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# Personal Inviolability and Diplomatic Immunity in Respect of Serious Crimes

Personal inviolability and diplomatic immunity from criminal jurisdiction still remain among the most problematic issues in modern diplomatic law. Such special privileges have for long effectively protected diplomatic representatives and other foreign officials from interference with their freedom, which may be attendant upon penal proceeding, the objective of which is the curtailment of financial or personal liberty in the interests of punishment or deterrence. However, everyday practice indicates that both states and diplomatic agents still have problems with interpreting the relevant provisions of the Vienna Convention on Diplomatic Immunity.\*<sup>1</sup> Unfortunately the diplomats are more likely those who occasionally tend to misinterpret the extent of their privileges and thus make use or, to be more precise and correct, abuse their inviolability and immunity. Such abuses may still be tolerable by the receiving state in the name of securing effective performance of diplomatic functions, if these abuses involve merely minor offences or crimes. But do receiving states and the international community have to tolerate personal inviolability and diplomatic immunity in case of serious crimes such as murder and conspiracy as well as war crimes and crimes against humanity? The present article intends to address such issues and examine possible solutions to these problems and possible remedies against abuses of diplomatic status.

## 1. General observations

Peoples have recognised the special status of foreign representatives already since ancient times and therefore some of the fundamental principles concerning such representatives, for example, personal inviolability, are as old as the first civilisations. Since then, diplomatic law has continuously developed and also changed, but the vital principles have survived that evolution. Nowadays diplomatic law has, in many respects, become a unique part of public international law. A vast majority of states, if not all, apply its rules every single day, as they are in diplomatic relations with one another. But when taking into consideration such wide and extensive application of diplomatic law, it is surprising to learn how exceptionally high the level of law-obedience is among the relevant states.\*<sup>2</sup> Why is that? Firstly, the rules of diplomatic law had

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<sup>1</sup> United Nations Treaty Series, 1964, vol. 500, p. 95.

<sup>2</sup> See S. Mahmoudi. Some Remarks on Diplomatic Immunity from Criminal Jurisdiction. – J. Ramberg, O. Bring, S. Mahmoudi (eds.). Festschrift till Lars Hjernér: Studies in International Law. Stockholm: Norstedts, 1990, p. 327.

long been stable and established before they were codified into the Vienna Convention.<sup>3</sup> Secondly, the simple principle of reciprocity represents an effective protection against the breaches of diplomatic law by states. As most states are normally both sending and receiving states, they can respond to any inappropriate actions from another state towards its diplomatic agents with similar measures against the diplomats of the offending state. Therefore, the principle of reciprocity with common interests of states guarantees efficient application of diplomatic law and also general obedience.<sup>4</sup> But at the same time, this principle can block desirable changes and innovations in connection with diplomatic immunity from criminal jurisdiction — states cannot initiate an emergence of new customary international law to deal with new developments.

As the concept of diplomatic immunity renders it virtually impossible for any local authority to exercise its power over duly appointed diplomatic agents, it has naturally caused many social problems. The general understanding is that diplomatic status does not in any way give diplomatic agents permission to violate the laws and regulations of the receiving state<sup>5</sup> and the overwhelming majority of diplomats are indeed law-obedient. Thus occasional abuses of their privileged status, for example, drunk-driving or causing a car accident, which are brought to public attention, tend to receive a disproportional amount of publicity compared to other similar cases, where the person concerned is without such special status, and therefore serve to prejudice public attitude toward the practice of personal inviolability and diplomatic immunity. However, regardless of the severity of offences, states have so far refrained from serious retaliatory actions due to several factors. Firstly, states maintain a substantial number of diplomatic agents abroad and they do not want to endanger the situation of their diplomats in different and not always particularly safe countries. Secondly, there may be a mentionable community of expatriates of the receiving state in the sending state and therefore the extent to which receiving states will avail themselves of the opportunities for response to abuse of diplomatic status depends in large measures upon whether that expatriated community is perceived to be at risk. For example, in the serious Libyan People's Bureau incident the United Kingdom restrained itself from more harsh reactions as it was concerned with the security and well-being of some 8,000 Britons resident in Libya.<sup>6</sup>

Personal inviolability and diplomatic immunity has been extended traditionally also to heads of state and even to members of government. Such people have committed even more serious and heinous crimes as leaders of their countries than diplomatic agents.

## 2. Personal inviolability

Before going any further with the issue of diplomatic immunity, we should look at the principle of personal inviolability, which is the oldest established rule of diplomatic law and also closely connected with diplomatic immunity. There is no doubt that the principle of inviolability of the person of a diplomatic representative is still the corner stone of diplomatic law. In the course of its historic development, the scope of personal inviolability became absolute, regardless of the severity of concerned offences. Although authors have long maintained that there is a right to self-defence, in the form of arrest or judicial proceeding, against an immediate threat from a diplomat, there does not appear to have been an instance where a state has officially relied on such a right and arrested the diplomat concerned.<sup>7</sup> However, before the Vienna Conference for Diplomatic Intercourse and Immunities, which adopted the Vienna Convention, the International Law Commission (ILC) still mentioned that personal inviolability does not exclude either self-defence or, in exceptional circumstances, other measures to prevent a diplomat from committing a crime or an offence.<sup>8</sup>

At the same Vienna Conference there was very little discussion on the draft article concerning personal inviolability and article 29 provides that a “diplomat shall not be liable to any form of arrest or detention” and “the receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity”.<sup>9</sup> As we can see, the article itself makes no effort to define or

<sup>3</sup> Hereinafter the Vienna Convention on Diplomatic Relations is referred to as the Vienna Convention.

<sup>4</sup> I.L.C. Yearbook, 1958, vol. II, p. 105.

<sup>5</sup> See also article 41, paragraph 1 of the Vienna Convention, which states 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>6</sup> R. Higgins. *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*. – *American Journal of International Law*, 1985, vol. 79, p. 645.

<sup>7</sup> See C. J. Lewis. *State and Diplomatic Immunity*. 3th ed. London: Lloyd's of London, 1990, p. 135. For example, the Spanish ambassador Mendoza was expelled in 1584 on suspicion of conspiracy against the English queen. But at the same time, the French ambassador d'Aubépine, who fell under similar suspicion three years later, continued to act as ambassador to Queen Elizabeth after the French king had ignored a request for his recall and he was not tried for his acts.

<sup>8</sup> I.L.C. Yearbook, 1957, vol. I, pp. 209–210; Vol. II, p. 138; I.L.C. Yearbook, 1958, vol. II, p. 97.

<sup>9</sup> Hereinafter all references to articles are references to the articles of the Vienna Convention if not noted otherwise.

explain the concept or extent of inviolability. Nevertheless, the article mentions two important aspects of this principle. Firstly, diplomatic agents are free from any sort of arrest or detention by the authorities of the receiving state and secondly, the latter has a duty to protect diplomatic agents.<sup>\*10</sup> Personal inviolability is a physical privilege in nature and thus it is distinct from the diplomatic immunity from criminal jurisdiction. As in case of the inviolability of mission premises, there is no express reservation for action in cases of emergency, for example, a drunken diplomat with a loaded gun in a public place.<sup>\*11</sup>

Thus due to personal inviolability, a diplomatic agent may not be arrested or detained in any circumstances.<sup>\*12</sup> The police can, of course, arrest such a person in good faith, but when they learn that the person is entitled to personal inviolability, the police must release him immediately. Diplomatic history has seen very few situations where states have not respected personal inviolability. Probably the best-known incidence occurred in Teheran, Iran, where on 4 November 1979, the Embassy of the United States was invaded by militant students and all personnel of the embassy were seized as hostages. The purpose of such action was to secure the extraction of the former Shah by the United States into the hands of new Islamic regime. The Iranian authorities subsequently approved the actions of the militant students and therefore took responsibility for such actions and grave breaches of the Vienna Convention. The International Court of Justice (ICJ) stated in the judgement on those events that the Iranian actions were “clear and serious violations” of article 29 and the decision of the Iranian authorities to continue the occupation of the mission premises “gave rise to repeated and multiple breaches of the applicable provisions of the [Vienna] Convention”.<sup>\*13</sup> The ICJ clearly condemned the Iranian actions, but the Iranian officials still alleged that these actions were warranted under Islamic law although they were indeed prohibited by the convention.<sup>\*14</sup>

## 3. Diplomatic immunity from criminal jurisdiction

### 3.1. Concept of diplomatic immunity

The immunity of a diplomatic representative from the criminal jurisdiction of the receiving state was, in earlier literature, regarded as indistinguishable from his personal inviolability. At the time when the principle of personal inviolability was first clearly established, it was unusual for criminal proceedings to take place without prior arrest and detention of the accused. But as time passed and the arrest and detention of the accused was not essential for criminal proceeding, diplomatic immunity from criminal jurisdiction emerged as a separate principle of diplomatic law.

However, the need for diplomatic immunities is not so self-evident. Although a majority of authors believe in such a need and do not admit any exceptions, there are also those who oppose these immunities or permit certain exceptions. But when speaking of the legal basis of diplomatic immunity, three theories are usually mentioned.<sup>\*15</sup> Firstly, the oldest and also the most outmoded is the “theory of extraterritoriality”, which was a legal fiction based on the notion that the territory of the receiving state used by the diplomatic mission or diplomat should be considered as a part of the territory of the sending state instead. Secondly, the latter theory was replaced by the “theory of representative character”, which was also partly used in the Vienna Convention.<sup>\*16</sup> This theory is based on the idea that the diplomatic mission, and thus also diplomats, personify the sending state and therefore they should be granted the same immunities and independence as those granted to the sending state.

Thirdly, there is now the “theory of functional necessity”, which provides a conceptual basis for the Vienna Convention (though there is no direct reference to such basis). According to this theory, the justification for

<sup>10</sup> States are under no obligation to have specially defined crimes if victims are diplomatic agents. Estonia, however, has *expressis verbis* criminalised attacks on internationally protected persons, which include also diplomats. – Subsection 246 (1) of the Estonian Penal Code (*karistusseadustik*). – Riigi Teataja (the State Gazette) I 2001, 61, 364; 2002, 64, 390 (in Estonian).

<sup>11</sup> I. Brownlie. *Principles of Public International Law*. 5th ed. Oxford: Oxford University Press, 1998, p. 358.

<sup>12</sup> It is interesting to note that in his statement, when answering to the request of a senator about French policy concerning diplomatic immunity, the French Prime Minister said that a diplomatic agent may not be arrested or detained except in case of *un flagrant délit*, that is a case requiring no further collection of evidence. The value of this kind of a statement is very doubtful and these on-the-spot arrests, under the circumstances whatsoever, clearly violate the inviolability of a diplomatic agent. See *Journal Officiel Sénat*, 16 December 1999, p. 4137.

<sup>13</sup> *United States Diplomatic and Consular Staff in Teheran*. – I.C.J. Reports, 1980, p. 3, respectively paras. 67 and 76.

<sup>14</sup> This Iranian position is, however, faulty, as the only reprisal allowed by the Koran is the prevention of an envoy’s departure (basically a violation of personal inviolability), but even that only if the envoy of the receiving state is being treated in the same manner. See C. Bassiouni. *Protection of Diplomats under Islamic Law*. – *American Journal of International Law*, 1980, vol. 74, p. 620.

<sup>15</sup> I.L.C. Yearbook, 1958, vol. II, pp. 94–95.

<sup>16</sup> Article 3 points out clearly that the diplomatic agent represents the sending state and the preamble also acknowledges the link between the immunities of diplomats and their function as representing the sending state.

granting immunities to diplomatic agents is based on the need to enable normal functioning of diplomatic missions and diplomats. The legal basis of immunities in the Vienna Conventions can be found in the preamble, which explains that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States”. Driven by the functional necessity, this theory confers a certain minimum immunity on the diplomatic agent to perform his functions without hindrance. This obviously makes a link between granting immunities and performing the diplomatic functions and can also provide a certain level of control where such a link is missing (this is further addressed below). Consequently, diplomatic immunity protects diplomats from the receiving state, which may, for various reasons, want to hinder the diplomatic agent in carrying out his functions effectively, for example, by commencing unfounded penal proceeding.

What does the immunity mean? The judge said in the classic case of *Empson v. Smith* that “it is elementary law that diplomatic immunity is not immunity from legal liability, but immunity from suit”.<sup>17</sup> This means that diplomatic agents are not above the law; on the contrary, they are under an obligation “to respect the laws and regulations of the receiving State”<sup>18</sup>, and if they breach the law they are still liable, but they cannot be sued in the receiving state unless they submit to the jurisdiction.<sup>19</sup> While personal inviolability is a physical privilege, diplomatic immunity is a procedural obstacle.

Diplomatic immunity from criminal jurisdiction is unqualified and absolute<sup>20</sup>, while in the case of civil and administrative jurisdiction there are certain exceptions.<sup>21</sup> Article 31, paragraph 1 confirms that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state. This unlimited immunity concerns all possible minor offences as well as grave crimes, starting with breaches of traffic regulations and finishing with conspiracy against the national security of the receiving state or crimes against humanity. It also seems to be so that enjoyment of immunity by a diplomatic agent is not connected with the functions *expressis verbis* enumerated in article 3.

The legal consequence of diplomatic immunity from criminal jurisdiction is procedural in character and does not affect any underlying substantive liability. Therefore, whenever immunity is established and accepted by the court, the latter must discontinue all proceedings against the defendant concerned. The court has to determine the issue of immunity on the facts at the date when this issue comes before it and not on the facts at the time when an event gave rise to the claim of immunity or at the time when proceedings were begun. This means that if a diplomatic agent becomes, in the eyes of the court, entitled to immunity he may raise it as a bar to both proceedings relating to prior events (that occurred before he became a diplomat and entitled to immunity) and proceedings already instituted against him. The diplomatic agent is also immune from any measure of execution and he can raise his immunity from execution to bar any form of enforcement of a conviction or judgement against him.<sup>22</sup>

Though all proceedings against the diplomat must be suspended during the period of entitlement to diplomatic immunity, it does not mean that these proceedings are “null and void” because of immunity. In the case of *Empson v. Smith* the court made it clear that on termination of diplomatic status for whatever reason, any subsisting action that had to be stayed on the ground of the defendant’s immunity could be revived. This can be done even though he was entitled to immunity when the events concerned took place or when process was originally begun. At the same time, the trial of a diplomatic agent after dismissal from his post and loss of his immunity does not violate the prohibition of retroactive application of criminal laws. The reasoning is that the effect of the loss of immunity is to remove the procedural impediment and enable judicial authorities to prosecute a former diplomat for acts, which at the date of their alleged commission constituted crimes according to local law.<sup>23</sup>

<sup>17</sup> See *Empson v. Smith*, Queen’s Bench Division. – 1 Q.B. 426 (1996).

<sup>18</sup> Article 41, paragraph 1 (see also Note 5).

<sup>19</sup> See for example *Dickinson v. Del Solar*, King’s Bench Division, – 1 K.B. 376 (1930).

<sup>20</sup> See also Arrest Warrant of 11 April 2000. Available at: [http://www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe\\_ijudgment\\_20020214.PDF](http://www.icj-cij.org/icjwww/idocket/icoBE/icobejudgment/icobe_ijudgment_20020214.PDF) (30.7.2003). Though this case did not actually concern any diplomatic agents but an incumbent Minister for Foreign Affairs, we can draw parallels to our topic as high officials of a state also enjoy immunity similar to diplomatic immunity.

<sup>21</sup> See article 31, paragraph 1.

<sup>22</sup> Article 31, paragraph 3, though there are still exceptions in case of execution of certain judgments in civil matters from which diplomats do not enjoy immunity.

<sup>23</sup> See for example the case of *Gustavo J. L. and Another before the Supreme Court of Spain*. – International Law Reports, 1991, vol. 86, p. 517.

## 3.2. Re-evaluation of the concept

### 3.2.1. Excluding immunity in case of grave crimes

Although the Vienna Convention makes no attempt to distinguish crimes according to their gravity, one may want to draw a line between the crimes of different gravity and also discuss the corresponding degree of immunity. Such people would argue that diplomatic agents should not indeed be disturbed with proceedings in respect of minor or not so important offences compared to the necessity to ensure effective performance of diplomatic functions, but in case of serious or generally dangerous offences the immunity of a diplomat should not become a basis for his impunity. The practical problem is that there is no unified definition of different degrees of crimes, as it is up to national laws of individual states to divide crimes according to their gravity. The simple fact is that certain offences are considered minor in one state and again grave in another or completely legal in one state and criminal acts in another. Therefore, most scholars categorically claim, and the actual state practice follows, that diplomatic agents cannot be tried or punished by local courts for committing a crime under any circumstances whatsoever. The ICJ shared the latter view and strongly emphasised that diplomats are entitled to diplomatic immunity from any form of criminal jurisdiction under general international law.<sup>\*24</sup>

Though this may be so in the case of crimes which do not concern the general interest of the whole international community, but only the respective society, one may still want to re-evaluate the applicability of absolute diplomatic immunity from criminal jurisdiction in cases of crimes against humanity, war crimes, or other crimes of such gravity — that is international crimes. Indeed, the theory of functional necessity or, in other words, the very same link between diplomatic immunity and necessity to perform diplomatic functions effectively renders questionable the necessity or legitimacy of diplomatic immunity in such cases. It is very difficult to argue that crimes such as crimes against humanity and war crimes are consistent with the functions of a diplomat. Thus, one can make an argument that when diplomats act in fact, for example, like war criminals, they are not diplomats at all and thus must lose the benefits of those immunities that diplomats are usually entitled to. In addition, one can nowadays refer to the Rome Statute of the International Criminal Court (ICC) and its annexes<sup>\*25</sup>, which everyday gather wider and wider support among states and may be seen even as evidence of customary international law. Differently from the situation where states have different criminal laws and defined crimes, these international instruments contain descriptions of possible serious international crimes that many states have agreed upon. So, now or soon one could say that states have a list of commonly accepted serious crimes from which diplomatic agents should not be immune. Indeed, in that way a receiving state cannot be accused of being biased and imposing its criminal law (also national criminal law tradition) upon foreign representatives and it is also more difficult to simply frame a diplomat for international crimes. States, however, seem to maintain so far the position that a person remains an appointed diplomat, and also entitled to diplomatic immunity, until his functions are duly terminated. Nevertheless, there has been an occasion where a diplomat was sentenced as a war criminal. Namely, in 1948 the Japanese ambassador to Belgium, General Oshima, was sentenced by a military tribunal for his war crimes during the Second World War despite his diplomatic status.<sup>\*26</sup>

But on the other hand, can, for example, manslaughter, murder or conspiracy, be considered as consistent with diplomatic functions? The majority take a view that we still should, in order to keep clarity and to avoid individual interpretation of the Vienna Convention by states, maintain the position that diplomatic immunity from criminal jurisdiction is unqualified and absolute. After all, the sending state retains its full jurisdiction over its diplomatic agents<sup>\*27</sup> and it would be under international pressure to prosecute diplomats who have committed serious crimes affecting the interests of all states. Sending states, however, have shown little enthusiasm in convicting their own diplomats for crimes committed abroad. An additional problem is that many states do not have jurisdiction over crimes committed abroad. There are also many other procedural problems such as securing the appearance of witnesses in the sending state, which make the continuing jurisdiction of the sending state still an ineffective measure. But this does not mean that sending states have never brought their diplomats to trial when they have returned to their own country. For example, a French diplomat was tried for killing his colleague in the course of a violent quarrel in Angola when he returned to France<sup>\*28</sup>; the United States took criminal proceedings against a *chargé d'affaires* in regard to the homicide of a colleague in Equatorial Guinea.<sup>\*29</sup>

<sup>24</sup> United States Diplomatic and Consular Staff in Teheran (Note 13), para. 79.

<sup>25</sup> Text of the Rome Statute of the International Criminal Court is available at: [http://www.icc-cpi.int/docs/basicdocs/rome\\_statute\(e\).pdf](http://www.icc-cpi.int/docs/basicdocs/rome_statute(e).pdf) (30.7.2003).

<sup>26</sup> C. Rousseau. *Droit international public*. Vol. IV. Paris: Sirey, 1980, p. 202.

<sup>27</sup> Article 31, paragraph 4 states that "the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State".

<sup>28</sup> *Revue Général de Droit International Public*, 1984, p. 674.

<sup>29</sup> See *United States v. Erdos*, United States Court of Appeals (4th Circuit). – 474 F.2d 157 (1973).

### 3.2.2. Limiting immunity to official acts

Occasionally it has been suggested that diplomatic agents should enjoy their diplomatic immunity only in connection with actions forming part of their official functions.<sup>\*30</sup> Therefore, any illegal acts, which are private acts in character or committed in connection with private activities, are under the jurisdiction of the receiving state and the latter can adjudicate over the offending diplomat. On the one hand, this can cause serious problems when deciding whether this or that action falls under acts performed in a private capacity or as part of official functions as numerated in article 3. Indeed, a Portuguese court once held that article 3 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 that article.<sup>\*31</sup> The ICJ also takes a similar stand and holds that no distinction can be drawn between acts performed in an official capacity and those claimed to have been performed in a private capacity.<sup>\*32</sup> Even though one could *prima facie* conclude that certain actions can be considered to be outside his official duties, such actions may still be of official character if the diplomat was instructed by his sending state to undertake that activity. On the other hand, can diplomatic agents and their sending state ever reasonably and credibly argue that committing serious offences can be considered as performing official functions (unless such offences were accidentally committed while carrying out diplomatic functions)? Such serious offences could include all violence against the person, for example, murder, rape, assault and battery, but not self-defence.

The scope of official functions becomes relevant also in another context. In fact, not all acts performed by a diplomatic agent remain forever immune from the jurisdiction of the receiving state.<sup>\*33</sup> After the function of a diplomatic agent comes to an end, he loses his diplomatic immunity and he may be sued for all his actions except for those performed in the exercise of his official functions. The diplomat concerned of course has reasonable time to leave the receiving state before he loses his immunity, but whenever he chooses to return to that country, he may find himself faced with criminal procedure. One can reasonably argue that such offences as murder, rape, causing serious bodily injuries, kidnapping, war crimes and crimes against humanity do not form a part of official functions and can be tried by the receiving state. The latter can also seek for extraction of the former diplomat concerned from the sending state or other states which exercise territorial jurisdiction over him. However, the usability of such a possibility is again somewhat doubtful, as the sending state is unlikely to extradite its own diplomat, and if it was ready to see the diplomat prosecuted, it could have waived his immunity or tried him itself.

### 3.2.3. Hierarchy of norms

One way of excluding diplomatic immunity in case of serious crimes is to establish a hierarchy between norms granting such immunity and norms protecting certain fundamental values such as human life and then show that the latter norms have priority over the former norms. We can follow this line of argument most likely in the case of human rights and international humanitarian law, which may not be derogated from at all or in very limited occasions. Both diplomatic law and norms protecting human beings in peacetime and in wartime have been described as general and fundamental. The crucial question is now whether one or both of such sets of norms constitute *ius cogens* or otherwise higher norms.

As the principles of personal inviolability and of diplomatic immunity are functionality-based principles, it is very difficult to consider such principles as *ius cogens*. Indeed, these two principles are strongly based on reciprocal compromise rather than on a necessarily desirable rule deriving from some higher source. Therefore, it is difficult to show that personal inviolability and diplomatic immunity are connected to natural law thinking associated with the concept of *ius cogens* — how can natural law justify a law destined to prevent justice because of utility-based status?<sup>\*34</sup> Moreover, the breaches of *ius cogens* norms should concern the whole international community, but diplomatic immunity creates obligations and results in possible responsibility only between the sending and receiving states. But at least some violations of basic human rights, for example, slavery, crimes against humanity, genocide, may result in a breach of international obligations *erga omnes*, which indeed concerns all states.<sup>\*35</sup> Differently from diplomatic law, human rights have frequently and expressly been regarded as *ius cogens* and there is one very powerful factor to support such an

<sup>30</sup> See S. L. Wright. Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts. – Boston University International Law Journal, 1987, vol. 5, pp. 177–211.

<sup>31</sup> See *Portugal v. Goncalves*. – International Law Reports, 1990, vol. 82, p. 115.

<sup>32</sup> Arrest Warrant of 11 April 2000 (Note 20), para. 55.

<sup>33</sup> See J. E. Donoghue. Perpetual Immunity for Former Diplomats? A Response to “The Abisinio Affairs: A Restrictive Theory of Diplomatic Immunity?” – Columbia Journal of Transnational Law, 1988–1989, vol. 27, pp. 615–630.

<sup>34</sup> See D. Ben-Asher. Human Rights Meet Diplomatic Immunities: Problems and Possible Solutions. Available at: [http://www.law.harvard.edu/Admissions/Graduate\\_Programs/publications/papers/benasher.pdf](http://www.law.harvard.edu/Admissions/Graduate_Programs/publications/papers/benasher.pdf) (30.7.2003).

<sup>35</sup> See *Barcelona Traction, Light and Power Company Case (Second Phase)*. – I.C.J. Reports, 1970, p. 3, para. 32.

assumption – fundamental human rights rules may not be derogated from. Norms of *ius cogens* cannot be set aside by treaty or acquiescence, but only by the formation of a subsequent customary law of contrary effect.<sup>\*36</sup>

Even though it may be difficult to establish in absolute certainty that human rights are *ius cogens* norms, one has to agree that norms granting or protecting fundamental human rights are important and should have priority compared to diplomatic immunity.

### 3.3. Position of Estonian legislation on diplomatic immunity

Estonia is a party to the Vienna Convention and according to the Estonian Constitution the latter is directly applicable and has priority before other legal acts in the national legal system.<sup>\*37</sup> Even if Estonia were not a party to the Vienna Convention, it would be bound by the principles of personal inviolability and diplomatic immunity because they represent well-recognised general principles of international law and such principles form an inseparable part of the Estonian legal system.<sup>\*38</sup> However, the Estonian Code of Criminal Procedure<sup>\*39</sup> also addresses the issue of diplomatic immunity and states in § 4 (2) that the code is not applicable to a person who has diplomatic immunity, unless the foreign state specifically requests to apply the code to that person. Such wording is somewhat strange, as the foreign state does not have to request the application, but merely waive the immunity and therefore give permission to application.

The Estonian Penal Code, on the other hand, refrains from addressing the issue of diplomatic immunity from criminal jurisdiction. Professor Jaan Sootak and Judge Priit Pikamäe note in their commentaries on the Penal Code that as diplomatic immunity derives directly from international law, it is not necessary to include a relevant provision in the Penal Code.<sup>\*40</sup> The authors of the Penal Code obviously relied on the previously mentioned direct applicability and status of general principles of international law.

The Penal Code takes advantage of many principles of criminal jurisdiction recognised under international law. Besides the principles of territoriality, passive personality and “vicarious administration of justice”, § 7 (3) of the Penal Code also enacts the principle of nationality or active personality. According to the latter, the Penal Code is valid for crimes committed outside the territory of Estonia if the person who committed those crimes was a national of Estonia or became one after committing those crimes. This provision should guarantee the effectiveness of article 31, paragraph 4 of the Vienna Convention and extend Estonian criminal jurisdiction to those diplomatic agents who represent Estonia abroad and are Estonian nationals.<sup>\*41</sup> Though there are no legislative or procedural obstacles for trial of Estonian criminal diplomats, in practice we do not know if such diplomats would indeed be tried on their return to Estonia.

## 4. Possible remedies against abuses of diplomatic status

Most remedies discussed previously are still theoretical and most likely require amendment to the Vienna Convention in order to become effective and applicable. This development is, however, unlikely, as states are not anxious to change the Vienna Convention and put at risk a stable and more or less satisfactory and operable system.<sup>\*42</sup> But now we will examine certain remedies that customary international law, the Vienna Convention, and other international instruments provide and receiving states can make use of to deal with cases where a person enjoying diplomatic immunity has seriously breached local or international law.

<sup>36</sup> I. Brownlie (Note 11), p. 515.

<sup>37</sup> Section 123 (2) of the Estonian Constitution. – Riigi Teataja (the State Gazette) 1992, 26, 349 (in Estonian).

<sup>38</sup> Section 3 of the Estonian Constitution.

<sup>39</sup> Kriminaalmenetluse seadustik (Code of Criminal Procedure). – Riigi Teataja (the State Gazette) I 2003, 27, 166 (in Estonian).

<sup>40</sup> J. Sootak, P. Pikamäe. Karistusseadustik: kommenteeritud väljaanne (Penal Code: Commented Edition). Tallinn: Juura, Õigusteabe AS, 2002, p. 34 (in Estonian).

<sup>41</sup> According to article 8, paragraphs 2 and 3, the sending state may appoint non-nationals as its diplomatic representatives with the consent of the receiving state.

<sup>42</sup> For example, after the Libyan People’s Bureau incident the House of Commons Foreign Affairs Committee considered amendments to the Vienna Convention, but found them not only virtually impossible to achieve, but also of doubtful desirability. See House of Commons Foreign Affairs Committee. First Report. The Abuse of Diplomatic Immunities and Privileges. Commons Paper No. 127 (1985), para. 42.

## 4.1. Self-defence

Scholars who tend to challenge the absolute nature of diplomatic immunity from criminal jurisdiction often argue that the receiving state may invoke self-defence as the basis for trial and punishment of offending diplomats. This was a popular view among writers in the 15<sup>th</sup> to 17<sup>th</sup> centuries, when conspiracy became quite a common crime committed by ambassadors. The main argument was that diplomatic immunity cannot be more important than the security of the receiving state, but nevertheless the sovereigns did not follow this line of argument and used other means to deal with the diplomats in question.

However, one has to make a distinction between self-defence as a basis for trial and punishment and as an immediate and proportionate reaction to a crime which can endanger the lives of other people. The latter concept is definitely more acceptable and reasonable and it is likely to be correct to argue that the offending diplomat could even be killed in self-defence.<sup>\*43</sup> Therefore the receiving state may, without breaching its obligations under the principle of personal inviolability, detain a diplomatic agent if he commits a crime, which is a flagrant breach of law, in order to ensure both the security of the diplomat himself and the public. This kind of detention should not be interpreted as punishment or subjecting the diplomat to the criminal jurisdiction of the receiving state. Consequently, self-defence could be used as an immediate measure of prevention in the case of threat of irreparable damage to person or property regardless of whether the threat is directed against the state, its agents, or its nationals.

Support for the principle of self-defence as a remedy against the crimes committed by diplomats can also be found in the commentary of the ILC on the article on personal inviolability. It states that being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion, but this, however, does not exclude self-defence.<sup>\*44</sup> The ILC considered self-defence as a measure of immediate reaction and not as a ground for trial and punishment (the latter has actually never left the realm of the doctrine). The ICJ, referring to the principles of personal inviolability and diplomatic immunity from jurisdiction, also said that naturally it does not mean that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving state in order to prevent the committing of the particular crime.<sup>\*45</sup>

It is very rare, but states have still availed themselves to the principle of self-defence. One of such incidents happened in Paris on 31 July 1978 following a hostage-taking operation by a Palestinian inside the Embassy of Iraq. The ambassador, who acted as a mediator, managed to reach an agreement with the Palestinian and the latter finally left the mission premises escorted by two French policemen. But at the moment when the Palestinian was going to get into the police car waiting for him at the gate of the embassy, the diplomats started to fire at them from the mission premises, killing two (including a policeman) and injuring others. The police returned fire immediately in self-defence and consequently killed one of the Iraqis. They also arrested three others for participation in the shooting and they were soon expelled from France.<sup>\*46</sup> The response of the police was surely justified and proportional and constituted an immediate measure to eliminate danger of injuries to person.

When commenting on this case, the government of France refrained from any official reference to the principle of self-defence. This is understandable, because there are no clear rules when and under what circumstances this principle may be applied as a response to serious crimes committed by diplomats, and any use of self-defence entails the risk of arbitrary application. Self-defence should be used with due regard to the requirement prescribed in this respect in the classic *Caroline* case, namely a necessity of self-defence, instant, overwhelming, leaving no choice of means, no moment for deliberation and proportionality.<sup>\*47</sup>

## 4.2. Waiver of immunity

The reaction of the receiving state to criminal offences committed by diplomatic agents depends largely on the gravity of the alleged offence. But when more serious crimes are concerned and admonition is not considered as a satisfactory punishment, it is more likely that the receiving state will request the sending state to waive the immunity of the offending diplomat so that the latter could be tried in court.

As diplomatic immunity belongs to the sending state and not to the diplomatic agent, it is only the sending state that has the right to waive the immunity.<sup>\*48</sup> The waiver must always be expressed<sup>\*49</sup> and once given the

<sup>43</sup> See S. Mahmoudi (Note 3), pp. 345–346.

<sup>44</sup> I.L.C. Yearbook, 1957, Vol. II, p. 138.

<sup>45</sup> United States Diplomatic and Consular Staff in Teheran (Note 13), para. 86.

<sup>46</sup> See C. Rousseau (Note 26), pp. 201–202.

<sup>47</sup> See *Caroline case*. – British and Foreign State Papers, 1857, vol. 29, pp. 1137–1139; British and Foreign State Papers, 1958, vol. 30, pp. 195–196; see also D. J. Harris. *Cases and Materials on International Law*. 5th ed. London: Sweet & Maxwell, 1998, pp. 894–896.

<sup>48</sup> Article 32, paragraph 1.



waiver is irrevocable. The requirement of the *expressis verbis* waiver reduces the possibility that the receiving state mistakenly considers, for example, an oral statement from the sending state as a valid waiver of immunity. It has to be borne in mind that proceedings in the same case, but on different stages, are to be regarded as a whole and thus one waiver is enough. The ILC also stated that it goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole and that immunity cannot be invoked on appeal if an express waiver was given in the court of first instance.<sup>\*50</sup>

History knows of very few cases when sending states have agreed to waive the immunity of their diplomatic agents. The sending state more likely prefers to recall the diplomat or dismiss him from its service in such cases.<sup>\*51</sup> The request for waiver of immunity usually means that the criminal offence in question is of such a degree that if the sending state does not waive the immunity, the receiving state is no longer prepared to accept the diplomat in issue as a diplomatic agent. States, however, have waived the immunity of their diplomatic agents and one of such instances concerns a Georgian diplomat. The second-highest ranking diplomat for the Republic of Georgia in the United States, Gueorgui Makharadze, was involved in a tragic automobile accident that resulted in the death of a sixteen-year-old girl, a Brazilian national, on 3 January 1997 in Washington D.C. He was alleged to have been driving at a speed of eighty miles per hour and under the influence of alcohol, but due to his diplomatic status he was not given a breathalyser or blood test. This incident was followed by public uproar, particularly when Georgia prepared to recall the diplomat. Finally, due to intense public pressure, the Georgian president agreed, as a moral gesture, to voluntarily waive Makharadze's immunity. The diplomat consequently pled guilty and currently serves his sentence in the United States.<sup>\*52</sup>

The waiver of immunity does not prevent committing of serious crimes, but can allow justice to take its course where such crimes have been committed. Even then there is no guarantee that states will waive the immunity of their diplomats and as a traditional rule, an undertaking by the state or its agent that immunity will be waived if dispute arises is of no legal effect.<sup>\*53</sup> This question is more likely to be relevant in case of civil matters, for example, when a landlord is reluctant to rent accommodation to diplomats and asks for such prior statement. The Vienna Convention and its *travaux préparatoires*, however, do not say anything about the effect of a prior agreement on waiving of diplomatic immunity. But as in the field of sovereign immunity it is now accepted that a state may agree in advance to submit a class of dispute to the jurisdiction of the court of another state and such agreement may constitute a valid waiver of immunity — there seems to be no reason why the state, which has the sovereign power to waive diplomatic immunity, could not do so in advance.<sup>\*54</sup> Though prior waiver of immunity in respect of criminal offences is still very unlikely, receiving states should consider such steps in regard to such other states whose diplomats tend to gravely misbehave.

### 4.3. International criminal procedure

The principles of personal inviolability and of diplomatic immunity only restrict the jurisdiction of the receiving state and possible transit states, thus not having an *erga omnes* effect.<sup>\*55</sup> Therefore, offending diplomatic agents can be prosecuted in certain circumstances as discussed above. But in addition to those there is one more possibility, namely where such diplomats are subject to criminal proceedings before certain international criminal courts.<sup>\*56</sup>

History has witnessed the creation of several international criminal tribunals. The first and probably the most notorious one was the International Military Tribunal of Nuremberg, which was created by the victors of the Second World War to try the war criminals of Nazi Germany. Since then, international tribunals have rejected any claim to official position as a defence.<sup>\*57</sup> For example, article 7 of the Charter of the Interna-

<sup>49</sup> Article 32, paragraph 2.

<sup>50</sup> I.L.C. Yearbook, 1958, Vol. II, p. 99.

<sup>51</sup> See J. Brown. Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations. – International and Comparative Law Quarterly, vol. 37, 1988, p. 78.

<sup>52</sup> See M. S. Zaid. Diplomatic Immunity: to Have or not to Have, that is the Question. – ILSA Journal of International and Comparative Law: International Practitioner's Notebook, 1998, vol. 4, No. 2.

<sup>53</sup> C. J. Lewis (Note 7), p. 154.

<sup>54</sup> See E. Denza. Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations. 2nd ed. Oxford: Oxford University Press, 1988, pp. 279–281.

<sup>55</sup> See for example Former Syrian Ambassador to the GDR case. – International Law Reports, 1999, vol. 115, p. 597.

<sup>56</sup> Arrest Warrant of 11 April 2000 (Note 20), para. 61.

<sup>57</sup> See for example Charter of the International Military Tribunal of Nuremberg, article 7; Charter of the International Military Tribunal of Tokyo, article 6; Statute of the International Criminal Tribunal for the former Yugoslavia, article 7, paragraph 2; Statute of the International Criminal Tribunal for Rwanda, article 6, paragraph 2; Rome Statute of the International Criminal Court, article 27, paragraph 1.

tional Military Tribunal of Nuremberg reads: “the position of defendants, whether as Heads of States or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”. It is clear that any claim to official status is not directed against the jurisdiction of the relevant tribunal, but against potential liability in respect of alleged crimes.

The same issue is also addressed in the Rome Statute<sup>\*58</sup>, but in addition to the question of liability, the statute considers also the question of jurisdiction. Firstly, the Rome Statute applies equally to all persons without any distinction based on official capacity, and the latter in no case exempts a person from criminal responsibility.<sup>\*59</sup> But secondly, article 27, paragraph 2 of the Rome Statute clarifies that “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the [International Criminal] Court from exercising its jurisdiction over such a person”.<sup>\*60</sup> Therefore, a person cannot hide behind his diplomatic immunity in order to escape criminal proceedings before the ICC as long as the crime occurred on the territory of a state party to the Rome Statute or the person accused of the crime is a national of a state party to the Rome Statute.<sup>\*61</sup> The latter possibility means that if the sending state of the criminal diplomat is party to the Rome Statute and the sending state has failed to initiate criminal proceedings or conduct such proceeding independently or impartially, the ICC can initiate its own criminal proceedings. However, the initiation of criminal proceedings is hindered by one factor — if the diplomat concerned is still in the receiving state and the sending state has refused to waive its immunity. Article 98, paragraph 1 of the Rome Statute states that the ICC may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international law with respect to the diplomatic immunity of a person, unless the ICC can first obtain the cooperation of the respective third state for the waiver of immunity. In other words, the Rome Statute does not permit the receiving or transit state to violate personal inviolability or diplomatic immunity in order to extradite the criminal diplomat to the ICC.<sup>\*62</sup> Therefore, such immunity can still be an obstacle to criminal proceedings, but at least retired or former diplomats can no longer hide behind continuing immunity in respect of official acts. Nevertheless, the ICC is an important step ahead in securing the prosecution of people who otherwise would escape legal proceeding due to their privileged status.

Such exceptions to diplomatic immunity in different international instruments do not, however, enable us to conclude that any of those exceptions exist in customary international law in regard to national courts.<sup>\*63</sup>

## 5. Conclusions

Presently, we have to conclude that the possibilities to prosecute diplomats or other state officials who have committed serious crimes but enjoy personal inviolability and diplomatic immunity are very much limited, both in number and effectiveness. As amendments to the Vienna Convention are unlikely to be achieved either through treaties or custom, so far we have to hope for greater readiness of sending states, in cooperation with receiving states, to ensure prosecution of serious criminals. Hopefully, we can in the future also rely on proceedings before the ICC, which should be the least biased and restricted. The problem is that the principle of reciprocity prevents states from introducing, through practice, perhaps desirable changes to diplomatic law by establishing a hierarchy between diplomatic law on the one hand and human rights and international humanitarian law on the other. But besides ensuring prosecution, receiving states should also attribute more importance to the prevention of such crimes by asking sending states to provide general and possible criminal background information on the diplomat and explanations about why the person left prior postings (if not because of normal termination of functions) and also by contacting those countries where the diplomat in question has served prior terms and inquire as to whether any problems arose involving that person.

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<sup>58</sup> Hereinafter the Rome Statute of the International Criminal Court is referred to as the Rome Statute.

<sup>59</sup> Article 27, paragraph 1 of the Rome Statute.

<sup>60</sup> This is a superfluous provision since if official status cannot constitute a defence to criminal liability, it necessarily follows that immunity regarding jurisdictional competence will have already been denied.

<sup>61</sup> Article 12 of the Rome Statute.

<sup>62</sup> See W. A. Schabas. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 2001, p. 64.

<sup>63</sup> Arrest Warrant of 11 April 2000 (Note 20), para. 58.