342. See also, Kartusch, who says that Article 41(1) means that a diplomat has an obligation to 'observe' local laws. Kartusch, p. 32.

<sup>100</sup> Ybk ILC 1957, vol. I, p. 218, para. 41 [Tunkin]. See also, *ibid*, p. 218, para. 42 [HSU]; p. 219, para. 52 [Liang]; para. 43 [The Chairman]; para. 47 [El-Erian].

<sup>101</sup> Ybk ILC 1958, vol. II, p. 104.

security<sup>102</sup> – to respect local laws, it seems certain that there exists no conflict between Article 41(1) and the argument presented in this section.

Therefore, it may be concluded that, for official acts which fall outside the law of the receiving State, diplomatic immunity *ratione materiae* should be regarded as substantive in nature. The scope of these official acts will be discussed more fully in Chapter 2(2) below.

### **3.2. Non-personal-liability for acts performed in the exercise of functions**

However, the above characterisation only resolved part of the problem. As shown above, there are also acts protected by diplomatic immunity *ratione materiae* which are subject to the law of the receiving State, but which do not attract procedural State immunity.<sup>103</sup> This in turn raises the question whether diplomatic immunity *ratione materiae* for these acts is also substantive in nature.

The argument that a diplomatic agent is not personally liable for an act performed in the exercise of functions seems indeed to point to this direction,<sup>104</sup> for, unlike the conclusion reached above, this argument does not separate official acts that fall outside the law of the receiving State from other (protected) official acts. If a diplomatic agent is not personally liable for *all* acts performed in the exercise of functions, diplomatic immunity *ratione materiae* as a whole may be characterised as substantive in nature.

It should be noted from the outset that acts which fall outside the law of the receiving State may also be explained by this non-personal-liability argument, albeit for slightly different reasons. For these acts, a diplomatic agent is not personally liable because no liability exists in domestic law – any responsibility lies on an interstate level. For acts that are subject to the law of the receiving State, on the other hand, domestic responsibility does exist, but is attributed solely to the sending State. In other words, for acts in this latter category, non-

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<sup>102</sup> *Satow's*, 5th edition, p. 120. Cf. Barker, who argues that certain diplomatic privileges, principally the privilege of inviolability, do not denote a substantive exemption from local law. Barker (1996), p. 67.

<sup>103</sup> See Section 2.2 above.

<sup>104</sup> See *supra* note 8 and 9.

liability is a matter of attribution of responsibility *according to law*, rather than an outright exemption from law.

Direct support for this ‘attribution of responsibility’ understanding of diplomatic immunity *ratione materiae* can be found in Article 31(1)(b) of the VCDR.

The 1958 draft of Article 31(1)(b) did not contain the proviso ‘as a private person and not on behalf of his Government’.<sup>105</sup> When Spain proposed adding this phrase to the article at the Vienna Conference, it was challenged by the representative of Switzerland, who argued that this phrase would ‘provide immunity for a State inheriting property and wishing to take possession of it’.<sup>106</sup> In his reply, the Spanish representative explained, *inter alia*, that

The object of the first of his delegation's amendments (L.221) was to exclude from the jurisdiction of the courts of the receiving States actions relating to a succession in which the diplomatic agent acted on behalf of his government. In that case, it was the sending State which was the heir, and not the diplomatic agent.<sup>107</sup>

This explanation proved acceptable to other delegates at the conference, and the phrase was thus added to Article 31(1)(b).<sup>108</sup>

The drafting history of Article 31(1)(b) indicates that diplomatic immunity *ratione materiae* under this article is meant to exempt a diplomatic agent from personal liability for an act of the sending State. The objection raised by Switzerland was in fact based on the understanding that diplomatic immunity *ratione materiae* is State immunity itself – if a diplomat enjoys immunity from a succession proceeding for acts performed on behalf of the sending State, the sending State itself would necessarily enjoy the same immunity, and this is unacceptable to Switzerland. Spain, on the other hand, approached the matter from a substantive perspective – the added phrase essentially answers the question ‘who is the correct defendant if a dispute arises’; and since the diplomat is not the heir, he or she should be exempted regardless of the immunity of the sending State. This means that diplomatic immunity *ratione materiae* under Article 31(1)(b) is in fact a personal protection of diplomatic agents; and the rationale behind

<sup>105</sup> Ybk ILC 1958, vol. II, p. 98, Article 29.

<sup>106</sup> Official Records, vol. I, p. 167, para. 33 [Bindschedler]. The same question was raised by the representative of Netherlands during the plenary meeting. See, *ibid*, p. 19, para. 36 [Riphagen].

<sup>107</sup> *Ibid*, para. 34 [de Erice y O’Shea].

<sup>108</sup> *Ibid*, p. 172, para. 27.

this personal protection is that, when a diplomatic agent has performed an act on behalf of the sending State, the responsibility for the act lies solely with the State.

In fact, Article 31(1)(b) is not the only article that provides for this personal protection in the name of diplomatic immunity *ratione materiae*. As mentioned above, Article 31(1)(a) also provides for diplomatic immunity *ratione materiae* for acts which do not necessarily attract State immunity.<sup>109</sup> An examination of the drafting history of Article 31(1)(a) reveals that the article addresses the narrow scenario in which a diplomat holds mission premises in his or her own name because local law does not permit acquisition of immovable property by a foreign State.<sup>110</sup> In this scenario, the diplomat is simply not the true owner of the immovable property and therefore must be protected by immunity. Essentially, this immunity, like the one in Article 31(1)(b), means that any proceeding relating to the immovable property can only be initiated against the sending State, which is solely responsible for the act.

In practice, situations like this may be dealt with as a matter of determination of correct defendant rather than immunity *stricto sensu*.<sup>111</sup> In the case of *Arab Republic of Syria v. Arab Republic of Egypt*, for example, the Syrian Ambassador to Brazil sued in front of the Brazilian Supreme Court the Egyptian Ambassador to Brazil for repossession of mission premises which were registered under the name of Syria in the land registry but occupied by Egypt following the dissolution of the United Arab Republic in 1961.<sup>112</sup> The Egyptian Ambassador claimed immunity, whereas Syria held that the ambassador was not protected because of the exception in Article 31(1)(a) of the VCDR. The court, following submissions made by the Deputy Attorney-General on behalf of the Brazilian Government, dismissed the proceeding against the Egyptian Ambassador and held that the real defendant should be the Egyptian State.<sup>113</sup> As a result, the case was decided on the basis of State immunity.

It seems clear that if a judgement had been rendered along the line of Article 31(1)(a), diplomatic immunity *ratione materiae* would have been upheld, for in this case the ambassador was holding the mission premises not as a private person but on behalf of the Egyptian State. The Supreme Court dealt with the issue as one of determining the correct defendant, but the

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<sup>109</sup> *Supra* note 73.

<sup>110</sup> On the drafting history of the article, see Chapter 4(2.1).

<sup>111</sup> Foakes, p. 8; Douglas, p. 324; Denza, 4th edition, pp. 235-236

<sup>112</sup> See, *Arab Republic of Syria v. Arab Republic of Egypt* (1982), 91 ILR 288.

<sup>113</sup> *Ibid.*

effect was the same: the Egyptian Ambassador did not have liability because the act was attributed exclusively to the sending State.

In her analysis of functional immunity of State officials in general international law, Fox points out that situations like those envisaged in Article 31(1)(a) and Article 31(1)(b) do not really concern immunity but are merely a matter of non-personal liability.<sup>114</sup> For Fox, the absence of State immunity in this respect means that there is no ‘applicable immunity’ to protect the State official involved.<sup>115</sup> This may well be the case for ordinary State officials, who enjoy no immunity other than State immunity in customary international law. The VCDR, however, has actually used the term ‘immunity’ to denote the inability of the court of the receiving State to adjudicate these matters of non-personal liability.<sup>116</sup> Part of the reason for this usage may be that State immunity was still regarded as absolute when the VCDR was adopted.<sup>117</sup> As a result, it made no difference whether a diplomat is exempt from a court proceeding as a matter of non-liability or as a matter of absolute State immunity, for as long as an act could be attributed to the sending State, the diplomat is protected by both. Modern development in the field of State immunity, however, has left a gap between diplomatic immunity *ratione materiae* and State immunity;<sup>118</sup> and this in turn calls for a more discerning understanding of diplomatic immunity *ratione materiae*. In any event, it seems clear from the above analysis that diplomatic immunities *ratione materiae* under Article 31(1)(a) and Article 31(1)(b) are substantive in nature because the acts concerned are attributed exclusively to the sending State.

Yet this conclusion still does not resolve the whole problem. Article 31(1)(a) and Article 31(1)(b) use the phrase ‘on behalf of the sending State’ to denote the acts protected by diplomatic immunity *ratione materiae*. This phrase, as will be proved in the following chapters,

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<sup>114</sup> Fox (2009), pp. 172-173. See also, Koh, who points out that, in practice, cases involving a foreign official do not always raise genuine immunity issues but merely concern some procedural matters such as real parties in interests and forum non conveniens. Koh, p. 1151. Cf. Preuss (1947), p. 576, in which the author argues that situations like this are one of the clearest example of immunity *ratione materiae*.

<sup>115</sup> Ibid.

<sup>116</sup> This pattern was followed by the VCCR. According to Article 43(2)(a) of the convention, a consul would be immune from a civil proceeding if he or she has concluded a contract ‘expressly or impliedly as an agent of the sending State’. Commenting on the article, Milhaupt points out that the purpose of the provision is to shield consular officers from ‘financial liability’. Milhaupt, p. 860.

<sup>117</sup> Salmon, p. 259; O’Keefe (2015), p. 430, fn. 142.

<sup>118</sup> See discussion in Section 2.2 above.

is actually narrower in scope that ‘in the exercise of functions’.<sup>119</sup> This means that only part of the acts performed in the exercise of functions are subject to local laws but still substantive in nature.<sup>120</sup> The problem is, therefore, whether this attribution of responsibility argument is capable of explaining all acts performed in the exercise of functions.

There is indeed support for this general understanding -- both among States and within the ILC.

In the case of *Caroline*,<sup>121</sup> a party of British troops headed by Captain McLeod was instructed to attack the ship *Caroline*, during which they killed a number of people and set the ship on fire. Later in 1840, McLeod was arrested in the US and charged with murder and arson. A subsequent exchange of diplomatic notes between the two States revealed however that both States regarded Captain McLeod as not personally liable for the crimes. According to the Statement of the US Secretary of State Webster, it is a ‘principle of public law sanctioned by the usages of all civilised nations’ that an individual acting under the authority of his government is not personally responsible for the injuries caused, because the acts in question are not his personal acts but acts of his government.<sup>122</sup>

This consensus between the US and the UK on the principle of non-liability for official acts was also supported by Switzerland in its understanding of diplomatic immunity *ratione materiae*. In its comments to the League of Nations’ report on diplomatic immunities and privileges,<sup>123</sup> the Swiss Government pointed out that ‘Switzerland adhered firmly to the principle that the diplomatic agent was not personally responsible for acts done in his official capacity’.<sup>124</sup>

In a 1953 Italian case concerning the immunity of the chancellor of the United States Embassy, the Tribunal of Rome ruled likewise that diplomatic agents and subordinate staff are not

<sup>119</sup> See, Chapter 4(2.1).

<sup>120</sup> Cf. acts which fall outside the law of the receiving State, Section 3.1 above.

<sup>121</sup> See, Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline. – March, April, 1841, *British and Foreign State Papers* (1840-1841), vol. XXIX, p. 1126.

<sup>122</sup> *Ibid*, p. 1140. On the question of functional immunity of the crew of a warship, see, Delupis, pp. 54-61.

<sup>123</sup> League of Nations publication, C.196.M.70. 1927. V.

<sup>124</sup> Memorandum of the VCDR, p. 144.



personally responsible for ‘acts done by them in their public capacity’ because only the foreign State should be regarded as responsible.<sup>125</sup>

During the drafting stage of Article 38(1) of the VCDR, Verdross, in explaining his proposal that a diplomatic agent with the nationality of the receiving State should only enjoy immunity for acts performed in the exercise of functions,<sup>126</sup> stated that ‘acts covered ... were not acts for which the diplomatic agent could himself be held responsible; they were the acts of the sending State’.<sup>127</sup> The proposal was accepted by the ILC and later became Article 38(1).

Similar attitudes towards ‘in the exercise of functions’ immunity can also be found in the drafting history of the VCCR.<sup>128</sup> In the ILC’s 1961 discussion on consular immunity, Verdross pointed out that the ‘only method’ to determine consular immunity is to examine whether an act is attributed to the sending State or to the consul personally.<sup>129</sup> During the Vienna Conference on Consular Relations, the US representative pointed out that ‘if the local court decided the acts complained of were performed within the scope of their official duties, then consuls were not liable as a matter of substantive law’.<sup>130</sup> In a similar vein, the Italian representative also indicated that consular immunity means that ‘an individual was not personally responsible for acts performed in the exercise of his functions’.<sup>131</sup>

The merit of this non-personal-liability argument is that it adequately explains the asymmetry between diplomatic immunity *ratione materiae* and State immunity<sup>132</sup> – the former is broader in scope because it concerns not only jurisdiction but also responsibility.

However, it is worth noting that this asymmetry exists only in *civil* proceedings. A sovereign State has no criminal responsibility and thus enjoys absolute immunity from criminal

<sup>125</sup> *Societa Arethusa Film v. Reist*, 22 ILR, p. 546.

<sup>126</sup> Ybk ILC 1957 vol. I, p. 98, para. 7 [Verdross].

<sup>127</sup> Ibid, p. 99, para. 21 [Verdross].

<sup>128</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see Introduction (3.2).

<sup>129</sup> Ybk ILC 1961, vol. I, p. 119, para. 11 [Verdross].

<sup>130</sup> Official Records of Vienna Conference on Consular Relations, vol. I, pp. 374-375, para. 34 [Blankinship].

<sup>131</sup> Ibid, p. 375, para. 36 [Maresca].

<sup>132</sup> See Section 2.2 above.

proceedings of a foreign State.<sup>133</sup> This rule has two implications. In the first place, diplomatic immunity *ratione materiae* from criminal proceedings may still be perceived as part of the *absolute* State immunity from criminal proceedings. This State immunity will be compromised if a criminal proceeding is initiated against a State official acting on behalf of the State.<sup>134</sup> As a result, State immunity must be extended to the protection of the State official. The same logic obviously does not exist in civil proceedings – if a State itself does not enjoy immunity, there is simply no question of extending State immunity to the protection of a State official. Secondly, the very fact that a sovereign State has no criminal responsibility suggests that any such responsibility lies solely with the actual perpetrator, viz. the State official, for otherwise the effect would be as if no crime has ever been committed. This in turn means that, for criminal activities, an official act may be attributed simultaneously to the individual and the State.<sup>135</sup> A prime example in this regard exists in international crimes – the individual criminal responsibility for these crimes does not absolve State responsibility.<sup>136</sup>

These two implications feature the main problem in literature concerning the nature of diplomatic immunity *ratione materiae* – authors on both sides fail to consider the difference

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<sup>133</sup> The 1996 Draft of the Articles on Responsibility of States for Internationally Wrongful Acts introduced the notion of ‘international crimes of States’, but this notion was later deleted from the draft due to strong opposition both within the ILC and in the comments of many governments. For more details concerning State criminal responsibility, see, James R Crawford, ‘State Responsibility’, *Max Planck Encyclopedia of Public International Law* (September 2006). For academic debate concerning criminal liability of a State, see, Tunkin, pp. 396-404. The ILC made clear in its commentaries to the CJIS that the convention (and the exceptions to immunity therein) concern only civil proceedings. See, Ybk ILC 1991, vol. II, Part Two, p. 14, para. 2. Early development of the restrictive theory of State immunity is partly based on the presumption that a distinction can be made between a State as a ‘body politic’ and as a *civil* entity. See, Sinclair (1980), pp. 208-209; Sucharitkul, p. 127.

<sup>134</sup> Akande and Shah, p. 827; Wickremasinghe, p. 410; Kelson, p. 358; Franey, p. 18; O’Keefe (2015), pp. 425-426; Trapp and Mills, p. 161. Similar opinions were also expressed in *Pinochet*, see, *Pinochet No. 3*, p. 210, 224 [Lord Goff], p. 268 [Lord Millett]. In *Mutual Assistance*, the ICJ also held that functional immunity of the Djiboutian officials from criminal proceedings is ‘in essence’ State immunity itself. *Mutual Assistance*, para. 188.

<sup>135</sup> Having expressed the opinion that functional immunity substantively exempts a State official from personal liability, Cassese makes a somewhat paradoxical statement that domestic criminal personal liability may arise in ‘serious criminal offence’ (Cassese (2005), pp. 112-113). It is submitted that *any* domestic criminal liability lies solely with the perpetrator, unless the domestic criminal law of the forum State recognises criminal responsibility of a State entity.

<sup>136</sup> For support of this dual attribution, see, for example, Nollkaemper, pp. 616-621; Behrens (2016), pp. 51-52; Clapham (2012), p.291. On the existence of individual civil responsibility in international law, see, Clapham (2010), p. 30; McGregor, pp. 143-145; Fox (2009), pp. 169-171.

between civil and criminal matters. Thus, Dinstein criticises the substantive characterisation of *all* diplomatic immunities *ratione materiae* by arguing that diplomatic immunity *ratione materiae* for criminal acts does not exempt the criminal liability of the perpetrator.<sup>137</sup> Similarly, Alebeek uses the case of an Ottoman ambassador not personally liable for a *civil* contract of installing embassy heating system to illustrate that *all* immunities *ratione materiae* are a matter of non-personal-liability.<sup>138</sup>

Yet the difference is important. In civil area, the relationship between a diplomatic agent and the sending State is, to a certain extent, analogous to the relationship between a principal and its agent in domestic agency law.<sup>139</sup> As pointed out by Fox, the doctrine of non-personal-liability for official acts in classic international law has in fact derived from domestic agency law which states that, for acts performed by an agent on behalf of the principal, any responsibility lies exclusively with the principal.<sup>140</sup> Reflected in civil disputes, this means that it is justifiable, in light of the fact that a sovereign State is capable of assuming civil liability in a foreign jurisdiction, to assert that in civil proceedings all acts performed in the exercise of functions are attributed solely to the sending State. Indeed, the very fact that domestic courts are willing to recognise diplomatic immunity *ratione materiae* for acts which do not attract State immunity demonstrates that States simply do not regard diplomatic agents acting in the performance of functions as even jointly liable for the act.

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<sup>137</sup> *Supra* note 14.

<sup>138</sup> *Supra* note 62, p. 12. See also, McCready, pp. 154-156; Farnelli, p. 275, in which the author discusses the availability functional immunity in criminal proceedings through the prism of the *imperii/gestionis* distinction.

<sup>139</sup> Franey, p. 138. In State practice, domestic courts have used the principle of *respondeat superior* to determine whether an act of a diplomat/consul has been performed in the exercise of functions. See, for example, *Commonwealth v. Jerez* (1983), 390 Mass. 456, 457 N. E. 2d 1105; *Skeen v. Federative Republic of Brazil* (1983), 566 F. Supp. 1414; *Military Affairs Office of the Embassy of the State of Kuwait v Caramba-Coker* (2003), 2003 WL 1610407. See also, *Propend v Sing*, in which the British Court of Appeal, in considering whether the commissioner of the Australian Federal Police should be vicariously liable for contempt of court committed by an Australian diplomatic agent who had performed some police functions on behalf of the AFP, looked to domestic agency law and ruled that the plaintiff failed to demonstrate the existence of agency between the diplomat and the commissioner. *Propend v. Sing* (1997), p. 7.

<sup>140</sup> Fox, 2nd edition, p. 455; Franey, p. 152: 'in civil cases there can be only one liability, and one entitlement for compensation'. See also, Delupis, pp. 70-71, in which the author argues that, in case of a diplomat performing spying activities under the instruction of the sending State, he or she is protected by the principle of *respondeat superior* which attributes the activities exclusively to the sending State. In this case, the lack of individual responsibility 'operates as a shield of immunity against any legal process in municipal courts'.

But the same cannot be said with regard to criminal matters. A principal is not responsible for criminal acts performed by his or her agent during the employment, and, when the principal is a sovereign State that has no criminal responsibility at all, it is impossible to argue that the official nature of an act eliminates individual criminal responsibility. Diplomatic immunity *ratione materiae* from criminal proceedings is State immunity from criminal proceedings itself. It does not exempt a diplomatic agent from individual criminal responsibility and is thus procedural in nature.

It should be noted, however, that this argument is based on the premise that the criminal act concerned is subject to the law of the receiving State. As concluded in Section 3.1 above, if an act is substantively exempt from local law, it does not attract any personal responsibility even if the responsibility is criminal in nature.<sup>141</sup> In this respect, the argument made in this section does not conflict with the conclusion in Section 3.1.

The specific nature of diplomatic immunity *ratione materiae* from criminal proceedings *for acts which are subject to local law* determines that, if this (State) immunity is waived, the individual criminal responsibility will be realised in the receiving State in the ordinary manner.

This seems indeed the case in *Knab*.<sup>142</sup> This case concerns a traffic accident (which killed one teenage and injured four others) caused by a Georgian diplomat on his way back from a diplomatic reception.<sup>143</sup> Georgia waived his immunity from criminal proceedings, and he was sentenced to 7-year imprisonment in a US court.<sup>144</sup> However, when the victims of the accident initiated civil proceedings against the diplomat one year later, Georgia insisted that the act for which the diplomat was prosecuted had been performed in the exercise of his functions as a member of the mission and should thus be protected under Article 39(2).<sup>145</sup> The plaintiffs accepted this argument, and the court accordingly ruled that Article 39(2) applied.<sup>146</sup>

<sup>141</sup> See, Section 3.1 above.

<sup>142</sup> *Knab v. Republic of Georgia*, No. 97CV3118, May 29, 1998.

<sup>143</sup> Bill Miller, 'Diplomat Pleads Guilty', *The Washington Post*, 9 October 1997.

<sup>144</sup> Michael Janofsky, 'Georgian Diplomat Pleads Guilty in Death of Teen-Age Girl', *The New York Times*, 9 October 1997.

<sup>145</sup> *Supra* note 142, 'Republic of Georgia's Motion for A Limited Appearance To Assert Immunity And Memorandum of Points of Authorities in Support Thereof'.

<sup>146</sup> *Supra* note 142, p. 4.

*Knab* can be understood in two ways.

Firstly, it may be argued that the Georgian diplomat, who was drunk-driving when the accident happened, was simply not performing an act in the exercise of functions. In fact, the US court did not really rule on the merits of the case. The decision that Article 39(2) applied was completely based on the consensus between the parties;<sup>147</sup> and the plaintiff agreed that the act had been performed in the exercise of functions in order to pursue their action against the Georgian State,<sup>148</sup> which, according to Section 1605(a)(5) of the US Foreign Sovereign Immunities Act, does not enjoy State immunity for tortious acts performed by its diplomat ‘within the scope of his office or employment’.<sup>149</sup> If the act of the diplomat does not really constitute an act performed in the exercise of functions, the waiver in this case is then not really a waiver of diplomatic immunity *ratione materiae* but simply a waiver of immunity for private acts.<sup>150</sup> Essentially, this is a question of whether criminal acts (except for those which fall outside the law of the receiving State) can be regarded as acts performed in the exercise of functions. This question will be discussed more fully in the following chapters.<sup>151</sup>

However, even if we presume that the position in *Knab* is justifiable, the different treatment of diplomatic immunity *ratione materiae* in civil and criminal proceedings can still be explained by the argument made in this section. The domestic criminal liability for drunk-driving lies solely with the diplomatic agent even though the act can be regarded as having been performed in the exercise of functions. The immunity in this regard is strictly State immunity which protects the *State* from being indirectly prosecuted by a criminal proceeding against its diplomat acting in an official capacity. As a result, when the State waives its immunity voluntarily, domestic individual criminal liability would be realised in the ordinary

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<sup>147</sup> *Ibid.*

<sup>148</sup> *McQueen v. Republic of Georgia*, C.A. No. 98-1115.

<sup>149</sup> Section 1605(a)(5) provides that a foreign State does not enjoy immunity from a proceeding ‘in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State or of any official or employee of that foreign State while acting within the scope of his office or employment’. See, Foreign Sovereign Immunities Act 1976 (FSIA), codified at 28 U.S.C.A. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611. According to Yang, the phrase ‘within the scope of his office or employment’ serves to attribute a tortious act to the State of the foreign official involved. Yang, pp. 224-225.

<sup>150</sup> For questions relating to waiver of diplomatic immunity *ratione materiae*, see Chapter 5(3.2).

<sup>151</sup> See, in particular, Chapter 2(4.3).

manner. In civil proceedings, on the other hand, liability (to compensate) lies solely with the sending State, who is responsible for damages caused by its officials in the performance of functions. Indeed, the very fact that Georgia was willing to waive diplomatic immunity *ratione materiae* in criminal proceedings but not in civil proceedings, in addition to the complete absence of State practice concerning waiver of diplomatic immunity *ratione materiae* from civil proceedings, seem to indicate that States simply do not regard a diplomatic agent as personally liable for civil compensation for acts performed in the exercise of functions.<sup>152</sup>

This analysis leads to the conclusion that not all acts performed in the exercise of functions are attributed exclusively to the sending State. The distinction between civil and criminal matters determines that this non-personal-liability argument is justifiable only with regard to civil disputes; and State practice suggests that neither the sending States (by not waiving diplomatic immunity *ratione materiae* from civil proceedings) nor the receiving States (by recognising a broader scope of diplomatic immunity *ratione materiae* from civil proceedings than State immunity) are willing to leave a diplomat civilly liable to a victim of an official act. Therefore, the better understanding seems to be that, whereas diplomatic immunity *ratione materiae* from criminal proceedings (for acts that fall inside the law of the receiving State) is procedural in nature, diplomatic immunity *ratione materiae* from civil proceedings represents non-personal-liability and is thus a substantive rule.

## 4. Conclusion

Diplomatic immunity *ratione materiae* under the VCDR covers acts of distinctly different nature that it is impossible to speak of the character of this immunity without examining these acts in detail. This chapter represents such a detailed examination. It is concluded that:

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<sup>152</sup> In fact, *Knab* is not the only case that makes a distinction between criminal and civil proceedings. In *Fillie v. Representative, World Health Organization and Monrovia*, a Sierra Leone court upheld the immunity from civil proceedings of the driver of an WHO official who had caused a car accident in the course of his duties, despite the fact that immunity from criminal proceedings had been waived, and the driver had pleaded guilty, in a previous criminal proceeding. The court applied Article 37(3) of the VCDR directly to the driver and ruled that the accident had been performed in the course of the driver's duties. For the court, the civil proceeding is 'a separate and distinct matter', which means the waiver in the criminal proceeding is irrelevant. See, *Fillie v. Representative, World Health Organization and Monrovia*, Case No CC1215/2005, ILDC 1540 (SL 2007).

Firstly, when a diplomatic agent has performed diplomatic functions by strict adherence to the law of the sending State, his or her acts fall outside the law of the receiving State regardless of the criminal or civil nature of the acts. Any dispute resulting from acts in this regard can only be resolved on an interstate level. Consequently, diplomatic immunity *ratione materiae* for these acts represents a substantive exemption from local laws.

Secondly, diplomatic immunities *ratione materiae* under Article 31(1)(a) and Article 31(1)(b) of the VCDR are substantive in nature because the acts concerned, albeit subject to local laws, are performed ‘on behalf of the sending State’ and thus exclusively attributed to that State.

Thirdly, diplomatic immunities *ratione materiae* for other acts performed in the exercise of functions must be understood in the light of the difference between criminal and civil matters. In criminal matters, diplomatic immunity *ratione materiae* is State immunity itself which is extended to the protection of a diplomatic agent. This immunity does not exempt the diplomat’s individual criminal responsibility in either domestic law or international law, hence the procedural nature of the immunity. In civil disputes, however, diplomatic immunity *ratione materiae* is substantive in nature because the civil liability for an act performed in the exercise of functions lies solely with the sending State.

Starting with the diplomatic immunity *ratione materiae* for acts performed ‘in the exercise of functions’, this thesis will proceed to examine the exact scope of different kinds of diplomatic immunity *ratione materiae* in the following chapters.

## Chapter 2: Immunity for Acts Performed ‘in the Exercise of Functions’

### 1. Introduction

This chapter deals with diplomatic immunities *ratione materiae* that employ the formula of ‘in the exercise/performance of functions’.<sup>1</sup> There are three provisions in the VCDR which concern immunity of this kind: Article 27(5) provides that a diplomatic courier is protected by the receiving State ‘in the performance of his functions’;<sup>2</sup> Article 38(1) prescribes that a diplomat who is a national or permanent resident of the receiving State enjoys immunity from jurisdiction and personal inviolability for ‘official acts performed in the exercise of his functions’;<sup>3</sup> and Article 39(2) exempts a former diplomat from the jurisdiction of the receiving State for ‘acts performed ... in the exercise of his functions as a member of the mission’.<sup>4</sup>

The difficulty with the determination of what constitutes an act performed ‘in the exercise of’ an official function is twofold.

On a general level, the formula itself is subject to several distinct interpretations. As Hardy points out, an act performed in the exercise of functions could be understood as ‘solely official acts in the strictest sense’, ‘acts in close connection with functions’, or ‘acts which occur in the course of duties in a looser, temporal sense’.<sup>5</sup> Whereas acts in the first category are certainly protected by diplomatic immunity *ratione materiae*, the same cannot be said with regard to acts in the second and the third category. The case of *Knab* discussed in Chapter 1 has partly illustrated the difficulty in this respect.<sup>6</sup> Notably, Georgia’s decision to waive diplomatic immunity *ratione materiae* in criminal proceedings but not in civil proceedings has left one wondering whether a traffic accident that has happened during an official trip could

<sup>1</sup> The rest of this thesis will use ‘in the exercise of functions’ to denote them both.

<sup>2</sup> Article 27(5) of the VCDR.

<sup>3</sup> Article 38(1) of the VCDR.

<sup>4</sup> Article 39(2) of the VCDR.

<sup>5</sup> Hardy, p. 66.

<sup>6</sup> Chapter 1, footnote 142.



be regarded as ‘in the exercise of’ official functions. In essence, the main question is whether, and if so to what extent, ancillary or preliminary acts may be protected by diplomatic immunity *ratione materiae*.<sup>7</sup>

More specifically, each article has problems of its own.

With regard to Article 38(1) and Article 39(2), the difference in wording between them seems to suggest that an official/private dichotomy exists within the formula of ‘in the exercise of functions’. Further, it is difficult to speak of the private acts of a diplomatic agent, who represents the sending State in the receiving State. There were cases in which a seemingly private act of a diplomat had been taken as reflecting the official position of the sending State and thus provoked harsh reaction by the receiving State.<sup>8</sup> In scholarship, opinions are also expressed that it is impossible to draw a line between the official acts and the private acts of a diplomatic agent because he or she is always ‘on duty’.<sup>9</sup>

Article 27(5) uses the formula ‘in the performance of functions’ to denote the ‘protection’ of a diplomatic courier. The rest of the article goes on to explain that a courier enjoys personal inviolability and shall not be liable to any form of arrest or detention. The question is, however, whether personal inviolability is the only form of protection enjoyed by a courier.<sup>10</sup> Further, in light of the difference between personal inviolability and immunity from jurisdiction, it must be questioned whether the former is capable of being evaluated according to the nature of a particular act.<sup>11</sup>

This chapter will start by looking at the immunity under Article 38(1).<sup>12</sup>

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<sup>7</sup> See *infra* Section 4.2.

<sup>8</sup> See, for example, the Bernard incident, *infra* note 99.

<sup>9</sup> Hurst (1950), p. 232.

<sup>10</sup> See *infra* Section 5.2.

<sup>11</sup> See *infra* Section 5.1.

<sup>12</sup> The contents of ‘functions’, i.e., whether functions of a diplomatic agent should be equated with functions of a diplomatic mission, will be dealt with in Chapter 4(2.2). This chapter only examines the scope of the formula itself.

## 2. The scope of ‘official acts performed in the exercise of functions’

The scope of immunity accorded to diplomatic agents with the nationality of the receiving State is a matter upon which no consensus existed in State practice before the VCDR. Argentina, for example, granted full immunity to all diplomatic agents regardless of their nationality.<sup>13</sup> The legislation of the Netherlands, on the contrary, made it clear that local diplomats do not enjoy any immunity in the receiving State.<sup>14</sup> Colombia granted to local diplomats full immunity from criminal jurisdiction but did not recognise their immunity from civil proceedings.<sup>15</sup> On the other hand, the Harvard Draft Convention, following the approach taken by the Havana Convention,<sup>16</sup> provided full diplomatic immunity to local diplomats on the condition that their appointment was expressly endorsed by the receiving State.<sup>17</sup>

The varying views on the issue indicate that Article 38(1) of the VCDR, which provides that a diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction and inviolability<sup>18</sup> ‘in respect of official acts performed in the exercise of his functions’,<sup>19</sup> constitutes a progressive development of international law rather than a mere codification of pre-convention customary rules.<sup>20</sup>

<sup>13</sup> The Argentine legislation prescribed different treatment based on nationality for subordinate staff of foreign missions, but treated all diplomatic agents as the same, *UN Laws and Regulations*, p. 4. See also, the legislation of Austria, Guatemala, p. 13, 149 respectively. This position was also supported by Czechoslovakia in its comments to the League of Nations’ report on diplomatic immunities and privileges, see, Memorandum of the VCDR, para. 98(h). See also, *Macartney v. Garbutt*, [1890] 24 QBD 368.

<sup>14</sup> *Ibid*, p. 196. See also, the legislation of Nicaragua, Pakistan, Poland, Venezuela, p. 224, 227, 242, 403 respectively.

<sup>15</sup> *Ibid*, p. 65. Sweden granted ‘official acts’ immunity to national diplomats, see, Memorandum of the VCDR, para. 96.

<sup>16</sup> Article 7 of the Havana Convention 1928, *ibid*, p. 420.

<sup>17</sup> Article 8 of the Harvard Draft, at p. 67. Cf. Article 15 of the Cambridge Draft of the Institute of International Law, *ibid*, p. 164.

<sup>18</sup> This section deals only with immunity *ratione materiae* from court jurisdiction. The question of inviolability *ratione materiae* will be dealt with in Section 5.1 below.

<sup>19</sup> Article 38(1) of the VCDR.

<sup>20</sup> The ILC recognised in its commentary to the 1958 draft of Article 38(1) that both State practice and academic opinions were not uniform on this issue, See *Ybk ILC 1958*, vol. II, p. 102, para. 2.

But neither the VCDR nor the ILC commentaries explains the meaning of an official act performed in the exercise of functions. Article 39(2) of the VCDR provides that a former diplomatic agent enjoys diplomatic immunity *ratione materiae* for acts performed ‘in the exercise of his functions’.<sup>21</sup> The omission of the term ‘official acts’ in Article 39(2) seems to imply that acts performed in the exercise of functions can be further divided into ‘official acts’ and ‘unofficial acts’ -- Article 38(1) only protects the former.

This seems to be the understanding of Salmon. For him, acts such as a traffic offence committed during an official trip may be deemed as acts performed in the exercise of functions but clearly fall outside the definition of ‘official acts’.<sup>22</sup> Murty examines the matter in the context of the VCCR<sup>23</sup> and holds in a similar vein that, whereas acts performed in the exercise of functions pertain to acts performed with ‘ostensible authority’, official acts are only those that have been performed with ‘actual authority’.<sup>24</sup>

Others do not agree. It has been argued that, despite the different wording, Article 38(1) and Article 39(2) are in fact one and the same.<sup>25</sup> Dinstein, in particular, points out that, since both diplomatic immunities *ratione materiae* protect acts which are attributed to the sending State, and since only acts in strict application of diplomatic functions can be so attributed,<sup>26</sup> the term ‘official acts’ simply serves to clarify the meaning of ‘acts performed in the exercise of functions’.<sup>27</sup>

A critical assessment of these arguments shows that Article 38(1) is in fact narrower in scope than Article 39(2).

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<sup>21</sup> Article 39(2) of the VCDR.

<sup>22</sup> Salmon, p. 437. Similar opinions were also expressed within the ILC at the drafting stage of Article 38(1), see *infra* note 33.

<sup>23</sup> On the relationship between diplomatic immunity *ratione materiae* and consular immunity, see Introduction (3.2).

<sup>24</sup> Murty, pp. 434-436.

<sup>25</sup> Denza, 3rd edition, p. 441; Dinstein, p. 86; *Satow's*, 5th edition, p. 131; Lewis, 3rd edition, p. 144; Brown, p. 76; Bolewski, p. 790. This also seems to be the opinion of the UK Supreme Court, which refers to all diplomatic immunities *ratione materiae* as immunity for ‘official acts’. *Reyes* (2017), para. 18.

<sup>26</sup> Dinstein, p. 82.

<sup>27</sup> *Ibid*, p. 85. For yet another view, albeit in the context of consular immunity, see, Lozancic, p. 56, in which the author says that ‘consular functions’ in Article 43 of the VCCR could be interpreted as narrower in scope than ‘official acts’ in Article 71 of the VCCR.

In the first place, the drafting history of Article 38(1) seems to suggest that the term ‘official acts’ was added to the article in order to narrow down the scope of ‘acts performed in the exercise of functions’.

The original provision proposed by the Special Rapporteur in his first report provided that a diplomat who is a national of the receiving State enjoys only immunity from criminal proceedings.<sup>28</sup> But this provision proved unacceptable to most members of the ILC because full immunity from criminal jurisdiction was deemed too broad. As a result, two variants emerged. The restrictive one, represented by El-Erian, provided that a local diplomat should enjoy immunity only to the extent specifically granted by the receiving State.<sup>29</sup> The broader view, on the other hand, held that if a receiving State does not oppose to the appointment of a local diplomat, it must grant the diplomat a certain degree of immunity to enable his or her performance of functions.<sup>30</sup>

The broader view later turned out to be favoured by the majority of the ILC members and the provision proposed by Verdross, which originally read ‘a diplomatic agent who is a national of the receiving State shall enjoy the privilege of immunity only in respect of acts performed in the exercise of his diplomatic functions’,<sup>31</sup> was accepted in principle. However, many members made their acceptance conditional on further drafting change which would narrow down the scope of the provision. François, for example, stated that the only reason he opposed to Verdross’s proposal was that it might lead to abuse.<sup>32</sup> For him, the formula ‘in the exercise of functions’ was so broadly worded that it would even ‘preclude action being taken against a diplomatic agent who was guilty of criminal negligence when taking a communication from his mission to the ministry of foreign affairs by car’.<sup>33</sup> The Special Rapporteur also pointed out in a similar vein that ‘acts performed in the exercise of his diplomatic functions’ are broader in scope than ‘*des actes de sa fonction diplomatique*’ (acts of his diplomatic function).<sup>34</sup> As a result, the phrase ‘official acts’ was added to the redrafted version of

<sup>28</sup> Ybk ILC 1955, vol. II, p. 12.

<sup>29</sup> Ybk ILC 1957, vol. I, p. 98, para. 9 [El-Erian]. See also, para. 16 [François]; p. 100, para. 24 [Tunkin].

<sup>30</sup> Ibid, p. 98, para. 7 [Verdross]; p. 126, para. 22 [Sandström]; p. 100, para. 32 [Spiropoulos]; p. 124, para. 6 [Fitzmaurice]; p. 126, para. 28 [Bartos].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, p. 103, para. 64 [François].

<sup>33</sup> Ibid, p. 99, para. 19 [François].

<sup>34</sup> Ibid, p. 100, para. 29 [Sandström].

Verdross's proposal; and the formula of 'official acts performed in the exercise of functions' was later adopted by the Vienna Conference.

The above history of Article 38(1) clearly indicates that the use of the term 'official acts' is a deliberate choice of the ILC. This in turn casts doubt on the argument that the term is merely meant to 'clarify' the meaning of 'acts performed in the exercise of functions',<sup>35</sup> for if clarification is necessary, it is difficult to understand why the ILC, on a later stage, reverted to the wording of 'acts performed in the exercise of functions' in the context of Article 39(2).

Further, the ILC justified the immunity in Article 38(1) on the ground that it is the 'irreducible minimum' for a diplomatic agent to carry out functions satisfactorily;<sup>36</sup> but the same consideration did not feature in either the ILC discussion of, or its commentaries to, Article 39(2). An irreducible minimum of immunity seems to concern acts which are in strict application of diplomatic functions, for otherwise the effect would be as if a diplomat is not allowed to perform these functions. Take the Iran-Australia incident as an example:<sup>37</sup> if the two Australian diplomats were nationals of the receiving State, the irreducible minimum of immunity in Article 38(1) must be able to protect their acts of issuing visas and passports in accordance with Australian visa regulations. If this were not the case, the effect would be that the diplomats were not allowed to perform the function of issuing visas and passports, because every single visa they issued would violate the Iranian Constitution.

On the other hand, acts which merely *facilitate* the performance of diplomatic functions are likely to fall outside the scope this 'irreducible minimum'. These acts may benefit the performance of diplomatic functions; but non-immunity for them would not necessarily lead to the impossibility of performing functions.<sup>38</sup> Thus, immunity for these acts can hardly be perceived as 'irreducible'.

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<sup>35</sup> Supra note 27.

<sup>36</sup> Commentaries to draft Article 30, Ybk ILC 1957, vol. II, pp. 141-142.

<sup>37</sup> Chapter 1, footnote 36 and accompanying text.

<sup>38</sup> See, for example, *Querouil v. Breton* (70 ILR 388), in which the Court of Appeal of Paris held that Article 38(1) of the VCDR does not protect a diplomat from a dispute concerning the lease of his private residence. For detailed discussion of the status of principal residence of a diplomatic agent, see, Chapter 4(3).

Yet in State practice after the adoption of the VCDR, it is exactly these ancillary acts that are likely to be regarded by domestic courts as ‘in the exercise of functions’.<sup>39</sup> In *Portugal v. Goncalves*, the Civil Court of Brussels, in holding that a Portuguese diplomat was in the exercise of his functions when he commissioned the plaintiff to provide translation service for the Portuguese Embassy,<sup>40</sup> indicated that ‘Article 3 (of the VCDR) sets out the general framework for diplomatic functions and must be interpreted as also covering all other incidental actions which are indispensable for the performance of those general functions listed in the Article’.<sup>41</sup> In the British case of *Abusabib v. Taddese*, the Employment Appeal Tribunal also held that Article 39(2) would apply if a former diplomat employs a personal assistant to help him/her deal with official business.<sup>42</sup> In a similar case concerning consular immunity,<sup>43</sup> the Italian Court of Cassation upheld consular immunity of a Cameroon consul for a parking offence and pointed out, inter alia, that ‘in the exercise of functions’ immunity covers not only acts in strict application of official functions, but also acts that are ‘closely linked’ to the performance of these functions.<sup>44</sup> All these cases concern acts which may be said to facilitate the performance of official functions. Yet it seems clear that a lack of immunity for these acts would not result in a diplomat being unable to perform his or her functions.<sup>45</sup> This in turn suggests that, like the drafting history of Article 38(1), State practice also supports a broader scope of ‘acts performed in the exercise of functions’.

In fact, although the ILC did not state explicitly, in the context of the VCDR, that Article 38(1) is narrower in scope than Article 39(2), it did so several years later — in the context of consular immunity. Article 43(1) and Article 71(1) of the VCCR apply the same formulas as Article 39(2) and Article 38(1) of the VCDR; and the ILC made clear in its 1961 commentaries that the former is patterned on the latter.<sup>46</sup> With regard to the difference between the two formulas, it was pointed out in the commentary to Article 71(1) that

<sup>39</sup> For a more detailed discussion of diplomatic immunity *ratione materiae* for ancillary acts, see, Section 4.2 below.

<sup>40</sup> This case concerns a serving diplomat. According to Article 31(1)(c) of the VCDR, a diplomat would enjoy immunity for professional or commercial activities if the activities have been performed ‘inside’ his or her official functions. For more details, see Chapter 4(5) below.

<sup>41</sup> *Portugal v. Goncalves*, 82 ILR 115, at p. 117.

<sup>42</sup> *Abusabib v. Taddese*, [2013] I.C.R. 603, at p. 608, para. 23.

<sup>43</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see Introduction (3.2).

<sup>44</sup> *Hesse v. Prefect of Trieste* (1977), 77 ILR 610.

<sup>45</sup> Cf. the Iran-Australia incident mentioned above, *supra* note 37.

<sup>46</sup> Ybk ILC 1961, vol. II, p. 127.

Since the present article applies to the nationals of the receiving State, it uses, unlike article 43, the expression ‘official acts’, the scope of which is more restricted than the expression used in article 43: ‘acts performed in the exercise of consular functions’.<sup>47</sup> In its commentary to draft Article 43 (on consular immunity), the ILC also indicated that it did not use the phrase ‘official acts’ to qualify consular immunity because the phrase might be used to ‘weaken the position of’ a consul.<sup>48</sup>

The government of Sweden in its comments to the 1961 Draft took note of the difference and argued that no discrimination should be made between consuls who are nationals of the receiving State and consuls who are not.<sup>49</sup> Netherlands also proposed during the Vienna Conference on Consular Relations to use the same wording for both articles.<sup>50</sup> However, neither suggestion was adopted and the different wording persisted.

The Italian Court of Cassation has on several occasions dealt with the difference between Article 43(1) and Article 71(1) of the VCCR.<sup>51</sup> In *Rubin v. Consul of the Republic of Panama*, the court held that the formula of ‘in the exercise of functions’ contains, in addition to official acts stricto sensu, acts that are ‘etiologically connected with the consular functions’.<sup>52</sup> As a result, ‘Article 43 covers an area of activity more extensive than that which relates solely to “official acts”’.<sup>53</sup> The exact scope of the formula of ‘in the exercise of functions’ will be dealt with in subsequent sections.<sup>54</sup> For the sake of current discussion, however, the Italian court’s decision is clearly supported by the drafting history of both the VCDR and the VCCR.

Underlying the different treatment between diplomats with the nationality of the receiving State and diplomats who are nationals of the sending State is the special status of the former.

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<sup>47</sup> Ibid. An examination of the ILC discussions also reveals that ILC members were fully aware of the difference in scope between the two formulas when they drafted the text. See, for example, Ybk ILC 1961, vol. I, p. 120, para. 19 [Yasseen]; p. 191, para. 22 [Verdross].

<sup>48</sup> Supra note 46, p. 117, para. 3.

<sup>49</sup> Ibid, p. 159. Similar comments were also made by Philippines and Norway, see, p. 154 and p. 151 respectively.

<sup>50</sup> Official Records of the United Nations Conference on Consular Relations, vol. I, p. 374, para. 33.

<sup>51</sup> Infra. See also, *Consul-General of Belgium in Naples v. Esposito* (1986), 101 ILR 376; *Church v. Ferraino and Others* (1986), 101 ILR 370;

<sup>52</sup> *Rubin v. Consul of the Republic of Panama* (1977), 77 ILR 593, at p. 594.

<sup>53</sup> Ibid, p. 595.

<sup>54</sup> Section 3 and Section 4 below.

Although Article 31(4) of the VCDR provides that diplomatic immunity does not exempt a diplomat from the jurisdiction of the sending State, in case of diplomats from the receiving State such a jurisdiction may be very difficult to effectuate. If such a diplomat accidentally kills a national of the receiving State while driving to an official business, courts of the *sending* State might not be able to impose criminal jurisdiction on the diplomat because the criminal activity has no connection with the sending State.<sup>55</sup> The same situation does not exist for diplomats with the nationality of the sending State, in which case criminal jurisdiction can be based on nationality.<sup>56</sup> In fact, the very reason that some members of the ILC were not willing to grant even an ‘irreducible minimum’ of immunity to diplomats who are nationals of the receiving State was that immunity for them could easily lead to impunity.<sup>57</sup> In this regard, the asymmetry between diplomats from the receiving State and diplomats with the nationality of the sending State clearly calls for a restrictive interpretation of the immunity of the former, for otherwise they would be in a more privileged status than diplomats in the latter category.

But even more important is that acts performed in strict application of diplomatic functions, being public acts of the sending State, are likely to fall outside the *law* of the receiving State.<sup>58</sup> For these acts, the incompetence of the court of the receiving State is in fact a matter of jurisdiction rather than immunity<sup>59</sup> – it is *not* immunity that impedes an otherwise applicable jurisdiction, but that the court does not have jurisdiction over these matters *ab initio*.<sup>60</sup>

<sup>55</sup> Cahier observes in his comments to the VCDR that Article 31(4) is ‘relatively meaningless’ because an injured party seeking redress in the *sending* State ‘may encounter a major obstacle: the absence of a competent tribunal’. Cahier, pp. 30-31. Citing the work of Michel Mouskhély, the ILC Memorandum of the VCDR also stated that local employees of a mission must be subject to local jurisdiction ‘for the simple reason that it is the only jurisdiction possible’. Memorandum of the VCDR, p. 163, para. 247.

<sup>56</sup> For the problems with the application of Article 31(4) in general, see, Barker (1996), pp. 112-119, see also, Hatana, pp. 23-24; Farhangi, pp. 1532-1533; Goodman, p. 406.

<sup>57</sup> Ybk ILC 1957, vol. I, p. 99, para. 13 [El-Erian]; p. 102, para. 58 [Bartos]; p. 107, para. 56 [Bartos]. Similar views were also expressed during the Vienna Conference, see, for example, Official Records, vol. I, p. 205, para. 59 [Iran]. See also, Cassese (2005), p. 115.

<sup>58</sup> Akehurst, p. 179: ‘in the fields of “public law”, one State has not legislative jurisdiction over another’; see also, Wedgwood, p. 497; Boas, p. 246.

<sup>59</sup> For the distinction between jurisdiction and immunity, see, *Arrest Warrant*, para. 59.

<sup>60</sup> Brownlie argues that cases in this respect are in fact a matter of ‘inadmissibility’ or ‘non-justiciability’ rather than immunity from jurisdiction. See, Brownlie, 5th edition, p. 326; See also, Fox, 2nd edition, pp. 522-530. In a 1987 case of *Fayed v. Al-Tajir* ([1988] 1 QB 712), the British Court of Appeal applied the principle of non-justiciability and refused to adjudicate a claim against the former ambassador of the UAE for making defamatory comments in an internal report of the embassy, even though the ambassador had purportedly waived his own immunity, and even though the report in question had been fully disclosed during the



The main reason for this argument is that the very definition of ‘acts performed in strict application of diplomatic functions’ leaves little room for personal wrongdoing.<sup>61</sup> Immunity is necessary only when an act has violated local laws; but in the case of acts performed in strict application of diplomatic functions, any such violation is likely to result from the (illegal) nature of the function itself. There may indeed be disagreement between two States concerning the exact scope of diplomatic functions;<sup>62</sup> but once consensus is reached for certain functions, an act performed in strict application of these functions would be either lawful under local laws (in which case immunity is simply not necessary),<sup>63</sup> or unlawful but falls outside local laws. In this latter case, the receiving State, by consenting to the performance of these functions on its territory, has voluntarily conceded part of its *prescriptive* jurisdiction over matters which are completely internal to the sending State.<sup>64</sup>

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proceeding. For the court, diplomatic immunity ‘is allied to but not the same as a voluntary abstention by the courts of the receiving State from inquiring into the conduct of his [the receiving State’s] embassy’. Ibid, p. 731. For the principle of non-justiciability in general, see, Shaw, pp. 138-152.

<sup>61</sup> In a similar vein, Brower indicates that, in cases where an official of an international organisation has committed intentional tort in a strictly official capacity, there exist no mistakes on the part of the official. Brower, p. 64.

<sup>62</sup> On the question whether functions of a diplomat should be explained outside the framework of Article 3(1) of the VCDR, see, Chapter 4(2.2).

<sup>63</sup> The function of observation, in particular, is recognised only when it is performed ‘by all lawful means’. See Article 3(1)(d) of the VCDR.

<sup>64</sup> As pointed out by Cassese, the general principle of independence of sovereign States determines that ‘A State may not exercise its sovereign powers over, or otherwise interfere with, actions legally performed by foreign States on its territory’. Cassese (2005), p. 98. For similar arguments concerning the exercise of consular functions, see, Akehurst, p. 151; Parry, pp. 130-131;

Situations like this are commonplace in interstate diplomacy. The employment/dismissal of diplomatic agents of a foreign embassy,<sup>65</sup> the grant/refusal of visas or passports,<sup>66</sup> the conducting of same sex marriages in a receiving State where such marriages are illegal,<sup>67</sup> all concern activities which, once recognised by the receiving State, are substantively exempt from local laws. If a diplomatic agent rejects the visa application of a receiving State's national, it is inconceivable that he or she could ever be tried in the receiving State *even if* immunity does not exist – the act is completely internal to the sending State, and the receiving State's visa regulations are simply not applicable to the diplomat. In this regard, the irreducible minimum of immunity in Article 38(1) does not merely concern performance of functions; it is also a recognition that courts of the receiving State lack jurisdiction over matters that fall outside local laws.

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<sup>65</sup> Akehurst, p. 179. Seyersted (1965), pp. 34-43. There is no reported case which concerns diplomatic agents in this regard; but there are numerous cases which concern officials of international organisations (who enjoy diplomatic immunity *ratione materiae* by reference to Article 39(2) of the VCDR) and consuls. Immunity has been consistently upheld in employment-related issues because it was held that the court of the forum State should not interfere with the internal administration of the organisation or the consulate. See, *De Luca v. United Nations*, 841 F. Supp. 531; *Brzak v. United Nations*, 551 F. Supp. 2d 313; *Esoc Official Immunity Case* (1973), 73 ILR 683; *Ford v. Clement*, 834 F.Supp. 72; *The United States Veterans Administration case*, *US Digest* (1978), p. 878-879; *Van Aggelen v. United Nations*, 311 Fed. Appx. 407 (2009); *Rubin*, supra note 52; *Ewald v. Royal Norwegian Embassy*, 2012 WL 245244; *Jimenez v. Delgado*, 978 F. Supp. 2d 726. See also, the ILC's commentaries to Article 11 of the convention on State Immunity, which indicate that the employer State has 'an overriding interest in ensuring compliance with its internal regulations and the prerogative of appointment or dismissal which results from unilateral decisions taken by the State'. CJIS with commentaries, p. 42, para. 3.

<sup>66</sup> *USA for the use of Adelaida Garcia v. consul general of the US at Santo Domingo et USA for the use of Jesus Ortiz v. consul of the US al Santo Domingo*, E.D.N.Y. 1977, *American International Law Cases*, vol. 26. p. 266; *Bigelow v. Princess Zizianoff and Others* (1934), 61 *Clunet* 982. See also, 'U.S. Diplomat Faces Visa Bribe Charge', *New York Times*, 26 August 2006, in which a US consul in Toronto was prosecuted in the sending State for issuing work visas in exchange of bribes; see also, *Dangin v. Paturau* (1949) (16 ILR 300) concerning the issuance of passport. The cases of issuing visa and dismissing employees of consulate were also mentioned during the ILC discussion on consular immunity, see, for example, Ybk ILC 1961, vol. I, p. 120, para. 22 [Gros].

<sup>67</sup> The British Consular Marriage and Marriages under Foreign Law Order 2014, which entered into force on 3 June 2014, allows same sex marriages to be taken place at British Consulates in a number of States where such marriages are illegal. See, *UK Digest* (2014), p. 543. See also, Cahier, p. 33 concerning the non-application of local laws regarding acquisition of nationality to diplomatic agents. Fitzmaurice held the same attitude towards local nationality laws, see, Ybk ILC 1957, vol. I, p. 217, para. 11 [Fitzmaurice].

### 3. Making the assessment: ‘in the exercise of functions’ from the perspective of State responsibility

#### 3.1. Introduction

Having determined that ‘in the exercise of functions’ is broader in scope than ‘official acts performed in the exercise of functions’ and that the latter refers to acts in strict application of diplomatic functions, this section will turn to assessing the scope of the former.

It has been argued in literature that an act performed in the exercise of functions is one which is attributed to the sending State and one for which the sending State is responsible.<sup>68</sup> However, it is not always easy to tell whether State responsibility of a sending State is involved. In a broad sense, a sending State is responsible for all acts performed by its diplomatic agents in the receiving State,<sup>69</sup> yet this understanding of State responsibility is clearly inappropriate for the determination of diplomatic immunity *ratione materiae*, as it would render such immunity essentially the same as full diplomatic immunity. On the other hand, if only acts in strict application of diplomatic functions could be attributed to the sending State,<sup>70</sup> all diplomatic immunities *ratione materiae* under the VCDR would assume the same scope as Article 38(1), and this is clearly not the intention of the parties.<sup>71</sup> The main problem is, therefore, how to properly understand ‘act of State’ in the context of diplomatic immunity *ratione materiae*.

Rules of attribution of State responsibility have been perceived as a pertinent standard for the determination of Article 39(2). Salmon, for instance, invokes the ILC Draft Articles on

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<sup>68</sup> As to whether the same act can also be attributed to the person of the diplomatic agent, see Chapter 1(3.2).

<sup>69</sup> *Oppenheim's*, 8th edition, vol. I, p. 359. See also, Dembinski, p. 202. Commenting on a case where Brazil was granted immunity for the murder committed by the grandson of the Brazilian Ambassador to the US, Herbert also holds the view that the sending State should be responsible for all acts that are covered by full diplomatic immunity. Herbert, p. 511. See also, Barker, who argues that a sending State should be responsible for all acts of its diplomats because it is the ultimate beneficiary of diplomatic immunity. Barker (1996), pp. 212-213.

<sup>70</sup> Dinstein, *supra* note 26.

<sup>71</sup> See Section 2 above.

Responsibility of States for Internationally Wrongful Acts (ARSIWA) and argues that, as long as an act can be attributed to the sending State in the field of State responsibility, diplomatic immunity *ratione materiae* must apply.<sup>72</sup> For Salmon, this is the case even with regard to acts of terrorism or espionage.<sup>73</sup> Similarly, the ‘ostensible authority’ test established by Murty<sup>74</sup> for the determination of consular immunity<sup>75</sup> also corresponds to the rules of attribution contained in the ARSIWA.<sup>76</sup>

Denza is more cautious in this regard. In her criticism of the *Former Syrian Ambassador Case*,<sup>77</sup> Denza indicates that, although the fact that an act has been carried out following the instructions of the sending State may be relevant for the determination of State responsibility, it is not the correct test for the determination of Article 39(2).<sup>78</sup> Yet the formula she proposes, that Article 39(2) protects acts performed ‘on behalf of or imputable to the sending State’,

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<sup>72</sup> Salmon, pp. 467-468. See also, O’Keefe (2015), p. 433, 458; Boas, p. 273. In *Jones v Saudi Arabia*, the British House of Lords held the view that ‘it has until now been generally assumed that the circumstances in which a State will be liable for the act of an official in international law mirror the circumstances in which the official will be immune in foreign domestic law’. See, *Jones v. Saudi Arabia* (2006), [2006] UKHL 26, para. 74 [Lord Hoffmann]. See also, the second report of the ILC Special Rapporteur Kolodkin on the immunity of State officials from foreign criminal jurisdiction, UN Doc. A/CN.4/631, para. 24. For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see, Introduction (3.2).

<sup>73</sup> *Ibid.*

<sup>74</sup> *Supra* note 24. See also, Watts, who argues that the standard of distinguishing the official capacity of a head of State from his private capacity is one of ostensible authority. Watts, p. 56-57.

<sup>75</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see, Introduction (3.2).

<sup>76</sup> See Section 3.2.1 below. In a pre-VCCR case concerning consular immunity, a French court held in a similar line that consular immunity protects *ultra vires* acts (which are also attributed to the State according to rules of attribution in ARSIWA). See, *Boyer and Another v. Aldrete* (1956), 23 ILR 445, at p. 446.

<sup>77</sup> In this case the German Federal Constitutional Court held the view that the act of helping carry out a terrorist attack can also be protected by Article 39(2) of the VCDR as long as it is instructed by the sending State’s government. *Former Syrian Ambassador to the German Democratic Republic* (1997), 115 ILR 595.

<sup>78</sup> Denza, 3rd edition, p. 448. A more direct juxtaposition of opinions concerning the applicability of ARSIWA to immunity *ratione materiae* can be found in the ILC project on Immunity of State Officials from Foreign Criminal Jurisdiction. Whereas the first Special Rapporteur supports the application of ARSIWA, the second Special Rapporteur argues that an act being attributed to the State under ARSIWA is merely the ‘prerequisite’ for the granting of functional immunity. See, UN Doc. A/CN.4/631, para. 24 and UN Doc. A/CN.4/686, para. 118 respectively. For criticism of the application of ARSIWA, see also, Fox (2009), pp. 171-177; Frulli, pp. 493-495; Keitner, p. 476.

does not really answer the question of what constitutes an act imputable to the sending State. Indeed, as will be shown in Chapter 4, ‘on behalf of’ the sending State under the VCDR actually has a more limited scope than ‘in the exercise of functions’,<sup>79</sup> and this in turn suggests that Denza’s formula could potentially lead to two different meanings.

It is therefore the purpose of this section to examine whether rules of attribution of State responsibility contained in ARSIWA can be used to determine diplomatic immunity *ratione materiae* for acts performed in the exercise of functions.<sup>80</sup> Section 3.2.1 will first establish a legal standard by examining State practice concerning the application of relevant rules of ARSIWA. In Section 3.2.2, the drafting history of the VCDR and State practice after its adoption will be assessed against this standard.

## 3.2. Acts performed in an official capacity

### 3.2.1. Setting up the context: the standard of ‘apparent authority’

Article 4 of the ARSIWA provides that the conduct of any State organ shall be considered an act of the State under international law.<sup>81</sup> Diplomatic agents clearly fall into the concept of ‘State organ’, which encompasses all State officials irrespective of their functions or rankings.<sup>82</sup> However, not all acts performed by a State organ can be attributed to the State — an act must have been performed ‘in that capacity’ for the State to be held responsible.<sup>83</sup> The

<sup>79</sup> See, Chapter 4(2.1).

<sup>80</sup> The ARSIWA itself is a combination of codification and progressive development of international law, but its customary law status has been repeatedly recognised in State practice since its adoption in 2001. For a compilation of decisions made by both domestic courts and international tribunals, see, the UN Secretary-General’s 2007 Report on responsibility of States for internationally wrongful acts, UN Doc. A/62/62; UN Doc. A/62/62 Add. 1. See also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 202, 207, 209, 211, 217.

<sup>81</sup> Article 4(1) of the ARSIWA.

<sup>82</sup> Article 4(2) of the ARSIWA. Commentaries, p. 40, para. 6, p. 41, para. 7. See also, commentaries to Article 6, which provides that a diplomatic mission is a State organ of the sending State that operates in the receiving State but retains its own autonomy and status, *ibid*, p. 44, para. 2

<sup>83</sup> Article 7 of the ARSIWA. See also, Crawford (2013), p. 137.

standard does not require the act to have been performed in strict application of official functions: as long as a State official has acted in an ‘apparently official capacity, or under colour of authority’, the action in question will be attributed to the State even if the official in acting as such ‘may have had ulterior or improper motives or may be abusing public power’.<sup>84</sup>

The ‘apparent authority’ standard determines that ultra vires acts would also be attributed to the State.<sup>85</sup> In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights, in holding Honduras responsible for the acts of detention and torture committed by its officials, indicated that:

[The attribution of responsibility] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.<sup>86</sup>

In an earlier incident between the US and Mexico, questions arose as to the extent to which the US should be responsible for the two assaults committed by a Texan deputy constable against a Mexican consul.<sup>87</sup> The first assault happened on a Sunday night, when the deputy constable beat the consul after coming across him in the street.<sup>88</sup> The second one took place in a street car operating between the Mexican city of Ciudad Juárez and the American city of El Paso.<sup>89</sup> When the constable saw the consul on the car, he jumped on board and told the conductor that he would ‘get’ the consul as soon as the car entered into Texas.<sup>90</sup> Once the car crossed the frontier, the constable brutally struck the consul before taking him to the El Paso county jail.<sup>91</sup> Both these assaults had been committed by the constable as a result of his personal aversion, which seemed to derive from the non-extradition by Mexico of a man who

<sup>84</sup> Commentaries, p. 42, para. 13.

<sup>85</sup> Article 7 of the ARSIWA; see also, O’Keefe (2015), p. 436.

<sup>86</sup> Case of *Velásquez-Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C No. 4, p. 30, para. 170.

<sup>87</sup> *Francisco Mallén (United Mexican States) v. United States of America* (1927), *UNRIAA*, vol. IV, pp. 173-190. See also, *Estate of Jean-Baptiste Caire (France) v. United Mexican States* (1929), *UNRIAA*, vol. V, pp. 516-534; *Maal Case* (1903), *UNRIAA*, vol. X, pp. 730-733; *Charles S. Stephens and Bowman Stephens (U.S.A.) v. United Mexican States* (1927), *UNRIAA*, vol. IV, pp. 265-268.

<sup>88</sup> *Ibid.*, pp. 174-175, para. 4.

<sup>89</sup> *Ibid.*, pp. 176-177, para. 7.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

had been suspected of murdering the constable's brother-in-law, against the consul.<sup>92</sup> Yet both the tribunal and the two States involved held the view that only the second assault could be attributed to the US. The constable's showing of his badge to assert authority, as well as the detention of the consul at the local jail, had rendered the assault an act of the US even though the act seemed to be 'a private act of revenge which was disguised'.<sup>93</sup> The first assault, on the other hand, was merely 'a malevolent and unlawful act of a private individual who happened to be an official'.<sup>94</sup>

### 3.2.2. Making the assessment: 'apparent authority' of a diplomatic agent?

The 'apparent authority' standard under the ARSIWA stresses the objective 'link' between a State official and the State. It is irrelevant for the determination of the link whether the official has intended to fulfil his or her functions, or whether the State has actually benefitted from his or her acts — as long as the formal nexus of 'capacity' is established, all acts performed in that capacity would be attributed to the State.

However, it is not always easy to tell what is the 'capacity' of a diplomatic agent. It should be noted that, in the *Mallén* case mentioned above,<sup>95</sup> the consensus of the two States is ultimately based on a common understanding of the 'capacity' of the police. The existence of this common understanding makes it possible for the tribunal to evaluate the factual ends of the case. As a result, the second assault is regarded as the act of the US because the constable's acts of showing police badge, of detaining the consul in a local jail, and of using force against the consul on the territory of the US fall into the recognisable scope of the capacity of the police.

Diplomatic agents are different. As representatives of the sending State, they are involved in all kinds of activities, ranging from providing medical service to the nationals of the sending

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<sup>92</sup> Ibid, p. 175, para. 4, 5.

<sup>93</sup> Ibid, pp. 176-177, para. 7.

<sup>94</sup> Ibid, p. 174, para. 4.

<sup>95</sup> Supra note 87.

State<sup>96</sup> to negotiating a treaty with the government of the receiving State,<sup>97</sup> that it is difficult to determine whether an act has been performed in their official capacity. Whereas the US constable's act of assaulting the Mexican consul in a Sunday street can be easily regarded as a private act of revenge,<sup>98</sup> an ambassador's comments during a private dinner may well be taken as representing the political stance of the sending State and thus provoke harsh reaction on an interstate level.<sup>99</sup> This in turn highlights the difficulty with the 'apparent authority' standard – in a broad sense, a diplomatic agent is always in an apparent authority,<sup>100</sup> and the application of this standard would in effect render diplomatic immunity *ratione materiae* the equivalent of personal diplomatic immunity.<sup>101</sup>

The apparent authority test seems to have been applied by the Supreme Court of Austria in the case of *Heirs of Pierre S v. Austria*.<sup>102</sup> In ruling that the Austrian Ambassador to Yugoslavia was in the exercise of his functions when he accidentally shot dead the French Ambassador in an official hunt invited by the president of the receiving State, the court held that, since fostering personal contacts with the president of the receiving State is a condition for the exercise of the ambassador's function of representation, acts performed in fulfilment of and

<sup>96</sup> See, *Arab Republic of Egypt v. Gamal-Eldin* (1995), 104 ILR 673, in which a British court held that the medical office of the Egyptian Embassy, which provided medical treatment to nationals of Egypt in the UK, was performing a function that falls into the non-exhaustive list of Article 3(1) of the VCDR.

<sup>97</sup> Article 3(1)(c) of the VCDR. Indeed, in the case of *Propend v. Sing*, the British Court of Appeal, in granting the immunity under Article 39(2) to a diplomatic agent who had been involved in performing some police functions, indicated that 'some police functions may be may be clothed with diplomatic immunity just as the functions of military or cultural attachés may be'. *Propend Finance Pty Ltd & Ors v. Sing & Anr* (1997), 111 ILR 611, at p. 653.

<sup>98</sup> *Supra* note 87.

<sup>99</sup> See, for example, the Bernard incident, in which derogatory remarks against Israel made by the incumbent French Ambassador to the UK during a private dinner party triggered reactions by the office of the Israeli Prime Minister. Ewen MacAskill, 'Israel Seeks Head of French Envoy,' *The Guardian*, 20 Dec 2011. For more detailed discussion of the incident, see, Behrens (2016), pp. 52-53. For the concept of 'representational entertainment', according to which the function of representation is carried out by attending social events in order to foster local contacts, see, Silva (1972), pp. 59-60.

<sup>100</sup> On this point, see, Hurst (1950), p. 232.

<sup>101</sup> In a similar vein, Tomonori argues that if immunity *ratione materiae* (including that of diplomats and consuls) covers *ultra vires* acts, the immunity could potentially become the equivalent of full personal immunity. Tomonori, p. 283.

<sup>102</sup> *Heirs of Pierre S v Austria*, 86 ILR 546. In the British case of *Estrada v. Al-Juffali*, the court seems to take a similar view of Article 38(1) when it held that the immunity protects a diplomatic agent 'while' he or she is exercising his official functions. See, *Estrada v. Al-Juffali*, [2017] 1 F.L.R. 669, para. 67.



bear ‘a sufficiently close internal and external relationship to’ the condition must be regarded as in the exercise of functions and thus attributed to the sending State.<sup>103</sup>

The upshot of the Austrian court’s judgment seems to be that, by engaging himself in the official hunt, the ambassador was facilitating the performance of the function of representation and therefore in an official capacity. As a result, any omission of the ambassador must be regarded as in the exercise of functions and attributed to the sending State.

But the drafting history of Article 39(2) suggests that the ILC members did not intend to give the immunity so broad a scope.

During the 1957 ILC discussion on Article 39(2) (draft Article 25(2)) of the VCDR, Matine-Daftary proposed to replace ‘in the exercise of his functions’ prescribed in the Special Rapporteur’s draft with ‘during the exercise of his functions’.<sup>104</sup> If this formula had been adopted, the effect would have been the same as the application of the ‘apparent authority’ standard — that a former diplomat would enjoy immunity for *all* acts that have happened in the temporal scope of the ‘exercise of functions’. However, this proposal was not supported by most members of the ILC. The response of the Special Rapporteur, in particular, suggests that the ILC members did not intend to give a former diplomat immunity for such a wide range of activities.<sup>105</sup>

An alignment between ‘apparent authority’ and ‘in the exercise of functions’ is not supported by post-VCDR State practice either. In *Baoanan v. Baja*, a domestic worker brought an employment-related action against her former employer, a Philippine diplomat who had left his post by the time of the proceeding.<sup>106</sup> The main question of the case was whether the employment of domestic service falls into the scope of ‘in the exercise of functions’.<sup>107</sup> The diplomat based his assertion of diplomatic immunity on two grounds: first, the employment benefitted not only his private life but also the Philippine mission, as the claimant had on

<sup>103</sup> Ibid, p. 548.

<sup>104</sup> Ybk ILC 1957, vol. I, p. 142, para. 35 [Matine-Daftary].

<sup>105</sup> The Special Rapporteur pointed out that ‘immunity should subsist *only* in respect of acts performed in the exercise of diplomatic functions’. Ibid, para. 38 (Emphasis added).

<sup>106</sup> *Baoanan v. Baja*, 627 F. Supp. 2d 155.

<sup>107</sup> The defendant was the Philippine representative to the United Nations who enjoyed diplomatic immunity. The court applied Article 39(2) of the VCDR to render the judgment.

occasions helped prepare and clean up diplomatic parties held inside the Philippine mission,<sup>108</sup> second, the claimant was the only domestic servant working in the Philippine mission, and all the contracted services and alleged acts had happened entirely inside the premises of the Philippine mission.<sup>109</sup> Both these points were nonetheless rejected by the court. Applying the principle proclaimed in *Swarna v. Al-Awadi*,<sup>110</sup> the court held that the tangential benefit of the employment to the Philippine mission was not sufficient to attract residual immunity under Article 39(2) of the VCDR.<sup>111</sup> With regard to the second ground, the court was of the view that the official *appearance* of the employment did not mean that the employment was in *substance* an act performed in the exercise of functions.<sup>112</sup> What really mattered, according to the court, was the extent to which the employment had actually benefitted the Philippine mission.<sup>113</sup>

It is clear that the court's interpretation of 'in the exercise of functions' is much more restrictive than the 'apparent authority' standard: not only was it necessary to establish an actual (as opposed to formal) connection between the act and the State, the connection itself must also be substantial (as opposed to tangential) in order to attract immunity. The same restrictive understanding of 'in the exercise of functions' has also featured in other domestic cases concerning the application of Article 39(2) of the VCDR.<sup>114</sup>

State practice with regard to consular immunity<sup>115</sup> also indicates that domestic courts, in determining whether an act has been performed in the exercise of functions, often consider elements that are completely alien to rules of attribution of State responsibility in ARSIWA. Thus, in *Gerritsen v. de la Madrid Hurtado*, the District Court of California, in granting consular immunity to two Mexican consuls who had verbally warned and threatened a protestor outside the Mexican Consulate, took into account the 'subjective intent' of the

<sup>108</sup> Supra note 106, p. 167.

<sup>109</sup> Ibid.

<sup>110</sup> *Swarna v. Al-Awadi*, 622 F. 3d 123.

<sup>111</sup> Supra note 106, p. 168.

<sup>112</sup> Supra note 106, p. 169.

<sup>113</sup> Ibid.

<sup>114</sup> See, for example, *Wokuri v. Kassam*, [2012] 3 W.L.R. 427; *Al-Malki v. Reyes*, 2015 WL 376101; *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122; *Abusabib v. Taddese*, [2013] I.C.R. 603; *Swarna v. Al-Awadi*, supra note 110.

<sup>115</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see, Introduction (3.2).

consuls,<sup>116</sup> the seriousness of the acts,<sup>117</sup> and the actual benefits of the acts to consular functions.<sup>118</sup> Similarly, in *L v. The Crown*, the Supreme Court of Auckland rejected the immunity of a foreign consul who had indecently assaulted a woman who came to his office for renewal of her passport.<sup>119</sup> For the court, although the assault happened during the exercise of consular functions, ‘it was not one required of him in the exercise of his functions’.<sup>120</sup>

In addition to the problem with determining the ‘apparent authority’ of a diplomatic agent, the application of ARSIWA to determine diplomatic immunity *ratione materiae* can also be criticised from another angle. In theory, diplomatic immunity *ratione materiae* does not mean impunity because any personal liability would be realised in the ordinary manner if immunity is waived.<sup>121</sup> Yet in practice States rarely waive diplomatic immunity *ratione materiae* of their diplomats -- indeed, as argued in Chapter 1, in the case of acts in strict application of diplomatic functions, such waiver is outright impossible.<sup>122</sup> This means that, *in practice*, the granting of diplomatic immunity *ratione materiae* often has the effect of eliminating a diplomat’s liability *under the domestic law of the receiving State*, for unless this immunity is waived, such liability would never be realised.<sup>123</sup> If, however, the determination of diplomatic immunity *ratione materiae* is aligned with rules of attribution of State responsibility, the effect would be as if the diplomat’s individual liability *under the law of the receiving State* is replaced by the responsibility of the sending State. Whereas this replacement seems reasonable in civil matters (as both individual civil liability and State responsibility take the form of financial

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<sup>116</sup> For another case in which personal motive is considered for the determination of consular immunity, see, *Maas v. Seelhiem* (1936), 8 ILR 404. See also, Webb, who holds the view that excluding personal motive from the consideration of immunity *ratione materiae* would severely limit the scope of the immunity. Webb, p. 84.

<sup>117</sup> For more discussion on this point, see Section 4.3 below.

<sup>118</sup> *Gerritsen v. Escobar Y Cordova*, 721 F. Supp. 253, at p. 259.

<sup>119</sup> *L. v. The Crown* (1977), 68 ILR 175. A similar case can be found in *US v. Cole*, 717 F. Supp. 309 (1989), in which the court rejected the immunity of a consul who claimed that he was ‘in the exercise of functions’ when he smuggled drugs into the receiving State through a diplomatic bag because he could not have been able to access a diplomatic bag without a consular capacity.

<sup>120</sup> *Ibid*, p. 177.

<sup>121</sup> Article 32 of the VCDR.

<sup>122</sup> Chapter 1(2.1).

<sup>123</sup> As pointed out by Lauterpacht, immunity from jurisdiction in practice amounts to immunity from the rule of law because immunity denies an otherwise existing legal remedy. Elihu Lauterpacht (1954), p. 71.

compensation<sup>124</sup>), States are not always willing to accept State responsibility as an alternative to individual criminal responsibility. Thus in the domestic phase of *Rainbow Warriors*, the High Court of Auckland refused to exempt the criminal responsibility of two French soldiers who had performed terrorist attacks in New Zealand following instructions of the French Government, in spite of the fact the French Government had repeatedly stressed that it would assume full responsibility for the acts of the soldiers.<sup>125</sup> For the court, acting under official instruction was merely a consideration of commutation, it did not exempt domestic criminal responsibility.<sup>126</sup> The dispute was later referred to an arbitral tribunal, which ruled that the French soldiers would serve their sentence in a French military base.<sup>127</sup>

This in turn highlights the necessity of leaving a ‘gap’ between ARSIWA and diplomatic immunity *ratione materiae*. A criminal act being attributed to the sending State according to ARSIWA does not necessarily mean that it cannot be simultaneously attributed to the person of the diplomatic agent.<sup>128</sup> It is therefore important to ensure that, when a crime has seriously infringed the interests of the receiving State, the gap would enable the State to hold both the diplomatic agent and the sending State responsible.

### 3.3. Conclusion

To sum up, it is submitted that rules of attribution of State responsibility are not a proper standard for the determination of diplomatic immunity *ratione materiae*. The application of ‘apparent authority’ test would potentially render diplomatic immunity *ratione materiae* the equivalent of personal diplomatic immunity. This broad scope is not supported by either the drafting history of Article 39(2) or State practice after the adoption of the VCDR. Further, it

<sup>124</sup> For more detailed discussion on the distinction between criminal and civil matters, see Chapter 1(3.2).

<sup>125</sup> *R. v. Mafart and Prieur* (1985), 74 ILR 241. The New Zealand Government stressed during the *Rainbow Warrior* arbitration that, since the act of the French soldiers is not only a breach of international law but also a serious crime in New Zealand criminal law, the release of the soldiers would ‘undermine the integrity of the New Zealand judicial system’. See, *infra* note 127, p. 213. For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see, Introduction (3.2).

<sup>126</sup> *Ibid*, p. 250.

<sup>127</sup> *Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair* (6 July 1986), *UNRIAA*, vol. XIX, pp. 199-221. For a detailed recount of the case, see, Davidson (1991), pp. 446-457.

<sup>128</sup> Unless, of course, the act itself falls outside the law of the receiving State, see Chapter 1(3.1).

is important to maintain a gap between ARSIWA and diplomatic immunity *ratione materiae*, because this would allow the receiving State to hold both the diplomatic agent and the sending State responsible when a crime has seriously infringed the interests of the receiving State.

## 4. Making the assessment: ‘In the exercise of functions’ from the perspective of functional necessity

### 4.1. Introduction

The determination of diplomatic immunity *ratione materiae* is an issue in which both the sending State and the receiving State take interests. This in turn suggests that the consideration of the topic must be conducted from two perspectives.

In the first place, the scope of the immunity has a direct bearing on the performance of diplomatic functions, which is primarily, though not exclusively, a concern of the sending State. Although Article 39(2) protects only former diplomats, who no longer perform any official functions, the formula of ‘in the exercise of functions’, as will be shown in Chapter 3,<sup>129</sup> is in fact the same as the formula of ‘in the course of duties’ contained in Article 37 of the VCDR. This means that the scope of ‘in the exercise of functions’ is not merely a concern of former diplomats, but is also relevant for those mission members who are actually performing official duties, hence the functional importance of the immunity. Further, the prospect of being sued in the receiving State may have an impact on a serving diplomat’s performance of official functions, especially if he or she plans to return to the receiving State after leaving the office.<sup>130</sup>

Meanwhile, the conclusion reached above – that a distinction can be made between acts in strict application of diplomatic functions and other acts performed in the exercise of

<sup>129</sup> See, Chapter 3(2).

<sup>130</sup> Bröhmer also justifies the functional importance of Article 39(2) by arguing that the immunity serves to guarantee the unrestricted exercise of diplomatic functions by succeeding diplomats in the receiving State. Bröhmer, p. 369.

functions<sup>131</sup> – suggests that certain extra-official activities, albeit not strictly diplomatic in nature, may nonetheless still be protected by Article 39(2). Thus, from the perspective of the sending State, the first inquiry concerning the determination of ‘in the exercise of functions’ immunity is the extent to which ancillary/incidental acts may be protected by Article 39(2).

On other hand, however, it should be noted that underlying the very notion of diplomatic immunity is the presumption that the interests of ensuring an unimpeded performance of diplomatic functions outweigh the interests of holding a diplomatic agent responsible in domestic law.<sup>132</sup> Reflected in the realm of diplomatic immunity *ratione materiae*, this presumption means that certain illegal ancillary/incidental acts may be tolerated because the interests of punishing the perpetrator do not match the damage caused to the performance of diplomatic functions by the punishment.

Yet this presumption is not absolute. There are cases in which the act of a diplomatic agent is so serious that the damage caused to the receiving State might outweigh the interests of ensuring the efficient performance of diplomatic functions. The VCDR recognises the legitimate interests of the receiving State in this regard. Thus in Article 41(1), the convention imposes an obligation to respect local laws on all persons enjoying immunities and privileges.<sup>133</sup> Similarly, according to Article 9(1), the receiving State may deal with any abuse of immunity by expelling the perpetrator.<sup>134</sup>

Hence, from the perspective of the receiving State, the second inquiry concerning the determination of diplomatic immunity *ratione materiae* is the extent to which the seriousness of an act may be overshadowed by the importance of performing diplomatic functions.

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<sup>131</sup> See, Section 2 above.

<sup>132</sup> In the words of Grotius, ‘the security of ambassadors outweighs any advantage which accrues from a punishment’. Grotius, p. 443. Higgins (1985): ‘diplomatic immunity is an exception to the general rule of territorial jurisdiction’ in order to balance ‘the pursuit of the foreign policy interests of the sending State with respect for the territorial sovereignty of the receiving State’, p. 641. See also, Hyde, p. 435; Bergma, p. 511; Wedgwood, pp. 498-499. In the context of State immunity, Yang points out that the principle emanates from an awareness on the part of a forum State that unrestricted exercise of territorial jurisdiction over foreign States will ultimately work against itself. Yang, p. 73. See also, *Tabion v. Mufti*, in which the court stated that the ‘apparent inequity to a private individual [resulting from diplomatic immunity] is outweighed by the great injury to the public that would arise from permitting suit against the entity or its agents calling for application of immunity’. *Tabion v. Mufti*, infra note 150, p. 539.

<sup>133</sup> Article 41(1) of the VCDR.

<sup>134</sup> Article 9(1) of the VCDR.

These two perspectives will be addressed in turn.

## 4.2. Acts ancillary or incidental to the performance of functions

The main problem with the determination of diplomatic immunity *ratione materiae* for ancillary/incidental acts is that these acts may all be said to benefit the performance of diplomatic functions to a certain extent, for even purely private acts of a diplomatic agent may still be perceived as enhancing his or her wellbeing and thus indirectly facilitating the performance of official functions.

Further, with regard to certain functions, a seemingly ancillary or preliminary act may be crucial to the fulfilment of the functions themselves. Behrens, for example, points out that the function of observation, viewed in the light of Article 26 (freedom of movement),<sup>135</sup> necessarily implies that certain information-collecting activities<sup>136</sup> must be allowed, for otherwise the function would be reduced to the meaningless exercise of passively receiving information.<sup>137</sup>

However, it should be noted that whether an act has been performed in the exercise of functions *in a general sense* is quite a distinct inquiry from whether an act has been performed in the exercise of functions *for the sake of immunity*. The question of immunity arises only when an act has (allegedly) violated local laws,<sup>138</sup> and this fact itself has excluded a wide range of legal activities which can be regarded as in the exercise of functions *in a general sense*. Buying a newspaper is certainly indispensable for the fulfilment of the function of observation,<sup>139</sup> but it is not an ancillary/incidental act that concerns immunity – nobody would argue that buying a

<sup>135</sup> Article 26 of the VCDR.

<sup>136</sup> Behrens indicates that, in particular, interviewing protestors and participating in debates should be deemed as indispensable ancillary or preliminary acts, *infra*, pp. 76, 159 respectively.

<sup>137</sup> Behrens (2016), p. 67.

<sup>138</sup> As pointed out by Higgins, immunity is ‘precisely’ for alleged violation of local laws. Higgins (1985), p. 649.

<sup>139</sup> *Supra* note 137. In a similar line, Seyersted indicates that the interpretation of the function of observation as one which would prohibit interaction with local citizens is in conflict with the VCDR. Seyersted (1970), p. 213; Green, p. 149.

newspaper is an illegal act. What if, however, the diplomatic agent refuses to pay for the newspaper? This is an act that is likely to raise the issue of immunity, but the underlying inquiry is completely different – here the inquiry is no longer whether buying a newspaper is an ancillary/incidental act necessary for the performance of functions, but whether the refusal of payment is such a necessary ancillary/incidental act.<sup>140</sup> In the context of diplomatic immunity *ratione materiae*, the phrase ‘acts performed in the exercise of functions’ has an implication of illegality; but this is simply not the case for acts performed in the exercise of functions *in a general sense*.

The failure to notice the distinction between acts performed in the exercise of functions in a general sense and these acts in the context of immunity also highlights the main problem in literature concerning the scope of diplomatic immunity *ratione materiae* – authors tend to use general terms to denote exceptions to immunity.

One prime example in this regard is traffic offence (including traffic accidents). The question whether a traffic offence can be perceived as an act performed in the exercise of functions has proved controversial within the ILC during the drafting stage of the VCDR,<sup>141</sup> among States at the two Vienna Conferences,<sup>142</sup> and in academic materials.<sup>143</sup> In the case of *Public Prosecutor v. A. d. S.F.*, the Supreme Court of Netherlands held, with regard to the immunity of a service staff member of the Italian Embassy who had driven under the influence of

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<sup>140</sup> For a similar argument, albeit in the context of State immunity for tortious acts committed by diplomatic mission staff, see Yang, p. 211.

<sup>141</sup> The drafting history of Article 38(1) of the VCDR seems to suggest that traffic accidents are protected under Article 39(2) but not Article 38(1), but the position of the ILC is not entirely clear, as most ILC members did not express opinions on this particular point. See, *supra* note 33.

<sup>142</sup> During the 1961 Vienna Conference, the Italian representative, in explaining a joint amendment which sought to grant ‘in the exercise of functions’ immunity to ATS members, stated that ‘traffic offences’ are excluded from the immunity (Official Records, vol. I, p. 36, para. 68 [Italy]). The amendment was partly adopted (with regard to civil immunity), but this statement on traffic offences was not discussed. The UK representative in the 1961 conference held the view that traffic accidents could be deemed as acts performed in the exercise of functions (Ibid, p. 171, para. 9 [UK]); but in the 1963 conference the UK representative indicated the opposite (Official Records of the 1963 conference, vol. II, p. 375, para. 45 [UK]).

<sup>143</sup> For support of immunity, see, Brownlie, 5th edition, p. 361, Salmon, p. 437. For opposite opinions, see, Denza, 3rd edition, p. 416, Brown, p. 77, Lewis, 3rd edition, p. 145, *Satow’s*, 5th edition, p. 145, Silva (1964), p. 1227, Bolewski, p. 792, Whomersley, p. 854.



alcohol,<sup>144</sup> that ‘driving a car may occur in the performance of the duties of a servant, in which case *acts contrary to road traffic provisions* are committed in the performance of such duties’.<sup>145</sup>

Yet it must be questioned whether this whole debate is misplaced in the first place. A traffic offence has various forms, and a traffic accident various causes, that it is simply impossible to state, in a general manner, whether all of them can be regarded as in the exercise of functions or not. Clearly, driving a vehicle to the Ministry of Foreign Affairs of the receiving State is per se an act performed in the exercise of functions *in a general sense*.<sup>146</sup> If, for example, an offence of speeding is committed by the diplomat during the trip, two scenarios can be roughly envisaged: firstly, the diplomat has slightly exceeded the speed limit in order to catch up with an urgent official meeting;<sup>147</sup> secondly, the diplomat has no urgent matter to deal with but still chooses to drive at three times the speed limit for personal pleasure. If in the course of speeding the diplomat causes a traffic accident, two more scenarios may exist: in the third scenario, the accident may cause the death of several persons; in the fourth case, the accident may cause merely some property loss.

From a functional perspective, it seems reasonable to maintain a dividing line between the first and the second scenario. Whereas in the former case the diplomat’s act of speeding seems

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<sup>144</sup> On the relationship between ‘in the exercise of functions’ and ‘in the course of duties’, see Chapter 3(2).

<sup>145</sup> *Public Prosecutor v. A. d. S.F.* (1975), reprinted at 7 *Netherlands Yearbook of International Law* (1976), p. 339 (Emphasis added). Cf. the Abisinio affair, in which the US Government made clear that drunk-driving is not protected by Article 39(2) of the VCDR. *Cumulative Digest*, pp. 997-999. See also, Pecoraro, pp. 533-540; Larschan, pp. 283-295; Donoghue, pp. 615-630. For pre-convention State practice concerning traffic offences, see, Hill (1931), pp. 261-267.

<sup>146</sup> For the same reason as buying a newspaper should be regarded as in the exercise of performing the function of observation, *supra* note 137.

<sup>147</sup> A similar case, albeit concerning the functional immunity of a chauffeur of the UN Secretary-General, can be found at *Westchester County on Complaint of Donnelly v. Ranollo*, 67 N.Y.S.2d 31. The court rejected the immunity of the chauffeur, who had committed speeding while driving the Secretary-General to an official conference, on the ground that his functions were not essential to the overall functioning of the UN. No analysis was provided as to whether speeding had been performed in the chauffeur’s official capacity. The case was subsequently adjourned, during which the US Department of State expressed the opinion that functional immunity should have been granted. The Secretary-General later stated that, in spite of the opinion of the Department of State, he would not ‘press the principle of immunity’ and would pay the fine on behalf of the chauffeur. See, Preuss (1947), pp. 556-557

necessary for him/her to attend the meeting punctually, in the latter scenario there is simply no need to violate local laws.

Yet for authors on both sides of the traffic offence argument, this line does not exist – as long as the diplomatic agent is driving to the Ministry of Foreign Affairs, he or she is either completely immune or completely not. Similarly, for the Supreme Court of Netherlands, no distinction can be made between a parking offence and a traffic accident that kills several pedestrians -- the fact that driving a car is necessary for a servant's performance of duties means that any violation of road traffic regulations would attract immunity.<sup>148</sup>

But this dividing line is important, for it allows for a more detailed examination of the various forms of traffic offences. It is difficult to understand why a diplomat who has slightly exceeded road speed limits in order to attend an urgent meeting should be on an equal standing with a diplomat who is drunk while driving to an official task -- indeed, in this latter case, it might even be argued that intoxication is detrimental to the performance of official functions and thus runs against the purpose of immunity.<sup>149</sup>

Further, it should not be forgotten that the functional necessity of diplomatic immunity is counterbalanced by Article 41(1) of the VCDR. The obligation to respect laws and regulations means that only when an illegal act is truly necessary for the performance of diplomatic functions can a diplomat be exempt from his or her obligation under Article 41(1). Therefore, instead of looking at general exceptions such as traffic accidents or acts incidental to daily

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<sup>148</sup> Supra note 145.

<sup>149</sup> With regard to drunk-driving, the US Department of State, in explaining its practice of submitting a (apparently) drunk diplomat to a breath test, stated that this measure is 'preventative' and serves to protect the diplomat's own safety. See, Circular Note of 3 July 1985, reprinted at Brown, p. 82. Similarly, Canada justified its practice of escorting drunk diplomats, in spite of their personal inviolability, to the local police station on the ground that this is in the interests of the offender himself. See, Department of External Affairs Circular Note of 22 April 1986, reprinted at Brown, p. 84. In a 1982 memorandum concerning diplomatic immunities and privileges, the Legal Bureau of Canadian Government also pointed out that 'it is generally recognised in international law and practice that the principle of inviolability of the diplomatic agent should not prevent the receiving State from taking measures as necessary for ... the protection of the diplomat himself'. *Canadian Digest* (1982), p. 309. For German practice in the same direction, see, Bolewski, p. 793.

life,<sup>150</sup> it seems better to evaluate whether, in each case, an ancillary/incidental act has actually benefited the performance of diplomatic functions directly.<sup>151</sup>

This ‘direct benefit’ test seems to be supported by State practice. Thus, in determining whether an act of employing domestic servants can be protected by Article 39(2) of the VCDR, the court in *Baoanan v. Baja* considered, inter alia, whether the plaintiff had been employed mainly to facilitate the functions of the Philippine mission.<sup>152</sup> In a similar vein, the British court in *Abusabib v. Taddese*, while rejecting the employment of a domestic servant as an act performed in the exercise of functions, recognised nonetheless that, if a diplomatic agent employs a personal assistant to specifically help him/her with official business, diplomatic immunity *ratione materiae* in Article 39(2) will be granted.<sup>153</sup>

However, this direct benefit test only addresses the matter from the perspective of the sending State. The main purpose of this test is to connect an ancillary/incidental act to the performance of functions, but it does not consider the interests of the receiving State. As shown in the above mentioned four scenarios, an ancillary/incidental act that is directly related to the performance of diplomatic functions may nevertheless produce very different consequences.<sup>154</sup> The question is, therefore, whether a receiving State is entitled to evaluate Article 39(2) in the light of the seriousness of an act.

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<sup>150</sup> See, *Tabion v. Mufti*, in which the US Court of Appeals held that ‘day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat’s official functions’. *Tabion v. Mufti*, 73 F. 3rd 535 (4th Cir. 1996), at p. 539. Similar sweeping statement can also be found in the abovementioned case of *Portugal v. Goncalves*, see supra note 41.

<sup>151</sup> Authors have expressed similar opinions in the context of consular immunity. See, Bolewski, p. 794; Milhaupt, p. 857; Harnish, p. 353. With regard to functional immunity in general international law, Foakes also points out that immunity protects ancillary acts ‘directly related’ to sovereign activity. Foakes, p. 146. For the relevance of consular immunity and functional immunity in general international law, see, Introduction (3.2).

<sup>152</sup> Supra note 106. In a similar vein, the US Court of Appeals held that, in order to be protected by consular immunity, an employment of domestic service must have ‘a direct, not an indirect, benefit to consular functions’. See, *Park v. Shin* (2002), 313 F.3d 1138, at p. 1143. See also, *Yugoslav Consul Immunity Case*, in which the Supreme Provincial Court of Bavaria held that a traffic offence would be protected by consular immunity if ‘the vehicle’s use is closely and materially connected with the effective safeguarding of consular functions’. *Yugoslav Consul Immunity Case* (1973), 73 ILR 689.

<sup>153</sup> Supra note 42, para. 31.

<sup>154</sup> See above, first, third, and fourth scenario, text after supra note 146.

### 4.3. Serious nature of an act as an indication of diplomatic immunity *ratione materiae*

In literature and practice, the argument that ‘in the exercise of functions’ immunity should be determined by reference to the serious nature of an act takes several different forms. Cahier, for example, believes that any act that violates local laws should not be regarded as performed in the exercise of functions.<sup>155</sup> The UK Foreign Affairs Committee in its 1984 Report stated that terrorism and other criminal activities can never be justified by reference to diplomatic functions [in Article 3(1) of the VCDR].<sup>156</sup> In a 1977 case concerning consular immunity,<sup>157</sup> the US court pointed out that, whereas a single criminal act may be perceived as ‘in the exercise of functions’, ‘a prolonged course of conduct flagrantly in violation of the criminal laws’ can never be thus perceived.<sup>158</sup> Harvard Draft Convention recognises the possibility of a criminal activity being perceived as within the scope of a diplomat’s functions, but provides that ‘a wilful disregard’ of criminal law is ‘presumably’ not in the exercise of functions.<sup>159</sup> Similarly, editors of *Oppenheim’s International Law* argue that, while serious crimes are certainly not to be regarded as in the exercise of functions, ‘there is more room for doubt where lesser offences are concerned’.<sup>160</sup>

In essence, all these arguments boil down to the statement that ‘the more serious an act, the less likely it is perceived as an act performed in the exercise of official functions’, although

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<sup>155</sup> Cahier, p. 35.

<sup>156</sup> Foreign Affairs Committee Report, para. 16. The same opinion was expressed in a 1987 case concerning consular immunity, see, *Gerritsen v. de la Madrid Hurtado*, 819 F. 2d 1511, at p. 1517. See also, Lee, 2nd edition, p. 497.

<sup>157</sup> For the relationship between consular immunity and diplomatic immunity *ratione materiae*, see Introduction (3.2).

<sup>158</sup> *Illinois Commerce Commission v. Salamie*, 54 Ill. App. 3d 465 (1977), at p. 474.

<sup>159</sup> Harvard Draft, p. 98. Others have argued that violations of human rights and abusive acts against domestic workers should not be regarded as ‘in the exercise of functions’. See, Vicuna, p. 48 and Garnett, p. 822 respectively. Cf. Ben-Asher, pp. 30-32.

<sup>160</sup> *Oppenheim’s*, 9th edition, p. 1145. Milhaupt also argues that criminal acts, in particular those which are *malum in se*, should never be protected by consular immunity, although the author recognises that in practice the criminal law of a receiving State may potentially conflict with an essential consular function. Milhaupt, p. 861. With regard to functional immunity in general international law, see, for example, Koh, p. 1154, in which the author argues that acts in violation of both international and domestic law are not within a State official’s ‘legitimate authority’.

authors do not have consensus as to the degree of seriousness required for the deprivation of immunity.

To some extent, this statement is supported by post-VCDR State practice. In cases where diplomatic immunity *ratione materiae* (or consular immunity) was upheld, the underlying act almost always concerned less serious offence. Thus in *Propend v. Sing*, the British Court of Appeal upheld immunity under Article 39(2) of the VCDR for a charge of contempt of court.<sup>161</sup> Similarly, in *Risk v. Halvorsen*, several Norwegian consular officials were granted consular immunity for an act of assisting Norwegian citizens to leave the US in violation of a court order.<sup>162</sup>

This tendency of not punishing minor offences seems justifiable from the perspective of the receiving State<sup>163</sup> -- as long as a minor offence is closely related to the performance of functions, it could be tolerated because the interests of leaving the diplomat free from harassment outweigh the interests of punishing him/her for the act.

Yet this standard has its problems in practice.

In the first place, this standard is not applicable to acts in strict application of diplomatic functions, as these acts fall outside the law of the *receiving State* and are usually lawful according to the law of the *sending State*.<sup>164</sup> Thus, in the Iran-Australia incident,<sup>165</sup> the Australian diplomats' act of issuing visas in accordance with Australian visa regulations should always be regarded as 'in the exercise of functions', even though, by asking Iranian women to take off their headdress, the diplomats had seriously violated Iranian law.

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<sup>161</sup> *Supra* note 97. Cf. *Gustavo JL and Another* (86 ILR 517) and *Tabatabai* (80 ILR 389), both concerning drug-trafficking. See also, with regard to the immunity of a chauffeur of Mexican Embassy to Netherlands, *L.F.L.M. v. the Public Prosecutions Department*, Supreme Court of Netherlands, 2 March 1993, NJ (1993) No. 667, at 25 NYIL 527.

<sup>162</sup> *Risk v. Halvorsen*, 936 F.2d 393. See also, *Gerritsen v. de la Madrid Hurtado*, concerning a verbal threat, *supra* note 156. Cf. Abu Omar, concerning kidnapping, *General Prosecutor at the Court of Appeals of Milan v. Adler and ors*, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012), 29 November 2012; *L. v. The Crown*, concerning indecent assault of a woman, *supra* note 119; *US v. Chindawongse*, concerning heroin distribution, *US v. Chindawongse* (1985), 771 F.2d 840.

<sup>163</sup> *Supra* note 132.

<sup>164</sup> See, Chapter 1(3.1).

<sup>165</sup> *Supra* note 37.

Secondly, using the serious nature of an act as a standard risks defeating the very purpose of immunity, which is to prohibit a court from looking into the substance of the case. If diplomatic immunity *ratione materiae* is based on the *alleged* seriousness of an act, the immunity would be easily circumvented by *claiming* that the act of a diplomat is serious.<sup>166</sup> On the other hand, if diplomatic immunity *ratione materiae* is based on the *actual* seriousness of an act, the court would have to examine the substance of the case in order to decide whether it has jurisdiction to examine the substance. This is a typical circular reasoning. Indeed, considering that in criminal proceedings a defendant is presumed to be innocent until a verdict is rendered, it is difficult to see how the actual criminality (seriousness) of an act could be applied to determine the preliminary issue of immunity.

Thirdly, it is difficult to draw a line between serious matters and non-serious matters. An act that is criminal in one State may not be so in another, and even for the same crime, different States may prescribe distinct criminal punishments.<sup>167</sup> The UK, for example, defines a serious crime as any offence that might carry a custodial sentence of over 12 months.<sup>168</sup> The US definition of serious offence, on the other hand, refers to ‘any felony’, ‘any crime of violence, such as an attack with a firearm or dangerous weapon’, and ‘driving under the influence of alcohol or drugs, which causes injury to persons’.<sup>169</sup> Australia, for its part, considers a grave crime ‘any offence punishable on a first conviction by imprisonment for a period that may extend to 5 years or by a more severe sentence’.<sup>170</sup>

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<sup>166</sup> In *Al-Malki v. Reyes*, for example, domestic workers of a Saudi Arabian diplomat tried to defeat diplomatic immunity by arguing that their employment by the diplomat had amounted to racial discrimination and human trafficking. The British Employment Appeal Tribunal rejected the claim. See, *Al-Malki and another v Reyes and another*, UKEAT/403/12, para. 44. See also, Kartusch, p. 35, in which the author reveals, based on an empirical study concerning the application of diplomatic immunity in situations of domestic employment abuse, that, in the majority of cases, domestic workers face difficulties to provide evidence for alleged abuse, thus leaving the court unable to make a decision.

<sup>167</sup> The problem is further complicated by the fact that, in federal systems like the US, each state has its own penal code. See, on this point, Lee, 3rd edition, p. 435.

<sup>168</sup> *UK Digest* (2014), p. 530. See also, Government Report 1985, para. 69.

<sup>169</sup> *US Digest* (1989-1990), pp. 327-328.

<sup>170</sup> Consular Privileges and Immunities Act 1972, Section 5(2)(d), available at: <https://www.legislation.gov.au/Details/C2016C01068>.

The drafting history of Article 41(1) of the VCCR, which provides that a consular officer does not enjoy personal inviolability in case of a ‘grave crime’,<sup>171</sup> also illustrates the difficulty of finding an international standard of serious acts.

In the 1960 draft of the VCCR, the ILC proposed two variants with regard to the exception of personal inviolability.<sup>172</sup> The first variant provided that personal inviolability does not apply in case of an offence ‘punishable by a maximum sentence of not less than five years’ imprisonment’. The second variant used the term ‘grave offence’ without defining its meaning. The first variant was later deleted from the draft because most States commenting on the draft held the view that, due to the difference between national legislations, a precise definition of grave offence was neither possible nor necessary.<sup>173</sup> During the Vienna Conference on Consular Relations, various amendments were made in order to provide a precise meaning of ‘grave crime’, but none received sufficient support.<sup>174</sup>

The difficulty of defining serious acts in turn highlights the problem with the standard of serious nature of an act. If this standard is used to determine diplomatic immunity *ratione materiae*, an act would be in the exercise of functions in one State but outside the exercise of functions in another. This result seems quite against the functional basis of the immunity, for if an act is directly related to the performance of diplomatic functions, it is illogical that the act is protected in one State but not in another. The serious nature of an act can be used as an indication that the act has not been performed in the exercise of functions; but it is not in itself sufficient to determine diplomatic immunity *ratione materiae*.

#### 4.4. Conclusion

The determination of diplomatic immunity *ratione materiae* is a process which requires a very detailed examination of the factual end of a case. This in turn suggests that, instead of trying to provide for individual general exceptions, each case should be evaluated according to its

<sup>171</sup> Article 41(1) of the VCCR.

<sup>172</sup> Ybk ILC 1960, vol. II, pp. 167-168.

<sup>173</sup> See, for example, comments made by Netherlands, Switzerland, and the US, Ybk ILC 1961, vol. II, p. 147, p. 162, p. 167 respectively.

<sup>174</sup> Brazil, for example, proposed defining a grave crime as one that carries a maximum term of five years; Yugoslavia, on the other hand, thought two years should be a better solution. See, Official Records of the Vienna Conference on Consular Relations, vol. II, p. 80, 86 respectively.

own details. Based on the rationale behind diplomatic immunity *ratione materiae*, it is submitted that an act should be regarded as in the exercise of functions if it directly benefits the performance of diplomatic functions. Meanwhile, although the serious nature of an act is not per se a viable standard, it is still an important factor to be considered in the determination of diplomatic immunity *ratione materiae* because it serves as a potential safeguard of the interests of the receiving State.

## 5. Protection ‘in the performance of his functions’ — the case of diplomatic couriers

On 7 March 1989, a French diplomatic courier found himself in trouble when he was transiting Miami airport on his way to deliver a diplomatic bag to the French Embassy in Jamaica.<sup>175</sup> As he was transferring to a flight bound for Kingston, a sniffer dog alerted the US authorities to the presence of drugs. The US customs was notified and the diplomatic bag was subjected to X-ray, which revealed ‘13 kilo-sized packages which were wrapped and configured in an identical manner to kilo-sized bundles of cocaine’. The US customs requested the bag be opened; and detained the diplomatic courier when the request was rejected. Officials from the US Government and the French Consulate in Miami were called in to resolve the issue; and during their meeting at the airport, a second sniffer dog gave the same alert for the same bag. After the meeting, the diplomatic bag was sent back to Paris for inspection; and the diplomatic courier, after being detained for several hours, was allowed to continue his journey.

The courier in this incident was not delivering the diplomatic bag to the French Embassy in Washington D.C., but the US has a duty under Article 40(3) of the VCDR to accord diplomatic couriers in transit ‘the same inviolability and protection as the receiving State is bound to accord’.<sup>176</sup> Article 27(5) of the VCDR provides that a diplomatic courier shall enjoy personal inviolability and shall not be liable to any form of arrest or detention in the receiving State while ‘in the performance of his functions’.<sup>177</sup> Interestingly, although the French authority

<sup>175</sup> ‘Diplomatic Courier’s Suspected Drug Pouch Sent Back to Paris’, *United Press International*, 8 March 1989.

<sup>176</sup> Article 40(3) of the VCDR.

<sup>177</sup> Article 27(5) of the VCDR.



insisted that the diplomatic bag merely contained ‘totally inoffensive working material’, it had never protested against the US’s disruption of the delivery of the ‘inoffensive material’.<sup>178</sup>

The attitude of France in this incident might be contrasted with that of Australia. In a diplomatic note addressed to the Canadian High Commission in Canberra, the Australian Department of Foreign Affairs set out its stance that even if a diplomatic courier ‘is found or suspected to be carrying arms, explosives, prohibited imports or the like’, he or she cannot be arrested or detained due to Article 27(5) of the VCDR.<sup>179</sup>

The different attitudes of France and Australia boil down to a proper interpretation of the phrase ‘shall be protected in the performance of his functions’ in Article 27(5). Unlike Article 38(1) and Article 39(2), ‘in the performance of his functions’ in Article 27(5) does not refer to the nature of an act, which in turn implies that diplomatic couriers are always protected as long as they are still in possession of a diplomatic bag.<sup>180</sup> If this is the proper understanding, the immunity under Article 27(5) would mean that a diplomatic courier is protected in the temporal scope of ‘performance of functions’, viz. during the performance of functions.<sup>181</sup>

On the other hand, it is also possible that the phrase intends to protect diplomatic couriers only when they are performing their functions in a strict sense. Following this line, acts such as smuggling drugs could hardly activate the protection under Article 27(5).<sup>182</sup>

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<sup>178</sup> Supra note 175.

<sup>179</sup> *Australian Digest* (1974-1975), p. 326.

<sup>180</sup> This is clearly the position of Australia, see *ibid*.

<sup>181</sup> This seems to be the attitude of Denza when she says, in the first edition of *Diplomatic Law*, that the phrase limits the receiving State’s duty of protection to ‘periods’ when a courier may be regarded as on duty. See, Denza, 1st edition, p. 130. But Denza does not expound on this point; and subsequent editions of the book simply state that personal inviolability is ‘closely linked’ to the protection of diplomatic bags. See, for example, Denza, 2nd edition, p. 206. For a similar understanding of the immunity of diplomatic couriers, see, Lyons (1954), p. 334, in which the author states that the purpose of such immunity is to make sure that a courier when delivering bags is ‘free from all interference’.

<sup>182</sup> For similar incidents like the one between the US and France, see, for example, ‘Croatian Foreign Ministry Employee Caught with Cocaine in Netherlands’, *Agency France Presse*, 17 February 2004; Tim Butcher, ‘Diplomatic Bag Is Used to Bring in Heroin’, *The Daily Telegraph (London)*, 30 October 2003. In an earlier incident between the US and Spain, several American couriers were arrested and searched by the Spanish authority in their performance of functions because they had carried two large briefcases in addition to the diplomatic bags entrusted to their care. Spain explained in a diplomatic note that ‘the intention of the Spanish officials was to avoid abuse of immunity through packages which bore no guarantee whatever of their official status’. Whiteman, *7 Digest*, pp. 214-216.

Further, the text of Article 27(5) fails to make clear whether personal inviolability is the only form of protection for a diplomatic courier who is performing functions. As will be seen below, there is no consensus among States as to the scope of protection necessary for the performance of a diplomatic courier's functions.<sup>183</sup>

This section will examine the two problems in turn.

## 5.1. 'In the performance of his functions' as a temporal conception

The phrase 'in the performance of his functions' was not added to Article 27(5) until the Vienna Conference, following a joint amendment submitted by France and Switzerland.<sup>184</sup> The two States did not explain the meaning of the amendment; and the discussion on Article 27 (then Article 25) during the conference, which was largely dominated by the controversy over the use of wireless transmitters, fails to provide much guidance as to the meaning of 'in the performance of his functions'. The representative of Switzerland had at an earlier stage expressed the view that the purpose of the phrase was to 'tighten up' the protection of diplomatic couriers by limiting their inviolability only to the performance of their functions.<sup>185</sup> Yet the core question remains unanswered: It was not clear whether States by adopting the phrase had intended it to denote the nature of acts or the temporal scope of the performance of functions.

Switzerland's understanding of the phrase was, however, explained more clearly in its response to the 1957 draft of the VCDR.<sup>186</sup> In proposing to add the phrase to the ILC draft Article 21(4), the Swiss Government stated that:

Unlike the members of the diplomatic mission, the diplomatic courier does not remain permanently in the receiving State; his stay is limited to the *periods of travel during*

<sup>183</sup> Section 5.2 below.

<sup>184</sup> Official Records, vol. II, pp. 38-39.

<sup>185</sup> Official Records, vol. I, p. 157, para. 49 [Switzerland].

<sup>186</sup> Article 21(4) of the ILC 1957 Draft simply stated that 'the diplomatic courier shall be protected by the receiving State'. Ybk ILC 1957, vol. II, p. 138.

*which* he exercises his functions. It is therefore enough to grant him personal inviolability in the actual exercise of his functions.<sup>187</sup>

In a similar move to curtail the scope of the protection of diplomatic couriers, the government of Netherlands also proposed that a diplomatic courier should enjoy personal inviolability only when ‘he travels exclusively as a diplomatic courier’.<sup>188</sup>

In order to give effect to the amendments of Switzerland and Netherlands, the Special Rapporteur changed the text of draft Article 21(4) to ‘if such a person [diplomatic courier] is travelling exclusively as a diplomatic courier he shall enjoy personal inviolability during his journey’.<sup>189</sup> But this text change incurred criticism inside the ILC. Fitzmaurice pointed out that the phrase ‘during his journey’ might be interpreted to mean that the courier should not enjoy personal inviolability in the intervals between his journeys.<sup>190</sup> For him, unless the courier ‘went on leave during the interval, his inviolability and immunity should not be interrupted’.<sup>191</sup> Yokota, in proposing the deletion of the word ‘exclusively’ from the Special Rapporteur’s text, also observed that a diplomatic courier should not be divested of inviolability if he or she is travelling for some other purposes at the same time.<sup>192</sup> As a result, the text adopted by the 1957 Draft, which was itself an adjustment to the Special Rapporteur’s original proposal that granted protection only when a diplomatic courier is ‘carrying the despatches’,<sup>193</sup> persisted.

The drafting history of Article 27(5) of the VCDR, taken as whole, suggests that the phrase ‘in the performance of his functions’ is intended to denote a temporal conception. The main controversy concerning the scope of Article 27(5) was whether a diplomatic courier should enjoy inviolability when he or she is *not* in possession of diplomatic bags but is still in the general framework of ‘performance of functions’. Yet even for the restrictive view,<sup>194</sup> personal inviolability still pertains to the whole period when the courier is carrying diplomatic bags, irrespective of the nature of a particular act he or she has committed during the journey. In this respect, ‘in the performance of his functions’ in Article 27(5) is similar to the formula of ‘during the exercise of functions’ which was proposed, but rejected, in the context of Article

<sup>187</sup> A/CN. 4/114 and Add. 1-6, p. 130 (Emphasis added).

<sup>188</sup> Ibid, p. 125.

<sup>189</sup> Ybk ILC 1958, vol. II, p. 17.

<sup>190</sup> Ybk ILC 1958, vol. I, p. 140, para. 2 [Fitzmaurice].

<sup>191</sup> Ibid.

<sup>192</sup> Ibid, para. 6 [Yokota].

<sup>193</sup> Ybk ILC 1957, vol. I, p. 74 [Sandström].

<sup>194</sup> Supra note 189. Cf. Fitzmaurice and Yokota, supra note 190 and 192.

39(2),<sup>195</sup> although a diplomatic courier's exercise of functions must be construed as encompassing the intervals between his or her official journeys.<sup>196</sup>

This understanding of 'in the performance of functions' finds support in State practice after the adoption of the VCDR. Besides the statement made by the Australian Department of Foreign Affairs above,<sup>197</sup> the US Department of State interprets Article 27(5) as granting full personal inviolability to professional couriers and inviolability for non-professional ones '*during the time* in which he/she has a properly designated diplomatic pouch in his/her charge'.<sup>198</sup> The UK Government simply states in its Diplomatic Privileges Manual that 'couriers are entitled to personal inviolability and must not be searched, arrested or detained'.<sup>199</sup> The Manual does not explicitly state that a courier is protected during his or her performance of functions. Yet it must be noted that the very definition of a courier implies that the person concerned is performing official functions of delivering diplomatic bags. Article 27(5) provides that a courier 'shall be provided with an official document indicating his status and the number of packages constituting the diplomatic'.<sup>200</sup> This provision serves two purposes: firstly, it gives a clear indication as to whether a courier is in the temporal scope of 'performance of functions'. Thus, as long as a courier is carrying this official document, he or she should be regarded as in the temporal scope and thus protected by inviolability regardless of the nature of a specific act; secondly, the provision separates a courier's official capacity from his or her private capacity. Therefore, when a courier does not carry the official document mentioned in Article 27(5), he or she is in fact not a courier but a private person, who enjoys no inviolability at all. In other words, the very fact that an individual can be regarded as a courier suggests that he or she is within the temporal scope of 'performance of functions', hence the protection of personal inviolability.

<sup>195</sup> Supra note 104, 105 and accompanying text.

<sup>196</sup> Cf. Article 27(6) of the VCDR, which provides that an ad hoc diplomatic courier enjoys all protection in Article 27(5) except that the protection expires immediately after the delivery of the diplomatic bag. Denza, 4th edition, pp. 209-210. But see, Silva (1972), who believes that Article 27(6) is 'superfluous' in practice because Article 27(5) only protects a courier when he is performing his functions. Silva, p. 54.

<sup>197</sup> Supra note 179.

<sup>198</sup> See, <https://www.state.gov/ofm/customs/c37011.htm> (Emphasis added).

<sup>199</sup> See, <https://www.gov.uk/hmrc-internal-manuals/diplomatic-privileges/dippriv2400>.

<sup>200</sup> Article 27(5) of the VCDR.

Underlying the difference between ‘in the performance of functions’ in Article 27(5) and ‘in the exercise of functions’ in Article 39(2) is the difference between personal inviolability and immunity from jurisdiction. Hardy observes in this regard that, whereas immunity from jurisdiction ‘is primarily directed to the action (or non-action) of the courts’, inviolability ‘has as its first concern the preservation of mission staff from immediate physical harm or constraint’.<sup>201</sup> A court proceeding against a courier would not necessarily disrupt the performance of official functions as long as the courier’s personal freedom remains intact. But arrest or detention is different: The delivery of a diplomatic bag would definitely be affected even if the courier is arrested or detained for matters *unrelated* to his or her performance of functions.<sup>202</sup> This in turn suggests that personal inviolability cannot be based on the nature of an act, but must be based on a temporal context. The purpose of granting personal inviolability to diplomatic couriers is to ensure the safety and unimpeded delivery of diplomatic bags. From this perspective, it is difficult to speak of ‘functional inviolability’ based on an evaluation of the nature of a particular act.<sup>203</sup> If personal inviolability can be denied when a diplomatic courier has committed a criminal activity which warrants arrest or detention on his or her way to deliver diplomatic bags, it must be questioned why the principle exists in the first place. In fact, during the Vienna Conference, the French representative had sought to base personal inviolability of ad hoc couriers on the nature of acts they perform when he argued, in the plenary meetings, that such inviolability should not pertain to the ‘personal effects’ of a courier.<sup>204</sup> This argument was nonetheless rejected by the Drafting Committee.<sup>205</sup>

Further evidence in this respect can be found in the VCCR. Article 43(1) of the VCCR provides that a consul enjoys immunity from jurisdiction for acts performed in the exercise of consular functions;<sup>206</sup> but under Article 41 the personal inviolability of consuls is not based on the official nature of an act — unless an arrest or detention is necessary to stop ‘a grave crime’,

<sup>201</sup> Hardy, p. 51. See also, Foakes, who points out that, unlike jurisdictional immunity, inviolability is not just a procedural bar but ‘an absolute physical privilege’. Foakes, p. 76. See also, Nahlik, p. 251; Bao, p. 25.

<sup>202</sup> As pointed out by Cahier, the arrest of a diplomatic courier would have ‘untoward consequences’ for the freedom of communication and derogate from the inviolability of diplomatic bags. Cahier, p. 26.

<sup>203</sup> For a distinct usage of the term ‘functional inviolability’, see, Addicott, who describes the protection of diplomatic bags as functional inviolability because the protection, albeit falling short of full inviolability, only allows for very limited exceptions. Addicott, pp. 227-229.

<sup>204</sup> Official Records, vol. I, p. 18, para. 31.

<sup>205</sup> Ibid, footnote 4.

<sup>206</sup> Article 43(1) of the VCCR.

or is in execution of a judicial decision of final effect, a consul essentially enjoys full personal inviolability.<sup>207</sup> In its commentary to the article on personal inviolability, the ILC explains that personal inviolability must be broader in scope than consular immunity because the arrest of a consul ‘hampers considerably the functioning of the consulate and the discharge of the daily tasks’.<sup>208</sup> More specifically, in its commentary to Article 16 of the Draft Articles on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier and Draft Optional Protocols (DASDC), which provides for ‘in the performance of functions’ personal inviolability to diplomatic couriers, the ILC observes that this inviolability ‘comes very close in its scope and legal implications’ to the inviolability of diplomatic agents.<sup>209</sup>

It then follows that ‘in the performance of his functions’ in Article 27(5) should be understood as a temporal conception denoting the whole period of a courier’s performance of functions. In this respect, it must be pointed out that this conclusion does not mean that a receiving State can do nothing to deal with abuse of personal inviolability. As the ICJ explained in *Tehran Hostages*, the principle of personal inviolability does not preclude a receiving State from ‘briefly’ arresting the perpetrator in order to discontinue an ongoing crime.<sup>210</sup> On other hand, however, if absolute personal inviolability *during* the performance of a courier’s functions is not guaranteed, the receiving State could easily disrupt the delivery of diplomatic bags by invoking some personal wrongdoing of the courier. This is clearly not the intention behind Article 27(5); and it would defeat the purpose of ensuring the safety and unimpeded delivery of diplomatic bags.

## 5.2. Personal inviolability as the only form of protection

<sup>207</sup> Article 41(1) and (2) of the VCCR.

<sup>208</sup> Ybk ILC 1961, vol. II, p. 116, para. 13.

<sup>209</sup> DASDC with commentaries, p. 27, para. 2.

<sup>210</sup> *Tehran Hostages*, para. 86. See also, commentaries to Article 29 (personal inviolability) of the 1958 Draft, Ybk ILC 1958, vol. II, p. 96; DASDC with commentaries, p. 27, para. 4; Shaw, p. 578. For State practice supporting this understanding, see, the US Guidance for Law Enforcement and Judicial Authorities, p. 7; with regard to German practice, see, Bolewski, p. 792; with regard to Canadian position, see, *Canadian Digest* (1982), p. 310. For a criticism of the ICJ judgment in *Tehran Hostages*, see, Behrens (2017), p. 83.

The principle of personal inviolability in Article 27(5) is set out in a separate sentence as the phrase '[The diplomatic courier] shall be protected by the receiving State in the performance of his functions'.<sup>211</sup> On its face, it is not clear whether personal inviolability is exclusive of or cumulative to other potential 'protection' enjoyed by a diplomatic courier.<sup>212</sup> The Preamble of the VCDR provides that rules of customary international law should continue to govern questions not expressly regulated by the convention.<sup>213</sup> Therefore, it is possible that additional immunities in customary international law may form part of the 'protection' of a diplomatic courier.

The separate sentence concerning personal inviolability was first added to the article in 1957, following an amendment proposed by Tunkin.<sup>214</sup> However, Tunkin in making the proposal did not explain whether he had intended the separate sentence to explain the overall 'protection' of diplomatic couriers or to merely stress the most important form of such protection. The ILC's discussion on the matter in 1957 had focused completely on personal inviolability, although Fitzmaurice had on one occasion alluded to 'diplomatic immunity' of professional couriers.<sup>215</sup>

In its response to the ILC 1957 Draft, Switzerland proposed a redraft of the article on diplomatic couriers which read:

In the exercise of his functions the diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial. *He shall enjoy no other privilege or immunity.*<sup>216</sup>

The scope of 'protection' provided to diplomatic couriers would have been greatly clarified if this last sentence had been adopted. But the ILC again did not consider this matter in its 1958 discussion and, as a result, the commentary to the 1958 Draft stated in ambiguous terms that 'paragraph 5 [of draft Article 25] deals with the inviolability *and the protection* enjoyed by

<sup>211</sup> Article 27(5) of the VCDR.

<sup>212</sup> Editors of earlier versions of *Oppenheim's International Law* seem to hold the view that personal inviolability is not sufficient for the protection of diplomatic couriers. See, *Oppenheim's*, 8th edition, p. 813: 'to ensure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction'.

<sup>213</sup> Preamble of the VCDR.

<sup>214</sup> Ybk ILC 1957, vol. I, p. 83, para. 79 [Tunkin].

<sup>215</sup> Ibid, para. 87 [Fitzmaurice].

<sup>216</sup> Supra note 187. (Emphasis added).

the diplomatic courier in the receiving State'.<sup>217</sup> This issue was not discussed during the Vienna Conference.

The main question to be answered with regard to the scope of the 'protection' in Article 27(5) is whether additional immunities are necessary for the performance of a diplomatic courier's functions. Early writers tend to believe that full diplomatic immunity is needed to ensure the freedom of communication,<sup>218</sup> whereas writers after the adoption of the VCDR seem to prefer the opposite.<sup>219</sup> States' attitudes towards this question are not consistent, either; and this can be reflected by their reaction to the DASDC.<sup>220</sup> The purpose of the DASDC is to 'develop and concretise' relevant provisions of the VCDR.<sup>221</sup> In its final form, the DASDC greatly expands the protection of diplomatic couriers to include, in addition to personal inviolability, inviolability of temporary accommodation,<sup>222</sup> immunity from jurisdiction for acts performed in the exercise of functions,<sup>223</sup> exemption from customs duties, dues and taxes,<sup>224</sup> and exemption from examination and inspection.<sup>225</sup>

Yet the opinions of States vary widely with regard to these additional protections.

For States which were in favour of this expansion, not only are these additional privileges and immunities necessary for the performance of a diplomatic courier's functions, the immunity from jurisdiction must also be complete in criminal proceedings. It was pointed out in particular that, due to the importance of the functions performed, a diplomatic courier should have a comparable status to that of a member of administrative and technical staff, hence the full immunity from criminal jurisdiction.<sup>226</sup>

<sup>217</sup> Ybk ILC 1958, vol. II, p. 97.

<sup>218</sup> *Oppenheim's*, 8th edition, p. 813; Hurst (1950), pp. 206-207.

<sup>219</sup> *Satow's*, 5th edition, p. 117; Aust (2010), p. 124; Murty, p. 389.

<sup>220</sup> Ybk ILC 1989, vol. II, Part Two, p. 14.

<sup>221</sup> GA Resolution 31/76 of 13 December 1976, available at: <http://legal.un.org/docs/?symbol=A/RES/31/76>.

<sup>222</sup> Article 17 of the DASDC.

<sup>223</sup> Article 18 of the DASDC.

<sup>224</sup> Article 19 of the DASDC.

<sup>225</sup> Article 20 of the DASDC.

<sup>226</sup> Ybk ILC 1988, vol. II (1), p. 139 [Czechoslovakia]. For similar opinions, see comments made by Bulgaria, Byelorussian Soviet Socialist Republic, Chile, Union of Soviet Socialist Republics, and Yugoslavia, p. 136, 138, 152, 159 respectively.



For other States, however, these additional privileges and immunities are incompatible with the functions performed by diplomatic couriers.<sup>227</sup> As diplomatic couriers are just a means used by the sending State to deliver diplomatic bags, it was believed that personal inviolability is sufficient from a functional perspective.<sup>228</sup>

The disagreement among States on the additional immunities in DASDC seems to militate against the existence of a customary rule recognising additional protection of diplomatic couriers.

Further, although State parties did not discuss the relationship between the ‘protection’ of diplomatic couriers and their personal inviolability during the Vienna Conference, certain minor aspects of the drafting history of Article 27(5) seem to support a restrictive understanding of the ‘protection’. The proposal made by the Swiss Government in its comments to the ILC 1957 Draft clearly indicates that Switzerland regarded personal inviolability as the only form of protection for diplomatic couriers.<sup>229</sup> Large parts of the proposal were later adopted by the Vienna Conference, although Switzerland in its renewed effort to introduce the proposal during the Vienna Conference somehow omitted the last sentence of ‘He shall enjoy no other privilege or immunity’.<sup>230</sup>

Bulgaria and Czechoslovakia intended to grant full immunity from criminal jurisdiction by aligning the status of diplomatic couriers with ATS members of a diplomatic mission,<sup>231</sup> but it should be recalled that during the Vienna Conference, a US’s amendment<sup>232</sup> which merely aimed at expanding personal inviolability (as opposed to full immunity from criminal jurisdiction) of diplomatic couriers to the same extent as ATS members was rejected by a rather wide margin.<sup>233</sup> Indeed, if the ‘protection’ of diplomatic couriers in Article 27(5) could

<sup>227</sup> See comments made by Australia, Austria, Belgium, Canada, France, Greece, Netherlands, UK, *ibid*, pp. 131, 132, 133, 138, 140-141, 145, 146, 153-158 respectively. See also the comments made by the US, at *Ybk ILC 1989*, vol. II (1), pp. 76-79. See also, Eiriksson, pp. 289-290.

<sup>228</sup> *Ibid*, p. 132.

<sup>229</sup> *Supra* note 216.

<sup>230</sup> Joint amendment of Switzerland and France, *supra* note 184.

<sup>231</sup> *Supra* note 226.

<sup>232</sup> *Official Records*, vol. II, p. 23.

<sup>233</sup> The amendment was rejected by 36 votes to 8, with 17 abstentions, *Official Records*, vol. I, p. 181. The US Department of State made it clear in a 1981 circular note addressed to Heads of Mission in Washington D.C. that ‘couriers, messengers, and guards’ would not be classified as ATS members because they ‘did not perform functions relating directly to the official relations between the mission and the receiving State’. *Cumulative Digest*, pp. 913-914.

encompass so many additional privileges and immunities as set out in the DASDC, it seems unlikely that the drafters of the VCDR did not even bother to discuss the matter.

It then follows that the better understanding of Article 27(5), in light of the relevant travaux préparatoires of the VCDR and States' opinions towards the DASDC, seems to be that personal inviolability is the only form of protection for a diplomatic courier.

This conclusion means that a diplomatic courier may be subject to the jurisdiction of the court of the receiving State for an act which attracts the protection of personal inviolability. During the Vienna Conference, some States expressed the opinion, in the context of the immunity of ATS members, that immunity from jurisdiction must be co-extensive with personal inviolability, for otherwise the jurisdiction of the court would be meaningless because the court could neither compel the attendance of the defendant (who enjoys personal inviolability), nor enforce a penal sentence.<sup>234</sup> This argument is untenable. A court proceeding, in particular a civil one, serves the unique purpose of establishing facts and attributing liabilities between the parties; and this process is not always accompanied by coercive measures. Personal inviolability, on the other hand, protects an individual from direct physical constraint; and in this respect it comes closer to immunity from *execution* rather than immunity from *jurisdiction*. Article 31(3) of the VCDR provides that any measure of execution cannot be taken if the personal inviolability of the diplomat might be infringed, but this does not affect the jurisdiction of the court to render judgment if one of the exceptions in Article 31(1) applies.<sup>235</sup> Similarly, if a court proceeding is only meaningful on the condition that coercive measures concomitant to the proceeding can be freely applied, Article 32(4) would become superfluous because it allows a sending State to waive immunity from jurisdiction without waiving immunity from execution.<sup>236</sup> Personal Inviolability and immunity from jurisdiction

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<sup>234</sup> Official Records, vol. I, p. 33, para. 47 [US]; p. 34, para. 52 [Poland]. This also seems to be opinion of Barker, who argues that 'it is difficult to imagine a circumstance in which the receiving State could exercise its jurisdiction over a diplomatic courier [covered by personal inviolability]'. See, Barker (1996), pp. 86-87.

<sup>235</sup> Article 31(3) of the VCDR.

<sup>236</sup> Article 32(4) of the VCDR. Attempts to delete the distinction between execution and jurisdiction have been rejected by a rather wide margin at the Vienna Conference, see, Official Records, vol. I, p. 177. It was pointed out in particular that execution is much more sensitive than mere assumption of jurisdiction. See, for example, *ibid*, p. 174, para. 4 [Israel]; p. 176, para. 25 [Yugoslavia]; p. 177, para. 37 [Romania].

are distinct matters; and this determines that there is nothing illogical in granting only personal inviolability to diplomatic couriers under Article 27(5).<sup>237</sup>

### 5.3. Conclusion

This section explored the scope of diplomatic immunity *ratione materiae* enjoyed by diplomatic couriers. It is concluded that:

Firstly, personal inviolability is the only form of protection under Article 27(5) of the VCDR. The drafting history of Article 27(5) suggests that State parties do not intend to give a diplomatic courier any protection broader than personal inviolability. Further, States' reaction to the ILC DASDC also illustrates that no consensus exists as to the potential additional protection under Article 27(5).

Secondly, personal inviolability applies to the temporal scope of a courier's performance of functions. The difference between personal inviolability and immunity from jurisdiction determines that it is impossible to base personal inviolability on the nature of a single act. In order to guarantee a safe and unimpeded delivery of diplomatic bags, a diplomatic courier must be protected by absolute personal inviolability *during* his or her performance of functions.

## 6. Conclusion of Chapter 2

This chapter has examined the formula of 'in the exercise/performance of functions' in the VCDR. Based on the conclusions reached above, it is submitted that each immunity has its unique scope of application:

The strictest form of the formula exists in Article 38(1). An 'official act' performed in the exercise of functions is one which is in strict application of these functions. The immunity for such an act is the 'irreducible minimum' for the performance of diplomatic functions; and it

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<sup>237</sup> In his criticism of the argument that State immunity from jurisdiction is based on the impossibility of execution against a foreign State's property, Sucharitkul indicates in a similar vein that 'the validity of a judgment does not depend on the possibility or difficulty of its execution'. Sucharitkul, p. 121

constitutes an exemption not only from court jurisdiction, but also from the law of the receiving State.

A slightly broader form of the formula exists in Article 39(2). An act performed in the exercise of functions encompasses, in addition to official acts, acts which directly benefit the functions of a diplomatic agent.

Rules of attribution of State responsibility are not a proper standard for the determination of diplomatic immunity *ratione materiae*, because the ‘apparent authority’ test in ARSIWA could result in a very extensive scope of Article 39(2) that is not supported by either the *travaux préparatoires* or post-VCDR State practice.

The serious nature of an act, on the other hand, should be considered while determining diplomatic immunity *ratione materiae*, although, due to the theoretical and practical difficulty of defining the seriousness of an act, it is not by itself a viable standard for the determination of Article 39(2).

The broadest form of the ‘in the exercise of functions’ formula can be found in Article 27(5). ‘In the performance of his functions’ in this article amounts, in effect, to the formula of ‘during the exercise of functions’: A diplomatic courier cannot be detained or arrested during the temporal scope of his or her performance of functions. Personal inviolability, however, is the only form of protection a diplomatic courier enjoys under the VCDR.

## Chapter 3: Immunity for Acts Performed ‘in the Course of Duties’

### 1. Introduction

The extent to which diplomatic immunity is enjoyed by subordinate members of a diplomatic mission is an issue on which no consensus existed before the VCDR. Some States extended full diplomatic immunity to all mission members: The British legislation, for example, provided that all proceedings instituted against the suite of a foreign ambassador ‘shall be deemed and adjudged to be utterly null and void’;<sup>1</sup> and Article 61 of the Austrian Code of Criminal Procedure extended immunity to diplomats, their servants and employees, and other ‘actual personnel’ of a mission.<sup>2</sup> The legislation of France, on the other hand, did not recognise the immunity of subordinate staff of a mission, but prescribed that any measure taken against these members should not disrupt the performance of diplomatic functions.<sup>3</sup> Switzerland likewise granted only immunity for acts performed in the exercise of functions to official staff other than diplomatic agents of a mission;<sup>4</sup> and Soviet Union only recognised diplomatic immunity of ‘diplomatic representatives and members of the diplomatic missions of foreign States, i.e., counsellors (including commercial counsellors), first, second and third secretaries and attachés (including commercial, financial, military and naval attachés)’.<sup>5</sup> Harvard Draft Convention combined the legislations of France and Switzerland by providing for ‘official acts’ immunity<sup>6</sup> and imposing an obligation on the receiving State of not interfering with the

<sup>1</sup> 7 Anne, Chapter XII, reprinted at *UN Laws and Regulations*, p. 347. See also, Diplomatic Immunities Act 1952, Article 1(1)(b) of which provided that diplomatic immunity should be granted to ‘official staff’ of an ambassador. Ibid, p. 348. For a review of pre-convention British practice concerning staff of a diplomatic mission, see, Przetacznik, pp. 388-392.

<sup>2</sup> Ibid, p. 13. See also, the legislation of the US, Australia, Hungary, Belgium, Germany, pp. 374-375, 8, 161, 23, 126 respectively. Cf. Article 14 and Article 19 of the Havana Convention.

<sup>3</sup> Ibid, pp. 121-122, para. 7, 13. Cf. Article 37(4) of the VCDR, which provides that a private servant of a mission member does not have any immunity but imposes on the receiving State an obligation of not interfering unduly with the performance of diplomatic functions.

<sup>4</sup> Ibid, p. 307.

<sup>5</sup> Ibid, p. 336. For national jurisprudence concerning the immunity of subordinate members, see, Gutteridge, pp. 151-156; Wilson (1965), pp. 1271-1278; Brookfield, pp. 151-160; Deener, p. 118.

<sup>6</sup> Article 18 of the Harvard Draft.

business of a foreign mission in the exercise of jurisdiction,<sup>7</sup> but admitted that this combination is *per se lex ferenda* because ‘there exists no universal rule of law upon the subject’.<sup>8</sup>

Having realised the inconsistency in State practice, the ILC in contemplating the subject matter deliberately chose progressive development of international law rather than mere codification.<sup>9</sup> The resulting Article 37, therefore, represents an innovation based on reasons<sup>10</sup> and attitudes of States during the Vienna Conference.<sup>11</sup> However, the rather hasty adoption of the provision at the Vienna Conference<sup>12</sup> has left it riddled with problems. The ILC intentionally replaced the formula of ‘in the exercise of functions’ with ‘in the course of duties’ without making clear the difference between the two.<sup>13</sup> Further, Article 37(2) and Article 37(3) speak of the ‘duties’ of respective staff but fail to indicate what these duties are. If, for example, a mission chauffeur is somehow involved in the process of recruiting domestic servants for the embassy,<sup>14</sup> questions may arise as to whether he or she could be regarded as performing *his or her* duties as a chauffeur.

<sup>7</sup> Article 23 of the Harvard Draft.

<sup>8</sup> Commentaries to Harvard Draft, pp. 119-120. For regulation of the matter in other drafts of academic institutes, see, Section 471 of Fibre’s Draft Code (1890); Article 2 and Article 7 of the Resolution of the Institute of International Law (1895); Article 126, 130 and 136 of Pessoa’s Draft Code (1911); Article 30 of the Project of American Institute of International Law (1925); Article 19 of the Project of the International Commission of American Jurists (1927); Article 27 of Phillimore’s Draft Code (1926); Article III of the Draft Code of the Japanese Branch of the International Association and the Kokusaiho Gakkwai (1926); Article 2 of the Resolution of the Institute of International Law (1929).

<sup>9</sup> Commentaries to Article 36 of the ILC 1958 Draft, Ybk ILC 1958, vol. II, p. 101, para. 5.

<sup>10</sup> *Ibid.*, para. 8-9.

<sup>11</sup> See *infra* Section 2 and 3.

<sup>12</sup> Article 37(2) was not adopted until the last day of the Vienna Conference, following an amendment proposed by ten States just one day earlier. The amendment was meant to provide a compromise between two conflicting principles, viz. full immunity for ATS and partial immunity for ATS. The last-day adoption of the amendment was accompanied by no discussion as to the scope of the immunity and its relationship with Article 39(2). See, *infra* note 46. For a detailed recount of the negotiation history of Article 37(2), see, Bruns, pp. 143-150.

<sup>13</sup> *Infra* note 30.

<sup>14</sup> In a 2015 incident between Japan and Philippines, a Filipino driver of the Philippine Embassy in Tokyo, apparently with the help of other mission members (including a diplomat), submitted false documents to the Japanese Immigration Bureau in order to gain visas for three Filipino men purportedly to work as domestic servants for embassy staff. The driver was convicted in a Japanese court; and other mission members involved were withdrawn from Japan. ‘R.P. Embassy Driver Helped Gain Dodgy Visas for “Servants”’, *The Japan News*, 21 February 2015. For a similar incident concerning the British Embassy in Israel, see *infra* note 74.

This chapter will start with the formula of ‘in the course of duties’ and examine, in particular, whether this immunity has the same scope with diplomatic immunity *ratione materiae* for acts performed ‘in the exercise of functions’.

## 2. The difference between ‘in the course of duties’ and ‘in the exercise of functions’

The question whether ‘in the course of duties’ and ‘in the exercise of functions’ refer to the same range of activity is one on which no consensus exists among writers in the field. Brownlie treats the two formulas as the same which would, for instance, encompass ‘a road accident involving a car on official business’.<sup>15</sup> Salmon equates the two formulas by holding that they both refer to acts attributable to the sending State.<sup>16</sup> Panhuys admits that ‘in the course of duties’ might be broader in scope than ‘in the exercise of functions’,<sup>17</sup> but argues nonetheless that the broader scope should be applied to both because ‘the *ratio legis* of the various provisions is to preclude interference by the local courts in the administration of the foreign mission’.<sup>18</sup> Denza, on the other hand, takes note of the different wording and expresses the opinion that ‘in the course of duties’ includes, in addition to ‘official acts performed in the exercise of functions’,<sup>19</sup> ‘acts performed during the working day which are reasonably incidental to employment with the diplomatic mission — for example, driving to an official appointment or giving instructions for delivery of equipment to mission premises’.<sup>20</sup> The

<sup>15</sup> Brownlie, 5th edition pp 361-362. For similar opinions, see, Wilson (1967), p. 161; Dembinski, p. 185; Wedgwood, p. 499; Haris, p. 108. Cf. Whomersley, who argues that diplomatic immunity *ratione materiae* in Article 37, 38 and 39 of the VCDR ‘have an identical effect’ of excluding traffic accidents from the protection of immunity. Whomersley, pp. 853-854. See also, Bolewski, pp. 790-791.

<sup>16</sup> Salmon, p. 391, 437. This also seems to be the opinion of Buckley, who refers to all diplomatic immunities *ratione materiae* in VCDR as immunity for official acts. Buckley, p. 351.

<sup>17</sup> Van Panhuys, p. 1207.

<sup>18</sup> Ibid, p. 1208.

<sup>19</sup> Article 38(1) of the VCDR. Denza perceives the immunity in Article 39(2) as the equivalent of the immunity in Article 38(1), Denza, 3rd edition, p. 441.

<sup>20</sup> Ibid, p. 408. See also, Whomersley, who holds the view that, since proving that an act is ‘outside’ the course of duties is more difficult than proving that an act is ‘in’ the course of duties, in marginal cases the immunity in Article 37(2) must be presumed to be broader than Article 37(3). Whomersley, p. 853. For similar opinions, see, Brown, p. 77; Lewis, 3rd edition, p. 145, Aust (2010), p. 135; Samuels, p. 690. In the context of diplomatic interference, Behrens

editors of *Satow's Diplomatic Practice* point out, in a similar vein, that 'incidental acts performed during the working day, or necessary for the conduct of life in the receiving State, such as the renting of living accommodation, or driving to an appointment, may be said to be "in the course of duties" but they are not "official acts performed in the exercise of his functions" [referring to Article 38(1)]'.<sup>21</sup> Cahier does not directly contrast the two formulas; but in holding that 'service personnel have no immunity except *when* carrying out activities in the course of their duties',<sup>22</sup> the author seems to imply that 'in the course duties' denotes a temporal conception rather than the actual nature of an act, and as such would clearly be broader than 'in the exercise of functions'.<sup>23</sup>

An examination of the ILC's discussion on the subject matter proves to be of little avail. When the question of immunity for subordinate members of a mission was first discussed in 1957, there was no consensus among members of the ILC as to the scope of such immunity. Whereas some members favoured full diplomatic immunity for all mission members,<sup>24</sup> others insisted that subordinate staff should only enjoy either functional immunity<sup>25</sup> or immunity specifically granted by the receiving State.<sup>26</sup> However, after it was decided that a distinction should be made between ATS and service staff,<sup>27</sup> the ILC members were quick to agree that, whereas the former should enjoy full diplomatic immunity, functional immunity would be sufficient for members in the latter category.<sup>28</sup>

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also indicates that certain incidental acts are indispensable for the performance of diplomatic functions, see, Behrens (2016), pp. 67-68.

<sup>21</sup> *Satow's*, 6th edition, p. 165. Like Denza, editors of *Satow's Diplomatic Practice* also seem to have equated Article 38(1) with Article 39(2), see, p. 139. See also, *Satow's*, 5th edition, p. 145.

<sup>22</sup> Cahier, p. 34.

<sup>23</sup> For discussion concerning 'in the exercise of functions' as a temporal conception denoting the whole period of performance of functions, see Chapter 2(5.1).

<sup>24</sup> The original article proposed by the Special Rapporteur in his first report granted full immunity to all mission members, provided that they are not nationals of the receiving State. See, Ybk ILC 1955, vol. II, p. 12. For opinions of the ILC members who supported this approach in 1957, see, Ybk ILC 1957, vol. I, p. 123, para. 86 [François]; p. 128, para. 65 [Fitzmaurice]; 69 [Yokota]; para. 70 [Spiropoulos]; p. 129, para. 72 [Khoman]; para. 75 [Pal]; p. 133, para. 51 [Edmonds]; para. 61 [Hsu].

<sup>25</sup> Ybk ILC 1957, vol. I, p. 124, para. 89 [Bartos], para. 91 [Matine-Daftary]; p. 132, para. 39 [Scelle].

<sup>26</sup> *Ibid*, p. 128, para. 63 [Tunkin]; p. 129, para. 76 [Chairman].

<sup>27</sup> *Ibid*, p. 132, para. 35.

<sup>28</sup> *Ibid*, para. 37; p. 134, para. 64.



The formula of ‘in the course of duties’ first emerged during the ILC’s discussion on the immunity of service staff. With regard to an earlier amendment proposed by Bartos, which granted immunity to all subordinate members only for ‘acts performed in the exercise of their functions in the mission’,<sup>29</sup> Ago suggested substituting ‘in the exercise of their functions in the mission’ with ‘in the course of their duties’.<sup>30</sup> The suggestion was later accepted by the ILC, but there was strong indication that members of the commission did not have consensus on the scope of the formula of ‘in the course of their duties’. Ago explained his suggestion in the following terms:

He would, however, prefer, so far as service staff were concerned, to speak of acts performed ‘in the course of their duties’ rather than ‘in the exercise of their functions in the mission’; the words ‘in the mission’ in particular seemed too restricted.<sup>31</sup>

It is obvious that Ago’s intention was to broaden the scope of Bartos’s formula; but it is not clear whether Ago, by using the phrase ‘in particular’, had intended ‘in the course of duties’ to be broader than ‘in the exercise of functions’ in a general manner, or merely to enclose acts performed in the exercise of functions *outside the mission*. Moreover, when the amendment was later put to vote, Ago said that the immunity proposed represents ‘the minimum immunity’,<sup>32</sup> a phrase which was adopted by the ILC in earlier sessions to denote the immunity of diplomats who are national or permanent resident of the receiving State.<sup>33</sup> As concluded in Chapter 2 above, ‘the minimum immunity’ in Article 38(1) refers to acts in strict application of official functions;<sup>34</sup> and the formula in Article 38(1) — ‘official acts performed in the exercise of functions’ — was meant to exclude acts such as traffic accidents from the protection of immunity.<sup>35</sup> But this was obviously not the understanding of Bartos. For him, Ago’s amendment merely clarified, rather than broaden, his own formula,<sup>36</sup> and in replying to

<sup>29</sup> Ibid, p. 130, para. 9 [Bartos].

<sup>30</sup> Ibid, p. 133, para. 53 [Ago].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, p. 134, para. 65 [Ago]. Fitzmaurice also on an earlier stage associated Bartos’s formula with the formula for local diplomats (p. 131, para. 27); but he did not opine after the formula was changed to ‘in the course of duties’.

<sup>33</sup> Commentaries to Article 30 of the 1957 Draft, Ybk ILC 1957, vol. II, pp. 141-142. For discussions on the subject within the ILC, see Chapter 2(2).

<sup>34</sup> Chapter 2(2).

<sup>35</sup> Ibid.

<sup>36</sup> Ybk ILC 1957, vol. I, p. 133, para. 57, 59 [Bartos]. Further evidence that Bartos had treated the two formulas as the same can be found in his statement in 1958 concerning the immunity of local diplomats, where it was argued that local diplomats should enjoy the same privileges and immunities as non-local diplomats and thus be protected after their term of office ‘in

Tunkin's question, Bartos observed that a mission chauffeur who knocked down and killed a pedestrian would be protected by immunity 'provided his duties required him to make the journey in question'.<sup>37</sup> This observation was neither accepted nor rejected by the ILC; and although some members, by using the two formulas indistinctly,<sup>38</sup> seemed to support Bartos's understanding, this position was by no means a consensus within the ILC.<sup>39</sup>

During the Vienna Conference, the text adopted by the Committee of the Whole,<sup>40</sup> which retained almost verbatim the wording concerning immunity of Article 36 of the ILC 1958 Draft, viz. full immunity for ATS and 'in the course of duties' immunity for service staff,<sup>41</sup> was subject to considerable controversy in the plenary meeting.<sup>42</sup> However, there was strong indication, from comments made and amendments submitted during the meeting, that States had understood 'in the course of duties' and 'in the exercise of functions' as the same.

A nineteen-State amendment, of which Italy, represented by Ago, was a sponsor, sought to limit ATS members' immunity from jurisdiction to 'acts performed in the exercise of their functions'.<sup>43</sup> A three-State amendment, on the other hand, spoke of 'in the course of duties' immunity for those ATS who do not perform confidential duties.<sup>44</sup> Yet in spite of the difference in wording, States from both camps supported each other's amendment to the extent that the amendment restricted immunity to acts relating to official duties.<sup>45</sup>

At a later stage, a ten-State amendment sought to strike a compromise between the nineteen-State amendment<sup>46</sup> and the text adopted by the Committee of the Whole (which granted full

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respect of acts performed in the course of their official duties (Cf. Article 38(2) of the 1958 Draft). Ybk ILC 1958, vol. I, p. 171, para. 43 [Bartos].

<sup>37</sup> Ibid (1957), para. 54-55.

<sup>38</sup> Ibid, p. 132, para. 39 [Scelle]; Ybk ILC 1958, vol. I, p. 163, para. 16 [Hsu].

<sup>39</sup> Hsu, for example, spoke of immunity for acts 'in the performance of official duties' of ATS members. This is neither the formula proposed by Bartos, nor the one used by Ago. Ibid.

<sup>40</sup> Official Records, vol. II, p. 72.

<sup>41</sup> Ybk ILC 1958, vol. II, p. 101.

<sup>42</sup> See more fully, *infra* Section 3.

<sup>43</sup> Official Records, vol. II, p. 77.

<sup>44</sup> Ibid, pp. 76-77.

<sup>45</sup> See, for example, the comments made by the representative of Tunisia (sponsor of the three-State amendment) and France (sponsor of the nineteen-State amendment), Official Records, vol. I, p. 32, para. 40, 44 respectively.

<sup>46</sup> *Supra* note 43.

immunity for ATS)<sup>47</sup> by providing for ‘in the course of duties’ immunity from civil and administrative proceedings only.<sup>48</sup> The difference in wording did not provoke any dispute throughout the discussion; quite the contrary, some States observed in clear terms that they understood the two formulas as referring to the same range of activity.<sup>49</sup> The representative of Soviet Union, in particular, pointed out that ‘in the course of duties’ immunity is ‘precisely’ the purpose of the nineteen-State amendment (which used the formula of ‘in the exercise of functions’).<sup>50</sup> The ten-State amendment was finally adopted by the conference and became Article 37(2).

Apart from the parties’ intention at the 1961 Vienna Conference, support for equal treatment of the two formulas can also be found at the 1963 Vienna Conference on Consular Relations. A nine-State amendment to Article 43(1) of the VCCR had sought to expand the application of consular immunity, which applied the formula of ‘in the exercise of functions’, to consular employees.<sup>51</sup> Explaining the amendment on behalf of other sponsor States, Poland made direct reference to Article 37(3) of the VCDR and argued that consular employees should enjoy the same immunity as service staff members of a diplomatic mission.<sup>52</sup> The amendment was later adopted by the conference; and the difference between Article 43(1) of the VCCR and Article 37(3) of the VCDR was never challenged by State delegates.

The ILC’s commentary to the Draft Articles on Diplomatic Couriers (DASDC) points to the same direction. Article 18(2) of the DASDC provides that a diplomatic courier enjoys immunity from civil and administrative proceedings for acts performed in the exercise of his functions.<sup>53</sup> For the ILC, this formula takes the same functional approach as the formula of ‘in the course of duties’ under Article 37(2) of the VCDR.<sup>54</sup>

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<sup>47</sup> *Supra* note 40.

<sup>48</sup> Official Records, vol. II, p. 78.

<sup>49</sup> See, in particular, the comments made by the representatives of Soviet Union and Vietnam, Official Records, vol. I, p. 39, para 37 and pp. 47-48, para. 8 respectively. Other States simply referred to official/private acts to denote both formulas, p. 35, para. 61 [India], para. 65 [UK], p. 33, para. 47 [US].

<sup>50</sup> *Ibid*, para. 37.

<sup>51</sup> Official Records of Consular Convention, vol. II, p. 168. The original text prepared by the Drafting Committee at the 1963 conference granted consular immunity only to ‘consular officers’. See, *ibid*, p. 157.

<sup>52</sup> Official Records of Consular Convention, vol. I, p. 56, para. 59 [Poland].

<sup>53</sup> Article 18(2) of the DASDC.

<sup>54</sup> DASDC with commentaries, p. 30, para. 6.

In addition to the drafting history of the relevant provisions, the argument that ‘in the course of duties’ is broader in scope than ‘in the exercise of functions’<sup>55</sup> can also be criticised from two aspects.

First, the argument is based on the premise that ‘in the exercise of functions’ immunity has the same scope as ‘official acts performed in the exercise of functions’, which pertains only to acts in strict application of diplomatic functions and thus precludes traffic offences and incidental acts to daily life.<sup>56</sup> However, as concluded in Chapter 2 above, this premise is per se untenable: the drafting history of relevant articles in the VCDR and in the VCCR works against equal treatment of the two formulas;<sup>57</sup> and no conclusive evidence can be found in post-convention State practice to support an exclusion from ‘in the exercise of functions’ immunity of either traffic offences or acts incidental to daily life.<sup>58</sup> Indeed, even the assertion that ‘in the course of duties’ immunity protects these two kinds of activity<sup>59</sup> is not free from doubt. With regard to traffic offences, the stark contrast between the opinions of Ago<sup>60</sup> and of Bartos<sup>61</sup> clearly indicates that there was no consensus on the issue within the ILC; and in State practice, immunity has been upheld in some cases but denied in others.<sup>62</sup> As for acts incidental to daily life, pre-convention State practice has already witnessed a number of occasions where immunity *ratione materiae* of a subordinate member of a mission was rejected for acts having

<sup>55</sup> *Supra* note 20.

<sup>56</sup> Denza, 3rd edition, p. 441, *Satow's*, 5th edition, p. 131, Lewis, 3rd edition, p. 144, Brown, p. 76.

<sup>57</sup> See Chapter 2(2).

<sup>58</sup> See Chapter 2(4).

<sup>59</sup> *Supra* note 56.

<sup>60</sup> *Supra* note 32. Ago also held as the representative of Italy during the Vienna Conference that traffic offences should not be protected by immunity *ratione materiae*. See, Official Records, vol. I, p. 36, para. 68 [Italy].

<sup>61</sup> *Supra* note 37. On an earlier stage, Bartos also pointed out that ‘the position of “diplomatic” chauffeurs who exceeded the speed limit on higher orders was far from clear’. Ybk ILC 1957, vol. I, p. 129, para. 79 [Bartos].

<sup>62</sup> For cases in favour of immunity, see, *Public Prosecutor v. A.d. S.F.*, Supreme Court, 15 September 1975, N.J. (1976) No. 69, reprinted at L.A.N.M. Barnhoorn, ‘Netherlands judicial decisions involving questions of public international law (1974-1975)’, *NYIL*, vol. 7, pp. 303-351, at p. 339; *Re DK* (1979), 77 ILR 467; *Case of Hitchcock*, reprinted at 7 *ICLQ* (1958), p. 562. For cases rejecting immunity, see, *Bonne and Company X v. Company Y* (1970), 69 ILR 280; *Re Jursitis* (1956), 23 ILR 429; *Public Prosecutor v. Sluys* (1957), 24 ILR 529; *Sergeant James incident*, at Arthur J. Olesen, ‘Embassy Marine Freed in Poland: Term Is Suspended in Auto Death — Immunity Denied’, *The New York Times*, 4 January 1963.

no direct relations with official functions.<sup>63</sup> Although in *Epson v. Smith*, the British Court of Appeal seemed to imply that Article 37(2) of the VCDR protects an act of renting private residence when it observed that, 'It is, to say the least, arguable that acts done by the defendant [an ATS member of Canadian High Commission in the UK] in relation to his tenancy of his private residence in London were performed by him outside the course of his duties',<sup>64</sup> the court in fact did not provide any proof to support this statement and simply remitted the case to a lower court for lack of evidence.<sup>65</sup> In any event, it can hardly be said that State practice supports a blanket extension of 'in the course of duties' immunity to acts incidental to daily life.<sup>66</sup>

Second, the broad interpretation of 'in the course of duties' immunity risks unjustifiably expanding the protection intended for service staff. From a functional perspective, the broad interpretation works well with ATS because: (a) ATS members perform duties which are no less important than the functions of some diplomatic agents,<sup>67</sup> and (b) Article 37(2) applies to serving members of a mission, whereas Article 39(2) concerns those who no longer have official functions to perform. The problem is, however, that an expansive interpretation of ATS's immunity would necessarily result in an equal expansion of the immunity of service staff members, which applies the same formula. Yet the duties performed by ATS and those performed by service staff are hardly comparable. As illustrated by the drafting history of Article 37, the very precondition of granting full diplomatic immunity to ATS members was maintaining a clear distinction between them and service staff.<sup>68</sup> Indeed, even those ILC members who strongly recommended full diplomatic immunity for all mission members admitted that the duties performed by service staff are not as important as the duties of ATS.<sup>69</sup> Whereas the broad interpretation would effectively reduce the chance of an incumbent ATS member being overexposed to civil proceedings, it is highly unlikely that drafters of the VCDR

<sup>63</sup> *Societa Arethusa Film v. Reist* (1953), 22 ILR 545; *Trost v. Tompkins*, 44 A. 2d 226 (1945); *Novello v. Toogood*, 1 B. & C. 556.

<sup>64</sup> *Epson v. Smith*, 1 Q.B. (1966), p. 438.

<sup>65</sup> *Ibid*, p. 440.

<sup>66</sup> See, on this point, Whomersley, p. 855

<sup>67</sup> See more fully, *infra* Section 3. In its response to a proposed bill which sought to deprive foreign ATS members' immunity from criminal jurisdiction for acts of violence, the US Department of State also indicated that full immunity must be recognized for these members because they perform very sensitive work crucial to the overall functioning of a diplomatic mission. See, Leich (1988), p. 108. For a similar criticism of the bill, see, Hickey and Fisch, pp. 356-367.

<sup>68</sup> *Supra* note 27, 28.

<sup>69</sup> See, for example, Ybk ILC 1957, p. 131, para. 29 [Fitzmaurice]; p. 132, para. 33 [Amado].

have intended to protect a mission cook from a dispute concerning, for example, the breach of a tenancy contract. In connection with the above-mentioned drafting history of the formula, the better understanding seems to be that ‘in the course of duties’ is the equivalent of ‘in the exercise of functions’.

Acts incidental to daily life only indirectly benefit the official duties of a service staff member because these acts normally do not take place during the actual performance of these duties; but in State practice even acts that have indeed happened during the actual performance of duties do not always attract immunity. In the case of *Mali v. Keith*, a Belgian court rejected the plea of Article 37(3) of an embassy chauffeur of Mali who had killed his ambassador due to dissatisfaction with the working conditions.<sup>70</sup> The court admitted, based on the statement of the Malian Government, that the killing had happened ‘during his [the chauffeur’s] hours of service, whilst on the premises of the embassy and at the disposal of the legation’; but ruled nonetheless that the act was not ‘in the course of duties’ because it was neither a ‘natural consequence’ of these duties nor performed in furtherance of the interests contained therein.<sup>71</sup> It would be difficult to speak of immunity for outside activity (such as renting a private residence) when acts that have happened in the actual performance of duties are subject to restriction.

It then follows that in the course of duties should better be understood as the equivalent of in the exercise of functions. As a result, what was said above in Chapter 2 — that an act should be perceived as ‘in the exercise of functions’ if it directly benefits the functions performed — should apply equally to the formula of ‘in the course of duties’.

### 3. The scope of ‘duties’: where is the limit?

The conclusion reached in the preceding section has only addressed part of the problem: Whereas the formula of ‘in the course of’ relates to the same range of activity as ‘in the exercise of’, it remains to be examined what the specific ‘duties’ of an ATS member or of a service staff member are. The VCDR does not set out the duties of either category; yet, in reality, difficulties might arise when a subordinate member is instructed to perform activities which

<sup>70</sup> *Ministère Public and Republic of Mali v. Keita* (1977), 77 ILR 410.

<sup>71</sup> *Ibid*, pp. 411-412.

are not strictly connected to his or her ordinary duties. In an incident between Angola and France in 1981, a mission chauffeur of the Angolan Embassy in Paris was arrested at the Roissy airport when weapons were found in a bag he was carrying.<sup>72</sup> The weapons were immediately confiscated by the French authority; but the chauffeur was released after his status was confirmed. The Angolan Ambassador was summoned to a meeting at the French Ministry for Foreign Affairs, during which he expressed regret and acknowledged that an error had been made. The chauffeur had been instructed to import weapons from Angola in order to maintain 'the internal security' of the embassy; and the ambassador pledged that the chauffeur had no 'fraudulent intent'.<sup>73</sup> However, in spite of the explanation, the French Government insisted that the act of the chauffeur was not acceptable and that he must be withdrawn immediately. The weapons, on the other hand, were later returned directly to Luanda.

In a similar event concerning the British Embassy in Israel, a mission driver, who had gained trust from British diplomats over his 17-year service of the embassy, and who had been acting as an intermediary with the local authority calculating the annual bonuses that must be paid to Israeli employees in the embassy, defrauded the embassy of more than £790000 by forging official documents.<sup>74</sup> The fraud later transpired and the driver was put on trial in a local court.

In both these cases, the acts performed by the mission chauffeurs, importation of weapons and liaising with local authority, could not be said to constitute *stricto sensu* their duties as a chauffeur. However, there are also cases in which immunity *ratione materiae* might be called into question even when a subordinate member is indeed performing his or her ordinary duties. In a 1999 incident between the US and Colombia, a military attaché of the US Embassy in Colombia and his wife committed drug trafficking and money laundering in the receiving State with the help of a mission chauffeur.<sup>75</sup> The couple were withdrawn and prosecuted in the US; and the chauffeur was sentenced to eight-year imprisonment in Colombia, despite of the

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<sup>72</sup> *Annuaire Français De Droit International* (1981), p. 914.

<sup>73</sup> *Ibid.*

<sup>74</sup> Francis Elliott, 'British Embassy in Israel Stung for £1m', *The Independent*, 22 January 2006. See also, Declan Walsh, 'Transplant Tourists Flock to Pakistan, Where Poverty and Lack of Regulation Fuel Trade in Human Organs', *The Guardian*, 12 February 2005, where an embassy doctor of Saudi mission in Pakistan reportedly helped patients from the sending State find organ transplants in the receiving State, apparently with the instruction of the Saudi Government.

<sup>75</sup> Bruce Zagaris, 'Colombian Congress Will Hold Hearings about Immunity for U.S. Troops', *International Enforcement Law Reporter*, August 2005.

extradition request from the US. If a mission chauffeur drives a diplomat to commit crimes,<sup>76</sup> it is questionable whether he or she could still be regarded as acting in the course of his or her duty (of driving a mission member).

All these problems boil down to a proper interpretation of the scope of ‘duties’; and this has been the centre of controversy throughout the drafting history of Article 37. It has been mentioned above that, at the early drafting stage of the article, members of the ILC disagreed as to whether full immunity should be granted to all mission members.<sup>77</sup> Underlying the disagreement was a juxtaposition of two different theories:<sup>78</sup> Whereas those who favoured full immunity held that a diplomatic mission must be viewed as a whole in which all members, regardless of their rank, contribute to its successful functioning,<sup>79</sup> proponents for immunity *ratione materiae* believed that immunity should only be granted in the light of the specific duties performed by a given category of staff.<sup>80</sup> The ILC later decided to draw a line between ATS and service staff due to the inferior nature of the duties performed by those in the latter category.<sup>81</sup> However, most ILC members believed that no such line could be drawn between ATS and diplomatic agents;<sup>82</sup> and this belief was so strong that the ILC refused to change its attitude although some States made clear in their comments to the 1957 Draft that full immunity for ATS was unacceptable.<sup>83</sup> In explaining the attitude of the ILC, Fitzmaurice pointed out, *inter alia*, that, since in practice ATS members are making a more important contribution to the functioning of a diplomatic mission than many junior diplomats, the commission should maintain its position against the opposition of some governments.<sup>84</sup>

Yet the insistence of the ILC was not well-received at the Vienna Conference; and the split between proponents of the ILC Draft and proponents of functional immunity almost led to a

<sup>76</sup> In the above case, the chauffeur had driven the diplomat’s wife on various occasions to Zona Rosa district of northern Bogota to purchase cocaine. See, ‘U.S. Embassy Staff in Bogota Investigated for Drug Smuggling’, *Calgary Herald (Alberta, Canada)*, 17 August 1999.

<sup>77</sup> *Supra* note 24-26.

<sup>78</sup> Commentaries to Article 28 of the 1957 Draft, Ybk ILC 1957 vol. II, pp. 140-141.

<sup>79</sup> Ybk ILC 1957, vol. I, p. 128, para. 67 [Sandström], 70 [Spiropoulos].

<sup>80</sup> *Ibid.*, p. 129, para. 71 [Amado], 79 [Bartos].

<sup>81</sup> *Supra* note 27.

<sup>82</sup> *Supra* note 28.

<sup>83</sup> Ybk ILC 1958, vol. I, pp. 165-166, para. 46. For comments of States, see, Ybk ILC 1958, vol. II, p. 111 [Argentina], p. 113 [Belgium], p. 117 [Czechoslovakia], p. 117 [China], p. 119 [Italy], p. 127 [Pakistan], p. 131 [Switzerland], p. 131 [USSR], p. 137 [US], p. 138 [Yugoslavia].

<sup>84</sup> Ybk ILC 1958, vol. I, p. 162, para. 10 [Fitzmaurice]. See also, Nahlik, p. 254.



complete failure of Article 37(2), as no amendment could receive necessary majority in the plenary meeting.<sup>85</sup> The resulting text of Article 37 represents a compromise;<sup>86</sup> but no conclusion can be drawn as to whether States had intended to give ‘duties’ of subordinate members a restrictive or expansive meaning.

In an Australian case concerning the immunity of an ATS member of the Canadian High Commission,<sup>87</sup> the Australian Government seems to have endorsed a restrictive understanding of the ‘duties’ of ATS when it stated in a note to the Canadian High Commission that

Given that a member of the administrative and technical staff of a mission is defined in terms of the administrative and technical services he or she performs, it follows that immunity is accorded *only in respect of acts performed in the course of those administrative and technical services* ... [the employee] is entitled to immunity from the civil jurisdiction of the courts only in respect of those acts performed in the course of his administrative and technical duties.<sup>88</sup>

This case concerns a family law dispute, which is clearly outside the ‘duties’ of the ATS member; yet the Australian Government’s interpretation of ‘duties’ as pertaining solely to ‘administrative and technical duties’ seems problematic. The absence of a definition of ‘duties’ in the VCDR means that in practice it would be all but impossible for a receiving State to determine what the ‘duties’ of a subordinate member of a foreign mission are<sup>89</sup> — as long as an act falls within the overall framework of Article 3(1) of the VCDR, the manner in which this act is carried out is largely a matter of internal administration of the foreign mission, on

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<sup>85</sup> The text adopted by the Committee of the Whole, a three-State amendment granting full immunity to ATS who perform ‘confidential duties’, and a nineteen-State amendment limiting immunity to ‘acts performed in the exercise of functions’ were all rejected in the plenary meeting. See, Official Records, vol. I, p. 40, para. 43; p. 39, para. 31; and p. 39, para. 30 respectively.

<sup>86</sup> The text was based on a ten-State amendment, *supra* note 48.

<sup>87</sup> *In the Marriage of Cashman and Teo*, 124 FLR 179 (1995).

<sup>88</sup> *Australian Digest* (1995), p. 381 (Emphasis original). Silva also seems to be of the view that duties of subordinate staff of a diplomatic mission should be strictly delineated when he says that the difference between the duties of ATS and that of service staff ‘lies in the nature of their functions’, although he does not explain how these different duties are to be identified in practice. Silva (1972), p. 146.

<sup>89</sup> This seems indeed the opinion of the UK Government, which stated in its 1985 Report that ‘it is virtually impossible in most cases for the FCO to tell whether a persona should more properly be described as a diplomat or as a member of the ATS or indeed a member of the mission at all’. Government Report 1985, para. 21.

which the receiving State should have no say.<sup>90</sup> The purpose of immunity is not to facilitate the performance of the official duties of individual categories of mission staff, but to facilitate the performance of diplomatic functions *as a whole*.<sup>91</sup> This means that, as long as an act is for the benefits of the official business of the diplomatic mission, immunity must follow, for it is the *process* of performing diplomatic functions that is protected, not the person who actually performs them.<sup>92</sup> Thus, if a mission cook is instructed by the ambassador to deliver an important document, or if a mission technician is tasked with processing some visa applications, the receiving State must recognise their immunity even though the acts performed do not pertain to their respective duties in a strict sense. The ‘unity of function’ theory was not strong enough to establish full diplomatic immunity for all mission members,<sup>93</sup> but it must be upheld to maintain a liberal interpretation of the ‘duties’ of subordinate members of a diplomatic mission.<sup>94</sup>

Support for this liberal understanding of ‘duties’ can be found within the ILC: In fact, the very reason that some members of the commission were opposed to a distinction between different categories of mission staff was the practical concern that ‘subordinate members perform whatever they are required to perform’. Verdross, for one, pointed out in the 1957 discussion that

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<sup>90</sup> As the ICTY Appeals Chamber indicated in *Prosecutor v. Blaškić*, ‘customary international law protects the internal organisation of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations ... The general rule has been implemented ... primarily with regard to ... the fight of a State to demand for its organs functional immunity from foreign jurisdiction’. ICTY, *Prosecutor v. Blaškić*, IT-95-14-AR108 bis, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 41.

<sup>91</sup> Preamble of the VCDR: the purpose of immunities is to ensure the efficient performance of ‘the functions of diplomatic missions as representing States’.

<sup>92</sup> For a similar argument, see, O’Neill, p. 669. It should be noted nonetheless that protection of mission members and protection of diplomatic functions as a whole are not mutually exclusive. As will be discussed in Chapter 4, immunity from civil proceedings for private matters is important to protect a diplomat from being overexposed to court proceedings in the receiving State. On this point, see, Barker (1996), p. 226.

<sup>93</sup> *Supra* note 79.

<sup>94</sup> For authors supporting this line of thought, see, for example, Simmonds, who argues that immunity in Article 37 of the VCDR is dependent upon the ‘function of the mission as a whole and not upon the actual work done by each person’. Simmonds, p. 1210. See also, Brookfield, pp. 153-156.

It was often most difficult to draw a clear-cut distinction between the diplomatic and non-diplomatic staff of missions. The missions of the smaller countries, particularly those accredited to other small countries, were often staffed merely by a head of mission and some administrative personnel, which often performed functions of a diplomatic nature.<sup>95</sup>

On a later stage, Matine-Daftary also proposed in a similar vein that all non-diplomatic staff should enjoy immunity 'within the limits and to the extent appropriate and applied for by the head of the mission on his own responsibility'.<sup>96</sup>

The extension of consular immunity to consular employees during the 1963 Vienna Conference also indirectly supports the liberal interpretation of 'duties' of subordinate staff.<sup>97</sup> A consular employee, according to Article 1(1)(e) of the VCCR, refers to a person employed in the administrative or technical service of a consular post.<sup>98</sup> Yet State delegates at the 1963 conference recognised that in practice consular functions are also performed by these subordinate members of a consulate.<sup>99</sup> The representative of Poland, for example, indicated that consular immunity must be extended to consular employees because 'consular functions were not infrequently performed' by them.<sup>100</sup> Similarly, the German representative held the view that all persons who participate in consular activities should be protected by immunity.<sup>101</sup> As a result, Article 43(1) of the VCCR confirms that a consular employee may perform consular functions and thus enjoy consular immunity.<sup>102</sup>

This understanding of 'duties' in Article 37 is also supported by post-VCCR State practice. In cases where a subordinate member was either expelled or prosecuted, the acts involved almost invariably concerned those which would normally lead to an expulsion even if they were performed by a serving diplomat.<sup>103</sup> On the contrary, when a subordinate staff has performed

<sup>95</sup> Ybk ILC 1957, vol. I, p. 123, para. 87 [Verdross].

<sup>96</sup> Ibid, p. 127, para. 54 [Chairman].

<sup>97</sup> Supra note 51. For the relationship between consular immunity and diplomatic immunity *ratione materiae*, see Introduction (3.3).

<sup>98</sup> Article 1(1)(e) of the VCCR.

<sup>99</sup> See, for example, Official Records of Consular Conference, vol. I, p. 56, para. 57 [Poland]; para. 60 [UK]; p. 57, para. 71 [Federal Republic of Germany].

<sup>100</sup> Ibid.

<sup>101</sup> Supra note 99.

<sup>102</sup> Article 43(1) of the VCCR.

<sup>103</sup> See, for example, cases concerning espionage: 'India Expels Pakistani Embassy Worker for Espionage', *Agence France Presse*, 25 October 2006; Eleanor Ainge Roy, 'US Diplomat

some extra, but acceptable, duties for the mission, the receiving State's attitude has tended to be quite lenient. In a 1981 circular note addressed to the Chiefs of Mission in Washington D.C., the US Department of State stated that those security personnel of foreign missions who perform 'both protective and administrative functions' will be lifted to the status of ATS and thus enjoy the immunity under Article 37(2).<sup>104</sup> Given the US Government's willingness to grant full immunity from criminal proceedings to those who perform both the duties of service staff and the duties of ATS, it seems unlikely that a US court would deprive a security staff member (who is not given the ATS status) of his or her 'in the course of duties' immunity simply because he or she has performed an administrative duty on an ad hoc basis. Indeed, the post-VCDR practice of concluding bilateral agreements to extend full immunity to all mission members also illustrates that States do not intend to maintain a rigid line between different categories of mission staff, for if a mission member is only allowed to perform his or her specific duties, full immunity is hardly necessary from a functional perspective.<sup>105</sup>

Article 3(1) of the VCDR sets out the 'licence' for a sending State to perform functions on the territory of the receiving State. As long as an act does not fall outside the scope of the licence, the sending State should retain its discretion to decide how the act is to be carried out. Therefore, 'duties' of subordinate members must be interpreted broadly in order to ensure the proper functioning of a diplomatic mission.

#### **4. Is inviolability part of a service staff member's immunity?**

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Ejected from New Zealand after Police Fail to Get Immunity Waived', *The Guardian*, 19 March 2017; Shashank Shekhar and Ajit K Dubey, 'Agent Akhtar, 'Persona Non Grata': Delhi Police Detain Pakistan Embassy Staffer over Allegations of Spying and Stealing Defence-Related Documents', *MailOnline*, 27 October 2016. Cases concerning drugs: 'US Embassy Staff Arrested in Indonesia in Drug Raids', *Xinhua News Agency*, 12 February 1994; 'French Embassy Staffer Caught with Drugs', *Agence France Presse*, 10 March 2009. Case concerning sabotage: *Employees in Iranian Embassy case*, *Revue Générale De Droit International Public* (1983), p. 863.

<sup>104</sup> *Cumulative Digest*, p. 914.

<sup>105</sup> See, for example, the agreement between US and Soviet Union (73 *AJIL* 277, at p. 285); the agreement between US and China (*Cumulative Digest*, p. 1047). For other similar bilateral arrangement between the US and other States, see, *Cumulative Digest*, pp. 1164-1168 and *US Digest* (1974), p. 170. For British practice, see, Frey, p. 490.

One problem with the text of Article 37 is that the immunities provided therein have been set out in different manners: Whereas Article 37(3) simply provides that service staff members enjoy ‘immunity’ for acts performed in the course of duties, both Article 37(1) and Article 37(2) make specific reference to personal inviolability (Article 29), inviolability of private residence and other property (Article 30), and immunity from jurisdiction (Article 31). This difference in text has greatly obscured the meaning of ‘immunity’ in Article 37(3). From a broad perspective, the term could refer to immunity from both court proceedings and law enforcement procedures of a receiving State, in which case a service staff member would enjoy not only immunity from jurisdiction but also inviolabilities attached to his or her person and property. On the other hand, the term could also be interpreted restrictively to denote only immunity from jurisdiction, and in this respect all inviolabilities would be precluded.

The narrower view is clearly followed by the US. In the Department of State’s *Guidance for Law Enforcement and Judicial Authorities*, it is pointed out that ‘service staff members have official acts immunity only and enjoy no personal inviolability, no inviolability of property, and no immunity from the obligation to provide evidence as witness’.<sup>106</sup>

The broader view, on the other hand, seems to have been favoured by the ILC. Throughout the drafting history of Article 37, the ILC members had never understood ‘immunity’ as referring exclusively to ‘immunity from court proceedings’. The proposal submitted by Bartos, which formed the basis of Article 37(3),<sup>107</sup> spoke of ‘privileges and immunities [of a diplomatic agent] with respect to acts performed in the exercise of their [service staff members’] functions in the mission’;<sup>108</sup> and other members simply used the phrase ‘full immunity’ to denote all the protection essential to the performance of official functions.<sup>109</sup> The ILC later adopted the principle that ATS should be accorded ‘full immunity’ unconditionally;<sup>110</sup> and this principle was translated into draft Article 28(1), which provides that ATS members enjoy not only immunity from jurisdiction but also inviolabilities enjoyed by diplomatic agents.<sup>111</sup> Service

<sup>106</sup> US Guidance for Law Enforcement and Judicial Authorities, pp. 8-9.

<sup>107</sup> Ybk ILC 1957, vol. I, p. 134, para. 64 [Chairman].

<sup>108</sup> Supra note 29.

<sup>109</sup> Ibid, p. 128, para. 65 [Fitzmaurice]; p. 131, para. 25 [Spiropoulos]; p. 132, para. 36 [Ago].

<sup>110</sup> Ibid, p. 132, para. 37 [Chairman].

<sup>111</sup> Ybk ILC 1957, vol. II, p. 140.

staff, on the other hand, enjoy ‘immunity’ for acts performed in the course of duties;<sup>112</sup> and this wording was not challenged in either the ILC 1958 discussion or the Vienna Conference.

Yet both interpretations seem problematic. The US’s approach would lead to an absurd situation where a service staff member can be arrested while performing official duties but cannot be prosecuted after the duties are finished. However, as mentioned in the context of Article 27(5), personal inviolability is the most essential form of immunity because it protects a diplomatic courier from direct physical coercion.<sup>113</sup> Indeed, the very reason that many States were not willing to grant immunity from jurisdiction to diplomatic couriers (under the DASDC) was that personal inviolability was regarded as sufficient to ensure a smooth delivery of diplomatic bags.<sup>114</sup> The same logic applies to service staff members. In the 2005 arbitration between Eritrea and Ethiopia, one of the underlying causes of dispute was Ethiopia’s maltreatment of the non-diplomatic staff of the Eritrean Embassy.<sup>115</sup> In one incident, an embassy chauffeur was pulled out of the embassy car by several Ethiopian security agents and beaten unconscious when he was waiting for the Eritrean chargé d’affaires outside another State’s embassy premises.<sup>116</sup> The chauffeur was a local national and therefore Article 38(2), rather than Article 37(3), applies; but the facts of the case clearly illustrate that without inviolability from direct physical coercion, the duties of a service staff member, and thus the proper functioning of the diplomatic mission, are by no means secured. The functional basis of diplomatic immunities logically requires that personal inviolability be at least as extensive as immunity from court jurisdiction. Thus, Article 31(3) of the VCDR emphasises that personal inviolability must not be compromised even in cases where immunity from jurisdiction and from execution is not available.<sup>117</sup> Similarly, whereas a consul enjoys only ‘in the exercise of functions’ immunity from court proceedings under Article 43(1) of the

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<sup>112</sup> Ibid.

<sup>113</sup> Chapter 2(5) above. See also, Barker (1996), p. 75, in which the author points out that the principle of inviolability is best explained by functional necessity theory because the principle is essential for maintaining the independence of diplomatic agents.

<sup>114</sup> Ibid.

<sup>115</sup> *Diplomatic Claim, Eritrea’s Claim 20 (Eritrea/Ethiopia)* (2005), 135 ILR 519.

<sup>116</sup> Ibid, pp. 535-536. In a similar incident concerning the Turkish Embassy in Croatia, a Turkish mission chauffeur, while driving for the Turkish Ambassador, was involved in a fight with a Croatian policeman when the policeman tried to remove the embassy car from a no-parking zone by force. The chauffeur was overpowered, but released immediately after his diplomatic immunity was recognised. See, ‘Turkish Embassy Driver Held after Attack on Croatian Policeman’, *Deutsche Presse-Agentur*, 22 May 2003.

<sup>117</sup> Article 31(3) of the VCDR.

VCCR,<sup>118</sup> his or her personal inviolability is absolute save in the case of grave crimes.<sup>119</sup> Immunity from ex post facto court proceedings would be largely meaningless if personal inviolability during the course of duties cannot be guaranteed.

If personal inviolability is understood as falling inside the scope of ‘immunity’, what was said above regarding the inviolability of diplomatic couriers, viz. personal inviolability applies to the temporal scope of the performance of duties, must apply equally to service staff members.<sup>120</sup> In a 1987 incident concerning the Norwegian mission to the UN, a chauffeur of the ambassador was arrested by the local police after he sold a pound of cocaine to several undercover agents.<sup>121</sup> The chauffeur had been using the ambassador’s official car to commit drug dealing on a weekly basis; but the arrest was made when the ambassador was off duty.<sup>122</sup> If personal inviolability were based on the nature of a particular act, the principle would be easily circumvented by accusing the subject of some personal wrongdoing.

Whereas personal inviolability is essential for the performance of official duties, other inviolabilities (such as inviolability of private residence and inviolability of papers and correspondence) in Article 30 of the VCCR are hardly compatible with the status of service staff. In this respect, analogy must be again drawn to the immunity of diplomatic couriers. The drafting history of Article 37 reveals that both the ILC members and States believed that the importance of a subordinate member’s duties is best indicated by whether he or she has access to confidential information of the diplomatic mission.<sup>123</sup> From this perspective, the duties of a diplomatic courier are arguably more important than most service staff of a diplomatic mission, as the courier, when performing his or her duties, is in actual possession of an inviolable diplomatic bag. However, as shown in Chapter 2, even for diplomatic couriers, most States are not willing to grant additional immunities other than personal inviolability.<sup>124</sup> Indeed, it seems rather against the functional basis of diplomatic immunity *ratione materiae* if,

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<sup>118</sup> Article 43(1) of the VCCR.

<sup>119</sup> Article 41(1) of the VCCR.

<sup>120</sup> Chapter 2(5).

<sup>121</sup> Gary Langer, ‘Federal Agents Charge Ambassador’s Driver with Cocaine Dealing’, *The Associated Press*, 9 March 1987.

<sup>122</sup> *Ibid.*

<sup>123</sup> For the opinions of the ILC members, see, for example, Ybk ILC 1957, vol. I, p. 128, para. 65 [Fitzmaurice]; Ybk ILC 1958, vol. I, p. 163, para. 20 [Amado]. For opinions of States, see, the three-State amendment, *supra* note 44; Official Records, vol. I, p. 33, para. 48 [US]; p. 34, para. 56 [Romania].

<sup>124</sup> Chapter 2(5).

for example, inviolability of correspondence can be claimed by a mission gardener who almost never performs any important duties.

From a strictly functional perspective, service staff, like diplomatic couriers, only need personal inviolability during the course of their duties to ensure the proper functioning of a diplomatic mission. However, considering the use of ‘immunity’ in Article 37(3), as well as the fact that certain diplomatic immunities *ratione materiae* represent non-personal-responsibility for acts performed in the exercise of official duties,<sup>125</sup> the better understanding seems to be that a service staff member enjoys personal inviolability *during* the course of official duties and immunity from jurisdiction for acts performed *in* the course of official duties.

## 5. The problem with immunity from execution: a broader scope for ATS?

Article 37(2) refers ‘in the course of duties’ immunity exclusively to Article 31(1).<sup>126</sup> Article 31(3), on the other hand, provides that a diplomatic agent does not enjoy immunity from execution in cases concerning the three exceptions in Article 31(1) if the execution would not infringe the diplomat’s personal inviolability or inviolability of private residence.<sup>127</sup> If an ATS member has performed an ‘outside the course of duties’ act which does not fall into any of the three exceptions in Article 31(1), questions may arise as to whether he or she would enjoy immunity from execution for such an act.<sup>128</sup>

This ambiguity in text has caused problems in practice. In the Australian case of *In the Marriage of Cashman and Teo*, the wife of a Canadian ATS member in Australia sought to enforce a series of property orders which were made against her husband in earlier proceedings concerning custodial rights and property settlement.<sup>129</sup> Having determined that marriage and

<sup>125</sup> Chapter 1(3.2).

<sup>126</sup> Article 37(2) of the VCDR.

<sup>127</sup> Article 31(3) of the VCDR.

<sup>128</sup> Denza seems to hold the view that immunity from execution should not be affected, but admits that this interpretation might not be the intention of the State delegates at the Vienna Conference. Denza, 1st edition, p. 231.

<sup>129</sup> *Supra* note 87.



family issues were not acts performed in the course of duties according to Article 37(2), the court had to decide whether the case, which did not pertain to any exception in Article 31(1), could nonetheless attract immunity from execution. The counsel for the wife argued that upholding immunity from execution in a case where immunity from jurisdiction is not available was ‘nonsensical’.<sup>130</sup> But this argument was rejected by the court. The court relied on two points to conclude that immunity from execution must be maintained even if immunity from jurisdiction is denied: First, since Article 37(2) covers all immunities ranging from Article 29 to Article 35, and since ‘in the course of duties’ immunity in Article 37(2) merely concerns Article 31(1) (immunity from jurisdiction, as opposed to immunity from execution),<sup>131</sup> immunity from execution in the present case must be maintained because Article 31(3) does not contain an exception to immunity based on marriage and family issues;<sup>132</sup> Second, the dichotomy between immunity from jurisdiction and immunity from execution in the VCDR means that the two do not necessarily have the same scope.<sup>133</sup>

However, the drafting history of Article 37(2) seems to suggest that a rigid adherence to the text of the article is not without problems. As mentioned above, ‘in the course of duties’ immunity from civil and administrative proceedings was not adopted by the Vienna Conference until the very last moment;<sup>134</sup> yet the provision that ATS ‘enjoy the privileges and immunities specified in articles 29 to 35’ was based on Article 36(1) of the ILC 1958 Draft, which provided for full diplomatic immunity to ATS members.<sup>135</sup> It seems that delegates at the Vienna Conference, in adopting ‘in the course of duties’ immunity for ATS, simply overlooked its potential impact on the immunity from execution: the representative of Yugoslavia asked, in obiter, whether the formula applies to Article 31 (then draft Article 29) as a whole or only to paragraph 1,<sup>136</sup> and the representative of the UK, as the original proposer

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<sup>130</sup> Ibid, p. 11. The Australian Government held in this case that ‘while the matter was not free from doubt, and that there were arguments to the contrary, the better view appeared to be that ... he does have immunity from execution of the orders made in those proceedings’; but it did not provide any State practice to support this argument. Ibid, p. 10.

<sup>131</sup> Article 37(2) provides that ‘ATS enjoy the privileges and immunities specified in articles 29 to 35, except that immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of article 31 shall not extend to acts performed outside the course of their duties’. (Emphasis added)

<sup>132</sup> Supra note 130, p. 12.

<sup>133</sup> Ibid.

<sup>134</sup> Supra note 12.

<sup>135</sup> Ybk ILC 1958, vol. II, p. 101.

<sup>136</sup> Official Records, vol. I, p. 39, para. 34 [Yugoslavia].

of the formula, replied that it applies only to paragraph 1.<sup>137</sup> Apart from this reply, there was no discussion on the issue during the conference. It could hardly be said that the asymmetry between immunity from jurisdiction and immunity from execution in Article 37(2) has been specifically intended for by the parties.

The court's second argument is not convincing either. It is possible, in the light of the dichotomy between immunity from jurisdiction and immunity from execution, that the two have different scopes; but this possibility is not per se sufficient to conclude that they *actually* have different scopes. Under Article 31(3), a diplomatic agent only enjoys, with the safeguard of personal inviolability and inviolability of private residence, immunity from execution to the same extent as immunity from jurisdiction.<sup>138</sup> The court's interpretation, however, would mean that an ATS member enjoys, with the same safeguard of inviolabilities, more extensive immunity from execution than immunity from jurisdiction. Article 37(2) derives from a draft where ATS enjoy full diplomatic immunity;<sup>139</sup> but once immunity from jurisdiction is curtailed, it is difficult to explain why this extra immunity from execution should persist. The purpose of diplomatic immunity is to facilitate the performance of diplomatic functions rather than benefit individuals;<sup>140</sup> yet by ruling that the Canadian ATS member could not be made subject to the enforcement process in a case which bears no connection with his official duties, the Australian court seems to have achieved the exact opposite. The better understanding, it is submitted, is that immunity from execution shares the same scope with immunity from jurisdiction, on the condition that personal inviolability and inviolability of private residence remain intact.

## 6. Conclusion

This chapter has explored those diplomatic immunities *ratione materiae* in the VCDR which apply the formula of 'in the course of duties'. It is submitted that:

First, 'in the course of duties' is essentially the same as 'in the exercise of functions' — they both refer to acts which have a substantive connection with official duties that come within

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<sup>137</sup> Ibid, para. 35 [UK].

<sup>138</sup> Article 31(3) of the VCDR. Denza notes that Article 31(3) is the 'logical conclusion' of the exceptions in Article 31(1), Denza, 4th edition, p. 264.

<sup>139</sup> Supra note 135.

<sup>140</sup> Preamble of the VCDR.

the overall framework of Article 3(1) of the VCDR. The argument that ‘in the course of duties’ is broader in scope than ‘in the exercise of functions’ is not supported by the drafting history of Article 37. Further, the argument would result in an expansion of the diplomatic immunity *ratione materiae* enjoyed by service staff members of a mission. This expansion, however, is hardly compatible with the importance of duties performed by these members.

Second, from a functional perspective, the immunity of service staff in Article 37(3) must be interpreted as encompassing personal inviolability *during* the performance of duties and immunity from jurisdiction for acts performed *in* the course of duties. The importance of personal inviolability to a successful performance of official duties determines that personal inviolability must be at least as extensive as immunity from court proceedings. Thus, in spite of the absence of personal inviolability in Article 37(3), the word ‘immunity’ must be taken as encompassing personal inviolability during a service staff member’s performance of duties. Other inviolabilities in Article 30 of the VCDR, however, are hardly compatible with the status of service staff members.

Third, an ATS member enjoys immunity from execution only to the same extent as he or she enjoys immunity from jurisdiction. Although the text of Article 37(2) suggests that ATS members enjoy immunity from execution for acts which do not attract immunity from jurisdiction, an examination of the drafting history of the article reveals that this was in fact not the intention of the parties. Like diplomatic agents, ATS should only enjoy immunity from execution to the same extent as they enjoy immunity from jurisdiction. Any enforcement measure, however, should not infringe their personal inviolability or inviolability of private residence.

# Chapter 4: Exceptions Ratione Materiae to Diplomatic Immunity

## 1. Introduction

Diplomatic immunity from judicial proceedings has long been seen as a corollary of the principle of inviolability.<sup>1</sup> However, unlike immunity from criminal proceedings, the absolute nature of which had met with almost universal recognition,<sup>2</sup> immunity from civil proceedings had been subject to many controversies before the adoption of the VCDR.<sup>3</sup> The so-called Italian school,<sup>4</sup> which sought to limit immunity from civil proceedings to official acts only, based their argument on the belief that interference with a diplomat's private life would not affect his or her performance of functions as the official representative of the sending State.<sup>5</sup> This theory echoed with the parallel development in the field of State immunity which sought to preserve immunity only for governmental acts;<sup>6</sup> but in the field of diplomatic immunity it incurred severe criticism from diplomats<sup>7</sup> and scholars alike.<sup>8</sup> It was argued in particular that

<sup>1</sup> Bynkershoek, p. 79; Murty, p. 350; Brown, p. 72; Silva (1972), p. 89.

<sup>2</sup> *Oppenheim's*, 7th edition, p. 708: 'As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of international law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys'; see also, Hurst (1950), p. 225: 'On the whole it may be stated with confidence that [diplomatic immunity from criminal jurisdiction] is not only sound in itself, but is in accordance with the practice of all civilised States'.

<sup>3</sup> Nahlik, p. 255; Adair, pp. 90-91.

<sup>4</sup> For a review of the history and development of the Italian school, see, Frey, pp. 342-345; see also, Barker (2006), pp. 50-52.

<sup>5</sup> Wilson (1967), p. 123. For Italian jurisprudence which applied official/private distinction, see, for example, *Comina v. Kite*, AD (1919-1922), case no. 202; *Perrucchetti v. Puig y Cassauro*, AD (1927-1928), case no. 247; *Castiglioni v. Federal Peoples Republic of Yugoslavia*, ILR 1952, case no. 43. For academic opinions which supported the distinction, see, in particular, Fiore's Draft Code (1890), Article 343.

<sup>6</sup> See, Chapter 1(2.2). Sen, 3rd edition, p. 143; Wilson (1967), p. 112; Barker (1999), p. 938. For a survey of State practice concerning the development of the restrictive theory of State immunity, see, Sucharitkul, pp. 126-170.

<sup>7</sup> In reaction to the ruling of *Comina v. Kite*, the French Ambassador, as dean of the diplomatic corps at Rome, sent a diplomatic note to the Italian Foreign Office to protest against the judgment. The note was reprinted at Harvard Draft, p. 105.

<sup>8</sup> Wilson (1967), p. 123; Briggs, p. 783.

it is impossible to make a distinction between official and private acts of a diplomat;<sup>9</sup> and in case of doubt only the diplomat himself/herself is in a position to determine the nature of an act.<sup>10</sup>

State practice before the VCDR seems to have favoured the latter approach. Domestic legislations provided for diplomatic immunity from civil proceedings without making an official/private distinction;<sup>11</sup> and national jurisprudence recognised diplomatic immunity even when the act involved had no connection with the functions of the diplomat.<sup>12</sup> In his report to the Committee of Experts established by the League of Nations, the Special Rapporteur concluded that, ‘in principle, international usage recognises this immunity [from civil proceedings] of diplomatic agents without distinguishing between acts performed by them in the exercise of their functions and those which they perform in a private capacity’.<sup>13</sup>

However, the rejection of the official/private distinction does not mean that diplomatic immunity from civil proceedings is absolute in nature. On the contrary, it was believed that the immunity should be qualified by exceptions.<sup>14</sup> A salient example in this respect was immunity from proceedings concerning immovable property: most draft codes prepared by learned academic societies or authors contained an exception to immunity based on real property;<sup>15</sup> and Diena noted in his report that the exception was ‘consistent with generally

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<sup>9</sup> Hurst (1950), p. 232.

<sup>10</sup> Ibid.

<sup>11</sup> For a general review of national legislations at this period, see, Harvard Draft, pp. 100-103.

<sup>12</sup> See, for example, *Taylor v. Best* (UK), 14 C. B. 487, 519; *De Bruc v. Bernard* (France), D.P.85.2.194, relevant parts reprinted at Harvard Draft, p. 106. In fact, even Italy had formally discarded the distinction in the case of *De Meeus v. Forzano*, AD (1938-1940), case no. 164; this judgment was later confirmed by *Nadaluti v. Barjansky* (1965), 71 ILR 535 and *Russel v. Societa Immobiliare Soblim* (1979), 78 ILR 101.

<sup>13</sup> Diena, ‘Report of the Sub-Committee on Diplomatic Privileges and Immunities’, League of Nations, C.196.M.70.1927.V., p. 80.

<sup>14</sup> Early writers have qualified immunity from civil proceedings on various grounds. Bynkershoek held that movable or immovable property held by a diplomat in his private capacity could be seized if the seizure would not impede the ‘adequate performance of the functions of his embassy’, see, supra note 1; and Vattel added in addition that goods and assets used by a diplomat when he engaged in commerce are also subject to the jurisdiction of the receiving State, see, Vattel, vol. 3, pp. 389-393.

<sup>15</sup> Article 27(1) of the Project of American Institute of International Law (1925); Article 27(b) of the Project of the International Commission of American Jurists (1927); Article 35 of the Phillimore’s Draft Code (1926); Article I(1) of the Draft Code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (1926).

recognised custom'.<sup>16</sup> Other potential exceptions, on the other hand, were more controversial: immunity for commercial or professional activities had been upheld in some cases but denied in others;<sup>17</sup> and although there were cases in which immunity was denied in a proceeding concerning succession,<sup>18</sup> State practice was so scarce that the customary status of the exception was questioned by both States<sup>19</sup> and writers.<sup>20</sup>

Article 31(1) as adopted by the VCDR was thus a combination of codification of customary international law<sup>21</sup> and progressive development of new rules.<sup>22</sup> The ILC justified the three exceptions on different grounds;<sup>23</sup> but they can also be based on the common rationales that: first, they all concern activities which are not likely to happen in the course of a diplomat's duties;<sup>24</sup> and second, they are not likely to involve criminal prosecution.<sup>25</sup>

<sup>16</sup> Supra note 13, p. 81. Even Hurst, who strongly supported complete immunity from civil jurisdiction, admitted that the exception of immovable property was the prevailing belief. See, Hurst (1950), p. 236.

<sup>17</sup> English courts had consistently granted immunity even when a diplomat was involved in business, see, *Taylor v. Best*, supra note 12; *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94. For State practice which rejected immunity for commercial or professional activities, see, for example, *Van Der Elst v. Commissioner of Internal Revenue* (1955), 22 ILR 543; *Thams v. Minister of Finance*, AD (1929-1930), case no. 191.

<sup>18</sup> See, for example, *Re Nijdam, deceased*, 22 ILR (1955), p. 530, in which immunity was rejected with respect to a request to supply information concerning an estate of which the diplomat was one of the beneficiaries.

<sup>19</sup> In its comments on the 1957 draft of the VCDR, the US Government questioned the customary status of the exceptions on succession and commercial or professional activities, see, A/CN.4/1116, pp. 55-56.

<sup>20</sup> *Oppenheim's*, 9th edition, p. 1094.

<sup>21</sup> Article 31(1)(a).

<sup>22</sup> Article 31(1)(b) and (c). For a comparison between exceptions in Article 31(1) and pre-convention British practice, see, Buckley, pp. 342-343.

<sup>23</sup> ILC's commentaries to 1958 Draft, Ybk ILC 1958, vol. II, p. 98. The first exception is justified on the exclusive jurisdiction of the receiving State with respect to immovable property; the second one is based on the consideration that a succession proceeding, which usually involves many parties in the receiving State, should not be hampered by the diplomatic immunity of only one party; and the third one echoes with Article 42 of the VCDR which prohibits a diplomat from performing commercial or professional activities.

<sup>24</sup> Cf. the amendment proposed by Netherlands during the Vienna Conference which sought to add a fourth exception based on traffic accidents, Official Records, vol. I, p. 27. The amendment was rejected because automobile accidents may happen in the performance of diplomatic functions, see on this point, Kerley, pp. 120-121. See also, Ybk ILC 1957, vol. I, p. 97, para. 60 [Matine-Daftary].

<sup>25</sup> Hardy, p. 59; Frey and Frey, p. 485. On similar opinions expressed by ILC members in travaux préparatoires, see, Ybk ILC 1957, vol. I, p. 94, para. 8 [Fitzmaurice] and p. 95, para. 20 [Sandström]. For a more extreme view, see, O'Nelli, who argues that functional necessity

However, the acceptance by States of the three exceptions does not render their *application* free from problems. The official/private distinction remains relevant in this regard because each exception contains a proviso which grants immunity for official acts.<sup>26</sup> The problem is further complicated by the different wording applied in the article,<sup>27</sup> which seems to suggest that the scope of ‘official acts’ may vary with respect to each exception. This chapter will thus start by answering the general questions about wording — i.e. whether ‘on behalf of State’ is the equivalent of ‘in the exercise of official functions’; and whether there is a difference between functions of a diplomatic agent and functions of a diplomatic mission. Section 3 will look at the status of private residences of diplomatic agents; and Section 4 will deal with the scope of ‘real actions’. The definition of ‘commercial or professional activities’ in Article 31(1)(c) will be examined in Section 5.

## 2. Problems with wording

### 2.1. The difference between ‘on behalf of the sending State’ and ‘in the exercise of official functions’

The relationship between ‘on behalf of the sending State’ and ‘in the exercise of official functions’ of a diplomat is a matter which informs the overall debate on diplomatic immunity *ratione materiae*.<sup>28</sup> Academic opinions are split on this issue. For Salmon, an act performed in the exercise of functions or in the course of duties<sup>29</sup> equals an act performed on behalf of the

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theory logically dictates a total denial of immunity from civil proceedings because civil proceedings would not jeopardise the process of diplomatic functions. O’Nelli, p. 689.

<sup>26</sup> In fact, the debate on official/private distinction has featured in several stages of the ILC discussion. See, for example, on the ‘official business’ of a diplomatic mission, Ybk ILC 1957, vol. I, pp. 144-145, para. 68 [Sandström]. For a review of the controversy on the distinction within the ILC in the context of diplomatic interference, see, Behrens (2016), pp. 48-52.

<sup>27</sup> Article 31(1)(a) and (b) apply the wording of ‘on behalf of the State’, whereas Article 31(c) uses ‘in the exercise of functions’.

<sup>28</sup> See, for example, the discussion of the relationship between rules of attribution of State responsibility and Article 39(2) at Chapter 2(3).

<sup>29</sup> Salmon regards the formula of ‘in the exercise of functions’ as the same with ‘in the course of duties’. On this point, see Chapter 3(2).

sending State, to which the act is attributed.<sup>30</sup> The author of the fifth edition of *Satow's Guide to Diplomatic Practice*, on the other hand, takes issue with the equation and argues that only 'official acts performed in the exercise of his functions' — the wording applied in Article 38(1) of the VCDR — can be regarded as acts performed on behalf of the sending State.<sup>31</sup> This in turn suggests that ancillary/incidental acts performed in the exercise of functions would not be regarded as acts performed on behalf the sending State.<sup>32</sup>

On a practical level, the relationship between the two phrases may determine the scope of the exceptions in Article 31(1)(a) and Article 31(1)(b). As concluded in Chapter 2, 'in the exercise of functions' is capable of covering certain ancillary/incidental acts which directly benefit the performance of diplomatic functions.<sup>33</sup> Thus, if 'on behalf of the sending State' is the equivalent of 'in the exercise of functions', questions may arise as to whether, for example, a diplomat's principal private residence, which arguably directly benefits his or her performance of functions in the receiving State, may be protected by Article 31(1)(a).<sup>34</sup> On the other hand, if 'on behalf of the sending State' refers only to acts in strict application of diplomatic functions, all ancillary/incidental acts would be excluded from the protection of Article 31(1)(a) and Article 31(1)(b).

To solve the problem, attention will first be directed to the travaux préparatoires of the VCDR. The exception on immovable property in the Special Rapporteur's original draft did not contain a proviso which would exempt a diplomat from local jurisdiction if he or she holds the property on behalf of the sending State.<sup>35</sup> During the discussion of the exception in 1957, Tunkin raised a practical issue where immovable property used for the purposes of a mission was held in the name of the ambassador because local law did not permit the property to be acquired by a foreign State.<sup>36</sup> For him, a diplomatic agent should enjoy immunity in this scenario because 'he was the owner only in name'.<sup>37</sup> This concern was shared by many

<sup>30</sup> Salmon, p. 321. Others do not mention the distinction between the two formulas but seem to have treated them as the same. See, Dembinski, p. 207, in which both are referred to as 'acts accomplished in the exercise of the official functions'; Sen, 3rd edition, p. 142, which put them under the same title of 'in an official capacity'. See also, Reyes (2017), para. 17.

<sup>31</sup> *Satow's*, 5th edition, p. 131. See also, Denza, 3rd edition, p. 408.

<sup>32</sup> On ancillary/incidental acts, see Chapter 2(4.2).

<sup>33</sup> *Ibid.*

<sup>34</sup> For more detailed discussion on this particular point, see, Section 3 below.

<sup>35</sup> Ybk ILC 1955, vol. II, pp. 11-12, Article 20(1)(a).

<sup>36</sup> Ybk ILC 1957, vol. I, p. 94, para. 5 [Tunkin].

<sup>37</sup> *Ibid.*, p. 95, para. 19 [Tunkin].



members of the ILC. Pal, in particular, argued that the diplomat in this situation was merely a name-lender or a trustee, since he was holding the premises *on behalf of* his government, who is the beneficial owner.<sup>38</sup> Other ILC members, while reluctant to admit any exception to the overriding jurisdiction of the receiving State with respect to immovable property,<sup>39</sup> recognised the practical necessity of a proviso in this regard.<sup>40</sup> Following an amendment proposed by Fitzmaurice,<sup>41</sup> the formula of ‘on behalf of the sending State’ was finally adopted by the ILC.

The above review of the history of the proviso in Article 31(1)(a) shows that the ILC members have intended to limit the scope of ‘on behalf of the sending State’ to the narrow scenario in which a diplomat holds mission premises in his or her own name because local law does not permit acquisition of immovable property by a foreign State. The sending State itself bears the rights and obligations of the immovable property; and the diplomat in this case is in fact holding the property *in the name* of the sending State.<sup>42</sup>

The practical relevance of this narrow construction of ‘on behalf of the sending State’ is fully illustrated by the case of *Rahimtoola v. Nizam of Hyderabad*.<sup>43</sup> In this case, an official of the government of Hyderabad transferred without authority some money into the account of the serving high commissioner of Pakistan in the UK, who received the money upon the clear instructions of Pakistan. The government of Hyderabad later brought action against the high commissioner and the bank holding the money for recovery. The House of Lords dismissed the action by upholding the State immunity of Pakistan, but the reasons given by individual Lords were distinct.<sup>44</sup> Lord Denning, in particular, took note of the question whether the legal title of the money, which was transferred to an account named ‘Habib Ibrahim Rahimtoola (High Commissioner for Pakistan in London)’, lay with the commissioner personally or with the State of Pakistan.<sup>45</sup> For Lord Denning, the description in the bracket signified the

<sup>38</sup> Ibid, p. 94, para. 13 [Pal].

<sup>39</sup> Ibid, p. 95, para. 23 [Sandström].

<sup>40</sup> Ibid, para. 35 [Spiropoulos].

<sup>41</sup> Ibid, para. 25 [Fitzmaurice].

<sup>42</sup> See also commentaries to Article 32 of the 1958 draft of the VCDR, where the ILC pointed out that when a diplomat holds an immovable property on behalf of the sending State, income derived from the immovable property should be exempt from personal taxation because the income ‘does not belong to him, and consequently he is not liable to dues and taxes on such income’. Ybk ILC 1958, vol. II, p. 100.

<sup>43</sup> *Rahimtoola v. Nizam of Hyderabad and Another*, [1958] A.C. 379.

<sup>44</sup> Ibid, p. 380.

<sup>45</sup> Ibid, pp. 412-413.

commissioner's office and the fact that he had been acting in an official capacity, but the legal title of the money still lay with the person of the commissioner rather than the sending State, because 'if Pakistan had desired to have the legal title in itself, it should have taken care to have the account transferred into its own name, but it did not do so and must take the consequences'.<sup>46</sup>

The opinion of Lord Denning was not shared by other Lords; but the problem with legal title in this case mirrors exactly the concern of the ILC members when they were drafting Article 31(1)(a) of the VCDR.<sup>47</sup> By adding the phrase 'on behalf of the sending State' to the article, the ILC members have intended to make it clear that, when a diplomat registers mission premises under his or her own name in order to comply with local laws, the effect is as if the premises have been registered in the name of the sending State.

This interpretation echoes the travaux préparatoires of the exception on succession proceedings. Unlike the proviso in Article 31(1)(a), the phrase 'as a private person and not on behalf of the sending State' in Article 31(1)(b) was not added to the VCDR until the Vienna Conference, following an amendment proposed by Spain.<sup>48</sup> In explaining the amendment, the Spanish representative indicated that

[T]he object of the ... amendments was to exclude from the jurisdiction of the courts of the receiving States actions relating to a succession in which the diplomatic agent acted *on behalf of* his government. In that case, it was the sending State which was the heir, and not the diplomatic agent.<sup>49</sup>

Like the proviso in Article 31(1)(a), the diplomat in this case is in fact inheriting the estate *in the name* of the sending State; and all rights and obligations relating to the succession should be borne by the State itself.

The narrow interpretation of the above two provisos, however, did not feature in the ILC's discussion on Article 31(1)(c). Neither the ILC members nor delegates at the Vienna Conference considered the scope of 'in the exercise of official functions' in Article 31(1)(c). However, the question was indeed discussed in the context of other diplomatic immunity

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<sup>46</sup> Ibid.

<sup>47</sup> Supra note 36-41 and accompanying text.

<sup>48</sup> Official Records, vol. II, p. 30.

<sup>49</sup> Official Records, vol. I, p. 167, para. 34 [Spain] (Emphasis added).

ratione materiae provisions. With regard to the immunity of diplomats who are nationals of the receiving State,<sup>50</sup> the majority of the ILC members believed that, if a receiving State agrees to the appointment of such a diplomat, it must accord a minimum degree of immunity to enable the *effective performance* of diplomatic functions.<sup>51</sup> In the discussion concerning the immunity of subordinate staff of a mission, those ILC members who favoured a restrictive approach<sup>52</sup> argued that immunity for acts performed ‘in the exercise of functions’ is sufficient to ensure the *performance* of duties by these junior staff.<sup>53</sup> It is true that different kinds of diplomatic immunity *ratione materiae* might entail different scope of application; but the opinions expressed within the ILC with respect to the formula of ‘in the exercise of functions’ have indeed proved a shift of focus from ‘in the name of the sending State’ to ‘facilitation of official functions’, i.e., *ne impediatur legatio*. The act of holding mission premises on behalf of the sending State certainly falls into the official functions of a diplomat,<sup>54</sup> but it is questionable whether the reverse side of the argument is equally tenable. An act which benefits official functions of a diplomat is not necessarily performed in the name of the sending State. If this logic is to be followed, the formula ‘in the exercise of official functions’ would then enjoy a broader scope than ‘on behalf of the sending State’. The *travaux préparatoires* provide little guidance in this regard; but subsequent State practice does illustrate the point.

In *Tabion v. Mufti*, the US Court of Appeals had to decide whether an incumbent foreign diplomat enjoyed immunity for alleged violation of an employment contract he concluded with a domestic servant.<sup>55</sup> The plaintiff claimed that contracting for domestic service amounted to

<sup>50</sup> The original proposal for Article 38(1) of the VCDR read: ‘A diplomatic agent who is a national of the receiving State shall enjoy the privilege of immunity only in respect of acts performed in the exercise of his diplomatic functions’. Ybk ILC 1957 vol. I, p. 98, para. 7 [Chairman].

<sup>51</sup> Ybk ILC 1957, vol. I, p. 99, para. 21 [Verdross]; p. 100, para. 28 [Yokota]; p. 100, para. 34 [Garcia Amador]; p. 101, para. 42 [Padilla Nervo]. See also, Chapter 2(2).

<sup>52</sup> The immunity of ATS was subject to intense controversy within the ILC during the drafting stage. Proponents of the restrictive approach held that these members should only enjoy immunity for acts performed in the exercise of functions; others argued that due to the importance of their duties, they should enjoy full immunity. See more fully, Chapter 3(2).

<sup>53</sup> See, the amendment proposed by Bartos, at Ybk ILC 1957, vol. I, p. 130, para. 9; p. 131, para. 16 [Matine-Daftary].

<sup>54</sup> The same goes for an ambassador signing a contract on behalf of the sending State for the repainting of the embassy building. Aust holds that in this situation, ‘it is the sending State that is the party to the contract, not the ambassador’. See, Aust (2010), p. 127.

<sup>55</sup> *Tabion v. Mufti*, 73 F. 3rd 535 (4th Cir. 1996).

a commercial activity outside the official functions of the diplomat and therefore Article 31(1)(c) applied.<sup>56</sup> The court rejected the claim, holding in particular that

Day-to-day living services such as dry cleaning or domestic help were not meant to be treated as outside a diplomat's official functions. Because these services are incidental to daily life, diplomats are to be immune from disputes arising out of them.<sup>57</sup>

In a more recent case of a similar kind, the District Court of Columbia confirmed this decision.<sup>58</sup>

Jurisprudence in the UK points to the same direction. In *Abusabib v. Taddese*, the British court established a spectrum to distinguish employment of domestic workers which falls inside the exercise of diplomatic functions from employment which does not.<sup>59</sup> Whereas the employment of a worker 'who performs no task outside the diplomat's home' is clearly outside the functions of the diplomat, the employment of a personal assistant 'whose job is replying to correspondence, both official and personal, and managing the diary, travel arrangements and the like of the diplomat' must be protected by the formula of 'in the exercise of functions'.<sup>60</sup> The employment of domestic workers, whose salary is paid by the diplomatic agent personally,<sup>61</sup> can hardly be regarded as an employment contracted 'on behalf of' the sending State. Yet the British court seems to have no problem in granting immunity to an employment relationship if the worker employed performs duties related to diplomatic functions.<sup>62</sup>

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<sup>56</sup> *Ibid*, p. 537.

<sup>57</sup> *Ibid*, p. 539. For the problem with this statement, see Chapter 2(4.2). See also, Mullally and Murphy, p. 699.

<sup>58</sup> *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, at 130. In a 2013 case concerning the bank account of the Lao diplomatic mission in the US, the US Government stated that the use of the account to purchase office supplies and telephone and internet services, as well as to pay rent on the facilities that house the embassy and the UN mission, 'is not commercial activity outside the official functions of the diplomatic staff, but rather is in connection with the performance of the functions of the mission'. *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al*, *US Digest* (2013), pp. 292-297, at p. 294.

<sup>59</sup> *Abusabib v. Taddese*, [2013] I.C.R. 603, para. 31.

<sup>60</sup> *Ibid*.

<sup>61</sup> US courts have on several occasions used this fact to illustrate the private nature of an employment of domestic staff. See, for example, *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509.

<sup>62</sup> For a similar decision in Belgium, see, *Portugal v. Goncalves*, in which the Civil Court of Brussels held that acts incidental to the performance of diplomatic functions in Article 3(1) of the VCDR must be regarded as in the exercise of a diplomat's functions. *Portugal v Goncalves*, 82 ILR 115, at p. 117. See also, *Reyes* (2017), para. 66 [Lord Wilson]. For a more detailed discussion on 'in the exercise of functions' immunity for ancillary/incidental acts, see Chapter 2(4.2).

A more extreme situation exists in the case of *Heirs of Pierre S. v. Austria*.<sup>63</sup> The Supreme Court of Austria in this case ruled that the Austrian Ambassador to Yugoslavia was performing his functions of representation when he accidentally killed the French Ambassador in an official hunt organised by the Yugoslav President.<sup>64</sup> The court held, inter alia, that

Representing the sending State and protecting its interests also requires that the ambassador of the sending State should accept an invitation from the President of the receiving State to participate in an official hunt, which serves not merely social purposes but also allows the fostering of personal contacts, which are so important, with representatives of the receiving State. The fostering of such contacts is a condition for the exercise of the office of ambassador and forms part of the fulfilment of his official duties.<sup>65</sup>

Whereas the ambassador could be said to have participated in the official hunt ‘on behalf of’ the sending State, it is difficult to argue that he had accidentally killed the French Ambassador on behalf of his State. The accident was the result of the ambassador’s personal negligence; it could be regarded as ‘in the exercise of functions’ not because it was performed in the name of the sending State,<sup>66</sup> but because of its close connection to the functions of the ambassador.<sup>67</sup>

To sum up, it is submitted that ‘on behalf of the sending State’ is narrower in scope than ‘in the exercise of functions’. While the former relates to an act performed in the name of the sending State *stricto sensu*; the latter aims at facilitating the performance of diplomatic functions and thus encompasses acts which are performed in the name of the diplomat but which are closely related to his or her official functions.

## 2.2. Functions of a diplomat and functions of a diplomatic mission: should there be a dividing line?

<sup>63</sup> *Heirs of Pierre S. v. Austria* (1982), 86 ILR 546.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, p. 548.

<sup>66</sup> See, the drafting history of Article 31(1)(a) and (b) at *supra* note 42 and 49 respectively.

<sup>67</sup> For a more detailed discussion on the impact of the seriousness of an act on ‘in the exercise of functions’ immunity, see, Chapter 2(4.3).

Amongst all the provisions which have applied ‘in the exercise of functions’ formula, none has linked the particular ‘functions’ directly to Article 3(1) of the VCDR, which sets out the functions of a diplomatic mission as a whole.<sup>68</sup> Article 31(1)(c) speaks of a commercial or professional activity outside *a diplomat’s* official functions. Questions may arise as to whether, and if so to what extent, the official functions of a diplomat can deviate from the functions of a diplomatic mission.

Some authors have treated them as the same: editors of the *Oppenheim’s International Law*, as well as Sen, have referred to Article 3(1) as functions of a diplomatic agent.<sup>69</sup> Others, however, take exception to the equation and argue that the difference in text must assume significance: Denza, for example, holds that the functions of a diplomat should be broader in scope than Article 3 in order to enclose any superior instruction as long as such instruction does not exceed the ‘bounds of proper activity’;<sup>70</sup> Salmon reaches the same conclusion from a different line. For him, all acts that could be attributed to the sending State should be regarded as acts performed in the exercise of a diplomat’s functions and thus protected by diplomatic immunity *ratione materiae*.<sup>71</sup> He contrasts the formula of ‘in the exercise of functions’ in the VCDR with Article 43(1) of the VCCR;<sup>72</sup> and argues that the absence of the word ‘diplomatic’ before ‘functions’ in the former indicates that reference should not be made to Article 3(1).<sup>73</sup>

The purpose of a broader interpretation of a diplomat’s functions is to reduce the chance of the diplomat being exposed to personal civil suits when he or she is carrying out instructions.<sup>74</sup> However, it is questionable whether ‘bounds of proper activity’ provides a better solution.

<sup>68</sup> See the text of Article 27(5), Article 31(1)(c), Article 38(1), and Article 39(2).

<sup>69</sup> *Oppenheim’s*, 9th edition, p. 1065; Sen, 3rd edition, p. 56. See also, Nahlik, pp. 294-295.

<sup>70</sup> Denza, 3rd edition, p. 307. This also seems to be the opinion of the British Employment Appeal Tribunal in *Abusabib v. Taddese*, where it was argued that there is a ‘clear distinction’ between functions of a former diplomat in Article 39(2) and functions performed by a serving diplomat. *Supra* note 59, para. 29. See also, *Reyes* (2017), para. 20.

<sup>71</sup> Salmon, p. 465. Glahn and Taulbee also seem to believe that functions of a diplomatic agent are distinct from functions of a diplomatic mission when they group the former under the titles of negotiation, representation, information, protection, public relations, and administration. Glahn and Taulbee, pp. 374-375.

<sup>72</sup> Article 43 provides that a consular agent enjoys immunity for acts performed in the exercise of *consular* functions; and Article 5 of the VCCR clearly sets out what *consular* functions are.

<sup>73</sup> Salmon, p. 465. Authors of *Brownlie’s Principles of Public International Law* (8th edition) seem to hold the same view when they argue that diplomatic immunity *ratione materiae* ‘appears to extend to acts undertaken by a diplomat which were ordered by the sending State’. *Brownlie’s*, 8th edition, p. 408.

<sup>74</sup> Denza, 3rd edition, p. 307. See also, Shapiro, p. 296.

Article 3 has been coined in such broad terms<sup>75</sup> that it could potentially include, as correctly indicated by Aust, ‘anything which the two States wish to do together through the means of their respective diplomatic missions’.<sup>76</sup> Take the examples of commercial activities and consular activities, the two kinds of conduct in which Denza perceives a necessity to establish the ‘bounds of proper activity’ formula: the function of developing economic relations in Article 3(1)(e), as well as the function of protecting interests of the sending State and of its nationals in Article 3(1)(b), may well include certain commercial activities such as trade promotion or assistance to businessmen;<sup>77</sup> with regard to consular activities, Article 3(2) provides that the VCDR does not prohibit the performance of consular functions by diplomatic agents;<sup>78</sup> and Article 3 of the VCCR explicitly states that the consular functions ‘are also exercised by diplomatic missions’.<sup>79</sup>

On the other hand, however, the ‘bounds of proper activity’ formula is per se a vague standard. The interpretation of what constitutes a ‘proper activity’ hinges upon the attitudes of the two States just as much as the interpretation of the exact contents of Article 3(1). If, for example, a receiving State holds the view that the running of a tourist office is incompatible with the

<sup>75</sup> The phrase ‘inter alia’ in Article 3(1) means that the functions enumerated are not exhaustive. See, ILC’ commentaries to draft Article 3, Ybk ILC 1958, vol. II, p. 90.

<sup>76</sup> Aust (2010), p. 110. See also, Silva (1972), p. 59, in which the author indicates that the headings of representation, negotiation, observation, and protection are sufficient to contain potential change in the specific functions of a diplomatic mission. In *Propend v. Sing*, the British Court of Appeal, in upholding the immunity under Article 39(2) for an Australian diplomat who had performed police functions, pointed out that certain police functions may also be regarded as part of the diplomatic functions under Article 3(1). *Propend v. Sing*, p. 6. With regard to a ‘permissive’ interpretation of Article 3(1)(b) as encompassing the function of protecting civilians of the receiving State in humanitarian crisis, see, Barker (2012), pp. 387-406.

<sup>77</sup> The Netherlands, for example, requests its military attachés abroad to identify new markets for Dutch military goods and to play a supportive role in the sale of these goods. See, *NYIL* (1984), p. 304. Similarly, in the agreement between the US and the German Democratic Republic concerning the opening of branch offices of the commercial sections of their respective embassies, it was provided that the officer in charge of the office, who retains his diplomatic status, ‘may engage in general trade promotion activity, but may not function as agents or principals in commercial transactions or enter into contractual agreements on behalf of commercial organisations’. See, *Cumulative Digest*, p. 927. For an analysis of the so-called ‘commercial diplomacy’, see, Berridge (2010), p. 119.

<sup>78</sup> Article 3(2) of the VCDR. Silva holds that the term ‘inter alia’ in Article 3(1) of the VCDR means that the exercise of consular functions is also deemed part of the exercise of diplomatic functions, see, Silva (1972), p. 65.

<sup>79</sup> Article 3 of the VCCR.

functions in Article 3(1),<sup>80</sup> it is difficult to understand why, by applying the ‘bounds of proper activity’ standard, the same State would acknowledge that a diplomatic agent working in such an office is performing ‘proper activity’ and thus inside *his or her* official functions.

A review of the travaux préparatoires shows that this broad interpretation is not supported. The concept of ‘functions of a diplomat’ as distinct from the functions of a diplomatic mission has never been subject to any serious debate within the ILC.<sup>81</sup> On the contrary, many ILC members have used ‘functions of a diplomatic mission’ and ‘functions of a diplomat’ indistinctly. El-Erian, for example, argued that a provision on the functions of a diplomatic mission is necessary because reference needs to be made to such a provision when the functions of a diplomatic agent come into question.<sup>82</sup> Scelle, for his part, simply equated the functions of a diplomatic mission with the functions of an ambassador.<sup>83</sup>

The main problem with the broad interpretation of a diplomat’s functions is that it introduces into the VCDR an element no less ambiguous than Article 3(1), and in doing so brings the risk of the element being abused to the extent that a diplomat’s functions could be interpreted as anything he or she does under the instruction of the sending State’s government.<sup>84</sup> Salmon, for example, holds that, ‘in good logic’, acts such as espionage and terrorism should also be protected by diplomatic immunity *ratione materiae* because they are normally official in nature.<sup>85</sup> In the case of *Former Syrian Ambassador to the German Democratic Republic*, the Federal Constitutional Court of Germany ruled in a similar vein that the former Syrian

<sup>80</sup> This was the stance of the UK Government in its 1985 Report. See, Government Report 1985, para. 39.

<sup>81</sup> On one of the rare occasions in which the distinction seems to have been made, see *infra* note 88 [Fitzmaurice].

<sup>82</sup> Ybk ILC 1957, vol. I, p. 50, para. 63 [El-Erian].

<sup>83</sup> *Ibid*, para. 69 [Scelle].

<sup>84</sup> In his comments on *Propend v. Sing* and *Re P*, Barker indicates in a similar vein that diplomatic immunity *ratione materiae* should be interpreted carefully in order to avoid the implication of a more general act of State doctrine according to which a mere assertion of the sending State would suffice for the granting of immunity. See, Barker, ‘State Immunity’ (1998), p. 958.

<sup>85</sup> Salmon, p. 468. But the author enters a caveat concerning international law which imposes personal responsibility, although he does not expound on this point. See also, Delupis, pp. 58-59. Värk also seems to hold a similar view when he argues that a *prima facie* private act may still be deemed official in nature if the act is instructed by the sending State’s government. Värk, p. 115. See also, Green, who holds the view that, if a criminal act is performed under the instruction of the sending State, any remedy should be sought against the State itself rather than the diplomatic agent concerned. Green, p. 150.



Ambassador, who had assisted in carrying out a terrorist attack in the receiving State, could be protected by Article 39(2) of the VCDR as long as the assistance had been instructed by his government.<sup>86</sup> During the ILC's discussion on the duty of non-interference in the internal affairs of the receiving State,<sup>87</sup> Fitzmaurice also expressed the view that when an ambassador was instructed to interfere, he or she would always follow the instruction and 'in doing so would be discharging his function'.<sup>88</sup>

However, it should be noted that diplomatic immunity, like any other kind of immunity in international law, constitutes a concession of part of the territorial State's sovereignty which is made in order to facilitate the performance of a particular function *recognised* by the territorial State.<sup>89</sup> Article 3(1) of the VCDR sets out the contents (and limits) of the license for a sending State to conduct official business in the receiving State, and this license separates diplomatic immunity from other immunities (such as consular immunity and functional immunity of ordinary State officials) in international law.<sup>90</sup> If a diplomat's functions could be interpreted outside the framework of Article 3(1), it must be questioned why the diplomat has the right to perform these functions *in the receiving State* in the first place.<sup>91</sup>

<sup>86</sup> *Former Syrian Ambassador to the German Democratic Republic* (1997), 115 ILR 595. For support of the ruling to the extent that Article 39(2) protects acts performed under official instructions, see, Fassbender, pp. 78-78, in which the author seems to hold the view that the Syrian Ambassador should enjoy diplomatic immunity *ratione materiae* even in a third State.

<sup>87</sup> Article 41(1) of the VCDR.

<sup>88</sup> Ybk ILC 1957, vol. I, p. 147, para. 22 [Fitzmaurice]. See also, para. 17 [Hsu].

<sup>89</sup> Higgins (1985), p. 641: 'diplomatic immunity is an exception to the general rule of territorial jurisdiction' in order to balance 'the pursuit of the foreign policy interests of the sending State with respect for the territorial sovereignty of the receiving State'. Hyde also points out that diplomatic privileges for those who are not expressly accepted by the receiving State can only be based on courtesy rather than right. Hyde, p. 438. See also, Sinclair (1980), pp. 214-216; Yang, p. 50. With regard to immunities of special missions, Kalb indicates that, under customary international law, a special mission member enjoys immunities in the receiving State only if his status is 'accepted as such'. Nadia Kalb, 'Immunities, Special Mission', *Max Planck Encyclopedia of Public International Law* (May 2011). In his second report on functional immunity in general international law, the ILC Special Rapporteur also states that 'it is customary rule that no State has to recognise the immunity of a foreign agent if his presence and performance of functions in its territory are not admitted in advance'. See, Second Report, para. 85.

<sup>90</sup> In a similar vein, Hurst points out that diplomatic immunity is not due to the fact that a diplomat 'is engaged on the business of a foreign government', but to the fact that 'he is part of the machine to maintain the relations between the two governments'. Hurst (1929), p. 4. For similar academic opinions, see, Murty, p. 431; Dinstein, p. 89; Milhaupt, p. 842, footnote 9; McCready, p. 180.

<sup>91</sup> In this respect, Akehurst is clearly justified when he states that diplomatic immunity and consular immunity are in fact based on an obligation 'not to derogate from an agent's grant of

The importance of this recognition by the receiving State of any official function performed on its territory has been repeatedly confirmed in State practice. Thus, in the case of *R v. Lambeth Justices*, the claim of diplomatic immunity by a major of the Nigerian Military, who had (with the help of Nigerian diplomats) abducted Umaru Dikko in London and attempted to repatriate him in a bag, was rejected by the English court because the major had never been accepted by the UK Government, although the abduction was clearly instructed by the Nigerian Government.<sup>92</sup> In other instances, even those who had been appointed by the sending State to perform functions which are capable of falling inside the remit of Article 3(1) were nonetheless denied any immunity because their appointment was not accepted by the receiving State. In the US case of *United States v. Sissoko*, for example, a Gambian diplomat appointed as an advisor to a special mission in the US was denied any immunity because the appointment was not recognized by the US.<sup>93</sup> In a similar vein, Lord Parker C.J. pointed out in *Regina v. Governor of Pentonville Prison* that ‘it is fundamental to the claiming of immunity by reason of being a diplomatic agent that that diplomatic agent should have been in some form accepted or received by this country’.<sup>94</sup>

Indeed, Article 3(1) is coined in broad terms that its exact scope is usually left to the attitudes of the two States. Yet it is still possible to discern a narrower scope of the article than ‘acts instructed by the sending State’. The Preamble of the VCDR stresses the importance of maintenance of international peace and security and promotion of friendly relations among States. It is thus difficult to understand how acts such as State-sponsored terrorism<sup>95</sup> or

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a right of entry’. Akehurst, p. 244. In arguing that diplomatic immunity *ratione materiae* differs from functional immunity in general international law because the former immunity is recognised by the receiving State for the sake of performing diplomatic activity, Dinstein also points out that, if a (former) diplomat has performed non-diplomatic functions, his position would be the same as an ordinary State official who visits the receiving State in a private capacity. Dinstein, pp. 88-89.

<sup>92</sup> *R v. Lambeth Justices*, 88 ILR 232. See also, Davidson (1986), pp. 435-436. For similar cases concerning abduction and political assassination, see, *Khurts Bat v. Investigating Judge of the German Federal Court* (2011), 147 ILR 633 and *Letelier v. Republic of Chile*, 488 F. Supp. 665 respectively.

<sup>93</sup> *United States v. Sissoko* (1997), 995 F.Supp. 1469.

<sup>94</sup> *Regina v. Governor of Pentonville Prison, Ex parte Teja* (1971), 2 Q.B. 274, at p. 282. Cf. *Abdulaziz and Others v. Metropolitan Dade County and Others* (99 ILR 113), in which consent was given retroactively.

<sup>95</sup> In 2017, a suspect of the 1984 Libyan Embassy shooting incident was arrested in the UK, but was later released because certain evidence against him was ‘inadmissible’ due to national security concern. Considering the reaction of the UK Government after the incident, it seems

international crimes,<sup>96</sup> which are usually official in nature, could be deemed as within the scope of diplomatic functions.<sup>97</sup> With respect to espionage, Article 3(1)(d) enunciates that the function of collecting information must be carried out by ‘all lawful means’.<sup>98</sup> In practice, the numerous cases of a foreign diplomat being expelled for ‘activities incompatible with his diplomatic status’ are also strong evidence that spying is *in principle* not a recognised diplomatic function,<sup>99</sup> although States may differ as to the exact scope of an act of espionage.<sup>100</sup>

It may be argued, as some members of the ILC did during the ILC 1957 discussion on diplomatic interference,<sup>101</sup> that depriving a diplomat’s immunity for acts performed following instructions may turn him into a ‘diplomatic whipping boy’ for the wrongful act of the sending State.<sup>102</sup> However, it should be noted that: In the first place, as explained in Chapter 1, an act

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unlikely that, if he had been put to trial, he would have been granted immunity under Article 39(2) of the VCDR. See, *BBC Online*, ‘Man Arrested over PC Yvonne Fletcher Shooting Released’, 16 May 2017. For the 1984 incident, see, Cameron, pp. 610-614.

<sup>96</sup> Some crimes are by definition ‘official’ in nature. See, for example, Article 1(1) of the Torture Convention, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. For a discussion of the availability of the personal diplomatic immunity of the serving Israeli Ambassador to Denmark, Carmi Gillon, who had been accused of committing torture while working in the Israeli Security Services, see, Hartmann, pp. 745-755.

<sup>97</sup> Wirth, pp. 448-449; Cf. Akande and Shah, who take the view that international crimes could be protected by diplomatic immunity *ratione materiae*. Akande and Shah, pp. 850-851

<sup>98</sup> Citing the article, Berridge points out that espionage is ‘prohibited’ by diplomatic law. Berridge (2012), p. 20.

<sup>99</sup> See, for example, *The Guardian*, ‘Russia Expels Two US Diplomats over Incident with Moscow Policeman’, 9 Jul 2016. In the context of functional immunity in general international law, States have expressed the view that espionage should not be protected by immunity *ratione materiae*. See, for example, comments made by Germany and Poland to the ILC ongoing project on immunity of foreign State officials from criminal jurisdiction, available at: [http://legal.un.org/ilc/guide/4\\_2.shtml#govcoms](http://legal.un.org/ilc/guide/4_2.shtml#govcoms). In the oral pleadings of the *Mutual Assistance* case, the counsel of Djibouti also claimed that immunity *ratione materiae* was not available in the event of war crimes, espionage, and sabotage carried out in the territory of a foreign State. Oral pleadings, 22 January 2008, ICR 2008/3 (Condorelli), para. 24.

<sup>100</sup> The ICJ in *Tehran Hostages* pointed out that espionage is an abuse of diplomatic immunity, but recognised that it is not always easy to distinguish espionage from the function of observation in Article 3(1)(d) of the VCDR. *Tehran Hostages*, para. 85. See also, Nahlik, p. 340. For more details concerning the relationship between the function of observation and espionage, see, Silva (1972), pp. 61-62. On the legality of espionage in international law and the responsibility for it, see, Delupis, pp. 61-71.

<sup>101</sup> *Supra* note 88.

<sup>102</sup> Commenting on the New York court’s decision of holding McLeod responsible for the *Caroline incident*, Eagleton also holds the view that the decision would put McLeod ‘between the upper and nether millstones to subject [him] to penalties imposed by the invaded State for having obeyed the orders of [his] own sovereign’. Eagleton, p. 301

being regarded as ‘in the exercise of functions’ does not always mean that the diplomat has no personal responsibility.<sup>103</sup> With regard to criminal matters, in particular, an official act could be attributed to both the sending State and the person of the perpetrator;<sup>104</sup> and this in turn suggests that there is nothing wrong in ‘whipping’ the diplomat for his or her wrongdoing; Secondly, and more importantly, if a diplomat has performed an official but non-diplomatic function in the receiving State, the receiving State has no obligation to recognise the official status of the diplomat, for it has never given consent for the performance of other official functions on its territory. This does not mean that full diplomatic immunity can be denied when a diplomat has conducted extra diplomatic activities; but it does mean that, when it comes to the determination of ‘in the exercise of functions’, the receiving State is entitled to reject diplomatic immunity *ratione materiae* for an official act which falls outside the license of Article 3(1). With regard to acts like this, the receiving State could simply regard the diplomat as an ordinary foreign national who must abide by local laws, as immunity is granted for the performance of *diplomatic* functions instead of functions of the sending State in general. It is true that a certain amount of unfairness would result for the diplomat, yet this seems to be the corollary of performing official functions for one State on the territory of another State in an arena which consists of equal sovereign players – it is one thing to say that an act is official in nature (because it has been instructed by the sending State), and quite another to say that the official nature of the act would be *recognised* by the territorial State.

States’ attitude with regard to consular immunity at the 1963 Vienna Conference on Consular Relations indirectly supports this understanding of the functions of a diplomatic agent. The Brazilian delegate proposed during the conference to replace ‘consular functions’ in Article 43(1) of the VCCR with ‘official functions’.<sup>105</sup> Explaining the proposal, the Brazilian representative indicated that, since under Article 17 a consular officer is allowed to perform diplomatic functions *with the consent of the receiving State*,<sup>106</sup> Article 43(1) must be phrased to cover this scenario.<sup>107</sup> But this proposal was rejected by a rather wide margin.<sup>108</sup> It was pointed out, in particular, that ‘official functions’ could be interpreted very widely by certain

<sup>103</sup> Chapter 1(3.2).

<sup>104</sup> Unless the act falls outside the law of the receiving State, see Chapter 1(3.1).

<sup>105</sup> Official Records of the Vienna Conference on Consular Relations, vol. II, p. 84.

<sup>106</sup> Article 17(1) of the VCCR.

<sup>107</sup> Official Records of the Vienna Conference on Consular Relations, vol. I, p. 374, para. 26 [Brazil].

<sup>108</sup> The proposal was rejected by 38 votes to 13, with 11 abstentions. *Ibid*, p. 376.

sending States.<sup>109</sup> Meanwhile, even if the Brazilian proposal had been adopted, it is clear that Brazil had intended the phrase to apply only when the performance of extra-consular functions was *recognised* by the receiving State.<sup>110</sup>

State practice after the adoption of the VCDR also reveals that States are not prepared to recognise functions which are not compatible with Article 3(1), even if such functions might be official in nature. The UK Government, for example, stated in its 1985 Report that it would no longer recognise the diplomatic status of foreign tourists offices even though they could be regarded as governmental in character.<sup>111</sup> In the 1998 case of *Re P*, the wife of a former US diplomat to the UK sought a declaration from the British court that the diplomat had illegally transferred their children from the UK to the US.<sup>112</sup> The court upheld State immunity by holding that the transfer, which was directly ordered by the US Government, was governmental in nature, but rejected the former diplomat's immunity under Article 39(2) of the VCDR because the act of removing the children could not be regarded as 'in fulfilment of a diplomat's functions'.<sup>113</sup>

On another occasion, the restrictive interpretation of diplomatic functions by the receiving State was even endorsed by the sending State. In 1985, the issuance by the Sri Lankan High Commission in Australia of a series of letters which aimed at raising funds for the so-called National Defence Fund of Sri Lanka raised the attention of the Australian Government.<sup>114</sup> The Australian Ministry for Foreign Affairs stated that, although this kind of fund raising was not prohibited by the VCDR, it should not be encouraged.<sup>115</sup> This position was accepted by Sri Lanka, whose high commissioner later promised no further fund-raising.<sup>116</sup>

The position of the US was even more restrictive. In a circular note sent to diplomatic missions in Washington D.C. in 1978, the Department of State claimed that the US would no longer

<sup>109</sup> Ibid, p. 374, para. 32 [Ukrainian Soviet Socialist Republic].

<sup>110</sup> Supra note 107. In an earlier case of *Arcaya v. Paez*, the district court of New York ruled that, although consular immunity might cover official functions which are not strictly commercial in nature, these functions must be clearly recognised by the US Government before immunity applies. *Arcaya v. Paez* (1956), 145 F. Supp. 464, at p. 471.

<sup>111</sup> Government Report 1985, para. 39(c).

<sup>112</sup> *P (Diplomatic Immunity: Jurisdiction), Re*, [1998] 2 F.C.R. 525.

<sup>113</sup> Ibid.

<sup>114</sup> *Australian Digest* (1984-1987), pp. 459-461.

<sup>115</sup> Ibid, p. 459.

<sup>116</sup> Ibid, p. 460.

recognise the diplomatic status of diplomats who, albeit accredited to a foreign mission, are in fact performing duties as a representative of the sending State to an international organisation.<sup>117</sup> In a similar note in 1974, it was also stated that the US would only accept diplomatic agents who perform ‘regular and accepted diplomatic functions’ and these exclude, inter alia, participation in intergovernmental military training courses.<sup>118</sup>

It then follows that the functions of a diplomatic agent should be understood within the framework of Article 3(1) of the VCDR. Diplomatic immunity represents a voluntary concession by a receiving State of part of its jurisdiction over foreign individuals in order to facilitate the performance of *diplomatic* functions. Without such a concession, a diplomatic agent, like any other State official of the sending State, would be on an equal standing with ordinary people even for acts performed under the instruction of the sending State’s government.

### **3. Problems with application: the status of principal private residence of a diplomatic agent.**

The main controversy regarding the application of Article 31(1)(a) is the status of the principal private residence of a diplomat. As stated above, the parties’ intention as regards the phrase ‘on behalf of’ is to grant immunity when a diplomatic agent holds immovable property in his or her own name in order to comply with the law of the receiving State.<sup>119</sup> However, neither

<sup>117</sup> *US Digest* (1978), p. 537. For the US, although Article 5(3) of the VCDR permits such practice, the functions performed by such a diplomat are ‘necessarily collateral and subordinate to’ his or her diplomatic functions.

<sup>118</sup> *US Digest* (1974), pp. 157-158; for an earlier note of similar content issued by the Japanese Foreign Office to the US Ambassador at Tokyo, see, Ogdon, pp. 191-192. In a pre-VCDR US case concerning diplomatic immunity *ratione materiae* of a subordinate member of Yugoslav Embassy, the Municipal Court of Appeals for the District of Columbia ruled that ‘in order to be entitled to the privilege a member of the staff must be working under the direct control and orders of the head of the mission *in his diplomatic capacity*, that is to say, he must be concerned with the work of the head of the mission as the channel of communication with the government to which he is accredited, and not concerned only with non-diplomatic work which the government may entrust to the head of the mission’. *Trost v. Tompkins*, 44 A.2d 226, at p. 232 (Emphasis original).

<sup>119</sup> Section 2.1.

the ILC nor delegates at the Vienna Conference have clarified what constitutes an immovable property held 'for the purpose of the mission'. Further, the first part of Article 31(1)(a) provides that the exception applies only to private immovable property; yet it is still possible to argue that a principal private residence, which seems indispensable for a diplomat's performance of functions in the receiving State, should not be regarded as a private immovable property in the first place.<sup>120</sup>

The problem has been subject to some debate before the VCDR, but no definite conclusion could be drawn therefrom. Lyons made a distinction between residence which is located within or in the same district as the embassy building and other property such as a country house or a shooting lodge, which is owned and occupied by a diplomat for his or her own recreation.<sup>121</sup> For him, only the former should enjoy immunity because it is the duty of an envoy to reside at the seat of the receiving State's government.<sup>122</sup> Hurst opposed to the distinction and argued that all residences of an ambassador should be treated as the same.<sup>123</sup> Others simply stated that the exception on immovable property does not apply to premises held by a diplomat in his or her official capacity,<sup>124</sup> which merely begs the question whether principal private residence comes within the scope.<sup>125</sup>

Article 31(1)(a) clearly recognizes the distinction between official/private residence by providing that only private immovable property not held for the purpose of the mission is

<sup>120</sup> This seems to be view of Wilson when he says that 'the principle that only immovable property utilised for private pleasure or profit is subject to jurisdiction of host State is incorporated into the Vienna Convention of 1961'. See, Wilson (1967), p. 107.

<sup>121</sup> Lyons (1953), p. 127.

<sup>122</sup> Ibid. For State practice following a similar view, see, *Montwid-Biallozor v. Ivaldi* AD (1925-1926), pp. 324-325; *Immunity of Legation Buildings (Czechoslovakia)*, AD (1927-1928), vol. 4, case no. 251, p. 370.

<sup>123</sup> Hurst (1950), p. 234. For State practice supporting this argument, see, *Tietz et al. v. People's Republic of Bulgaria*, 28 ILR 369; *Weinmann v. Republic of Latvia*, 28 ILR 385; *Bennett and Ball v. People's Republic of Hungary*, 28 ILR 392; *Cassirer and Geheeb v. Japan*, 28 ILR 396. Cf. *Hallberg v. Pombo Arguez*, in which the Court of Appeal of Paris held that consular immunity does not protect the lease of private residence. *Hallberg v. Pombo Arguez* (1963), 44 ILR 190.

<sup>124</sup> Bynkershoeck, p. 83; *Oppenheim's*, 8th edition, p. 800; Wharton, vol. I, p. 653.

<sup>125</sup> In *Agostini v. De Antuono*, the US court, in rejecting the immunity of a UN officer (who enjoyed full diplomatic immunity according to the agreement between the US and the UN) from a proceeding concerning the lease of an apartment, held the view that private residence 'does not pertain ... [the officer's] diplomatic status'. *Agostini v. De Antuono*, 17 ILR (1950) 295.

subject to local jurisdiction. The problem with the *scope* of ‘official residence’, on the other hand, persists. This section will first look at the drafting history of Article 31(1)(a) and Article 34(b) (which adopts the same wording as Article 31(1)(a)) to see whether parties’ intentions could be found therein.

### 3.1. The elusive intention of the parties’: drafting history of Article 31(1)(a) and Article 34(b)

It has been mentioned before that the original purpose of the second part of Article 31(1)(a) was to protect a diplomat who holds immovable property used for the purpose of the mission in his or her own name in order to meet local regulations.<sup>126</sup> The ILC at this stage did not consider whether private residence forms part of the ‘immovable property used for the purpose of the mission’. Yet it seems that some members, in agreeing to the wording, held the view that at least certain private residences of a diplomat should be excluded.<sup>127</sup> Moreover, in the discussion of the inviolability of mission premises, most members seemed to be of the view that ‘premises of the mission’ did not include private residences.<sup>128</sup> The Special Rapporteur, in particular, indicated that the definition of ‘mission premises’ suggested by the US Government, which encompassed ‘residences for officers and employees of the mission’,<sup>129</sup> was ‘far too broad’.<sup>130</sup>

When the 1957 Draft was referred to governments for comments, Japan requested the exception on immovable property be interpreted so as to exclude ‘residences of which the diplomatic agent might be the owner in his private capacity’.<sup>131</sup> The Special Rapporteur adopted the position and deleted the phrase ‘in his private capacity’ from the exception.<sup>132</sup> The

<sup>126</sup> Section 2.1.

<sup>127</sup> For example, Ago, in criticising Tunkin’s suggestion of adding the phrase ‘representing a source of income’ after ‘private immovable property situated in the receiving State’, pointed out that ‘a real action could well be brought regarding a villa belonging to a diplomatic agent which had been only a source of expense to him’. Ybk ILC 1957, vol. I, p. 94, para. 17 [Ago]

<sup>128</sup> See, *infra* 148-152 and accompanying text.

<sup>129</sup> Ybk ILC 1958, vol. II, p. 136.

<sup>130</sup> Ybk ILC 1958, vol. I, p. 127, para. 57 [Sandström].

<sup>131</sup> A/CN. 4/116, p. 55.

<sup>132</sup> The exception in 1957 Draft read: A real action relating to private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity and not on behalf of his Government for the purposes of the mission. Ybk ILC 1957, vol. II, p. 138.



adjusted version was adopted by the ILC in 1958 without much discussion.<sup>133</sup> As a result, when this version was put to discussion at the Vienna Conference, private residences of diplomats were not meant to be excluded from the protection of diplomatic immunity.

However, States at the Vienna Conference still seemed to have doubts on the status of private residences. France proposed two amendments which sought to clarify the scope of Article 34(b) (then Article 32(b), concerning tax exemption of private immovable property) which adopts the same wording as Article 31(1)(a).<sup>134</sup> The first one was aimed at providing tax exemption only to mission premises held by a diplomat on behalf of the sending State; whereas the second one sought to exempt only the ‘official residence’ of a diplomat from taxation.<sup>135</sup> Both amendments were rejected; and Tunkin pointed out in his objection that in his understanding the ILC had intended to exempt all residences occupied by diplomats.<sup>136</sup> On the other hand, however, Japan, which proposed the drafting change in 1957 in order to exclude all residences of a diplomat from the application of Article 31(1)(a),<sup>137</sup> cast doubt on the wording of the 1958 Draft.<sup>138</sup> It was believed that the wording would result in a diplomat losing taxation immunity for his private residence.<sup>139</sup> But in its proposal to address the problem, Japan was willing to add only the residence of the head of the mission into the definition of ‘premises of the mission’, and this seems to imply that private residences of other diplomats are not exempt from taxation, which in turn suggests that only residence of the head of the mission is protected under Article 31(1)(a). The Japanese proposal was accepted by the conference, but the ambiguity surrounding the application of Article 31(1)(a) and Article 34(b) was never resolved.

### **3.2. Article 1(i): principal private residence as part of the ‘premises of the mission’?**

<sup>133</sup> The exception in 1958 Draft thus read: A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission. Ybk ILC 1958, vol. II, p. 98.

<sup>134</sup> The ILC made clear in its 1958 Draft that Article 34(b) is patterned on Article 31(1)(a), see *infra* note 159.

<sup>135</sup> Official Records, vol. II, p. 30.

<sup>136</sup> Official Records, vol. I, pp. 186-187, para. 9 [Soviet Union].

<sup>137</sup> *Supra* note 131.

<sup>138</sup> *Supra* note 133.

<sup>139</sup> Official Records, vol. I, p. 225, para. 42 [Japan].

Article 1(i) of the VCDR defines ‘premises of the mission’ as ‘buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, *used for the purposes of the mission including the residence of the head of the mission*’.<sup>140</sup> The word ‘including’ seems to suggest that immovable property other than the embassy building and the head of mission’s residence may also be regarded as being ‘used for the purposes of the mission’ and thus fall into the definition of ‘premises of the mission’.<sup>141</sup> If the definition encompasses the principal private residence of a diplomat, a strong case can be made for the granting of diplomatic immunity for such a residence.

Early drafts of the VCDR did not contain a provision which defined ‘premises of the mission’.<sup>142</sup> The Special Rapporteur in his original report to the ILC had intended to enclose in the concept only ‘official premises and not those used for dwelling purposes’.<sup>143</sup> However, after the report was referred to governments for comments, it was felt that the scope of ‘premises of the mission’ still needed further clarification.<sup>144</sup> The Japanese Government, in particular, argued that the concept could be interpreted as

- (a) only the official residence of an ambassador or a minister, and the chancellery, or
- (b) all accommodations (including housing facilities for the members of the mission) owned or leased for diplomatic purposes by the sending State, or (c) all accommodations used for diplomatic purposes (including dwellings of diplomatic agents).<sup>145</sup>

In his reply to the comment made by the Australian Government, the Special Rapporteur adopted the view that the concept should mean ‘official premises used for the mission, including the private dwelling of the head of the mission’.<sup>146</sup> This view was nonetheless opposed by the US, which proposed that the concept include ‘the land and buildings used for the embassy or legation, the chancellery and all annexes thereto, and residences for officers and employees of the mission’.<sup>147</sup>

<sup>140</sup> Article 1(i) of the VCDR (Emphasis added).

<sup>141</sup> This seems to be the opinion of Kerley at p. 109. This is also the stance held by the US Court of Appeal in *U.S. v. Arlington County, Va.*, 702 F. 2d 485, at p. 488. For more details about the case, see, *infra* 162 and accompanying text.

<sup>142</sup> Article 1(i) was not inserted into the VCDR until the Vienna Conference, following an amendment proposed by Byelorussia and Bulgaria. See, Official Records, vol. II, p. 10.

<sup>143</sup> Ybk ILC 1957, vol. I, para. 24 [Sandström].

<sup>144</sup> See comments made by Japan, Australia, Belgium, and the US, A/CN.4/116, pp. 35-36.

<sup>145</sup> *Ibid*, p. 33-34.

<sup>146</sup> *Ibid*, p. 34.

<sup>147</sup> *Ibid*, p. 36.

The ILC reconsidered the matter in 1958 in the context of inviolability of mission premises. The Special Rapporteur insisted that the US approach was too broad.<sup>148</sup> Yet his proposal to add the word ‘official’ before ‘premises of the mission’ in Article 16 of the 1957 Draft<sup>149</sup> was not adopted by the ILC because it would cause the negative implication that premises of the mission could be ‘unofficial’.<sup>150</sup> Most members of the ILC at this stage seemed to be of the view that, since inviolability of mission premises and inviolability of private residence were regulated by two different articles, the concept of ‘premises of the mission’ logically excluded the residence even of a head of mission.<sup>151</sup> As a result, the definition of ‘premises of the mission’ in the 1958 Draft did not make any reference to the private residence of a diplomat.<sup>152</sup>

The phrase ‘including the residence of the head of the mission’ as it currently stands in Article 1(i) was adopted during the Vienna Conference following an amendment proposed by the Japanese delegation.<sup>153</sup> The purpose of the amendment was to ensure that a head of mission enjoys privileges under Article 34(b) and (f) (then Article 32(b) and (f)) of the VCDR.<sup>154</sup> For the Japanese delegate, the absence of the residence of a head of mission from Article 1(i) would result in the residence being regarded as a private immovable property and thus subject to the taxation jurisdiction of the receiving State.<sup>155</sup>

The overall history of the term ‘premises of the mission’ seems to suggest that the broad approach taken by the US was not supported. The fact that the term was originally discussed by the ILC mainly in the context of inviolability of mission premises shows that the ILC did not regard even the residence of a head of mission as part of the term’s definition.<sup>156</sup> The

<sup>148</sup> Ybk ILC 1958, vol. I, p. 127, para. 57 [Sandström].

<sup>149</sup> Article 16 of the draft read: ‘The premises of the mission shall be inviolable. The agents of the receiving State may not enter the premises, save with the consent of the head of the mission’. Ybk ILC 1957, vol. II, p. 136.

<sup>150</sup> Ybk ILC 1958, vol. I, p. 128, paras. 76-77 [Sandström].

<sup>151</sup> See comments made by Fitzmaurice at *ibid*, para. 70; François at para. 63; Tunkin at para. 68.

<sup>152</sup> Commentaries to draft Article 20 (inviolability of mission premises), Ybk ILC 1958, vol. II, p. 95.

<sup>153</sup> Official Records, vol. II, p. 43.

<sup>154</sup> *Supra* note 139.

<sup>155</sup> *Ibid*.

<sup>156</sup> *Supra* note 151. This is also in consonance with the text of Article 30 of the VCDR, which provides that the private residence of a diplomatic agent shall enjoy the same inviolability and protection as *the premises of the mission*.

Japanese amendment, on the other hand, was merely aimed at adding to this restrictive definition the residence of a head of mission due to its importance.<sup>157</sup> Indeed, considering the fact that the Japanese delegate was fully aware of the consequence of not mentioning the residence of a head of mission in Article 1(i),<sup>158</sup> the absence of other private residences from the article is strong evidence that the parties have never intended to enclose these residences into the definition of ‘premises of the mission’.

### 3.3. The status of principal private residence in the context of taxation immunity

Article 34(b) of the VCDR applies the same wording as Article 31(1)(a) and it was made clear by the ILC that the former was patterned on the latter.<sup>159</sup> The drafting history of Article 34(b) has been briefly reviewed above.<sup>160</sup> This section will explore subsequent State practice concerning the taxation immunity of diplomatic residences.

The US insisted in the past that only the residence of a head of mission enjoys tax exemption.<sup>161</sup> This position changed, however, following the case of *County Board of Arlington County v. German Democratic Republic*.<sup>162</sup> This case concerned a multi-unit apartment building which was purchased by the GDR Government to house its embassy members other than the ambassador. The County of Arlington sought to impose local real property taxes on the building, but the GDR, invoking its sovereign immunity as well as Article 23 and 34 of the VCDR, objected.<sup>163</sup> The US Department of State did not intervene initially because by then it was of the view that tax exemption applies only to the residence of the ambassador. However, after the court ruled in favour of the Arlington County and the GDR protested, the Department of State changed its attitude and concluded an agreement with the GDR which set out, inter alia, that any real property *owned by* the respective governments and used ‘exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic

<sup>157</sup> Supra note 139.

<sup>158</sup> Supra note 155.

<sup>159</sup> Commentaries to Article 32 of the 1958 Draft, see, Ybk ILC 1958, vol. II, p. 100.

<sup>160</sup> Section 3.1.

<sup>161</sup> *US Digest* (1978), p. 610

<sup>162</sup> *County Board of Arlington County v. German Democratic Republic* (1978), Civil Action No. 78-293-A (E. D. Va.), reprinted at *ibid*, pp. 608-609.

<sup>163</sup> *Ibid*, p. 608.

missions and members of their families forming part of their households', shall be exempt from real estate taxes.<sup>164</sup> As a result, the Court of Appeals reversed the district court's decision in 1982<sup>165</sup> and upheld tax exemption in 1983.<sup>166</sup>

Following this case and an earlier incident concerning the Chilean Embassy in Washington D.C.,<sup>167</sup> the Department of State conducted systematic research on the problem of tax exemption of diplomatic residences.<sup>168</sup> With regard to the text of the VCDR, it was concluded that Article 1(i), Article 23 and Article 34(b) in combination have left unanswered whether the residence of a diplomat other than the ambassador could be covered by tax exemption. The Department of State held, inter alia, that, if Article 1(i) were to be construed as comprising only the residence of a head of mission, 'the only applicability of the Article 34(b) rule would be to the *unlikely* situation where a diplomat, other than the head of mission, acquired property for the sending State to be used as a chancery or an ambassadorial residence'.<sup>169</sup>

Having determined the ambiguous nature of these provisions, the Department of State then turned to State practice after the adoption of the VCDR. It was revealed, based on the information collected by the US diplomatic posts abroad concerning tax treatment of US diplomatic residences by respective receiving States, that there existed 'compelling evidence of a virtually universal practice in favour of exempting such property from taxation'.<sup>170</sup> As a result, the Department of State concluded that 'the United States no longer has an acceptable legal basis for denying exempt status to similar property in our territory'.<sup>171</sup>

However, the conclusion reached by the US is not without problems.

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<sup>164</sup> Ibid, p. 609.

<sup>165</sup> *U.S. v. Arlington County, Va.*, 669 F. 2d 925.

<sup>166</sup> *U.S. v. Arlington County, Va.*, 702 F. 2d 485.

<sup>167</sup> *US Digest* (1978), pp. 605-606. In this case the Department of State was requested by the Chilean Embassy to help secure tax exemption on the residences of its Naval and Military Attachés. Exemption was granted on the basis of reciprocity (Chile granted such exemption to American Minister Counsellor and Agricultural Attaché).

<sup>168</sup> The full conclusion reached by the Department of State was set out in *US Digest* (1980), pp. 343-349.

<sup>169</sup> Ibid, pp. 346-347 (Emphasis added).

<sup>170</sup> Ibid, p. 347.

<sup>171</sup> Ibid.

Firstly, as mentioned above, the very purpose behind the addition of ‘residence of the head of the mission’ in Article 1(i) was to grant such a residence, and no other, full tax exemption;<sup>172</sup> and the proviso ‘unless he holds it on behalf of the sending State for the purposes of the mission’ was originally adopted exactly to deal with the ‘unlikely’ situation where a diplomat holds mission premises in his or her own name in order to meet the requirement of local law, and in this respect the ILC made no distinction between an ambassador and an ordinary diplomat.<sup>173</sup>

Secondly, the conclusion did not make clear on what basis a legal obligation to grant tax exemption was established. Indeed, the Department of State admitted that ‘the survey [of State practice] does not always establish with precision whether the exemption is granted because the receiving State’s interpretation of the Vienna Convention or because of its understanding of its obligations under customary international law’.<sup>174</sup> The VCDR does not prohibit States from extending more favourable treatment to each other on the basis of custom or agreement;<sup>175</sup> and for matters not regulated by the VCDR, rules of customary international law continue to prevail.<sup>176</sup> In this regard, it is questionable whether the uniform State practice constitutes ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.<sup>177</sup>

Even more problematic is the relevance of State practice concerning tax exemption of *State-owned* diplomatic residences to Article 31(1)(a).<sup>178</sup> A diplomat’s residence that is registered under the name of the sending State is not *his or her* immovable property in the first place. The tax exemption on such a residence is rather a matter of State immunity than diplomatic immunity.<sup>179</sup> If a diplomat’s private residence is registered in his or her own name while the mission premises are registered in the name of the sending State, it is difficult to understand

<sup>172</sup> Section 3.2.

<sup>173</sup> Section 2.1.

<sup>174</sup> Supra note 170.

<sup>175</sup> Article 47(2)(b) of the VCDR.

<sup>176</sup> Preamble of the VCDR.

<sup>177</sup> Article 31(3)(b) of the VCLT.

<sup>178</sup> In both the Chilean Embassy incident and the US-GDR Agreement, reference was made specifically to State-owned residences, see, supra note 164, 167. Indeed, the uniform State practice investigated in the Department of State’s research all concern ‘foreign-government-owned real property’, supra note 168.

<sup>179</sup> The Department of State in its research cited the case of *Republic of Argentina v. City of New York* (303 N. Y. S. 2d 644) to support its conclusion, but this case was decided purely on the ground of State immunity.

why the diplomat should also be covered by tax exemption simply because the sending State would have enjoyed such exemption were this residence registered in its own name. Indeed, from a functional perspective, the principal residence of a diplomat is essential to his or her performance of diplomatic functions, and in this respect a different treatment based on title seems unwarranted. But it should be noted that the very definition of ‘principal residence’ is subject to a functional test. When the law of the receiving State permits the acquisition of immovable property by foreign States, the very fact that a residence is registered under the name of a diplomat is a strong indication that the residence is not used for official purposes, for if the sending State intends to protect the residence, it should have registered the residence in its own name.

A situation of this kind could be found in a series of circular notes in 1980s sent by the US Department of State to Chiefs of Mission in Washington D.C..<sup>180</sup> According to these notes, all foreign missions ‘are requested to notify the Department of State by diplomatic note prior to any acquisition, use, sale or other disposition, by or on behalf of the foreign mission, of real property which is located in the United States, its territories or possessions’.<sup>181</sup>

This procedure would allow the Department of State a 60-day period to approve or disapprove the acquisition. The reason for this procedure was to ‘facilitate the determination of the privileges and immunities appropriate with respect to the use of the property in question’.<sup>182</sup> With regard to diplomatic residences, the Department of State made clear that the procedure applies to all residential property except for ‘property acquired in the personal name of the occupant’.<sup>183</sup> In other words, only residential property acquired by the sending State needs be scrutinised because residences purchased by individual diplomats are to be regarded as non-official in nature.

In fact, even if principal private residences enjoy tax exemption under Article 34(b), it is still questionable whether this conclusion could be transposed directly to Article 31(1)(a). Although the two provisions have the same wording, their underlying rationales are not necessarily the same. Article 31(1)(a) is based on the exclusive jurisdiction of the receiving State in which an immovable property is located<sup>184</sup> — if local courts are denied jurisdiction

<sup>180</sup> *Cumulative Digest*, pp. 916-917.

<sup>181</sup> *Ibid*, p. 916.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid*, p. 917.

<sup>184</sup> Commentaries to draft Article 29(1)(a), Ybk ILC 1958, vol. II, p. 98.

due to diplomatic immunity, disputes on the immovable property might never be resolved. The same consideration, however, does not exist in Article 34(b). Meanwhile, the exception in Article 31(1)(a) is qualified by the conditions that first, the exception applies only to real actions, which are not directed against the person of the diplomat holding an immovable property;<sup>185</sup> and second, the residence of a diplomat is inviolable<sup>186</sup> and thus free from execution.<sup>187</sup> These two qualifications determine that the performance of diplomatic functions is not likely to be jeopardised by a real action. Therefore, even if Article 34(b) does not apply to principal private residences, it is still possible that Article 31(1)(a) retains a broader scope.

### 3.4. Subsequent State practice concerning the application of Article 31(1)(a)

The main argument for extending diplomatic immunity *ratione materiae* to the private residence of a diplomat is that such residence is indispensable for the performance of diplomatic functions. However, as explained in Chapter 2 above, an act being indispensable for the performance of diplomatic functions *in a general sense* is not the reason for asserting that any dispute arising out of this act should be immune.<sup>188</sup> A detailed analysis of the actual benefits to diplomatic functions accrued from a particular act is always needed when determining diplomatic immunity *ratione materiae*.<sup>189</sup> With regard to a principal private residence, two potential benefits may be conceived: In the first place, such a residence may be said to benefit diplomatic functions because it enables a diplomat to live in the capital city of the receiving State or close to the embassy; secondly, it may be argued that, since a diplomat may carry out social activities in his or her private residence, the residence facilitates the performance of diplomatic functions by fostering the diplomat's personal contacts in the receiving State.

Yet none of the two benefits is recognised in post-VCDR State practice.

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<sup>185</sup> See *infra* Section 4.

<sup>186</sup> Article 30(1) of the VCDR.

<sup>187</sup> Article 31(3) of the VCDR.

<sup>188</sup> Chapter 2(4.1).

<sup>189</sup> *Ibid.*



In *Intpro Properties v. Sauvel*,<sup>190</sup> the British Court of Appeal examined whether the private residence of a French diplomat and his family, which was leased by the French Government from the plaintiffs, was used ‘for the purposes of a diplomatic mission’.<sup>191</sup> For the court, the ‘proper construction’ of the phrase means that the private residence of a diplomat should not be included ‘even though incidentally that diplomatic agent has certain understandable social obligations which he and his wife carry out on the premises’.<sup>192</sup> The court took note of the absence from Article 1(i) of the VCDR the private residence of a diplomat and held that, had the house been leased by the diplomat himself, he would not have been regarded as holding the property on behalf of the sending State for the purposes of the mission for the sake of Article 31(1)(a).<sup>193</sup>

With regard to the first potential benefit listed above, the Netherlands court in *Deputy Registrar Case* denied the immunity of an ICJ official, who enjoyed full diplomatic immunity according to the agreement between the ICJ and the Netherlands, by applying Article 31(1)(a) in a dispute concerning the lease of the official’s private residence.<sup>194</sup> The defendant claimed that the residence was official in nature because it had enabled him to perform his duties in The Hague ‘in the same way as diplomats reside in the capital of a foreign State to carry out their mission’.<sup>195</sup> The court rejected this argument on two grounds: first, the mere function of providing somewhere close to the ICJ to live was not enough to render the residence outside the definition of ‘private immovable property’;<sup>196</sup> second, the latter part of Article 31(1)(a) only applies to the situation where the law of the receiving State does not permit acquisition of immovable property by foreign States, and this was clearly not the case in the present proceeding.<sup>197</sup>

<sup>190</sup> *Intpro Properties v. Sauvel*, [1983] 2 WLR 908. For a similar case in South Africa, see, *Portion 20 of Plot 15 Athol Ltd v. Rodrigues* (1999), 133 ILR 389.

<sup>191</sup> Section 16(1)(b) of the British State Immunity Act provides for State immunity for disputes concerning immovable property used ‘for the purposes of a diplomatic mission’. But the court was of the view that the phrase has the same meaning as ‘for the purposes of the mission’ in the VCDR and applied Article 1(i) and Article 31(1)(a) of the VCDR to illustrate that France did not enjoy State immunity. See, *ibid*, pp. 914-915.

<sup>192</sup> *Ibid*, p. 914.

<sup>193</sup> *Ibid*, p. 915.

<sup>194</sup> *Deputy Registrar Case* (1980), 94 ILR 308.

<sup>195</sup> *Ibid*, p. 312.

<sup>196</sup> *Ibid*.

<sup>197</sup> *Ibid*, p. 313

### 3.5. Conclusion

To sum up, the better view seems to be that all private residences of a diplomat should not be protected by Article 31(1)(a). The only evidence that supports the granting of immunity is post-VCDR State practice concerning Article 23 of the VCDR, which grants State immunity from tax exemption for such residences. However, for such a conclusion to be transposed to Article 31(1)(a), a private residence must be explained as either for the purposes of the mission or not a private immovable property at all. Both explanations prove to be difficult in the light of the drafting history of the VCDR: Article 1(i) excludes private residences other than that of a head of mission from its scope, whereas drafters of Article 31(1)(a) made it clear that even mission premises registered under the name of a diplomat can be regarded as ‘private immovable property’, which in turn makes the argument that a private residence registered in the same name is not ‘private immovable property’ almost impossible. Considering the fact that functions of a diplomat are not likely to be jeopardised by a real action, the conclusion reached under this section seems to be a better balance between the rationale behind Article 31(1)(a) and the principle of functional necessity.

## 4. Problems with application: what is a ‘real action’?

Before the VCDR, State practice varied as regards the scope of the exception on immovable property. Whereas some States allowed only actions in rem<sup>198</sup> to proceed in their domestic courts,<sup>199</sup> others took a more liberal position and expanded the exception to any proceeding

<sup>198</sup> For the definition of the term, see *infra* note 209.

<sup>199</sup> Colombian legislation, for example, excepted from diplomatic immunity only ‘actions in rem, including possessory actions, which relate to movable or immovable property situated within the territory’. *UN Laws and Regulations*, p. 65. For similar provisions in the draft codes prepared by academic institutes before the VCDR, see, Article 27(1) of the Project of American Institute of International Law (1925); Article 27(b) Project of the International Commission of American Jurists (1927); Article 139(b) of Pessôa’s Draft Code (1911); Article 363(b) of Fiore’s Draft Code (1890). For judicial decisions, see, *Agostini*, *supra* note 125; *Afghan Minister (Consular Activities) Case*, AD (1931-1932), case no. 179, p. 327; *Martelly et Admin. des Domaines v Diaz del Corral*, 18 ILR (1951), case no. 111.

relating to immovable property.<sup>200</sup> The VCDR applies the phrase ‘real action’ to denote the exception, but it does not clarify the meaning of the phrase. The commentaries to both the 1957 and the 1958 Draft merely state that ‘all States claim exclusive jurisdiction over immovable property’;<sup>201</sup> but a dispute ‘over’ immovable property can be anything ranging from the title in the registry<sup>202</sup> to a breach of sales contract.<sup>203</sup> If the ILC in making the statement had intended to include any dispute concerning an immovable property over which the court of the territorial State assumes exclusive jurisdiction, the scope of Article 31(1)(a) could potentially become very broad.

Yet this broad approach has indeed been applied to interpret Article 31(1)(a). In the above mentioned *Deputy Registrar Case*,<sup>204</sup> the court developed two arguments to rebut the defendant’s plea that a proceeding for eviction order was not a real action: first, the court held the view that ‘real actions’ should be interpreted in the light of the exclusive jurisdiction of the receiving State.<sup>205</sup> For the court, since the Netherlands’ jurisdiction is the only jurisdiction possible, upholding diplomatic immunity would be tantamount to denying the plaintiff’s right of access to justice. As a result, Article 31(1)(a) must be interpreted broadly so as to enclose an eviction order into the definition of ‘real action’;<sup>206</sup> second, the court also argued, based on the same rationale, that an exception to diplomatic immunity with regard to eviction orders exists in customary international law.<sup>207</sup>

While the court is justified in its assertion that the rationale behind Article 31(1)(a) is the pre-eminence of *lex rei sitae*,<sup>208</sup> it is questionable whether the principle could be pushed to its extreme so as to disregard the ordinary meaning of the phrase. ‘Real action’ as defined by *Black’s Law Dictionary* refers to ‘an action based on, and tending to protect, a real right, namely, the right of ownership and its dismemberments’;<sup>209</sup> and ‘action in rem’, the term which was used by the ILC members as the equivalent of ‘real action’ in their discussion of

<sup>200</sup> See the legislation of India, Czechoslovakia, Austria, and Switzerland, *ibid*, pp. 167, 82, 15, 308. See also, Section 35 of the Phillimore’s Draft Code (1926).

<sup>201</sup> Ybk ILC 1957, vol. II, p. 139; Ybk ILC 1958, vol. II, p. 98.

<sup>202</sup> *Tietz et al*, *supra* note 123.

<sup>203</sup> *Deposit (Land in Czechoslovakia) Case*, AD (1938-1940), case no. 167, p. 429.

<sup>204</sup> *Supra* note 194.

<sup>205</sup> *Ibid*, p. 311.

<sup>206</sup> *Ibid*, p. 312.

<sup>207</sup> *Ibid*. For a critique of this reasoning, see *infra* notes 216-225 and accompanying text.

<sup>208</sup> *Supra* note 184 and the accompanying text.

<sup>209</sup> *Black’s Law Dictionary*, 9th edition, p. 36

Article 31(1)(a),<sup>210</sup> denotes ‘an action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property’ or ‘an action in which the named defendant is real or personal property [as opposed to a person]’.<sup>211</sup>

The essence of the definitions is that a proceeding of this kind is directed against the property itself, not the person owning or occupying the property; and the relief sought in such a proceeding is either a declaration of title to the property, an order for sale by authority of the court, or an order for possession.<sup>212</sup> This understanding is supported by the travaux préparatoires of Article 31(1)(a). Although the ILC members did not define a real action, the records of their discussion suggest that they did have a common understanding as to its scope. Padilla Nervo, for one, pointed out during the 1957 discussion that ‘in real actions, the proceedings related to the property and not to the person owning it, so the property could be the subject of an action irrespective of whether the diplomatic agent acquired income from it or not’.<sup>213</sup> At a later stage, Matine-Daftary indicated in a similar vein that ‘personal actions, relating, for instance, to the failure of a diplomatic agent to pay his debts, were settled through diplomatic channels’;<sup>214</sup> and this was confirmed by the Special Rapporteur, who claimed that proceedings against diplomatic agents in this respect should be conducted in the sending State.<sup>215</sup>

The court’s second argument is equally problematic. It has been mentioned above that, prior to the VCDR, some States had adopted a restrictive view of the exception of immovable property which limited its application to in rem proceedings.<sup>216</sup> Domestic courts in their decision concerning the definition of ‘in rem’ had adhered to its non-personal nature.<sup>217</sup> In *Martelly et Admin. des Domaines v Diaz del Corral*, for example, the plaintiffs sought an eviction order against the cultural counsellor of the Spanish Embassy in France who had taken possession of an apartment by force. The Court of Appeals of Paris upheld the defendant’s

<sup>210</sup> See, for example, Ybk ILC 1957, vol. I, p. 95, para. 27 [Sandström], para. 35 [Spiropoulos], p. 96, para. 42 [Liang].

<sup>211</sup> Supra note 209, p. 34.

<sup>212</sup> Denza, 3rd edition, p. 291; see also, Aust (2010), p. 117; *Satow’s*, 5th edition, p. 125.

<sup>213</sup> Ybk ILC 1957, vol. I, p. 94, para. 10. See also, para. 15 [Spiropoulos].

<sup>214</sup> Ibid, p. 95, para. 28 [Matine-Daftary].

<sup>215</sup> Ibid, para. 34 [Sandström].

<sup>216</sup> Supra note 199.

<sup>217</sup> *Tietz et al.*, supra note 123; *Montwid-Biallozor v. Ivaldi*, supra note 122.

diplomatic immunity and claimed, inter alia, that ‘even if it is true that the defendant appropriated by force something to which he had no legal right, this does not prevent him from invoking his immunity from jurisdiction in a personal, civil action concerning immovable property’.<sup>218</sup> Similarly, in the American case of *Agostini v. De Antueno*, the US court, in upholding its jurisdiction over a case concerning the *possession* of an immovable property, made it clear that ‘this is not a proceeding to evict the petitioner. In fact this court has no jurisdiction with respect to such a proceeding [of evicting the petitioner] ... The jurisdiction of this court is basically in rem, and not in personam’.<sup>219</sup>

State practice after the adoption of the VCDR points to the same direction. In *Logan v. Dupuis*,<sup>220</sup> the US court rejected the plaintiff’s argument that Article 31(1)(a) applies to a proceeding concerning a breach of lease contract, and held that such an argument would in effect render any action relating to a real property a ‘real action’ — an interpretation which is inconsistent with the object and purpose of the VCDR.<sup>221</sup> In the above mentioned British case of *Intro Properties v. Sauvel*, it was also pointed out that a real action ‘is one in which the ownership or possession, as distinct from mere use, of such property is in issue’.<sup>222</sup> In Italy, the Court of Cassation ruled in *Largueche v. Tancredi Fenu* that a proceeding for the vacation of an apartment was one which arose from the tenancy agreement and therefore personal in nature.<sup>223</sup> A real action, the court claimed, ‘can only refer ... to cases concerning the ownership and possession of property’.<sup>224</sup> Courts in other States have also endorsed this understanding of ‘real action’.<sup>225</sup> It is true that *Deputy Registrar Case* finds support in the South African case of *Portion 20 of Plot 15 Athol Ltd v Rodrigues*,<sup>226</sup> but that case is mainly about the official nature of an ambassador’s residence and contains no discussion about the definition of ‘real

<sup>218</sup> Supra note 199.

<sup>219</sup> Supra note 125, p. 298.

<sup>220</sup> *Logan v. Dupuis*, 990 F. Supp. 26 (1997).

<sup>221</sup> *Ibid*, p. 29.

<sup>222</sup> Supra note 190, p. 915.

<sup>223</sup> *Largueche v. Tancredi Fenu* (1987), 101 ILR 377.

<sup>224</sup> *Ibid*, p. 379. The decision of the Court of Cassation is consistent with other Italian jurisprudence. See, *Aziz v. Caruzzi* (1983), 101 ILR 359; *Labyad v. Ilari*, IYBIL (1985), p. 190; *Russel v. Società Immobiliare Soblim* (1979), 78 ILR 101.

<sup>225</sup> Australia: *In the Marriage of M T and I J DE ANDRADE* (1984), 19 Family Law Reports 271; France: *Ribeyro v. Massari* (1981), 77 ILR 495; Belgium: *Hildebrand v Champagne* (1984), 82 ILR 121.

<sup>226</sup> Supra note 190.

action'. In any event, it is difficult to conclude that an expansive interpretation of 'real action' exists in customary international law.

Underlying the judgment of *Deputy Registrar Case* is an unjustifiable emphasis of the right of access to justice without considering the object and purpose of diplomatic immunity,<sup>227</sup> which is to benefit the proper functioning of a diplomatic mission. Article 31(1)(a) represents not a blanket recognition of the exclusive jurisdiction of the receiving State, but a balance between the interests of access to justice and the interests of ensuring smooth performance of diplomatic functions. Unlike the exceptions of succession proceedings and commercial or professional activities, which normally have no connection with functions of a diplomatic agent, the exception of immovable property, due to its effect on the residence of a diplomat,<sup>228</sup> has a real potential of disrupting the work of a diplomat. It is therefore important to circumscribe the application of Article 31(1)(a) in order not to overexpose a diplomat to domestic proceedings. Indeed, considering the fact that both the European Court of Human Rights<sup>229</sup> and the ICJ<sup>230</sup> have regarded the right of access to justice as not capable of denying generally accepted rules of immunity,<sup>231</sup> the broad approach taken by the court of *Deputy Registrar Case* is hardly tenable.

<sup>227</sup> For a similar emphasis of the right of access to justice vis-à-vis diplomatic immunity, see, Staiano, pp. 213-216.

<sup>228</sup> See the conclusion reached in Section 3.5.

<sup>229</sup> See, for example, *Jones and Others v. The United Kingdom*, Application no. 343356/06 and 40528/06 (2014); *Al-Adsani v. The United Kingdom*, Application no. 35763/97 (2001).

<sup>230</sup> In *Jurisdictional Immunity* case, one of the arguments presented by Italy was that State immunity must be denied when a domestic proceeding is the 'last resort' for victims of WWII. This argument was rejected by the ICJ. *Jurisdictional Immunities of the State*, Judgement, para. 98-104.

<sup>231</sup> Domestic courts, too, have ruled that the right of access to justice does not defeat diplomatic immunity. See, for example, *Al-Malki v. Reyes*, [2015] EWCA Civ 32, para. 65-76. See also, Denza, 4th edition, pp. 252-253. It should be noted however that non-violation of the right of access to justice can only be based on the immunity rules *recognised* in international law. Thus in *Benkharbouche v. Embassy of the Republic of Sudan*, the UK Supreme Court held that Article 16(1)(a) of the UK State Immunity Act, which extends State immunity to all employment relationship concerning a foreign mission, violates Article 6 of the European Convention on Human Rights because the extension is not recognised in customary international law. *Benkharbouche v. Embassy of the Republic of Sudan*, [2017] UKSC 62. For a detailed analysis of the issue, see Ziegler (2017).

## 5. Problems with application: what is a commercial or professional activity.

### 5.1. Introduction

A practical difficulty regarding the application of Article 31(1)(c) is to define what constitutes a commercial or professional activity. The VCDR does not define the two terms.<sup>232</sup> On the contrary, delegates at the Vienna Conference seemed to be reluctant to give the terms a precise description. Norway, for example, requested during the Vienna Conference an explanation as regards the scope of ‘commercial activity’.<sup>233</sup> It was questioned in particular whether the term applies to ‘a loan to a friend in financial difficulties, or to operations on the stock exchange’.<sup>234</sup> The representative of the US at an earlier stage asked whether the case of a diplomatic agent who was a stockholder and member of the board of directors of the parent company in the sending State of a company operating in the receiving State is a case of commercial activity.<sup>235</sup> Neither question received an answer from the Vienna Conference.

Academic opinions are not uniform on this topic.

Denza holds the view that a commercial or professional activity should be continuous in nature in order to fall into the remit of Article 31(1)(c).<sup>236</sup> Salmon concurs: For him an incidental action such as an isolated contract should not be included in the meaning of ‘commercial or professional activity’ even if it is by nature commercial.<sup>237</sup> Following this standard, it is pointed out that ‘a bill of exchange’ and ‘a bank loan’ are both examples of commercial but incidental actions that should be protected by diplomatic immunity.<sup>238</sup>

<sup>232</sup> For pre-convention status of the exception, see, Denza, 4th edition, pp. 248-250.

<sup>233</sup> Official Records, vol. I, p. 213, para. 32 [Norway].

<sup>234</sup> Ibid.

<sup>235</sup> Ibid, p. 21, para. 21 [US].

<sup>236</sup> Denza, 3rd edition, p. 305; Lewis, 2nd edition, p. 178. For domestic cases supporting this view, see, *Reyes* (2017); *De Andrade*, infra note 240.

<sup>237</sup> Salmon, p. 313.

<sup>238</sup> Ibid.

Aust takes a different view. For him, a commercial activity ‘must generally be continuous, not an isolated act unless it is of some magnitude, like the speculative purchase of land. Investments in shares and suchlike are also likely to fall within the exception’.<sup>239</sup> If this standard is followed, the purchase of an immovable property for the purpose of resale for gain would not be protected by immunity, although such purchase is merely a single act.<sup>240</sup> With respect to professional activity, on the other hand, it seems that Aust, by arguing that ‘if a diplomat writing a book in his spare time defames someone, he will have no immunity from an action for defamation’, simply does not believe in the standard of continuous nature.<sup>241</sup>

Murty, for his part, questions the feasibility of the standard of continuity because it ‘raises the difficult question how many transactions should occur before the element of continuity can be considered as established’.<sup>242</sup> Yet the standard he proposes, that an act should be perceived as a commercial or professional activity if the dominant motive behind the act is ‘personal profit’, is not free from problems. In the first place, the Algoaibi incident mentioned above shows that even acts which are seemingly not performed for personal profit may nonetheless prove

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<sup>239</sup> Aust (2010), p. 128. The position of Lewis seems ambivalent. Under the context of Article 42 of the VCDR, he holds the view that ‘some commercial activity of a minor and incidental character, as opposed to the carrying on of a business, is unlikely to be in breach of the provision, and in such a case the diplomat would be subject to civil process under the exception embodied in Article 31(1)(c)’. On a later stage, however, he seems to endorse Denza’s ‘continuous’ formula. See, Lewis, 3rd edition, p. 131 and p. 140.

<sup>240</sup> In the Australian case of *De Andrade*, the wife of a diplomatic agent applied for dissolution of marriage and with it an injunction restraining the diplomat from disposing of certain property, among which is an immovable property which the diplomat had purchased as an investment and subsequently let to local tenants. The wife tried to circumvent diplomatic immunity by arguing that the investment in immovable property was a commercial activity under Article 31(1), but this argument was rejected by the court, which ruled that neither the investment nor the collection of rent was a ‘commercial activity’ according to the ordinary meaning of the term. See, *In the Marriage of M T and I J DE ANDRADE* (1984), 19 Family Law Reports 271.

<sup>241</sup> Aust (2010), p. 128. For a similar case in practice, see, the Algoaibi incident, in which the Saudi Ambassador to the UK, Ghazi Algoaibi, wrote and published a poem which glorified a Palestinian suicide bomber. The ambassador claimed that he was both a poet and an ambassador; and that the poem was written in his capacity as a poet. But this poem seems to have caused some displeasure to the UK Government. For a detailed analysis of the incident, see, Behrens (2016), pp. 180-181.

<sup>242</sup> Murty, pp. 356-357. For domestic cases supporting Murty’s standard, see, *Tabion v. Mufti*, 73 F. 3rd 535 (4th Cir. 1996); *Logan v. Dupuis*, 990 F. Supp. 26 (1997); *Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187; *Propend Finance Pty Limited and Others v. Sing and Others* (1997), 111 ILR 611; *Van Der Elst v. Commissioner of Internal Revenue* (1955), 22 ILR 543; *Tchitchérine*, reprinted at *Satow’s*, 4th edition, p. 185.



unacceptable.<sup>243</sup> Further, the term ‘personal profit’ is open to different interpretations. Whereas a restrictive understanding of the term could mean ‘personal financial profit’ acquired from selling a product or providing a professional service, an expansive interpretation would suggest that, even if a diplomat is on the receiving end of a service, he or she would still not be protected by immunity because the service brings him/her personal benefits.<sup>244</sup>

This section will start by looking at the drafting history of Article 31(1)(c) and Article 42.

## **5.2. Article 42: an evaluation of commercial or professional activities in the light of the scope of Article 42.**

### **5.2.1. Relevance of Article 42: is it coextensive with Article 31(1)(c)?**

Article 42 of the VCDR prohibits a diplomat from practising ‘for personal profit’ any professional or commercial activity in the receiving State.<sup>245</sup> The phrase ‘for personal profit’, which is absent from Article 31(1)(c), raises the question whether the two articles are co-extensive. Denza does not think so. For her, the prohibition under Article 42 is narrower in scope than the exception in Article 31(1)(c).<sup>246</sup> As a result, if a diplomat invests private capital in property or in shares in enterprises in the receiving State, he or she would be subject to the jurisdiction of the receiving State while not violating the duty under Article 42.<sup>247</sup> Aust argues in a similar vein that, since Article 42 does not prohibit all paid activities, and since Article 31(1)(c) is for the benefit of persons doing business with a diplomat who performs these paid activities, whether the diplomat has violated Article 42 is irrelevant for the determination of

<sup>243</sup> Supra note 241.

<sup>244</sup> See, for example, Rodgers, who holds the view that a diplomat’s act of employing domestic servants should be regarded as a commercial activity because the employment brings the diplomat ‘personal profit’. Rodgers, p. 115. Cf. *Reyes* (2017), para. 51.

<sup>245</sup> Article 42 of the VCDR.

<sup>246</sup> Denza, 4th edition, pp. 387-388.

<sup>247</sup> *Ibid*, p. 387.

diplomatic immunity.<sup>248</sup> Others, on the other hand, regard Article 31(1)(c) as a corollary of the prohibition of Article 42 and hold that they have the same scope.<sup>249</sup>

The ILC's commentary to the 1958 Draft justifies the exception of commercial or professional activities on the ground that persons dealing with a diplomatic agent who has performed acts incompatible with his or her status should not be deprived of their ordinary remedies.<sup>250</sup> During the Vienna Conference, however, it was felt that a new article concerning the duty of diplomatic agents was needed in order to make it clear that a diplomat who violates the duty enjoys neither immunity under Article 31(1)(c) (then Article 29(1)(c)) nor privileges from taxation.<sup>251</sup> As a result, the proposal made by Colombia, which originally read 'the staff of a diplomatic mission may not practise any liberal profession or commercial activity otherwise than in the performance of their official duties',<sup>252</sup> was accepted in principle and referred to the Drafting Committee for revision.

When the new article was discussed again several days later, the parties had before them draft Article 40 (bis) which read 'in principle a diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity'.<sup>253</sup> The main controversy between States at this stage concerned the additional phrase of 'in principle'. The original sponsor of the article, Colombia, was opposed to the phrase because it 'greatly weakened' the purpose of the article by allowing a diplomat to carry out some commercial or professional activities.<sup>254</sup> The US, on the other hand, was in favour of retaining the phrase because it could save the practical difficulty of defining the term 'commercial activity'.<sup>255</sup> If adopted, the US suggestion would in effect render Article 40 (bis) and Article 29(1)(d) (then the article on the exception of commercial or professional activity) different in scope, as certain activities which are not prohibited under the former might still be subject to the exception in the latter.<sup>256</sup> This

<sup>248</sup> Aust (2010), p. 128.

<sup>249</sup> Hardy, p. 62; McClanahan, pp. 130-131; Kleiner, p. 137; Cahier, p. 29.

<sup>250</sup> Ybk ILC 1958, vol. II, p. 98, para. 7.

<sup>251</sup> Official Records, vol. I, p. 211, para. 3 [Colombia].

<sup>252</sup> Official Records, vol. II, p. 25.

<sup>253</sup> Official Records, vol. II, p. 73.

<sup>254</sup> Official Records, vol. I, p. 21, para. 20 [Colombia].

<sup>255</sup> Ibid, para. 21 [US].

<sup>256</sup> This was exactly the understanding of Italy, who believed that Article 29(1)(d) was necessary only if 'in principle' was retained in Article 40 (b). Without the phrase, on the other hand, the two articles would be co-extensive and the former would be superfluous. Ibid, p. 20, para. 11. This also seems to be the understanding of Denza, supra note 246.

was not, however, supported by the parties. The phrase ‘in principle’ was deleted and Article 40 (bis), as amended, was adopted by a rather wide margin<sup>257</sup> and later became Article 42.

The drafting history of Article 42 demonstrates that parties to the Vienna Conference have never intended to treat the article and Article 31(1)(c) differently. The very purpose of Colombia’s original proposal was to guide the application of diplomatic immunities and privileges with respect to commercial or professional activities;<sup>258</sup> and the US suggestion, which would have resulted in a different scope of Article 42, was rejected by the Vienna Conference.<sup>259</sup> It is true that the proposals to delete Article 31(1)(c) completely were not adopted by the conference,<sup>260</sup> but the reason was *not* the different scopes of the two articles; rather, it was because Article 31(1)(c) remains useful for the immunity of those who are not regulated by Article 42<sup>261</sup> and in the situation where a diplomat ignores the obligation under Article 42.<sup>262</sup> Indeed, the very fact that States had moved to delete Article 31(1)(c) indicates that they had treated the article as coextensive with Article 42.<sup>263</sup>

The main problem with the different treatment of Article 42 and Article 31(1)(c) is that it fails to answer why diplomatic immunity should be denied when a diplomat does *not* violate his or her obligations under the VCDR. As in the case of Article 31(1)(a),<sup>264</sup> Article 31(1)(c) represents a balance between the right of access to justice of those who are dealing with a diplomatic agent and the smooth performance of diplomatic functions. Both the ILC<sup>265</sup> and parties at the Vienna Conference<sup>266</sup> have drawn the line at acts incompatible with the status of

<sup>257</sup> Official Records, vol. I, p. 21.

<sup>258</sup> Supra note 251, 252 and the accompanying text.

<sup>259</sup> Supra note 257. The US itself seems to have treated Article 42 and Article 31(1)(c) as coextensive in a 1986 circular note to Chiefs of Mission in Washington D.C.. See, *Cumulative Digest*, pp. 961-962.

<sup>260</sup> Supra note 256. A similar proposal was made at an earlier stage by Colombia, Official Records, vol. II, p. 25.

<sup>261</sup> Families of diplomatic agents and subordinate members of a diplomatic mission as well as their families. Official Records, vol. I, pp. 212-213, para. 26 [Japan]; p. 20, para. 10 [Soviet Union].

<sup>262</sup> Ibid, p. 20, para. 12 [Romania]; para. 14 [United Arab Republic].

<sup>263</sup> For Silva, Article 42 merely creates a ‘redundant moral obligation’ due to the existence of Article 31(1)(c). Silva, p. 119.

<sup>264</sup> See, Section 4 above.

<sup>265</sup> Supra note 250.

<sup>266</sup> Supra note 253-257.

a diplomatic agent.<sup>267</sup> Underlying this dividing line is the belief that, unless a diplomatic agent has violated the obligation under Article 42, he or she should not be exposed to a civil proceeding in the receiving State, as this would jeopardise his or her performance of official functions.

It is true that, as evidenced by the Alghosaibi incident,<sup>268</sup> certain acts not in violation of Article 42 may nonetheless infringe the interests of others. However, it should be noted that whether diplomatic immunity should be denied is quite a distinct matter from whether an act is wrong or deplorable. The very notion of diplomatic immunity implies a certain degree of injustice to those dealing with a diplomat.<sup>269</sup> Article 31(1) only provides for three exceptions to immunity from civil proceedings, yet it is obvious that there is a wide range of activities which are more offensive than the poem written by Alghosaibi but which are still covered by diplomatic immunity.<sup>270</sup> After all, the main purpose of diplomatic immunity is to protect a diplomat from being overexposed to court proceedings, not to protect the right of access to justice of a private person. It is therefore important to interpret any exception to diplomatic immunity in strict adherence to the parties' intention. This means that, in the case of Alghosaibi, he would be protected by diplomatic immunity if sued for defamation, as in writing the offensive poem, the ambassador had no intention of profiting himself and was thus not in violation of Article 42 of the VCDR.

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<sup>267</sup> It was also recognised by academic institutes in their draft codes before the VCDR. See, Harvard Draft, Article 24; Pessôa Draft, Article 139; Institute of International Law, New York Draft, Article 13.

<sup>268</sup> Supra note 241.

<sup>269</sup> As Bolewski points out, diplomatic immunity constitutes 'an exception to one of the fundamental principles of the rule of law – equality before the law'. Bolewski, p. 789. See also, Zaid, p. 624; Kartusch, p. 32. In a US case concerning consular immunity for alleged breach of contract, it was also pointed out that 'some unfairness to the wronged party is inherent in the notion of immunity'. *Koepfel and Koepfel and Another v. Federal Republic of Nigeria and Others* (1989), 99 ILR 121, at p. 125.

<sup>270</sup> Commenting on the exceptions to diplomatic immunity in Article 31(1)(a) and Article 31(1)(b), Denza points out that there are also other situations of a similar kind which are covered by diplomatic immunity. In these situations, the plaintiff would be deprived of any possible forum. Denza, 2nd edition, p. 246.

## 5.2.2. Making the assessment: the attitude of States' as regards Article 42

Having determined that Article 31(1)(c) is based on the obligation in Article 42, reference would next be made to the scope of the prohibition in Article 42. An examination of the relevant discussion at the Vienna Conference reveals several things: First, there was consensus among States that cultural or academic activities should not be prohibited under Article 42.<sup>271</sup> Second, most States in justifying this position looked to the underlying motive rather than the continuous nature of the activities. Malaya (and India), for example, pointed out that the underlying principle of Article 42 was to forbid activities performed for personal profit.<sup>272</sup> Therefore, 'it was surely permissible for a diplomatic agent to take part in a raffle or auction for charity, or to give a lecture on a subject on which he was a specialist'.<sup>273</sup> France stated in a similar vein that 'such activities as lectures at universities and elsewhere, even if paid, were exclusively cultural in character. That type of activity, which rendered a service to the receiving State, should not be discouraged any more than the literary activity of a diplomat who happened to be a well-known author'.<sup>274</sup> The only two States that adopted the standard of 'continuous nature' were Italy and Ceylon; but even for them, a 'regular' professional activity must also be profitable in nature.<sup>275</sup> All these statements were made with regard to the original proposal of Colombia,<sup>276</sup> which did not contain the phrase 'for personal profit'. In other words, States had regarded 'for personal profit' as an integral part of the definition of 'commercial or professional activity'. Therefore, the phrase as it currently stands in Article 42 is meant to *clarify* the meaning of 'commercial or professional activity' *ex abundante cautela* rather than give Article 42 a narrower scope than Article 31(1)(c).

Third, it seems that States had understood 'profit' as referring solely to financial profit. Delegates at the Vienna Conference repeatedly mentioned 'gainful' activities to denote the

<sup>271</sup> See comments made by Spain, Official Records, vol. I, p. 212, para. 11; France, para. 14; Ceylon, para. 17; Colombia, para. 22; Peru, para. 25; Portugal at p. 213, para. 28; United Kingdom, para. 30; Malaya, para. 33.

<sup>272</sup> Ibid.

<sup>273</sup> Ibid.

<sup>274</sup> Supra note 271.

<sup>275</sup> Italy held that the prohibition applies to 'gainful activities such as commerce, industry, or a regular profession', Ibid, p. 213, para. 27; Ceylon spoke of a 'regular professional activity from which a permanent income was derived', p. 212, para. 17.

<sup>276</sup> Supra note 252.

scope of Article 42.<sup>277</sup> With respect professional activities, it was also pointed out that the prohibition relates only to those from which a permanent income is derived.<sup>278</sup> Indeed, throughout the discussion on Article 42, ‘profit’ had never been understood as denoting benefits other than financial gain; on the other hand, the very exclusion of academic and cultural activities from the prohibition, both of which could be perceived as relating to ‘profit’ of other kinds, illustrates that States did not intend to give the word too broad a definition.

It then follows that parties to the VCDR have considered ‘for personal financial profit’ as an element common to both commercial activities and professional activities.

Less clear, however, is the attitude of States with regard to the standard of ‘continuous nature’. Italy’s statement above seems to suggest that only professional activity needs to be continuous;<sup>279</sup> whereas Ceylon argued that Article 42 as a whole referred only to ‘a regular professional activity from which a permanent income was derived, and not an occasional activity’.<sup>280</sup>

With regard to commercial activities, a review of the ILC’s discussion on draft Article 29(1)(c) seems to suggest that a commercial activity does not need to be continuous in nature.

Support for the standard of ‘continuous nature’ comes from the Special Rapporteur’s reply to the Australian Government, which requested a clarification of ‘commercial activity’ in 1957. According to the Special Rapporteur, ‘the use of the words “commercial activity” as part of the phrase “a professional or commercial activity” indicates that it is not a single act of commerce which is meant, but a continuous activity’.<sup>281</sup> As a result, a reference was made into the commentary to the effect that the exception did not include ‘an isolated commercial transaction’. However, it should be noted that this reference was subsequently deleted from the ILC’s commentary exactly because it was felt that the commercial nature of an act should

<sup>277</sup> Official Records, vol. I, p. 212, para. 7 [Venezuela]; para. 16 [Ecuador]; p. 213, para. 27 [Italy];

<sup>278</sup> Ceylon, *supra* note 275. See also, para. 22 [Colombia].

<sup>279</sup> *Supra* note 275. The word ‘regular’ appears before the word ‘profession’ but not ‘commerce’.

<sup>280</sup> *Ibid.*

<sup>281</sup> A/CN.4/116, p. 56.

not depend on whether it is performed on a regular basis. Zourek, who proposed the deletion of the reference, held in particular that:

A purchase was a commercial transaction only if made with a view to resale for purpose of gain. On the other hand, he did not think it necessary for a diplomatic agent to engage in continuous commercial activity in order to come under the provisions of paragraph 1(c) of the article. If the agent engaged in a single large-scale commercial transaction which ended in disaster, he should not be immune from civil jurisdiction as far as it was concerned.<sup>282</sup>

The suggestion was accepted by the Special Rapporteur,<sup>283</sup> and the deletion of the reference suggests that the ILC had intended to use ‘for personal profit’ as the sole indication of the commercial nature of an act.

With regard to professional activities, however, the ILC discussion does not offer much guidance. Yet the principle stated above – that immunity can be deprived only when a diplomatic agent has violated his or her obligation under Article 42 – stands. If a diplomatic agent has performed a single professional act with the intention of making personal financial profit, it is difficult to understand why he or she could not be subject to a local court when disputes arise. The evaluation of the primary motive behind an act can only be made in the light of the specific circumstances of the case, but this is no reason to deviate from State parties’ intention of aligning Article 31(1)(c) with Article 42. Considering the fact that the standard of ‘continuous nature’ relies on a case-by-case analysis (to determine how many times are needed for an act to be qualified as continuous in nature) just as much as the primary motive standard does, it is hardly necessary to introduce in Article 31(1)(c) an element that was not clearly approved of by State parties at the Vienna Conference.

The standard of personal financial profit would exclude from the application of Article 31(1)(c) situations in which a diplomatic agent is on the receiving end of a service. In recent years, reports on the abuses of domestic workers by diplomatic agents<sup>284</sup> have led authors to argue that an employment of domestic service is a commercial activity under Article 31(1)(c), the reason being that, by exploiting a domestic worker, the diplomat has indirectly profited

<sup>282</sup> Ybk ILC 1958, vol. I, p. 244, para. 29 [Zourek].

<sup>283</sup> Ibid, para. 34 [Sandström].

<sup>284</sup> See, in particular, the empirical study concerning the relationship between diplomatic immunity and employment abuse conducted by Kartusch.

himself/herself.<sup>285</sup> This broad understanding of commercial activity was not supported by State representatives at the Vienna Conference, who seemed to have in mind only those activities in which a diplomatic agent earns personal profit by providing an extra-diplomatic service. Indeed, if this argument is upheld, anything relating to monetary obligations would be deemed as a commercial activity. This would effectively result in a loss of diplomatic immunity for most of the daily activities of a diplomatic agent, for even an omission to pay for a newspaper would be regarded as a commercial activity performed with the intention of making personal financial profit. In any event, domestic courts seem consistent in rejecting this expansive interpretation of commercial activity.<sup>286</sup>

As a final note, it should be pointed out that, although States at the Vienna Conference seemed quite willing to encourage acts such as lecturing at universities, this sentiment should not be overstated. It has been explained in Chapter 2 that providing general exceptions to diplomatic immunity *ratione materiae* is not an appropriate way of understanding the scope of this immunity.<sup>287</sup> The same logic applies here. It is all too easy to say that a diplomatic agent, who lectures at a local university with the (express or tacit) approval of both States,<sup>288</sup> does not violate the obligation under Article 42 even if he or she receives remuneration from the university. Indeed, in this case, it may even be argued that the diplomat is performing the function of ‘promoting cultural relations between the two States’.<sup>289</sup> However, in practice, lecturing in a local university could take so many different forms that one may wonder whether all of them could be regarded as not performed ‘primarily’ for personal profit. If a diplomatic agent, in the absence of approval from either the sending State or the receiving State, devotes his or her private time to lecturing at a local university in order to earn a huge amount of

<sup>285</sup> Rodgers, *supra* note 244; see also, Garnett, p. 824; Bergmar, pp. 526-527. In a similar vein, it is argued that employment of domestic servants, being part of the overall operation of human trafficking, is a commercial activity because of the commercial nature of human trafficking. Webb (2016), p. 761; Sanger, p. 5; Reyes (2017), paras. 61-62 [Lord Wilson]. For a more extreme view, see, Friedrich, p. 1168, in which the author argues that diplomatic immunity as a whole should be denied in case of human trafficking because the crime violates *jus cogens* norms relating to slavery and human rights.

<sup>286</sup> Reyes (2017), paras. 45-47 [Lord Sumption]; *Tabion v. Mufti*, *supra* note 242; *Gonzalez Paredes v. Vila*, *supra* note 242; *Sabbithi v. Al Saleh*, *supra* note 58; *Fun v. Pulgar* (2014), 993 F.Supp.2d 470; *Montuya v. Chedid* (2011), 779 F.Supp.2d 60.

<sup>287</sup> Chapter 2(4.2).

<sup>288</sup> The US, for example, made clear that, whereas in principle private gainful employment is strictly prohibited for foreign diplomats in the US, approval might be granted in exceptional cases concerning ‘educational, cultural or medical field’. *US Digest* (1976), p. 201.

<sup>289</sup> Article 3(1)(e) of the VCDR.



money, it is questionable whether this act could still be regarded as not in violation of Article 42. Article 3(1) of the VCDR is framed in such broad terms that it is sometimes more useful to look at the attitudes of the two States than the article itself. Whereas running a tourist office in the receiving State *with the consent of that State* may well indicate that those working in the office, even if paid, are contributing to the function of protecting the sending State's interests<sup>290</sup> and thus not 'primarily' for personal profit, things may be completely different if the receiving State makes clear that running such an office is incompatible with diplomatic functions.<sup>291</sup> In this latter case, those working in the office may well be taken as performing some non-diplomatic professional activity; and since the act is no longer part of recognised diplomatic functions, the fact that they are paid may well be perceived as an indication that they have performed the act primarily for personal profit. The potential problems that may arise in real practice highlight the inadvisability of framing general exceptions to diplomatic immunity *ratione materiae*. More important, it is submitted, is the basic principle that diplomatic immunity will be denied if a diplomat has performed a commercial or professional activity for personal financial profit.

### 5.3. Conclusion

On the whole, this section has interpreted 'commercial or professional activity' in the light of Article 42 of the VCDR. The underlying reason for this approach is that diplomatic immunity could be denied only when a diplomat has performed activities incompatible with his or her diplomatic status. As a result, a commercial or professional activity should better be understood as one which is performed primarily for personal financial profit; and this is the case even when the act in question is not continuous in nature.

## 6. Conclusion of Chapter 4

This chapter examined Article 31(1) of the VCDR. Several conclusions can be drawn from the above analysis:

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<sup>290</sup> Article 3(1)(b) of the VCDR.

<sup>291</sup> See, the position of the UK after 1984, *supra* note 80.

First, the formula of ‘on behalf of’ provided in Article 31(1)(a) and Article 31(1)(b) is narrower in scope than the formula of ‘in the exercise of functions’. Whereas the former merely relates to acts performed strictly in the name of the sending State, the latter includes in addition acts which are performed in the name of the diplomat but which are closely related to his or her diplomatic functions. In practice, this would mean that certain ancillary/incidental acts could be regarded as performed ‘in the exercise of functions’ but not ‘on behalf of the sending State’.

Second, the functions of a diplomatic agent must be understood in the framework of Article 3(1). A broader interpretation of the functions of a diplomatic agent is both unnecessary and risky. Unnecessary because Article 3(1) is already broad enough to encompass any official act that is likely to be performed by a diplomatic agent; and risky because the interpretation could potentially lead to an understanding where anything instructed by the sending State might be regarded as the official function of a diplomatic agent. Acts such as State-sponsored terrorism or espionage, in spite of their official nature, should never be regarded as the functions of a diplomatic agent.

Third, the private residence of a diplomatic agent should not be protected under Article 31(1)(a). Although the principal private residence of a diplomat may be said to facilitate his or her performance of functions, States tend to believe that the benefits accrued are not sufficient to justify immunity. The preeminence of *lex rei sitae* requires that any dispute concerning the title or possession of an immovable property be settled in the forum State; on the other hand, the nature of real actions, as well as the inviolability of private residence of a diplomat, ensure that the performance of diplomatic functions would not be easily disrupted.

Fourth, a ‘real action’ is an action concerning the title or possession of an immovable property. It is directed at the property itself rather than the person of a diplomat. The right of access to justice is not a sufficient justification to give the term a broad meaning so as to include any proceeding relating to an immovable property. The very notion of diplomatic immunity implies a denial of access to justice to a certain extent, yet this is justified on the ground that, in order to fulfil diplomatic functions satisfactorily, a diplomat should not be overexposed to court proceedings in the receiving State.

Fifth, the interpretation of ‘commercial or professional activities’ under Article 31(1)(c) must be made in strict adherence to Article 42 of the VCDR. As a result, a commercial or

professional activity should be perceived as one which is performed primarily for personal financial profit, and this is the case even when the act in question is not continuous in nature.

# Chapter 5: Procedural Aspects in the Application of Diplomatic Immunity Ratione Materiae

## 1. Introduction

The preceding chapters approached the issue of diplomatic immunity *ratione materiae* from a substantive perspective, viz. the contents of each kind of immunity. In practice, however, the actual application of rules on diplomatic immunity *ratione materiae* has problems of its own.

In the first place, it is not clear whether the court of the receiving State has an obligation to consider immunity issues *ex proprio motu* in the absence of an invocation of immunity. The issue of diplomatic immunity *ratione materiae* arises only when the official nature of an act is called into question. If, for example, an ATS member has caused a traffic accident while driving, the sending State is usually in a better position to inform the official nature of the act, for the details of the trip (such as the destination of the trip, or the person the ATS member is instructed to meet) are likely to be unknown to the receiving State. This in turn highlights the importance of invocation of immunity to the determination of immunity, for if no immunity claim is made, it is possible that the court of the receiving State would proceed on the assumption that the act in question is private in nature.

This seems indeed the belief of the ICJ.<sup>1</sup> To the extent that both immunities refer to the immunity for an act of State, and to the extent that the home State of an official is usually in a better position to inform the details of an official act, diplomatic immunity *ratione materiae* is

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<sup>1</sup> *Mutual Assistance*, para. 196. This is also the view of the US Government in the case of *Yousuf v. Samantar*, in which the government pointed out that functional immunity of former high-ranking officials of Somalian Government should be rejected because there was no recognised government in Somalia that was capable of invoking immunity on behalf of the officials. *Yousuf v. Samantar*, 699 F.3d 763, at p. 767; see also, Koh, p. 1152. For discussion on the issue relating to functional immunity in general international law, see, Foakes, pp. 172-175; Douglas, p. 343.

analogous to the functional immunity of State officials in general international law. In *Mutual Assistance*, the ICJ, endorsing the view of France that the denial of immunity *ratione materiae* of several Djiboutian officials is justified because Djibouti's non-invocation of immunity has made it impossible for the French court to assess the official nature of the acts involved,<sup>2</sup> pointed out that 'the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned'.<sup>3</sup>

In Section 2 of this chapter, it will be discussed whether the court of a receiving State could likewise reject diplomatic immunity *ratione materiae* if no invocation of immunity is made. The ICJ justified its ground along the line of determination of immunity *ratione materiae*, viz. invocation of immunity is an indispensable part to assessing the official nature of an act. Yet it has also been argued, by the ILC Special Rapporteur in his report on the project of Immunity of State Officials from Foreign Criminal Jurisdiction,<sup>4</sup> that, in case of non-invocation, functional immunity may be deemed as having been implicitly waived.<sup>5</sup> Section 2 will examine these two lines of thought in the context of diplomatic law.

Further, practical difficulties also exist with regard to waiver of immunity.

Article 32(1) of the VCDR confirms the principle that only the sending State has the substantive authority to waive immunity. But as an abstract entity, the opinion of the sending State must be communicated to the receiving State in a particular way, and in this respect the VCDR does not make clear how this communication is to be effectuated. In a broad sense, diplomatic agents as representatives of the sending State may be said to speak with authority. From a narrow view, however, only a statement deriving directly from the central government of the sending State may be deemed with certainty as the opinion of the sending State.

In addition, the article makes no distinction between waiver of immunity for private acts and waiver of diplomatic immunity *ratione materiae*. Whereas the former merely has the effect of lifting the procedural bar to the jurisdiction of a receiving State's court; the effect of the latter

<sup>2</sup> Ibid, para. 189.

<sup>3</sup> Ibid, para. 196.

<sup>4</sup> Roman Anatolevich Kolodkin, 'Third report on immunity of State officials from foreign criminal jurisdiction', A/CN.4/646.

<sup>5</sup> Ibid, para. 18. On the point whether the VCDR permits implied waiver in spite of the existence of Article 32(2), see Section 2.1.2 below.

merits closer examination because, as concluded in Chapter 1, certain diplomatic immunities *ratione materiae* concern not only jurisdiction but also responsibility.<sup>6</sup>

Problems relating to waiver of immunity will be dealt with in Section 3.

## 2. The effect of non-invocation of diplomatic immunity *ratione materiae*

### 2.1. Non-invocation as a matter of determination of diplomatic immunity *ratione materiae*

The ICJ (and France in the case) approached the issue of non-invocation from the perspective of determination of immunity *ratione materiae*: if the home State of an official does not invoke immunity, the forum State could simply presume that the act has been performed in a private capacity.<sup>7</sup>

Before examining whether this argument applies equally to diplomatic immunity *ratione materiae*, it seems necessary to discuss how such immunity is determined.

#### 2.1.1. Rules on determination of diplomatic immunity *ratione materiae*

The determination of what constitutes an act performed in the exercise of functions is a topic which features different opinions in scholarship and in practice.

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<sup>6</sup> Chapter 1(3).

<sup>7</sup> A similar opinion was also expressed by Michael Wood (on behalf of the UK Government) in the case of *Khurst Bat*, which concerns the functional immunity of a Mongolian official for kidnapping. See, *Khurst Bat v. Investigating Judge of the Federal Court of Germany*, [2013] QB 349, at para. 67. In the context of consular immunity, Hickey and Fisch also argue that the sending State has the burden of demonstrating that the act involved is official in nature. Hickey and Fisch, pp. 370-372.

It has been argued that only the sending State can make the decision. Hurst, for example, holds the view that, when the official nature of a diplomat's act is cast in doubt, only the diplomat himself could make a decision.<sup>8</sup> During the ILC discussion in 1957, Scelle expressed a similar view that 'the only criterion' for distinguishing official and private acts is whether the sending State approves the act in question.<sup>9</sup>

Others disagree. Hardy points out that there is 'no reason' for a bare assertion of the sending State to be regarded as sufficient for the determination of diplomatic immunity *ratione materiae*.<sup>10</sup> Salmon indicates likewise that the authority of determining the nature of an act ultimately lies with the court of the receiving State.<sup>11</sup> In a 1988 case concerning the consular immunity of a Yugoslav consul in Chicago,<sup>12</sup> the US Government also indicated that 'in the majority of cases, it is only the trier of facts which is in a position to make the determination as to the "official" nature of the activity'.<sup>13</sup>

The main difficulty with the determination of diplomatic immunity *ratione materiae* is that this process involves conflicting interests between the sending State and the receiving State.

On the one hand, the issue of immunity usually arises when an act has violated local laws. This means that, from the perspective of the receiving State, the interests of a private party, as well as the interests of maintaining the integrity of the judicial system,<sup>14</sup> are potentially at stake. The VCDR recognises the legitimate interests of the receiving State by imposing an

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<sup>8</sup> Hurst (1950), p. 232. See also, Samuels, who points out, in the context of diplomatic immunity *ratione materiae* of ATS members, that if a sending State claims that an act has been performed in the course of duties, it would be difficult for the court to decline to accept this claim. Samuels, p. 691; Dupuis, p. 303.

<sup>9</sup> Ybk ILC 1957, vol. I, p. 150, para. 51 [Scelle].

<sup>10</sup> Hardy, p. 65. See also, Silva, who argues, in the context of Article 31(1)(c), that the receiving State is the 'sole authority competent to determine which activities are or are not compatible with' the privileged status of diplomats. Silva (1972), p. 119.

<sup>11</sup> Salmon, p. 478; see also, O'Keefe (2015), p. 437.

<sup>12</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see, Introduction (3.2).

<sup>13</sup> *US Digest* (1989-1990), p. 349. See also, Frulli, p. 490, in which the author holds the view that, whereas consular immunity could be determined by the agreement between the two States involved, it is 'eventually domestic judges [that] decide at their discretion on the application of the rule'.

<sup>14</sup> This is exactly the claim of New Zealand in the *Rainbow Warriors*, see Chapter 2, footnote 125.

obligation to respect local laws on persons enjoying immunities.<sup>15</sup> However, the very fact that the interests of the receiving State are likely to be infringed by an act covered by diplomatic immunity *ratione materiae* means that, in determining such immunity, the receiving State would normally support a restrictive view. Thus, in the case of *Mali v. Keita*, the Belgium court refused to recognise the immunity of a foreign embassy chauffeur who had committed homicide during his working hours, in spite of the invocation of diplomatic immunity *ratione materiae* by the sending State's government.<sup>16</sup>

From the perspective of the sending State, however, the VCDR recognises the interests of ensuring the smooth performance of diplomatic functions.<sup>17</sup> Therefore, when a mission member has violated local laws during his or her performance of official duties, the sending State, as evidenced by the *Keita* case mentioned above,<sup>18</sup> would tend to claim a broader scope of immunity in order to ensure that the mission member is free from harassment.<sup>19</sup>

It then follows that the process of determining diplomatic immunity *ratione materiae* concerns a balance of these conflicting interests; and since both interests are recognised by the VCDR, it seems the better approach is one of conciliation rather than confrontation.<sup>20</sup> In other words, instead of claiming that one interest overrides another, the better solution would take the interests of both sides into account.<sup>21</sup>

In the first place, the interests of the receiving State must be recognised by upholding the principle that, in an ultimate sense, the determination of diplomatic immunity *ratione materiae* is a matter of the court of the receiving State. As explained in Chapter 2, underlying diplomatic immunity *ratione materiae* is the consideration that the interests of protecting an act closely

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<sup>15</sup> Article 41(1) of the VCDR.

<sup>16</sup> *Ministère Public and Republic of Mali v. Keita* (1977), 77 ILR 410.

<sup>17</sup> Preamble of the VCDR.

<sup>18</sup> *Supra* note 16.

<sup>19</sup> Commenting on the argument that a sending State has an obligation to waive immunity if no interference would result from a waiver, Barker points out in a similar vein that, if assessment is to be made by the sending State, it is doubtful whether a waiver would ever be given. Barker (1996), p. 204.

<sup>20</sup> For more details on application of these two methods in diplomatic law, see, Behrens (2012), pp. 215-242.

<sup>21</sup> In a similar vein, the ICJ pointed out in the *Asylum Case* that the authority to determine the nature of the acts of an asylum seeker 'must be attributed to each of the States concerned'. *Colombian-Peruvian Asylum Case, Judgment of November 20th, 1950, I.C.J. Reports 1950*, p. 266, at p. 275.



related to the performance of functions outweigh the interests of punishing the diplomat. But this consideration is not absolute. In case of serious abuse, the receiving State should be given the opportunity to safeguard its interests.<sup>22</sup> If diplomatic immunity *ratione materiae* is determined solely by the sending State, the result would be as if the sending State is exercising the judicial power of the receiving State with regard to immunity. Considering the inclination of a sending State to claim as much protection as possible for its officials, diplomatic immunity *ratione materiae* would easily become *de facto* full diplomatic immunity if the sending State is the sole arbitrator of the official nature of an act. Indeed, if murder can be regarded as an act performed in the course of duties,<sup>23</sup> it would not be far away before a mission cook could successfully claim the immunity under Article 37(3) for an act of planting a bomb on his or her way to the embassy.

On the other hand, however, the authority of the court of the receiving State should be exercised with great caution, for otherwise the very purpose of immunity – that of prohibiting the receiving State from looking into the details of an official act of the sending State – would be defeated. The *Kenyan Diplomatic Residence Case* illustrates this point.<sup>24</sup> In this case, a Kenyan national, who had obtained a judgment by default which ordered Kenya to pay his salary arrears, sued for execution of the judgment by selling a building owned by Kenya in Bonn. The building was once used as the mission premises of the Kenyan Embassy. Yet by the time of the proceeding, the embassy had been moved to Berlin. The plaintiff argued that the building was not used for diplomatic purposes and thus should not be immune. The Kenyan Ambassador, on the other hand, invoked immunity by informing the court that the building was still used for official purposes. The Federal Supreme Court of Germany accepted the suggestion of the ambassador. For the court, this suggestion must be treated as sufficient *prima facie* evidence, as the sending State has no obligation under international law to disclose the

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<sup>22</sup> Commenting on the argument that the diplomatic immunity *ratione materiae* of officials of the UN should be determined by the UN itself, Jenks points out that this argument is likely to be accepted by the receiving State ‘only in the clearest cases’. Jenks, p. 118. For the relationship between diplomatic immunity *ratione materiae* and functional immunity of UN officials, see Introduction (3.2).

<sup>23</sup> *Supra* note 16. In a similar incident between Yemen and Iraq, three security guards from the Iraqi Embassy in Yemen murdered, apparently under the instruction of Iraqi Government, an Iraqi citizen taking refuge in Yemen. The Yemeni authority broke into the Iraqi Embassy and arrested the three suspects. Two of them were exempt from prosecution due to their diplomatic status; the other one, however, was sentenced to ten years’ imprisonment. See, Grzybowski, pp. 51-52.

<sup>24</sup> *Kenyan Diplomatic Residence Case* (2003), 128 ILR 632.

details of its diplomatic activity.<sup>25</sup> On the other hand, the principle of *ne impediatur legatio* would be violated if the receiving State is permitted to *verify* the suggestion of the ambassador, for the taking of evidence would lead to the disclosure of internal matters of the Kenya mission.<sup>26</sup>

The *Kenyan Diplomatic Residence Case* concerns the immunity from execution of diplomatic premises,<sup>27</sup> yet the consideration is the same with regard to diplomatic immunity *ratione materiae*. If, for example, an ATS member has rented an office to perform some confidential duties on behalf of the mission, the sending State's invocation of his or her immunity under Article 37(2) must be regarded as binding, for otherwise the court of the receiving State would have to conduct a detailed investigation to verify how the office has actually been used.<sup>28</sup> The primary purpose of diplomatic immunity is to protect diplomatic functions, not the person who performs these functions.<sup>29</sup> Therefore, if confidential matters are revealed, immunity would lose much of its substance even if the ATS member is finally granted immunity.

This conciliatory approach requires the receiving State to accept the invocation of diplomatic immunity *ratione materiae* unless there is strong evidence that immunity has been abused. Support for this approach can be found in post-VCDR State practice.<sup>30</sup>

On the one hand, when a claim of immunity *ratione materiae* is not likely to lead to abuse, the court of the receiving State usually recognises immunity without inquiring into the details of the act. In the case of *Australian Federation of Islamic Councils Inc. v. Westpac Banking*

<sup>25</sup> Ibid, p. 633.

<sup>26</sup> Ibid, p. 638. See also, with regard to the use of real property, *United States v. County of Arlington and Another*, 702 F.2d 485. For a similar case concerning the use of embassy bank account, see, *Thai-Lao Lignite and Hongsa Lignite v. Government of the Lao People's Democratic Republic et al.*, No. 13-495 (2d Cir. 2013), reprinted at *US Digest* (2013), pp. 292-295.

<sup>27</sup> For a similar argument, see, Crawford (1981), pp. 862-864.

<sup>28</sup> In a similar vein, Franey points out that, if a diplomat could be prosecuted for illegally collecting information in the receiving State, the plans and policies of the sending State would be exposed to the receiving State because the diplomat would have to explain what information has been collected and why the collection is necessary. Franey, p. 65.

<sup>29</sup> Preamble of the VCDR.

<sup>30</sup> For support of this conciliatory approach with regard to the determination of functional immunity in general international law, see, Foakes, p. 146. For the relationship between functional immunity in general international law and diplomatic immunity *ratione materiae*, see, Introduction (3.2).

*Corporation*, a dispute arose with regard to the management of the Australian Federation of Islamic Councils, to which the then serving ambassador of Saudi Arabia donated funds on behalf of his government for the purpose of developing Islamic education in Australia.<sup>31</sup> The ambassador was not a direct party to the dispute, but since he claimed rights in the property involved, the court had to consider whether the proceeding would be debarred by the application of Article 31(1) of the VCDR. The court, in ruling that the ambassador had been acting in an official capacity, pointed out that the ambassador's claim had to be accepted as long as it is not 'merely illusory, nor founded on a title manifestly defective'.<sup>32</sup>

On the contrary, when there is strong reason to believe that a claim of immunity is mainly aimed at evading liability for personal wrongdoing, the receiving State has shown a greater willingness to dig into the details of the act. Thus in *Portion 20 of Plot 15 Athol (Pty) Ltd v. Rodrigues*, the High Court of South Africa rejected the incumbent Angolan Ambassador's immunity under Article 31(1)(a) in a dispute concerning the ambassador's purchase of a private immovable property, in spite of the statement of the sending State that the immovable property had been held by the ambassador for official purposes.<sup>33</sup> This case can be distinguished from *Australian Federation of Islamic Councils Inc. v. Westpac Banking Corporation* because there was strong indication that the Angolan Government had intended to invoke immunity in order to shield the ambassador from civil liability for a purely private act.<sup>34</sup> Unlike the ambassador's official residence,<sup>34</sup> the immovable property in question was not registered at the South African Minister of Foreign Affairs, which was a compulsory procedure under South African law for any foreign property to be regarded as diplomatic in nature. The immovable property did not bear any external or outward sign which might suggest its official nature, and throughout the transaction the ambassador had never revealed his official status. Although the result of this case is contrary to that of the *Australian Federation of Islamic Councils Inc. v. Westpac Banking Corporation*, the South African court has in fact strengthened the principle proclaimed in the Australian case: the statement of the sending State should be given great weight *unless* there is strong indication of abuse.<sup>35</sup>

<sup>31</sup> *Australian Federation of Islamic Councils Inc. v. Westpac Banking Corporation*, 104 ILR 405.

<sup>32</sup> *Ibid*, p. 414.

<sup>33</sup> *Portion 20 of Plot 15 Athol (Pty) Ltd v. Rodrigues* (1999), 133 ILR 389.

<sup>34</sup> In fact, even the authority of the statement is not free from doubt, see *ibid*, p. 396.

<sup>35</sup> *Supra* note 32.

A trickier situation can be found in the British case of *P v. P*.<sup>36</sup> In this case, the wife of a US diplomat sued her husband, who had by the time of the proceeding left his post in London following the instruction of the US Government, for wrongful removal of their children. The US Government officially intervened in the proceeding by claiming that, since the diplomat had been recalled by the US Government, and since the authority to assign US diplomats lay exclusively with the US Government, diplomatic immunity *ratione materiae* under Article 39(2) of the VCDR must be granted, for otherwise the British court would be interfering with the right of the US to determine the manner of its representation in the UK. The court of first instance rejected this claim by holding that the act of removing the children from the UK was a private act of the diplomat, but ruled that the diplomat was nonetheless protected by State immunity due to the governmental nature of the removal.<sup>37</sup> The Court of Appeal, however, refrained from dealing with the issue of immunity and dismissed the proceeding by holding that any decision on the issue, which would necessarily delay the process of a related proceeding in the US, would be contrary to the interests of the children.<sup>38</sup>

Whereas obeying the recall order of the sending State is clearly an official act protected by diplomatic immunity *ratione materiae*,<sup>39</sup> it is questionable whether the removal of the children, which was in fact not directly ordered by the US Government, is within ‘the right of the US to determine the manner of its representation’ and thus falls inside the diplomat’s official functions. On the other hand, however, the rejection of diplomatic immunity *ratione materiae* by the court of first instance illustrates at least in part that the authority to determine immunity ultimately lies with the court of the receiving State. In other domestic cases which concern acts that are even further removed from diplomatic or consular functions,<sup>40</sup> immunity *ratione materiae* has been consistently rejected despite of the contrary opinion of the sending State.<sup>41</sup>

<sup>36</sup> *P v. P (Diplomatic Immunity: Jurisdiction)*, [1998] 1 F.L.R. 1026.

<sup>37</sup> [1998] 2 F.C.R. 525.

<sup>38</sup> *Supra* note 36. For a detailed discussion of the issues of State immunity and diplomatic immunity *ratione materiae* in this case, see, Barker, ‘Re P’ (1998), pp. 213-218.

<sup>39</sup> Indeed, as analysed in Chapter 2(2) and Chapter 1(3.1), this act is not only immune from court proceedings but falls outside the law of the receiving State.

<sup>40</sup> For relationship between diplomatic immunity *ratione materiae* and consular immunity, see Introduction (3.2).

<sup>41</sup> *Ministère Public and Republic of Mali v. Keith*, 77 ILR 410 (concerning murder); *General Prosecutor at the Court of Appeals of Milan v. Adler and ors*, Final appeal judgment, No 46340/2012, ILDC 1960 (IT 2012), 29th November 2012 (concerning kidnapping); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (concerning kidnapping and assault); *State v. Doering-Sachs*, 652 So.2d 420 (concerning assault and threatening with guns).

The ICJ, in its advisory opinion concerning the immunity of the Special Rapporteur of the Commission on Human Rights, also supported this conciliatory approach.<sup>42</sup> Like diplomatic immunity *ratione materiae*, the immunity of the Special Rapporteur, which covers ‘acts done by [him] in the course of the performance of [his] mission’, is also based on a strictly functional consideration.<sup>43</sup> With regard to the determination of this immunity, the ICJ held, *inter alia*, that the opinion of the Secretary-General of the UN should be given ‘the greatest weight by national courts’ and ‘can only be set aside for the most compelling reasons’.<sup>44</sup>

It then follows that the better understanding concerning the determination of diplomatic immunity *ratione materiae* is that both the sending State and the receiving State should have a say. In principle determination should be made by the court of the receiving State in light of the factual ends of a case. However, considering the nature of acts covered by diplomatic immunity *ratione materiae*, weight should always be given to the opinion of the sending State.

### 2.1.2. Evaluation of the effect of non-invocation from the perspective of determination of diplomatic immunity *ratione materiae*

However, if diplomatic immunity *ratione materiae* is to be objectively assessed by the court in the light of the opinion of the sending State, it is difficult to understand why non-invocation of immunity could directly result in non-immunity. An act performed in the exercise of diplomatic functions should be protected by immunity not only because the act is attributable to the sending State,<sup>45</sup> but also due to the fact that an inquiry by the receiving State into the details of the act risks interfering with the internal business of the foreign embassy.<sup>46</sup> To a

<sup>42</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62.

<sup>43</sup> Convention on the Privileges and Immunities of the United Nations, *UNTS*, vol. 1, p. 15, Article VI, Section 22. Section 23 and the Preamble of the convention make clear that the immunity is not to benefit individuals but to facilitate the performance of the functions of the United Nations.

<sup>44</sup> *Supra* note 42, para. 62.

<sup>45</sup> Chapter 1(2.2).

<sup>46</sup> Webb (2016), p. 759.

great extent, this latter aspect is a matter of fact rather than law. In the above-mentioned *Kenyan Diplomatic Residence Case*, an examination by the German court of the use of Kenya's mission premises would be bound to reveal certain internal information of the Kenyan Embassy regardless of the attitude of the Kenyan Ambassador.<sup>47</sup> Similarly, the investigation of an alleged defamatory comment contained in an internal report of a foreign embassy would surely disclose the whole contents of the report, even if the ambassador is not opposed to the disclosure.

The problem is, given the fact that internal information is bound to be compromised by certain investigative measures, whether it is appropriate to infer from a non-invocation of diplomatic immunity *ratione materiae* that the sending State has consented to the disclosure of the information. The ICJ's reasoning in the *Mutual Assistance* seems to proceed from the presumption that the State of a foreign official would invoke immunity if it is opposed to the acts involved being subject to local jurisdiction. Thus, when the State does not invoke immunity, the forum court could simply deem the acts private in nature. Transposing this logic to the context of diplomatic immunity *ratione materiae*, it might be argued that if a sending State does not invoke immunity, the receiving State could simply presume that the information about to be disclosed is non-confidential in nature.

Yet this presumption is susceptible to abuse. Buzzini, in criticising the ICJ judgment in *Mutual Assistance*, points out that France should have considered the immunity of the Djiboutian officials because the circumstances of the case clearly indicated that official acts were involved.<sup>48</sup> By intentionally ignoring the issue of immunity, according to the author, France has violated the principle of good faith.<sup>49</sup> The same problem also exists in the field of diplomatic immunity *ratione materiae*: Concomitant to the argument that non-invocation would lead to non-immunity is the danger that the negligence of a sending State might be exploited by an ill-intentioned receiving State to interfere with the internal business of the sending State's mission; and this would almost certainly lead to retaliation.<sup>50</sup> The particularly sensitive nature of interstate diplomacy determines that any uncorroborated presumption should be avoided.<sup>51</sup> The different treatment of the inviolability of diplomatic and consular

<sup>47</sup> *Supra* note 24.

<sup>48</sup> Buzzini, p. 473.

<sup>49</sup> *Ibid.*

<sup>50</sup> Article 47(2)(a) of the VCDR.

<sup>51</sup> See also, *infra* Section 2.2, the issue concerning implied waiver.

premises in case of emergency illustrates this point. Article 31(2) of the VCCR provides that the consent of the head of the consular post may be assumed in case of fire or other disaster requiring prompt protective action,<sup>52</sup> but no such assumption can be made in respect of embassy premises;<sup>53</sup> and a review of the 1961 and 1963 Vienna Conference shows that the main concern of States with regard to exceptions to inviolability was that confidential matters may be revealed if assumption is allowed.<sup>54</sup> From this perspective, the ICJ's position in *Mutual Assistance* seems inappropriate with regard to diplomatic immunity *ratione materiae*. Indeed, whereas an invocation of functional immunity at a later stage of a proceeding could still protect a State official from being held personally liable,<sup>55</sup> the damage caused by an incautious disclosure of confidential information of a foreign embassy is largely irreversible.

In holding that a forum State could simply disregard immunity *ratione materiae* in case of non-invocation, both the ICJ and the ILC Special Rapporteur seem to be of the view that only the sending State could validly invoke immunity.<sup>56</sup> Yet in State practice concerning diplomatic immunity *ratione materiae*, domestic courts have almost invariably considered immunity issues even when the sending State did not intervene.<sup>57</sup> This in turn corroborates the argument made above: States tend to be more cautious when they are dealing with the immunity of a foreign diplomatic mission member.

It then follows that, from the perspective of determination of diplomatic immunity *ratione materiae*, there seems to be no reason to argue that a receiving State could simply ignore the immunity in case of non-invocation. The sensitivity of interstate diplomacy, as well as the fact that the VCCR permits a restrictive application of the convention as a measure of retaliation, determines that any presumption that would lead to an interference with a foreign mission's performance of functions should be avoided.

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<sup>52</sup> Article 31(2) of the VCCR.

<sup>53</sup> Article 22(1) of the VCCR. See also, Cameron, p. 611.

<sup>54</sup> See, for example, Official Records of the Vienna Conference on Consular Relations, vol. I, p. 24, para. 33 [Yugoslavia]. For full details of relevant discussions at the two conferences, see, Denza, 3rd edition, pp. 144-145; Lee, 3rd edition, pp. 356-359.

<sup>55</sup> Kolodkin was of the view that functional immunity can be invoked at any stage of the proceeding. See, *Supra* note 4, para. 17.

<sup>56</sup> For Kolodkin, an invocation of immunity by the foreign official himself 'lacks sufficient legal weight and significance' in the absence of the opinion of his State, *supra* note 4, para. 15.

<sup>57</sup> See cases in Chapter 2(3) and (4).

## 2.2. Non-invocation as a matter of implied waiver

The second rationale behind the argument that non-invocation would lead to non-immunity is that non-invocation could be taken as a form of implied waiver.<sup>58</sup> With regard to diplomatic immunity *ratione materiae*, this rationale is justifiable only if it is proved that the VCDR permits implied waiver to some extent.

Article 32(2) of the VCDR provides that a waiver should always be express. The article replaced Article 30(3) of the ILC 1958 Draft which permitted implied waiver in civil proceedings,<sup>59</sup> as States at the Vienna Conference believed that any uncorroborated presumption that could lead to a loss of diplomatic immunity should be avoided.<sup>60</sup> Article 32(3), however, prescribes that, if a person enjoying diplomatic immunity initiates a proceeding in the receiving State, he or she would automatically lose immunity in respect of any counterclaim directly connected with the principal claim.<sup>61</sup> The provision does not require prior consent of the sending State, and this has been confirmed in State practice.<sup>62</sup>

Hurst points out that it is 'illogical' to permit a diplomatic agent to initiate proceedings in the receiving State without authorisation when only the sending State is entitled to waive immunity.<sup>63</sup> Denza indicates in a similar line that the terms of Article 32(3) are in fact incompatible with Article 32(1) and Article 32(2), as 'submission to the jurisdiction for the purpose of instituting proceedings constitutes an implied and not an express waiver of diplomatic immunity'.<sup>64</sup>

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<sup>58</sup> *Supra* note 5.

<sup>59</sup> Ybk ILC 1958, vol. II, p. 99.

<sup>60</sup> See, for example, statements made by the representative of Israel: 'any misunderstanding over the waiving of immunity could only cause embarrassment [and thus should be avoided]', Official Records, vol. I, p. 174, para. 3 [Israel]; see also, p. 176, para. 32 [Romania].

<sup>61</sup> Article 32(3) of the VCDR.

<sup>62</sup> *Hart v. Helinski* (1977), 78 ILR 4; *Re R.F.N* (1977), 77 ILR 452; *S v. India* (1984), 82 ILR 13.

<sup>63</sup> Hurst (1950), p. 252; see also, Silva, who points out that there is an 'apparent contradiction' between Article 32(2) and (3), but argues that in case of a diplomat initiating a proceeding in the receiving State, he must be presumed to have acquired consent from the sending State, Silva (1972), p. 131.

<sup>64</sup> Denza, 3rd edition, p. 340. See also, Buckley, p. 357; McAuliffe, p. 231.



If Article 32(3) could be regarded as a form of implied waiver, it means that, at least in certain circumstances, waiver does not have to be express. This in turn opens the possibility that non-invocation of immunity could be perceived as a form of implied waiver under the VCDR.

However, an examination of the drafting history of Article 32(3) reveals that the ILC has not intended to treat the article as an exception to Article 32(2).

Article 30(3) of the ILC 1958 Draft provides that:

In civil or administrative proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counterclaims directly connected with the principal claim.<sup>65</sup>

Whereas the participation in a proceeding was presented as a form of presumed waiver, the ILC used the phrase ‘preclude him from invoking immunity of jurisdiction’ to denote the initiation of proceedings. According to the commentaries, this paragraph explains the ‘circumstances’ in which immunity from civil and administrative proceedings is presumed to be waived.<sup>66</sup> The use of the plural ‘circumstances’ seems to suggest that both initiation of proceedings and non-invocation of immunity in front of a court constitute a form of implied waiver; yet the ILC also justified the initiation of proceedings in a separate paragraph, following the line that a provision in this regard is necessary for the complete settlement of the principal proceeding initiated by the diplomat.<sup>67</sup> The draft article as a whole was based on the principle that immunity from civil and administrative proceedings can be waived implicitly;<sup>68</sup> but since this principle was not recognised by States at the Vienna Conference, no conclusion could be drawn as to whether States have regarded Article 32(3) of the VCDR as a form of implied waiver. The representative of Venezuela observed during the plenary meeting that ‘immunity was automatically assumed to be waived’ in case of initiation of a proceeding,<sup>69</sup> but this position was by no means a consensus.

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<sup>65</sup> Ybk ILC 1958, vol. II, p. 99.

<sup>66</sup> Ibid, para. 3.

<sup>67</sup> Ibid, para. 6.

<sup>68</sup> Supra note 65.

<sup>69</sup> Official Records, vol. I, p. 175, para. 18 [Venezuela].

However, a study of the ILC's discussion in 1957 reveals that the commission has not regarded initiation of proceedings as a waiver. The above-mentioned draft Article 30(3) was based on a proposal submitted by Fitzmaurice in 1957 which originally read:

In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if the member of the mission submits voluntarily to the jurisdiction of the Court, either by himself initiating the proceedings, or by appearing in them as defendant without making any objection to the jurisdiction of the Court.<sup>70</sup>

The ILC members at first disputed whether this provision would conflict with the principle that only the sending State could waive diplomatic immunity.<sup>71</sup> However, after it was pointed out by Ago that the initiation of proceedings does not actually concern the issue of waiver, the ILC members were quick to agree that Fitzmaurice's proposal, subject to a text change, should be adopted. The logic behind Ago's understanding seems to be that, since diplomatic immunity does not preclude a diplomat from initiating a proceeding in the receiving State, and since a counterclaim is merely a part of the principal claim, the whole issue is rather a matter of exception to civil proceedings than waiver of immunity.<sup>72</sup> This understanding was accepted by Fitzmaurice,<sup>73</sup> and the text of draft Article 30(3) therefore applied different wording for initiation of proceedings.

This understanding of Article 32(3) of the VCDR was later confirmed by the ILC when it was preparing for the DASDC. In its commentaries to Article 22(3) of the DASDC, which corresponds to Article 32(3) of the VCDR, the ILC explains that 'the situation contemplated in paragraph 3 is not an implied waiver but an absence of immunity and therefore does not constitute a true exception to the principle that the waiver must always be express'.<sup>74</sup> In an earlier interpretation of the article by the Chairman of the ILC Drafting Committee, it was also made clear that 'the situation envisaged in paragraph 3 was not a situation of waiver stricto sensu; indeed, in article 32 of the 1961 Vienna Convention on Diplomatic Relations, the

<sup>70</sup> Ybk ILC 1957, vol. I, p. 116, para. 42 [Fitzmaurice].

<sup>71</sup> Some members believed that a conflict exists because the provision does not require the consent of the sending State (See, *Ibid*, p. 110, para. 21 [Bartos], p. 113, para. 4 [Spiropoulos], p. 114, para. 17 [Amado]); others held the view that a diplomatic agent in initiating a proceeding is presumed to have authority to waive immunity (See, *ibid*, p. 112, para. 48 [Khoman], pp. 113-114, para. 6-8 [Pal], p. 115, para. 23 [Hsu], para. 24 [Tunkin]).

<sup>72</sup> See, comments made by Ago at *ibid*, p. 115, para. 29 and p. 117, para. 53. For support of this understanding in scholarship, see, Nahlik, p. 262.

<sup>73</sup> *Ibid*, p. 118, para. 61 [Fitzmaurice].

<sup>74</sup> Ybk ILC 1989, vol. II, Part Two, pp. 36-37, para. 7.

situation in question was not presented as an exception to the rule that waiver had to be express in all cases'.<sup>75</sup>

The drafting history of Article 32(3) shows that the article does not really constitute an implied waiver. A diplomatic agent's right to initiate proceedings in the receiving State is not affected by the diplomatic immunity he or she enjoys; and a counterclaim in this respect is merely a valid defence of the respondent, which forms an indispensable part of the principal claim.<sup>76</sup> This in turn suggests that, under the VCDR, waiver must always be express. Consequently, the second rationale behind the argument that non-invocation would lead to non-immunity is also untenable with regard to diplomatic immunity *ratione materiae*.

## 2.3. Conclusion

To sum up, this section has examined, in the light of the ICJ judgment in *Mutual Assistance* and the conclusions reached by the ILC Special Rapporteur Kolodkin in his third report, whether the court of the receiving State has an obligation to consider immunity issues *ex proprio motu* in the absence of an invocation of immunity. It is submitted that, considering the sensitive nature of interstate diplomacy, as well as the attitude of States with regard to waiver of immunity at the Vienna Conference, the better solution seems to be that such an obligation does exist. The loss of immunity would have a huge (and usually negative) impact on the official business of a diplomatic mission, and this determines that any uncorroborated presumption that could lead to non-immunity should be avoided. This is in particular the case with regard to diplomatic immunity *ratione materiae*, which normally covers acts in close connection with the performance of diplomatic functions.

<sup>75</sup> Ybk ILC 1989, vol. I, p. 261, para. 56.

<sup>76</sup> *Satow's*, 4th edition, p. 200; Keith, p. 214: A sovereign or ambassador who brings an action in the High Court undoubtedly submits himself to its jurisdiction in regard to that action, but no further. This principle decides the extent to which the court has jurisdiction to entertain a counterclaim against, e.g., an ambassador who is plaintiff in an action. If the counterclaim is really a defence to the action, i.e. is a set-off, or something in the nature of a set-off, the court has a right to entertain it. If the counterclaim is really a cross-action, the court has no jurisdiction to entertain it. See also, *High Commissioner for India v. Ghosh* (1959), [1960] 1 Q. B. 134, at p. 141.

### 3. Problems with waiver of immunity

#### 3.1. Authority to waive immunity

A question germane to both full diplomatic immunity and diplomatic immunity *ratione materiae* is who has the authority to waive immunity. Article 32(1) of the VCDR simply provides that immunity may be waived by the sending State.<sup>77</sup> But as an abstract entity, the opinion of the sending State must be communicated to the receiving State in a particular way, and in this respect the VCDR does not make clear how this communication is to be effectuated. In a broad sense, diplomatic agents as representatives of the sending State may be said to speak with authority.<sup>78</sup> From a narrow view, however, only a statement deriving directly from the central government of the sending State may be deemed with certainty as the opinion of the sending State.<sup>79</sup>

The question regarding the authority to waive immunity has been subject to some debate before the VCDR, but no consensus existed among authors. It has been argued that a diplomatic agent could only waive his or her immunity with the express authorisation of the sending State.<sup>80</sup> Others, on the other hand, took the view that a diplomat has the authority to waive his or her own immunity.<sup>81</sup> Article 19 of the Havana Convention provides that a diplomatic officer may not waive diplomatic immunity in the absence of authorisation;<sup>82</sup> but the preamble of the convention seems to imply that, in a civil action ‘entirely alien to the

<sup>77</sup> Article 32(1) of the VCDR.

<sup>78</sup> See, for example, Diena’s Report, pp. 81-82. Stark states in ambiguous terms that the waiver of the immunity a mission member other than the head of mission must be made ‘by or on behalf of the superior envoy or his government’. Stark, p. 221. Similar opinions have been expressed with regard to the waiver of the immunity of a head of State, see, Foakes, pp. 97-98.

<sup>79</sup> Deak, for example, points out that any misunderstanding could be avoided by requiring the consent of the government to any waiver of immunity. Deak, p. 350. See also, Green, p. 134; Castel, p. 182; Shaw, p. 583, Przetacznik, p. 387.

<sup>80</sup> See, Pessoa’s Draft Code, Article 143; Project of American Institute of International Law (1925), Article 27(4); Project of the International Commission of American Jurists (1927), Article 27(c).

<sup>81</sup> Draft Code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai (1926), Article 3. For a similar view, see, Hurst (1950), p. 252; Westlake and Bentwich, p. 279.

<sup>82</sup> Article 19 of the Havana Convention.

fulfilment of his mission’, a diplomat could waive his own immunity.<sup>83</sup> Article 26 of the Harvard Draft Convention sets out different treatment between the immunity of a chief of mission and the immunity of his or her staff: Whereas the former could only be waived by the government of the sending State, a waiver of the latter may also be made by the chief himself/herself.<sup>84</sup> The commentary to the article, however, admits that this position is not free from doubt, and that the article represents ‘the maximum requirements of international law, while allowing for variations in existing practice and the tendency toward a demand for the express consent of the sending State in cases of renunciation’.<sup>85</sup>

The original article concerning waiver of immunity proposed by the Special Rapporteur stated that only the sending State can waive immunity and that a waiver from the head of mission should have the same effect as a waiver from the sending State.<sup>86</sup> During the 1957 discussion of the article, three distinct understandings emerged within the ILC. The restrictive one, represented by Tunkin, held that diplomatic immunity of all mission members can only be waived by the government of sending State. For Tunkin, since immunity is granted not for the benefits of diplomatic agents but for the smooth performance of diplomatic functions, only the sending State’s government should be entitled to waive immunity, and in this respect, no distinction can be made between an ambassador and a subordinate mission member.<sup>87</sup> Those who took a liberal view, on the other hand, believed that an ambassador should be able to waive not only his or her own immunity but also the immunity of other mission members.<sup>88</sup> With respect to diplomatic agents other than the ambassador, it was argued that a distinction should be made between criminal and civil proceedings: While immunity from criminal proceedings must be waived by the sending State’s government, a diplomat retains the authority to waive his or her own immunity in civil disputes.<sup>89</sup> The intermediate approach essentially followed Article 26 of the Harvard Draft Convention<sup>90</sup> and held that, while an

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<sup>83</sup> Preamble of the Havana Convention.

<sup>84</sup> Harvard Draft, p. 125. See also, Phillimore’s Draft Code, Article 28, 29; Schwarzenberger, pp. 65-66. This position is also supported by authors in their understanding of Article 32 of the VCDR, see, for example, Samuels, p. 693; Bishop, p. 713.

<sup>85</sup> *Ibid*, pp. 127-128.

<sup>86</sup> Ybk ILC 1955, vol. II, p. 12.

<sup>87</sup> Ybk ILC 1957, vol. I, p. 111, para. 32-36 [Tunkin]. See also, p. 112, para. 47 [Khoman], p. 117, para. 52 [El-Khour].

<sup>88</sup> *Ibid*, p. 110, para. 27 [Fitzmaurice].

<sup>89</sup> *Ibid*, para. 24 [Verdross];

<sup>90</sup> *Supra* note 84.

ordinary mission member's immunity could be waived by the ambassador, the ambassador's own immunity could only be waived by the sending State's government.<sup>91</sup>

The consequent Article 25 of the ILC 1957 Draft made a clear distinction between criminal and civil proceedings, but obscured the difference between the head of mission and other mission members.<sup>92</sup> Ago stated at the end of the 1957 discussion that he understood the text of draft Article 25(3) as a recognition of his intermediate approach.<sup>93</sup> Fitzmaurice, speaking on behalf of the Drafting Committee, replied in ambiguous terms that

The Drafting Committee had decided to express it [paragraph 3] in rather vague terms because of the difficulty of framing a satisfactory detailed provision. It was an essential point that immunity from civil proceedings could be waived by the diplomatic agent himself, the assumption being that he did so with the consent either of his Government or of the head of the mission.<sup>94</sup>

The ambivalence of the ILC with regard to the difference between the immunity of an ambassador and the immunity of an ordinary mission member was also reflected in the comments of States on the 1957 Draft. Luxembourg supported the liberal approach and proposed an amendment which would have enabled a diplomatic agent to communicate a waiver of his or her own immunity in all cases.<sup>95</sup> The US took to another extreme by arguing that waiver should always be expressly made by a sending State's government.<sup>96</sup> Sweden, Italy, and the UK, on the other hand, expressed their support for the intermediate approach.<sup>97</sup>

Ago continued to push for the adoption of his intermediate approach in 1958 by introducing the Italian Government's amendment which read 'the head of mission may waive the immunity of members of his staff from jurisdiction on his own authority'.<sup>98</sup> But many members of the commission pointed out that the text of the amendment could be read as

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<sup>91</sup> Ybk ILC 1957, vol. I, p. 111, para. 37-38 [Ago]; p. 112, para. 41-42 [Liang]; p. 115, para. 32 [El-Erian].

<sup>92</sup> Draft Article 25(2) provides that immunity from criminal proceedings can only be expressly waived by the government of the sending State; paragraph 3 of the article simply states that waiver may be express or implied in civil proceedings. Ybk ILC 1957, vol. II, p. 139.

<sup>93</sup> Ybk ILC 1957, vol. I, p. 212, para. 52 [Ago].

<sup>94</sup> Ibid, para. 54 [Fitzmaurice].

<sup>95</sup> A/CN.4/114 and Add. 1-6, p. 122.

<sup>96</sup> Ibid, p. 137.

<sup>97</sup> Ibid, p. 127, 119, 132 respectively.

<sup>98</sup> Ybk ILC 1958, vol. I, p. 154, para. 65 [Ago].

implying that a head of mission has the *substantive* authority to waive the immunity of other mission members, which would be against the overarching principle that only the sending State has such authority.<sup>99</sup> The ILC later reached the consensus that the *ways* to communicate a waiver should not as an internal matter of the sending State feature in the draft article.<sup>100</sup> As a result, the phrase ‘by the Government of the sending State’ was deleted from draft Article 25(2) to become Article 30(2) of the 1958 Draft;<sup>101</sup> and paragraph (1) of the article simply stated that immunity may be waived by the sending State.<sup>102</sup>

However, having determined that the ways to communicate a waiver should not be provided for in the draft, the ILC made a rather paradoxical statement in its commentaries that ‘the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State’.<sup>103</sup> The statement did not differentiate between the immunity of the head of mission and of other mission members. It may thus be interpreted to mean that even when the head of mission waives his or her own immunity, the court of the receiving State is entitled to presume that he or she speaks on behalf of the sending State.

Yet an examination of the relevant ILC debate reveals that there was in fact no consensus on this particular point. Some members clearly had in mind the distinction between an ambassador and other mission members.<sup>104</sup> Others, on the other hand, simply stated that an ambassador speaks with authority and that the matter is internal to the sending State.<sup>105</sup> Consensus may be said to exist with regard to the binding effect of the ambassador’s waiver of a mission member’s immunity; but there was actually no discussion as to whether the same could be said with regard to the immunity of the ambassador himself/herself.

<sup>99</sup> Ibid, para. 69 [Amado]; para. 70 [Tunkin]; p. 155, para. 76 [Bartos].

<sup>100</sup> Commentaries to draft Article 30(2), Ybk ILC 1958, vol. II, p. 99, para. 2: ‘In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and not to the head of the mission’.

<sup>101</sup> For the text of draft Article 25(2), see supra note 92.

<sup>102</sup> Supra note 100.

<sup>103</sup> Ibid.

<sup>104</sup> See comments made by Ago, Alfaro, and Fitzmaurice, Ybk ILC 1957, vol. I, p. 154, para. 65, 67, 68 respectively.

<sup>105</sup> See comments made by Tunkin, Bartos, Amado, and Matine-Daftary, Ibid, p. 155, para. 71, 76, 79, 80 respectively.

This problem did not receive much attention during the Vienna Conference. France proposed to replace draft Article 30(1) with the text ‘the sending State may permit a diplomatic agent to waive immunity from jurisdiction’.<sup>106</sup> But this proposal was criticised by Tunkin (as the representative of the Soviet Union) as contrary to international law.<sup>107</sup> For him, ‘if a diplomatic agent announced that he was waiving his own immunity, there was no knowing whether or not he had his government’s consent to do so, and it was essential for the receiving State to have official notification from the government concerned’.<sup>108</sup> Other delegates did not comment on the French proposal and the proposal was not put to vote.

Three conclusions can be drawn from the whole drafting history of Article 32: first, the ILC made a distinction between the substantive authority to waive immunity and the ways to communicate a waiver. Whereas Article 32(1) confirms the principle that only the sending State has the substantive authority, the ILC has decided not to prescribe the ways to communicate a waiver, and this decision was not contested at the Vienna Conference; second, the ILC members agreed that, when an ambassador waives the immunity of an ordinary mission member, such waiver should be regarded as binding.<sup>109</sup> However, there was no consensus as to the binding nature of the ambassador’s waiver of his or her own immunity;<sup>110</sup> third, a diplomatic agent, like other ordinary mission members enjoying diplomatic immunity, cannot waive his or her own immunity in the absence of a clear position taken by the sending State. The original support within the ILC of the authority of a diplomatic agent to waive his or her own immunity was based on the presumption that, in civil proceedings, waiver could be implied by the act of a diplomat.<sup>111</sup> But this presumption was completely rejected at the

<sup>106</sup> Official Records, vol. II, p. 30.

<sup>107</sup> Official Records, vol. I, p. 175, para. 7 [Tunkin].

<sup>108</sup> Ibid.

<sup>109</sup> Supra note 104-105 and accompanying text. For similar academic opinions, see, Bishop, p. 713; McAuliffe, p. 231.

<sup>110</sup> Authors who recognise the binding effect of a head of mission’s waiver of other mission members’ immunity tend to equivocate on this particular point. O’Keefe, for example, holds the view that immunity cannot be waived by the person involved himself, but later makes a rather ambiguous comment that a waiver of immunity by a head of mission should be deemed a waiver made by the government of the sending State. O’Keefe (1977), p. 271; see also, Castel, p. 182; Nahlik, p. 349; Bolewski, p. 796.

<sup>111</sup> Supra note 65.



Vienna Conference;<sup>112</sup> and some States at the conference made clear that a diplomat's waiver of his or her own immunity has no binding effect.<sup>113</sup>

The main problem with the argument that a diplomat (head of mission or otherwise) could waive his or her own immunity is that this argument comes at odds with the functional basis of diplomatic immunity. The logic behind diplomatic immunity is that exposure to court proceedings would jeopardise a diplomat's performance of functions and thus affect the overall functioning of the diplomatic mission. On the other hand, the main purpose of diplomatic immunity is to protect the performance of diplomatic functions, not the person of a diplomatic agent. The problem is, given the fact that performance of diplomatic functions is bound to be affected by a diplomat being involved in a court proceeding, whether it is appropriate to allow a diplomat to freely subject himself/herself to local jurisdiction. The ILC 1958 draft Article 30(3), which permitted a diplomat to implicitly waive his or her own immunity by voluntarily appearing as defendant in a civil or administrative proceeding,<sup>114</sup> would have had this effect if it had been adopted at the Vienna Conference. On the other hand, however, the rejection by States of this article indicates that States are not willing to give their diplomats discretion to be involved in matters that could potentially affect their performance of functions.

On a practical level, when a dispute concerning a diplomatic agent arises, the personal interests of the diplomat may be involved. There may be cases where a diplomat, in order to rent a private cottage from a landlord who is reluctant to deal with diplomatic agents due to their immunity, pledges to waive diplomatic immunity in order to secure the lease.<sup>115</sup> Alternatively, it is also possible that a diplomat, in order to maintain a good reputation or prove his or her innocence, tends to waive immunity and let the court render judgment.<sup>116</sup> Yet in these cases,

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<sup>112</sup> Supra note 60 and accompanying text.

<sup>113</sup> In addition to Tunkin's comments at supra note 107, The representatives of Philippines and Romania also expressed similar opinions, see, Official Records, vol. I, p. 176, para. 28, 33 respectively.

<sup>114</sup> Supra note 65.

<sup>115</sup> The difficulty for a diplomat to acquire local accommodation can be illustrated by *Parker v. Boggon*, in which the British court held, with regard to a flat to be leased to the Counsellor of Turkish Embassy in London, that it is unreasonable to withhold consent to an underlease on the ground that the underlessee is a person who enjoys diplomatic immunity. *Parker v. Boggon*, [1947] K.B. 346.

<sup>116</sup> See, *Fayed v. Al-Tajir*, 1 Q.B. 712, in which the ambassador of the UAE to the UK, in order to defend against an allegation of defamation, voluntarily waived his own diplomatic

the involvement in the court proceeding would nonetheless affect the diplomat's performance of functions. Diplomatic immunity protects the performance of diplomatic functions but not necessarily the personal interests of a diplomatic agent. It is thus important that, when there is a conflict of interests, the decision should not be made by the diplomat himself/herself. In this regard, no distinction can be made between a head of mission and an ordinary mission member.

State practice after the adoption of the VCDR supports this understanding. Thus in *United States v. Deaver*, the US Government stated, with regard to the immunity of the serving Canadian Ambassador to the US, that the 'customary form' of communicating a waiver is to provide a diplomatic note expressly waiving immunity; and that the Canadian Ambassador was not entitled to waive his own immunity.<sup>117</sup> Similarly, in *Gustavo J.L. and Another*, the Supreme Court of Spain, in dealing with the diplomatic immunity *ratione materiae* of a former Colombian diplomat, indicated that the power to waive immunity 'must not be exercised by the official or agent himself'.<sup>118</sup>

In the light of the drafting history of Article 32, as well as State practice after the adoption of the VCDR, it seems the better understanding with regard to the authority to waive immunity is that, whereas a head of mission could waive the immunity of other mission members, his or her own immunity must be waived by the government of the sending State.

### 3.2. The effect of waiver in the context of diplomatic immunity *ratione materiae*

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immunity. The waiver was nonetheless not accepted by the British Court of Appeal because the court had doubt as to the authority of the waiver. In a similar case concerning a UN official in Sudan entitled to diplomatic immunity, the official resigned when the Secretary-General refused to waive her immunity in order to stand trial for an act of wearing indecent clothing at a private party. See Denza, 4th edition, p. 274.

<sup>117</sup> *Cumulative Digest*, pp. 980-988, at p. 983. See also, *Fayed v. Al-Tajir*, supra note 116. Canada holds a similar position, see *Canadian Digest* (1982), p. 309.

<sup>118</sup> *Gustavo J.L. and Another* (1987), 86 ILR 517, at p. 522. For similar cases, see, *Nzie v. Vessah* (1978), 74 ILR 519; *Public Prosecutor v. JBC* (1984), 94 ILR 339; *Arab Republic of Egypt v. Gamal-Eldin* (1995), 104 ILR 673; *Logan v. Dupuis*, 990 F.Supp. 26; *Empson v. Smith*, 1 Q.B. 1966; *Pfarr v. Anonymous* (2011), Appeal judgment, 17 Sa 1468/11, [2011] Arbeit und Recht 507, [2012] Zeitschrift fuer Tarifrecht 56, ILDC 1903 (DE 2011).

An issue peculiar to diplomatic immunity *ratione materiae* is the effect of waiver. Article 32 of the VCDR does not distinguish waiver of personal diplomatic immunity and waiver of functional immunity. If a serving diplomat has committed a crime in his or her personal capacity or signed a private contract, a waiver of personal diplomatic immunity has the effect of lifting the procedural bar and thus enabling the diplomat's individual criminal or civil liability to be realised in the court of the receiving State. But things might be different with regard to diplomatic immunity *ratione materiae*, which covers acts performed in the exercise of functions. It has been mentioned in previous chapters that, at the drafting stage of relevant provisions of diplomatic immunity *ratione materiae* and consular immunity, opinions were expressed, by ILC members and States alike, that immunity *ratione materiae* is in fact State immunity for acts attributed to the sending State.<sup>119</sup> Following this logic, a waiver of 'in the exercise of functions' immunity would result in the sending State itself being subject to the jurisdiction of the receiving State. In practice, however, when immunity (personal immunity or functional immunity) is waived, the consequence has invariably been that the diplomat involved being held personally liable for the act.<sup>120</sup> This in turn raises the question whether waiver of immunity *ratione materiae* could be understood in the same way as waiver of personal diplomatic immunity for private acts – for, if a waiver of an official act immunity would result in the diplomat being held personally liable, the waiver seems more of a matter of allocation of responsibility for the official act than a mere lifting of a procedural bar that impedes the jurisdiction of the receiving State over a purely private matter.

The distinct nature of waiver of diplomatic immunity *ratione materiae* has received very little attention at the drafting stage of the VCDR, but there was slight evidence that certain members of the ILC had regarded this waiver as different from waiver of immunity for private acts. Zourek, for example, pointed out, during the ILC 1957 discussion on the topic of waiver, that 'a distinction should be made between acts carried out in the discharge of diplomatic functions

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<sup>119</sup> Bartos, for example, claimed during the ILC 1958 discussion on the immunity of diplomats with the nationality of the receiving State, that 'it was the immunity of the sending State itself which was involved and which must be respected', Ybk ILC 1958 vol. I, p. 169, para. 23 [Bartos]; see also, the ILC's commentaries to Article 43 of the VCCR, Ybk ILC, 1961, vol. II, p. 117, para. 2.

<sup>120</sup> See, for example, Martina E. Vandenberg, 'Diplomats Who Commit Domestic-Worker Crimes Shouldn't Get a Free Pass', *The Washington Post*, 1 January 2014; Dan Bloom, 'Gambian Diplomats Ran Tax-Free Tobacconist from Their London Embassy — Cheating Taxpayers Out of £5 Million in Revenue', *MailOnline*, 8 December 2014; Duncan Campbell, 'Thai Diplomat Smuggled Heroin', *The Guardian*, 24 June 1992.

and those which were not'.<sup>121</sup> Zourek suggested the topic be discussed in the context of immunity of former diplomats, but no discussion actually took place therein. On an earlier stage, Amado also seemed to have noticed the problem when he said, citing Article 26 of the Harvard Draft Convention,<sup>122</sup> that 'the question [of waiver] did not relate solely to immunity from jurisdiction';<sup>123</sup> but he did not push this issue further.

Article 26 of the Harvard Draft Convention provides that diplomatic privileges and immunities might be waived by the sending State.<sup>124</sup> However, it should be noted that immunity for official acts *is not* deemed by the draft convention as diplomatic privileges or immunities *stricto sensu*. The commentary to Article 18 of the draft convention states that immunity for official acts 'does not constitute a part of "extritoriality" or diplomatic immunity in the strict sense',<sup>125</sup> as 'the incompetence of the courts in the case of official acts does not constitute a diplomatic privilege in the sense that it is imposed by international law as an exception to the competence which the courts would normally possess'.<sup>126</sup> In the commentary to Article 26, it is also pointed out that waiver of diplomatic immunity cannot confer upon the court of the receiving State 'a competence denied them under the law of the receiving State'.<sup>127</sup> These comments essentially suggest that waiver of official acts immunity is not possible under the Harvard Draft Convention,<sup>128</sup> and this finding is further corroborated by the fact that none of the pre-VCCR draft conventions contained a provision on waiver of consular immunity.<sup>129</sup>

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<sup>121</sup> Ybk ILC 1957, vol. I, p. 112, para. 52 [Chairman].

<sup>122</sup> See *infra* note 124.

<sup>123</sup> Ybk ILC 1957, vol. I, p. 111, para. 30 [Amado].

<sup>124</sup> Harvard Draft, p. 125.

<sup>125</sup> *Ibid*, p. 99. On the theory of extritoriality, see, Barker (1995), pp. 593-615.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*, p. 125. As explained in Chapter 1, Harvard Draft Convention essentially takes the position that official acts of a sending State are not subject to the law of the receiving State. See, Chapter 1, footnote 4.

<sup>128</sup> For a similar attitude, see, Hill (1931), p. 261.

<sup>129</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see Introduction (3.2). The Harvard Draft Convention on consular immunity has essentially followed the solution of its draft convention on diplomatic immunity, *viz.* immunity for official acts is a matter of liability rather than immunity (Article 21 of the consular draft convention). The commentary to the article merely provides for guidance to the determination of official acts immunity; and there is no provision on waiver of immunity. Harvard Draft (Consular), pp. 339-340. For other pre-VCCR draft conventions, see, pp. 376-446.

Article 45(1) of the VCCR provides that consular immunity can be waived.<sup>130</sup> However, an examination of the drafting history of the article reveals that there was very little debate, let alone consensus, on the meaning of a waiver of official acts immunity.<sup>131</sup> Opinions were expressed in 1961 that waiver of consular immunity was distinct in nature,<sup>132</sup> but the issue had largely been ignored both within the ILC and at the Vienna Conference on Consular Relations.

Denza seems to have noticed the peculiar nature of waiver of diplomatic immunity *ratione materiae* in her comments to the *Pinochet* case.<sup>133</sup> Having pointed out the principle that a former diplomat cannot be held personally liable for an act performed in the exercise of functions, Denza observes that the former diplomat may nonetheless be sued or tried in the receiving State if the sending State ‘waives his immunity or disclaims responsibility for the act in question, saying or accepting that it was *not* performed in the exercise of sovereign functions’.<sup>134</sup> The use of the phrase ‘waives immunity or disclaims responsibility’ seems to reflect the author’s ambivalence towards the procedural implication of waiver of diplomatic immunity *ratione materiae*: If the effect of such a statement by the sending State is to render the act in question private in nature, ‘disclaimer of responsibility’ is clearly a more pertinent description than ‘waiver of immunity’ — there would be no immunity to waive in the first place.

Denza’s position with regard to waiver of immunity under Article 39(2) of the VCDR seems to have been clarified by Lee and Quigley, albeit in the context of consular immunity.<sup>135</sup> In their criticism of the transposition between Article 32 of the VCDR and Article 45 of the VCCR, Lee and Quigley point out that the ‘conceptual difficulty’ of waiver of official acts immunity lies in the fact that ‘if the sending State has accepted the official nature of the act, it

<sup>130</sup> Article 45(1) of the VCCR.

<sup>131</sup> Article 45(1) of the VCCR was proposed by the Special Rapporteur following the text of Article 32(1) of the VCDR, and was adopted by the ILC without much discussion. See, Ybk ILC 1961, vol. I, pp. 189-192.

<sup>132</sup> Yugoslavia originally took the view that waiver applied only to personal inviolability but not immunity from jurisdiction, but it did not explain its position. See, Ybk ILC 1961, vol. II, p. 170. Within the ILC, Yasseen indicated that, whereas waiver of diplomatic immunity is necessary because the immunity pertains to private acts, such necessity is lacking vis-à-vis consular immunity. Other ILC members, however, simply ignored this issue. See, Ybk ILC 1961, vol. I, p. 191, para. 19 [Yasseen].

<sup>133</sup> Denza (1999), pp. 949-958.

<sup>134</sup> *Ibid*, p. 952 (Emphasis added).

<sup>135</sup> For the relationship between diplomatic immunity *ratione materiae* and consular immunity, see, Introduction (3.2).

cannot consent to the waiver of immunity without abandoning its responsibility to its consuls'.<sup>136</sup> Citing the fact that, in State practice, waiver of diplomatic or consular immunity invariably concerns acts which are 'wanting' in official nature, the authors conclude that 'the very fact that the receiving State has requested or acquiesced in the waiver at all is tantamount to its denial of the official character of the act'.<sup>137</sup>

Essentially, the authors mentioned above hold the view that: firstly, immunity for a *genuine* official act cannot be waived,<sup>138</sup> and secondly, when the immunity of a *seemingly* official act is 'waived', the so-called waiver is in fact a statement by the sending State that the act in question is private in nature.<sup>139</sup>

The main problem with this view is that it is based on the presumption that dual attribution of responsibility does not exist. Thus, an act is either 'in the exercise of functions', in which case it is attributed exclusively to the sending State, or completely private in nature, in which case it is attributed solely to the diplomat. As a result, since waiver could only exist in this latter scenario, it is in fact not a waiver but a proclamation of the sending State as to the private nature of the act.

However, as analysed in Chapter 1, an act covered by diplomatic immunity *ratione materiae* is not always attributed exclusively to the sending State.<sup>140</sup> With regard to criminal matters, in particular, an official act could be simultaneously attributed to both the sending State and the person of the perpetrator,<sup>141</sup> and the immunity in this regard is simply an extension of absolute

<sup>136</sup> Lee, 3rd edition, p. 462; See also, Franey, p. 138: 'it is the duty of the State to protect its officials who are acting in the interests of the State'. Cf. Starke, p. 223.

<sup>137</sup> Ibid.

<sup>138</sup> This also seems to be the position of Watts, who, having argued that residual immunity (of a former head of State or of a former ambassador) for certain official acts is not strictly jurisdictional immunity, points out that waiver is possible 'in so far' as (genuine) residual immunity is concerned. Watts, p. 90. See also, Foakes, p. 87.

<sup>139</sup> For authors holding a similar opinion with regard to functional immunity of State officials in general international law, see, in particular, Alebeek, who argues that waiver in this situation is in fact 'a (*a posteriori* and ad hoc) defeat of the presumption of [official] authority'. Alebeek (2008), p. 135. Frulli also points out that in practice States waive their officials' functional immunity 'precisely' to absolve State responsibility. Frulli, p. 496. See also, Douglas, p. 323; Buzzini, p. 475; McCready, p. 173.

<sup>140</sup> Chapter 1(3.2).

<sup>141</sup> Unless the act itself falls outside the law of the receiving State, in which case domestic criminal liability simply does not arise, see, Chapter 1(3.1).

State immunity from criminal proceedings, which can be waived at any time.<sup>142</sup> The existence of dual attribution means that an act could be regarded as official for the sake of State responsibility and unofficial for the sake of personal criminal liability. This in turn suggests that waiver in this situation does not necessarily indicate the private nature of the act concerned – the sending State is simply removing its own (absolute) immunity that is extended to the protection of its diplomat.

It then follows that the effect of waiver of diplomatic immunity *ratione materiae* must be understood in the light of the specific nature of an act. Thus, for those diplomatic immunities *ratione materiae* that represent a substantive exemption of personal liability,<sup>143</sup> either immunities cannot be waived (in case of *genuine* official acts), or a purported waiver is in fact a statement by the sending State that the act in question is the private act of the diplomat. In this latter scenario, the statement has no difference in nature from a statement of invocation of diplomatic immunity *ratione materiae*.<sup>144</sup> In theory, therefore, since the authority to determine diplomatic immunity *ratione materiae* ultimately lies with the court of the receiving State,<sup>145</sup> it is possible that the waiver might not be accepted, although in practice non-acceptance of waiver has been very rare.<sup>146</sup>

On the other hand, when dual attribution is possible, waiver of diplomatic immunity *ratione materiae* is in fact waiver of State immunity from jurisdiction. Thus, if a diplomatic agent committed a criminal offence when he or she was performing diplomatic functions, it is possible that the offence is regarded as a private act of the diplomat in a criminal proceeding but an official act of the sending State in a civil proceeding. Indeed, in the case of *Knab*, Georgia's waiver of diplomatic immunity *ratione materiae* from criminal proceedings has

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<sup>142</sup> Chapter 1(3.2).

<sup>143</sup> Either as a matter of substantive exemption from local law, or as a matter of exclusive attribution of responsibility, see, Chapter 1(3.1) and (3.2).

<sup>144</sup> See Section 2.1.1 above.

<sup>145</sup> *Ibid.*

<sup>146</sup> One such occasion can be found in the ICJ case of *Questions relating to the Obligation to Prosecute or Extradite*. This case concerns the obligation of Senegal to prosecute or extradite the former president of Chad for acts of torture and crimes against humanity. On one occasion, a Senegalese Court of Appeal granted the former president functional immunity in spite of the purported waiver of immunity by Chad. See, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 20, 22 respectively. For the relationship between diplomatic immunity *ratione materiae* and functional immunity of State officials in general international law, see, Introduction (3.2).

neither stopped Georgia itself from claiming the official nature of the act in a subsequent civil proceeding, nor inhibited the plaintiff from arguing that, in spite of the waiver, Georgia should be civilly liable for the act of its diplomat because the act has been performed in the exercise of functions.<sup>147</sup> Underlying this dual attribution, as analysed in Chapter 1, is the fundamental difference between criminal and civil matters.<sup>148</sup>

### 3.3. Conclusion

This section has examined the issue of waiver. Section 3.1 discussed questions relating to the authority to waive immunity. Article 32(1) of the VCDR provides that immunity may be waived by the sending State, but it does not articulate how a waiver is to be communicated to the receiving State. In the light of the drafting history of Article 32 and State practice after the adoption of the VCDR, it is submitted in Section 3.1 that, whereas an ordinary mission member's immunity could be waived by the head of mission, the head of mission's immunity must be waived by the sending State's government.

The effect of waiver of diplomatic immunity *ratione materiae* has been explored in Section 3.2. It is submitted that, due to the distinct nature of different kinds of diplomatic immunity *ratione materiae*, waiver must be understood in the light of the specific nature of an act. Thus, for acts that do not attract individual responsibility, waiver of immunity is in fact a testament to the private nature of the act involved. On the other hand, for acts that can be attributed to both the sending State and the person of the diplomat, waiver of diplomatic immunity *ratione materiae* is waiver of State immunity itself and does not necessarily mean that the act in question is private in nature.

## 4. Conclusion of Chapter 5

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<sup>147</sup> *Knab v. Republic of Georgia* (1998), No. 97CV3118. This case concerned the Georgian diplomat's immunity from civil proceedings under Article 39(2) of the VCDR. In a separate proceeding, the plaintiff also sued the Georgia State for civil compensation by invoking the tort exception to State immunity, according to which a sending State is civilly liable for the official act of its diplomats. See, *McQueen v. Republic of Georgia*, C.A. No. 98-1115. For a detailed description of the case, see, Chapter 1, footnote 142-146.

<sup>148</sup> Chapter 1(3.2).



This chapter has examined the procedural aspects germane to diplomatic immunity *ratione materiae*. Several conclusions can be drawn from the above analysis:

First, unlike functional immunity in general international law, invocation of immunity by the sending State is not a precondition for diplomatic immunity *ratione materiae* to be considered by the receiving State. The sensitive nature of interstate diplomacy determines that any uncorroborated presumption that could lead to non-immunity should be strictly avoided. The attitude of States with regard to waiver of immunity at the Vienna Conference, as well as post-VCDR State practice concerning the determination of immunity *ratione materiae*, demonstrates that States tend to be very cautious in dealing with issues relating to diplomatic immunity. Therefore, the better understanding seems to be that the court of the receiving State has an obligation to consider immunity issues *ex proprio motu* in the absence of an invocation of immunity.

Second, with regard to the authority to waive diplomatic immunity, it is submitted that, whereas an ordinary mission member's immunity could be waived by the head of mission, the head of mission's immunity must be waived by the sending State's government. There are times when diplomatic immunity is not necessarily in the personal interests of a mission member. Therefore, it is important that, in these situations, the mission member (head of mission or otherwise) should not retain the discretion to waive his or her own immunity, as immunity ultimately benefits the performance of diplomatic functions, not the person who actually performs them.

Lastly, waiver of diplomatic immunity *ratione materiae* is distinct in nature from waiver of personal diplomatic immunity for private acts. With regard to acts which do not attract personal liability, waiver of diplomatic immunity *ratione materiae* is in fact a statement by the sending State that the act in question is private in nature, for otherwise the act would be attributed exclusively to the sending State. On the other hand, however, for acts that can be attributed to both the sending State and the person of the diplomat, waiver of diplomatic immunity *ratione materiae* is actually waiver of State immunity itself and does not necessarily mean that the act in question is private in nature.

## Conclusion

This thesis has examined different types of diplomatic immunity *ratione materiae* in the VCDR. Based on the analyses in the previous chapters, it is concluded that:

Firstly, diplomatic immunity *ratione materiae* is not always procedural in character.<sup>1</sup> Diplomatic immunity *ratione materiae* under the VCDR covers acts of distinctly different nature that it is impossible to speak of the character of this immunity without examining these acts in detail. Chapter 1 of this thesis challenged the procedural characterisation of diplomatic immunity *ratione materiae* by contrasting the immunity with personal diplomatic immunity and State immunity.<sup>2</sup> Upon demonstrating that none of the reasons behind the procedural characterisation of personal diplomatic immunity and State immunity could justify the procedural characterisation of diplomatic immunity *ratione materiae*, it is submitted that the nature of diplomatic immunity *ratione materiae* must be understood from several different aspects.

In the first place, immunity for acts performed in strict application of diplomatic functions is substantive in nature because these acts, being sovereign acts of the sending State, are not subject to the law of the receiving State.<sup>3</sup> The incompetence of the receiving State's court to adjudicate these matters is in fact due to a lack of jurisdiction rather than immunity from (an existing) jurisdiction. Thus, disputes arising from these acts can only be resolved on an interstate level.

Further, for acts which are subject to local laws but which are not attributed to the person of a diplomatic agent, diplomatic immunity *ratione materiae* is substantive in nature.<sup>4</sup> Notably, immunities in Article 31(1)(a) and Article 31(1)(b) both concern acts which, albeit regulated by local laws, are nonetheless attributed exclusively to the sending State. In these situations, the diplomat is not the true bearer of civil rights and obligations, and the immunities thus protect him/her from being held personally liable for the act of the sending State.

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<sup>1</sup> Chapter 1(3).

<sup>2</sup> Chapter 1(2).

<sup>3</sup> Chapter 1(3.1).

<sup>4</sup> Chapter 1(3.2).

Lastly, for criminal acts covered by diplomatic immunity *ratione materiae*, unless the acts fall outside the law of the receiving State, immunity is procedural in nature.<sup>5</sup> In this respect, the immunity is in fact State immunity of the sending State from foreign criminal jurisdiction, which can be waived by the State at any time. A diplomat who has performed an act like this has individual criminal responsibility under the law of the receiving State. Thus, once the procedural State immunity is lifted, the diplomat's responsibility will be realised in the ordinary manner.

Secondly, with regard to diplomatic immunities *ratione materiae* which use the formula of 'in the exercise of functions', it is submitted that they each have their own distinct scope.

Article 38(1) concerns acts performed in strict application of diplomatic functions.<sup>6</sup> The special status of diplomatic agents with the nationality or permanent residency of the receiving State means that immunity for them could easily lead to impunity. Thus, drafters of the VCDR were willing to give them only a minimum of immunity indispensable for their performance of functions. This minimum, it is submitted, is immunity for acts performed in strict application of diplomatic functions, as disputes concerning these acts fall outside the law of the receiving State and can only be resolved on an interstate level.

Article 39(2) is broader in scope than Article 38(1) and protects, in addition to acts performed in strict application of diplomatic functions, certain ancillary/incidental acts that are closely related to the performance of diplomatic functions.<sup>7</sup> The determination whether an ancillary/incidental act falls inside the performance of functions should be made by considering two factors. On the one hand, the purpose of diplomatic immunity – that of facilitating the performance of diplomatic functions – determines that an ancillary/incidental act must directly (as opposed to indirectly) benefit the performance of official functions in order to be protected by immunity. On the other hand, since the logic behind immunity is that the interests accrued from the smooth performance of diplomatic functions outweigh the interests of punishing the offending diplomat, the serious nature of an act should be taken into

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<sup>5</sup> Ibid.

<sup>6</sup> Chapter 2(2).

<sup>7</sup> Chapter 2(3) and (4).

account when determining diplomatic immunity *ratione materiae*, although this standard of serious nature has its own problems in practice.

Article 27(5) is the broadest form of diplomatic immunity *ratione materiae*.<sup>8</sup> The specific nature of personal inviolability means that it cannot be based on the nature of a particular act, but must be extended to the whole temporal period of a courier's performance of functions. Thus, the pertinent understanding of Article 27(5) is that a courier is protected by personal inviolability *during* his or her performance of functions. The fact that a courier is required by Article 27(5) to carry an official document while performing functions means that, in practice, the receiving State would have little difficulty in judging whether a courier is within the temporal scope of his or her performance of functions. On the other hand, however, given the attitude of States with regard to the DASDC, the better understanding of the word 'protection' in Article 27(5) seems to be that it only includes personal inviolability.

Thirdly, with regard to diplomatic immunity *ratione materiae* of subordinate members of a diplomatic mission, it is submitted that 'in the course of duties' immunity in Article 37 is the equivalent of 'in the exercise of functions' immunity in Article 39(2).<sup>9</sup> Duties of a subordinate member should not be given a restrictive meaning as pertaining solely to administrative or technical duties, but should be understood in the general framework of Article 3(1). As long as an act is compatible with the general functions of a diplomatic mission, the way it is carried out (*viz.* by whom the act is carried out) is largely an internal matter of the mission, to which the receiving State has no say. Thus, a subordinate member should be protected by 'in the course of duties' immunity even if he or she has performed a diplomatic duty.<sup>10</sup>

As to the diplomatic immunity *ratione materiae* enjoyed by service staff members, it is submitted that the word 'immunity' in Article 37(3) necessarily encompasses personal inviolability *during* a service staff member's performance of duties.<sup>11</sup> The importance of personal inviolability to the smooth performance of official duties determines that its scope must be at least as extensive as immunity from court proceedings. Without the safeguard of

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<sup>8</sup> Chapter 2(5).

<sup>9</sup> Chapter 3(2).

<sup>10</sup> Chapter 3(3).

<sup>11</sup> Chapter 3(4).

personal inviolability, immunity from ex post facto court proceedings would be largely meaningless from a functional perspective.

On the other hand, however, there seems to be no reason to grant an ATS member immunity from execution for acts which do not attract immunity from jurisdiction.<sup>12</sup> With the safeguard of personal inviolability and inviolability for private residence, ATS members, like diplomatic agents, should only enjoy immunity from execution to the same extent as they enjoy immunity from court proceedings.

Chapter 4 has addressed the diplomatic immunities *ratione materiae* in Article 31(1) of the VCDR.

On a general level, it is submitted that: first, the formula of ‘on behalf of the sending State’ in Article 31(1)(a) and (b) is narrower in scope than the formula of ‘in the exercise of official functions’ in Article 31(1)(c).<sup>13</sup> Whereas the latter contains ancillary/incidental acts which are performed in a private capacity but which are closely related to official functions, the former only pertains to acts performed in the name of the sending State; second, functions of a diplomatic agent should be understood in the light of Article 3(1).<sup>14</sup> The argument that functions of a diplomat should include any instruction from the sending State as long as the instruction does not exceed ‘bounds of proper activity’ fails to answer why a diplomat is allowed to perform an official function in the receiving State if that function falls outside the scope of Article 3(1). The article is phrased in such broad terms that it is not necessary to introduce a new standard which would cause more problems than it purports to resolve. Notably, the ‘bounds of proper activity’ standard could easily lead to an interpretation of a diplomat’s functions as any official function of the sending State, and this interpretation, as shown in Chapter 4, is clearly not supported by State practice.

More specifically, Chapter 4 has examined the status of the principal private residence of a diplomatic agent, the definition of a real action, and the scope of a commercial or professional activity. It is submitted that:

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<sup>12</sup> Chapter 3(5).

<sup>13</sup> Chapter 4(2.1).

<sup>14</sup> Chapter 4(2.2).

The principal private residence of a diplomatic agent should not be protected by Article 31(1)(a).<sup>15</sup> Although such a residence may be said to facilitate the performance of a diplomat's functions, States tend to believe that the benefits accrued are not sufficient to justify immunity. Considering the pre-eminence of *lex rei sitae*, as well as the fact that performance of diplomatic functions is not likely to be disrupted by a real action, the better understanding seems to be that principal private residence is not protected by Article 31(1)(a).

A real action is an action concerning the title or possession of an immovable property.<sup>16</sup> It is directed at the property itself rather than the person of the diplomat holding the property. The right of access to justice is not a sufficient justification to give the term a broad meaning so as to include any proceeding relating to an immovable property. The very notion of diplomatic immunity implies a denial of access to justice to a certain extent, yet this is justified on the ground that, in order to fulfil diplomatic functions satisfactorily, a diplomat should not be overexposed to court proceedings in the receiving State.

Lastly, a commercial or professional activity is one which is performed primarily for personal financial profit.<sup>17</sup> The additional phrase of 'for personal profit' in Article 42 is meant, according to an examination of the drafting history of the article, to clarify the meaning of a commercial or professional activity rather than give Article 42 a narrower scope. The parties' intention with regard to Article 42 and Article 31(1)(c) is that diplomatic immunity could be denied only when a diplomat has violated his or her obligation under Article 42. It is thus important to stick to this principle so that a diplomat is not overexposed to civil proceedings in the receiving State.

Chapter 5 has discussed the procedural aspects in the application of diplomatic immunity *ratione materiae*.

With regard to invocation of immunity, it is submitted that, unlike functional immunity of State officials in general international law, invocation of immunity by the sending State is not a precondition for diplomatic immunity *ratione materiae* to be considered by the receiving State.<sup>18</sup> Post-VCDR State practice concerning the determination of diplomatic immunity

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<sup>15</sup> Chapter 4(3).

<sup>16</sup> Chapter 4(4).

<sup>17</sup> Chapter 4(5).

<sup>18</sup> Chapter 5(2).

ratione materiae, as well as States' attitude towards waiver of immunity at the Vienna Conference, reveals that States tend to be very cautious when they are dealing with diplomatic immunity. The sensitive nature of interstate diplomacy suggests that any uncorroborated presumption that could lead to a detailed inquiry into the official business of a diplomatic mission should be strictly avoided. Thus, the better understanding is that the court of the receiving State has an obligation to consider immunity issues *ex proprio motu* in the absence of an invocation of diplomatic immunity *ratione materiae*.

As to the authority to waive immunity, it is concluded that, whereas a waiver by the head of mission of other mission members' immunity should be regarded as binding, the head of mission's own immunity must be waived by the sending State's government.<sup>19</sup> The basic principle concerning waiver is that a mission member (head of mission or otherwise) should not be given the discretion to waive his or her own immunity in order to pursue personal interests.

With respect to the effect of waiving diplomatic immunity *ratione materiae*, it is concluded that such waiver is distinct in nature from waiver of personal diplomatic immunity for private acts.<sup>20</sup> For official acts that constitute an exemption of personal liability, waiver of diplomatic immunity *ratione materiae* is in fact a testament from the sending State to the private nature of the act concerned. On the other hand, for acts which could be attributed both to the sending State and to the person of a diplomat, waiver of diplomatic immunity *ratione materiae* is actually the sending State withdrawing its own immunity that is extended to the protection of its diplomat. In this scenario, the waiver does not necessarily mean that the act in question is not carried out in the performance of diplomatic functions.

As a final comment, it is worth pointing out that the conclusions reached in this thesis do not render the determination of diplomatic immunity *ratione materiae* free from problems. The determination of the official nature of a foreign State organ's act is a process which involves too many legal and political considerations<sup>21</sup> to allow for the design of a mechanism capable

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<sup>19</sup> Chapter 5(3.1).

<sup>20</sup> Chapter 5(3.2).

<sup>21</sup> As pointed out by Grzybowski, albeit with regard to the VCDR in general, diplomatic law is neither complete nor universal because the actual content of (apparently) uniform rules hinges upon the cultural and political diversity of contemporary international community. Grzybowski, pp. 57-58

of addressing every problem in practice. The VCDR owes its success not so much to the fineness of legal provisions than to the principle of reciprocity,<sup>22</sup> yet by clarifying the ambiguities of the convention, this thesis contributes to a coherent understanding of diplomatic immunity *ratione materiae* — a topic which will remain relevant as long as interstate diplomacy is set to continue.

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<sup>22</sup> Young, p. 181. Young points out that the form and the procedure of the Vienna Conference has caused the consequence that issues on diplomatic immunities and privileges were not sufficiently dealt with during the conference, leaving many ambiguities unresolved. See also, Stewart, who indicates that ‘it is the mutuality of interest that makes the system of diplomatic and consular immunity work’. Stewart, p. 229.



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